Theodore Roosevelt American Inn of Court

Program Agenda - May 15, 2024

Supreme Court review: Affirmative Action cases -
"Is DEI dead?"

Program participants -

Michael Ciaffa (Chair), Hon. Andrea Phoenix, Stan Camhi, Michael Berger, Veronica Ebhuoma, Tara-Marie Desruisseaux, Jack Prochner

- Overview - Michael Ciaffa [5 minutes]
- Comments re: diversity on the bench - Judge Phoenix [5 minutes]
- Leading Supreme Court decisions before Affirmative Action cases: Bakke, Grutter, Fisher - Michael Ciaffa [10 minutes]
- History of recent litigation challenging affirmative action in college admissions - Stan Camhi [5 minutes]
- Fair Admission cases - background facts, oral argument excerpts, majority opinions and dissents - Jack Prochner, Stan Camhi, and others [30 minutes]
- Video parodies: college admission offices, discussing diversity and applications for admission - Veronica Ebhuoma [5 minutes]

- DEI programs in higher education after decisions in Fair Admission cases, discussion of current practices - Tara-Marie Desruisseaux and others [15 minutes]
- Open issues in litigation: military academies, selective high schools - Michael Berger [15 minutes]
- Challenges to DEI programs in corporate context - Stan Camhi and others [15 minutes]
- Concluding discussion re: DEI and litigation avoidance - [10 minutes]
- Audience questions [5 minutes]

THEODORE ROOSEVELT AMERICAN INN OF COURT
MAY 15, 2024
NASSAU COUNTY BAR ASSOCIATION
CHAIR: MICHAEL A. CIAFFA

PROGRAM

IS DEI DEAD?

Supreme Court Review of Affirmative Action Cases

CLE: 1 Credit Professional Practice
1 Credit Diversity, Inclusion and Elimination of Bias

Presenters:

Hon. Andrea Phoenix, District Court, Nassau County

Michael A. Ciaffa, Esq., Forchelli, Deegan Terrana LLP

Stanley A. Camhi, Esq., Jaspan Schlesinger Narendran LLP

Michael A. Berger, Esq., Forchelli, Deegan Terrana LLP

Veronica Ebhuoma, Esq., Milberg, Coleman, Bryson, Phillips, Grossman PLLC

Tara-Marie Desruisseaux, Assistant Dean for Diversity and Inclusion, Hofstra Law School

Law Student: Jack D. Prochner, 3rd Year, St. John's Law School

Dinner will begin at 5:30pm and the program begins at 6:00pm.

Michael A. Ciaffa, Esq.
Forchelli, Deegan, Terrana LLP
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Uniondale, NY 11553
516-248-1700

Michael A. Ciaffa is Of Counsel to the firm's Litigation Department. He was a Nassau County District Court Judge from 2009-2014, where he presided over the busy trial and motion calendar, hearing thousands of civil matters. During his tenure, he had many "Decisions of Interest" published in the *New York Law Journal*.

Throughout the course of his legal career spanning more than three decades, Mr. Ciaffa achieved notable success litigating high profile commercial cases, partnership disputes, insurance coverage issues, and lawsuits challenging illegal or unconstitutional government actions.

Between 1984 and 2008, he worked as a litigator at Meyer, Suozzi, English & Klein, P.C. Before that, he served as the Law Secretary to Justice Jeffrey G. Stark of the Supreme Court, Nassau County. During the first six years of his legal career, he was a member of the Criminal Appeals Bureau of the Legal Aid Society of New York. He obtained his J.D. degree from St. John's Law School in 1977. In 1974, he received a B.A. from Colgate University.

Mr. Ciaffa is a member of the New York State and Nassau County Bar Associations. He is admitted to practice law in the State of New York, and before the United States District Courts for the Southern and Eastern Districts of New York, the U.S. Court of Appeals for the Second Circuit, and the United States Supreme Court.

Andrea Phoenix was elected to the Nassau County District Court in 2006 and was re-elected to a third term in 2018. Previously, Judge Phoenix was an attorney concentrating in Family Law and was an active member of the New York State Law Guardian Panel now known as the Attorneys for Children Program. Judge Phoenix was appointed to preside over the Drug Treatment Court and the Mental Health Court. As an Acting County Court Judge, she adjudicates both misdemeanor and felony matters. Judge Phoenix serves on the Unified Court System Family Violence Task Force and the Nassau County Family Court Children's Center Advisory Committee. Presently, the Judge serves as Co-Chair of the Nassau County Committee on Equal Justice in the Courts along with the Administrative Judge of Nassau County, Honorable Vito M. DeStefano.

Judge Phoenix received her undergraduate degree from Hampton University and her graduate degree from The Ohio State University. She earned her law degree from Hofstra University School of Law, where she was Editor-in-Chief of the *Environmental Law Digest*. She has remained involved in alumni activities and was inducted into the law school's Hall of Fame recently.

Judge Phoenix is a recent past president of the Theodore Roosevelt American Inn of Court. She is the immediate past president of the Nassau Lawyers' Association of Long Island. She is also a past president of the Women's Bar Association of the State of New York, the Nassau County Women's Bar Association and the New York Chapter of the Association of Family and Conciliation Courts. Notably, the Judge was the first African American president of all four of the previously aforementioned organizations. Judge Phoenix sits on the WE CARE Advisory Board of the Nassau County Bar Association. She holds membership in the Nassau County Women's Bar Foundation, the Nassau County Criminal Courts Bar Association of Nassau County, Amistad Long Island Black Bar Association, the Jewish Lawyers Association of Nassau County and the Long Island Hispanic Bar Association. Over the years, she has been active in many other community and public service organizations. These include Antioch Baptist Church of Hempstead where she serves on the Board of Trustees, the Nassau Alumnae Chapter of Delta Sigma Theta Sorority, Inc., the Empire City Moles, and the Long Island Chapter of the Links, Incorporated, where the Judge is the chair of the International Trends and Services Facet, and she is the inaugural and immediate past chair of the National LIFE Committee. Judge Phoenix's volunteerism is extensive and rewarding inclusive of mission trips to Jamaica, West Indies and Accra, Ghana.

The Judge has received various awards and accolades stemming from her organizational involvement. She is the recipient of both the Nassau County Women's Bar Association's Bessie Ray Geffner, Esq. Memorial Award and the Virginia C. Duncombe, Esq. Scholarship Award. Judge Phoenix also received the organization's distinguished Rona Seider Award. Additionally, Judge Phoenix received the Stephen Gassman Award from the Nassau County Bar Association's WE CARE Advisory Board. In 2020, Judge Phoenix received the Visionary Award from Operation Get Ahead, Inc. and she received the Hon. Alfred S. Robbins Memorial Award jointly from the Amistad Long Island Black Bar Association and the Nassau County Courts' Black History Committee. In 2022, Judge Phoenix received a Lifetime Achievement Award at the International Human Rights Commission's Annual Gala. Most recently, in 2023, Judge Phoenix was honored with the Judith S. Kaye Access to Justice Award from the Women's Bar Association of the State of New York and is the recipient of the National Association of the Negro Business and Professional Women's Clubs, Inc. Social Justice Award. She is listed in *Who's Who in Black New York City*.

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STANLEY A. CAMHI

Stanley A. Camhi is co-chair of the Firm's Litigation Practice Group and Labor and Employment Practice Group and a member of the Firm's Appellate Practice Group. Mr. Camhi practices in the area of general civil litigation with an emphasis on labor and employment related matters and insurance defense work. His practice includes the defense of employment discrimination claims in both the public and private sector, including claims brought under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the State Human Rights Law, and the Civil Rights Acts. Rated AV, the highest Martindale-Hubbell peer rating for lawyers, Mr. Camhi has also lectured on the topic of wrongful discharge and privacy in the workplace.

From 1980 until 1986, when he joined Jaspan Schlesinger Narendran LLP, Mr. Camhi was an Assistant Attorney General for the State of New York. In 1983, the Attorney General appointed him to serve as Chief of a Litigation Section where he supervised a staff of ten attorneys primarily responsible for defending Title VII and other discrimination claims brought against the State. As an Assistant Attorney General, Mr. Camhi defended the State of New York and its agencies against lawsuits brought in both federal and state court. His responsibilities included all phases of pre-trial discovery and motion practice as well as trial and appellate work.

Prior to becoming an Assistant Attorney General, Mr. Camhi practiced law for five years with a Capitol Hill law firm in Washington, D.C. where he was primarily responsible for handling the firm's litigation in both the federal and local courts of the District of Columbia.

Mr. Camhi is a past recipient of the Long Island Business News Leadership in Law Award and was named to the list of New York Metro Area Super Lawyers. The Super Lawyers list is issued by Thomson Reuters. A description of the selection methodology can be found at: http://www.superlawyers.com/about/selection_process.html.

Mr. Camhi has served as a Board member of the Long Island Chapter of the American Foundation for Suicide Prevention and is currently on the Board of the Sephardic Temple in Cedarhurst, New York.

Mr. Camhi received his Juris Doctor degree from the Emory University School of Law where he graduated with distinction and was awarded the Order of the Coif based upon his academic achievements. Upon graduation he was admitted to practice law in Georgia.

In 1976, Mr. Camhi was admitted to practice law in both the District of Columbia and Virginia. In 1980, he was also admitted to practice in New York. In addition, Mr. Camhi is admitted to practice law in several federal district courts where he has tried numerous cases. He has also argued a number of appeals in the United States Court of Appeals for the Second Circuit and the New York appellate courts including the New York Court of Appeals, the State's highest court. He is also admitted to practice before the United States Supreme Court.

Mr. Camhi is a member of New York State Bar Association, the Nassau County Bar Association and the Theodore Roosevelt Inn of Court of the American Inns of Court.

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Michael A. Berger is an associate in the Firm's Employment & Labor and Veterinary practice groups. He concentrates his practice on counseling and defending employers on various employment and labor law issues, including wage and hour, discrimination and retaliation.

In the Veterinary practice group, he represents both veterinary consolidators and individual practitioners in employment related matters, such as drafting Employee Handbooks, employment policies, and negotiating employment and severance agreements on behalf of both veterinarians and executives. Additionally, he counsels veterinarians on numerous compliance and regulatory issues, including the specific laws of states throughout the country.

Mr. Berger is admitted in New York, New Jersey and the U.S. District Courts for the Southern, Eastern and Western Districts of New York.

Immediately prior to joining our Firm, Mr. Berger was an associate at a Long Island-based labor law firm. Prior to that, he was an associate at a New York City firm.

Mr. Berger served as a legal fellow to the Hon. Sandra L. Sgroi, Appellate Division, Second Department; a volunteer at Nassau/Suffolk Law Services: Volunteer Lawyers Project; a legal intern at the Law Reform Advocacy Clinic at his law school and at the New York State Office of the Attorney General; and as a law clerk to the Hon. Joseph A. Zayas, Supreme Court of the State of New York, Criminal Term.

Mr. Berger earned his J.D. from the Maurice A. Deane School of Law at Hofstra University, where he was a Book Review Editor for the *Journal of International Business and Law*. In 2013, he published a Note and Book Review. Mr. Berger received his B.A. from the University of Pittsburgh, College of Arts & Sciences.

PRACTICE AREAS

- Employment & Labor
- Litigation
- Securities Litigation and Regulation
- Veterinary

EDUCATION

- Maurice A. Deane School of Law, Hofstra University, J.D., 2013
- University of Pittsburgh, Kenneth P. Dietrich School of Arts & Sciences, B.A., 2010

ADMISSIONS

- New York State Bar
- New Jersey State Bar
- United States District Courts for the Southern, Eastern and Western Districts of New York

PROFESSIONAL AFFILIATIONS AND ACCOMPLISHMENTS

- Member, The Nassau Lawyers Association of Long Island, Inc.
- Treasurer, The Theodore Roosevelt American Inn of Court
- Nassau County Bar Association
    - Chair, New Lawyers Committee

VERONICA EBHUOMA, ESQ.

Veronica Ebhuoma is a Senior Associate with Milberg Coleman Bryson Phillips Grossman, PLLC in Garden City, New York. Veronica's current area of practice is Mass Torts litigation regarding defective medical devices.

Prior to joining Milberg, Veronica was an Associate with the Law Offices of Vernita Charles, in Brooklyn, New York for many years. Veronica practiced in the areas of Foreclosure Defense, Family/Matrimonial law, Probate/Estate Administration, and Landlord/Tenant law.

Veronica also has extensive government experience. She served as Associate Counsel to the New York State Assembly Codes Committee for several years. In this capacity, Veronica had the privilege of not only reviewing and drafting legislation, but also seeing many pieces of legislation that she helped to draft become law in New York State. The Assembly Codes Committee reviews all proposed legislation regarding the Penal law, CPLR, and other areas of law that would impose or change any fines, terms of imprisonment, forfeiture of rights, other types of penal sanctions, and the procedures related thereto.

Veronica has also served as a Community Liaison for New York State Assemblyman Edward P. Ra and former New York State Assemblyman Thomas Alfano. Assemblyman Edward P. Ra represents the 19th Assembly District which currently includes the areas of Carle Place, East Meadow, Floral Park, Franklin Square, Garden City, Garden City South, Mineola, New Hyde Park, Stewart Manor, West Hempstead, Westbury, East Williston and Williston Park. As Community Liaison, Veronica played an integral role in the management of constituent affairs.

Veronica graduated Magna Cum Laude from the State University of New York at Albany and earned a J.D. from Boston University School of Law. Veronica currently serves as a Board Member of the Theodore Roosevelt American Inn of Court and is a member the New York State Bar Association.

Tara-Marie Desruisseaux is the Assistant Dean for Diversity and Inclusion at the Maurice A. Deane School of Law at Hofstra University. Her academic journey includes earning a bachelor's degree from Duke University and a PhD in Urban Education Policy from the University of Southern California. Prior to her current role, she worked in recruiting and diversity positions at Cravath, Swaine & Moore LLP and Wachtell, Lipton, Rosen & Katz.

JACK PROCHNER is a third-year student at St. John's University School of Law. He previously worked as a summer associate at one firm specializing in commercial construction disputes and another in securities litigation. In 2021, Jack graduated from the University of Miami with a B.A. in Accounting and a minor in Finance. Jack has previously assisted the Inn in preparing the following: the *How to Navigate the New Gun Laws* program held on December 7th, 2022, the *Negotiating A Record Contract* program held on May 23rd, 2023, and the *Who Wants a Free House?* program held on February 28, 2024.

Syllabus

REGENTS OF THE UNIVERSITY OF CALIFORNIA v. BAKKE

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 76–811. Argued October 12, 1977—Decided June 28, 1978

The Medical School of the University of California at Davis (hereinafter Davis) had two admissions programs for the entering 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

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 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 pro-

gram, 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, 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. 281–287.

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. 287–320.

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. 320.

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. 328–355.

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. 355–379.

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. 408–421.

POWELL, J., announced the Court's judgment and filed an opinion expressing his views of the case, in Parts I, III–A, and V–C of which WHITE, J., joined; and in Parts I and V–C of which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. BRENNAN, WHITE, MARSHALL, and BLACK-

MUN, JJ., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 324. WHITE, J., *post*, p. 379, MARSHALL, J., *post*, p. 387, and BLACKMUN, J., *post*, p. 402, filed separate opinions. STEVENS, J., filed an opinion concurring in the judgment in part and dissenting in part, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined, *post*, p. 408.

Archibald Cox argued the cause for petitioner. With him on the briefs were *Paul J. Mishkin, Jack B. Owens,* and *Donald L. Reidhaar.*

Reynold H. Colvin argued the cause and filed briefs for respondent.

Solicitor General McCree argued the cause for the United States as *amicus curiae.* With him on the briefs were *Attorney General Bell, Assistant Attorney General Days, Deputy Solicitor General Wallace, Brian K. Landsberg, Jessica Dunsay Silver, Miriam R. Eisenstein,* and *Vincent F. O'Rourke.**

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*Briefs of *amici curiae* urging reversal were filed by *Slade Gorton,* Attorney General, and *James B. Wilson,* Senior Assistant Attorney General, for the State of Washington et al.; by *E. Richard Larson, Joel M. Gora, Charles C. Marson, Sanford Jay Rosen, Fred Okrand, Norman Dorsen, Ruth Bader Ginsburg,* and *Frank Askin* for the American Civil Liberties Union et al.; by *Edgar S. Cahn, Jean Camper Cahn,* and *Robert S. Catz* for the Antioch School of Law; by *William Jack Chow* for the Asian American Bar Assn. of the Greater Bay Area; by *A. Kenneth Pye, Robert B. McKay, David E. Feller,* and *Ernest Gellhorn* for the Association of American Law Schools; by *John Holt Myers* for the Association of American Medical Colleges; by *Jerome B. Falk* and *Peter Roos* for the Bar Assn. of San Francisco et al.; by *Ephraim Margolin* for the Black Law Students Assn. at the University of California, Berkeley School of Law; by *John T. Baker* for the Black Law Students Union of Yale University Law School; by *Annamay T. Sheppard* and *Jonathan M. Hyman* for the Board of Governors of Rutgers, State University of New Jersey, et al.; by *Robert J. Willey* for the Cleveland State University Chapter of the Black American Law Students Assn.; by *John Mason Harding, Albert J. Rosenthal, Daniel Steiner, Iris Brest, James V. Siena, Louis H. Pollak,* and *Michael I. Sovern* for Columbia University et al.; by *Herbert O. Reid* for Howard University; by *Harry B. Reese* and *L. Orin Slagle* for the Law School Admission Council; by *Albert E. Jenner, Jr., Stephen J. Pollak, Burke Marshall,*

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 admis-

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Norman Redlich, Robert A. Murphy, and *William E. Caldwell* for the Lawyers' Committee for Civil Rights Under Law; by *Alice Daniel* and *James E. Coleman, Jr.,* for the Legal Services Corp.; by *Nathaniel R. Jones, Nathaniel S. Colley,* and *Stanley Goodman* for the National Assn. for the Advancement of Colored People; by *Jack Greenberg, James M. Nabrit III, Charles S. Ralston, Eric Schnapper,* and *David E. Kendall* for the NAACP Legal Defense and Educational Fund, Inc.; by *Stephen V. Bomse* for the National Assn. of Minority Contractors et al.; by *Richard B. Sobol, Marian Wright Edelman, Stephen P. Berzon,* and *Joseph L. Rauh, Jr.,* for the National Council of Churches of Christ in the United States et al.; by *Barbara A. Morris, Joan Bertin Lowy,* and *Diana H. Greene* for the National Employment Law Project, Inc.; by *Herbert O. Reid* and *J. Clay Smith, Jr.,* for the National Medical Assn., Inc., et al.; by *Robert Hermann* for the Puerto Rican Legal Defense and Education Fund et al.; by *Robert Allen Sedler, Howard Lesnick,* and *Arval A. Morris* for the Society of American Law Teachers; for the American Medical Student Assn.; and for the Council on Legal Education Opportunity.

Briefs of *amici curiae* urging affirmance were filed by *Lawrence A. Poltrock* and *Wayne B. Giampietro* for the American Federation of Teachers; by *Abraham S. Goldstein, Nathan Z. Dershowitz, Arthur J. Gajarsa, Thaddeus L. Kowalski, Anthony J. Fornelli, Howard L. Greenberger, Samuel Rabinove, Themis N. Anastos, Julian E. Kulas,* and *Alan M. Dershowitz* for the American Jewish Committee et al.; by *McNeill Stokes* and *Ira J. Smotherman, Jr.,* for the American Subcontractors Assn.; by *Philip B. Kurland, Daniel D. Polsby, Larry M. Lavinsky, Arnold Forster, Dennis Rapps, Anthony J. Fornelli, Leonard Greenwald,* and *David I. Ashe* for the Anti-Defamation League of B'nai B'rith et al.; by *Charles G. Bakaly* and *Lawrence B. Kraus* for the Chamber of Commerce of the United States; by *Roger A. Clark, Jerome K. Tankel,* and *Glen R. Murphy* for the Fraternal Order of Police et al.; by *Judith R. Cohn* for the Order Sons of Italy in America; by *Ronald A. Zumbrun, John H. Findley,* and *William F. Harvey* for the Pacific Legal Foundation; by *Benjamin Vinar* and *David I. Caplan* for the Queens Jewish Community Council et al.; and by *Jennings P. Felix* for Young Americans for Freedom.

Briefs of *amici curiae* were filed by *Matthew W. Finkin* for the American Assn. of University Professors; by *John W. Finley, Jr., Michael*

sion 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 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 appli-

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Blinick, John Cannon, Leonard J. Theberge, and *Edward H. Dowd* for the Committee on Academic Nondiscrimination and Integrity et al.; by *Kenneth C. McGuiness, Robert E. Williams, Douglas S. McDowell,* and *Ronald M. Green* for the Equal Employment Advisory Council; by *Charles E. Wilson* for the Fair Employment Practice Comm'n of California; by *Mario G. Obledo* for Jerome A. Lackner, Director of the Department of Health of California, et al.; by *Vilma S. Martinez, Peter D. Roos,* and *Ralph Santiago Abascal* for the Mexican American Legal Defense and Educational Fund et al.; by *Eva S. Goodwin* for the National Assn. of Affirmative Action Officers; by *Lennox S. Hinds* for the National Conference of Black Lawyers; by *David Ginsburg* for the National Fund for Minority Engineering Students; by *A. John Wabaunsee, Walter R. Echo-Hawk,* and *Thomas W. Fredericks* for the Native American Law Students of the University of California at Davis et al.; by *Joseph A. Broderick, Calvin Brown, LeMarquis DeJarmon, James E. Ferguson II, Harry E. Groves, John H. Harmon, William A. Marsh, Jr.,* and *James W. Smith* for the North Carolina Assn. of Black Lawyers; by *Leonard F. Walentynowicz* for the Polish American Congress et al.; by *Daniel M. Luevano* and *John E. McDermott* for the UCLA Black Law Students Assn. et al.; by *Henry A. Waxman pro se;* by *Leo Branton, Jr., Ann Fagan Ginger, Sam Rosenwein,* and *Laurence R. Sperber* for Price M. Cobbs, M. D., et al.; by *John S. Nolan* for Ralph J. Galliano; and by *Daniel T. Spitler* for Timothy J. Hoy.

cant.† 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.

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†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 408–411. 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, 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.

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 program consisted of

‡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 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

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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 Admission 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.

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, 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 "disad-

[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.

vantaged" 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,

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[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.

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.

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.

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[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.

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, 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

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[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

[*Footnote 7 is continued on p. 278; footnote 8 is on p. 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

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."

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, 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, 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, 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

[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, 553 P. 2d, at 1159.

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, 553 P. 2d, at 1166.

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, 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 (1976). 18 Cal. 3d, at 63–64, 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

[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 (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

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, 553 P. 2d, at 1172. That order was stayed pending review in this Court. 429 U. S. 953 (1976). We granted certiorari to consider the important constitutional issue. 429 U. S. 1090 (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 (1936) (concurring opinion), we requested supplementary briefing on the statutory issue. 434 U. S. 900 (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 the test set forth in *Cort* v. *Ash*, 422 U. S. 66, 78 (1975). He contends

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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 (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.

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

[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 (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 (CA7 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 (ND 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

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 (1940). See also *Massachusetts* v. *Westcott,* 431 U. S. 322 (1977); *Cardinale* v. *Louisiana,* 394 U. S. 437, 439 (1969). Cf. *Singleton* v. *Wulff,* 428 U. S. 106, 121 (1976). We therefore do not address this difficult issue. Similarly, we need not pass

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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).

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 (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 (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 (1976), quoting *United States* v. *American Trucking Assns.,* 310 U. S. 534, 543–544 (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 Pro-

[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

tection 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, 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

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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. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, pp. 24–25 (1963).

> 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

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[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).

"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 (1938); *Sipuel* v. *Board of Regents*, 332 U. S. 631 (1948); *Sweatt* v. *Painter*, 339 U. S. 629 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637 (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 (1943); *Korematsu* v. *United States*, 323 U. S. 214 (1944); *Lee* v. *Washington*, 390 U. S. 333, 334 (1968) (Black, Harlan, and STEWART, JJ., concurring); *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (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

[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).

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 (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 (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]

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[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

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 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. Accord, *Missouri ex rel. Gaines* v. *Canada, supra,* at 351; *McCabe* v. *Atchison, T. & S. F. R. Co.,* 235 U. S. 151, 161–162 (1914). The guarantee of equal protection cannot mean one thing when applied to one individual and something else when

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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, 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 (1977); *Washington* v. *Davis,* 426 U. S. 229, 242 (1976); see *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886).

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,* at 152–153, n. 4. 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 (1942); *Carrington* v. *Rash,* 380 U. S. 89, 94–97 (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 (1976) (age); *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S. 1, 28 (1973) (wealth); *Graham* v. *Richardson,* 403 U. S. 365, 372 (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

[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 (1940) (Stone, J., dissenting). The next does not appear until 1970. *Oregon* v. *Mitchell,* 400 U. S. 112, 295 n. 14 (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 (1971).

> whose institutions are founded upon the doctrine of equality." *Hirabayashi,* 320 U. S., at 100.
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> "[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.

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 oppressions of those who had formerly exercised dominion over him." *Slaughter-House Cases,* 16 Wall. 36, 71 (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 (1887); *Allgeyer* v. *Louisiana,* 165 U. S. 578 (1897); *Lochner* v. *New York,* 198 U. S. 45 (1905). In that cause, the Fourteenth Amendment's "one pervading purpose" was displaced. See, *e. g., Plessy* v. *Ferguson,* 163 U. S. 537 (1896). It was only as the era of substantive due process came to a close, see, *e. g., Nebbia* v. *New*

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[29] Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 381 (1949).

York, 291 U. S. 502 (1934); *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379 (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 (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 (1880) (Celtic Irishmen) (dictum); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886) (Chinese); *Truax* v. *Raich,* 239 U. S. 33, 41 (1915) (Austrian resident aliens); *Korematsu, supra* (Japanese); *Hernandez* v. *Texas,* 347 U. S. 475 (1954) (Mexican-Americans). The guarantees of equal protection, said the Court in

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[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).

[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.,* P. Roberts, *supra* n. 31, at 75; G. Abbott, *supra* n. 31, at 270–271. See generally n. 31, *supra.*

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.

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 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 (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 (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

equal laws," *Yick Wo, supra,* at 369, in a Nation confronting a legacy of slavery and racial discrimination. See, *e. g., Shelley* v. *Kraemer,* 334 U. S. 1 (1948); *Brown* v. *Board of Education,* 347 U. S. 483 (1954); *Hills* v. *Gautreaux,* 425 U. S. 284 (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 (1967), quoting *Hirabayashi,* 320 U. S., at 100.

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]

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[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 361, 362. 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

The clock of our liberties, however, cannot be turned back to 1868. *Brown* v. *Board of Education, supra,* at 492; accord, *Loving* v. *Virginia, supra,* at 9. It is far too late to argue that the guarantee of equal protection 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.

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 toler-

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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).

ance 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

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[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 369 (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 365–366.

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 374 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*.

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 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]

[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 (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, 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 even-

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 (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 (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

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handed manner. See, *e. g.*, *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Terrace* v. *Thompson*, 263 U. S. 197; *Oyama* v. *California*, 332 U. S. 633. This Court has not sustained a racial classification since the wartime cases of *Korematsu* v. *United States*, 323 U. S. 214, and *Hirabayashi* v. *United States*, 320 U. S. 81, 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 (1974) (dissenting opinion) (footnotes omitted).

racial and ethnic antagonisms rather than alleviate them. *United Jewish Organizations, supra,* at 173–174 (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 one generation to the next, a critical feature of its coherent interpretation. *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 650–651 (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 (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; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S., at 351.

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[38] R. Dahl, A Preface to Democratic Theory (1956); Posner, *supra* n. 25, at 27.

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 (1971); *McDaniel* v. *Barresi,* 402 U. S. 39 (1971); *Green* v. *County School Board,* 391 U. S. 430 (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

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[39] Petitioner cites three lower court decisions allegedly deviating from this general rule in school desegregation cases: *Offermann* v. *Nitkowski,* 378 F. 2d 22 (CA2 1967); *Wanner* v. *County School Board,* 357 F. 2d 452 (CA4 1966); *Springfield School Committee* v. *Barksdale,* 348 F. 2d 261 (CA1 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 (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 (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.

violations. *E. g., Dayton Board of Education* v. *Brinkman,* 433 U. S. 406 (1977); *Milliken* v. *Bradley,* 418 U. S. 717 (1974); see *Pasadena City Board of Education* v. *Spangler,* 427 U. S. 424 (1976). See also *Austin Independent School Dist.* v. *United States,* 429 U. S. 990, 991–995 (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 (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, quoting *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 418 (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 (CA3), cert. denied, 404 U. S. 854 (1971);[40] *Associated General*

[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

Contractors of Massachusetts, Inc. v. *Altshuler,* 490 F. 2d 9 (CA1 1973), cert. denied, 416 U. S. 957 (1974); cf. *Katzenbach* v. *Morgan,* 384 U. S. 641 (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 gender-based classifications are not subjected to this level of scrutiny. *E. g., Califano* v. *Webster,* 430 U. S. 313, 316–317 (1977); *Craig* v. *Boren,* 429 U. S. 190, 211 n. (1976) (POWELL, J., concurring). Gender-based distinctions are less likely to create the analytical and prac-

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the imposition of a preferential remedy. *Contractors Association of Eastern Pennsylvania; Southern Illinois Builders Assn.* v. *Ogilvie,* 471 F. 2d 680 (CA7 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 (1970). See also *Rosetti Contracting Co.* v. *Brennan,* 508 F. 2d 1039, 1041 (CA7 1975); *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler,* 490 F. 2d 9 (CA1 1973), cert. denied, 416 U. S. 957 (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 (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 (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 (1966); *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409 (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.

tical problems 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 (1977); *Weinberger* v. *Wiesenfeld,* 420 U. S. 636, 645 (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 (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. 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.

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. 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 (STEWART, J., concurring in result).

In a similar vein,[42] petitioner contends that our recent decision in *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (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

[42] Petitioner also cites our decision in *Morton* v. *Mancari*, 417 U. S. 535 (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. 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 . . . groups . . . whose lives and activities are governed by the BIA in a unique fashion." *Ibid.*

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.

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 (1973) (footnotes omitted); *Loving* v. *Virginia,* 388 U. S., at 11; *McLaughlin* v. *Florida,* 379 U. S. 184, 196 (1964). The special admissions

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 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.

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[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.

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,* at 11; *McLaughlin* v. *Florida, supra,* at 196; *Brown* v. *Board of Education,* 347 U. S. 483 (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 (1977); *United Jewish Organizations,* 430 U. S., at 155–156; *South Carolina* v. *Katzenbach,* 383 U. S. 301, 308 (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

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

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[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 363–366, 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 (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 (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. See also *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802–803, 805–806 (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

said that 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 (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; *Califano*

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intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs, supra,* at 429–430. 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. 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.*

v. *Goldfarb*, 430 U. S., at 212–217. 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 (1976).

C

Petitioner identifies, as another purpose of its program, improving the delivery of 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

[46] The only evidence in the record with respect to such underservice is a newspaper article. Record 473.

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, 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 per-

[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.

missible 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 (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 (1967):

> "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,* 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

[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

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, the

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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).

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 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

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[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.

program's racial classification is necessary to promote this interest. *In re Griffiths,* 413 U. S., at 721–722.

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.

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[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).

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 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

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

[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.

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 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 (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

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[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.

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 (1977); *Washington* v. *Davis*, 426 U. S. 229 (1976); *Swain* v. *Alabama*, 380 U. S. 202 (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

[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 (1954).

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. 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 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]

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[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*

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 educa-

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City Board of Ed. v. *Doyle*, 429 U. S. 274, 284–287 (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. 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*.

tional 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 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,

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

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 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—

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, 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 271 n. Since we conclude that the affirmative admissions program at the Davis

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 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 (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

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[1] We also agree with MR. JUSTICE POWELL that a plan like the "Harvard" plan, see *ante*, at 316–318, 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 (1896).

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 (*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 (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.

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[3] *New Orleans City Park Improvement Assn.* v. *Detiege,* 358 U. S. 54 (1958); *Muir* v. *Louisville Park Theatrical Assn.,* 347 U. S. 971 (1954); *Mayor of Baltimore* v. *Dawson,* 350 U. S. 877 (1955); *Holmes* v. *Atlanta,* 350 U. S. 879 (1955); *Gayle* v. *Browder,* 352 U. S. 903 (1956).

[4] See *Green* v. *County School Board,* 391 U. S. 430 (1968).

[5] See *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971); *Davis* v. *School Comm'rs of Mobile County,* 402 U. S. 33 (1971); *North Carolina Board of Education* v. *Swann,* 402 U. S. 43 (1971).

[6] See, *e. g.,* cases collected in *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658, 663 n. 5 (1978).

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 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 au-

[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. 379.

thority 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]

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[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

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).

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

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of any administrator with respect to Federal funds or financial assistance and discriminatory practices." 109 Cong. Rec. 11161 (1963).

> 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.
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> "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

> 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 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 (1964)]. In all cases, such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply

[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).

> 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]

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[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

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

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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.

> "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

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[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. 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).

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 355–356.

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. 25 (1963); 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

[13] See separate opinion of MR. JUSTICE WHITE, *post,* at 382–383, n. 2.

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 (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. 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 segre-

gated 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. 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

[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

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 evolu-

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concern—the segregation of Negroes in federally funded programs and their exclusion from the full benefits of such programs—was clear. See *supra*, at 333–336; *infra*, at 340–342, 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).

tionary 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 (1976), quoting *United States* v. *American Trucking Assns.,* 310 U. S. 534, 543–544 (1940). This is especially so when, as is the case here, the literal application of what is believed to be the 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]

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[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

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Section 602 of Title VI, 42 U. S. C. § 2000d–1, instructs federal agencies to promulgate regulations interpreting Title

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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 339–340; 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

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.*, *Lau* v. *Nichols*,

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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 353, 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 (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; *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 418 (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 353–355, and n. 28.

414 U. S. 563 (1974); *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356, 369 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 381 (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

> 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.

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

[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.

> 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]

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[19] Moreover, the President has delegated to the Attorney General responsibility 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

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; *Zemel* v. *Rusk*, 381 U. S. 1, 11–12 (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 Cong.

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.

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 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.

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[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.

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

[22] 91 Stat. 117, 42 U. S. C. § 6705 (f)(2) (1976 ed.).

[23] 123 Cong. Rec. 7156 (1977); *id.*, at 5327–5330.

the excessive rate of unemployment among minority citizens and to encourage the development of viable minority controlled enterprises.[24] 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–

[24] See *id.,* at 7156 (Sen. Brooke).

381; *Erlenbaugh* v. *United States*, 409 U. S. 239, 243–244 (1972). See also *United States* v. *Stewart*, 311 U. S. 60, 64–65 (1940).[25]

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 (1974), the Court held that the failure of the San

[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 undergradu-

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 num-

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ate 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 colorblind 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.).

bers 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 (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 view that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's, this would not assist the respondent

[26] Cf. *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971).

in the least. First, for the reasons discussed *supra,* at 336–350, regardless of whether Title VI's prohibitions extend beyond the 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 "colorblind" 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

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[27] *Ibid.; Albemarle Paper Co.* v. *Moody,* 422 U. S. 405 (1975).

[28] *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747 (1976); *Teamsters* v. *United States,* 431 U. S. 324 (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

Rights Act of 1965, 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

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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 (CA5 1969); *United States* v. *Electrical Workers,* 428 F. 2d 144, 149–150 (CA6), cert. denied, 400 U. S. 943 (1970); *United States* v. *Sheetmetal Workers,* 416 F. 2d 123 (CA8 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 (CA3), cert. denied, 404 U. S. 854 (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 (CA7 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

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 (1941) (Jackson, J., concurring), summed up by the shorthand phrase "[o]ur Constitution is color-blind," *Plessy* v. *Ferguson,* 163 U. S. 537, 559 (1896) (Harlan, J., dissenting), has never been adopted by this Court as the proper meaning of the Equal Protection Clause. In-

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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 (1977). See also *id.,* at 167–168 (opinion of WHITE, J.).

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 (1964), could be found that would justify racial classifications. See, *e. g., ibid.; Loving* v. *Virginia*, 388 U. S. 1, 11 (1967); *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944); *Hirabayashi* v. *United States*, 320 U. S. 81, 100–101 (1943). More recently, in *McDaniel* v. *Barresi*, 402 U. S. 39 (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 colorblind. And in *North Carolina Board of Education* v. *Swann* we held, again unanimously, that a statute mandating colorblind 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.

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 classifications used by its program are reasonably related to what it tells us are its benign

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 (1973); *Dunn* v. *Blumstein,* 405 U. S. 330 (1972). But no fundamental right is involved here. See *San Antonio, supra,* at 29–36. 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; see *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152 n. 4 (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,* at 100. 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 govern-

[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 (1977); *id.,* at 501 (MARSHALL, J., concurring).

ment behind racial hatred and separatism—are invalid without more. See *Yick Wo* v. *Hopkins,* 118 U. S. 356, 374 (1886); [32] accord, *Strauder* v. *West Virginia,* 100 U. S. 303, 308 (1880); *Korematsu* v. *United States, supra,* at 223; *Oyama* v. *California,* 332 U. S. 633, 663 (1948) (Murphy, J., concurring); *Brown I,* 347 U. S. 483 (1954); *McLaughlin* v. *Florida, supra,* at 191–192; *Loving* v. *Virginia, supra,* at 11–12; *Reitman* v. *Mulkey,* 387 U. S. 369, 375–376 (1967); *United Jewish Organizations* v. *Carey,* 430 U. S. 144, 165 (1977) (*UJO*) (opinion of WHITE, J., joined by REHNQUIST and STEVENS, JJ.); *id.,* at 169 (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 recitation of a benign, compensatory purpose is not an automatic shield

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[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.

[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 (1943), and *Korematsu* v. *United States,* 323 U. S. 214 (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." 320 U. S., at 101. A similar mode of analysis was followed in *Korematsu,* see 323 U. S., at 224, even though the Court stated there that racial classifications were "immediately suspect" and should be subject to "the most rigid scrutiny." *Id.,* at 216.

which protects against any inquiry into the actual purposes underlying a statutory scheme.' " *Califano* v. *Webster,* 430 U. S. 313, 317 (1977), quoting *Weinberger* v. *Wiesenfeld,* 420 U. S. 636, 648 (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,* at 317, quoting *Craig* v. *Boren,* 429 U. S. 190, 197 (1976).[35]

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[35] We disagree with our Brother POWELL's suggestion, *ante,* at 303, 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 296, 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 274. 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 (1977); *Washington* v. *Davis,* 426 U. S. 229, 238–241 (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 (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. *Rodriguez,* 411 U. S. 1, 38–39 (1973) (applying *Katzenbach* test to state action intended to remove discrimination in edu-

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 (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 (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*, at 508; *UJO*, *supra*, at 174, and n. 3 (opinion concurring in part); *Califano* v. *Goldfarb*, 430 U. S. 199, 223 (1977) (STEVENS, J., concurring in judgment). See also *Stanton* v. *Stanton*, 421 U. S. 7, 14–15 (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*, at 172 (opinion concurring in part); *ante*, at 298 (opinion of POWELL, J.).

Second, race, like gender and illegitimacy, see *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (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 355–356, it is nevertheless true that such divisions are contrary to our deep belief that "legal burdens should bear some relationship to individual responsibility or

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cational opportunity). Thus, claims of rival groups, although they may create thorny political problems, create relatively simple problems for the courts.

wrongdoing," *Weber, supra,* at 175; *Frontiero* v. *Richardson,* 411 U. S. 677, 686 (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 (opinion concurring in part); *Kotch* v. *Board of River Port Pilot Comm'rs,* 330 U. S. 552, 566 (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 processes [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,* at 174 (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 (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

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.

A

At least since *Green* v. *County School Board,* 391 U. S. 430 (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 (1971), and its companion cases, *Davis* v. *School Comm'rs of Mobile County,* 402 U. S. 33 (1971); *McDaniel* v. *Barresi,* 402 U. S. 39 (1971); and *North Carolina Board of Education* v. *Swann,* 402 U. S. 43 (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,* at 28. 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 (1969), and that local school boards could *voluntarily* adopt desegregation

[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).

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,* at 16. In each instance, the creation of unitary school systems, in which the effects of past discrimination had been "eliminated root and branch," *Green, supra,* at 438, 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 (1976); *Teamsters* v. *United States,* 431 U. S. 324 (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. 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

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 (1975).[37]

These cases cannot be distinguished simply by the presence of judicial findings of 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 (1977); *Schlesinger* v. *Ballard,* 419 U. S. 498 (1975); *Kahn* v. *Shevin,* 416 U. S. 351 (1974). See also *Katzenbach* v. *Morgan,* 384 U. S. 641 (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]

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[37] In *Albemarle,* we approved "differential validation" of employment tests. See 422 U. S., at 435. 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 336–338. 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

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 (opinion of WHITE, J., joined by BRENNAN, BLACKMUN, and STEVENS, JJ.);[39] *id.*, at 167 (opinion of WHITE, J., joined by REHNQUIST and STEVENS, JJ.);[40] cf. *Califano* v. *Webster, supra,* at 317; *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, 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, than there is a reasonable likelihood that, but for pervasive racial discrim-

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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."

ination, 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 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]

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[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 304. 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 305. 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 307. 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 (1971); *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (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,

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

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256 (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 have 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 370.

[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 (1976) (*per curiam*), citing *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 638 n. 2 (1975).

Teamsters v. *United States,* 431 U. S. 324 (1977), implicitly recognize that the affirmative use of race is consistent with the equal protection component of the Fifth Amendment 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 (1945) (Frankfurter, J., concurring).[44] We there-

[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. That case thus established the principle that a State voluntarily could go beyond what the Fourteenth Amendment required in eliminating private racial discrimination.

fore 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

[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

constituted 10% of the 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

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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 276 n. 6 (opinion of POWELL, J.).

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 (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 (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. See also *Plessy* v. *Ferguson*, 163 U. S. 537 (1896).

Green v. *County School Board*, 391 U. S. 430 (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 the professions. The generation of minority students applying to Davis Medical School since it opened in 1968—most of whom

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[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).

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 schoolchildren 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,* at 494, 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 (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 341–343, has also reached the conclusion that race may be taken into account in situations

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[53] See, *e. g., Crawford* v. *Board of Education,* 17 Cal. 3d 280, 551 P. 2d 28 (1976); *Soria* v. *Oxnard School Dist. Board, supra; Spangler* v. *Pasadena City Board of Education,* 311 F. Supp. 501 (CD 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).

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 344–345, discussing 45 CFR §§ 80.3 (b)(6)(ii) and 80.5 (j) (1977). 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 346–347. 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 (1966); *UJO,* 430 U. S., at 175–178 (opinion concurring in part).[56]

C

The second prong of our test—whether the Davis program stigmatizes any discrete group or individual and whether race

[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 348–349.

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]

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[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,

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. 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

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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.

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

[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).

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 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

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[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).

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 (1969); *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966). 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 (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]

[63] The excluded white applicant, despite MR. JUSTICE POWELL's conten-

The "Harvard" program, see *ante,* at 316–318, 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 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

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tion to the contrary, *ante,* at 318 n. 52, receives no more or less "individualized consideration" under our approach than under his.

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 (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

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[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. See also *Mount Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 278 (1977); *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149, 152 (1908); *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884).

In *Lau* v. *Nichols*, 414 U. S. 563 (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. 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.

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 (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, 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 agen-

cies 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

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[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 safe-

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, 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

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guards 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.

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 (CA4 1963), cert. denied, 376 U. S. 938 (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

[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 (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. The mandate of *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 722 (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 (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.

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

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 passage of Title VI explicitly stated that a private right of action under Title VI does not exist.[4]

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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 (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

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, clearer statements cannot be imagined, and under *Cort*, "an explicit purpose to *deny* such cause of action [is] controlling." *Id.*, at 82. 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 419–420, 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.

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.

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 (1974). See also *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412, 418–420 (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 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,

[7] I also join Parts I, III–A, and V–C of MR. JUSTICE POWELL's opinion.

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

[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).

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 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 (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

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 (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

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 (1876); *United States* v. *Cruikshank,* 92 U. S. 542 (1876). Then in the notorious *Civil Rights Cases,* 109 U. S. 3 (1883), 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. 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. "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that

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. 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.

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 (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. 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.

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. He expressed his fear that if like laws were enacted in other

States, "the effect would be in the highest degree mischievous." *Id.*, at 563. 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 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

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 (1954). See, *e. g., Morgan* v. *Virginia,* 328 U. S. 373 (1946); *Sweatt* v. *Painter,* 339 U. S. 629 (1950); *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637 (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.

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]

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

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[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).

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

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[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).

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 391. 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:

> "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 prin-

cipal 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 (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 (1971); *McDaniel* v. *Barresi,* 402 U. S. 39, 41 (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 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 (1968), that all reasonable methods be available to formulate an effective remedy." *Board of Education* v. *Swann,* 402 U. S. 43, 46 (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,* at 41.

Only last Term, in *United Jewish Organizations* v. *Carey,* 430 U. S. 144 (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, *Califano* v. *Webster,* 430 U. S. 313 (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, quoting *Califano* v. *Goldfarb,* 430 U. S. 199, 209 n. 8 (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

[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

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

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groups even where the institution was not guilty of prior discrimination. 45 CFR § 80.3 (b) (6) (ii) (1977).

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; see *supra,* at 392. 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 (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 the principle that the "Constitution is color-blind" appeared only in the opinion of the lone dissenter. 163 U. S., at 559. The majority of the Court rejected the principle of color blindness, and for the next 60 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

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. 324, 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.

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 (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 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

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 distinc-

tions 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 293, quoting from the Court's opinion in *McDonald* v. *Santa Fe Trail Transp. Co.,* 427 U. S. 273, 296 (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. 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 (1974), and in *United Jewish Organizations* v. *Carey,* 430 U. S. 144 (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 305. And surely in *Lau* v. *Nichols* we looked to ethnicity.

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

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?

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 (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).

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

[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 324–325. 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.

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 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

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[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.

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 para-

[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, 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."

graph 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, 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.[7] The more important the issue, the more force

[6] "This Court . . . reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories,* 351 U. S. 292, 297.

[7] "From *Hayburn's Case,* 2 Dall. 409, to *Alma Motor Co.* v. *Timken-Detroit Axle Co.* [, 329 U. S. 129,] and the Hatch Act case [*United Public Workers* v. *Mitchell,* 330 U. S. 75] 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

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

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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 (footnotes omitted). See also *Ashwander* v. *TVA*, 297 U. S. 288, 346–348 (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.

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 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,[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

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[10] H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963).

[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. Quoting from our earlier decision in *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431, 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 (emphasis in original).

Cong., 1st Sess., pt. 1, p. 25 (1963) (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 "dis-

[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 Abernethy'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).

crimination" 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 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).
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> "[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.

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[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).

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]

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[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], 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., at 191. 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, at 175." *Moor* v. *County of Alameda,* 411 U. S. 693, 709.

[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 & Power* v. *Manhart,* 435 U. S. 702, 709 ("[T]he basic policy of the statute [Title VII] requires that we focus on fairness to individuals rather than fairness

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

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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:

" 'Our Constitution is color-blind.'

"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, 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 304. See also *Washington* v. *Davis,* 426 U. S. 229, 238–239; *Allen* v. *State Board of Elections,* 393 U. S. 544, 588 (Harlan, J., concurring and dissenting).

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

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[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).

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 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, 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]

[24] Record 30–31.

[25] See, *e. g., Lau* v. *Nichols, supra; Bossier Parish School Board* v. *Lemon,* 370 F. 2d 847 (CA5 1967), cert. denied, 388 U. S. 911; *Uzzell* v. *Friday,* 547 F. 2d 801 (CA4 1977), opinion on rehearing en banc, 558 F. 2d 727, cert. pending, No. 77–635; *Serna* v. *Portales,* 499 F. 2d 1147 (CA10 1974); cf. *Chambers* v. *Omaha Public School District,* 536 F. 2d 222, 225 n. 2 (CA8 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 380–383. But Bakke did not seek to cut off the University's federal funding; he sought admission

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 short, a fair consideration of

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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.

[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 (CA7 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, 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 283 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

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.

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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. In *Allen,* of course, this Court found a private right of action under the Voting Rights Act.

Syllabus

GRATZ ET AL. *v.* BOLLINGER ET AL.

CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 02–516. Argued April 1, 2003—Decided June 23, 2003

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 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*

Univ. of Cal. v. *Bakke*, 438 U. S. 265, 317, 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*, *post*, p. 306, 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. 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 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

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; *Blum* v. *Yaretsky*, 457 U. S. 991, 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. 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. 260–268.

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*, *post*, at 327–333, 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. 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. The current LSA policy does 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

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, 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. 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. 268–275.

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; *General Building Contractors Assn.* v. *Pennsylvania*, 458 U. S. 375, 389–390. Accordingly, the Court reverses that portion of the District Court's decision granting respondents summary judgment with respect to liability. Pp. 275–276.

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. 276. THOMAS, J., filed a concurring opinion, *post*, p. 281. BREYER, J., filed an opinion concurring in the judgment, *post*, p. 281. STEVENS, J., filed a dissenting opinion, in which SOUTER, J., joined, *post*, p. 282. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined as to Part II, *post*, p. 291. GINSBURG, J., filed a dissenting opinion, in which SOUTER, J., joined, and in which BREYER, J., joined as to Part I, *post*, p. 298.

Counsel

Kirk O. Kolbo argued the cause for petitioners. With him on the briefs were *David F. Herr*, *R. Lawrence Purdy*, *Michael C. McCarthy*, *Michael E. Rosman*, *Hans Bader*, and *Kerry L. Morgan.*

Solicitor General Olson argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Boyd* and *Deputy Solicitor General Clement.*

John Payton argued the cause for respondents. With him on the brief for respondent Bollinger et al. were *John H. Pickering*, *Brigida Benitez*, *Craig Goldblatt*, *Terry A. Maroney*, *Maureen E. Mahoney*, *Marvin Krislov*, *Jonathan Alger*, *Jeffrey Lehman*, *Evan Caminker*, *Philip J. Kessler*, and *Leonard M. Niehoff.* *Theodore M. Shaw*, *Norman J. Chachkin*, *James L. Cott*, *Melissa S. Woods*, *Christopher A. Hansen*, *Brent E. Simmons*, *Michael J. Steinberg*, *Antonia Hernandez*, *Patricia Mendoza*, *Godfrey J. Dillard*, and *Milton R. Henry* filed a brief for respondent Patterson et al.*

*Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Charlie Crist*, Attorney General of Florida, *Christopher M. Kise*, Solicitor General, *Louis F. Hubener*, Deputy Solicitor General, and *Daniel Woodring;* for the Cato Institute by *Robert A. Levy*, *Timothy Lynch*, *James L. Swanson*, and *Samuel Estreicher;* for the Center for Equal Opportunity et al. by *Roger Clegg* and *C. Mark Pickrell;* for the Center for Individual Freedom by *Renee L. Giachino;* for the Center for New Black Leadership by *Clint Bolick*, *William H. Mellor*, and *Richard D. Komer;* for the Center for the Advancement of Capitalism by *David Reed Burton;* for the Claremont Institute Center for Constitutional Jurisprudence by *Edwin Meese III;* for the Michigan Association of Scholars by *William F. Mohrman;* for the National Association of Scholars by *William H. Allen*, *Oscar M. Garibaldi*, and *Keith A. Noreika;* for the Pacific Legal Foundation by *John H. Findley;* and for the Reason Foundation by *Martin S. Kaufman.*

Briefs of *amici curiae* urging affirmance were filed for Members of the United States Congress by *Leslie T. Thornton* and *Steven M. Schneebaum;* for the State of Maryland et al. by *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Andrew H. Baida*, Solicitor General, *Mark J. Davis* and *William F. Brockman*, Assistant Attorneys General, *Eliot Spitzer*, Attorney General of New York, *Caitlin J. Halligan*, Solicitor General, *Michelle Aronowitz*, Deputy Solicitor General, and *Julie Mathy Sheridan* and

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 under-

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Sachin S. Pandya, Assistant Solicitors General, and by the Attorneys General for their respective jurisdictions as follows: *Terry Goddard* of Arizona, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *G. Steven Rowe* of Maine, *Thomas F. Reilly* of Massachusetts, *Mike Hatch* of Minnesota, *Mike McGrath* of Montana, *Patricia A. Madrid* of New Mexico, *Roy Cooper* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Patrick Lynch* of Rhode Island, *William H. Sorrell* of Vermont, *Iver A. Stridiron* of the Virgin Islands, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *Peggy A. Lautenschlager* of Wisconsin; for the State of New Jersey by *David Samson*, Attorney General, *Jeffrey Burstein*, Assistant Attorney General, and *Donna Arons* and *Anne Marie Kelly*, Deputy Attorneys General; for New York City Council Speaker A. Gifford Miller et al. by *Jack Greenberg* and *Saul B. Shapiro;* for the City of Philadelphia, Pennsylvania, et al. by *Victor A. Bolden* and *Nelson A. Diaz;* for the American Educational Research Association et al. by *Angelo N. Ancheta;* for the American Jewish Committee et al. by *Stewart D. Aaron*, *Thomas M. Jancik*, *Jeffrey P. Sinensky*, *Kara H. Stein*, and *Richard T. Foltin;* for the American Psychological Association by *Paul R. Friedman*, *William F. Sheehan*, and *Nathalie F. P. Gilfoyle;* for Amherst College et al. by *Charles S. Sims;* for the Authors of the Texas Ten Percent Plan by *Rolando L. Rios;* for the Bay Mills Indian Community et al. by *Vanya S. Hogen;* for the College Board by *Janet Pitterle Holt;* for Columbia University et al. by *Floyd Abrams*, *Susan Buckley*, and *James J. Mingle;* for Harvard University et al. by *Laurence H. Tribe*, *Jonathan S. Massey*, *Beverly Ledbetter*, *Robert B. Donin*, and *Wendy S. White;* for Howard University by *Janell M. Byrd;* for the Lawyers' Committee for Civil Rights Under Law et al. by *John S. Skilton*, *Barbara R. Arnwine*, *Thomas J. Henderson*, *Dennis C. Hayes*, *Marcia D. Greenberger*, *Judith L. Lichtman*, and *Jocelyn C. Frye;* for the Leadership Conference on Civil Rights et al. by *Robert N. Weiner* and *William L. Taylor;* for the National Coalition of Blacks for Reparations in America et al. by *Kevin Outterson;* for the National Education Association et al. by *Robert H. Chanin*, *John M. West*, *Elliot Mincberg*, *Larry P. Weinberg*, and *John C. Dempsey;* for the National Urban League et al. by *William A. Norris* and *Michael C. Small;* for the New America Alliance by *Thomas R. Julin* and *D. Patricia*

graduate 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

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Wallace; for Northeastern University by *Daryl J. Lapp* and *Lisa A. Sinclair;* for the NOW Legal Defense and Education Fund et al. by *Wendy R. Weiser* and *Martha F. Davis;* for the United Negro College Fund et al. by *Drew S. Days III* and *Beth S. Brinkmann;* for the University of Pittsburgh et al. by *David C. Frederick* and *Sean A. Lev;* for Lieutenant General Julius W. Becton, Jr., et al. by *Virginia A. Seitz*, *Joseph R. Reeder*, *Robert P. Charrow*, and *Kevin E. Stern;* for Senator Thomas A. Daschle et al. by *David T. Goldberg* and *Penny Shane;* for the Hayden Family by *Roy C. Howell;* and for Glenn C. Loury et al. by *Jeffrey F. Liss* and *James J. Halpert.*

Briefs of *amici curiae* were filed for Michigan Governor Jennifer M. Granholm by *John D. Pirich* and *Mark A. Goldsmith;* for the American Federation of Labor and Congress of Industrial Organizations by *Harold Craig Becker*, *David J. Strom*, *Jonathan P. Hiatt*, and *Daniel W. Sherrick;* for the Asian American Legal Foundation by *Daniel C. Girard* and *Gordon M. Fauth, Jr.;* for the Anti-Defamation League by *Martin E. Karlinsky* and *Steven M. Freeman;* for Banks Broadcasting, Inc., by *Elizabeth G. Taylor;* for the Black Women Lawyers Association of Greater Chicago, Inc., by *Sharon E. Jones;* for Carnegie Mellon University et al. by *W. Thomas McGough, Jr.*, *Kathy M. Banke*, *Gary L. Kaplan*, and *Edward N. Stoner II;* for the Equal Employment Advisory Council by *Jeffrey A. Norris* and *Ann Elizabeth Reesman;* for Exxon Mobil Corp. by *Richard R. Brann;* for General Motors Corp. by *Kenneth S. Geller*, *Eileen Penner*, and *Thomas A. Gottschalk;* for Human Rights Advocates et al. by *Constance de la Vega;* for the Massachusetts Institute of Technology et al. by *Donald B. Ayer*, *Elizabeth Rees*, *Debra L. Zumwalt*, and *Stacey J. Mobley;* for the National Asian Pacific American Legal Consortium et al. by *Mark A. Packman*, *Jonathan M. Cohen*, *Karen K. Narasaki*, *Vincent A. Eng*, and *Trang Q. Tran;* for the National Council of La Raza et al. by *Vilma S. Martinez* and *Jeffrey L. Bleich;* for the National School Boards Association et al. by *Julie Underwood* and *Naomi Gittins;* for 3M et al. by *David W. DeBruin*, *Deanne E. Maynard*, *Daniel Mach*, *Russell W. Porter, Jr.*, *Charles R. Wall*, *Martin J. Barrington*, *Deval L. Patrick*, *John R. Parker, Jr.*, *William J. O'Brien*, *Gary P. Van Graafeiland*, *Kathryn A. Oberly*, *Randall E. Mehrberg*, *Donald M. Remy*, *Ben W. Heineman, Jr.*, *Brackett B. Denniston III*, *Elpidio Villarreal*, *Wayne A. Budd*, *J. Richard Smith*, *Stewart S. Hudnut*, *John A. Shutkin*, *Theodore L. Banks*, *Kenneth C. Frazier*, *David R. Andrews*, *Jeffrey B. Kindler*, *Teresa M. Holland*, *Charles*

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]

W. Gerdts III, John L. Sander, Mark P. Klein, and *Stephen P. Sawyer;* for Representative John Conyers, Jr., et al. by *Paul J. Lawrence* and *Anthony R. Miles;* for Duane C. Ellison, by *Mr. Ellison, pro se,* and *Carl V. Angelis;* and for Representative Richard A. Gephardt et al. by *Andrew L. Sandler* and *Mary L. Smith.*

[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.

In October 1997, Gratz and Hamacher filed a lawsuit in the United States District Court for the Eastern District of Michigan 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

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[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).

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 strength, geography, alumni relationships, and leadership. OUA also considers race. During all periods relevant to this litigation, the Uni-

[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.

versity 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.

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[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.

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 "'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.

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 com-

[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.

position 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 (1978), to respond to petitioners' arguments. As discussed in greater detail in the Court's opinion in *Grutter* v. *Bollinger*, *post*, at 323–325, 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. 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]

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[9] The District Court considered and rejected respondent-intervenors' arguments in a supplemental opinion and order. See 135 F. Supp. 2d 790 (ED 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.

The District Court began its analysis by reviewing this Court's decision in *Bakke*. See 122 F. Supp. 2d 811, 817 (ED 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

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, 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

[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.

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 (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 285 (dissenting opinion). But whether Hamacher "actually applied" for admission as a transfer student is not

[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."

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 (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 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; accord, *Turner* v. *Fouche*, 396 U. S. 346, 361–362, n. 23 (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 (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 (1993), we considered whether an association challenging an ordinance that gave preferential treatment to certain

[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.

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. 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 286–287 (dissenting opinion).

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]

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 repre-

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[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 (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 (1982) (class representatives who had been transferred to lower levels of medical care lacked standing to challenge transfers to higher levels of care).

sentative 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 (1982), in arguing that the District Court erred. *Post*, at 289. 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. 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 (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).

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 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

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]

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[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

Particularly instructive here is our statement in *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147 (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 (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

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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 (1979). This case was therefore quite unlike *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147 (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

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 (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 *Grutter* v. *Bollinger*, *post*, at 327–333, the Court has rejected these arguments of petitioners.

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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 (quoting *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538, 553 (1974)).

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.

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[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 (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. 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. Justice Powell concluded that such arguments misunderstood the very nature of the diversity he found to be compelling. See *ibid.*

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 (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 (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.

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. 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 (1980) (STEVENS, J., dissenting), our review of whether such requirements have been met must entail "'a most searching examination.'" *Adarand*, *supra*, at 223 (quoting *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 273 (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 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. 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

deemed a 'plus' in a particular applicant's file." *Id.*, at 317. 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. See also *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547, 618 (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

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, 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. 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 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 depend-*

[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 296 (dissenting opinion).

ent 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 Univer-

[20] JUSTICE SOUTER is therefore wrong when he contends that "applicants to the undergraduate college are [not] denied individualized consideration." *Post,* at 295. 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 279.

sity would never consider student A's individual background, experiences, and characteristics to assess his individual "potential contribution to diversity," *Bakke*, *supra*, at 317. 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] 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.

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[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 297, 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 (internal quotation marks omitted).

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 (citing *Frontiero* v. *Richardson*, 411 U. S. 677, 690 (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

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[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 304. 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." *Post*, at 305. These observations are remarkable for two reasons. First, they suggest that universities—to whose academic judgment we are told in *Grutter* v. *Bollinger*, *post*, at 328, 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.

42 U. S. C. § 1981.[23] Accordingly, we reverse 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*, *post*, p. 306, 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 (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*, *post*, at 337–339. 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

[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 (2001); *United States* v. *Fordice*, 505 U. S. 717, 732, n. 7 (1992); *Alexander* v. *Choate*, 469 U. S. 287, 293 (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 (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 (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 (1982).

*JUSTICE BREYER joins this opinion, except for the last sentence.

qualities of each individual applicant. Cf. *ante,* at 271–272, 273. 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, post,* at 334, 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 272–273 (citing *Bakke, supra,* at 324).

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 (ED 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 per-

formance, 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 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

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, 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. 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*, *post*, at 337 ("[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

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. The bulk of admissions decisions are executed based on selection index score parameters set by the [Enrollment Working Group].'" *Ante*, at 274 (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*, *post*, p. 306. 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.

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*, *post*, p. 306. For similar reasons to those given in my separate opinion in that case, see *post*, p. 349 (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*, *post*, at 336 (opinion of the Court); *post*, at 374 (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 *post*, at 374–375; *Grutter*, *post*, at 329–330 (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 272–273 (opinion of the Court); *ante*, at 276–277 (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

Court's reversal of the District Court's 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 301, 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*, *post*, p. 306,[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.

[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.

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"). 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

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[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.

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 (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 ("'[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 (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 (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]

[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

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 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

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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 (1995) (quoting *Los Angeles* v. *Lyons*, 461 U. S. 95, 105 (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 (1978); cf. *DeFunis* v. *Odegaard*, 416 U. S. 312 (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 (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 (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.

(internal quotation marks omitted); see also *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (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 271. 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." *Lewis* v. *Casey*, 518 U. S. 343,

358–359, n. 6 (1996) (emphasis in original); see also *Blum* v. *Yaretsky*, 457 U. S. 991, 999 (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 *Allen* v. *Wright*, 468 U. S. 737, 751 (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 (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 266, 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 ab-*

[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.

solute 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 286, 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 265. 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.

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 (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. 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 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 (1976) (quoting *Warth* v. *Seldin*, 422 U. S. 490, 502 (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

[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.

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 (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 (1974).' *Ibid.*" 457 U. S., at 1001, n. 13.

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

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, 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 261–263, 265–269, 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 269. 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 266, n. 16 ("[P]etitioners challenged any use of race by the University to promote diversity, including through the transfer policy"); *ante*, at 267, n. 16 ("'[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 cri-

tique 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 286–287, 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 268 (citing *Grutter* v. *Bollinger*, *post*, at 327–333). Since, as the Court says, "petitioners did not raise a narrow tailoring challenge to the transfer policy," *ante*, at 266, 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]

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[1] The Court's holding arguably exposes a weakness in the rule of *Blum* v. *Yaretsky*, 457 U. S. 991 (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 266. 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 265 (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*, *post*, at 337.

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 of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (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 (opinion of Powell, J.); see also *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 496 (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 (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

disadvantage, athletic ability, and quality of a personal essay. *Ante*, at 255. 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 (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. In the Court's own words, "each characteristic of a particular applicant [is] considered in assessing the applicant's entire application." *Ante*, at 271. 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 (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 so-

cioeconomically disadvantaged or predominantly minority high school, or at the Provost's discretion; they may also receive 10 points for being residents of 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 271–272. 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*, *post*, at 337; 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 (opinion of Powell, J.). But petitioners do not have a convincing ar-

gument 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 (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 (ED Mich. 2000). As the Court indicates, we know very little about the actual role of the review committee. *Ante*, at 274 ("The record does not reveal precisely how many applications are flagged for this individualized consideration [by the committee]"); see also *ante*, at 279–280 (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

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

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[3] The Court surmises that the committee does not contribute meaningfully to the university's individualized review of applications. *Ante*, at 273–274. 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 (ED 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 279 (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.

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 268; see *Grutter* v. *Bollinger, post,* at 326–333. But the Court once again maintains that the same standard of review controls judicial inspection of all official race classifications. *Ante,* at 270 (quoting *Adarand Constructors, Inc.* v. *Peña,* 515 U. S. 200, 224 (1995); *Richmond* v. *J. A. Croson Co.,* 488 U. S. 469, 494 (1989) (plurality opinion)). This insistence on "consistency," *Adarand,* 515 U. S., at 224, 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 (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.

*JUSTICE BREYER joins Part I of this opinion.

In the wake "of a system of racial caste only recently ended," *id.*, at 273 (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-

[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 student 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.").

stricken 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 real estate markets[8] and consumer transactions.[9] "Bias both

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[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").

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 (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 (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 (1978)] was the same as the issue in [*Brown* v. *Board of Education*, 347 U. S. 483 (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 (CA2 1968) (footnote omitted). But where race is considered "for the purpose of achieving equality," *id.*, at 932, no automatic proscription is in order.

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 (CA5 1966) (Wisdom, J.); see Wechsler, The Nationalization of Civil Liberties and Civil Rights, Supp. to 12 Tex. Q. 10, 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*, *post*, at 344 (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 (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.

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

JUSTICE SOUTER, I see no constitutional infirmity. See *ante*, at 293–298 (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 298–301. 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]

[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

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,

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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.

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]

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For the reasons stated, I would affirm the judgment of the District Court.

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[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 275, n. 22. In my view, the Constitution, properly interpreted, permits government officials to respond openly to the continuing importance of race. See *supra*, at 301–302. Among constitutionally permissible options, those that candidly disclose their consideration of race seem to me preferable to those that conceal it.

Syllabus

GRUTTER *v.* BOLLINGER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 02–241. Argued April 1, 2003—Decided June 23, 2003

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. 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 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

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. 322–344.

(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. Four other Justices would have struck the program down on statutory grounds. *Id.*, at 408. 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. Grounding his analysis in the academic freedom that "long has been viewed as a special concern of the First Amendment," *id.*, at 312, 314, 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. 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. 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.* 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. 322–325.

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(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. 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. Context matters when reviewing such action. See *Gomillion* v. *Lightfoot*, 364 U. S. 339, 343–344. 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. 326–327.

(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 (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. 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. 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, 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. 327–333.

Syllabus

(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 competition with all other applicants." *Bakke*, 438 U. S., at 315 (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. 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. 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. 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*, *ante*, p. 244, 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. 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

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. 333–343.

(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 (opinion of Powell, J.); *General Building Contractors Assn., Inc.* v. *Pennsylvania,* 458 U. S. 375, 389–391. Pp. 343–344.

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. 344. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which THOMAS, J., joined, *post,* p. 346. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which SCALIA, J., joined as to Parts I–VII, *post,* p. 349. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA, KENNEDY, and THOMAS, JJ., joined, *post,* p. 378. KENNEDY, J., filed a dissenting opinion, *post,* p. 387.

Kirk O. Kolbo argued the cause for petitioner. With him on the briefs were *David F. Herr, R. Lawrence Purdy, Michael C. McCarthy, Michael E. Rosman, Hans Bader,* and *Kerry L. Morgan.*

Solicitor General Olson argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Boyd* and *Deputy Solicitor General Clement.*

Maureen E. Mahoney argued the cause for respondent Bollinger et al. With her on the brief were *John H. Pickering, John Payton, Brigida Benitez, Craig Goldblatt, Terry A. Maroney, Marvin Krislov, Jonathan Alger, Evan Caminker, Philip J. Kessler,* and *Leonard M. Niehoff.*

Miranda K. S. Massie and *George B. Washington* filed a brief for respondent James et al.*

*Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Charlie Crist,* Attorney General of Florida, *Christopher M. Kise,* Solicitor General, *Louis F. Hubener,* Deputy Solicitor General, and

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.

Daniel Woodring; for the Cato Institute by *Robert A. Levy, Timothy Lynch, James L. Swanson,* and *Samuel Estreicher;* for the Center for Equal Opportunity et al. by *Roger Clegg* and *C. Mark Pickrell;* for the Center for Individual Freedom by *Renee L. Giachino;* for the Center for New Black Leadership by *Clint Bolick, William H. Mellor,* and *Richard D. Komer;* for the Center for the Advancement of Capitalism by *David Reed Burton;* for the Claremont Institute Center for Constitutional Jurisprudence by *Edwin Meese III;* for the Michigan Association of Scholars by *William F. Mohrman;* for the National Association of Scholars by *William H. Allen, Oscar M. Garibaldi,* and *Keith A. Noreika;* for the Pacific Legal Foundation by *John H. Findley;* for Law Professor Larry Alexander et al. by *Erik S. Jaffe;* and for the Reason Foundation by *Martin S. Kaufman.*

Briefs of *amici curiae* urging affirmance were filed for the State of Maryland et al. by *J. Joseph Curran, Jr.,* Attorney General of Maryland, *Andrew H. Baida,* Solicitor General, *Mark J. Davis* and *William F. Brockman,* Assistant Attorneys General, *Eliot Spitzer,* Attorney General of New York, *Caitlin J. Halligan,* Solicitor General, *Michelle Aronowitz,* Deputy Solicitor General, and *Julie Mathy Sheridan* and *Sachin S. Pandya,* Assistant Solicitors General, and by the Attorneys General for their respective jurisdictions as follows: *Terry Goddard* of Arizona, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *G. Steven Rowe* of Maine, *Thomas F. Reilly* of Massachusetts, *Mike Hatch* of Minnesota, *Mike McGrath* of Montana, *Patricia A. Madrid* of New Mexico, *Roy Cooper* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Patrick Lynch* of Rhode Island, *William H. Sorrell* of Vermont, *Iver A. Stridiron* of the Virgin Islands, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.,* of West Virginia, and *Peggy A. Lautenschlager* of Wisconsin; for the State of New Jersey by *David Samson,* Attorney General, *Jeffrey Burstein,* Assistant Attorney General, and *Donna Arons* and *Anne Marie Kelly,* Deputy Attorneys General; for New York City Council Speaker A. Gifford Miller et al. by *Jack Greenberg* and *Saul B. Shapiro;* for the City of Philadelphia, Pennsylvania, et al. by *Victor A. Bolden* and *Nelson A. Diaz;* for the American Bar Association by *Paul M. Dodyk* and *Rowan D. Wilson;* for the American Educational Re-

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A

The Law School ranks among the Nation's top law schools. It receives more than 3,500 applications each year for a class

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search Association et al. by *Angelo N. Ancheta;* for the American Jewish Committee et al. by *Stewart D. Aaron, Thomas M. Jancik, Jeffrey P. Sinensky, Kara H. Stein,* and *Richard T. Foltin;* for the American Law Deans Association by *Samuel Issacharoff;* for the American Psychological Association by *Paul R. Friedman, William F. Sheehan,* and *Nathalie F. P. Gilfoyle;* for the American Sociological Association et al. by *Bill Lann Lee* and *Deborah J. Merritt;* for Amherst College et al. by *Charles S. Sims;* for the Arizona State University College of Law by *Ralph S. Spritzer* and *Paul Bender;* for the Association of American Law Schools by *Pamela S. Karlan;* for the Association of American Medical Colleges et al. by *Robert A. Burgoyne* and *Joseph A. Keyes, Jr.;* for the Bay Mills Indian Community et al. by *Vanya S. Hogen;* for the Clinical Legal Education Association by *Timothy A. Nelsen, Frances P. Kao,* and *Eric J. Gorman;* for Columbia University et al. by *Floyd Abrams* and *Susan Buckley;* for the Graduate Management Admission Council et al. by *Stephen M. McNabb;* for the Harvard Black Law Students Association et al. by *George W. Jones, Jr., William J. Jefferson, Theodore V. Wells, Jr.,* and *David W. Brown;* for Harvard University et al. by *Laurence H. Tribe, Jonathan S. Massey, Beverly Ledbetter, Robert B. Donin,* and *Wendy S. White;* for the Hispanic National Bar Association et al. by *Gilbert Paul Carrasco;* for Howard University by *Janell M. Byrd;* for Indiana University by *James Fitzpatrick, Lauren K. Robel,* and *Jeffrey Evans Stake;* for the King County Bar Association by *John Warner Widell, John H. Chun,* and *Melissa O'Loughlin White;* for the Law School Admission Council by *Walter Dellinger, Pamela Harris,* and *Jonathan D. Hacker;* for the Lawyers' Committee for Civil Rights Under Law et al. by *John S. Skilton, David E. Jones, Barbara R. Arnwine, Thomas J. Henderson, Dennis C. Hayes, Marcia D. Greenberger,* and *Judith L. Lichtman;* for the Leadership Conference on Civil Rights et al. by *Robert N. Weiner* and *William L. Taylor;* for the Mexican American Legal Defense and Educational Fund et al. by *Antonia Hernandez;* for the Michigan Black Law Alumni Society by *Christopher J. Wright, Timothy J. Simeone,* and *Kathleen McCree Lewis;* for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Theodore M. Shaw, Norman J. Chachkin, Robert H. Stroup, Elise C. Boddie,* and *Christopher A. Hansen;* for the National Center for Fair & Open Testing by *John T. Affeldt* and *Mark Savage;* for the National Coalition of Blacks for Reparations in America et al. by *Kevin Outterson;* for the National Education

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 "sub-

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Association et al. by *Robert H. Chanin, John M. West, Elliot Mincberg, Larry P. Weinberg,* and *John C. Dempsey;* for the National Urban League et al. by *William A. Norris* and *Michael C. Small;* for the New America Alliance by *Thomas R. Julin* and *D. Patricia Wallace;* for the New Mexico Hispanic Bar Association et al. by *Edward Benavidez;* for the NOW Legal Defense and Educational Fund et al. by *Wendy R. Weiser* and *Martha F. Davis;* for the School of Law of the University of North Carolina by *John Charles Boger, Julius L. Chambers,* and *Charles E. Daye;* for the Society of American Law Teachers by *Michael Selmi* and *Gabriel J. Chin;* for the UCLA School of Law Students of Color by *Sonia Mercado;* for the United Negro College Fund et al. by *Drew S. Days III* and *Beth S. Brinkmann;* for the University of Michigan Asian Pacific American Law Students Association et al. by *Jerome S. Hirsch;* for the University of Pittsburgh et al. by *David C. Frederick* and *Sean A. Lev;* for Judith Areen et al. by *Neal Katyal* and *Kumiki Gibson;* for Lieutenant General Julius W. Becton, Jr., et al. by *Virginia A. Seitz, Joseph R. Reeder, Robert P. Charrow,* and *Kevin E. Stern;* for Hillary Browne et al. by *Gregory Alan Berry;* for Senator Thomas A. Daschle et al. by *David T. Goldberg* and *Penny Shane;* for the Hayden Family by *Roy C. Howell;* for Glenn C. Loury by *Jeffrey F. Liss* and *James J. Halpert;* and for 13,922 Current Law Students at Accredited American Law Schools by *Julie R. O'Sullivan* and *Peter J. Rubin.*

Briefs of *amici curiae* were filed for Michigan Governor Jennifer M. Granholm by *John D. Pirich* and *Mark A. Goldsmith;* for Members and Former Members of the Pennsylvania General Assembly et al. by *Mark B. Cohen* and *Eric S. Fillman;* for the American Council on Education et al. by *Martin Michaelson, Alexander E. Dreier,* and *Sheldon E. Steinbach;* for the American Federation of Labor and Congress of Industrial Organizations by *Harold Craig Becker, David J. Strom, Jonathan P. Hiatt,* and *Daniel W. Sherrick;* for the Anti-Defamation League by *Martin E. Karlinsky* and *Steven M. Freeman;* for the Asian American Legal Foundation by *Daniel C. Girard* and *Gordon M. Fauth, Jr.;* for Banks Broadcasting, Inc., by *Elizabeth G. Taylor;* for the Black Women Lawyers Association of Greater Chicago, Inc., by *Sharon E. Jones;* for the Boston Bar Association et al. by *Thomas E. Dwyer, Jr.,* and *Joseph L. Kociubes;* for the Carnegie Mellon University et al. by *W. Thomas McGough, Jr., Kathy M. Banke, Gary L. Kaplan,* and *Edward N. Stoner II;* for the Coalition for Economic Equity et al. by *Eva J. Paterson* and *Eric K. Yamamoto;*

stantial 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 (1978).

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for the Committee of Concerned Black Graduates of ABA Accredited Law Schools et al. by *Mary Mack Adu;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* for the Equal Employment Advisory Council by *Jeffrey A. Norris* and *Ann Elizabeth Reesman;* for Exxon Mobil Corp. by *Richard R. Brann;* for General Motors Corp. by *Kenneth S. Geller, Eileen Penner,* and *Thomas A. Gottschalk;* for Human Rights Advocates et al. by *Constance de la Vega;* for the Massachusetts Institute of Technology et al. by *Donald B. Ayer, Elizabeth Rees, Debra L. Zumwalt,* and *Stacey J. Mobley;* for the Massachusetts School of Law by *Lawrence R. Velvel;* for the National Asian Pacific American Legal Consortium et al. by *Mark A. Packman, Karen K. Narasaki, Vincent A. Eng,* and *Trang Q. Tran;* for the National School Boards Association et al. by *Julie Underwood* and *Naomi Gittins;* for the New York State Black and Puerto Rican Legislative Caucus by *Victor Goode;* for Veterans of the Southern Civil Rights Movement et al. by *Mitchell Zimmerman;* for 3M et al. by *David W. DeBruin, Deanne E. Maynard, Daniel Mach, Russell W. Porter, Jr., Charles R. Wall, Martin J. Barrington, Deval L. Patrick, William J. O'Brien, Gary P. Van Graafeiland, Kathryn A. Oberly, Randall E. Mehrberg, Donald M. Remy, Ben W. Heineman, Jr., Brackett B. Denniston III, Elpidio Villarreal, Wayne A. Budd, J. Richard Smith, Stewart S. Hudnut, John A. Shutkin, Theodore L. Banks, Kenneth C. Frazier, David R. Andrews, Jeffrey B. Kinder, Teresa M. Holland, Charles W. Gerdts III, John L. Sander, Mark P. Klein,* and *Stephen P. Sawyer;* for Ward Connerly by *Manuel S. Klausner* and *Patrick J. Manshardt;* for Representative John Conyers, Jr., et al. by *Paul J. Lawrence* and *Anthony R. Miles;* and for Representative Richard A. Gephardt et al. by *Andrew L. Sandler* and *Mary L. Smith.*

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, 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.

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

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, 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 (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 compel-

ling. 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

not quantify critical mass in terms of numbers or percentages. *Id.*, at 211a. He indicated that critical mass means numbers 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 pres-

ent, 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.*

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 (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 (CA6 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 dissent-

ers, 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 (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 (CA5 1996) *(Hopwood I)* (holding that diversity is not a compelling state interest), with *Smith* v. *University of Wash. Law School*, 233 F. 3d 1188 (CA9 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 (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 (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 (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 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 involv-

ing the competitive consideration of race and ethnic origin." *Id.*, at 320. 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. 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. 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. Second, Justice Powell rejected an interest in remedying societal dis-

crimination 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. 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.

Justice Powell approved the university's use of race to further only one interest: "the attainment of a diverse student body." *Id.*, at 311. 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. 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 (quoting *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 603 (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. Both "tradition and experience lend support to 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. 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

can justify the use of race. *Id.*, at 315. 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 (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 (1994). Compare, *e. g.*, *Johnson* v. *Board of Regents of Univ. of Ga.*, 263 F. 3d 1234 (CA11 2001) (Justice Powell's diversity rationale was not the holding of the Court); *Hopwood* v. *Texas*, 236 F. 3d 256, 274–275 (CA5 2000) *(Hopwood II)* (same); *Hopwood I*, 78 F. 3d 932 (CA5 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. 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.

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 (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 (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.

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 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 (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 (internal quotation marks and citation omitted). Although all gov-

ernmental 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. 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. 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 (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. 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

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 (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 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 (1985); *Board of Curators of Univ. of Mo.*

v. *Horowitz*, 435 U. S. 78, 96, n. 6 (1978); *Bakke*, 438 U. S., at 319, n. 53 (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 (1952) (Frankfurter, J., concurring); *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957); *Shelton* v. *Tucker*, 364 U. S. 479, 487 (1960); *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S., at 603. 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. 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 (quoting *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, *supra*, at 603). 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.

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." *Bakke*, 438 U. S., at

307 (opinion of Powell, J.). That would amount to outright racial balancing, which is patently unconstitutional. *Ibid.*; *Freeman* v. *Pitts*, 503 U. S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake"); *Richmond* v. *J. A. Croson Co.*, 488 U. S., at 507. 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 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*

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 (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 (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

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 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 (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. 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

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 (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 (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

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 394 (dissenting opinion). Rather, as we have already explained, *supra*, at 327, 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 (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 (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. 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. 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.*

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 (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 (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 (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, 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 (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 (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.

The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its pro-

gram 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. "[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 392 (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 Respondent 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 390, 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 380–386 (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 385 (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"

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 (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*, *ante*, p. 244, the Law School awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity. See *ante*, at 271–272 (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, although not necessarily according them the same weight." *Bakke*, *supra*, at 317 (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 re-

spect 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

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 389 (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 ("'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 (1986) (alternatives must serve the interest "'about as well'"); *Richmond* v. *J. A. Croson Co.*, 488 U. S., at 509–510 (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 (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 (narrow tailoring

"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.

We acknowledge that "there are serious problems of justice connected with the idea of preference itself." *Bakke*, 438 U. S., at 298 (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. 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 (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 (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 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.

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." *Palmore* v. *Si-*

doti, 466 U. S. 429, 432 (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 (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 (plurality opinion); see also Nathanson & Bartnik, The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools,

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 (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. 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 (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 (1982) (the prohibition against discrimination in § 1981 is coextensive with the Equal Protection Clause). The judgment

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 342, 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 (1978)] first approved the use of race to further an interest in student body diversity in the context of public higher education." *Ante*, at 343. For at least part of that

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 (CA5 1996); cf. *Wessmann* v. *Gittens*, 160 F. 3d 790 (CA1 1998); *Tuttle* v. *Arlington Cty. School Bd.*, 195 F. 3d 698 (CA4 1999); *Johnson* v. *Board of Regents of Univ. of Ga.*, 263 F. 3d 1234 (CA11 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 (1954); cf. *Cooper* v. *Aaron*, 358 U. S. 1 (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 values and ideals. See, *e. g.*, *Gratz* v. *Bollinger*, *ante*, at 298–301 (GINSBURG, J., dissenting); *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 272–274 (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.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.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)).

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

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*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 (1995), *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989), and Justice Powell's opinion in *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (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, ante*, at 301–302 (GINSBURG, J., dissenting); *Adarand*, 515 U. S., at 274, n. 8 (GINSBURG, J., dissenting). Nor does this case necessitate reconsideration whether interests other than "student body diversity," *ante*, at 325, rank as sufficiently important to justify a race-conscious government program. Cf. *Gratz, ante*, at 301–302 (GINSBURG, J., dissenting); *Adarand*, 515 U. S., at 273–274 (GINSBURG, J., dissenting).

"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 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 330, and " 'better prepar[ation of] students for an increasingly diverse workforce and society,' " *ibid.*, all of which is necessary not only for work, but also for good "citizenship," *ante,* at 331. 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 Univer-

*Part VII of JUSTICE THOMAS's opinion describes those portions of the Court's opinion in which I concur. See *post,* at 374–378 (opinion concurring in part and dissenting in part).

sity 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 337, and sufficiently avoids "separate admissions tracks," *ante*, at 334, 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 335 (quoting *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421, 495 (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 328, "deference does not imply

abandonment or abdication of judicial review," *Miller-El* v. *Cockrell*, 537 U. S. 322, 340 (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 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

> 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

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 343 (stating that racial discrimination will no longer be narrowly tailored, or "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 326. 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 (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. 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 (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

[1] Throughout I will use the two phrases interchangeably.

past discrimination for which it is responsible. *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 504 (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 (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 (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 (plurality opinion); *id.*, at 295 (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 (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. *Id.*, at 433 (finding the interest "substantial" but

[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?

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 (plurality opinion); *Croson,* 488 U. S., at 496–498 (plurality opinion); *id.,* at 520–521 (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 (plurality opinion). But see *Gratz* v. *Bollinger, ante,* p. 298 (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 (1968) *(per curiam)* (Black, J., concurring) (indicating that protecting prisoners from violence might justify narrowly tailored racial discrimination); *Croson, supra,* at 521 (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."

Adarand Constructors, Inc. v. *Peña*, 515 U. S. 200, 240 (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

[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 (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.

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 330, 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 *ante*, at 328 ("[T]he Law School has a compelling interest in attaining a diverse student body"), with *ante*, at 333 (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 *ante*, at 332 (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

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 333. No serious effort is made to explain how these 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 (1978),

[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.

is binding, *ante*, at 325, 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

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 (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 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 (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

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

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 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.

[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).

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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 340, 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 339 (quoting *Wygant*, 476 U. S., at 280, n. 6). The majority errs, however, because race-neutral alternatives must only be "workable," *ante*, at 339, 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,

[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 340.

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 329. In my view, there is no basis for a right of public 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 (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.

Justice Frankfurter went further, however, reasoning that the First Amendment created a right of academic freedom that prohibited the investigation. *Id.,* at 256–267 (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 ("For a citizen to be

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. 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 (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 (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. *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, violated the First Amendment for vagueness. The statutes covered all public employees and were not invalidated only as applied to uni-

versity 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. 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.

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 330–332; 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 Stu-

dent 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*, *ante*, p. 244, 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 328. 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 (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

[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.

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 (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 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, 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. That case involved sex discrimination, which is subjected to intermediate, not strict, scrutiny. *Id.*, at 533; *Craig* v. *Boren*, 429 U. S. 190, 197 (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. Today, however, the majority ignores the "experience" of those institutions that have been forced to abandon explicit racial discrimination in admissions.

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 339, 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

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[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 (CA9 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.

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 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 rigor-

[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.

ous subject-matter entrance examinations. *Id.*, at 57–58. The facially race-neutral "percent plans" now used in Texas, California, and Florida, see *ante*, at 340, 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 (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

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 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 plati-

tudes 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 (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 330–331. 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,

credentialing process. The 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.

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[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

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 (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 332.

Finally, the Court's disturbing reference to the importance of the country's law 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

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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.

rejected the remedying of societal discrimination as a justification for governmental use of race. *Wygant*, 476 U. S., at 276 (plurality opinion); *Croson*, 488 U. S., at 497 (plurality opinion); *id.*, at 520–521 (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 (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 (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 326–327. Under today's

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 330. Like the Court, *ante*, at 336, 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 25 years before it is deemed no longer narrowly tailored to the Law School's fabricated compelling state interest. *Ante*, at 343. 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

[12] That interest depends on enrolling a "critical mass" of underrepresented minority students, as the majority repeatedly states. *Ante*, at 316, 318, 319, 330, 333, 335, 340; cf. *ante*, at 333 (referring to the unique experience of being a "racial minority," as opposed to being black, or Native American); *ante*, at 335–336 (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."

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]

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[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," *post*, at 346 (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 343, 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.

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] 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]

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.

the [perceived] need for any racial or ethnic'" discrimination because the academic credentials gap will still be there. *Ante*, at 343 (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 343, 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 (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 333; see also *Fullilove* v. *Klutznick*, 448 U. S. 448, 498 (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 govern-

mental 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 (1995) (quoting *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 273 (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; *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 299 (1978) (opinion of Powell, J.) ("When [political judgments] 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").

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; *Fullilove*, *supra*, at 537 (STEVENS, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"). We likewise re-

jected 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.

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 328 (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 330. 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

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 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.

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*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.

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 338 (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

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 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 329 (quoting *Bakke*, 438 U. S., at 307 (opinion of Powell, J.)). The Court recognizes that such an interest "would amount to outright racial balancing, which is patently unconstitutional." *Ante*, at 330. 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 336 (quoting *Bakke*, *supra*, at 323).

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

Year	Number of law school applicants	Number of Hispanic applicants	% of applicants who were Hispanic	Number of applicants admitted by the law school	Number of Hispanic applicants admitted	% of 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%*

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

that the Court finds appealing, see *ante*, at 337–338, 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 330.

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 (Powell, J., concurring); see also *United States* v. *Paradise*, 480 U. S. 149, 171 (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. See *ante*, at 343. 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

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 (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; *ante*, at 329. Our precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among

students can further its educational task, when supported by empirical evidence. *Ante*, at 329–331.

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 ("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 (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 (1989); see *id.*, at 519 (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 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

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 330; see also *Bakke*, *supra*, at 307 (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.

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 (ED 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%

The narrow fluctuation band raises an inference that the Law School subverted individual determination, and strict

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 (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. 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 380–386, 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 389. 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

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 (ED 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.

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

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

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 341–343. 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, 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 343 (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

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.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. 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.

SUPREME COURT OF THE UNITED STATES

Syllabus

FISHER *v.* UNIVERSITY OF TEXAS AT AUSTIN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11–345. Argued October 10, 2012—Decided June 24, 2013

The University of Texas at Austin considers race as one of various factors in 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, 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, 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, its decision affirming the District Court's grant of summary judgment to the University was incorrect. Pp. 5–13.

(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

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under the Fourteenth Amendment," 438 U. S., at 287, using a strict scrutiny standard, *id.*, at 299. 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

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, *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. Additional guidance may be found in the Court's broader equal protection jurisprudence. See, *e.g., Rice* v. *Cayetano*, 528 U. S. 495, 517; *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 505. 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. 5–8.

(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, provided that diversity is not defined as 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. 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. 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. 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

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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. Strict scrutiny does not permit a court to accept a school's assertion that 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. 8–13.

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.

SUPREME COURT OF THE UNITED STATES

No. 11–345

ABIGAIL NOEL FISHER, PETITIONER *v.* UNIVERSITY OF TEXAS AT AUSTIN ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 24, 2013]

JUSTICE KENNEDY delivered the opinion of the Court.

The University of Texas at Austin considers race as one of various factors in its undergraduate admissions 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, 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.

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 (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 (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.

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 back-

ground. 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.

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 (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 automat-

ically 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 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 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 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 (CA5 2011) (*per curiam*). Petitioner sought a writ of certiorari. The writ was granted. 565 U. S. ___ (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; *Gratz*, *supra*; and *Grutter*, 539 U. S. 306. 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 (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. 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 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.

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.

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. 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 (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 (separate opinion).

In *Gratz*, 539 U. S. 244, and *Grutter, supra*, the Court endorsed the precepts stated by Justice Powell. In *Grutter*, 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.

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. "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," *id.,* at 337. 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 (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 (2000) (internal quotation marks omitted), and therefore "are contrary to our traditions and hence constitutionally suspect," *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (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 (1989) (quoting *Fullilove* v. *Klutznick*, 448 U. S. 448, 533–534 (1980) (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 (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 (Stewart, J., dissenting); *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (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 (quoting *Fullilove*, 448 *supra*, at 533–535 (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. 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 (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. *Grutter* concluded that the decision to pursue "the educational benefits that flow from student body diversity," *id.,* at 330, 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 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 (WD 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 1 (SCALIA, J., concurring); *post,* at 4–5 (THOMAS, J., concurring); *post,* at 1–2 (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 (opinion of Powell, J.). "That would amount to outright racial balancing, which is patently unconstitutional." *Grutter*, *supra,* at 330. "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 (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 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 (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 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.

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. 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 (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 (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 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 (quoting *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227 (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. As noted above, see *supra,* at 1, 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. 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.

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 (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. 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—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; see also *Grutter*, *supra*, at 326. 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 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 (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.

SUPREME COURT OF THE UNITED STATES

No. 11–345

ABIGAIL NOEL FISHER, PETITIONER *v.* UNIVERSITY OF TEXAS AT AUSTIN ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 24, 2013]

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 (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.

SUPREME COURT OF THE UNITED STATES

No. 11–345

ABIGAIL NOEL FISHER, PETITIONER *v.* UNIVERSITY OF TEXAS AT AUSTIN ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 24, 2013]

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 1. I write separately to explain that I would overrule *Grutter* v. *Bollinger*, 539 U. S. 306 (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." 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 (1995) (THOMAS, J., concurring). "It is for this reason that we must subject all racial classifications to the strictest of scrutiny." *Id.*, at 121.

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 (2005) (quoting *Grutter*, *supra,* at 327). This most exacting standard "has proven automatically fatal" in almost every case. *Jenkins*, *supra*, at 121 (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. *Peña*, 515 U. S. 200, 240 (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 (THOMAS, J., concurring in part and dissenting in part).

B

1

The Court first articulated the strict-scrutiny standard in *Korematsu* v. *United States*, 323 U. S. 214 (1944). There, we held that "[p]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can." *Id.,* at 216.[1] Aside from *Grutter*, the Court has 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 rela-

[1] The standard of "pressing public necessity" is more frequently called a "compelling governmental interest." I use the terms interchangeably.

tionship to the prevention of espionage and sabotage." 323 U. S., at 217–218. 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 (1989) (quoting *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 277 (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 (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. 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.*

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 (plurality opinion). We rejected the interest in remedying societal discrimination because it had no logical stopping point. *Id.,* at 276. 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 (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. 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. 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.

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. Cf. *Lee* v. *Washington*, 390 U. S. 333, 334 (1968) (Black, J., concurring) (protecting prisoners from violence might justify narrowly tailored discrimination); *J. A. Croson*, *supra*, at 521 (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 ("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 (1978); citation omitted)); see also *id.*, at 307 ("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 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. In-

deed, 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 (1954), the alleged educational benefits of diversity 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 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 ("[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 Edward Cty.*, 249 F. 2d 462, 465 (CA4 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

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[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").

may not be denied enforcement of rights to 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 (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 by the University today. The University asserts, for instance, that the diversity obtained through its dis-

criminatory 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.

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 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 (1950), where we held that segregation would be unconstitutional even if white students never tolerated blacks. *Id.,* at 641 ("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, thus, entirely irrele-

vant 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 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 (1974) (Douglas, J., dissenting) ("The 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"). 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 (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

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[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.

the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." Tr. of Oral Arg. in *Brown* 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 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 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 3 (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 (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—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 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 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 (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 ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications"); *Adarand*, 515 U. S., at 227 ("[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 ("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.

B

While it does not, for constitutional purposes, matter whether the University's racial discrimination is benign, I note that 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 dis-

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[4]The lowest possible score on the SAT is 600, and the highest possible score is 2400.

crimination 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 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 (CA5 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 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 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 (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

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[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).

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. "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 (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.

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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.

SUPREME COURT OF THE UNITED STATES

No. 11–345

ABIGAIL NOEL FISHER, PETITIONER *v.* UNIVERSITY OF TEXAS AT AUSTIN ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 24, 2013]

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 (1978). The University has steered clear of a quota system 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 (opinion of Powell, J.). See also *Gratz* v. *Bollinger*, 539 U. S. 244, 293 (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 model approved by the Court in *Grutter* v. *Bollinger*, 539 U. S. 306 (2003). See 645

[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.

F. Supp. 2d 587, 609 (WD 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 (dissenting opinion). As Justice Souter observed, the vaunted alternatives suffer from "the disadvantage of deliberate obfuscation." *Id.*, at 297–298 (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 include race as a factor, many may "resort to camouflage" to "maintain their minority enrollment." *Gratz*, 539 U. S., at 304 (GINSBURG, J., dissenting).

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[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.

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 (dissenting opinion). See also *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 272–274 (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." *Gratz*, 539 U. S., at 305, n. 11 (dissenting opinion).

Accordingly, I would not return this case for a second look. As the thorough opinions below show, 631 F. 3d 213 (CA5 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 in *Grutter* require no further determinations. See *Grutter*,

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[3] As the Court said in *Grutter* v. *Bollinger*, 539 U. S. 306, 339 (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 10 (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").

539 U. S., at 333–343; *Bakke*, 438 U. S., at 315–320.

The Court rightly declines to cast off the equal protection framework settled in *Grutter*. See *ante*, at 5. 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 13. 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.

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[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. (GINSBURG, J., concurring). See also *Gratz* v. *Bollinger*, 539 U. S. 244, 301 (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.").

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. 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.

SUPREME COURT OF THE UNITED STATES

Syllabus

FISHER *v.* UNIVERSITY OF TEXAS AT AUSTIN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14–981. Argued December 9, 2015—Decided June 23, 2016

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, and *Gratz* v. *Bollinger*, 539 U. S. 244—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. ___ (*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.

Syllabus

Pp. 6–20.

(a) *Fisher I* sets out three controlling principles relevant to assessing the constitutionality of a public university's affirmative action program. First, a university 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 ___. 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 ___. 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 ___. Pp. 6–8.

(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. 8–11.

(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. 11–19.

(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 ___. Since the University is prohibited from

Syllabus

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 decision, *id.,* at ___, 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. 11–13.

(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. 13–15.

(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. 15.

(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. 15–19.

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.

SUPREME COURT OF THE UNITED STATES

No. 14–981

ABIGAIL NOEL FISHER, PETITIONER *v.* UNIVERSITY OF TEXAS AT AUSTIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 23, 2016]

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, and *Gratz* v. *Bollinger*, 539 U. S. 244. 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. 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. 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 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 incom-

ing 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.

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 (WD 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. ___ (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 (CA5 2014). This Court granted certiorari for a second time, 576 U. S. ___ (2015), and now affirms.

II

Fisher I set forth three controlling principles relevant to assessing the constitutionality of a public university's affirmative-action program. First, "because racial charac-

teristics so seldom provide a relevant basis for disparate treatment," *Richmond* v. *J. A. Croson Co.,* 488 U. S. 469, 505 (1989), "[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny," *Fisher I*, 570 U. S., at ___ (slip op., at 7). 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 ___ (slip op, at 9). 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 ___ (slip op., at 10). 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 ___ (slip op., at 11) (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, 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 ___ (slip op., at 11).

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 ___ (slip op., at 12) 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 ___ (slip op., at 13). 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 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 fact-finding. 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 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 ___ (slip op., at

9) (internal quotation marks omitted); see also *Grutter*, 539 U. S., at 328. 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 (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.

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 ___ (slip op., at 9). 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 to this case at best and none of which the University has had a full opportunity to respond to. See, *e.g., post,* at 45–46 (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 loneli-

ness 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 Uni-

versity'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 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.

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 ___ (GINSBURG, J., dissenting) (slip op., at 2). "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 it. See *Grut-*

ter, *supra*, at 340 (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 (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 (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 de-

fined them in 2008. *Fisher I*, *supra*, at ___ (slip op., at 11). 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 (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 (1995) (KENNEDY, J., concurring); see also *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (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 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 admis-

sions 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.

SUPREME COURT OF THE UNITED STATES

No. 14–981

ABIGAIL NOEL FISHER, PETITIONER *v.* UNIVERSITY OF TEXAS AT AUSTIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 23, 2016]

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. ___, ___ (2013) (THOMAS, J., concurring) (slip op., at 1). "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 ___ (slip op., at 2) (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 ___, ___ (slip op., at 5, 13). The Court was wrong to hold otherwise in *Grutter* v. *Bollinger*, 539 U. S. 306, 343 (2003). I would overrule *Grutter* and reverse the Fifth Circuit's judgment.

SUPREME COURT OF THE UNITED STATES

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ABIGAIL NOEL FISHER, PETITIONER *v.* UNIVERSITY OF TEXAS AT AUSTIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 23, 2016]

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. ___ (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. 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 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 (WD Tex. 2009).

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 ___ (slip op., at 3). 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 (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. 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 have later engaged in

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[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

"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 ___ (slip op., at 4). 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 ___ (slip op., at 4), 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

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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").

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 ___ (slip op., at 4). "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, 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 Clause." *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 518 (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 (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 (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 (2000) (quoting *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (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 ___ (slip op., at 8) (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 (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 (O'Connor, J., for the Court).

The "higher education dynamic does not change" this standard. *Fisher I*, *supra*, at ___ (slip op., at 12). "Racial discrimination [is] invidious in all contexts," *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 619 (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 ___ (slip op., at 12).

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 (2003) (quoting *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 224 (1995)); see also *Miller*, *supra*, at 904 ("This rule obtains with equal force regardless of 'the race of those burdened or benefited by a particular classification'" (quoting *Croson*, *supra*, at 494 (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 (quoting *Adarand*, *supra*, at 224).

In short, in "all contexts," *Edmonson*, *supra*, at 619, racial classifications are permitted only "as a last resort," when all else has failed, *Croson*, *supra*, at 519 (opinion of 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 ___ (slip op., at 8). 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 ___ (slip op., at 7) (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 ___ (slip op., at 1). 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 (CA5 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 ___ (slip op., at 10).

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 11. But in order for us to assess whether 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 (2007). Because UT has failed to explain "with clarity," *Fisher I*, *supra*, at ___ (slip op., at 7), 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 12. 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 12–13 (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 (citing *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 291 (1978) (opinion of Powell, J.)); see also, *e.g., Miller*, *supra*, at 922 ("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 ("[T]he mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight"); *id.,* at 501 ("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 ___ (slip op., at 12). 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 ___ (slip op., at 10).

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 goals are "so broad and imprecise that they cannot withstand strict scrutiny." *Parents Involved*, *supra*, at 785 (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 14. 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]

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

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[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.

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 ___ (slip op., at 9); see *Grutter*, 539 U. S., at 330 ("[O]utright racial balancing . . . is patently unconstitutional"); *Freeman* v. *Pitts*, 503 U. S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake"); *Croson*, 488 U. S., at 507 (rejecting goal of "outright racial balancing"); *Bakke*, 438 U. S., at 307 (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 (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 ___ (slip op., at 9) (quoting *Parents Involved*, 551 U. S., at 732).

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 14. 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, *ante*, at 14, 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 (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 (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

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[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.

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 9 (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 15—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

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[4]The majority's assertion that UT's race-based policy does not discriminate against Asian-American students, see *ante,* at 5–6, defies the laws of mathematics. UT's program is clearly designed to increase the

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 15.

While both the majority and the Fifth Circuit rely on UT's classroom study, see *ante*, at 15; 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 14 (mentioning Asian-Americans only a single time outside of parentheticals, and not in the context of the classroom study); 758 F. 3d,

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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 (WD Tex. 2009); see also *ante,* at 15 (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.

at 658 (mentioning Asian-Americans only a single time).[5] Only the District 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

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[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.

favor." *Metro Broadcasting*, 497 U. S., at 632 (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 (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 (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 (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. 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 (opinion of KENNEDY, J.) (quoting *Croson*, 488 U. S., at 493 (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 (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 ___ (slip op., at 4) ("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 (opinion of KENNEDY, J.), UT's reliance on such measures further undermines any claim based on classroom diversity statistics, see *id.,* at 723 (majority opinion) (criticizing school policies that viewed race in rough "white/nonwhite" or "black/'other'" terms); *id.*, at 786 (opinion of KENNEDY, J.) (faulting government for relying on "crude racial categories"); *Metro Broadcasting*, *supra*, at 633, n. 1 (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 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]

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[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

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 ___ (slip op., at 4). 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

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"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/.

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 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 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

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[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)).

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. 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. ___, ___ (2013) (slip op., at 4) (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 (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 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/twqozsbm2vb9lhm14o0v0czvqs1ygzqr/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 16 ("[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 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

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[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").

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]

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[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

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 9 (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

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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.*

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 (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 14–15; 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.

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 ___ (slip op., at 10). "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 ___ (slip op., at 11) (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 16. 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 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

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[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 16 ("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 10, its rejection of race-blind, holistic review relies exclusively on "evidence" predating petitioner's suit by five years.

17. 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,

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[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.

not evidence of unconstitutionality." *Ante,* at 15. This argument directly contradicts this Court's precedent. Because racial classifications are "'a highly suspect tool,'" *Grutter*, 539 U. S, at 326, they should be employed only "as a last resort," *Croson*, 488 U. S., at 519 (opinion of KENNEDY, J.); see also *Grutter*, *supra*, at 342 ("[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 likely could have reached the same result. See *Parents Involved*, 551 U. S., at 733–734 (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 (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.

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 6–7. The Court admits that the burden of proof is on UT, *ante,* at 7, 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 13–14. 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 9. 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 11–19. 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 (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 (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 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 9. 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 13–14 ("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 ___ (slip op., at 11) ("[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

[16] Recall that UT's president vowed to reinstate race-conscious admissions within hours of *Grutter*'s release. See Part I, *supra.*

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 9–10. 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 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

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[17] See also, *e.g., Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 720 (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 (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 (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 (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").

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 10.

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 (KENNEDY, J., dissenting).[18]

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[18] The majority's claim that UT has not "had a full opportunity to respond to" the Kroll Report, *ante,* at 14, 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

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 9. 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

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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 14, 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 14. 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.

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 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

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[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. ___, ___ (2016) (slip op., at 12) (allowing "a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records").

[20] See *ante,* at 10 ("*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*,

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. 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 (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 (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

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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").

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 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.

ACLU

NEWS & COMMENTARY

Meet Edward Blum, the Man Who Wants to Kill Affirmative Action in Higher Education

Striking down affirmative action would be a blow to efforts to help address our country's long history of discrimination and systemic inequality in higher education.

Sarah Hinger, Deputy Director, ACLU Racial Justice Program

October 18, 2018

Editor's note: This blog was updated in April 2023.

This term, the U.S. Supreme Court is set to decide on two cases concerning affirmative action brought by the conservative activist group Students for Fair Admissions. If the court strikes down affirmative action – sometimes referred to as race-conscious admissions policies – it would make it unconstitutional for universities across the country to consider a student's race as one factor in a holistic admissions review process. These policies help to address our country's long history of discrimination and systemic inequality in higher

education by increasing access for underrepresented groups.

So, who is behind this case?

In 2016, in *Fisher v. University of Texas*, the Supreme Court reaffirmed that the consideration of race as part of a holistic admissions process, a practice known as affirmative action, is consistent with the Equal Protection Clause. The district court already dismissed this claim, citing *Fisher*.

But make no mistake about it – the engineer behind this litigation is intent on sowing divisiveness amongst communities of color in an effort to dismantle diversity programs and civil rights protections that benefit all people of color. Students for Fair Admissions is the creation of Edward Blum. Blum is not a lawyer, but he has a long history of crafting legal attacks on civil rights.

After losing a congressional election in the early 1990s, Blum, who is white, challenged the Texas redistricting process as discriminating in favor of African American and Latinx voters. While his success in that case, *Bush v. Vera*, was limited to particular districts, among his other challenges to the voting rights, Blum was behind *Shelby v. Holder*. That case gutted important protections in the Voting Rights Act with drastic effects for voters of color. His attacks on laws and policies designed to promote the equality of people of color are not limited to voting rights. Blum also crafted the unsuccessful challenge to race-conscious college admissions programs in *Fisher v. University of Texas*.

Failing in Fisher, Blum baldly strategized that he "needed Asian plaintiffs." He formed Students for Fair Admissions as a vehicle to file litigation. The organization's leadership consists solely of Mr. Blum, Abigail Fisher, and Richard Fisher, her father. Through Students for Fair Admissions, Blum recruited "members" and filed his challenge to college admissions against

Harvard and the University of North Carolina with a twist. This time, Blum claims that the consideration of race discriminates against Asian Americans.

Listen to our Podcast on the Case Against Harvard

While Blum now purports to represent the interests of Asian Americans, none of his goals in litigation have changed. Blum isn't seeking to ensure that universities adequately address any implicit biases against Asian Americans in their admissions practices, nor is he asking them to take other affirmative steps to recognize the value of Asian-American applicants.

Blum's cynical attempt to use members of the Asian American community seeks to pit people of color against one another.

The relief Blum seeks is narrowly focused on what has always been his objective: a prohibition on any awareness of race in college admissions. If Blum gets his wish, statistical projections show that white applicants will be the primary beneficiaries. Not talking about race doesn't erase discrimination; it reinforces the privileges of white applicants by ignoring the ways in which deep-seeded structural racial inequality impacts individuals.

Blum's cynical attempt to use members of the Asian American community seeks to pit people of color against one another. This is the direct antithesis of race-conscious admissions programs, which endeavor to create richly diverse college campuses. A college community that includes diversity across many spectrums, including race, allows students to learn from one another and to work together. The dialogue and debate that happens on college campuses will prepare students for engagement in the private sector workforce, the military,

and many facets of civil society.

Contemporary events demonstrate all too clearly that racial divides and racial discrimination persist in America. In this context, efforts to promote diversity cannot be viewed as mere niceties, and attacks on those efforts cannot be treated as benign. There are real consequences for democracy at stake.

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. 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.

SUPREME COURT OF THE UNITED STATES

Syllabus

STUDENTS FOR FAIR ADMISSIONS, INC. *v.* PRESIDENT AND FELLOWS OF HARVARD COLLEGE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 20–1199. Argued October 31, 2022—Decided June 29, 2023*

Harvard College and the University of North Carolina (UNC) are two of the oldest institutions of higher learning in the United States. Every year, tens of thousands of students apply to each school; many fewer are admitted. Both Harvard and UNC employ a highly selective admissions process to make their decisions. Admission to each school can depend on a student's grades, recommendation letters, or extracurricular involvement. It can also depend on their race. The question presented is whether the admissions systems used by Harvard College and UNC are lawful under the Equal Protection Clause of the Fourteenth Amendment.

At Harvard, each application for admission is initially screened by a "first reader," who assigns a numerical score in each of six categories: academic, extracurricular, athletic, school support, personal, and overall. For the "overall" category—a composite of the five other ratings—a first reader can and does consider the applicant's race. Harvard's admissions subcommittees then review all applications from a particular geographic area. These regional subcommittees make recommendations to the full admissions committee, and they take an applicant's race into account. When the 40-member full admissions committee begins its deliberations, it discusses the relative breakdown of applicants by race. The goal of the process, according to Harvard's director of admissions, is ensuring there is no "dramatic drop-off" in minority admissions from the prior class. An applicant receiving a majority of

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*Together with No. 21–707, *Students for Fair Admissions, Inc.* v. *University of North Carolina et al.*, on certiorari before judgment to the United States Court of Appeals for the Fourth Circuit.

the full committee's votes is tentatively accepted for admission. At the end of this process, the racial composition of the tentative applicant pool is disclosed to the committee. The last stage of Harvard's admissions process, called the "lop," winnows the list of tentatively admitted students to arrive at the final class. Applicants that Harvard considers cutting at this stage are placed on the "lop list," which contains only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. In the Harvard admissions process, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants."

UNC has a similar admissions process. Every application is reviewed first by an admissions office reader, who assigns a numerical rating to each of several categories. Readers are required to consider the applicant's race as a factor in their review. Readers then make a written recommendation on each assigned application, and they may provide an applicant a substantial "plus" depending on the applicant's race. At this stage, most recommendations are provisionally final. A committee of experienced staff members then conducts a "school group review" of every initial decision made by a reader and either approves or rejects the recommendation. In making those decisions, the committee may consider the applicant's race.

Petitioner, Students for Fair Admissions (SFFA), is a nonprofit organization whose stated purpose is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law." SFFA filed separate lawsuits against Harvard and UNC, arguing that their race-based admissions programs violate, respectively, Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. After separate bench trials, both admissions programs were found permissible under the Equal Protection Clause and this Court's precedents. In the Harvard case, the First Circuit affirmed, and this Court granted certiorari. In the UNC case, this Court granted certiorari before judgment.

Held: Harvard's and UNC's admissions programs violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 6–40.

(a) Because SFFA complies with the standing requirements for organizational plaintiffs articulated by this Court in *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, SFFA's obligations under Article III are satisfied, and this Court has jurisdiction to consider the merits of SFFA's claims.

The Court rejects UNC's argument that SFFA lacks standing because it is not a "genuine" membership organization. An organizational plaintiff can satisfy Article III jurisdiction in two ways, one of which is to assert "standing solely as the representative of its mem-

bers," *Warth* v. *Seldin,* 422 U. S. 490, 511, an approach known as representational or organizational standing. To invoke it, an organization must satisfy the three-part test in *Hunt*. Respondents do not suggest that SFFA fails *Hunt*'s test for organizational standing. They argue instead that SFFA cannot invoke organizational standing at all because SFFA was not a genuine membership organization at the time it filed suit. Respondents maintain that, under *Hunt*, a group qualifies as a genuine membership organization only if it is controlled and funded by its members. In *Hunt*, this Court determined that a state agency with no traditional members could still qualify as a genuine membership organization in substance because the agency represented the interests of individuals and otherwise satisfied *Hunt*'s three-part test for organizational standing. See 432 U. S., at 342. *Hunt*'s "indicia of membership" analysis, however, has no applicability here. As the courts below found, SFFA is indisputably a voluntary membership organization with identifiable members who support its mission and whom SFFA represents in good faith. SFFA is thus entitled to rely on the organizational standing doctrine as articulated in *Hunt*. Pp. 6–9.

(b) Proposed by Congress and ratified by the States in the wake of the Civil War, the Fourteenth Amendment provides that no State shall "deny to any person . . . the equal protection of the laws." Proponents of the Equal Protection Clause described its "foundation[al] principle" as "not permit[ing] any distinctions of law based on race or color." Any "law which operates upon one man," they maintained, should "operate equally upon all." Accordingly, as this Court's early decisions interpreting the Equal Protection Clause explained, the Fourteenth Amendment guaranteed "that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States."

Despite the early recognition of the broad sweep of the Equal Protection Clause, the Court—alongside the country—quickly failed to live up to the Clause's core commitments. For almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy* v. *Ferguson* the separate but equal regime that would come to deface much of America. 163 U. S. 537.

After *Plessy*, "American courts . . . labored with the doctrine [of separate but equal] for over half a century." *Brown* v. *Board of Education*, 347 U. S. 483, 491. Some cases in this period attempted to curtail the perniciousness of the doctrine by emphasizing that it required States to provide black students educational opportunities equal to—even if formally separate from—those enjoyed by white students. See, *e.g.*, *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 349–350. But the

inherent folly of that approach—of trying to derive equality from inequality—soon became apparent. As the Court subsequently recognized, even racial distinctions that were argued to have no palpable effect worked to subordinate the afflicted students. See, *e.g.*, *McLaurin* v. *Oklahoma State Regents for Higher Ed.*, 339 U. S. 637, 640–642. By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal.

The culmination of this approach came finally in *Brown* v. *Board of Education,* 347 U. S. 483. There, the Court overturned the separate but equal regime established in *Plessy* and began on the path of invalidating all *de jure* racial discrimination by the States and Federal Government. The conclusion reached by the *Brown* Court was unmistakably clear: the right to a public education "must be made available to all on equal terms." 347 U. S., at 493. The Court reiterated that rule just one year later, holding that "full compliance" with *Brown* required schools to admit students "on a racially nondiscriminatory basis." *Brown* v. *Board of Education,* 349 U. S. 294, 300–301.

In the years that followed, *Brown*'s "fundamental principle that racial discrimination in public education is unconstitutional," *id.,* at 298, reached other areas of life—for example, state and local laws requiring segregation in busing, *Gayle* v. *Browder*, 352 U. S. 903 (*per curiam*); racial segregation in the enjoyment of public beaches and bathhouses *Mayor and City Council of Baltimore* v. *Dawson*, 350 U. S. 877 (*per curiam*); and antimiscegenation laws, *Loving* v. *Virginia,* 388 U. S. 1. These decisions, and others like them, reflect the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race." *Palmore* v. *Sidoti*, 466 U. S. 429, 432.

Eliminating racial discrimination means eliminating all of it. Accordingly, the Court has held that the Equal Protection Clause applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369. For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 289–290.

Any exceptions to the Equal Protection Clause's guarantee must survive a daunting two-step examination known as "strict scrutiny," *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227, which asks first whether the racial classification is used to "further compelling governmental interests," *Grutter* v. *Bollinger,* 539 U. S. 306, 326, and second whether the government's use of race is "narrowly tailored," *i.e.,* "necessary," to achieve that interest, *Fisher* v. *University of Tex. at Austin,* 570 U. S. 297, 311–312. Acceptance of race-based state action

is rare for a reason: "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Rice* v. *Cayetano*, 528 U. S. 495, 517. Pp. 9–16.

(c) This Court first considered whether a university may make race-based admissions decisions in *Bakke,* 438 U. S. 265. In a deeply splintered decision that produced six different opinions, Justice Powell's opinion for himself alone would eventually come to "serv[e] as the touchstone for constitutional analysis of race-conscious admissions policies." *Grutter*, 539 U. S., at 323. After rejecting three of the University's four justifications as not sufficiently compelling, Justice Powell turned to its last interest asserted to be compelling—obtaining the educational benefits that flow from a racially diverse student body. Justice Powell found that interest to be "a constitutionally permissible goal for an institution of higher education," which was entitled as a matter of academic freedom "to make its own judgments as to . . . the selection of its student body." 438 U. S., at 311–312. But a university's freedom was not unlimited—"[r]acial and ethnic distinctions of any sort are inherently suspect," Justice Powell explained, and antipathy toward them was deeply "rooted in our Nation's constitutional and demographic history." *Id.*, at 291. Accordingly, a university could not employ a two-track quota system with a specific number of seats reserved for individuals from a preferred ethnic group. *Id.,* at 315. Neither still could a university use race to foreclose an individual from all consideration. *Id.,* at 318. Race could only operate as "a 'plus' in a particular applicant's file," and even then it had to be weighed in a manner "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Id.,* at 317. Pp. 16–19.

(d) For years following *Bakke*, lower courts struggled to determine whether Justice Powell's decision was "binding precedent." *Grutter*, 539 U. S., at 325. Then, in *Grutter* v. *Bollinger*, the Court for the first time "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Ibid.* The *Grutter* majority's analysis tracked Justice Powell's in many respects, including its insistence on limits on how universities may consider race in their admissions programs. Those limits, *Grutter* explained, were intended to guard against two dangers that all race-based government action portends. The first is the risk that the use of race will devolve into "illegitimate . . . stereotyp[ing]." *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493 (plurality opinion). Admissions programs could thus not operate on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U. S., at 333 (internal

quotation marks omitted). The second risk is that race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference. A university's use of race, accordingly, could not occur in a manner that "unduly harm[ed] nonminority applicants." *Id.*, at 341.

To manage these concerns, *Grutter* imposed one final limit on race-based admissions programs: At some point, the Court held, they must end. *Id.,* at 342. Recognizing that "[e]nshrining a permanent justification for racial preferences would offend" the Constitution's unambiguous guarantee of equal protection, the Court expressed its expectation that, in 25 years, "the use of racial preferences will no longer be necessary to further the interest approved today." *Id.,* at 343. Pp. 19–21.

(e) Twenty years have passed since *Grutter*, with no end to race-based college admissions in sight. But the Court has permitted race-based college admissions only within the confines of narrow restrictions: such admissions programs must comply with strict scrutiny, may never use race as a stereotype or negative, and must—at some point—end. Respondents' admissions systems fail each of these criteria and must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment. Pp. 21–34.

(1) Respondents fail to operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial [review]" under the rubric of strict scrutiny. *Fisher* v. *University of Tex. at Austin*, 579 U. S. 365, 381. First, the interests that respondents view as compelling cannot be subjected to meaningful judicial review. Those interests include training future leaders, acquiring new knowledge based on diverse outlooks, promoting a robust marketplace of ideas, and preparing engaged and productive citizens. While these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. It is unclear how courts are supposed to measure any of these goals, or if they could, to know when they have been reached so that racial preferences can end. The elusiveness of respondents' asserted goals is further illustrated by comparing them to recognized compelling interests. For example, courts can discern whether the temporary racial segregation of inmates will prevent harm to those in the prison, see *Johnson* v. *California,* 543 U. S. 499, 512–513, but the question whether a particular mix of minority students produces "engaged and productive citizens" or effectively "train[s] future leaders" is standardless.

Second, respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue. To achieve the educational benefits of diversity, respondents measure the racial composition of their classes using racial categories

that are plainly overbroad (expressing, for example, no concern whether *South* Asian or *East* Asian students are adequately represented as "Asian"); arbitrary or undefined (the use of the category "Hispanic"); or underinclusive (no category at all for Middle Eastern students). The unclear connection between the goals that respondents seek and the means they employ preclude courts from meaningfully scrutinizing respondents' admissions programs.

The universities' main response to these criticisms is "trust us." They assert that universities are owed deference when using race to benefit some applicants but not others. While this Court has recognized a "tradition of giving a degree of deference to a university's academic decisions," it has made clear that deference must exist "within constitutionally prescribed limits." *Grutter*, 539 U. S., at 328. Respondents have failed to present an exceedingly persuasive justification for separating students on the basis of race that is measurable and concrete enough to permit judicial review, as the Equal Protection Clause requires. Pp. 22–26.

(2) Respondents' race-based admissions systems also fail to comply with the Equal Protection Clause's twin commands that race may never be used as a "negative" and that it may not operate as a stereotype. The First Circuit found that Harvard's consideration of race has resulted in fewer admissions of Asian-American students. Respondents' assertion that race is never a negative factor in their admissions programs cannot withstand scrutiny. College admissions are zero-sum, and a benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter.

Respondents admissions programs are infirm for a second reason as well: They require stereotyping—the very thing *Grutter* foreswore. When a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike." *Miller* v. *Johnson*, 515 U. S. 900, 911–912. Such stereotyping is contrary to the "core purpose" of the Equal Protection Clause. *Palmore*, 466 U. S., at 432. Pp. 26–29.

(3) Respondents' admissions programs also lack a "logical end point" as *Grutter* required. 539 U. S., at 342. Respondents suggest that the end of race-based admissions programs will occur once meaningful representation and diversity are achieved on college campuses. Such measures of success amount to little more than comparing the racial breakdown of the incoming class and comparing it to some other metric, such as the racial makeup of the previous incoming class or the population in general, to see whether some proportional goal has been reached. The problem with this approach is well established: "[O]utright racial balancing" is "patently unconstitutional." *Fisher,*

570 U. S., at 311. Respondents' second proffered end point—when students receive the educational benefits of diversity—fares no better. As explained, it is unclear how a court is supposed to determine if or when such goals would be adequately met. Third, respondents suggest the 25-year expectation in *Grutter* means that race-based preferences must be allowed to continue until at least 2028. The Court's statement in *Grutter*, however, reflected only that Court's expectation that race-based preferences would, by 2028, be unnecessary in the context of racial diversity on college campuses. Finally, respondents argue that the frequent reviews they conduct to determine whether racial preferences are still necessary obviates the need for an end point. But *Grutter* never suggested that periodic review can make unconstitutional conduct constitutional. Pp. 29–34.

(f) Because Harvard's and UNC's admissions programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points, those admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. At the same time, nothing prohibits universities from considering an applicant's discussion of how race affected the applicant's life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university. Many universities have for too long wrongly concluded that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned, but the color of their skin. This Nation's constitutional history does not tolerate that choice. Pp. 39–40.

No. 20–1199, 980 F. 3d 157; No. 21–707, 567 F. Supp. 3d 580, reversed.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. THOMAS, J., filed a concurring opinion. GORSUCH, J., filed a concurring opinion, in which THOMAS, J., joined. KAVANAUGH, J., filed a concurring opinion. SOTOMAYOR, J., filed a dissenting opinion, in which KAGAN, J., joined, and in which JACKSON, J., joined as it applies to No. 21–707. JACKSON, J., filed a dissenting opinion in No. 21–707, in which SOTOMAYOR and KAGAN, JJ., joined. JACKSON, J., took no part in the consideration or decision of the case in No. 20–1199.

SUPREME COURT OF THE UNITED STATES

Nos. 20–1199 and 21–707

STUDENTS FOR FAIR ADMISSIONS, INC.,
PETITIONER
20–1199 *v.*
PRESIDENT AND FELLOWS OF
HARVARD COLLEGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STUDENTS FOR FAIR ADMISSIONS, INC.,
PETITIONER
21–707 *v.*
UNIVERSITY OF NORTH CAROLINA, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 29, 2023]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In these cases we consider whether the admissions systems used by Harvard College and the University of North Carolina, two of the oldest institutions of higher learning in the United States, are lawful under the Equal Protection Clause of the Fourteenth Amendment.

I

A

Founded in 1636, Harvard College has one of the most

selective application processes in the country. Over 60,000 people applied to the school last year; fewer than 2,000 were admitted. Gaining admission to Harvard is thus no easy feat. It can depend on having excellent grades, glowing recommendation letters, or overcoming significant adversity. See 980 F. 3d 157, 166–169 (CA1 2020). It can also depend on your race.

The admissions process at Harvard works as follows. Every application is initially screened by a "first reader," who assigns scores in six categories: academic, extracurricular, athletic, school support, personal, and overall. *Ibid.* A rating of "1" is the best; a rating of "6" the worst. *Ibid.* In the academic category, for example, a "1" signifies "near-perfect standardized test scores and grades"; in the extracurricular category, it indicates "truly unusual achievement"; and in the personal category, it denotes "outstanding" attributes like maturity, integrity, leadership, kindness, and courage. *Id.*, at 167–168. A score of "1" on the overall rating—a composite of the five other ratings—"signifies an exceptional candidate with >90% chance of admission." *Id.*, at 169 (internal quotation marks omitted). In assigning the overall rating, the first readers "can and do take an applicant's race into account." *Ibid.*

Once the first read process is complete, Harvard convenes admissions subcommittees. *Ibid.* Each subcommittee meets for three to five days and evaluates all applicants from a particular geographic area. *Ibid.* The subcommittees are responsible for making recommendations to the full admissions committee. *Id.*, at 169–170. The subcommittees can and do take an applicant's race into account when making their recommendations. *Id.*, at 170.

The next step of the Harvard process is the full committee meeting. The committee has 40 members, and its discussion centers around the applicants who have been recommended by the regional subcommittees. *Ibid.* At the beginning of the meeting, the committee discusses the relative

breakdown of applicants by race. The "goal," according to Harvard's director of admissions, "is to make sure that [Harvard does] not hav[e] a dramatic drop-off" in minority admissions from the prior class. 2 App. in No. 20–1199, pp. 744, 747–748. Each applicant considered by the full committee is discussed one by one, and every member of the committee must vote on admission. 980 F. 3d, at 170. Only when an applicant secures a majority of the full committee's votes is he or she tentatively accepted for admission. *Ibid.* At the end of the full committee meeting, the racial composition of the pool of tentatively admitted students is disclosed to the committee. *Ibid.*; 2 App. in No. 20–1199, at 861.

The final stage of Harvard's process is called the "lop," during which the list of tentatively admitted students is winnowed further to arrive at the final class. Any applicants that Harvard considers cutting at this stage are placed on a "lop list," which contains only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. 980 F. 3d, at 170. The full committee decides as a group which students to lop. 397 F. Supp. 3d 126, 144 (Mass. 2019). In doing so, the committee can and does take race into account. *Ibid.* Once the lop process is complete, Harvard's admitted class is set. *Ibid.* In the Harvard admissions process, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants." *Id.*, at 178.

B

Founded shortly after the Constitution was ratified, the University of North Carolina (UNC) prides itself on being the "nation's first public university." 567 F. Supp. 3d 580, 588 (MDNC 2021). Like Harvard, UNC's "admissions process is highly selective": In a typical year, the school "receives approximately 43,500 applications for

its freshman class of 4,200." *Id.*, at 595.

Every application the University receives is initially reviewed by one of approximately 40 admissions office readers, each of whom reviews roughly five applications per hour. *Id.*, at 596, 598. Readers are required to consider "[r]ace and ethnicity . . . as one factor" in their review. *Id.*, at 597 (internal quotation marks omitted). Other factors include academic performance and rigor, standardized testing results, extracurricular involvement, essay quality, personal factors, and student background. *Id.*, at 600. Readers are responsible for providing numerical ratings for the academic, extracurricular, personal, and essay categories. *Ibid.* During the years at issue in this litigation, underrepresented minority students were "more likely to score [highly] on their personal ratings than their white and Asian American peers," but were more likely to be "rated lower by UNC readers on their academic program, academic performance, . . . extracurricular activities," and essays. *Id.*, at 616–617.

After assessing an applicant's materials along these lines, the reader "formulates an opinion about whether the student should be offered admission" and then "writes a comment defending his or her recommended decision." *Id.*, at 598 (internal quotation marks omitted). In making that decision, readers may offer students a "plus" based on their race, which "may be significant in an individual case." *Id.*, at 601 (internal quotation marks omitted). The admissions decisions made by the first readers are, in most cases, "provisionally final." *Students for Fair Admissions, Inc.* v. *University of N. C. at Chapel Hill*, No. 1:14–cv–954 (MDNC, Nov. 9, 2020), ECF Doc. 225, p. 7, ¶52.

Following the first read process, "applications then go to a process called 'school group review' . . . where a committee composed of experienced staff members reviews every [initial] decision." 567 F. Supp. 3d, at 599. The review committee receives a report on each student which contains,

among other things, their "class rank, GPA, and test scores; the ratings assigned to them by their initial readers; and their status as residents, legacies, or special recruits." *Ibid.* (footnote omitted). The review committee either approves or rejects each admission recommendation made by the first reader, after which the admissions decisions are finalized. *Ibid.* In making those decisions, the review committee may also consider the applicant's race. *Id.*, at 607; 2 App. in No. 21–707, p. 407.[1]

C

Petitioner, Students for Fair Admissions (SFFA), is a

[1] JUSTICE JACKSON attempts to minimize the role that race plays in UNC's admissions process by noting that, from 2016–2021, the school accepted a lower "percentage of the most academically excellent in-state Black candidates"—that is, 65 out of 67 such applicants (97.01%)—than it did similarly situated Asian applicants—that is, 1118 out of 1139 such applicants (98.16%). *Post*, at 20 (dissenting opinion); see also 3 App. in No. 21–707, pp. 1078–1080. It is not clear how the rejection of just two black applicants over five years could be "indicative of a genuinely holistic [admissions] process," as JUSTICE JACKSON contends. *Post*, at 20–21. And indeed it cannot be, as the *overall* acceptance rates of academically excellent applicants to UNC illustrates full well. According to SFFA's expert, over 80% of all black applicants in the top academic decile were admitted to UNC, while under 70% of white and Asian applicants in that decile were admitted. 3 App. in No. 21–707, at 1078–1083. In the second highest academic decile, the disparity is even starker: 83% of black applicants were admitted, while 58% of white applicants and 47% of Asian applicants were admitted. *Ibid.* And in the third highest decile, 77% of black applicants were admitted, compared to 48% of white applicants and 34% of Asian applicants. *Ibid.* The dissent does not dispute the accuracy of these figures. See *post*, at 20, n. 94 (opinion of JACKSON, J.). And its contention that white and Asian students "receive a diversity plus" in UNC's race-based admissions system blinks reality. *Post*, at 18.

The same is true at Harvard. See Brief for Petitioner 24 ("[A]n African American [student] in [the fourth lowest academic] decile has a higher chance of admission (12.8%) than an Asian American in the *top* decile (12.7%)." (emphasis added)); see also 4 App. in No. 20–1199, p. 1793 (black applicants in the top four academic deciles are between four and ten times more likely to be admitted to Harvard than Asian applicants in those deciles).

nonprofit organization founded in 2014 whose purpose is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law." 980 F. 3d, at 164 (internal quotation marks omitted). In November 2014, SFFA filed separate lawsuits against Harvard College and the University of North Carolina, arguing that their race-based admissions programs violated, respectively, Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. §2000d *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment.[2] See 397 F. Supp. 3d, at 131–132; 567 F. Supp. 3d, at 585–586. The District Courts in both cases held bench trials to evaluate SFFA's claims. See 980 F. 3d, at 179; 567 F. Supp. 3d, at 588. Trial in the Harvard case lasted 15 days and included testimony from 30 witnesses, after which the Court concluded that Harvard's admissions program comported with our precedents on the use of race in college admissions. See 397 F. Supp. 3d, at 132, 183. The First Circuit affirmed that determination. See 980 F. 3d, at 204. Similarly, in the UNC case, the District Court concluded after an eight-day trial that UNC's admissions program was permissible under the Equal Protection Clause. 567 F. Supp. 3d, at 588, 666.

We granted certiorari in the Harvard case and certiorari before judgment in the UNC case. 595 U. S. ___ (2022).

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[2] Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U. S. C. §2000d. "We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." *Gratz* v. *Bollinger*, 539 U. S. 244, 276, n. 23 (2003). Although JUSTICE GORSUCH questions that proposition, no party asks us to reconsider it. We accordingly evaluate Harvard's admissions program under the standards of the Equal Protection Clause itself.

II

Before turning to the merits, we must assure ourselves of our jurisdiction. See *Summers* v. *Earth Island Institute*, 555 U. S. 488, 499 (2009). UNC argues that SFFA lacks standing to bring its claims because it is not a "genuine" membership organization. Brief for University Respondents in No. 21–707, pp. 23–26. Every court to have considered this argument has rejected it, and so do we. See *Students for Fair Admissions, Inc.* v. *University of Tex. at Austin*, 37 F. 4th 1078, 1084–1086, and n. 8 (CA5 2022) (collecting cases).

Article III of the Constitution limits "[t]he judicial power of the United States" to "cases" or "controversies," ensuring that federal courts act only "as a necessity in the determination of real, earnest and vital" disputes. *Muskrat* v. *United States*, 219 U. S. 346, 351, 359 (1911) (internal quotation marks omitted). "To state a case or controversy under Article III, a plaintiff must establish standing." *Arizona Christian School Tuition Organization* v. *Winn*, 563 U. S. 125, 133 (2011). That, in turn, requires a plaintiff to demonstrate that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 338 (2016).

In cases like these, where the plaintiff is an organization, the standing requirements of Article III can be satisfied in two ways. Either the organization can claim that it suffered an injury in its own right or, alternatively, it can assert "standing solely as the representative of its members." *Warth* v. *Seldin*, 422 U. S. 490, 511 (1975). The latter approach is known as representational or organizational standing. *Ibid.*; *Summers*, 555 U. S., at 497–498. To invoke it, an organization must demonstrate that "(a) its members would otherwise have standing to sue in their own right;

(b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 343 (1977).

Respondents do not contest that SFFA satisfies the three-part test for organizational standing articulated in *Hunt*, and like the courts below, we find no basis in the record to conclude otherwise. See 980 F. 3d, at 182–184; 397 F. Supp. 3d, at 183–184; No. 1:14–cv–954 (MDNC, Sept. 29, 2018), App. D to Pet. for Cert. in No. 21–707, pp. 237–245 (2018 DC Opinion). Respondents instead argue that SFFA was not a "genuine 'membership organization'" when it filed suit, and thus that it could not invoke the doctrine of organizational standing in the first place. Brief for University Respondents in No. 21–707, at 24. According to respondents, our decision in *Hunt* established that groups qualify as genuine membership organizations only if they are controlled and funded by their members. And because SFFA's members did neither at the time this litigation commenced, respondents' argument goes, SFFA could not represent its members for purposes of Article III standing. Brief for University Respondents in No. 21–707, at 24 (citing *Hunt*, 432 U. S., at 343).

Hunt involved the Washington State Apple Advertising Commission, a state agency whose purpose was to protect the local apple industry. The Commission brought suit challenging a North Carolina statute that imposed a labeling requirement on containers of apples sold in that State. The Commission argued that it had standing to challenge the requirement on behalf of Washington's apple industry. See *id.*, at 336–341. We recognized, however, that as a state agency, "the Commission [wa]s not a traditional voluntary membership organization . . . , for it ha[d] no members at all." *Id.*, at 342. As a result, we could not easily apply the three-part test for organizational standing, which asks

whether an organization's *members* have standing. We nevertheless concluded that the Commission had standing because the apple growers and dealers it represented were *effectively* members of the Commission. *Id.*, at 344. The growers and dealers "alone elect[ed] the members of the Commission," "alone . . . serve[d] on the Commission," and "alone finance[d] its activities"—they possessed, in other words, "all of the indicia of membership." *Ibid.* The Commission was therefore a genuine membership organization in substance, if not in form. And it was "clearly" entitled to rely on the doctrine of organizational standing under the three-part test recounted above. *Id.*, at 343.

The indicia of membership analysis employed in *Hunt* has no applicability in these cases. Here, SFFA *is* indisputably a voluntary membership organization with identifiable members—it is not, as in *Hunt*, a state agency that concededly has no members. See 2018 DC Opinion 241–242. As the First Circuit in the Harvard litigation observed, at the time SFFA filed suit, it was "a validly incorporated 501(c)(3) nonprofit with forty-seven members who joined voluntarily to support its mission." 980 F. 3d, at 184. Meanwhile in the UNC litigation, SFFA represented four members in particular—high school graduates who were denied admission to UNC. See 2018 DC Opinion 234. Those members filed declarations with the District Court stating "that they have voluntarily joined SFFA; they support its mission; they receive updates about the status of the case from SFFA's President; and they have had the opportunity to have input and direction on SFFA's case." *Id.*, at 234–235 (internal quotation marks omitted). Where, as here, an organization has identified members and represents them in good faith, our cases do not require further scrutiny into how the organization operates. Because SFFA complies with the standing requirements demanded of organizational plaintiffs in *Hunt*, its obligations under Article III are satisfied.

III

A

In the wake of the Civil War, Congress proposed and the States ratified the Fourteenth Amendment, providing that no State shall "deny to any person . . . the equal protection of the laws." Amdt. 14, §1. To its proponents, the Equal Protection Clause represented a "foundation[al] principle"—"the absolute equality of all citizens of the United States politically and civilly before their own laws." Cong. Globe, 39th Cong., 1st Sess., 431 (1866) (statement of Rep. Bingham) (Cong. Globe). The Constitution, they were determined, "should not permit any distinctions of law based on race or color," Supp. Brief for United States on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1 etc., p. 41 (detailing the history of the adoption of the Equal Protection Clause), because any "law which operates upon one man [should] operate *equally* upon all," Cong. Globe 2459 (statement of Rep. Stevens). As soon-to-be President James Garfield observed, the Fourteenth Amendment would hold "over every American citizen, without regard to color, the protecting shield of law." *Id.*, at 2462. And in doing so, said Senator Jacob Howard of Michigan, the Amendment would give "to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." *Id.*, at 2766. For "[w]ithout this principle of equal justice," Howard continued, "there is no republican government and none that is really worth maintaining." *Ibid.*

At first, this Court embraced the transcendent aims of the Equal Protection Clause. "What is this," we said of the Clause in 1880, "but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States?" *Strauder* v. *West Virginia*, 100 U. S. 303, 307–309. "[T]he broad and benign provisions of the

Fourteenth Amendment" apply "to all persons," we unanimously declared six years later; it is "hostility to . . . race and nationality" "which in the eye of the law is not justified." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 368–369, 373–374 (1886); see also *id.*, at 368 (applying the Clause to "aliens and subjects of the Emperor of China"); *Truax* v. *Raich*, 239 U. S. 33, 36 (1915) ("a native of Austria"); semble *Strauder*, 100 U. S., at 308–309 ("Celtic Irishmen") (dictum).

Despite our early recognition of the broad sweep of the Equal Protection Clause, this Court—alongside the country—quickly failed to live up to the Clause's core commitments. For almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy* v. *Ferguson* the separate but equal regime that would come to deface much of America. 163 U. S. 537 (1896). The aspirations of the framers of the Equal Protection Clause, "[v]irtually strangled in [their] infancy," would remain for too long only that—aspirations. J. Tussman & J. tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341, 381 (1949).

After *Plessy*, "American courts . . . labored with the doctrine [of separate but equal] for over half a century." *Brown* v. *Board of Education*, 347 U. S. 483, 491 (1954). Some cases in this period attempted to curtail the perniciousness of the doctrine by emphasizing that it required States to provide black students educational opportunities equal to—even if formally separate from—those enjoyed by white students. See, *e.g.*, *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 349–350 (1938) ("The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups . . . ."). But the inherent folly of that approach—of trying to derive equality from inequality—soon became apparent. As the Court subse-

quently recognized, even racial distinctions that were argued to have no palpable effect worked to subordinate the afflicted students. See, *e.g.*, *McLaurin* v. *Oklahoma State Regents for Higher Ed.*, 339 U. S. 637, 640–642 (1950) ("It is said that the separations imposed by the State in this case are in form merely nominal. . . . But they signify that the State . . . sets [petitioner] apart from the other students."). By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal.

The culmination of this approach came finally in *Brown* v. *Board of Education*. In that seminal decision, we overturned *Plessy* for good and set firmly on the path of invalidating all *de jure* racial discrimination by the States and Federal Government. 347 U. S., at 494–495. *Brown* concerned the permissibility of racial segregation in public schools. The school district maintained that such segregation was lawful because the schools provided to black students and white students were of roughly the same quality. But we held such segregation impermissible "*even though* the physical facilities and other 'tangible' factors may be equal." *Id.*, at 493 (emphasis added). The mere act of separating "children . . . because of their race," we explained, itself "generate[d] a feeling of inferiority." *Id.*, at 494.

The conclusion reached by the *Brown* Court was thus unmistakably clear: the right to a public education "must be made available to all on equal terms." *Id.*, at 493. As the plaintiffs had argued, "no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." Tr. of Oral Arg. in *Brown I*, O. T. 1952, No. 8, p. 7 (Robert L. Carter, Dec. 9, 1952); see also Supp. Brief for Appellants on Reargument in Nos. 1, 2, and 4, and for Respondents in No. 10, in *Brown* v. *Board of Education*, O. T. 1953, p. 65 ("That the Constitution is color blind is our

dedicated belief."); *post*, at 39, n. 7 (THOMAS, J., concurring). The Court reiterated that rule just one year later, holding that "full compliance" with *Brown* required schools to admit students "on a racially nondiscriminatory basis." *Brown* v. *Board of Education*, 349 U. S. 294, 300–301 (1955). The time for making distinctions based on race had passed. *Brown*, the Court observed, "declar[ed] the fundamental principle that racial discrimination in public education is unconstitutional." *Id.*, at 298.

So too in other areas of life. Immediately after *Brown*, we began routinely affirming lower court decisions that invalidated all manner of race-based state action. In *Gayle* v. *Browder*, for example, we summarily affirmed a decision invalidating state and local laws that required segregation in busing. 352 U. S. 903 (1956) (*per curiam*). As the lower court explained, "[t]he equal protection clause requires equality of treatment before the law for all persons without regard to race or color." *Browder* v. *Gayle*, 142 F. Supp. 707, 715 (MD Ala. 1956). And in *Mayor and City Council of Baltimore* v. *Dawson*, we summarily affirmed a decision striking down racial segregation at public beaches and bathhouses maintained by the State of Maryland and the city of Baltimore. 350 U. S. 877 (1955) (*per curiam*). "It is obvious that racial segregation in recreational activities can no longer be sustained," the lower court observed. *Dawson* v. *Mayor and City Council of Baltimore*, 220 F. 2d 386, 387 (CA4 1955) (*per curiam*). "[T]he ideal of equality before the law which characterizes our institutions" demanded as much. *Ibid.*

In the decades that followed, this Court continued to vindicate the Constitution's pledge of racial equality. Laws dividing parks and golf courses; neighborhoods and businesses; buses and trains; schools and juries were undone, all by a transformative promise "stemming from our American ideal of fairness": "'the Constitution . . . forbids . . . discrimination by the General Government, or by the States,

against any citizen because of his race.'" *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954) (quoting *Gibson* v. *Mississippi*, 162 U. S. 565, 591 (1896) (Harlan, J., for the Court)). As we recounted in striking down the State of Virginia's ban on interracial marriage 13 years after *Brown*, the Fourteenth Amendment "proscri[bes] . . . all invidious racial discriminations." *Loving* v. *Virginia*, 388 U. S. 1, 8 (1967). Our cases had thus "consistently denied the constitutionality of measures which restrict the rights of citizens on account of race." *Id.*, at 11–12; *s*ee also *Yick Wo*, 118 U. S., at 373–375 (commercial property); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948) (housing covenants); *Hernandez* v. *Texas*, 347 U. S. 475 (1954) (composition of juries); *Dawson*, 350 U. S., at 877 (beaches and bathhouses); *Holmes* v. *Atlanta*, 350 U. S. 879 (1955) (*per curiam*) (golf courses); *Browder*, 352 U. S., at 903 (busing); *New Orleans City Park Improvement Assn.* v. *Detiege*, 358 U. S. 54 (1958) (*per curiam*) (public parks); *Bailey* v. *Patterson*, 369 U. S. 31 (1962) (*per curiam*) (transportation facilities); *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1 (1971) (education); *Batson* v. *Kentucky*, 476 U. S. 79 (1986) (peremptory jury strikes).

These decisions reflect the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race." *Palmore* v. *Sidoti*, 466 U. S. 429, 432 (1984) (footnote omitted). We have recognized that repeatedly. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving*, 388 U. S., at 10; see also *Washington* v. *Davis*, 426 U. S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."); *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964) ("[T]he historical fact [is] that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination.").

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

Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as "strict scrutiny." *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227 (1995). Under that standard we ask, first, whether the racial classification is used to "further compelling governmental interests." *Grutter* v. *Bollinger*, 539 U. S. 306, 326 (2003). Second, if so, we ask whether the government's use of race is "narrowly tailored"—meaning "necessary"—to achieve that interest. *Fisher* v. *University of Tex. at Austin*, 570 U. S. 297, 311–312 (2013) (*Fisher I*) (internal quotation marks omitted).

Outside the circumstances of these cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. See, *e.g.*, *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 720 (2007); *Shaw* v. *Hunt*, 517 U. S. 899, 909–910 (1996); *post*, at 19–20, 30–31 (opinion of THOMAS, J.). The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot. See *Johnson* v. *California*, 543 U. S. 499, 512–513 (2005).[3]

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[3]The first time we determined that a governmental racial classification satisfied "the most rigid scrutiny" was 10 years before *Brown* v.

Our acceptance of race-based state action has been rare for a reason. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Rice* v. *Cayetano*, 528 U. S. 495, 517 (2000) (quoting *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943)). That principle cannot be overridden except in the most extraordinary case.

B

These cases involve whether a university may make admissions decisions that turn on an applicant's race. Our Court first considered that issue in *Regents of University of California* v. *Bakke*, which involved a set-aside admissions program used by the University of California, Davis, medical school. 438 U. S., at 272–276. Each year, the school held 16 of its 100 seats open for members of certain minority groups, who were reviewed on a special admissions track separate from those in the main admissions pool. *Id.*, at

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Board of Education, 347 U. S. 483 (1954), in the infamous case *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944). There, the Court upheld the internment of "all persons of Japanese ancestry in prescribed West Coast . . . areas" during World War II because "the military urgency of the situation demanded" it. *Id.*, at 217, 223. We have since overruled *Korematsu*, recognizing that it was "gravely wrong the day it was decided." *Trump* v. *Hawaii*, 585 U. S. ___, ___ (2018) (slip op., at 38). The Court's decision in *Korematsu* nevertheless "demonstrates vividly that even the most rigid scrutiny can sometimes fail to detect an illegitimate racial classification" and that "[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future." *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 236 (1995) (internal quotation marks omitted).

The principal dissent, for its part, claims that the Court has also permitted "the use of race when that use burdens minority populations." *Post*, at 38–39 (opinion of SOTOMAYOR, J.). In support of that claim, the dissent cites two cases that have nothing to do with the Equal Protection Clause. See *ibid.* (citing *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975) (Fourth Amendment case), and *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976) (another Fourth Amendment case)).

272–275. The plaintiff, Allan Bakke, was denied admission two years in a row, despite the admission of minority applicants with lower grade point averages and MCAT scores. *Id.*, at 276–277. Bakke subsequently sued the school, arguing that its set-aside program violated the Equal Protection Clause.

In a deeply splintered decision that produced six different opinions—none of which commanded a majority of the Court—we ultimately ruled in part in favor of the school and in part in favor of Bakke. Justice Powell announced the Court's judgment, and his opinion—though written for himself alone—would eventually come to "serv[e] as the touchstone for constitutional analysis of race-conscious admissions policies." *Grutter*, 539 U. S., at 323.

Justice Powell began by finding three of the school's four justifications for its policy not sufficiently compelling. The school's first justification of "reducing the historic deficit of traditionally disfavored minorities in medical schools," he wrote, was akin to "[p]referring members of any one group for no reason other than race or ethnic origin." *Bakke*, 438 U. S., at 306–307 (internal quotation marks omitted). Yet that was "discrimination for its own sake," which "the Constitution forbids." *Id.*, at 307 (citing, *inter alia*, *Loving*, 388 U. S., at 11). Justice Powell next observed that the goal of "remedying . . . the effects of 'societal discrimination'" was also insufficient because it was "an amorphous concept of injury that may be ageless in its reach into the past." *Bakke*, 438 U. S., at 307. Finally, Justice Powell found there was "virtually no evidence in the record indicating that [the school's] special admissions program" would, as the school had argued, increase the number of doctors working in underserved areas. *Id.*, at 310.

Justice Powell then turned to the school's last interest asserted to be compelling—obtaining the educational benefits that flow from a racially diverse student body. That interest, in his view, was "a constitutionally permissible goal for

an institution of higher education." *Id.*, at 311–312. And that was so, he opined, because a university was entitled as a matter of academic freedom "to make its own judgments as to . . . the selection of its student body." *Id.*, at 312.

But a university's freedom was not unlimited. "Racial and ethnic distinctions of any sort are inherently suspect," Justice Powell explained, and antipathy toward them was deeply "rooted in our Nation's constitutional and demographic history." *Id.*, at 291. A university could not employ a quota system, for example, reserving "a specified number of seats in each class for individuals from the preferred ethnic groups." *Id.*, at 315. Nor could it impose a "multitrack program with a prescribed number of seats set aside for each identifiable category of applicants." *Ibid.* And neither still could it use race to foreclose an individual "from all consideration . . . simply because he was not the right color." *Id.*, at 318.

The role of race had to be cabined. It could operate only as "a 'plus' in a particular applicant's file." *Id.*, at 317. And even then, race was to be weighed in a manner "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Ibid.* Justice Powell derived this approach from what he called the "illuminating example" of the admissions system then used by Harvard College. *Id.*, at 316. Under that system, as described by Harvard in a brief it had filed with the Court, "the race of an applicant may tip the balance in his favor just as geographic origin or a life [experience] may tip the balance in other candidates' cases." *Ibid.* (internal quotation marks omitted). Harvard continued: "A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer." *Ibid.* (internal quotation marks omitted). The result, Harvard proclaimed, was that "race has been"—and should be—"a factor in some admission decisions." *Ibid.* (internal

quotation marks omitted).

No other Member of the Court joined Justice Powell's opinion. Four Justices instead would have held that the government may use race for the purpose of "remedying the effects of past societal discrimination." *Id.*, at 362 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). Four other Justices, meanwhile, would have struck down the Davis program as violative of Title VI. In their view, it "seem[ed] clear that the proponents of Title VI assumed that the Constitution itself required a colorblind standard on the part of government." *Id.*, at 416 (Stevens, J., joined by Burger, C. J., and Stewart and Rehnquist, JJ., concurring in judgment in part and dissenting in part). The Davis program therefore flatly contravened a core "principle imbedded in the constitutional *and* moral understanding of the times": the prohibition against "racial discrimination." *Id.*, at 418, n. 21 (internal quotation marks omitted).

C

In the years that followed our "fractured decision in *Bakke*," lower courts "struggled to discern whether Justice Powell's" opinion constituted "binding precedent." *Grutter*, 539 U. S., at 325. We accordingly took up the matter again in 2003, in the case *Grutter* v. *Bollinger*, which concerned the admissions system used by the University of Michigan law school. *Id.*, at 311. There, in another sharply divided decision, the Court for the first time "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.*, at 325.

The Court's analysis tracked Justice Powell's in many respects. As for compelling interest, the Court held that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." *Id.*, at 328. In achieving that goal, however, the Court

made clear—just as Justice Powell had—that the law school was limited in the means that it could pursue. The school could not "establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks." *Id.*, at 334. Neither could it "insulate applicants who belong to certain racial or ethnic groups from the competition for admission." *Ibid.* Nor still could it desire "some specified percentage of a particular group merely because of its race or ethnic origin." *Id.*, at 329–330 (quoting *Bakke*, 438 U. S., at 307 (opinion of Powell, J.)).

These limits, *Grutter* explained, were intended to guard against two dangers that all race-based government action portends. The first is the risk that the use of race will devolve into "illegitimate . . . stereotyp[ing]." *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493 (1989) (plurality opinion). Universities were thus not permitted to operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U. S., at 333 (internal quotation marks omitted). The second risk is that race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference. A university's use of race, accordingly, could not occur in a manner that "unduly harm[ed] nonminority applicants." *Id.*, at 341.

But even with these constraints in place, *Grutter* expressed marked discomfort with the use of race in college admissions. The Court stressed the fundamental principle that "there are serious problems of justice connected with the idea of [racial] preference itself." *Ibid.* (quoting *Bakke*, 438 U. S., at 298 (opinion of Powell, J.)). It observed that all "racial classifications, however compelling their goals," were "dangerous." *Grutter*, 539 U. S., at 342. And it cautioned that all "race-based governmental action" should "remai[n] subject to continuing oversight to assure that it will

work the least harm possible to other innocent persons competing for the benefit." *Id.*, at 341 (internal quotation marks omitted).

To manage these concerns, *Grutter* imposed one final limit on race-based admissions programs. At some point, the Court held, they must end. *Id.*, at 342. This requirement was critical, and *Grutter* emphasized it repeatedly. "[A]ll race-conscious admissions programs [must] have a termination point"; they "must have reasonable durational limits"; they "must be limited in time"; they must have "sunset provisions"; they "must have a logical end point"; their "deviation from the norm of equal treatment" must be "a temporary matter." *Ibid.* (internal quotation marks omitted). The importance of an end point was not just a matter of repetition. It was the reason the Court was willing to dispense temporarily with the Constitution's unambiguous guarantee of equal protection. The Court recognized as much: "[e]nshrining a permanent justification for racial preferences," the Court explained, "would offend this fundamental equal protection principle." *Ibid.*; see also *id.,* at 342–343 (quoting N. Nathanson & C. Bartnik, The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools, 58 Chi. Bar Rec. 282, 293 (May–June 1977), for the proposition that "[i]t would be a sad day indeed, were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life").

Grutter thus concluded with the following caution: "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U. S., at 343.

IV

Twenty years later, no end is in sight. "Harvard's view about when [race-based admissions will end] doesn't have a date on it." Tr. of Oral Arg. in No. 20–1199, p. 85; Brief for Respondent in No. 20–1199, p. 52. Neither does UNC's. 567 F. Supp. 3d, at 612. Yet both insist that the use of race in their admissions programs must continue.

But we have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents' admissions systems—however well intentioned and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.[4]

A

Because "[r]acial discrimination [is] invidious in all contexts," *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 619 (1991), we have required that universities operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial [review]" under the rubric of strict scrutiny, *Fisher* v. *University of Tex. at Austin*, 579 U. S. 365, 381 (2016) (*Fisher II*). "Classifying and assigning" students based on their race "requires more than . . . an amorphous end to justify it." *Parents Involved*, 551 U. S., at 735.

Respondents have fallen short of satisfying that burden.

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[4] The United States as *amicus curiae* contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.

First, the interests they view as compelling cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." 980 F. 3d, at 173–174. UNC points to similar benefits, namely, "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes." 567 F. Supp. 3d, at 656.

Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. At the outset, it is unclear how courts are supposed to measure any of these goals. How is a court to know whether leaders have been adequately "train[ed]"; whether the exchange of ideas is "robust"; or whether "new knowledge" is being developed? *Ibid.*; 980 F. 3d, at 173–174. Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? There is no particular point at which there exists sufficient "innovation and problem-solving," or students who are appropriately "engaged and productive." 567 F. Supp. 3d, at 656. Finally, the question in this context is not one of *no* diversity or of *some*: it is a question of degree. How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve.

Comparing respondents' asserted goals to interests we have recognized as compelling further illustrates their elusive nature. In the context of racial violence in a prison, for

example, courts can ask whether temporary racial segregation of inmates will prevent harm to those in the prison. See *Johnson*, 543 U. S., at 512–513. When it comes to workplace discrimination, courts can ask whether a race-based benefit makes members of the discriminated class "whole for [the] injuries [they] suffered." *Franks* v. *Bowman Transp. Co.*, 424 U. S. 747, 763 (1976) (internal quotation marks omitted). And in school segregation cases, courts can determine whether any race-based remedial action produces a distribution of students "compar[able] to what it would have been in the absence of such constitutional violations." *Dayton Bd. of Ed.* v. *Brinkman*, 433 U. S. 406, 420 (1977).

Nothing like that is possible when it comes to evaluating the interests respondents assert here. Unlike discerning whether a prisoner will be injured or whether an employee should receive backpay, the question whether a particular mix of minority students produces "engaged and productive citizens," sufficiently "enhance[s] appreciation, respect, and empathy," or effectively "train[s] future leaders" is standardless. 567 F. Supp. 3d, at 656; 980 F. 3d, at 173–174. The interests that respondents seek, though plainly worthy, are inescapably imponderable.

Second, respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue. To achieve the educational benefits of diversity, UNC works to avoid the underrepresentation of minority groups, 567 F. Supp. 3d, at 591–592, and n. 7, while Harvard likewise "guard[s] against inadvertent drop-offs in representation" of certain minority groups from year to year, Brief for Respondent in No. 20–1199, at 16. To accomplish both of those goals, in turn, the universities measure the racial composition of their classes using the following categories: (1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American. See, *e.g.*, 397

F. Supp. 3d, at 137, 178; 3 App. in No. 20–1199, at 1278, 1280–1283; 3 App. in No. 21–707, at 1234–1241. It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.

For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as "Hispanic," are arbitrary or undefined. See, *e.g.*, M. Lopez, J. Krogstad, & J. Passel, Pew Research Center, Who is Hispanic? (Sept. 15, 2022) (referencing the "long history of changing labels [and] shifting categories . . . reflect[ing] evolving cultural norms about what it means to be Hispanic or Latino in the U. S. today"). And still other categories are underinclusive. When asked at oral argument "how are applicants from Middle Eastern countries classified, [such as] Jordan, Iraq, Iran, [and] Egypt," UNC's counsel responded, "[I] do not know the answer to that question." Tr. of Oral Arg. in No. 21–707, p. 107; cf. *post*, at 6–7 (GORSUCH, J., concurring) (detailing the "incoherent" and "irrational stereotypes" that these racial categories further).

Indeed, the use of these opaque racial categories undermines, instead of promotes, respondents' goals. By focusing on underrepresentation, respondents would apparently prefer a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply because the former contains more Hispanic students than the latter. Yet "[i]t is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is 'broadly

diverse.'" *Parents Involved*, 551 U. S., at 724 (quoting *Grutter*, 539 U. S., at 329). And given the mismatch between the means respondents employ and the goals they seek, it is especially hard to understand how courts are supposed to scrutinize the admissions programs that respondents use.

The universities' main response to these criticisms is, essentially, "trust us." None of the questions recited above need answering, they say, because universities are "owed deference" when using race to benefit some applicants but not others. Brief for University Respondents in No. 21–707, at 39 (internal quotation marks omitted). It is true that our cases have recognized a "tradition of giving a degree of deference to a university's academic decisions." *Grutter*, 539 U. S., at 328. But we have been unmistakably clear that any deference must exist "within constitutionally prescribed limits," *ibid.*, and that "deference does not imply abandonment or abdication of judicial review," *Miller–El* v. *Cockrell*, 537 U. S. 322, 340 (2003). Universities may define their missions as they see fit. The Constitution defines ours. Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. As this Court has repeatedly reaffirmed, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Gratz* v. *Bollinger*, 539 U. S. 244, 270 (2003) (internal quotation marks omitted). The programs at issue here do not satisfy that standard.[5]

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[5] For that reason, one dissent candidly advocates abandoning the demands of strict scrutiny. See *post*, at 24, 26–28 (opinion of JACKSON, J.) (arguing the Court must "get out of the way," "leav[e] well enough alone," and defer to universities and "experts" in determining who should be discriminated against). An opinion professing fidelity to history (to say nothing of the law) should surely see the folly in that approach.

B

The race-based admissions systems that respondents employ also fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a "negative" and that it may not operate as a stereotype.

First, our cases have stressed that an individual's race may never be used against him in the admissions process. Here, however, the First Circuit found that Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard. 980 F. 3d, at 170, n. 29. And the District Court observed that Harvard's "policy of considering applicants' race . . . overall results in fewer Asian American and white students being admitted." 397 F. Supp. 3d, at 178.

Respondents nonetheless contend that an individual's race is never a negative factor in their admissions programs, but that assertion cannot withstand scrutiny. Harvard, for example, draws an analogy between race and other factors it considers in admission. "[W]hile admissions officers may give a preference to applicants likely to excel in the Harvard-Radcliffe Orchestra," Harvard explains, "that does not mean it is a 'negative' not to excel at a musical instrument." Brief for Respondent in No. 20–1199, at 51. But on Harvard's logic, while it gives preferences to applicants with high grades and test scores, "that does not mean it is a 'negative'" to be a student with lower grades and lower test scores. *Ibid.* This understanding of the admissions process is hard to take seriously. College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.

Respondents also suggest that race is not a negative factor because it does not impact many admissions decisions. See *id.*, at 49; Brief for University Respondents in No. 21–707, at 2. Yet, at the same time, respondents also maintain that the demographics of their admitted classes would

meaningfully change if race-based admissions were abandoned. And they acknowledge that race is determinative for at least some—if not many—of the students they admit. See, *e.g.*, Tr. of Oral Arg. in No. 20–1199, at 67; 567 F. Supp. 3d, at 633. How else but "negative" can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been? The "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley*, 334 U. S., at 22.[6]

Respondents' admissions programs are infirm for a second reason as well. We have long held that universities may not operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U. S., at 333 (internal quotation marks omitted). That requirement is found throughout our Equal Protection Clause jurisprudence more generally. See, *e.g.*, *Schuette* v. *BAMN*, 572 U. S. 291, 308 (2014) (plurality opinion) ("In cautioning against 'impermissible racial stereotypes,' this Court has rejected the assumption that 'members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike . . . .'" (quoting *Shaw* v. *Reno*, 509 U. S.

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[6]JUSTICE JACKSON contends that race does not play a "determinative role for applicants" to UNC. *Post*, at 24. But even the principal dissent acknowledges that race—and race alone—explains the admissions decisions for hundreds if not thousands of applicants to UNC each year. *Post*, at 33, n. 28 (opinion of SOTOMAYOR, J.); see also *Students for Fair Admissions, Inc.* v. *University of N. C. at Chapel Hill*, No. 1:14–cv–954 (MDNC, Dec. 21, 2020), ECF Doc. 233, at 23–27 (UNC expert testifying that race explains 1.2% of in state and 5.1% of out of state admissions decisions); 3 App. in No. 21–707, at 1069 (observing that UNC evaluated 57,225 in state applicants and 105,632 out of state applicants from 2016–2021). The suggestion by the principal dissent that our analysis relies on extra-record materials, see *post*, at 29–30, n. 25 (opinion of SOTOMAYOR, J.), is simply mistaken.

630, 647 (1993))).

Yet by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping. The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that "a black student can usually bring something that a white person cannot offer." *Bakke*, 438 U. S., at 316 (opinion of Powell, J.) (internal quotation marks omitted); see also Tr. of Oral Arg. in No. 20–1199, at 92. UNC is much the same. It argues that race in itself "says [something] about who you are." Tr. of Oral Arg. in No. 21–707, at 97; see also *id.*, at 96 (analogizing being of a certain race to being from a rural area).

We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those "who may have little in common with one another but the color of their skin." *Shaw*, 509 U. S., at 647. The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.

"One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice*, 528 U. S., at 517. But when a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike," *Miller* v. *Johnson*, 515 U. S. 900, 911–912 (1995) (internal quotation marks omitted)—at the very least alike in the sense of being different from nonminority students. In

doing so, the university furthers "stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id.*, at 912 (internal quotation marks omitted). Such stereotyping can only "cause[] continued hurt and injury," *Edmonson*, 500 U. S., at 631, contrary as it is to the "core purpose" of the Equal Protection Clause, *Palmore*, 466 U. S., at 432.

C

If all this were not enough, respondents' admissions programs also lack a "logical end point." *Grutter*, 539 U. S., at 342.

Respondents and the Government first suggest that respondents' race-based admissions programs will end when, in their absence, there is "meaningful representation and meaningful diversity" on college campuses. Tr. of Oral Arg. in No. 21–707, at 167. The metric of meaningful representation, respondents assert, does not involve any "strict numerical benchmark," *id.*, at 86; or "precise number or percentage," *id.*, at 167; or "specified percentage," Brief for Respondent in No. 20–1199, at 38 (internal quotation marks omitted). So what does it involve?

Numbers all the same. At Harvard, each full committee meeting begins with a discussion of "how the breakdown of the class compares to the prior year in terms of racial identities." 397 F. Supp. 3d, at 146. And "if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the Admissions Committee may decide to give additional attention to applications from students within that group." *Ibid.*; see also *id.*, at 147 (District Court finding that Harvard uses race to "trac[k] how each class is shaping up relative to previous years with an eye towards achieving a level of racial diversity"); 2 App. in No. 20–1199,

at 821–822.

The results of the Harvard admissions process reflect this numerical commitment. For the admitted classes of 2009 to 2018, black students represented a tight band of 10.0%–11.7% of the admitted pool. The same theme held true for other minority groups:

Share of Students Admitted to Harvard by Race			
	African-American Share of Class	Hispanic Share of Class	Asian-American Share of Class
Class of 2009	11%	8%	18%
Class of 2010	10%	10%	18%
Class of 2011	10%	10%	19%
Class of 2012	10%	9%	19%
Class of 2013	10%	11%	17%
Class of 2014	11%	9%	20%
Class of 2015	12%	11%	19%
Class of 2016	10%	9%	20%
Class of 2017	11%	10%	20%
Class of 2018	12%	12%	19%

Brief for Petitioner in No. 20–1199 etc., p. 23. Harvard's focus on numbers is obvious.[7]

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[7]The principal dissent claims that "[t]he fact that Harvard's racial shares of admitted applicants varies relatively little . . . is unsurprising and reflects the fact that the racial makeup of Harvard's applicant pool also varies very little over this period." *Post*, at 35 (opinion of SOTOMAYOR, J.) (internal quotation marks omitted). But that is exactly the point: Harvard must use precise racial preferences year in and year out to maintain the unyielding demographic composition of its class. The dissent is thus left to attack the numbers themselves, arguing they were "handpicked" "from a truncated period." *Ibid.*, n. 29 (opinion of SOTOMAYOR, J.). As supposed proof, the dissent notes that the share of

UNC's admissions program operates similarly. The University frames the challenge it faces as "the admission and enrollment of underrepresented minorities," Brief for University Respondents in No. 21–707, at 7, a metric that turns solely on whether a group's "percentage enrollment within the undergraduate student body is lower than their percentage within the general population in North Carolina," 567 F. Supp. 3d, at 591, n. 7; see also Tr. of Oral Arg. in No. 21–707, at 79. The University "has not yet fully achieved its diversity-related educational goals," it explains, in part due to its failure to obtain closer to proportional representation. Brief for University Respondents in No. 21–707, at 7; see also 567 F. Supp. 3d, at 594.

The problem with these approaches is well established. "[O]utright racial balancing" is "patently unconstitutional." *Fisher I*, 570 U. S., at 311 (internal quotation marks omitted). That is so, we have repeatedly explained, because "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller,* 515 U. S., at 911 (internal quotation marks omitted). By promising to terminate their use of race only when some rough percentage of various racial groups is admitted, respondents turn that principle on its head. Their admissions programs "effectively assure[] that race will always be relevant . . . and that the ultimate goal of eliminating" race as a criterion "will never be achieved." *Croson*, 488 U. S., at 495 (internal

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Asian students at Harvard varied significantly from 1980 to 1994—a 14-year period that ended nearly three decades ago. 4 App. in No. 20–1199, at 1770. But the relevance of that observation—handpicked and truncated as it is—is lost on us. And the dissent does not and cannot dispute that the share of black and Hispanic students at Harvard—"the primary beneficiaries" of its race-based admissions policy—has remained consistent for decades. 397 F. Supp. 3d, at 178; 4 App. in No. 20–1199, at 1770. For all the talk of holistic and contextual judgments, the racial preferences at issue here in fact operate like clockwork.

quotation marks omitted).

Respondents' second proffered end point fares no better. Respondents assert that universities will no longer need to engage in race-based admissions when, in their absence, students nevertheless receive the educational benefits of diversity. But as we have already explained, it is not clear how a court is supposed to determine when stereotypes have broken down or "productive citizens and leaders" have been created. 567 F. Supp. 3d, at 656. Nor is there any way to know whether those goals would adequately be met in the absence of a race-based admissions program. As UNC itself acknowledges, these "qualitative standard[s]" are "difficult to measure." Tr. of Oral Arg. in No. 21–707, at 78; but see *Fisher II*, 579 U. S., at 381 (requiring race-based admissions programs to operate in a manner that is "sufficiently measurable").

Third, respondents suggest that race-based preferences must be allowed to continue for at least five more years, based on the Court's statement in *Grutter* that it "expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary." 539 U. S., at 343. The 25-year mark articulated in *Grutter*, however, reflected only that Court's view that race-based preferences would, by 2028, be unnecessary to ensure a requisite level of racial diversity on college campuses. *Ibid.* That expectation was oversold. Neither Harvard nor UNC believes that race-based admissions will in fact be unnecessary in five years, and both universities thus expect to continue using race as a criterion well beyond the time limit that *Grutter* suggested. See Tr. of Oral Arg. in No. 20–1199, at 84–85; Tr. of Oral Arg. in No. 21–707, at 85–86. Indeed, the high school applicants that Harvard and UNC will evaluate this fall using their race-based admissions systems are expected to graduate in 2028—25 years after *Grutter* was decided.

Finally, respondents argue that their programs need not have an end point at all because they frequently review

them to determine whether they remain necessary. See Brief for Respondent in No. 20–1199, at 52; Brief for University Respondents in No. 21–707, at 58–59. Respondents point to language in *Grutter* that, they contend, permits "the durational requirement [to] be met" with "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." 539 U. S., at 342. But *Grutter* never suggested that periodic review could make unconstitutional conduct constitutional. To the contrary, the Court made clear that race-based admissions programs eventually had to end—despite whatever periodic review universities conducted. *Ibid.*; see also *supra*, at 18.

Here, however, Harvard concedes that its race-based admissions program has no end point. Brief for Respondent in No. 20–1199, at 52 (Harvard "has not set a sunset date" for its program (internal quotation marks omitted)). And it acknowledges that the way it thinks about the use of race in its admissions process "is the same now as it was" nearly 50 years ago. Tr. of Oral Arg. in No. 20–1199, at 91. UNC's race-based admissions program is likewise not set to expire any time soon—nor, indeed, any time at all. The University admits that it "has not set forth a proposed time period in which it believes it can end all race-conscious admissions practices." 567 F. Supp. 3d, at 612. And UNC suggests that it might soon use race to a *greater* extent than it currently does. See Brief for University Respondents in No. 21–707, at 57. In short, there is no reason to believe that respondents will—even acting in good faith—comply with the Equal Protection Clause any time soon.

V

The dissenting opinions resist these conclusions. They would instead uphold respondents' admissions programs based on their view that the Fourteenth Amendment permits state actors to remedy the effects of societal discrimination through explicitly race-based measures. Although

both opinions are thorough and thoughtful in many respects, this Court has long rejected their core thesis.

The dissents' interpretation of the Equal Protection Clause is not new. In *Bakke*, four Justices would have permitted race-based admissions programs to remedy the effects of societal discrimination. 438 U. S., at 362 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). But that minority view was just that—a minority view. Justice Powell, who provided the fifth vote and controlling opinion in *Bakke*, firmly rejected the notion that societal discrimination constituted a compelling interest. Such an interest presents "an amorphous concept of injury that may be ageless in its reach into the past," he explained. *Id.*, at 307. It cannot "justify a [racial] classification that imposes disadvantages upon persons . . . who bear no responsibility for whatever harm the beneficiaries of the [race-based] admissions program are thought to have suffered." *Id.*, at 310.

The Court soon adopted Justice Powell's analysis as its own. In the years after *Bakke*, the Court repeatedly held that ameliorating societal discrimination does not constitute a compelling interest that justifies race-based state action. "[A]n effort to alleviate the effects of societal discrimination is not a compelling interest," we said plainly in *Hunt*, a 1996 case about the Voting Rights Act. 517 U. S., at 909–910. We reached the same conclusion in *Croson*, a case that concerned a preferential government contracting program. Permitting "past societal discrimination" to "serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group." 488 U. S., at 505. Opening that door would shutter another—"[t]he dream of a Nation of equal citizens . . . would be lost," we observed, "in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." *Id.*, at 505–506. "[S]uch a result would be contrary to both the letter and spirit of a

constitutional provision whose central command is equality." *Id.*, at 506.

The dissents here do not acknowledge any of this. They fail to cite *Hunt*. They fail to cite *Croson*. They fail to mention that the entirety of their analysis of the Equal Protection Clause—the statistics, the cases, the history—has been considered and rejected before. There is a reason the principal dissent must invoke Justice Marshall's partial dissent in *Bakke* nearly a dozen times while mentioning Justice Powell's controlling opinion barely once (JUSTICE JACKSON's opinion ignores Justice Powell altogether). For what one dissent denigrates as "rhetorical flourishes about colorblindness," *post*, at 14 (opinion of SOTOMAYOR, J.), are in fact the proud pronouncements of cases like *Loving* and *Yick Wo*, like *Shelley* and *Bolling*—they are defining statements of law. We understand the dissents want that law to be different. They are entitled to that desire. But they surely cannot claim the mantle of *stare decisis* while pursuing it.[8]

The dissents are no more faithful to our precedent on race-based admissions. To hear the principal dissent tell it, *Grutter* blessed such programs indefinitely, until "racial inequality will end." *Post*, at 54 (opinion of SOTOMAYOR, J.). But *Grutter* did no such thing. It emphasized—not once or twice, but at least six separate times—that race-based ad-

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[8] Perhaps recognizing as much, the principal dissent at one point attempts to press a different remedial rationale altogether, stating that both respondents "have sordid legacies of racial exclusion." *Post*, at 21 (opinion of SOTOMAYOR, J.). Such institutions should perhaps be the very *last* ones to be allowed to make race-based decisions, let alone be accorded deference in doing so. In any event, neither university defends its admissions system as a remedy for past discrimination—their own or anyone else's. See Tr. of Oral Arg. in No. 21–707, at 90 ("[W]e're not pursuing any sort of remedial justification for our policy."). Nor has any decision of ours permitted a remedial justification for race-based college admissions. Cf. *Bakke*, 438 U. S., at 307 (opinion of Powell, J.).

missions programs "must have reasonable durational limits" and that their "deviation from the norm of equal treatment" must be "a temporary matter." 539 U. S., at 342. The Court also disclaimed "[e]nshrining a permanent justification for racial preferences." *Ibid.* Yet the justification for race-based admissions that the dissent latches on to is just that—unceasing.

The principal dissent's reliance on *Fisher II* is similarly mistaken. There, by a 4-to-3 vote, the Court upheld a "*sui generis*" race-based admissions program used by the University of Texas, 579 U. S., at 377, whose "goal" it was to enroll a "critical mass" of certain minority students, *Fisher I*, 570 U. S., at 297. But neither Harvard nor UNC claims to be using the critical mass concept—indeed, the universities admit they do not even know what it means. See 1 App. in No. 21–707, at 402 ("[N]o one has directed anybody to achieve a critical mass, and I'm not even sure we would know what it is." (testimony of UNC administrator)); 3 App. in No. 20–1199, at 1137–1138 (similar testimony from Harvard administrator).

Fisher II also recognized the "enduring challenge" that race-based admissions systems place on "the constitutional promise of equal treatment." 579 U. S., at 388. The Court thus reaffirmed the "continuing obligation" of universities "to satisfy the burden of strict scrutiny." *Id.*, at 379. To drive the point home, *Fisher II* limited itself just as *Grutter* had—in duration. The Court stressed that its decision did "*not* necessarily mean the University may rely on the same policy" going forward. 579 U. S., at 388 (emphasis added); see also *Fisher I*, 570 U. S., at 313 (recognizing that "*Grutter* . . . approved the plan at issue upon concluding that it . . . was limited in time"). And the Court openly acknowl-

edged that its decision offered limited "prospective guidance." *Fisher II*, 579 U. S., at 379.[9]

The principal dissent wrenches our case law from its context, going to lengths to ignore the parts of that law it does not like. The serious reservations that *Bakke*, *Grutter*, and *Fisher* had about racial preferences go unrecognized. The unambiguous requirements of the Equal Protection Clause—"the most rigid," "searching" scrutiny it entails—go without note. *Fisher I*, 570 U. S., at 310. And the repeated demands that race-based admissions programs must end go overlooked—contorted, worse still, into a demand that such programs never stop.

Most troubling of all is what the dissent must make these omissions to defend: a judiciary that picks winners and losers based on the color of their skin. While the dissent would certainly not permit university programs that discriminated *against* black and Latino applicants, it is perfectly willing to let the programs here continue. In its view, this Court is supposed to tell state actors when they have picked the right races to benefit. Separate but equal is "*inherently* unequal," said *Brown*. 347 U. S., at 495 (emphasis added). It depends, says the dissent.

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[9]The principal dissent rebukes the Court for not considering adequately the reliance interests respondents and other universities had in *Grutter*. But as we have explained, *Grutter* itself limited the reliance that could be placed upon it by insisting, over and over again, that race-based admissions programs be limited in time. See *supra*, at 20. *Grutter* indeed went so far as to suggest a specific period of reliance—25 years—precluding the indefinite reliance interests that the dissent articulates. Cf. *post*, at 2–4 (KAVANAUGH, J., concurring). Those interests are, moreover, vastly overstated on their own terms. Three out of every five American universities do *not* consider race in their admissions decisions. See Brief for Respondent in No. 20–1199, p. 40. And several States—including some of the most populous (California, Florida, and Michigan)—have prohibited race-based admissions outright. See Brief for Oklahoma et al. as *Amici Curiae* 9, n. 6.

That is a remarkable view of the judicial role—remarkably wrong. Lost in the false pretense of judicial humility that the dissent espouses is a claim to power so radical, so destructive, that it required a Second Founding to undo. "Justice Harlan knew better," one of the dissents decrees. *Post*, at 5 (opinion of JACKSON, J.). Indeed he did:

> "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy*, 163 U. S., at 559 (Harlan, J., dissenting).

VI

For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today.

At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. See, *e.g.*, 4 App. in No. 21–707, at 1725–1726, 1741; Tr. of Oral Arg. in No. 20–1199, at 10. But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. (A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.) "[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows," and the prohibition against racial discrimination is "levelled at the thing,

not the name." *Cummings* v. *Missouri*, 4 Wall. 277, 325 (1867). A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.

The judgments of the Court of Appeals for the First Circuit and of the District Court for the Middle District of North Carolina are reversed.

It is so ordered.

JUSTICE JACKSON took no part in the consideration or decision of the case in No. 20–1199.

SUPREME COURT OF THE UNITED STATES

Nos. 20–1199 and 21–707

STUDENTS FOR FAIR ADMISSIONS, INC.,
PETITIONER
20–1199 *v.*
PRESIDENT AND FELLOWS OF
HARVARD COLLEGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STUDENTS FOR FAIR ADMISSIONS, INC.,
PETITIONER
21–707 *v.*
UNIVERSITY OF NORTH CAROLINA, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 29, 2023]

JUSTICE THOMAS, concurring.

In the wake of the Civil War, the country focused its attention on restoring the Union and establishing the legal status of newly freed slaves. The Constitution was amended to abolish slavery and proclaim that all persons born in the United States are citizens, entitled to the privileges or immunities of citizenship and the equal protection of the laws. Amdts. 13, 14. Because of that second founding, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896) (Harlan, J., dissenting).

This Court's commitment to that equality principle has ebbed and flowed over time. After forsaking the principle for decades, offering a judicial *imprimatur* to segregation

and ushering in the Jim Crow era, the Court finally corrected course in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), announcing that primary schools must either desegregate with all deliberate speed or else close their doors. See also *Brown* v. *Board of Education*, 349 U. S. 294 (1955) (*Brown II*). It then pulled back in *Grutter* v. *Bollinger*, 539 U. S. 306 (2003), permitting universities to discriminate based on race in their admissions process (though only temporarily) in order to achieve alleged "educational benefits of diversity." *Id.*, at 319. Yet, the Constitution continues to embody a simple truth: Two discriminatory wrongs cannot make a right.

I wrote separately in *Grutter*, explaining that the use of race in higher education admissions decisions—regardless of whether intended to help or to hurt—violates the Fourteenth Amendment. *Id.*, at 351 (opinion concurring in part and dissenting in part). In the decades since, I have repeatedly stated that *Grutter* was wrongly decided and should be overruled. *Fisher* v. *University of Tex. at Austin*, 570 U. S. 297, 315, 328 (2013) (concurring opinion) (*Fisher I*); *Fisher* v. *University of Tex. at Austin*, 579 U. S. 365, 389 (2016) (dissenting opinion). Today, and despite a lengthy interregnum, the Constitution prevails.

Because the Court today applies genuine strict scrutiny to the race-conscious admissions policies employed at Harvard and the University of North Carolina (UNC) and finds that they fail that searching review, I join the majority opinion in full. I write separately to offer an originalist defense of the colorblind Constitution; to explain further the flaws of the Court's *Grutter* jurisprudence; to clarify that all forms of discrimination based on race—including so-called affirmative action—are prohibited under the Constitution; and to emphasize the pernicious effects of all such discrimination.

I

In the 1860s, Congress proposed and the States ratified the Thirteenth and Fourteenth Amendments. And, with the authority conferred by these Amendments, Congress passed two landmark Civil Rights Acts. Throughout the debates on each of these measures, their proponents repeatedly affirmed their view of equal citizenship and the racial equality that flows from it. In fact, they held this principle so deeply that their crowning accomplishment—the Fourteenth Amendment—ensures racial equality *with no textual reference to race whatsoever*. The history of these measures' enactment renders their motivating principle as clear as their text: All citizens of the United States, regardless of skin color, are equal before the law.

I do not contend that all of the individuals who put forth and ratified the Fourteenth Amendment universally believed this to be true. Some Members of the proposing Congress, for example, opposed the Amendment. And, the historical record—particularly with respect to the debates on ratification in the States—is sparse. Nonetheless, substantial evidence suggests that the Fourteenth Amendment was passed to "establis[h] the broad constitutional principle of full and complete equality of all persons under the law," forbidding "all legal distinctions based on race or color." Supp. Brief for United States on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1 etc., p. 115 (U. S. *Brown* Reargument Brief).

This was Justice Harlan's view in his lone dissent in *Plessy*, where he observed that "[o]ur Constitution is color-blind." 163 U. S., at 559. It was the view of the Court in *Brown*, which rejected "'any authority . . . to use race as a factor in affording educational opportunities.'" *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 747 (2007). And, it is the view adopted in the Court's opinion today, requiring "the absolute equality of all citizens" under the law. *Ante*, at 10 (internal quotation

marks omitted).

A

In its 1864 election platform, the Republican Party pledged to amend the Constitution to accomplish the "utter and complete extirpation" of slavery from "the soil of the Republic." 2 A. Schlesinger, History of U. S. Political Parties 1860–1910, p. 1303 (1973). After their landslide victory, Republicans quickly moved to make good on that promise. Congress proposed what would become the Thirteenth Amendment to the States in January 1865, and it was ratified as part of the Constitution later that year. The new Amendment stated that "[n]either slavery nor involuntary servitude . . . shall exist" in the United States "except as a punishment for crime whereof the party shall have been duly convicted." §1. It thus not only prohibited States from themselves enslaving persons, but also obligated them to end enslavement by private individuals within their borders. Its Framers viewed the text broadly, arguing that it "allowed Congress to legislate not merely against slavery itself, but against all the badges and relics of a slave system." A. Amar, America's Constitution: A Biography 362 (2005) (internal quotation marks omitted). The Amendment also authorized "Congress . . . to enforce" its terms "by appropriate legislation"—authority not granted in any prior Amendment. §2. Proponents believed this enforcement clause permitted legislative measures designed to accomplish the Amendment's broader goal of equality for the freedmen.

It quickly became clear, however, that further amendment would be necessary to safeguard that goal. Soon after the Thirteenth Amendment's adoption, the reconstructed Southern States began to enact "Black Codes," which circumscribed the newly won freedoms of blacks. The Black Code of Mississippi, for example, "imposed all sorts of disabilities" on blacks, "including limiting their freedom of

movement and barring them from following certain occupations, owning firearms, serving on juries, testifying in cases involving whites, or voting." E. Foner, The Second Founding 48 (2019).

Congress responded with the landmark Civil Rights Act of 1866, 14 Stat. 27, in an attempt to pre-empt the Black Codes. The 1866 Act promised such a sweeping form of equality that it would lead many to say that it exceeded the scope of Congress' authority under the Thirteenth Amendment. As enacted, it stated:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The text of the provision left no doubt as to its aim: All persons born in the United States were equal citizens entitled to the same rights and subject to the same penalties as white citizens in the categories enumerated. See M. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 958 (1995) ("Note that the bill neither

forbade racial discrimination generally nor did it guarantee particular rights to all persons. Rather, it required an equality in certain specific rights"). And, while the 1866 Act used the rights of "white citizens" as a benchmark, its rule was decidedly colorblind, safeguarding legal equality for *all* citizens "of every race and color" and providing the same rights to all.

The 1866 Act's evolution further highlights its rule of equality. To start, *Dred Scott* v. *Sandford*, 19 How. 393 (1857), had previously held that blacks "were not regarded as a portion of the people or citizens of the Government" and "had no rights which the white man was bound to respect." *Id.*, at 407, 411. The Act, however, would effectively overrule *Dred Scott* and ensure the equality that had been promised to blacks. But the Act went further still. On January 29, 1866, Senator Lyman Trumbull, the bill's principal sponsor in the Senate, proposed text stating that "all persons of African descent born in the United States are hereby declared to be citizens." Cong. Globe, 39th Cong., 1st Sess., 474. The following day, Trumbull revised his proposal, removing the reference to "African descent" and declaring more broadly that "all persons born in the United States, and not subject to any foreign Power," are "citizens of the United States." *Id.*, at 498.

"In the years before the Fourteenth Amendment's adoption, jurists and legislators often connected citizenship with equality," where "the absence or presence of one entailed the absence or presence of the other." *United States* v. *Vaello Madero*, 596 U. S. ___, ___ (2022) (THOMAS, J., concurring) (slip op., at 6). The addition of a citizenship guarantee thus evidenced an intent to broaden the provision, extending beyond recently freed blacks and incorporating a more general view of equality for *all* Americans. Indeed, the drafters later included a specific carveout for "Indians not taxed," demonstrating the breadth of the bill's other-

wise general citizenship language. 14 Stat. 27.[1] As Trumbull explained, the provision created a bond between all Americans; "any statute which is not equal to *all*, and which deprives any citizen of civil rights which are secured to other citizens," was "an unjust encroachment upon his liberty" and a "badge of servitude" prohibited by the Constitution. Cong. Globe, 39th Cong., 1st Sess., at 474 (emphasis added).

Trumbull and most of the Act's other supporters identified the Thirteenth Amendment as a principal source of constitutional authority for the Act's nondiscrimination provisions. See, *e.g.*, *id.*, at 475 (statement of Sen. Trumbull); *id.*, at 1152 (statement of Rep. Thayer); *id.*, at 503–504 (statement of Sen. Howard). In particular, they explained that the Thirteenth Amendment allowed Congress not merely to legislate against slavery itself, but also to counter measures "which depriv[e] any citizen of civil rights which are secured to other citizens." *Id.*, at 474.

But opponents argued that Congress' authority did not sweep so broadly. President Andrew Johnson, for example, contended that Congress lacked authority to pass the measure, seizing on the breadth of the citizenship text and emphasizing state authority over matters of state citizenship. See S. Doc. No. 31, 39th Cong., 1st Sess., 1, 6 (1866) (Johnson veto message). Consequently, "doubts about the constitutional authority conferred by that measure led supporters to supplement their Thirteenth Amendment arguments with other sources of constitutional authority." R. Williams, Originalism and the Other Desegregation Decision, 99 Va. L. Rev. 493, 532–533 (2013) (describing appeals to the naturalization power and the inherent power to protect

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[1] In fact, Indians would not be considered citizens until several decades later. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (declaring that all Indians born in the United States are citizens).

the rights of citizens). As debates continued, it became increasingly apparent that safeguarding the 1866 Act, including its promise of black citizenship and the equal rights that citizenship entailed, would require further submission to the people of the United States in the form of a proposed constitutional amendment. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., at 498 (statement of Sen. Van Winkle).

B

Critically, many of those who believed that Congress lacked the authority to enact the 1866 Act also supported the principle of racial equality. So, almost immediately following the ratification of the Thirteenth Amendment, several proposals for further amendments were submitted in Congress. One such proposal, approved by the Joint Committee on Reconstruction and then submitted to the House of Representatives on February 26, 1866, would have declared that "[t]he Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." *Id.*, at 1033–1034. Representative John Bingham, its drafter, was among those who believed Congress lacked the power to enact the 1866 Act. See *id.*, at 1291. Specifically, he believed the "very letter of the Constitution" already required equality, but the enforcement of that requirement "is of the reserved powers of the States." Cong. Globe, 39th Cong., 1st Sess., at 1034, 1291 (statement of Rep. Bingham). His proposed constitutional amendment accordingly would provide a clear constitutional basis for the 1866 Act and ensure that future Congresses would be unable to repeal it. See W. Nelson, The Fourteenth Amendment 48–49 (1988).

Discussion of Bingham's initial draft was later postponed in the House, but the Joint Committee on Reconstruction

continued its work. See 2 K. Lash, The Reconstruction Amendments 8 (2021). In April, Representative Thaddeus Stevens proposed to the Joint Committee an amendment that began, "[n]o discrimination shall be made by any State nor by the United States as to the civil rights of persons because of race, color, or previous condition of servitude." S. Doc. No. 711, 63d Cong., 1st Sess., 31–32 (1915) (reprinting the Journal of the Joint Committee on Reconstruction for the Thirty-Ninth Congress). Stevens' proposal was later revised to read as follows: "'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'" *Id.*, at 39. This revised text was submitted to the full House on April 30, 1866. Cong. Globe, 39th Cong., 1st Sess., at 2286–2287. Like the eventual first section of the Fourteenth Amendment, this proposal embodied the familiar Privileges or Immunities, Due Process, and Equal Protection Clauses. And, importantly, it also featured an enforcement clause—with text borrowed from the Thirteenth Amendment—conferring upon Congress the power to enforce its provisions. *Ibid.*

Stevens explained that the draft was intended to "allo[w] Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all." *Id.*, at 2459. Moreover, Stevens' later statements indicate that he did not believe there was a difference "in substance between the new proposal and" earlier measures calling for impartial and equal treatment without regard to race. U. S. *Brown* Reargument Brief 44 (noting a distinction only with respect to a suffrage provision). And, Bingham argued that the need for the proposed text was "one of the lessons that have been taught . . . by the history of the past four years of terrific conflict" during the Civil War. Cong. Globe, 39th Cong., 1st Sess., at 2542.

The proposal passed the House by a vote of 128 to 37. *Id.*, at 2545.

Senator Jacob Howard introduced the proposed Amendment in the Senate, powerfully asking, "Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government, and both equally responsible to justice and to God for the deeds done in the body?" *Id.*, at 2766. In keeping with this view, he proposed an introductory sentence, declaring that "'all persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.'" *Id.*, at 2869. This text, the Citizenship Clause, was the final missing element of what would ultimately become §1 of the Fourteenth Amendment. Howard's draft for the proposed citizenship text was modeled on the Civil Rights Act of 1866's text, and he suggested the alternative language to "remov[e] all doubt as to what persons are or are not citizens of the United States," a question which had "long been a great desideratum in the jurisprudence and legislation of this country." *Id.*, at 2890. He further characterized the addition as "simply declaratory of what I regard as the law of the land already." *Ibid.*

The proposal was approved in the Senate by a vote of 33 to 11. *Id.*, at 3042. The House then reconciled differences between the two measures, approving the Senate's changes by a vote of 120 to 32. See *id.*, at 3149. And, in June 1866, the amendment was submitted to the States for their consideration and ratification. Two years later, it was ratified by the requisite number of States and became the Fourteenth Amendment to the United States Constitution. See 15 Stat. 706–707; *id.*, at 709–711. Its opening words instilled in our Nation's Constitution a new birth of freedom:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." §1.

As enacted, the text of the Fourteenth Amendment provides a firm statement of equality before the law. It begins by guaranteeing citizenship status, invoking the "longstanding political and legal tradition that closely associated the status of citizenship with the entitlement to legal equality." *Vaello Madero*, 596 U. S., at ___ (THOMAS, J., concurring) (slip op., at 6) (internal quotation marks omitted). It then confirms that States may not "abridge the rights of national citizenship, including whatever civil equality is guaranteed to 'citizens' under the Citizenship Clause." *Id.*, at ___, n. 3 (slip op., at 13, n. 3). Finally, it pledges that even noncitizens must be treated equally "as individuals, and not as members of racial, ethnic, or religious groups." *Missouri* v. *Jenkins*, 515 U. S. 70, 120–121 (1995) (THOMAS, J., concurring).

The drafters and ratifiers of the Fourteenth Amendment focused on this broad equality idea, offering surprisingly little explanation of which term was intended to accomplish which part of the Amendment's overall goal. "The available materials . . . show," however, "that there were widespread expressions of a general understanding of the broad scope of the Amendment similar to that abundantly demonstrated in the Congressional debates, namely, that the first section of the Amendment would establish the full constitutional right of all persons to equality before the law and would prohibit legal distinctions based on race or color."

U. S. *Brown* Reargument Brief 65 (citation omitted). For example, the Pennsylvania debate suggests that the Fourteenth Amendment was understood to make the law "what justice is represented to be, blind" to the "color of [one's] skin." App. to Pa. Leg. Record XLVIII (1867) (Rep. Mann).

The most commonly held view today—consistent with the rationale repeatedly invoked during the congressional debates, see, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., at 2458–2469—is that the Amendment was designed to remove any doubts regarding Congress' authority to enact the Civil Rights Act of 1866 and to establish a nondiscrimination rule that could not be repealed by future Congresses. See, *e.g.*, J. Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L. J. 1385, 1388 (1992) (noting that the "primary purpose" of the Fourteenth Amendment "was to mandate certain rules of racial equality, especially those contained in Section 1 of the Civil Rights Act of 1866").[2] The Amendment's phrasing supports this view, and there does not appear to have been any argument to the contrary predating *Brown*.

Consistent with the Civil Rights Act of 1866's aim, the Amendment definitively overruled Chief Justice Taney's opinion in *Dred Scott* that blacks "were not regarded as a portion of the people or citizens of the Government" and "had no rights which the white man was bound to respect." 19 How., at 407, 411. And, like the 1866 Act, the Amendment also clarified that American citizenship conferred

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[2] There is "some support" in the history of enactment for at least "four interpretations of the first section of the proposed amendment, and in particular of its Privileges [or] Immunities Clause: it would authorize Congress to enforce the Privileges and Immunities Clause of Article IV; it would forbid discrimination between citizens with respect to fundamental rights; it would establish a set of basic rights that all citizens must enjoy; and it would make the Bill of Rights applicable to the states." D. Currie, The Reconstruction Congress, 75 U. Chi. L. Rev. 383, 406 (2008) (citing sources). Notably, those four interpretations are all color-blind.

rights not just against the Federal Government but also the government of the citizen's State of residence. Unlike the Civil Rights Act, however, the Amendment employed a wholly race-neutral text, extending privileges or immunities to all "citizens"—even if its practical effect was to provide all citizens with the same privileges then enjoyed by whites. That citizenship guarantee was often linked with the concept of equality. *Vaello Madero*, 596 U. S., at ___ (THOMAS, J., concurring) (slip op., at 10). Combining the citizenship guarantee with the Privileges or Immunities Clause and the Equal Protection Clause, the Fourteenth Amendment ensures protection for all equal citizens of the Nation without regard to race. Put succinctly, "[o]ur Constitution is color-blind." *Plessy*, 163 U. S., at 559 (Harlan, J., dissenting).

C

In the period closely following the Fourteenth Amendment's ratification, Congress passed several statutes designed to enforce its terms, eliminating government-based Black Codes—systems of government-imposed segregation—and criminalizing racially motivated violence. The marquee legislation was the Civil Rights Act of 1875, ch. 114, 18 Stat. 335–337, and the justifications offered by proponents of that measure are further evidence for the color-blind view of the Fourteenth Amendment.

The Civil Rights Act of 1875 sought to counteract the systems of racial segregation that had arisen in the wake of the Reconstruction era. Advocates of so-called separate-but-equal systems, which allowed segregated facilities for blacks and whites, had argued that laws permitting or requiring such segregation treated members of both races precisely alike: Blacks could not attend a white school, but symmetrically, whites could not attend a black school. See *Plessy*, 163 U. S., at 544 (arguing that, in light of the social

circumstances at the time, racial segregation did not "necessarily imply the inferiority of either race to the other"). Congress was not persuaded. Supporters of the soon-to-be 1875 Act successfully countered that symmetrical restrictions did not constitute equality, and they did so on colorblind terms.

For example, they asserted that "free government demands the abolition of all distinctions founded on color and race." 2 Cong. Rec. 4083 (1874). And, they submitted that "[t]he time has come when all distinctions that grew out of slavery ought to disappear." Cong. Globe, 42d Cong., 2d Sess., 3193 (1872) ("[A]s long as you have distinctions and discriminations between white and black in the enjoyment of legal rights and privileges[,] you will have discontent and parties divided between black and white"). Leading Republican Senator Charles Sumner compellingly argued that "any rule excluding a man on account of his color is an indignity, an insult, and a wrong." *Id.*, at 242; see also *ibid.* ("I insist that by the law of the land all persons without distinction of color shall be equal before the law"). Far from conceding that segregation would be perceived as inoffensive if race roles were reversed, he declared that "[t]his is plain oppression, which you . . . would feel keenly were it directed against you or your child." *Id.*, at 384. He went on to paraphrase the English common-law rule to which he subscribed: "[The law] makes no discrimination on account of color." *Id.*, at 385.

Others echoed this view. Representative John Lynch declared that "[t]he duty of the law-maker is to know no race, no color, no religion, no nationality, except to prevent distinctions on any of these grounds, so far as the law is concerned." 3 Cong. Rec. 945 (1875). Senator John Sherman believed that the route to peace was to "[w]ipe out all legal discriminations between white and black [and] make no distinction between black and white." Cong. Globe, 42d Cong., 2d Sess., at 3193. And, Senator Henry Wilson

sought to "make illegal all distinctions on account of color" because "there should be no distinction recognized by the laws of the land." *Id.*, at 819; see also 3 Cong. Rec., at 956 (statement of Rep. Cain) ("[M]en [are] formed of God equally . . . . The civil-rights bill simply declares this: that there shall be no discriminations between citizens of this land so far as the laws of the land are concerned"). The view of the Legislature was clear: The Constitution "neither knows nor tolerates classes among citizens." *Plessy*, 163 U. S., at 559 (Harlan, J., dissenting).

D

The earliest Supreme Court opinions to interpret the Fourteenth Amendment did so in colorblind terms. Their statements characterizing the Amendment evidence its commitment to equal rights for all citizens, regardless of the color of their skin. See *ante*, at 10–11.

In the *Slaughter-House Cases*, 16 Wall. 36 (1873), the Court identified the "pervading purpose" of the Reconstruction Amendments as "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Id.*, at 67–72. Yet, the Court quickly acknowledged that the language of the Amendments did not suggest "that no one else but the negro can share in this protection." *Id.*, at 72. Rather, "[i]f Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, [the Thirteenth Amendment] may safely be trusted to make it void." *Ibid.* And, similarly, "if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent." *Ibid.*

The Court thus made clear that the Fourteenth Amendment's equality guarantee applied to members of *all* races, including Asian Americans, ensuring all citizens equal treatment under law.

Seven years later, the Court relied on the *Slaughter-House* view to conclude that "[t]he words of the [Fourteenth A]mendment . . . contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored." *Strauder* v. *West Virginia*, 100 U. S. 303, 307–308 (1880). The Court thus found that the Fourteenth Amendment banned "expres[s]" racial classifications, no matter the race affected, because these classifications are "a stimulant to . . . race prejudice." *Id.*, at 308. See also *ante*, at 10–11. Similar statements appeared in other cases decided around that time. See *Virginia* v. *Rives*, 100 U. S. 313, 318 (1880) ("The plain object of these statutes [enacted to enforce the Fourteenth Amendment], as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same"); *Ex parte Virginia*, 100 U. S. 339, 344–345 (1880) ("One great purpose of [the Thirteenth and Fourteenth Amendments] was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States").

This Court's view of the Fourteenth Amendment reached its nadir in *Plessy*, infamously concluding that the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." 163 U. S., at 544. That holding stood in sharp contrast to the Court's earlier embrace of the Fourteenth Amendment's equality

ideal, as Justice Harlan emphasized in dissent: The Reconstruction Amendments had aimed to remove "the race line from our systems of governments." *Id.*, at 563. For Justice Harlan, the Constitution was colorblind and categorically rejected laws designed to protect "a dominant race—a superior class of citizens," while imposing a "badge of servitude" on others. *Id.*, at 560–562.

History has vindicated Justice Harlan's view, and this Court recently acknowledged that *Plessy* should have been overruled immediately because it "betrayed our commitment to 'equality before the law.'" *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. ___, ___ (2022) (slip op., at 44). Nonetheless, and despite Justice Harlan's efforts, the era of state-sanctioned segregation persisted for more than a half century.

E

Despite the extensive evidence favoring the colorblind view, as detailed above, it appears increasingly in vogue to embrace an "antisubordination" view of the Fourteenth Amendment: that the Amendment forbids only laws that hurt, but not help, blacks. Such a theory lacks any basis in the original meaning of the Fourteenth Amendment. Respondents cite a smattering of federal and state statutes passed during the years surrounding the ratification of the Fourteenth Amendment. And, JUSTICE SOTOMAYOR's dissent argues that several of these statutes evidence the ratifiers' understanding that the Equal Protection Clause "permits consideration of race to achieve its goal." *Post*, at 6. Upon examination, however, it is clear that these statutes are fully consistent with the colorblind view.

Start with the 1865 Freedmen's Bureau Act. That Act established the Freedmen's Bureau to issue "provisions, clothing, and fuel . . . needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children" and the setting

"apart, for the use of loyal refugees and freedmen," abandoned, confiscated, or purchased lands, and assigning "to every male citizen, whether refugee or freedman, . . . not more than forty acres of such land." Ch. 90, §§2, 4, 13 Stat. 507. The 1866 Freedmen's Bureau Act then expanded upon the prior year's law, authorizing the Bureau to care for all loyal refugees and freedmen. Ch. 200, 14 Stat. 173–174. Importantly, however, the Acts applied to *freedmen* (and refugees), a formally race-neutral category, not blacks writ large. And, because "not all blacks in the United States were former slaves," "'freedman'" was a decidedly underinclusive proxy for race. M. Rappaport, Originalism and the Colorblind Constitution, 89 Notre Dame L. Rev. 71, 98 (2013) (Rappaport). Moreover, the Freedmen's Bureau served newly freed slaves alongside white refugees. P. Moreno, Racial Classifications and Reconstruction Legislation, 61 J. So. Hist. 271, 276–277 (1995); R. Barnett & E. Bernick, The Original Meaning of the Fourteenth Amendment 119 (2021). And, advocates of the law explicitly disclaimed any view rooted in modern conceptions of antisubordination. To the contrary, they explicitly clarified that the equality sought by the law was not one in which all men shall be "six feet high"; rather, it strove to ensure that freedmen enjoy "equal rights before the law" such that "each man shall have the right to pursue in his own way life, liberty, and happiness." Cong. Globe, 39th Cong., 1st Sess., at 322, 342.

Several additional federal laws cited by respondents appear to classify based on race, rather than previous condition of servitude. For example, an 1866 law adopted special rules and procedures for the payment of "colored" servicemen in the Union Army to agents who helped them secure bounties, pensions, and other payments that they were due. 14 Stat. 367–368. At the time, however, Congress believed that many "black servicemen were significantly overpaying for these agents' services in part because [the servicemen]

did not understand how the payment system operated." Rappaport 110; see also S. Siegel, The Federal Government's Power To Enact Color-Conscious Laws: An Originalist Inquiry, 92 Nw. U. L. Rev. 477, 561 (1998). Thus, while this legislation appears to have provided a discrete race-based benefit, its aim—to prohibit race-based exploitation—may not have been possible at the time without using a racial screen. In other words, the statute's racial classifications may well have survived strict scrutiny. See Rappaport 111–112. Another law, passed in 1867, provided funds for "freedmen or destitute colored people" in the District of Columbia. Res. of Mar. 16, 1867, No. 4, 15 Stat. 20. However, when a prior version of this law targeting only blacks was criticized for being racially discriminatory, "it was defended on the grounds that there were various places in the city where former slaves . . . lived in densely populated shantytowns." Rappaport 104–105 (citing Cong. Globe, 39th Cong., 1st Sess., at 1507). Congress thus may have enacted the measure not because of race, but rather to address a special problem in shantytowns in the District where blacks lived.

These laws—even if targeting race as such—likely were also constitutionally permissible examples of Government action "undo[ing] the effects of past discrimination in [a way] that do[es] not involve classification by race," even though they had "a racially disproportionate impact." *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 526 (1989) (Scalia, J., concurring in judgment) (internal quotation marks omitted). The government can plainly remedy a race-based injury that it has inflicted—though such remedies must be meant to further a colorblind government, not perpetuate racial consciousness. See *id.*, at 505 (majority opinion). In that way, "[r]ace-based government measures during the 1860's and 1870's to remedy *state-enforced slavery* were . . . not inconsistent with the colorblind Constitution." *Parents Involved*, 551 U. S., at 772, n. 19 (THOMAS, J., concurring).

Moreover, the very same Congress passed both these laws *and* the unambiguously worded Civil Rights Act of 1866 that clearly prohibited discrimination on the basis of race.[3] And, as noted above, the proponents of these laws explicitly sought equal rights without regard to race while disavowing any antisubordination view.

JUSTICE SOTOMAYOR argues otherwise, pointing to "a number of race-conscious" federal laws passed around the time of the Fourteenth Amendment's enactment. *Post*, at 6 (dissenting opinion). She identifies the Freedmen's Bureau Act of 1865, already discussed above, as one such law, but she admits that the programs did not benefit blacks exclusively. She also does not dispute that legislation targeting the needs of newly freed blacks in 1865 could be understood as directly remedial. Even today, nothing prevents the States from according an admissions preference to identified victims of discrimination. See *Croson*, 488 U. S., at 526 (opinion of Scalia, J.) ("While most of the beneficiaries might be black, neither the beneficiaries nor those disadvantaged by the preference would be identified *on the basis of their race*" (emphasis in original)); see also *ante*, at 39.

JUSTICE SOTOMAYOR points also to the Civil Rights Act of 1866, which as discussed above, mandated that all citizens have the same rights as those "enjoyed by white citizens." 14 Stat. 27. But these references to the station of white citizens do not refute the view that the Fourteenth Amendment is colorblind. Rather, they specify that, in meeting the Amendment's goal of equal citizenship, States must level up. The Act did not single out a group of citizens for

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[3] UNC asserts that the Freedmen's Bureau gave money to Berea College at a time when the school sought to achieve a 50–50 ratio of black to white students. Brief for University Respondents in No. 21–707, p. 32. But, evidence suggests that, at the relevant time, Berea conducted its admissions without distinction by race. S. Wilson, Berea College: An Illustrated History 2 (2006) (quoting Berea's first president's statement that the school "would welcome 'all races of men, without distinction'").

special treatment—rather, all citizens were meant to be treated the same as those who, at the time, had the full rights of citizenship. Other provisions of the 1866 Act reinforce this view, providing for equality in civil rights. See Rappaport 97. Most notably, §14 stated that the basic civil rights of citizenship shall be secured "without respect to race or color." 14 Stat. 176–177. And, §8 required that funds from land sales must be used to support schools "without distinction of color or race, . . . in the parishes of" the area where the land had been sold. *Id.*, at 175.

In addition to these federal laws, Harvard also points to two state laws: a South Carolina statute that placed the burden of proof on the defendant when a "colored or black" plaintiff claimed a violation, 1870 S. C. Acts pp. 387–388, and Kentucky legislation that authorized a county superintendent to aid "negro paupers" in Mercer County, 1871 Ky. Acts pp. 273–274. Even if these statutes provided race-based benefits, they do not support respondents' and JUSTICE SOTOMAYOR's view that the Fourteenth Amendment was contemporaneously understood to permit differential treatment based on race, prohibiting only caste legislation while authorizing antisubordination measures. Cf., *e.g.*, O. Fiss, Groups and the Equal Protection Clause, 5 Philos. & Pub. Aff. 107, 147 (1976) (articulating the antisubordination view); R. Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over *Brown*, 117 Harv. L. Rev. 1470, 1473, n. 8 (2004) (collecting scholarship). At most, these laws would support the kinds of discrete remedial measures that our precedents have permitted.

If services had been given only to white persons up to the Fourteenth Amendment's adoption, then providing those same services only to previously excluded black persons would work to equalize treatment against a concrete baseline of government-imposed inequality. It thus may have been the case that Kentucky's county-specific, race-based

public aid law was necessary because that particular county was not providing certain services to local poor blacks. Similarly, South Carolina's burden-shifting framework (where the substantive rule being applied remained notably race neutral) may have been necessary to streamline litigation around the most commonly litigated type of case: a lawsuit seeking to remedy discrimination against a member of the large population of recently freed black Americans. See 1870 S. C. Acts, at 386 (documenting "persist[ent]" racial discrimination by state-licensed entities).

Most importantly, however, there was a wide range of federal and state statutes enacted at the time of the Fourteenth Amendment's adoption and during the period thereafter that explicitly sought to discriminate *against* blacks on the basis of race or a proxy for race. See Rappaport 113–115. These laws, hallmarks of the race-conscious Jim Crow era, are precisely the sort of enactments that the Framers of the Fourteenth Amendment sought to eradicate. Yet, proponents of an antisubordination view necessarily do not take those laws as evidence of the Fourteenth Amendment's true meaning. And rightly so. Neither those laws, nor a small number of laws that appear to target blacks for preferred treatment, displace the equality vision reflected in the history of the Fourteenth Amendment's enactment. This is particularly true in light of the clear equality requirements present in the Fourteenth Amendment's text. See *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 597 U. S. ___, ___–___ (2022) (slip op., at 26–27) (noting that text controls over inconsistent postratification history).

II

Properly understood, our precedents have largely adhered to the Fourteenth Amendment's demand for color-blind laws.[4] That is why, for example, courts "must subject

[4]The Court has remarked that Title VI is coextensive with the Equal Protection Clause. See *Gratz* v. *Bollinger*, 539 U. S. 244, 276, n. 23

all racial classifications to the strictest of scrutiny." *Jenkins*, 515 U. S., at 121 (THOMAS, J., concurring); see also *ante*, at 15, n. 4 (emphasizing the consequences of an insufficiently searching inquiry). And, in case after case, we have employed strict scrutiny vigorously to reject various forms of racial discrimination as unconstitutional. See *Fisher I*, 570 U. S., at 317–318 (THOMAS, J., concurring). The Court today rightly upholds that tradition and acknowledges the consequences that have flowed from *Grutter*'s contrary approach.

Three aspects of today's decision warrant comment: First, to satisfy strict scrutiny, universities must be able to establish an actual link between racial discrimination and educational benefits. Second, those engaged in racial discrimination do not deserve deference with respect to their reasons for discriminating. Third, attempts to remedy past governmental discrimination must be closely tailored to address *that* particular past governmental discrimination.

A

To satisfy strict scrutiny, universities must be able to establish a compelling reason to racially discriminate. *Grutter* recognized "only one" interest sufficiently compelling to justify race-conscious admissions programs: the "educational benefits of a diverse student body." 539 U. S., at 328,

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(2003) ("We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI"); *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 287 (1978) (opinion of Powell, J.) ("Title VI . . . proscribe[s] only those racial classifications that would violate the Equal Protection Clause"). As JUSTICE GORSUCH points out, the language of Title VI makes no allowance for racial considerations in university admissions. See *post*, at 2–3 (concurring opinion). Though I continue to adhere to my view in *Bostock* v. *Clayton County*, 590 U. S. ___, ___–___ (2020) (ALITO, J., dissenting) (slip op., at 1–54), I agree with JUSTICE GORSUCH's concurrence in this case. The plain text of Title VI reinforces the colorblind view of the Fourteenth Amendment.

333. Expanding on this theme, Harvard and UNC have offered a grab bag of interests to justify their programs, spanning from "'training future leaders in the public and private sectors'" to "'enhancing appreciation, respect, and empathy,'" with references to "'better educating [their] students through diversity'" in between. *Ante*, at 22–23. The Court today finds that each of these interests are too vague and immeasurable to suffice, *ibid.*, and I agree.

Even in *Grutter*, the Court failed to clearly define "the educational benefits of a diverse student body." 539 U. S., at 333. Thus, in the years since *Grutter*, I have sought to understand exactly how racial diversity yields *educational* benefits. With nearly 50 years to develop their arguments, neither Harvard nor UNC—two of the foremost research institutions in the world—nor any of their *amici* can explain that critical link.

Harvard, for example, offers a report finding that meaningful representation of racial minorities promotes several goals. Only one of those goals—"producing new knowledge stemming from diverse outlooks," 980 F. 3d 157, 174 (CA1 2020)—bears any possible relationship to educational benefits. Yet, it too is extremely vague and offers no indication that, for example, student test scores increased as a result of Harvard's efforts toward racial diversity.

More fundamentally, it is not clear how racial diversity, as opposed to other forms of diversity, uniquely and independently advances Harvard's goal. This is particularly true because Harvard blinds itself to other forms of applicant diversity, such as religion. See 2 App. in No. 20–1199, pp. 734–743. It may be the case that exposure to different perspectives and thoughts can foster debate, sharpen young minds, and hone students' reasoning skills. But, it is not clear how diversity with respect to race, *qua* race, furthers this goal. Two white students, one from rural Appalachia and one from a wealthy San Francisco suburb, may well

have more diverse outlooks on this metric than two students from Manhattan's Upper East Side attending its most elite schools, one of whom is white and other of whom is black. If Harvard cannot even *explain* the link between racial diversity and education, then surely its interest in racial diversity cannot be compelling enough to overcome the constitutional limits on race consciousness.

UNC fares no better. It asserts, for example, an interest in training students to "live together in a diverse society." Brief for University Respondents in No. 21–707, p. 39. This may well be important to a university experience, but it is a *social* goal, not an educational one. See *Grutter*, 539 U. S., at 347–348 (Scalia, J., concurring in part and dissenting in part) (criticizing similar rationales as divorced from educational goals). And, again, UNC offers no reason why seeking a diverse society would not be equally supported by admitting individuals with diverse perspectives and backgrounds, rather than varying skin pigmentation.

Nor have *amici* pointed to any concrete and quantifiable *educational* benefits of racial diversity. The United States focuses on alleged civic benefits, including "increasing tolerance and decreasing racial prejudice." Brief for United States as *Amicus Curiae* 21–22. Yet, when it comes to educational benefits, the Government offers only one study purportedly showing that "college diversity experiences are significantly and positively related to cognitive development" and that "interpersonal interactions with racial diversity are the most strongly related to cognitive development." N. Bowman, College Diversity Experiences and Cognitive Development: A Meta-Analysis, 80 Rev. Educ. Research 4, 20 (2010). Here again, the link is, at best, tenuous, unspecific, and stereotypical. Other *amici* assert that diversity (generally) fosters the even-more nebulous values of "creativity" and "innovation," particularly in graduates' future workplaces. See, *e.g.*, Brief for Major American Busi-

ness Enterprises as *Amici Curiae* 7–9; Brief for Massachusetts Institute of Technology et al. as *Amici Curiae* 16–17 (describing experience at IBM). Yet, none of those assertions deals exclusively with *racial* diversity—as opposed to cultural or ideological diversity. And, none of those *amici* demonstrate measurable or concrete benefits that have resulted from universities' race-conscious admissions programs.

Of course, even if these universities had shown that racial diversity yielded any concrete or measurable benefits, they would still face a very high bar to show that their interest is compelling. To survive strict scrutiny, any such benefits would have to outweigh the tremendous harm inflicted by sorting individuals on the basis of race. See *Cooper* v. *Aaron*, 358 U. S. 1, 16 (1958) (following *Brown*, "law and order are not here to be preserved by depriving the Negro children of their constitutional rights"). As the Court's opinions in these cases make clear, all racial stereotypes harm and demean individuals. That is why "only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a pressing public necessity" sufficient to satisfy strict scrutiny today. *Grutter*, 539 U. S., at 353 (opinion of THOMAS, J.) (internal quotations marks omitted). Cf. *Lee* v. *Washington*, 390 U. S. 333, 334 (1968) (Black, J., concurring) (protecting prisoners from violence might justify narrowly tailored discrimination); *Croson*, 488 U. S., at 521 (opinion of Scalia, J.) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify [racial discrimination]"). For this reason, "just as the alleged educational benefits of segregation were insufficient to justify racial discrimination [in the 1950s], see *Brown* v. *Board of Education*, the alleged educational benefits of diversity cannot justify racial discrimination today." *Fisher I*, 570 U. S., at 320 (THOMAS, J., concurring) (citation omitted).

B

The Court also correctly refuses to defer to the universities' own assessments that the alleged benefits of race-conscious admissions programs are compelling. It instead demands that the "interests [universities] view as compelling" must be capable of being "subjected to meaningful judicial review." *Ante*, at 22. In other words, a court must be able to measure the goals asserted and determine when they have been reached. *Ante*, at 22–24. The Court's opinion today further insists that universities must be able to "articulate a meaningful connection between the means they employ and the goals they pursue." *Ante*, at 24. Again, I agree. Universities' self-proclaimed righteousness does not afford them license to discriminate on the basis of race.

In fact, it is error for a court to defer to the views of an alleged discriminator while assessing claims of racial discrimination. See *Grutter*, 539 U. S., at 362–364 (opinion of THOMAS, J.); see also *Fisher I*, 570 U. S., at 318–319 (THOMAS, J., concurring); *United States* v. *Virginia*, 518 U. S. 515, 551, n. 19 (1996) (refusing to defer to the Virginia Military Institute's judgment that the changes necessary to accommodate the admission of women would be too great and characterizing the necessary changes as "manageable"). We would not offer such deference in any other context. In employment discrimination lawsuits under Title VII of the Civil Rights Act, for example, courts require only a minimal prima facie showing by a complainant before shifting the burden onto the shoulders of the alleged-discriminator employer. See *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 803–805 (1973). And, Congress has passed numerous laws—such as the Civil Rights Act of 1875—under its authority to enforce the Fourteenth Amendment, each designed to counter discrimination and each relying on courts to bring a skeptical eye to alleged discriminators.

This judicial skepticism is vital. History has repeatedly

shown that purportedly benign discrimination may be pernicious, and discriminators may go to great lengths to hide and perpetuate their unlawful conduct. Take, for example, the university respondents here. Harvard's "holistic" admissions policy began in the 1920s when it was developed to exclude Jews. See M. Synnott, The Half-Opened Door: Discrimination and Admission at Harvard, Yale, and Princeton, 1900–1970, pp. 58–59, 61, 69, 73–74 (2010). Based on *de facto* quotas that Harvard quietly implemented, the proportion of Jews in Harvard's freshman class declined from 28% as late as 1925 to just 12% by 1933. J. Karabel, The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton 172 (2005). During this same period, Harvard played a prominent role in the eugenics movement. According to then-President Abbott Lawrence Lowell, excluding Jews from Harvard would help maintain admissions opportunities for Gentiles and perpetuate the purity of the Brahmin race—New England's white, Protestant upper crust. See D. Okrent, The Guarded Gate 309, and n. * (2019).

UNC also has a checkered history, dating back to its time as a segregated university. It admitted its first black undergraduate students in 1955—but only after being ordered to do so by a court, following a long legal battle in which UNC sought to keep its segregated status. Even then, UNC did not turn on a dime: The first three black students admitted as undergraduates enrolled at UNC but ultimately earned their bachelor's degrees elsewhere. See M. Beauregard, Column: The Desegregation of UNC, The Daily Tar Heel, Feb. 16, 2022. To the extent past is prologue, the university respondents' histories hardly recommend them as trustworthy arbiters of whether racial discrimination is necessary to achieve educational goals.

Of course, none of this should matter in any event; courts have an independent duty to interpret and uphold the Constitution that no university's claimed interest may override.

See *ante*, at 26, n. 5. The Court today makes clear that, in the future, universities wishing to discriminate based on race in admissions must articulate and justify a compelling and measurable state interest based on concrete evidence. Given the strictures set out by the Court, I highly doubt any will be able to do so.

C

In an effort to salvage their patently unconstitutional programs, the universities and their *amici* pivot to argue that the Fourteenth Amendment permits the use of race to benefit only certain racial groups—rather than applicants writ large. Yet, this is just the latest disguise for discrimination. The sudden narrative shift is not surprising, as it has long been apparent that "'diversity [was] merely the current rationale of convenience'" to support racially discriminatory admissions programs. *Grutter*, 539 U. S., at 393 (Kennedy, J., dissenting). Under our precedents, this new rationale is also lacking.

To start, the case for affirmative action has emphasized a number of rationales over the years, including: (1) restitution to compensate those who have been victimized by past discrimination, (2) fostering "diversity," (3) facilitating "integration" and the destruction of perceived racial castes, and (4) countering longstanding and diffuse racial prejudice. See R. Kennedy, For Discrimination: Race, Affirmative Action, and the Law 78 (2013); see also P. Schuck, Affirmative Action: Past, Present, and Future, 20 Yale L. & Pol'y Rev. 1, 22–46 (2002). Again, this Court has only recognized one interest as compelling: the educational benefits of diversity embraced in *Grutter*. Yet, as the universities define the "diversity" that they practice, it encompasses social and aesthetic goals far afield from the education-based interest discussed in *Grutter*. See *supra*, at 23. The dissents too attempt to stretch the diversity rationale, suggesting that it supports broad remedial interests. See, *e.g.*, *post*,

at 23, 43, 67 (opinion of SOTOMAYOR, J.) (noting that UNC's black admissions percentages "do not reflect the diversity of the State"; equating the diversity interest under the Court's precedents with a goal of "integration in higher education" more broadly; and warning of "the dangerous consequences of an America where its leadership does not reflect the diversity of the People"); *post*, at 23 (opinion of JACKSON, J.) (explaining that diversity programs close wealth gaps). But language—particularly the language of controlling opinions of this Court—is not so elastic. See J. Pieper, Abuse of Language—Abuse of Power 23 (L. Krauth transl. 1992) (explaining that propaganda, "in contradiction to the nature of language, intends not to communicate but to manipulate" and becomes an "[i]nstrument of power" (emphasis deleted)).

The Court refuses to engage in this lexicographic drift, seeing these arguments for what they are: a remedial rationale in disguise. See *ante*, at 34–35. As the Court points out, the interest for which respondents advocate has been presented to and rejected by this Court many times before. In *Regents of University of California* v. *Bakke*, 438 U. S. 265 (1978), the University of California made clear its rationale for the quota system it had established: It wished to "counteract effects of generations of pervasive discrimination" against certain minority groups. Brief for Petitioner, O. T. 1977, No. 76–811, p. 2. But, the Court rejected this distinctly remedial rationale, with Justice Powell adopting in its place the familiar "diversity" interest that appeared later in *Grutter*. See *Bakke*, 438 U. S., at 306 (plurality opinion). The Court similarly did not adopt the broad remedial rationale in *Grutter*; and it rejects it again today. Newly and often minted theories cannot be said to be commanded by our precedents.

Indeed, our precedents have repeatedly and soundly distinguished between programs designed to compensate vic-

tims of past governmental discrimination from so-called benign race-conscious measures, such as affirmative action. *Croson*, 488 U. S., at 504–505; *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 226–227 (1995). To enforce that distinction, our precedents explicitly require that any attempt to compensate victims of past governmental discrimination must be concrete and traceable to the *de jure* segregated system, which must have some discrete and continuing discriminatory effect that warrants a present remedy. See *United States* v. *Fordice*, 505 U. S. 717, 731 (1992). Today's opinion for the Court reaffirms the need for such a close remedial fit, hewing to the same line we have consistently drawn. *Ante*, at 24–25.

Without such guardrails, the Fourteenth Amendment would become self-defeating, promising a Nation based on the equality ideal but yielding a quota- and caste-ridden society steeped in race-based discrimination. Even *Grutter* itself could not tolerate this outcome. It accordingly imposed a time limit for its race-based regime, observing that "'a core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.'" 539 U. S., at 341–342 (quoting *Palmore* v. *Sidoti*, 466 U. S. 429, 432 (1984); alterations omitted).

The Court today enforces those limits. And rightly so. As noted above, both Harvard and UNC have a history of racial discrimination. But, neither have even attempted to explain how their current racially discriminatory programs are even remotely traceable to their past discriminatory conduct. Nor could they; the current race-conscious admissions programs take no account of ancestry and, at least for Harvard, likely have the effect of discriminating against some of the very same ethnic groups against which Harvard previously discriminated (*i.e.*, Jews and those who are not part of the white elite). All the while, Harvard and UNC ask us to blind ourselves to the burdens imposed on the millions of innocent applicants denied admission because of

their membership in a currently disfavored race.

The Constitution neither commands nor permits such a result. "Purchased at the price of immeasurable human suffering," the Fourteenth Amendment recognizes that classifications based on race lead to ruinous consequences for individuals and the Nation. *Adarand Constructors*, *Inc.*, 515 U. S., at 240 (THOMAS, J., concurring in part and concurring in judgment). Consequently, "*all*" racial classifications are "inherently suspect," *id.*, at 223–224 (majority opinion) (emphasis added; internal quotation marks omitted), and must be subjected to the searching inquiry conducted by the Court, *ante*, at 21–34.

III

Both experience and logic have vindicated the Constitution's colorblind rule and confirmed that the universities' new narrative cannot stand. Despite the Court's hope in *Grutter* that universities would voluntarily end their race-conscious programs and further the goal of racial equality, the opposite appears increasingly true. Harvard and UNC now forthrightly state that they racially discriminate when it comes to admitting students, arguing that such discrimination is consistent with this Court's precedents. And they, along with today's dissenters, defend that discrimination as *good*. More broadly, it is becoming increasingly clear that discrimination on the basis of race—often packaged as "affirmative action" or "equity" programs—are based on the benighted notion "that it is possible to tell when discrimination helps, rather than hurts, racial minorities." *Fisher I*, 570 U. S., at 328 (THOMAS, J., concurring).

We cannot be guided by those who would desire less in our Constitution, or by those who would desire more. "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." *Grutter*, 539 U. S., at 353 (opinion of THOMAS, J.).

A

The Constitution's colorblind rule reflects one of the core principles upon which our Nation was founded: that "all men are created equal." Those words featured prominently in our Declaration of Independence and were inspired by a rich tradition of political thinkers, from Locke to Montesquieu, who considered equality to be the foundation of a just government. See, *e.g.*, J. Locke, Second Treatise of Civil Government 48 (J. Gough ed. 1948); T. Hobbes, Leviathan 98 (M. Oakeshott ed. 1962); 1 B. Montesquieu, The Spirit of Laws 121 (T. Nugent transl., J. Prichard ed. 1914). Several Constitutions enacted by the newly independent States at the founding reflected this principle. For example, the Virginia Bill of Rights of 1776 explicitly affirmed "[t]hat all men are by nature equally free and independent, and have certain inherent rights." Ch. 1, §1. The State Constitutions of Massachusetts, Pennsylvania, and New Hampshire adopted similar language. Pa. Const., Art. I (1776), in 2 Federal and State Constitutions 1541 (P. Poore ed. 1877); Mass. Const., Art. I (1780), in 1 *id.*, at 957; N. H. Const., Art. I (1784), in 2 *id.*, at 1280.[5] And, prominent Founders

[5] In fact, the Massachusetts Supreme Court in 1783 declared that slavery was abolished in Massachusetts by virtue of the newly enacted Constitution's provision of equality under the law. See *The Quock Walker Case*, in 1 H. Commager, Documents of American History 110 (9th ed. 1973) (Cushing, C. J.) ("[W]hatever sentiments have formerly prevailed in this particular or slid in upon us by the example of others, a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty . . . . And upon this ground our Constitution of Government . . . sets out with declaring that all men are born free and equal . . . and in short is totally repugnant to the idea of being born slaves").

publicly mused about the need for equality as the foundation for government. *E.g.*, 1 Cong. Register 430 (T. Lloyd ed. 1789) (Madison, J.); 1 Letters and Other Writings of James Madison 164 (J. Lippincott ed. 1867); N. Webster, The Revolution in France, in 2 Political Sermons of the Founding Era, 1730–1805, pp. 1236–1299 (1998). As Jefferson declared in his first inaugural address, "the minority possess their equal rights, which equal law must protect." First Inaugural Address (Mar. 4, 1801), in 8 The Writings of Thomas Jefferson 4 (Washington ed. 1854).

Our Nation did not initially live up to the equality principle. The institution of slavery persisted for nearly a century, and the United States Constitution itself included several provisions acknowledging the practice. The period leading up to our second founding brought these flaws into bold relief and encouraged the Nation to finally make good on the equality promise. As Lincoln recognized, the promise of equality extended to *all people*—including immigrants and blacks whose ancestors had taken no part in the original founding. See Speech at Chicago, Ill. (July 10, 1858), in 2 The Collected Works of Abraham Lincoln 488–489, 499 (R. Basler ed. 1953). Thus, in Lincoln's view, "'the natural rights enumerated in the Declaration of Independence'" extended to blacks as his "'equal,'" and "'the equal of every living man.'" The Lincoln-Douglas Debates 285 (H. Holzer ed. 1993).

As discussed above, the Fourteenth Amendment reflected that vision, affirming that equality and racial discrimination cannot coexist. Under that Amendment, the color of a person's skin is irrelevant to that individual's equal status as a citizen of this Nation. To treat him differently on the basis of such a legally irrelevant trait is therefore a deviation from the equality principle and a constitutional injury.

Of course, even the promise of the second founding took time to materialize. Seeking to perpetuate a segregationist

system in the wake of the Fourteenth Amendment's ratification, proponents urged a "separate but equal" regime. They met with initial success, ossifying the segregationist view for over a half century. As this Court said in *Plessy*:

> "A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude." 163 U. S., at 543.

Such a statement, of course, is precisely antithetical to the notion that all men, regardless of the color of their skin, are born equal and must be treated equally under the law. Only one Member of the Court adhered to the equality principle; Justice Harlan, standing alone in dissent, wrote: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." *Id.*, at 559. Though Justice Harlan rightly predicted that *Plessy* would, "in time, prove to be quite as pernicious as the decision made . . . in the *Dred Scott* case," the *Plessy* rule persisted for over a half century. *Ibid.* While it remained in force, Jim Crow laws prohibiting blacks from entering or utilizing public facilities such as schools, libraries, restaurants, and theaters sprang up across the South.

This Court rightly reversed course in *Brown* v. *Board of Education*. The *Brown* appellants—those challenging segregated schools—embraced the equality principle, arguing that "[a] racial criterion is a constitutional irrelevance, and is not saved from condemnation even though dictated by a sincere desire to avoid the possibility of violence or race friction." Brief for Appellants in *Brown* v. *Board of Education*,

O. T. 1952, No. 1, p. 7 (citation omitted).[6] Embracing that view, the Court held that "in the field of public education the doctrine of 'separate but equal' has no place" and "[s]eparate educational facilities are inherently unequal." *Brown*, 347 U. S., at 493, 495. Importantly, in reaching this conclusion, *Brown* did not rely on the particular qualities of the Kansas schools. The mere separation of students on the basis of race—the "*segregation* complained of," *id.*, at 495 (emphasis added)—constituted a constitutional injury. See *ante*, at 12 ("Separate cannot be equal").

Just a few years later, the Court's application of *Brown* made explicit what was already forcefully implied: "[O]ur decisions have foreclosed any possible contention that . . . a statute or regulation" fostering segregation in public facilities "may stand consistently with the Fourteenth Amendment." *Turner* v. *Memphis*, 369 U. S. 350, 353 (1962) (*per curiam*); cf. A. Blaustein & C. Ferguson, Desegregation and the Law: The Meaning and Effect of the School Segregation Cases 145 (rev. 2d ed. 1962) (arguing that the Court in *Brown* had "adopt[ed] a constitutional standard" declaring "that all classification by race is unconstitutional *per se*").

Today, our precedents place this principle beyond question. In assessing racial segregation during a race-motivated prison riot, for example, this Court applied strict scrutiny without requiring an allegation of unequal treatment among the segregated facilities. *Johnson* v. *California*, 543 U. S. 499, 505–506 (2005). The Court today reaffirms the rule, stating that, following *Brown*, "[t]he time for

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[6] Briefing in a case consolidated with *Brown* stated the colorblind position forthrightly: Classifications "[b]ased [s]olely on [r]ace or [c]olor" "can never be" constitutional. Juris. Statement in *Briggs* v. *Elliott*, O. T. 1951, No. 273, pp. 20–21, 25, 29; see also Juris. Statement in *Davis* v. *County School Bd. of Prince Edward Cty.*, O. T. 1952, No. 191, p. 8 ("Indeed, we take the unqualified position that the Fourteenth Amendment has totally stripped the state of power to make race and color the basis for governmental action. . . . For this reason alone, we submit, the state separate school laws in this case must fall").

making distinctions based on race had passed." *Ante*, at 13. "What was wrong" when the Court decided *Brown* "in 1954 cannot be right today." *Parents Involved*, 551 U. S., at 778 (THOMAS, J., concurring). Rather, we must adhere to the promise of equality under the law declared by the Declaration of Independence and codified by the Fourteenth Amendment.

B

Respondents and the dissents argue that the universities' race-conscious admissions programs ought to be permitted because they accomplish positive social goals. I would have thought that history had by now taught a "greater humility" when attempting to "distinguish good from harmful uses of racial criteria." *Id.*, at 742 (plurality opinion). From the Black Codes, to discriminatory and destructive social welfare programs, to discrimination by individual government actors, bigotry has reared its ugly head time and again. Anyone who today thinks that some form of racial discrimination will prove "helpful" should thus tread cautiously, lest racial discriminators succeed (as they once did) in using such language to disguise more invidious motives.

Arguments for the benefits of race-based solutions have proved pernicious in segregationist circles. Segregated universities once argued that race-based discrimination was needed "to preserve harmony and peace and at the same time furnish equal education to both groups." Brief for Respondents in *Sweatt* v. *Painter*, O. T. 1949, No. 44, p. 94; see also *id.*, at 79 ("'[T]he *mores* of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and Negroes to the same institutions'"). And, parties consistently attempted to convince the Court that the time was not right to disrupt segregationist systems. See Brief for Appellees in *McLaurin* v. *Oklahoma State Regents for Higher Ed.*, O. T. 1949, No. 34, p. 12 (claiming that a holding rejecting separate but equal

would "necessarily result . . . [i]n the *abandoning* of many of the state's existing educational establishments" and the "*crowding* of other such establishments"); Brief for State of Kansas on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1, p. 56 ("We grant that segregation may not be the ethical or political ideal. At the same time we recognize that practical considerations may prevent realization of the ideal"); Tr. of Oral Arg. in *Davis* v. *School Bd. of Prince Edward Cty.*, O. T. 1954, No. 3, p. 208 ("We are up against the proposition: What does the Negro profit if he procures an immediate detailed decree from this Court now and then impairs or mars or destroys the public school system in Prince Edward County"). Litigants have even gone so far as to offer straight-faced arguments that segregation has practical benefits. Brief for Respondents in *Sweatt* v. *Painter*, at 77–78 (requesting deference to a state law, observing that "'the necessity for such separation [of the races] still exists in the interest of public welfare, safety, harmony, health, and recreation . . .'" and remarking on the reasonableness of the position); Brief for Appellees in *Davis* v. *County School Bd. of Prince Edward Cty.*, O. T. 1952, No. 3, p. 17 ("Virginia has established segregation in certain fields as a part of her public policy to prevent violence and reduce resentment. The result, in the view of an overwhelming Virginia majority, has been to improve the relationship between the different races"); *id.*, at 25 ("If segregation be stricken down, the general welfare will be definitely harmed . . . there would be more friction developed" (internal quotation marks omitted)). In fact, slaveholders once "argued that slavery was a 'positive good' that civilized blacks and elevated them in every dimension of life," and "segregationists similarly asserted that segregation was not only benign, but good for black students." *Fisher I*, 570 U. S., at 328–329 (THOMAS, J., concurring).

"Indeed, if our history has taught us anything, it has

taught us to beware of elites bearing racial theories." *Parents Involved*, 551 U. S., at 780–781 (THOMAS, J., concurring). We cannot now blink reality to pretend, as the dissents urge, that affirmative action should be legally permissible merely because the experts assure us that it is "good" for black students. Though I do not doubt the sincerity of my dissenting colleagues' beliefs, experts and elites have been wrong before—and they may prove to be wrong again. In part for this reason, the Fourteenth Amendment outlaws government-sanctioned racial discrimination of all types. The stakes are simply too high to gamble.[7] Then, as now, the views that motivated *Dred Scott* and *Plessy* have not been confined to the past, and we must remain ever vigilant against *all* forms of racial discrimination.

C

Even taking the desire to help on its face, what initially seems like aid may in reality be a burden, including for the very people it seeks to assist. Take, for example, the college admissions policies here. "Affirmative action" policies do nothing to increase the overall number of blacks and Hispanics able to access a college education. Rather, those racial policies simply redistribute individuals among institutions of higher learning, placing some into more competitive institutions than they otherwise would have attended. See

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[7] Indeed, the lawyers who litigated *Brown* were unwilling to take this bet, insisting on a colorblind legal rule. See, *e.g.*, Supp. Brief for Appellants on Reargument in Nos. 1, 2, and 4, and for Respondents in No. 10, in *Brown* v. *Board of Education*, O. T. 1953, p. 65 ("That the Constitution is color blind is our dedicated belief"); Brief for Appellants in *Brown* v. *Board of Education*, O. T. 1952, No. 1, p. 5 ("The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone"). In fact, Justice Marshall viewed Justice Harlan's *Plessy* dissent as "a 'Bible' to which he turned during his most depressed moments"; no opinion "buoyed Marshall more in his pre-*Brown* days." In Memoriam: Honorable Thurgood Marshall, Proceedings of the Bar and Officers of the Supreme Court of the United States, p. X (1993) (remarks of Judge Motley).

T. Sowell, Affirmative Action Around the World 145–146 (2004). In doing so, those policies sort at least some blacks and Hispanics into environments where they are less likely to succeed academically relative to their peers. *Ibid.* The resulting mismatch places "many blacks and Hispanics who likely would have excelled at less elite schools . . . in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete." *Fisher I*, 570 U. S., at 332 (THOMAS, J., concurring).

It is self-evident why that is so. As anyone who has labored over an algebra textbook has undoubtedly discovered, academic advancement results from hard work and practice, not mere declaration. Simply treating students as though their grades put them at the top of their high school classes does nothing to enhance the performance level of those students or otherwise prepare them for competitive college environments. In fact, studies suggest that large racial preferences for black and Hispanic applicants have led to a disproportionately large share of those students receiving mediocre or poor grades once they arrive in competitive collegiate environments. See, *e.g.*, R. Sander, A Systemic Analysis of Affirmative Action in American Law Schools, 57 Stan. L. Rev. 367, 371–372 (2004); see also R. Sander & R. Steinbuch, Mismatch and Bar Passage: A School-Specific Analysis (Oct. 6, 2017), https://ssrn.com/abstract=3054208. Take science, technology, engineering, and mathematics (STEM) fields, for example. Those students who receive a large admissions preference are more likely to drop out of STEM fields than similarly situated students who did not receive such a preference. F. Smith & J. McArdle, Ethnic and Gender Differences in Science Graduation at Selective Colleges With Implications for Admission Policy and College Choice, 45 Research in Higher Ed. 353 (2004). "Even if most minority students are able to meet the normal standards at the 'average' range of colleges

and universities, the systematic mismatching of minority students begun at the top can mean that such students are generally overmatched throughout all levels of higher education." T. Sowell, Race and Culture 176–177 (1994).[8]

These policies may harm even those who succeed academically. I have long believed that large racial preferences in college admissions "stamp [blacks and Hispanics] with a badge of inferiority." *Adarand*, 515 U. S., at 241 (opinion of THOMAS, J.). They thus "tain[t] the accomplishments of all those who are admitted as a result of racial discrimination" as well as "all those who are the same race as those admitted as a result of racial discrimination" because "no one can distinguish those students from the ones whose race played a role in their admission." *Fisher I*, 570 U. S., at 333 (opinion of THOMAS, J.). Consequently, "[w]hen blacks" and, now, Hispanics "take positions in the highest places of government, industry, or academia, it is an open question . . . whether their skin color played a part in their advancement." *Grutter*, 539 U. S., at 373 (THOMAS, J., concurring). "The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case asking the question itself unfairly marks those . . . who would succeed without discrimination." *Ibid.*

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[8] JUSTICE SOTOMAYOR rejects this mismatch theory as "debunked long ago," citing an *amicus* brief. *Post*, at 56. But, in 2016, the Journal of Economic Literature published a review of mismatch literature—coauthored by a critic and a defender of affirmative action—which concluded that the evidence for mismatch was "fairly convincing." P. Arcidiacono & M. Lovenheim, Affirmative Action and the Quality-Fit Tradeoff, 54 J. Econ. Lit. 3, 20 (Arcidiacono & Lovenheim). And, of course, if universities wish to refute the mismatch theory, they need only release the data necessary to test its accuracy. See Brief for Richard Sander as *Amicus Curiae* 16–19 (noting that universities have been unwilling to provide the necessary data concerning student admissions and outcomes); accord, Arcidiacono & Lovenheim 20 ("Our hope is that better datasets soon will become available").

Yet, in the face of those problems, it seems increasingly clear that universities are focused on "aesthetic" solutions unlikely to help deserving members of minority groups. In fact, universities' affirmative action programs are a particularly poor use of such resources. To start, these programs are overinclusive, providing the same admissions bump to a wealthy black applicant given every advantage in life as to a black applicant from a poor family with seemingly insurmountable barriers to overcome. In doing so, the programs may wind up helping the most well-off members of minority races without meaningfully assisting those who struggle with real hardship. Simultaneously, the programs risk continuing to ignore the academic underperformance of "the purported 'beneficiaries'" of racial preferences and the racial stigma that those preferences generate. *Grutter*, 539 U. S., at 371 (opinion of THOMAS, J.). Rather than performing their academic mission, universities thus may "see[k] only a facade—it is sufficient that the class looks right, even if it does not perform right." *Id.*, at 372.

D

Finally, it is not even theoretically possible to "help" a certain racial group without causing harm to members of other racial groups. "It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others." *Adarand*, 515 U. S., at 241, n. * (opinion of THOMAS, J.). And, even purportedly benign race-based discrimination has secondary effects on members of other races. The antisubordination view thus has never guided the Court's analysis because "whether a law relying upon racial taxonomy is 'benign' or 'malign' either turns on 'whose ox is gored' or on distinctions found only in the eye of the beholder." *Ibid.* (citations and some internal quotation marks omitted). Courts are not suited to the impossible task of determining which racially discriminatory programs are helping which members of which races—and

whether those benefits outweigh the burdens thrust onto other racial groups.

As the Court's opinion today explains, the zero-sum nature of college admissions—where students compete for a finite number of seats in each school's entering class—aptly demonstrates the point. *Ante*, at 27.[9] Petitioner here represents Asian Americans who allege that, at the margins, Asian applicants were denied admission because of their race. Yet, Asian Americans can hardly be described as the beneficiaries of historical racial advantages. To the contrary, our Nation's first immigration ban targeted the Chinese, in part, based on "worker resentment of the low wage rates accepted by Chinese workers." U. S. Commission on Civil Rights, Civil Rights Issues Facing Asian Americans in the 1990s, p. 3 (1992) (Civil Rights Issues); Act of May 6, 1882, ch. 126, 22 Stat. 58–59.

In subsequent years, "strong anti-Asian sentiments in the Western States led to the adoption of many discriminatory laws at the State and local levels, similar to those aimed at blacks in the South," and "segregation in public facilities, including schools, was quite common until after the Second World War." Civil Rights Issues 7; see also S. Hinnershitz, A Different Shade of Justice: Asian American

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[9] JUSTICE SOTOMAYOR apparently believes that race-conscious admission programs can somehow increase the chances that members of certain races (blacks and Hispanics) are admitted without decreasing the chances of admission for members of other races (Asians). See *post*, at 58–59. This simply defies mathematics. In a zero-sum game like college admissions, any sorting mechanism that takes race into account in any way, see *post*, at 27 (opinion of JACKSON, J.) (defending such a system), has discriminated based on race to the benefit of some races and the detriment of others. And, the universities here admit that race is determinative in at least some of their admissions decisions. See, *e.g.*, Tr. of Oral Arg. in No. 20–1199, at 67; 567 F. Supp. 3d 580, 633 (MDNC 2021); see also 397 F. Supp. 3d 126, 178 (Mass. 2019) (noting that, for Harvard, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants"); *ante*, at 5, n. 1 (describing the role that race plays in the universities' admissions processes).

Civil Rights in the South 21 (2017) (explaining that while both Asians and blacks have at times fought "against similar forms of discrimination," "[t]he issues of citizenship and immigrant status often defined Asian American battles for civil rights and separated them from African American legal battles"). Indeed, this Court even sanctioned this segregation—in the context of schools, no less. In *Gong Lum* v. *Rice*, 275 U. S. 78, 81–82, 85–87 (1927), the Court held that a 9-year-old Chinese-American girl could be denied entry to a "white" school because she was "a member of the Mongolian or yellow race."

Also, following the Japanese attack on the U. S. Navy base at Pearl Harbor, Japanese Americans in the American West were evacuated and interned in relocation camps. See Exec. Order No. 9066, 3 CFR 1092 (1943). Over 120,000 were removed to camps beginning in 1942, and the last camp that held Japanese Americans did not close until 1948. National Park Service, Japanese American Life During Internment, www.nps.gov/articles/japanese-american-internment-archeology.htm. In the interim, this Court endorsed the practice. *Korematsu* v. *United States*, 323 U. S. 214 (1944).

Given the history of discrimination against Asian Americans, especially their history with segregated schools, it seems particularly incongruous to suggest that a past history of segregationist policies toward blacks should be remedied at the expense of Asian American college applicants.[10] But this problem is not limited to Asian Americans; more

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[10] Even beyond Asian Americans, it is abundantly clear that the university respondents' racial categories are vastly oversimplistic, as the opinion of the Court and JUSTICE GORSUCH's concurrence make clear. See *ante*, at 24–25; *post*, at 5–7 (opinion of GORSUCH, J.). Their "affirmative action" programs do not help Jewish, Irish, Polish, or other "white" ethnic groups whose ancestors faced discrimination upon arrival in America, any more than they help the descendants of those Japanese-American citizens interned during World War II.

broadly, universities' discriminatory policies burden millions of applicants who are not responsible for the racial discrimination that sullied our Nation's past. That is why, "[i]n the absence of special circumstances, the remedy for *de jure* segregation ordinarily should not include educational programs for students who were not in school (or even alive) during the period of segregation." *Jenkins*, 515 U. S., at 137 (THOMAS, J., concurring). Today's 17-year-olds, after all, did not live through the Jim Crow era, enact or enforce segregation laws, or take any action to oppress or enslave the victims of the past. Whatever their skin color, today's youth simply are not responsible for instituting the segregation of the 20th century, and they do not shoulder the moral debts of their ancestors. Our Nation should not punish today's youth for the sins of the past.

IV

Far from advancing the cause of improved race relations in our Nation, affirmative action highlights our racial differences with pernicious effect. In fact, recent history reveals a disturbing pattern: Affirmative action policies appear to have prolonged the asserted need for racial discrimination. Parties and *amici* in these cases report that, in the nearly 50 years since *Bakke*, 438 U. S. 265, racial progress on campuses adopting affirmative action admissions policies has stagnated, including making no meaningful progress toward a colorblind goal since *Grutter*. See *ante*, at 21–22. Rather, the legacy of *Grutter* appears to be ever increasing and strident demands for *yet more* racially oriented solutions.

A

It has become clear that sorting by race does not stop at the admissions office. In his *Grutter* opinion, Justice Scalia criticized universities for "talk[ing] of multiculturalism and

racial diversity," but supporting "tribalism and racial segregation on their campuses," including through "minority only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies." 539 U. S., at 349 (opinion concurring in part and dissenting in part). This trend has hardly abated with time, and today, such programs are commonplace. See Brief for Gail Heriot et al. as *Amici Curiae* 9. In fact, a recent study considering 173 schools found that 43% of colleges offered segregated housing to students of different races, 46% offered segregated orientation programs, and 72% sponsored segregated graduation ceremonies. D. Pierre & P. Wood, Neo-Segregation at Yale 16–17 (2019); see also D. Pierre, Demands for Segregated Housing at Williams College Are Not News, Nat. Rev., May 8, 2019. In addition to contradicting the universities' claims regarding the need for interracial interaction, see Brief for National Association of Scholars as *Amicus Curiae* 4–12, these trends increasingly encourage our Nation's youth to view racial differences as important and segregation as routine.

Meanwhile, these discriminatory policies risk creating new prejudices and allowing old ones to fester. I previously observed that "[t]here can be no doubt" that discriminatory affirmative action policies "injur[e] white and Asian applicants who are denied admission because of their race." *Fisher I*, 570 U. S., at 331 (concurring opinion). Petitioner here clearly demonstrates this fact. Moreover, "no social science has disproved the notion that this discrimination 'engenders attitudes of superiority or, alternatively, provokes resentment among those who believe that they have been wronged by the government's use of race.'" *Grutter*, 539 U. S., at 373 (opinion of THOMAS, J.) (quoting *Adarand*, 515 U. S., at 241 (opinion of THOMAS, J.) (alterations omitted)). Applicants denied admission to certain colleges may

come to believe—accurately or not—that their race was responsible for their failure to attain a life-long dream. These individuals, and others who wished for their success, may resent members of what they perceive to be favored races, believing that the successes of those individuals are unearned.

What, then, would be the endpoint of these affirmative action policies? Not racial harmony, integration, or equality under the law. Rather, these policies appear to be leading to a world in which everyone is defined by their skin color, demanding ever-increasing entitlements and preferences on that basis. Not only is that *exactly* the kind of factionalism that the Constitution was meant to safeguard against, see The Federalist No. 10 (J. Madison), but it is a factionalism based on ever-shifting sands.

That is because race is a social construct; we may each identify as members of particular races for any number of reasons, having to do with our skin color, our heritage, or our cultural identity. And, over time, these ephemeral, socially constructed categories have often shifted. For example, whereas universities today would group all white applicants together, white elites previously sought to exclude Jews and other white immigrant groups from higher education. In fact, it is impossible to look at an individual and know definitively his or her race; some who would consider themselves black, for example, may be quite fair skinned. Yet, university admissions policies ask individuals to identify themselves as belonging to one of only a few reductionist racial groups. With boxes for only "black," "white," "Hispanic," "Asian," or the ambiguous "other," how is a Middle Eastern person to choose? Someone from the Philippines? See *post*, at 5–7 (GORSUCH, J., concurring). Whichever choice he makes (in the event he chooses to report a race at all), the form silos him into an artificial category. Worse, it sends a clear signal that the category matters.

But, under our Constitution, race is irrelevant, as the

Court acknowledges. In fact, all racial categories are little more than stereotypes, suggesting that immutable characteristics somehow conclusively determine a person's ideology, beliefs, and abilities. Of course, that is false. See *ante*, at 28–30 (noting that the Court's Equal Protection Clause jurisprudence forbids such stereotyping). Members of the same race do not all share the exact same experiences and viewpoints; far from it. A black person from rural Alabama surely has different experiences than a black person from Manhattan or a black first-generation immigrant from Nigeria, in the same way that a white person from rural Vermont has a different perspective than a white person from Houston, Texas. Yet, universities' racial policies suggest that racial identity "*alone constitutes the being* of the race or the man." J. Barzun, Race: A Study in Modern Superstition 114 (1937). That is the same naked racism upon which segregation itself was built. Small wonder, then, that these policies are leading to increasing racial polarization and friction. This kind of reductionist logic leads directly to the "disregard for what does not jibe with preconceived theory," providing a "cloa[k] to conceal complexity, argumen[t] to the crown for praising or damning without the trouble of going into details"—such as details about an individual's ideas or unique background. *Ibid.* Rather than forming a more pluralistic society, these policies thus strip us of our individuality and undermine the very diversity of thought that universities purport to seek.

The solution to our Nation's racial problems thus cannot come from policies grounded in affirmative action or some other conception of equity. Racialism simply cannot be undone by different or more racialism. Instead, the solution announced in the second founding is incorporated in our Constitution: that we are all equal, and should be treated equally before the law without regard to our race. Only that promise can allow us to look past our differing skin colors

and identities and see each other for what we truly are: individuals with unique thoughts, perspectives, and goals, but with equal dignity and equal rights under the law.

B

JUSTICE JACKSON has a different view. Rather than focusing on individuals as individuals, her dissent focuses on the historical subjugation of black Americans, invoking statistical racial gaps to argue in favor of defining and categorizing individuals by their race. As she sees things, we are all inexorably trapped in a fundamentally racist society, with the original sin of slavery and the historical subjugation of black Americans still determining our lives today. *Post*, at 1–26 (dissenting opinion). The panacea, she counsels, is to unquestioningly accede to the view of elite experts and reallocate society's riches by racial means as necessary to "level the playing field," all as judged by racial metrics. *Post*, at 26. I strongly disagree.

First, as stated above, any statistical gaps between the average wealth of black and white Americans is constitutionally irrelevant. I, of course, agree that our society is not, and has never been, colorblind. *Post*, at 2 (JACKSON, J., dissenting); see also *Plessy*, 163 U. S., at 559 (Harlan, J., dissenting). People discriminate against one another for a whole host of reasons. But, under the Fourteenth Amendment, the law must disregard all racial distinctions:

> "[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Ibid.*

With the passage of the Fourteenth Amendment, the people of our Nation proclaimed that the law may not sort citizens based on race. It is this principle that the Framers of the Fourteenth Amendment adopted in the wake of the Civil War to fulfill the promise of equality under the law. And it is this principle that has guaranteed a Nation of equal citizens the privileges or immunities of citizenship and the equal protection of the laws. To now dismiss it as "two-dimensional flatness," *post*, at 25 (JACKSON, J., dissenting), is to abdicate a sacred trust to ensure that our "honored dead . . . shall not have died in vain." A. Lincoln, Gettysburg Address (1863).

Yet, JUSTICE JACKSON would replace the second Founders' vision with an organizing principle based on race. In fact, on her view, almost all of life's outcomes may be unhesitatingly ascribed to race. *Post*, at 24–26. This is so, she writes, because of statistical disparities among different racial groups. See *post*, at 11–14. Even if some whites have a lower household net worth than some blacks, what matters to JUSTICE JACKSON is that the *average* white household has more wealth than the *average* black household. *Post*, at 11.

This lore is not and has never been true. Even in the segregated South where I grew up, individuals were not the sum of their skin color. Then as now, not all disparities are based on race; not all people are racist; and not all differences between individuals are ascribable to race. Put simply, "the fate of abstract categories of wealth statistics is not the same as the fate of a given set of flesh-and-blood human beings." T. Sowell, Wealth, Poverty and Politics 333 (2016). Worse still, JUSTICE JACKSON uses her broad observations about statistical relationships between race and select measures of health, wealth, and well-being to label all blacks as victims. Her desire to do so is unfathomable to me. I cannot deny the great accomplishments of black Americans, including those who succeeded despite long

odds.

Nor do JUSTICE JACKSON's statistics regarding a correlation between levels of health, wealth, and well-being between selected racial groups prove anything. Of course, none of those statistics are capable of drawing a direct causal link between race—rather than socioeconomic status or any other factor—and individual outcomes. So JUSTICE JACKSON supplies the link herself: the legacy of slavery and the nature of inherited wealth. This, she claims, locks blacks into a seemingly perpetual inferior caste. Such a view is irrational; it is an insult to individual achievement and cancerous to young minds seeking to push through barriers, rather than consign themselves to permanent victimhood. If an applicant has less financial means (because of generational inheritance or otherwise), then surely a university may take that into account. If an applicant has medical struggles or a family member with medical concerns, a university may consider that too. What it cannot do is use the applicant's skin color as a heuristic, assuming that because the applicant checks the box for "black" he therefore conforms to the university's monolithic and reductionist view of an abstract, average black person.

Accordingly, JUSTICE JACKSON's race-infused world view falls flat at each step. Individuals are the sum of their unique experiences, challenges, and accomplishments. What matters is not the barriers they face, but how they choose to confront them. And their race is not to blame for everything—good or bad—that happens in their lives. A contrary, myopic world view based on individuals' skin color to the total exclusion of their personal choices is nothing short of racial determinism.

JUSTICE JACKSON then builds from her faulty premise to call for action, arguing that courts should defer to "experts" and allow institutions to discriminate on the basis of race. Make no mistake: Her dissent is not a vanguard of the in-

nocent and helpless. It is instead a call to empower privileged elites, who will "tell us [what] is required to level the playing field" among castes and classifications that they alone can divine. *Post*, at 26; see also *post*, at 5–7 (GORSUCH, J., concurring) (explaining the arbitrariness of these classifications). Then, after siloing us all into racial castes and pitting those castes against each other, the dissent somehow believes that we will be able—at some undefined point—to "march forward together" into some utopian vision. *Post*, at 26 (opinion of JACKSON, J.). Social movements that invoke these sorts of rallying cries, historically, have ended disastrously.

Unsurprisingly, this tried-and-failed system defies both law and reason. Start with the obvious: If social reorganization in the name of equality may be justified by the mere fact of statistical disparities among racial groups, then that reorganization must continue until these disparities are fully eliminated, regardless of the reasons for the disparities and the cost of their elimination. If blacks fail a test at higher rates than their white counterparts (regardless of whether the reason for the disparity has anything at all to do with race), the only solution will be race-focused measures. If those measures were to result in blacks failing at yet higher rates, the only solution would be to double down. In fact, there would seem to be no logical limit to what the government may do to level the racial playing field—outright wealth transfers, quota systems, and racial preferences would all seem permissible. In such a system, it would not matter how many innocents suffer race-based injuries; all that would matter is reaching the race-based goal.

Worse, the classifications that JUSTICE JACKSON draws are themselves race-based stereotypes. She focuses on two hypothetical applicants, John and James, competing for admission to UNC. John is a white, seventh-generation legacy at the school, while James is black and would be the

first in his family to attend UNC. *Post*, at 3. JUSTICE JACKSON argues that race-conscious admission programs are necessary to adequately compare the two applicants. As an initial matter, it is not clear why James's race is the only factor that could encourage UNC to admit him; his status as a first-generation college applicant seems to contextualize his application. But, setting that aside, why is it that John should be judged based on the actions of his great-great-great-grandparents? And what would JUSTICE JACKSON say to John when deeming him not as worthy of admission: Some statistically significant number of white people had advantages in college admissions seven generations ago, and you have inherited their incurable sin?

Nor should we accept that John or James represent all members of their respective races. All racial groups are heterogeneous, and blacks are no exception—encompassing northerners and southerners, rich and poor, and recent immigrants and descendants of slaves. See, *e.g.*, T. Sowell, Ethnic America 220 (1981) (noting that the great success of West Indian immigrants to the United States—disproportionate among blacks more broadly—"seriously undermines the proposition that color is a fatal handicap in the American economy"). Eschewing the complexity that comes with individuality may make for an uncomplicated narrative, but lumping people together and judging them based on assumed inherited or ancestral traits is nothing but stereotyping.[11]

To further illustrate, let's expand the applicant pool beyond John and James. Consider Jack, a black applicant and the son of a multimillionaire industrialist. In a world of race-based preferences, James' seat could very well go to

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[11] Again, universities may offer admissions preferences to students from disadvantaged backgrounds, and they need not withhold those preferences from students who happen to be members of racial minorities. Universities may not, however, assume that all members of certain racial minorities are disadvantaged.

Jack rather than John—both are black, after all. And what about members of the numerous other racial and ethnic groups in our Nation? What about Anne, the child of Chinese immigrants? Jacob, the grandchild of Holocaust survivors who escaped to this Nation with nothing and faced discrimination upon arrival? Or Thomas, the great-grandchild of Irish immigrants escaping famine? While articulating her black and white world (literally), JUSTICE JACKSON ignores the experiences of other immigrant groups (like Asians, see *supra*, at 43–44) and white communities that have faced historic barriers.

Though JUSTICE JACKSON seems to think that her race-based theory can somehow benefit everyone, it is an immutable fact that "every time the government uses racial criteria to 'bring the races together,' someone gets excluded, and the person excluded suffers an injury solely because of his or her race." *Parents Involved*, 551 U. S., at 759 (THOMAS, J., concurring) (citation omitted). Indeed, JUSTICE JACKSON seems to have no response—no explanation at all—for the people who will shoulder that burden. How, for example, would JUSTICE JACKSON explain the need for race-based preferences to the Chinese student who has worked hard his whole life, only to be denied college admission in part because of his skin color? If such a burden would seem difficult to impose on a bright-eyed young person, that's because it should be. History has taught us to abhor theories that call for elites to pick racial winners and losers in the name of sociological experimentation.

Nor is it clear what another few generations of race-conscious college admissions may be expected to accomplish. Even today, affirmative action programs that offer an admissions boost to black and Hispanic students discriminate against those who identify themselves as members of other races that do not receive such preferential treatment. Must others in the future make sacrifices to re-

level the playing field for this new phase of racial subordination? And then, out of whose lives should the debt owed to those further victims be repaid? This vision of meeting social racism with government-imposed racism is thus self-defeating, resulting in a never-ending cycle of victimization. There is no reason to continue down that path. In the wake of the Civil War, the Framers of the Fourteenth Amendment charted a way out: a colorblind Constitution that requires the government to, at long last, put aside its citizens' skin color and focus on their individual achievements.

C

Universities' recent experiences confirm the efficacy of a colorblind rule. To start, universities prohibited from engaging in racial discrimination by state law continue to enroll racially diverse classes by race-neutral means. For example, the University of California purportedly recently admitted its "most diverse undergraduate class ever," despite California's ban on racial preferences. T. Watanabe, UC Admits Largest, Most Diverse Class Ever, But It Was Harder To Get Accepted, L. A. Times, July 20, 2021, p. A1. Similarly, the University of Michigan's 2021 incoming class was "among the university's most racially and ethnically diverse classes, with 37% of first-year students identifying as persons of color." S. Dodge, Largest Ever Student Body at University of Michigan This Fall, Officials Say, MLive.com (Oct. 22, 2021), https://www.mlive.com/news/ann-arbor/2021/10/largest-ever-student-body-at-university-of-michigan-this-fall-officials-say.html. In fact, at least one set of studies suggests that, "when we consider the higher education system as a whole, it is clear that the vast majority of schools would be as racially integrated, or more racially integrated, under a system of no preferences than under a system of large preferences." Brief for Richard Sander as *Amicus Curiae* 26. Race-neutral policies may thus achieve the same benefits of racial harmony and equality without

any of the burdens and strife generated by affirmative action policies.

In fact, meritocratic systems have long refuted bigoted misperceptions of what black students can accomplish. I have always viewed "higher education's purpose as imparting knowledge and skills to students, rather than a communal, rubber-stamp, credentialing process." *Grutter*, 539 U. S., at 371–372 (opinion concurring in part and dissenting in part). And, I continue to strongly believe (and have never doubted) that "blacks can achieve in every avenue of American life without the meddling of university administrators." *Id.*, at 350. Meritocratic systems, with objective grading scales, are critical to that belief. Such scales have always been a great equalizer—offering a metric for achievement that bigotry could not alter. Racial preferences take away this benefit, eliminating the very metric by which those who have the most to prove can clearly demonstrate their accomplishments—both to themselves and to others.

Schools' successes, like students' grades, also provide objective proof of ability. Historically Black Colleges and Universities (HBCUs) do not have a large amount of racial diversity, but they demonstrate a marked ability to improve the lives of their students. To this day, they have proved "to be extremely effective in educating Black students, particularly in STEM," where "HBCUs represent seven of the top eight institutions that graduate the highest number of Black undergraduate students who go on to earn [science and engineering] doctorates." W. Wondwossen, The Science Behind HBCU Success, Nat. Science Foundation (Sept. 24, 2020), https://beta.nsf.gov/science-matters/science-behind-hbcu-success. "HBCUs have produced 40% of all Black engineers." Presidential Proclamation No. 10451, 87 Fed. Reg. 57567 (2022). And, they "account for 80% of Black judges, 50% of Black doctors, and 50% of Black lawyers."

M. Hammond, L. Owens, & B. Gulko, Social Mobility Outcomes for HBCU Alumni, United Negro College Fund 4 (2021) (Hammond), https://cdn.uncf.org/wp-content/uploads/Social-Mobility-Report-FINAL.pdf; see also 87 Fed. Reg. 57567 (placing the percentage of black doctors even higher, at 70%). In fact, Xavier University, an HBCU with only a small percentage of white students, has had better success at helping its low-income students move into the middle class than Harvard has. See Hammond 14; see also Brief for Oklahoma et al. as *Amici Curiae* 18. And, each of the top 10 HBCUs have a success rate above the national average. Hammond 14.[12]

Why, then, would this Court need to allow other universities to racially discriminate? Not for the betterment of those black students, it would seem. The hard work of HBCUs and their students demonstrate that "black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement." *Jenkins*, 515 U. S., at 122

[12] Such black achievement in "racially isolated" environments is neither new nor isolated to higher education. See T. Sowell, Education: Assumptions Versus History 7–38 (1986). As I have previously observed, in the years preceding *Brown*, the "most prominent example of an exemplary black school was Dunbar High School," America's first public high school for black students. *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 763 (2007) (concurring opinion). Known for its academics, the school attracted black students from across the Washington, D. C., area. "[I]n the period 1918–1923, Dunbar graduates earned fifteen degrees from Ivy League colleges, and ten degrees from Amherst, Williams, and Wesleyan." Sowell, Education: Assumptions Versus History, at 29. Dunbar produced the first black General in the U. S. Army, the first black Federal Court Judge, and the first black Presidential Cabinet member. A. Stewart, First Class: The Legacy of Dunbar 2 (2013). Indeed, efforts towards racial integration ultimately precipitated the school's decline. When the D. C. schools moved to a neighborhood-based admissions model, Dunbar was no longer able to maintain its prior admissions policies—and "[m]ore than 80 years of quality education came to an abrupt end." T. Sowell, Wealth, Poverty and Politics 194 (2016).

(THOMAS, J., concurring) (citing *Fordice*, 505 U. S., at 748 (THOMAS, J., concurring)). And, because race-conscious college admissions are plainly not necessary to serve even the interests of blacks, there is no justification to compel such programs more broadly. See *Parents Involved*, 551 U. S., at 765 (THOMAS, J., concurring).

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The great failure of this country was slavery and its progeny. And, the tragic failure of this Court was its misinterpretation of the Reconstruction Amendments, as Justice Harlan predicted in *Plessy*. We should not repeat this mistake merely because we think, as our predecessors thought, that the present arrangements are superior to the Constitution.

The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled. And, it sees the universities' admissions policies for what they are: rudderless, race-based preferences designed to ensure a particular racial mix in their entering classes. Those policies fly in the face of our colorblind Constitution and our Nation's equality ideal. In short, they are plainly—and boldly—unconstitutional. See *Brown II*, 349 U. S., at 298 (noting that the *Brown* case one year earlier had "declare[d] the fundamental principle that racial discrimination in public education is unconstitutional").

While I am painfully aware of the social and economic ravages which have befallen my race and all who suffer discrimination, I hold out enduring hope that this country will live up to its principles so clearly enunciated in the Declaration of Independence and the Constitution of the United States: that all men are created equal, are equal citizens, and must be treated equally before the law.

SUPREME COURT OF THE UNITED STATES

Nos. 20–1199 and 21–707

STUDENTS FOR FAIR ADMISSIONS, INC.,
PETITIONER
20–1199 *v.*
PRESIDENT AND FELLOWS OF
HARVARD COLLEGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STUDENTS FOR FAIR ADMISSIONS, INC.,
PETITIONER
21–707 *v.*
UNIVERSITY OF NORTH CAROLINA, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 29, 2023]

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring.

For many students, an acceptance letter from Harvard or the University of North Carolina is a ticket to a brighter future. Tens of thousands of applicants compete for a small number of coveted spots. For some time, both universities have decided which applicants to admit or reject based in part on race. Today, the Court holds that the Equal Protection Clause of the Fourteenth Amendment does not tolerate this practice. I write to emphasize that Title VI of the Civil Rights Act of 1964 does not either.

I

"[F]ew pieces of federal legislation rank in significance

with the Civil Rights Act of 1964." *Bostock* v. *Clayton County*, 590 U. S. ___, ___ (2020) (slip op., at 2). Title VI of that law contains terms as powerful as they are easy to understand: "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. The message for these cases is unmistakable. Students for Fair Admissions (SFFA) brought claims against Harvard and UNC under Title VI. That law applies to both institutions, as they elect to receive millions of dollars of federal assistance annually. And the trial records reveal that both schools routinely discriminate on the basis of race when choosing new students—exactly what the law forbids.

A

When a party seeks relief under a statute, our task is to apply the law's terms as a reasonable reader would have understood them at the time Congress enacted them. "After all, only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock*, 590 U. S., at ___ (slip op., at 4).

The key phrases in Title VI at issue here are "subjected to discrimination" and "on the ground of." Begin with the first. To "discriminate" against a person meant in 1964 what it means today: to "trea[t] that individual worse than others who are similarly situated." *Id.*, at ___ (slip op., at 7); see also Webster's New International Dictionary 745 (2d ed. 1954) ("[t]o make a distinction" or "[t]o make a difference in treatment or favor (of one as compared with others)"); Webster's Third New International Dictionary 648 (1961) ("to make a difference in treatment or favor on a class or categorical basis"). The provision of Title VI before us, this Court has also held, "prohibits only intentional discrimination." *Alexander* v. *Sandoval*, 532 U. S. 275, 280 (2001).

From this, we can safely say that Title VI forbids a recipient of federal funds from intentionally treating one person worse than another similarly situated person on the ground of race, color, or national origin.

What does the statute's second critical phrase—"on the ground of"—mean? Again, the answer is uncomplicated: It means "because of." See, *e.g.,* Webster's New World Dictionary 640 (1960) ("because of"); Webster's Third New International Dictionary, at 1002 (defining "grounds" as "a logical condition, physical cause, or metaphysical basis"). "Because of" is a familiar phrase in the law, one we often apply in cases arising under the Civil Rights Act of 1964, and one that we usually understand to invoke "the 'simple' and 'traditional' standard of but-for causation." *Bostock*, 590 U. S., at ___ (slip op., at 5) (quoting *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 346, 360 (2013); some internal quotation marks omitted). The but-for-causation standard is a "sweeping" one too. *Bostock*, 590 U. S., at ___ (slip op., at 5). A defendant's actions need not be the primary or proximate cause of the plaintiff's injury to qualify. Nor may a defendant avoid liability "just by citing some *other* factor that contributed to" the plaintiff's loss. *Id.*, at ___ (slip op., at 6). All that matters is that the plaintiff's injury would not have happened *but for* the defendant's conduct. *Ibid.*

Now put these pieces back together and a clear rule emerges. Title VI prohibits a recipient of federal funds from intentionally treating one person worse than another similarly situated person because of his race, color, or national origin. It does not matter if the recipient can point to "some other . . . factor" that contributed to its decision to disfavor that individual. *Id.,* at ___–___ (slip op., at 14–15). It does not matter if the recipient discriminates in order to advance some further benign "intention" or "motivation." *Id.,* at ___ (slip op., at 13); see also *Automobile Workers* v. *Johnson Controls, Inc.*, 499 U. S. 187, 199 (1991) ("the absence of a

malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect" or "alter [its] intentionally discriminatory character"). Nor does it matter if the recipient discriminates against an individual member of a protected class with the idea that doing so might "favor" the interests of that "class" as a whole or otherwise "promot[e] equality at the group level." *Bostock*, 590 U. S., at ___, ___ (slip op., at 13, 15). Title VI prohibits a recipient of federal funds from intentionally treating any individual worse even in part because of his race, color, or national origin and without regard to any other reason or motive the recipient might assert. Without question, Congress in 1964 could have taken the law in various directions. But to safeguard the civil rights of all Americans, Congress chose a simple and profound rule. One holding that a recipient of federal funds may never discriminate based on race, color, or national origin—period.

If this exposition of Title VI sounds familiar, it should. Just next door, in Title VII, Congress made it "unlawful . . . for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." §2000e–2(a)(1). Appreciating the breadth of this provision, just three years ago this Court read its essentially identical terms the same way. See *Bostock*, 590 U. S., at ___–___ (slip op., at 4–9). This Court has long recognized, too, that when Congress uses the same terms in the same statute, we should presume they "have the same meaning." *IBP, Inc.* v. *Alvarez*, 546 U. S. 21, 34 (2005). And that presumption surely makes sense here, for as Justice Stevens recognized years ago, "[b]oth Title VI and Title VII" codify a categorical rule of "individual equality, without regard to race." *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 416, n. 19 (1978) (opinion concurring in judgment in part and dissenting in part) (emphasis deleted).

B

Applying Title VI to the cases now before us, the result is plain. The parties debate certain details of Harvard's and UNC's admissions practices. But no one disputes that both universities operate "program[s] or activit[ies] receiving Federal financial assistance." §2000d. No one questions that both institutions consult race when making their admissions decisions. And no one can doubt that both schools intentionally treat some applicants worse than others at least in part because of their race.

1

Start with how Harvard and UNC use race. Like many colleges and universities, those schools invite interested students to complete the Common Application. As part of that process, the trial records show, applicants are prompted to tick one or more boxes to explain "how you identify yourself." 4 App. in No. 21–707, p. 1732. The available choices are American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; Hispanic or Latino; or White. Applicants can write in further details if they choose. *Ibid.*; see also 397 F. Supp. 3d 126, 137 (Mass. 2019); 567 F. Supp. 3d 580, 596 (MDNC 2021).

Where do these boxes come from? Bureaucrats. A federal interagency commission devised this scheme of classifications in the 1970s to facilitate data collection. See D. Bernstein, The Modern American Law of Race, 94 S. Cal. L. Rev. 171, 196–202 (2021); see also 43 Fed. Reg. 19269 (1978). That commission acted "without any input from anthropologists, sociologists, ethnologists, or other experts." Brief for David E. Bernstein as *Amicus Curiae* 3 (Bernstein *Amicus* Brief). Recognizing the limitations of their work, federal regulators cautioned that their classifications "should not be interpreted as being scientific or anthropological in nature, *nor should they be viewed as determinants of eligibility*

for participation in any Federal program." 43 Fed. Reg. 19269 (emphasis added). Despite that warning, others eventually used this classification system for that very purpose—to "sor[t] out winners and losers in a process that, by the end of the century, would grant preference[s] in jobs . . . and university admissions." H. Graham, The Origins of Official Minority Designation, in The New Race Question: How the Census Counts Multiracial Individuals 289 (J. Perlmann & M. Waters eds. 2002).

These classifications rest on incoherent stereotypes. Take the "Asian" category. It sweeps into one pile East Asians (*e.g.,* Chinese, Korean, Japanese) and South Asians (*e.g.,* Indian, Pakistani, Bangladeshi), even though together they constitute about 60% of the world's population. Bernstein *Amicus* Brief 2, 5. This agglomeration of so many peoples paves over countless differences in "language," "culture," and historical experience. *Id.*, at 5–6. It does so even though few would suggest that all such persons share "similar backgrounds and similar ideas and experiences." *Fisher* v. *University of Tex. at Austin*, 579 U. S. 365, 414 (2016) (ALITO, J., dissenting). Consider, as well, the development of a separate category for "Native Hawaiian or Other Pacific Islander." It seems federal officials disaggregated these groups from the "Asian" category only in the 1990s and only "in response to political lobbying." Bernstein *Amicus* Brief 9–10. And even that category contains its curiosities. It appears, for example, that Filipino Americans remain classified as "Asian" rather than "Other Pacific Islander." See 4 App. in No. 21–707, at 1732.

The remaining classifications depend just as much on irrational stereotypes. The "Hispanic" category covers those whose ancestral language is Spanish, Basque, or Catalan—but it also covers individuals of Mayan, Mixtec, or Zapotec descent who do not speak any of those languages and whose ancestry does not trace to the Iberian Peninsula but bears deep ties to the Americas. See Bernstein *Amicus* Brief 10–

11. The "White" category sweeps in anyone from "Europe, Asia west of India, and North Africa." *Id.*, at 14. That includes those of Welsh, Norwegian, Greek, Italian, Moroccan, Lebanese, Turkish, or Iranian descent. It embraces an Iraqi or Ukrainian refugee as much as a member of the British royal family. Meanwhile, "Black or African American" covers everyone from a descendant of enslaved persons who grew up poor in the rural South, to a first-generation child of wealthy Nigerian immigrants, to a Black-identifying applicant with multiracial ancestry whose family lives in a typical American suburb. See *id.,* at 15–16.

If anything, attempts to divide us all up into a handful of groups have become only more incoherent with time. American families have become increasingly multicultural, a fact that has led to unseemly disputes about whether someone is *really* a member of a certain racial or ethnic group. There are decisions denying Hispanic status to someone of Italian-Argentine descent, *Marinelli Constr. Corp.* v. *New York*, 200 App. Div. 2d 294, 296–297, 613 N. Y. S. 2d 1000, 1002 (1994), as well as someone with one Mexican grandparent, *Major Concrete Constr., Inc.* v. *Erie County*, 134 App. Div. 2d 872, 873, 521 N. Y. S. 2d 959, 960 (1987). Yet there are also decisions granting Hispanic status to a Sephardic Jew whose ancestors fled Spain centuries ago, *In re Rothschild-Lynn Legal & Fin. Servs.*, SBA No. 499, 1995 WL 542398, *2–*4 (Apr. 12, 1995), and bestowing a "sort of Hispanic" status on a person with one Cuban grandparent, Bernstein, 94 S. Cal. L. Rev., at 232 (discussing *In re Kist Corp.*, 99 F. C. C. 2d 173, 193 (1984)).

Given all this, is it any surprise that members of certain groups sometimes try to conceal their race or ethnicity? Or that a cottage industry has sprung up to help college applicants do so? We are told, for example, that one effect of lumping so many people of so many disparate backgrounds into the "Asian" category is that many colleges consider "Asians" to be "overrepresented" in their admission pools.

Brief for Asian American Coalition for Education et al. as *Amici Curiae* 12–14, 18–19. Paid advisors, in turn, tell high school students of Asian descent to downplay their heritage to maximize their odds of admission. "'We will make them appear less Asian when they apply,'" one promises. *Id.,* at 16. "'If you're given an option, don't attach a photograph to your application,'" another instructs. *Ibid.*[1] It is difficult to imagine those who receive this advice would find comfort in a bald (and mistaken) assurance that "race-conscious admissions benefit . . . the Asian American community," *post*, at 60 (SOTOMAYOR, J., dissenting). See 397 F. Supp. 3d, at 178 (district court finding that "overall" Harvard's race-conscious admissions policy "results in fewer Asian American[s]" being admitted). And it is hard not to wonder whether those left paying the steepest price are those least able to afford it—children of families with no chance of hiring the kind of consultants who know how to play this game.[2]

2

Just as there is no question Harvard and UNC consider race in their admissions processes, there is no question both schools intentionally treat some applicants worse than others because of their race. Both schools frequently choose to

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[1] See also A. Qin, Aiming for an Ivy and Trying to Seem 'Less Asian,' N. Y. Times, Dec. 3, 2022, p. A18, col. 1 ("[T]he rumor that students can appear 'too Asian' has hardened into a kind of received wisdom within many Asian American communities," and "college admissions consultants [have] spoke[n] about trying to steer their Asian American clients away from so-called typically Asian activities such as Chinese language school, piano and Indian classical instruments.").

[2] Though the matter did not receive much attention in the proceedings below, it appears that the Common Application has evolved in recent years to allow applicants to choose among more options to describe their backgrounds. The decisions below do not disclose how much Harvard or UNC made use of this further information (or whether they make use of it now). But neither does it make a difference. Title VI no more tolerates discrimination based on 60 racial categories than it does 6.

award a "tip" or a "plus" to applicants from certain racial groups but not others. These tips or plusses are just what they sound like—"factors that might tip an applicant into [an] admitted class." 980 F. 3d 157, 170 (CA1 2020). And in a process where applicants compete for a limited pool of spots, "[a] tip for one race" necessarily works as "a penalty against other races." Brief for Economists as *Amici Curiae* 20. As the trial court in the Harvard case put it: "Race conscious admissions will always penalize to some extent the groups that are not being advantaged by the process." 397 F. Supp. 3d, at 202–203.

Consider how this plays out at Harvard. In a given year, the university's undergraduate program may receive 60,000 applications for roughly 1,600 spots. Tr. of Oral Arg. in No. 20–1199, p. 60. Admissions officers read each application and rate students across several categories: academic, extracurricular, athletic, school support, personal, and overall. 980 F. 3d, at 167. Harvard says its admissions officers "should not" consider race or ethnicity when assigning the "personal" rating. *Id.,* at 169 (internal quotation marks omitted). But Harvard did not make this instruction explicit until *after* SFFA filed this suit. *Ibid.* And, in any event, Harvard concedes that its admissions officers "*can* and *do* take an applicant's race into account when assigning an *overall* rating." *Ibid.* (emphasis added). At that stage, the lower courts found, applicants of certain races may receive a "tip" in their favor. *Ibid.*

The next step in the process is committee review. Regional subcommittees may consider an applicant's race when deciding whether to recommend admission. *Id.*, at 169–170. So, too, may the full admissions committee. *Ibid.* As the Court explains, that latter committee "discusses the relative breakdown of applicants by race." *Ante*, at 2–3. And "if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the [committee]

may decide to give additional attention to applications from students within that group." 397 F. Supp. 3d, at 146.

The last step is "lopping," where the admissions committee trims the list of "prospective admits" before settling on a final class. *Id.,* at 144 (internal quotation marks omitted). At this stage, again, the committee considers the "characteristics of the admitted class," including its "racial composition." *Ibid.* Once more, too, the committee may consider each applicant's race in deciding whom to "lop off." *Ibid.*

All told, the district court made a number of findings about Harvard's use of race-based tips. For example: "[T]he tip[s] given for race impac[t] who among the highly-qualified students in the applicant pool will be selected for admission." *Id.*, at 178. "At least 10% of Harvard's admitted class . . . would most likely not be admitted in the absence of Harvard's race-conscious admissions process." *Ibid.* Race-based tips are "determinative" in securing favorable decisions for a significant percentage of "African American and Hispanic applicants," the "primary beneficiaries" of this system. *Ibid.* There are clear losers too. "[W]hite and Asian American applicants are unlikely to receive a meaningful race-based tip," *id.,* at 190, n. 56, and "overall" the school's race-based practices "resul[t] in fewer Asian American and white students being admitted," *id.*, at 178. For these reasons and others still, the district court concluded that "Harvard's admissions process is not facially neutral" with respect to race. *Id.,* at 189–190; see also *id.*, at 190, n. 56 ("The policy cannot . . . be considered facially neutral from a Title VI perspective.").

Things work similarly at UNC. In a typical year, about 44,000 applicants vie for 4,200 spots. 567 F. Supp. 3d, at 595. Admissions officers read each application and rate prospective students along eight dimensions: academic programming, academic performance, standardized tests, extracurriculars, special talents, essays, background, and personal. *Id.,* at 600. The district court found that "UNC's

admissions policies mandate that race is taken into consideration" in this process as a "'plus' facto[r]." *Id.,* at 594–595. It is a plus that is "sometimes" awarded to "underrepresented minority" or "URM" candidates—a group UNC defines to include "'those students identifying themselves as African American or [B]lack; American Indian or Alaska Native; or Hispanic, Latino, or Latina,'" but not Asian or white students. *Id.*, at 591–592, n. 7, 601.

At UNC, the admissions officers' decisions to admit or deny are "'provisionally final.'" *Ante*, at 4 (opinion for the Court). The decisions become truly final only after a committee approves or rejects them. 567 F. Supp. 3d, at 599. That committee may consider an applicant's race too. *Id.*, at 607. In the end, the district court found that "race plays a role"—perhaps even "a determinative role"—in the decision to admit or deny some "URM students." *Id.,* at 634; see also *id.,* at 662 ("race may tip the scale"). Nor is this an accident. As at Harvard, officials at UNC have made a "deliberate decision" to employ race-conscious admissions practices. *Id.,* at 588–589.

While the district courts' findings tell the full story, one can also get a glimpse from aggregate statistics. Consider the chart in the Court's opinion collecting Harvard's data for the period 2009 to 2018. *Ante,* at 31. The racial composition of each incoming class remained steady over that time—remarkably so. The proportion of African Americans hovered between 10% and 12%; the proportion of Hispanics between 8% and 12%; and the proportion of Asian Americans between 17% and 20%. *Ibid.* Might this merely reflect the demographics of the school's applicant pool? Cf. *post*, at 35 (opinion of SOTOMAYOR, J.). Perhaps—at least assuming the applicant pool looks much the same each year and the school rather mechanically admits applicants based on objective criteria. But the possibility that it instead betrays the school's persistent focus on numbers of this race and numbers of that race is entirely consistent with the findings

recounted above. See, *e.g.,* 397 F. Supp. 3d, at 146 ("if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the [committee] may decide to give additional attention to applications from students within that group"); cf. *ante,* at 31–32, n. 7 (opinion for the Court).

C

Throughout this litigation, the parties have spent less time contesting these facts than debating other matters.

For example, the parties debate *how much* of a role race plays in admissions at Harvard and UNC. Both schools insist that they consider race as just one of many factors when making admissions decisions in their self-described "holistic" review of each applicant. SFFA responds with trial evidence showing that, whatever label the universities use to describe their processes, they intentionally consult race and, by design, their race-based tips and plusses benefit applicants of certain groups to the detriment of others. See Brief for Petitioner 20–35, 40–45.

The parties also debate the *reasons* both schools consult race. SFFA observes that, in the 1920s, Harvard began moving away from "test scores" and toward "plac[ing] greater emphasis on character, fitness, and other subjective criteria." *Id.*, at 12–13 (internal quotation marks omitted). Harvard made this move, SFFA asserts, because President A. Lawrence Lowell and other university leaders had become "alarmed by the growing number of Jewish students who were testing in," and they sought some way to cap the number of Jewish students without "'stat[ing] frankly'" that they were "'directly excluding all [Jews] beyond a certain percentage.'" *Id.,* at 12; see also 3 App. in No. 20–1199, pp. 1131–1133. SFFA contends that Harvard's current "holistic" approach to admissions works similarly to disguise

the school's efforts to assemble classes with a particular racial composition—and, in particular, to limit the number of Asian Americans it admits. Brief for Petitioner 12–14, 25–32. For its part, Harvard expresses regret for its past practices while denying that they resemble its current ones. Tr. of Oral Arg. in No. 20–1199, at 51. And both schools insist that their student bodies would lack sufficient diversity without race-conscious admissions. Brief for Respondent in No. 20–1199, pp. 52–54; Brief for University Respondents in No. 21–707, pp. 54–59.

When it comes to defining and measuring diversity, the parties spar too. SFFA observes that the racial categories the universities employ in the name of diversity do not begin to reflect the differences that exist within each group. See Part I–B–1, *supra*. Instead, they lump together white and Asian students from privileged backgrounds with "Jewish, Irish, Polish, or other 'white' ethnic groups whose ancestors faced discrimination" and "descendants of those Japanese-American citizens interned during World War II." *Ante*, at 45, n. 10 (THOMAS, J., concurring). Even putting all that aside, SFFA stresses that neither Harvard nor UNC is willing to quantify how much racial and ethnic diversity they think sufficient. And, SFFA contends, the universities may not wish to do so because their stated goal implies a desire to admit some fixed number (or quota) of students from each racial group. See Brief for Petitioner 77, 80; Tr. of Oral Arg. in No. 21–707, p. 180. Besides, SFFA asks, if it is diversity the schools are after, why do they exhibit so little interest in other (non-racial) markers of it? See Brief for Petitioner 78, 83–86. While Harvard professes interest in socioeconomic diversity, for example, SFFA points to trial testimony that there are "23 times as many rich kids on campus as poor kids." 2 App. in No. 20–1199,

p. 756.[3]

Even beyond all this, the parties debate the availability of alternatives. SFFA contends that both Harvard and UNC could obtain significant racial diversity without resorting to race-based admissions practices. Many other universities across the country, SFFA points out, have sought to do just that by reducing legacy preferences, increasing financial aid, and the like. Brief for Petitioner 85–86; see also Brief for Oklahoma et al. as *Amici Curiae* 9–19.[4] As part of its affirmative case, SFFA also submitted evidence that Harvard could nearly replicate the current racial composition of its student body without resorting to race-based practices if it: (1) provided socioeconomically

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[3] See also E. Bazelon, Why Is Affirmative Action in Peril? One Man's Decision, N. Y. Times Magazine, Feb. 15, 2023, p. 41 ("In the Ivy League, children whose parents are in the top 1 percent of the income distribution are 77 times as likely to attend as those whose parents are in the bottom 20 percent of the income bracket."); *ibid.* ("[A] common critique . . . is that schools have made a bargain with economic elites of all races, with the exception of Asian Americans, who are underrepresented compared with their level of academic achievement.").

[4] The principal dissent chides me for "reach[ing] beyond the factfinding below" by acknowledging SFFA's argument that other universities have employed various race-neutral tools. *Post,* at 29–30, n. 25 (opinion of SOTOMAYOR, J.). Contrary to the dissent's suggestion, however, I do not purport to find facts about those practices; all I do here is recount what SFFA has argued every step of the way. See, *e.g.,* Brief for Petitioner 55, 66–67; 1 App. in No. 20–1199, pp. 415–416, 440; 2 App. in No. 21–707, pp. 551–552. Nor, of course, is it somehow remarkable to acknowledge the parties' arguments. The principal dissent itself recites SFFA's arguments about Harvard's and other universities' practices too. See, *e.g., post,* at 30–31, 50 (opinion of SOTOMAYOR, J.). In truth, it is the dissent that reaches beyond the factfinding below when it argues from studies recited in a dissenting opinion in a different case decided almost a decade ago. *Post,* at 29–30, n. 25 (opinion of SOTOMAYOR, J.); see also *post,* at 18–21 (opinion of SOTOMAYOR, J.) (further venturing beyond the trial records to discuss data about employment, income, wealth, home ownership, and healthcare).

disadvantaged applicants just *half* of the tip it gives recruited athletes; and (2) eliminated tips for the children of donors, alumni, and faculty. Brief for Petitioner 33–34, 81; see 2 App. in No. 20–1199, at 763–765, 774–775. Doing these two things would barely affect the academic credentials of each incoming class. Brief for Petitioner 33–34. And it would not require Harvard to end tips for recruited athletes, who as a group are much weaker academically than non-athletes.[5]

At trial, however, Harvard resisted this proposal. Its preferences for the children of donors, alumni, and faculty are no help to applicants who cannot boast of their parents' good fortune or trips to the alumni tent all their lives. While race-neutral on their face, too, these preferences undoubtedly benefit white and wealthy applicants the most. See 980 F. 3d, at 171. Still, Harvard stands by them. See Brief for Respondent in No. 20–1199, at 52–54; Tr. of Oral Arg. in No. 21–1199, at 48–49. As a result, athletes and the children of donors, alumni, and faculty—groups that together "make up less than 5% of applicants to Harvard"—constitute "around 30% of the applicants admitted each year." 980 F. 3d, at 171.

To be sure, the parties' debates raise some hard-to-answer questions. Just how many admissions decisions turn on race? And what really motivates the universities' race-conscious admissions policies and their refusal to modify other preferential practices? Fortunately, Title VI does not require an answer to any of these questions. It does not ask

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[5] See Brief for Defense of Freedom Institute for Policy Studies as *Amicus Curiae* 11 (recruited athletes make up less than 1% of Harvard's applicant pool but represent more than 10% of the admitted class); P. Arcidiacono, J. Kinsler, & T. Ransom, Legacy and Athlete Preferences at Harvard, 40 J. Lab. Econ. 133, 141, n. 17 (2021) (recruited athletes were the only applicants admitted with the lowest possible academic rating and 79% of recruited athletes with the next lowest rating were admitted compared to 0.02% of other applicants with the same rating).

how much a recipient of federal funds discriminates. It does not scrutinize a recipient's reasons or motives for discriminating. Instead, the law prohibits covered institutions from intentionally treating *any* individual worse even *in part* because of race. So yes, of course, the universities consider many non-racial factors in their admissions processes too. And perhaps they mean well when they favor certain candidates over others based on the color of their skin. But even if all that is true, their conduct violates Title VI just the same. See Part I–A, *supra*; see also *Bostock*, 590 U. S., at ___, ___–___ (slip op., at 6, 12–15).

D

The principal dissent contends that this understanding of Title VI is contrary to precedent. *Post*, at 26–27, n. 21 (opinion of SOTOMAYOR, J.). But the dissent does not dispute that everything said here about the meaning of Title VI tracks this Court's precedent in *Bostock* interpreting materially identical language in Title VII. That raises two questions: Do the dissenters think *Bostock* wrongly decided? Or do they read the same words in neighboring provisions of the same statute—enacted at the same time by the same Congress—to mean different things? Apparently, the federal government takes the latter view. The Solicitor General insists that there is "ambiguity in the term 'discrimination'" in Title VI but no ambiguity in the term "discriminate" in Title VII. Tr. of Oral Arg. in No. 21–707, at 164. Respectfully, I do not see it. The words of the Civil Rights Act of 1964 are not like mood rings; they do not change their message from one moment to the next.

Rather than engage with the statutory text or our precedent in *Bostock*, the principal dissent seeks to sow confusion about the facts. It insists that all applicants to Harvard and UNC are "eligible" to receive a race-based tip. *Post*, at 32, n. 27 (opinion of SOTOMAYOR, J.); cf. *post*, at 17 (JACKSON, J., dissenting). But the question in these cases

is not who could *hypothetically* receive a race-based tip. It is who *actually* receives one. And on that score the lower courts left no doubt. The district court in the Harvard case found that the school's admissions policy "cannot . . . be considered facially neutral from a Title VI perspective given that admissions officers provide [race-based] tips to African American and Hispanic applicants, while white and Asian American applicants are unlikely to receive a meaningful race-based tip." 397 F. Supp. 3d, at 190, n. 56; see also *id.,* at 189–190 ("Harvard's admissions process is not facially neutral."). Likewise, the district court in the UNC case found that admissions officers "sometimes" award race-based plusses to URM candidates—a category that excludes Asian American and white students. 567 F. Supp. 3d, at 591–592, n. 7, 601.[6]

Nor could anyone doubt that these cases are about intentional discrimination just because Harvard in particular "'does not *explicitly* prioritize any particular racial group over any other.'" *Post,* at 32, n. 27 (opinion of SOTOMAYOR, J.) (emphasis added). Forget for a moment the universities' concessions about how they deliberately consult race when deciding whom to admit. See *supra,* at 12–13.[7] Look past

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[6]The principal dissent suggests "some Asian American applicants are actually advantaged by Harvard's use of race." *Post,* at 60 (opinion of SOTOMAYOR, J.) (internal quotation marks omitted). What is the dissent's basis for that claim? The district court's finding that "considering applicants' race *may* improve the admission chances of *some* Asian Americans *who connect their racial identities with particularly compelling narratives*." 397 F. Supp. 3d, at 178 (emphasis added). The dissent neglects to mention those key qualifications. Worse, it ignores completely the district court's further finding that "*overall*" Harvard's race-conscious admissions policy "results in fewer Asian American[s] . . . being admitted." *Ibid*. (emphasis added). So much for affording the district court's "careful factfinding" the "deference it [is] owe[d]." *Post,* at 29–30, n. 25 (opinion of SOTOMAYOR, J.).

[7]See also, *e.g.*, Tr. of Oral Arg. in No. 20–1199, at 67, 84, 91; Tr. of Oral Arg. in No. 21–707, at 70–71, 81, 84, 91–92, 110.

the lower courts' findings recounted above about how the universities intentionally give tips to students of some races and not others. See *supra,* at 8–12, 16–17. Put to the side telling evidence that came out in discovery.[8] Ignore, too, our many precedents holding that it does not matter how a defendant "label[s]" its practices, *Bostock*, 590 U. S., at ___ (slip op., at 14); that intentional discrimination between individuals is unlawful whether "motivated by a wish to achieve classwide equality" or any other purpose, *id.*, at ___ (slip op., at 13); and that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a [merely] discriminatory effect," *Johnson Controls*, 499 U. S., at 199. Consider just the dissents in these cases. From start to finish and over the course of nearly 100 pages, they defend the universities' purposeful discrimination between applicants based on race. "[N]eutrality," they insist, is not enough. *Post,* at 12, 68 (opinion of SOTOMAYOR, J.); cf. *post*, at 21 (opinion of JACKSON, J.). "[T]he use of race," they stress, "is critical." *Post,* at 59–60 (opinion of SOTOMAYOR, J.); see *id.,* at 2, 33, 39, 43–45; cf. *post,* at 2, 26 (opinion of JACKSON, J.). Plainly, Harvard and UNC choose to treat some students worse than others in part because of race. To suggest otherwise—or to cling to the fact that the schools do not always say the quiet part aloud—is to deny reality.[9]

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[8] Messages among UNC admissions officers included statements such as these: "[P]erfect 2400 SAT All 5 on AP one B in 11th [grade]." "Brown?!" "Heck no. Asian." "Of course. Still impressive."; "If it[']s brown and above a 1300 [SAT] put them in for [the] merit/Excel [scholarship]."; "I just opened a brown girl who's an 810 [SAT]."; "I'm going through this trouble because this is a bi-racial (black/white) male."; "[S]tellar academics for a Native Amer[ican]/African Amer[ican] kid." 3 App. in No. 21–707, pp. 1242–1251.

[9] Left with no reply on the statute or its application to the facts, the principal dissent suggests that it violates "principles of party presentation" and abandons "judicial restraint" even to look at the text of Title VI.

II

So far, we have seen that Title VI prohibits a recipient of federal funds from discriminating against individuals even in part because of race. We have seen, too, that Harvard and UNC do just what the law forbids. One might wonder, then, why the parties have devoted years and fortunes litigating other matters, like how much the universities discriminate and why they do so. The answer lies in *Bakke*.

A

Bakke concerned admissions to the medical school at the University of California, Davis. That school set aside a certain number of spots in each class for minority applicants. See 438 U. S., at 272–276 (opinion of Powell, J.). Allan Bakke argued that the school's policy violated Title VI and the Equal Protection Clause of the Fourteenth Amendment. *Id.,* at 270. The Court agreed with Mr. Bakke. In a fractured decision that yielded six opinions, a majority of the Court held that the school's set-aside system went too far. At the same time, however, a different coalition of five Justices ventured beyond the facts of the case to suggest that, in other circumstances not at issue, universities may sometimes permissibly use race in their admissions processes. See *ante*, at 16–19 (opinion for the Court).

As important as these conclusions were some of the interpretive moves made along the way. Justice Powell (writing only for himself) and Justice Brennan (writing for himself

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Post, at 26–27, n. 21 (opinion of SOTOMAYOR, J.). It is a bewildering suggestion. SFFA sued Harvard and UNC under Title VI. And when a party seeks relief under a statute, our task is to apply the law's terms as a reasonable reader would have understood them when Congress enacted them. *Bostock* v. *Clayton County*, 590 U. S. ___, ___ (2020) (slip op., at 4). To be sure, parties are free to frame their arguments. But they are not free to stipulate to a statute's meaning and no party may "waiv[e]" the proper interpretation of the law by "fail[ing] to invoke it." *EEOC* v. *FLRA*, 476 U. S. 19, 23 (1986) (*per curiam*) (internal quotation marks omitted); see also *Young* v. *United States*, 315 U. S. 257, 258–259 (1942).

and three others) argued that Title VI is coterminous with the Equal Protection Clause. Put differently, they read Title VI to prohibit recipients of federal funds from doing whatever the Equal Protection Clause prohibits States from doing. Justice Powell and Justice Brennan then proceeded to evaluate racial preferences in higher education directly under the Equal Protection Clause. From there, however, their paths diverged. Justice Powell thought some racial preferences might be permissible but that the admissions program at issue violated the promise of equal protection. 438 U. S., at 315–320. Justice Brennan would have given a wider berth to racial preferences and allowed the challenged program to proceed. *Id.*, at 355–379.

Justice Stevens (also writing for himself and three others) took an altogether different approach. He began by noting the Court's "settled practice" of "avoid[ing] the decision of a constitutional issue if a case can be fairly decided on a statutory ground." *Id.,* at 411. He then turned to the "broad prohibition" of Title VI, *id.,* at 413, and summarized his views this way: "The University . . . 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. The plain language of the statute therefore requires" finding a Title VI violation. *Id.,* at 412 (footnote omitted).

In the years following *Bakke*, this Court hewed to Justice Powell's and Justice Brennan's shared premise that Title VI and the Equal Protection Clause mean the same thing. See *Gratz* v. *Bollinger*, 539 U. S. 244, 276, n. 23 (2003); *Grutter* v. *Bollinger*, 539 U. S. 306, 343 (2003). Justice Stevens's statute-focused approach receded from view. As a result, for over four decades, every case about racial preferences in school admissions under Title VI has turned into a case about the meaning of the Fourteenth Amendment.

And what a confused body of constitutional law followed. For years, this Court has said that the Equal Protection

Clause requires any consideration of race to satisfy "strict scrutiny," meaning it must be "narrowly tailored to further compelling governmental interests." *Grutter*, 539 U. S., at 326 (internal quotation marks omitted). Outside the context of higher education, "our precedents have identified only two" interests that meet this demanding standard: "remediating specific, identified instances of past discrimination that violated the Constitution or a statute," and "avoiding imminent and serious risks to human safety in prisons." *Ante,* at 15 (opinion for the Court).

Within higher education, however, an entirely distinct set of rules emerged. Following *Bakke*, this Court declared that judges may simply "defer" to a school's assertion that "diversity is essential" to its "educational mission." *Grutter*, 539 U. S., at 328. Not all schools, though—elementary and secondary schools apparently do not qualify for this deference. See *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 724–725 (2007). Only colleges and universities, the Court explained, "occupy a special niche in our constitutional tradition." *Grutter*, 539 U. S., at 329. Yet even they (wielding their "special niche" authority) cannot simply assert an interest in diversity and discriminate as they please. *Fisher*, 579 U. S., at 381. Instead, they may consider race only as a "plus" factor for the purpose of "attaining a critical mass of underrepresented minority students" or "a diverse student body." *Grutter*, 539 U. S., at 335–336 (internal quotation marks omitted). At the same time, the Court cautioned, this practice "must have a logical end point." *Id.,* at 342. And in the meantime, "outright racial balancing" and "quota system[s]" remain "patently unconstitutional." *Id.*, at 330, 334. Nor may a college or university ever provide "mechanical, predetermined diversity bonuses." *Id.*, at 337 (internal quotation marks omitted). Only a "tip" or "plus" is constitutionally tolerable, and only for a limited time. *Id.*, at 338–339, 341.

If you cannot follow all these twists and turns, you are

not alone. See, *e.g., Fisher*, 579 U. S., at 401–437 (ALITO, J., dissenting); *Grutter*, 539 U. S., at 346–349 (Scalia, J., joined by THOMAS, J., concurring in part and dissenting in part); 1 App. in No. 21–707, pp. 401–402 (testimony from UNC administrator: "[M]y understanding of the term 'critical mass' is that it's a . . . I'm trying to decide if it's an analogy or a metaphor[.] I think it's an analogy. . . . I'm not even sure we would know what it is."); 3 App. in No. 20–1199, at 1137–1138 (similar testimony from a Harvard administrator). If the Court's post-*Bakke* higher-education precedents ever made sense, they are by now incoherent.

Recognizing as much, the Court today cuts through the kudzu. It ends university exceptionalism and returns this Court to the traditional rule that the Equal Protection Clause forbids the use of race in distinguishing between persons unless strict scrutiny's demanding standards can be met. In that way, today's decision wakes the echoes of Justice John Marshall Harlan: "The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896) (dissenting opinion).

B

If *Bakke* led to errors in interpreting the Equal Protection Clause, its first mistake was to take us there. These cases arise under Title VI and that statute is "more than a simple paraphrasing" of the Equal Protection Clause. 438 U. S., at 416 (opinion of Stevens, J.). Title VI has "independent force, with language and emphasis in addition to that found in the Constitution." *Ibid.* That law deserves our respect and its terms provide us with all the direction we need.

Put the two provisions side by side. Title VI says: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination

under any program or activity receiving Federal financial assistance." §2000d. The Equal Protection Clause reads: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Amdt. 14, §1. That such differently worded provisions should mean the same thing is implausible on its face.

Consider just some of the obvious differences. The Equal Protection Clause operates on States. It does not purport to regulate the conduct of private parties. By contrast, Title VI applies to recipients of federal funds—covering not just many state actors, but many private actors too. In this way, Title VI reaches entities and organizations that the Equal Protection Clause does not.

In other respects, however, the relative scope of the two provisions is inverted. The Equal Protection Clause addresses all manner of distinctions between persons and this Court has held that it implies different degrees of judicial scrutiny for different kinds of classifications. So, for example, courts apply strict scrutiny for classifications based on race, color, and national origin; intermediate scrutiny for classifications based on sex; and rational-basis review for classifications based on more prosaic grounds. See, *e.g.*, *Fisher*, 579 U. S., at 376; *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493–495 (1989) (plurality opinion); *United States* v. *Virginia*, 518 U. S. 515, 555–556 (1996); *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 366–367 (2001). By contrast, Title VI targets only certain classifications—those based on race, color, or national origin. And that law does not direct courts to subject these classifications to one degree of scrutiny or another. Instead, as we have seen, its rule is as uncomplicated as it is momentous. Under Title VI, it is *always* unlawful to discriminate among persons even in part because of race, color, or national origin.

In truth, neither Justice Powell's nor Justice Brennan's opinion in *Bakke* focused on the text of Title VI. Instead,

both leapt almost immediately to its "voluminous legislative history," from which they proceeded to divine an implicit "congressional intent" to link the statute with the Equal Protection Clause. 438 U. S., at 284–285 (opinion of Powell, J.); *id.,* at 328–336 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.). Along the way, as Justice Stevens documented, both opinions did more than a little cherry-picking from the legislative record. See *id.*, at 413–417. Justice Brennan went so far as to declare that "any claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its legislative history." *Id.,* at 340. And once liberated from the statute's firm rule against discrimination based on race, both opinions proceeded to devise their own and very different arrangements in the name of the Equal Protection Clause.

The moves made in *Bakke* were not statutory interpretation. They were judicial improvisation. Under our Constitution, judges have never been entitled to disregard the plain terms of a valid congressional enactment based on surmise about unenacted legislative intentions. Instead, it has always been this Court's duty "to give effect, if possible, to every clause and word of a statute," *Montclair* v. *Ramsdell*, 107 U. S. 147, 152 (1883), and of the Constitution itself, see *Knowlton* v. *Moore*, 178 U. S. 41, 87 (1900). In this country, "[o]nly the written word is the law, and all persons are entitled to its benefit." *Bostock*, 590 U. S., at ___ (slip op., at 2). When judges disregard these principles and enforce rules "inspired only by extratextual sources and [their] own imaginations," they usurp a lawmaking function "reserved for the people's representatives." *Id.*, at ___ (slip op., at 4).

Today, the Court corrects course in its reading of the Equal Protection Clause. With that, courts should now also correct course in their treatment of Title VI. For years, they

have read a solo opinion in *Bakke* like a statute while reading Title VI as a mere suggestion. A proper respect for the law demands the opposite. Title VI bears independent force beyond the Equal Protection Clause. Nothing in it grants special deference to university administrators. Nothing in it endorses racial discrimination to any degree or for any purpose. Title VI is more consequential than that.

*

In the aftermath of the Civil War, Congress took vital steps toward realizing the promise of equality under the law. As important as those initial efforts were, much work remained to be done—and much remains today. But by any measure, the Civil Rights Act of 1964 stands as a landmark on this journey and one of the Nation's great triumphs. We have no right to make a blank sheet of any of its provisions. And when we look to the clear and powerful command Congress set forth in that law, these cases all but resolve themselves. Under Title VI, it is never permissible "'to say "yes" to one person . . . but to say "no" to another person'" even in part "'because of the color of his skin.'" *Bakke*, 438 U. S., at 418 (opinion of Stevens, J.).

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 29, 2023]

JUSTICE KAVANAUGH, concurring.

I join the Court's opinion in full. I add this concurring opinion to further explain why the Court's decision today is consistent with and follows from the Court's equal protection precedents, including the Court's precedents on race-based affirmative action in higher education.

Ratified in 1868 in the wake of the Civil War, the Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, §1. In accord with the Fourteenth Amendment's text and history, this Court considers all racial classifications to be constitutionally suspect. See *Grutter* v. *Bollinger*, 539 U. S. 306, 326 (2003); *Strauder* v. *West Virginia*, 100 U. S. 303,

306–308 (1880). As a result, the Court has long held that racial classifications by the government, including race-based affirmative action programs, are subject to strict judicial scrutiny.

Under strict scrutiny, racial classifications are constitutionally prohibited unless they are narrowly tailored to further a compelling governmental interest. *Grutter*, 539 U. S., at 326–327. Narrow tailoring requires courts to examine, among other things, whether a racial classification is "necessary"—in other words, whether race-neutral alternatives could adequately achieve the governmental interest. *Id.,* at 327, 339–340; *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 507 (1989).

Importantly, even if a racial classification is otherwise narrowly tailored to further a compelling governmental interest, a "deviation from the norm of equal treatment of all racial and ethnic groups" must be "a temporary matter"—or stated otherwise, must be "limited in time." *Id.,* at 510 (plurality opinion of O'Connor, J.); *Grutter*, 539 U. S., at 342.

In 1978, five Members of this Court held that race-based affirmative action in higher education did not violate the Equal Protection Clause or Title VI of the Civil Rights Act, so long as universities used race only as a factor in admissions decisions and did not employ quotas. See *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 325–326 (1978) (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.); *id.,* at 287, 315–320 (opinion of Powell, J.). One Member of the Court's five-Justice majority, Justice Blackmun, added that race-based affirmative action should exist only as a temporary measure. He expressed hope that such programs would be "unnecessary" and a "relic of the past" by 1988—within 10 years "at the most," in his words—although he doubted that the goal could be achieved by then. *Id.,* at 403 (opinion of Blackmun, J.).

In 2003, 25 years after *Bakke*, five Members of this Court

again held that race-based affirmative action in higher education did not violate the Equal Protection Clause or Title VI. *Grutter*, 539 U. S., at 343. This time, however, the Court also specifically indicated—despite the reservations of Justice Ginsburg and Justice Breyer—that race-based affirmative action in higher education would *not* be constitutionally justified after another 25 years, at least absent something not "expect[ed]." *Ibid.* And various Members of the Court wrote separate opinions explicitly referencing the Court's 25-year limit.

- Justice O'Connor's opinion for the Court stated: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Ibid.*
- JUSTICE THOMAS expressly concurred in "the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years." *Id.,* at 351 (opinion concurring in part and dissenting in part).
- JUSTICE THOMAS, joined here by Justice Scalia, reiterated "the Court's holding" that race-based affirmative action in higher education "will be unconstitutional in 25 years" and "that in 25 years the practices of the Law School will be illegal," while also stating that "they are, for the reasons I have given, illegal now." *Id.,* at 375–376.
- Justice Kennedy referred to "the Court's pronouncement that race-conscious admissions programs will be unnecessary 25 years from now." *Id.,* at 394 (dissenting opinion).
- Justice Ginsburg, joined by Justice Breyer, acknowledged the Court's 25-year limit but questioned it, writing that "one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely

equal opportunity will make it safe to sunset affirmative action." *Id.,* at 346 (concurring opinion).

In allowing race-based affirmative action in higher education for another generation—and only for another generation—the Court in *Grutter* took into account competing considerations. The Court recognized the barriers that some minority applicants to universities still faced as of 2003, notwithstanding the progress made since *Bakke*. See *Grutter*, 539 U. S., at 343. The Court stressed, however, that "there are serious problems of justice connected with the idea of preference itself." *Id.,* at 341 (internal quotation marks omitted). And the Court added that a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Ibid.* (internal quotation marks omitted).

The *Grutter* Court also emphasized the equal protection principle that racial classifications, even when otherwise permissible, must be a "'temporary matter,'" and "must be limited in time." *Id.,* at 342 (quoting *Croson*, 488 U. S., at 510 (plurality opinion of O'Connor, J.)). The requirement of a time limit "reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle." *Grutter*, 539 U. S., at 342.

Importantly, the *Grutter* Court saw "no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point." *Ibid.* The Court reasoned that the "requirement that all race-conscious admissions programs have a termination point assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Ibid.* (internal

quotation marks and alteration omitted). The Court therefore concluded that race-based affirmative action programs in higher education, like other racial classifications, must be "limited in time." *Ibid.*

The *Grutter* Court's conclusion that race-based affirmative action in higher education must be limited in time followed not only from fundamental equal protection principles, but also from this Court's equal protection precedents applying those principles. Under those precedents, racial classifications may not continue indefinitely. For example, in the elementary and secondary school context after *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the Court authorized race-based student assignments for several decades—but not indefinitely into the future. See, *e.g., Board of Ed. of Oklahoma City Public Schools* v. *Dowell*, 498 U. S. 237, 247–248 (1991); *Pasadena City Bd. of Ed.* v. *Spangler*, 427 U. S. 424, 433–434, 436 (1976); *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 31–32 (1971); cf. *McDaniel* v. *Barresi*, 402 U. S. 39, 41 (1971).

In those decisions, this Court ruled that the race-based "injunctions entered in school desegregation cases" could not "operate in perpetuity." *Dowell*, 498 U. S., at 248. Consistent with those decisions, the *Grutter* Court ruled that race-based affirmative action in higher education likewise could not operate in perpetuity.

As of 2003, when *Grutter* was decided, many race-based affirmative action programs in higher education had been operating for about 25 to 35 years. Pointing to the Court's precedents requiring that racial classifications be "temporary," *Croson*, 488 U. S., at 510 (plurality opinion of O'Connor, J.), the petitioner in *Grutter*, joined by the United States, argued that race-based affirmative action in higher education could continue no longer. See Brief for Petitioner 21–22, 30–31, 33, 42, Brief for United States 26–27, in *Grutter* v. *Bollinger*, O. T. 2002, No. 02–241.

The *Grutter* Court rejected those arguments for ending race-based affirmative action in higher education in 2003. But in doing so, the Court struck a careful balance. The Court ruled that narrowly tailored race-based affirmative action in higher education could continue for another generation. But the Court also explicitly rejected any "permanent justification for racial preferences," and therefore ruled that race-based affirmative action in higher education could continue *only* for another generation. 539 U. S., at 342–343.

Harvard and North Carolina would prefer that the Court now ignore or discard *Grutter*'s 25-year limit on race-based affirmative action in higher education, or treat it as a mere aspiration. But the 25-year limit constituted an important part of Justice O'Connor's nuanced opinion for the Court in *Grutter*. Indeed, four of the separate opinions in *Grutter* discussed the majority opinion's 25-year limit, which belies any suggestion that the Court's reference to it was insignificant or not carefully considered.

In short, the Court in *Grutter* expressly recognized the serious issues raised by racial classifications—particularly permanent or long-term racial classifications. And the Court "assure[d] all citizens" throughout America that "the deviation from the norm of equal treatment" in higher education could continue for another generation, and only for another generation. *Ibid.* (internal quotation marks omitted).

A generation has now passed since *Grutter*, and about 50 years have gone by since the era of *Bakke* and *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974), when race-based affirmative action programs in higher education largely began. In light of the Constitution's text, history, and precedent, the Court's decision today appropriately respects and abides by *Grutter*'s explicit temporal limit on the use of race-based affirmative action in higher

education.[1]

JUSTICE SOTOMAYOR, JUSTICE KAGAN, and JUSTICE JACKSON disagree with the Court's decision. I respect their views. They thoroughly recount the horrific history of slavery and Jim Crow in America, cf. *Bakke*, 438 U. S., at 395–402 (opinion of Marshall, J.), as well as the continuing effects of that history on African Americans today. And they are of course correct that for the last five decades, *Bakke* and *Grutter* have allowed narrowly tailored race-based affirmative action in higher education.

But I respectfully part ways with my dissenting colleagues on the question of whether, under this Court's precedents, race-based affirmative action in higher education may extend indefinitely into the future. The dissents suggest that the answer is yes. But this Court's precedents make clear that the answer is no. See *Grutter*, 539 U. S., at 342–343; *Dowell*, 498 U. S., at 247–248; *Croson*, 488 U. S., at 510 (plurality opinion of O'Connor, J.).

To reiterate: For about 50 years, many institutions of higher education have employed race-based affirmative action programs. In the abstract, it might have been debatable how long those race-based admissions programs could continue under the "temporary matter"/"limited in time" equal protection principle recognized and applied by this Court. *Grutter*, 539 U. S., at 342 (internal quotation marks omitted); cf. *Dowell*, 498 U. S., at 247–248. But in 2003, the *Grutter* Court applied that temporal equal

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[1] The Court's decision will first apply to the admissions process for the college class of 2028, which is the next class to be admitted. Some might have debated how to calculate *Grutter*'s 25-year period—whether it ends with admissions for the college class of 2028 or instead for the college class of 2032. But neither Harvard nor North Carolina argued that *Grutter*'s 25-year period ends with the class of 2032 rather than the class of 2028. Indeed, notwithstanding the 25-year limit set forth in *Grutter*, neither university embraced *any* temporal limit on race-based affirmative action in higher education, or identified any end date for its continued use of race in admissions. *Ante,* at 30–34.

protection principle and resolved the debate: The Court declared that race-based affirmative action in higher education could continue for another generation, and only for another generation, at least absent something unexpected. *Grutter*, 539 U. S., at 343. As I have explained, the Court's pronouncement of a 25-year period—as both an extension of *and* an outer limit to race-based affirmative action in higher education—formed an important part of the carefully constructed *Grutter* decision. I would abide by that temporal limit rather than discarding it, as today's dissents would do.

To be clear, although progress has been made since *Bakke* and *Grutter*, racial discrimination still occurs and the effects of past racial discrimination still persist. Federal and state civil rights laws serve to deter and provide remedies for current acts of racial discrimination. And governments and universities still "can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race." *Croson*, 488 U. S., at 526 (Scalia, J., concurring in judgment) (internal quotation marks omitted); see *id.,* at 509 (plurality opinion of O'Connor, J.) ("the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races"); *ante,* at 39–40; Brief for Petitioner 80–86; Reply Brief in No. 20–1199, pp. 25–26; Reply Brief in No. 21–707, pp. 23–26.

In sum, the Court's opinion today is consistent with and follows from the Court's equal protection precedents, and I join the Court's opinion in full.

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[June 29, 2023]

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and JUSTICE JACKSON join,* dissenting.

The Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality. The Court long ago concluded that this guarantee can be enforced through race-conscious means in a society that is not, and has never been, colorblind. In *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the Court recognized the constitutional necessity of racially integrated schools in light of the

*JUSTICE JACKSON did not participate in the consideration or decision of the case in No. 20–1199 and joins this opinion only as it applies to the case in No. 21–707.

harm inflicted by segregation and the "importance of education to our democratic society." *Id.*, at 492–495. For 45 years, the Court extended *Brown*'s transformative legacy to the context of higher education, allowing colleges and universities to consider race in a limited way and for the limited purpose of promoting the important benefits of racial diversity. This limited use of race has helped equalize educational opportunities for all students of every race and background and has improved racial diversity on college campuses. Although progress has been slow and imperfect, race-conscious college admissions policies have advanced the Constitution's guarantee of equality and have promoted *Brown*'s vision of a Nation with more inclusive schools.

Today, this Court stands in the way and rolls back decades of precedent and momentous progress. It holds that race can no longer be used in a limited way in college admissions to achieve such critical benefits. In so holding, the Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter. The Court subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic government and pluralistic society. Because the Court's opinion is not grounded in law or fact and contravenes the vision of equality embodied in the Fourteenth Amendment, I dissent.

I

A

Equal educational opportunity is a prerequisite to achieving racial equality in our Nation. From its founding, the United States was a new experiment in a republican form of government where democratic participation and the capacity to engage in self-rule were vital. At the same time, American society was structured around the profitable institution that was slavery, which the original Constitution

protected. The Constitution initially limited the power of Congress to restrict the slave trade, Art. I, §9, cl. 1, accorded Southern States additional electoral power by counting three-fifths of their enslaved population in apportioning congressional seats, §2, cl. 3, and gave enslavers the right to retrieve enslaved people who escaped to free States, Art. IV, §2, cl. 3. Because a foundational pillar of slavery was the racist notion that Black people are a subordinate class with intellectual inferiority, Southern States sought to ensure slavery's longevity by prohibiting the education of Black people, whether enslaved or free. See H. Williams, Self-Taught: African American Education in Slavery and Freedom 7, 203–213 (2005) (Self-Taught). Thus, from this Nation's birth, the freedom to learn was neither colorblind nor equal.

With time, and at the tremendous cost of the Civil War, abolition came. More than two centuries after the first African enslaved persons were forcibly brought to our shores, Congress adopted the Thirteenth Amendment to the Constitution, which abolished "slavery" and "involuntary servitude, except as a punishment for crime." §1. "Like all great historical transformations," emancipation was a movement, "not a single event" owed to any single individual, institution, or political party. E. Foner, The Second Founding 21, 51–54 (2019) (The Second Founding).

The fight for equal educational opportunity, however, was a key driver. Literacy was an "instrument of resistance and liberation." Self-Taught 8. Education "provided the means to write a pass to freedom" and "to learn of abolitionist activities." *Id.*, at 7. It allowed enslaved Black people "to disturb the power relations between master and slave," which "fused their desire for literacy with their desire for freedom." *Ibid.* Put simply, "[t]he very feeling of inferiority which slavery forced upon [Black people] fathered an intense desire to rise out of their condition by means of education." W. E. B. Du Bois, Black Reconstruction in America

1860–1880, p. 638 (1935); see J. Anderson, The Education of Blacks in the South 1860–1935, p. 7 (1988). Black Americans thus insisted, in the words of Frederick Douglass, "that in a country governed by the people, like ours, education of the youth of all classes is vital to its welfare, prosperity, and to its existence." Address to the People of the United States (1883), in 4 P. Foner, The Life and Writings of Frederick Douglass 386 (1955). Black people's yearning for freedom of thought, and for a more perfect Union with educational opportunity for all, played a crucial role during the Reconstruction era.

Yet emancipation marked the beginning, not the end, of that era. Abolition alone could not repair centuries of racial subjugation. Following the Thirteenth Amendment's ratification, the Southern States replaced slavery with "a system of 'laws which imposed upon [Black people] onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value.'" *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 390 (1978) (opinion of Marshall, J.) (quoting *Slaughter-House Cases*, 16 Wall. 36, 70 (1873)). Those so-called "Black Codes" discriminated against Black people on the basis of race, regardless of whether they had been previously enslaved. See, *e.g.*, 1866 N. C. Sess. Laws pp. 99, 102.

Moreover, the criminal punishment exception in the Thirteenth Amendment facilitated the creation of a new system of forced labor in the South. Southern States expanded their criminal laws, which in turn "permitted involuntary servitude as a punishment" for convicted Black persons. D. Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans From the Civil War to World War II, pp. 7, 53 (2009) (Slavery by Another Name). States required, for example, that Black people "sign a labor contract to work for a white employer or face prosecution for vagrancy." The Second Founding 48. State laws

then forced Black convicted persons to labor in "plantations, mines, and industries in the South." *Id.*, at 50. This system of free forced labor provided tremendous benefits to Southern whites and was designed to intimidate, subjugate, and control newly emancipated Black people. See Slavery by Another Name 5–6, 53. The Thirteenth Amendment, without more, failed to equalize society.

Congress thus went further and embarked on months of deliberation about additional Reconstruction laws. Those efforts included the appointment of a Committee, the Joint Committee on Reconstruction, "to inquire into the condition of the Confederate States." Report of the Joint Committee on Reconstruction, S. Rep. No. 112, 39th Cong., 1st Sess., 1 (1866) (hereinafter Joint Comm. Rep.). Among other things, the Committee's Report to Congress documented the "deep-seated prejudice" against emancipated Black people in the Southern States and the lack of a "general disposition to place the colored race, constituting at least two-fifths of the population, upon terms even of civil equality." *Id.*, at 11. In light of its findings, the Committee proposed amending the Constitution to secure the equality of "rights, civil and political." *Id.*, at 7.

Congress acted on that recommendation and adopted the Fourteenth Amendment. Proponents of the Amendment declared that one of its key goals was to "protec[t] the black man in his fundamental rights as a citizen with the same shield which it throws over the white man." Cong. Globe, 39th Cong., 1st Sess., 2766 (1866) (Cong. Globe) (statement of Sen. Howard). That is, the Amendment sought "to secure to a race recently emancipated, a race that through many generations [was] held in slavery, all the civil rights that the superior race enjoy." *Plessy* v. *Ferguson*, 163 U. S. 537, 555–556 (1896) (Harlan, J., dissenting) (internal quotation marks omitted).

To promote this goal, Congress enshrined a broad guarantee of equality in the Equal Protection Clause of the

Amendment. That Clause commands that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Amdt. 14, §1. Congress chose its words carefully, opting for expansive language that focused on equal protection and rejecting "proposals that would have made the Constitution explicitly color-blind." A. Kull, The Color-Blind Constitution 69 (1992); see also, *e.g.*, Cong. Globe 1287 (rejecting proposed language providing that "no State . . . shall . . . recognize any distinction between citizens . . . on account of race or color"). This choice makes it clear that the Fourteenth Amendment does not impose a blanket ban on race-conscious policies.

Simultaneously with the passage of the Fourteenth Amendment, Congress enacted a number of race-conscious laws to fulfill the Amendment's promise of equality, leaving no doubt that the Equal Protection Clause permits consideration of race to achieve its goal. One such law was the Freedmen's Bureau Act, enacted in 1865 and then expanded in 1866, which established a federal agency to provide certain benefits to refugees and newly emancipated freedmen. See Act of Mar. 3, 1865, ch. 90, 13 Stat. 507; Act of July 16, 1866, ch. 200, 14 Stat. 173. For the Bureau, education "was the foundation upon which all efforts to assist the freedmen rested." E. Foner, Reconstruction: America's Unfinished Revolution 1863–1877, p. 144 (1988). Consistent with that view, the Bureau provided essential "funding for black education during Reconstruction." *Id.*, at 97.

Black people were the targeted beneficiaries of the Bureau's programs, especially when it came to investments in education in the wake of the Civil War. Each year surrounding the passage of the Fourteenth Amendment, the Bureau "educated approximately 100,000 students, nearly all of them black," and regardless of "degree of past disadvantage." E. Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev.

753, 781 (1985). The Bureau also provided land and funding to establish some of our Nation's Historically Black Colleges and Universities (HBCUs). *Ibid.*; see also Brief for HBCU Leaders et al. as *Amici Curiae* 13 (HBCU Brief). In 1867, for example, the Bureau provided Howard University tens of thousands of dollars to buy property and construct its campus in our Nation's capital. 2 O. Howard, Autobiography 397–401 (1907). Howard University was designed to provide "special opportunities for a higher education to the newly enfranchised of the south," but it was available to all Black people, "whatever may have been their previous condition." Bureau Refugees, Freedmen and Abandoned Lands, Sixth Semi-Annual Report on Schools for Freedmen 60 (July 1, 1868).[1] The Bureau also "expended a total of $407,752.21 on black colleges, and only $3,000 on white colleges" from 1867 to 1870. Schnapper, 71 Va. L. Rev., at 798, n. 149.

Indeed, contemporaries understood that the Freedmen's Bureau Act benefited Black people. Supporters defended the law by stressing its race-conscious approach. See, *e.g.*, Cong. Globe 632 (statement of Rep. Moulton) ("[T]he true object of this bill is the amelioration of the condition of the colored people"); Joint Comm. Rep. 11 (reporting that "the Union men of the south" declared "with one voice" that the Bureau's efforts "protect[ed] the colored people"). Opponents argued that the Act created harmful racial classifications that favored Black people and disfavored white Americans. See, *e.g.*, Cong. Globe 397 (statement of Sen. Willey) (the Act makes "a distinction on account of color between the two races"), 544 (statement of Rep. Taylor) (the Act is

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[1] As JUSTICE THOMAS acknowledges, the HBCUs, including Howard University, account for a high proportion of Black college graduates. *Ante*, at 56–57 (concurring opinion). That reality cannot be divorced from the history of anti-Black discrimination that gave rise to the HBCUs and the targeted work of the Freedmen's Bureau to help Black people obtain a higher education. See HBCU Brief 13–15.

"legislation for a particular class of the blacks to the exclusion of all whites"), App. to Cong. Globe, 39th Cong., 1st Sess., 69–70 (statement of Rep. Rousseau) ("You raise a spirit of antagonism between the black race and the white race in our country, and the law-abiding will be powerless to control it"). President Andrew Johnson vetoed the bill on the basis that it provided benefits "to a particular class of citizens," 6 Messages and Papers of the Presidents 1789–1897, p. 425 (J. Richardson ed. 1897) (Messages & Papers) (A. Johnson to House of Rep. July 16, 1866), but Congress overrode his veto. Cong. Globe 3849–3850. Thus, rejecting those opponents' objections, the same Reconstruction Congress that passed the Fourteenth Amendment eschewed the concept of colorblindness as sufficient to remedy inequality in education.

Congress also debated and passed the Civil Rights Act of 1866 contemporaneously with the Fourteenth Amendment. The goal of that Act was to eradicate the Black Codes enacted by Southern States following ratification of the Thirteenth Amendment. See *id.*, at 474. Because the Black Codes focused on race, not just slavery-related status, the Civil Rights Act explicitly recognized that white citizens enjoyed certain rights that non-white citizens did not. Section 1 of the Act provided that all persons "of every race and color . . . shall have the same right[s]" as those "enjoyed by white citizens." Act of Apr. 9, 1866, 14 Stat. 27. Similarly, Section 2 established criminal penalties for subjecting racial minorities to "different punishment . . . by reason of . . . color or race, than is prescribed for the punishment of white persons." *Ibid.* In other words, the Act was not colorblind. By using white citizens as a benchmark, the law classified by race and took account of the privileges enjoyed only by white people. As he did with the Freedmen's Bureau Act, President Johnson vetoed the Civil Rights Act in part because he viewed it as providing Black citizens with special treatment. See Messages and Papers 408, 413 (the Act is

designed "to afford discriminating protection to colored persons," and its "distinction of race and color . . . operate[s] in favor of the colored and against the white race"). Again, Congress overrode his veto. Cong. Globe 1861. In fact, Congress reenacted race-conscious language in the Civil Rights Act of 1870, two years after ratification of the Fourteenth Amendment, see Act of May 31, 1870, §16, 16 Stat. 144, where it remains today, see 42 U. S. C. §§1981(a) and 1982 (Rev. Stat. §§1972, 1978).

Congress similarly appropriated federal dollars explicitly and solely for the benefit of racial minorities. For example, it appropriated money for "'the relief of destitute colored women and children,'" without regard to prior enslavement. Act of July 28, 1866, 14 Stat. 317. Several times during and after the passage of the Fourteenth Amendment, Congress also made special appropriations and adopted special protections for the bounty and prize money owed to "colored soldiers and sailors" of the Union Army. 14 Stat. 357, Res. No. 46, June 15, 1866; Act of Mar. 3, 1869, ch. 122, 15 Stat. 301; Act of Mar. 3, 1873, 17 Stat. 528. In doing so, it rebuffed objections to these measures as "class legislation" "applicable to colored people and not . . . to the white people." Cong. Globe, 40th Cong., 1st Sess., 79 (1867) (statement of Sen. Grimes). This history makes it "inconceivable" that race-conscious college admissions are unconstitutional. *Bakke*, 438 U. S., at 398 (opinion of Marshall, J.).[2]

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[2] By the time the Fourteenth Amendment was ratified by the States in 1868, "education had become a right of state citizenship in the constitution of every readmitted state," including in North Carolina. D. Black, The Fundamental Right to Education, 94 Notre Dame L. Rev. 1059, 1089 (2019); see also Brief for Black Women Scholars as *Amici Curiae* 9 ("The herculean efforts of Black reformers, activists, and lawmakers during the Reconstruction Era forever transformed State constitutional law; today, thanks to the impact of their work, every State constitution contains language guaranteeing the right to public education").

B

The Reconstruction era marked a transformational point in the history of American democracy. Its vision of equal opportunity leading to an equal society "was short-lived," however, "with the assistance of this Court." *Id.*, at 391. In a series of decisions, the Court "sharply curtailed" the "substantive protections" of the Reconstruction Amendments and the Civil Rights Acts. *Id.*, at 391–392 (collecting cases). That endeavor culminated with the Court's shameful decision in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), which established that "equality of treatment" exists "when the races are provided substantially equal facilities, even though these facilities be separate." *Brown*, 347 U. S., at 488. Therefore, with this Court's approval, government-enforced segregation and its concomitant destruction of equal opportunity became the constitutional norm and infected every sector of our society, from bathrooms to military units and, crucially, schools. See *Bakke*, 438 U. S., at 393–394 (opinion of Marshall, J.); see also generally R. Rothstein, The Color of Law 17–176 (2017) (discussing various federal policies that promoted racial segregation).

In a powerful dissent, Justice Harlan explained in *Plessy* that the Louisiana law at issue, which authorized segregation in railway carriages, perpetuated a "caste" system. 163 U. S., at 559–560. Although the State argued that the law "prescribe[d] a rule applicable alike to white and colored citizens," all knew that the law's purpose was not "to exclude white persons from railroad cars occupied by blacks," but "to exclude colored people from coaches occupied by or assigned to white persons." *Id.*, at 557. That is, the law "proceed[ed] on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." *Id.*, at 560. Although "[t]he white race deems itself to be the dominant race . . . in prestige, in achievements, in education, in wealth, and in power," Justice Harlan explained, there is "no superior,

dominant, ruling class of citizens" in the eyes of the law. *Id.*, at 559. In that context, Justice Harlan thus announced his view that "[o]ur constitution is color-blind." *Ibid.*

It was not until half a century later, in *Brown*, that the Court honored the guarantee of equality in the Equal Protection Clause and Justice Harlan's vision of a Constitution that "neither knows nor tolerates classes among citizens." *Ibid.* Considering the "effect[s] of segregation" and the role of education "in the light of its full development and its present place in American life throughout the Nation," *Brown* overruled *Plessy*. 347 U. S., at 492–495. The *Brown* Court held that "[s]eparate educational facilities are inherently unequal," and that such racial segregation deprives Black students "of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.*, at 494–495. The Court thus ordered segregated schools to transition to a racially integrated system of public education "with all deliberate speed," "ordering the immediate admission of [Black children] to schools previously attended only by white children." *Brown* v. *Board of Education*, 349 U. S. 294, 301 (1955).

Brown was a race-conscious decision that emphasized the importance of education in our society. Central to the Court's holding was the recognition that, as Justice Harlan emphasized in *Plessy*, segregation perpetuates a caste system wherein Black children receive inferior educational opportunities "solely because of their race," denoting "inferiority as to their status in the community." 347 U. S., at 494, and n. 10. Moreover, because education is "the very foundation of good citizenship," segregation in public education harms "our democratic society" more broadly as well. *Id.*, at 493. In light of the harmful effects of entrenched racial subordination on racial minorities and American democracy, *Brown* recognized the constitutional necessity of a racially integrated system of schools where education is "available to all on equal terms." *Ibid.*

The desegregation cases that followed *Brown* confirm that the ultimate goal of that seminal decision was to achieve a system of integrated schools that ensured racial equality of opportunity, not to impose a formalistic rule of race-blindness. In *Green* v. *School Bd. of New Kent Cty.*, 391 U. S. 430 (1968), for example, the Court held that the New Kent County School Board's "freedom of choice" plan, which allegedly allowed "every student, regardless of race, . . . 'freely' [to] choose the school he [would] attend," was insufficient to effectuate "the command of [*Brown*]." *Id.*, at 437, 441–442. That command, the Court explained, was that schools dismantle "well-entrenched dual systems" and transition "to a unitary, nonracial system of public education." *Id.*, at 435–436. That the board "opened the doors of the former 'white' school to [Black] children and the ['Black'] school to white children" on a race-blind basis was not enough. *Id.*, at 437. Passively eliminating race classifications did not suffice when *de facto* segregation persisted. *Id.*, at 440–442 (noting that 85% of Black children in the school system were still attending an all-Black school). Instead, the board was "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.*, at 437–438. Affirmative steps, this Court held, are constitutionally necessary when mere formal neutrality cannot achieve *Brown*'s promise of racial equality. See *Green*, 391 U. S., at 440–442; see also *North Carolina Bd. of Ed.* v. *Swann*, 402 U. S. 43, 45–46 (1971) (holding that North Carolina statute that forbade the use of race in school busing "exploits an apparently neutral form to control school assignment plans by directing that they be 'colorblind'; that requirement, against the background of segregation, would render illusory the promise of *Brown*"); *Dayton Bd. of Ed.* v. *Brinkman*, 443 U. S. 526, 538 (1979) (school board "had to do more than abandon

its prior discriminatory purpose"; it "had an affirmative responsibility" to integrate); *Keyes* v. *School Dist. No. 1, Denver*, 413 U. S. 189, 200 (1973) ("[T]he State automatically assumes an affirmative duty" under *Brown* to eliminate the vestiges of segregation).[3]

In so holding, this Court's post-*Brown* decisions rejected arguments advanced by opponents of integration suggesting that "restor[ing] race as a criterion in the operation of the public schools" was at odds with "the *Brown* decisions." Brief for Respondents in *Green* v. *School Bd. of New Kent Cty.*, O. T. 1967, No. 695, p. 6 (*Green* Brief). Those opponents argued that *Brown* only required the admission of Black students "to public schools on a racially nondiscriminatory basis." *Id.*, at 11 (emphasis deleted). Relying on Justice Harlan's dissent in *Plessy*, they argued that the use of race "is improper" because the "'Constitution is colorblind.'" *Green* Brief 6, n. 6 (quoting *Plessy*, 163 U. S., at 559 (Harlan, J., dissenting)). They also incorrectly claimed that their views aligned with those of the *Brown* litigators, arguing that the *Brown* plaintiffs "understood" that *Brown*'s "mandate" was colorblindness. *Green* Brief 17. This Court rejected that characterization of "the thrust of *Brown*." *Green*, 391 U. S., at 437. It made clear that indifference to race "is not an end in itself" under that watershed decision. *Id.*, at 440. The ultimate goal is racial equality of opportunity.

Those rejected arguments mirror the Court's opinion today. The Court claims that *Brown* requires that students

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[3]The majority suggests that "it required a Second Founding to undo" programs that help ensure racial integration and therefore greater equality in education. *Ante*, at 38. At the risk of stating the blindingly obvious, and as *Brown* recognized, the Fourteenth Amendment was intended to undo the effects of a world where laws systematically subordinated Black people and created a racial caste system. Cf. *Dred Scott* v. *Sandford*, 19 How. 393, 405 (1857). *Brown* and its progeny recognized the need to take affirmative, race-conscious steps to eliminate that system.

be admitted "'on a racially nondiscriminatory basis.'" *Ante*, at 13. It distorts the dissent in *Plessy* to advance a colorblindness theory. *Ante*, at 38–39; see also *ante*, at 22 (GORSUCH, J., concurring) ("[T]oday's decision wakes the echoes of Justice John Marshall Harlan [in *Plessy*]"); *ante*, at 3 (THOMAS, J., concurring) (same). The Court also invokes the *Brown* litigators, relying on what the *Brown* "plaintiffs had argued." *Ante*, at 12; *ante*, at 35–36, 39, n. 7 (opinion of THOMAS, J.).

If there was a Member of this Court who understood the *Brown* litigation, it was Justice Thurgood Marshall, who "led the litigation campaign" to dismantle segregation as a civil rights lawyer and "rejected the hollow, race-ignorant conception of equal protection" endorsed by the Court's ruling today. Brief for NAACP Legal Defense and Educational Fund, Inc., et al. as *Amici Curiae* 9. Justice Marshall joined the *Bakke* plurality and "applaud[ed] the judgment of the Court that a university may consider race in its admissions process." 438 U. S., at 400. In fact, Justice Marshall's view was that *Bakke*'s holding should have been even more protective of race-conscious college admissions programs in light of the remedial purpose of the Fourteenth Amendment and the legacy of racial inequality in our society. See *id.*, at 396–402 (arguing that "a class-based remedy" should be constitutionally permissible in light of the hundreds of "years of class-based discrimination against [Black Americans]"). The Court's recharacterization of *Brown* is nothing but revisionist history and an affront to the legendary life of Justice Marshall, a great jurist who was a champion of true equal opportunity, not rhetorical flourishes about colorblindness.

C

Two decades after *Brown*, in *Bakke*, a plurality of the Court held that "the attainment of a diverse student body" is a "compelling" and "constitutionally permissible goal for

an institution of higher education." 438 U. S., at 311–315. Race could be considered in the college admissions process in pursuit of this goal, the plurality explained, if it is one factor of many in an applicant's file, and each applicant receives individualized review as part of a holistic admissions process. *Id.*, at 316–318.

Since *Bakke*, the Court has reaffirmed numerous times the constitutionality of limited race-conscious college admissions. First, in *Grutter* v. *Bollinger*, 539 U. S. 306 (2003), a majority of the Court endorsed the *Bakke* plurality's "view that student body diversity is a compelling state interest that can justify the use of race in university admissions," 539 U. S., at 325, and held that race may be used in a narrowly tailored manner to achieve this interest, *id.*, at 333–344; see also *Gratz* v. *Bollinger*, 539 U. S. 244, 268 (2003) ("for the reasons set forth [the same day] in *Grutter*," rejecting petitioners' arguments that race can only be considered in college admissions "to remedy identified discrimination" and that diversity is "'too open-ended, ill-defined, and indefinite to constitute a compelling interest'").

Later, in the *Fisher* litigation, the Court twice reaffirmed that a limited use of race in college admissions is constitutionally permissible if it satisfies strict scrutiny. In *Fisher* v. *University of Texas at Austin*, 570 U. S. 297 (2013) (*Fisher I*), seven Members of the Court concluded that the use of race in college admissions comports with the Fourteenth Amendment if it "is narrowly tailored to obtain the educational benefits of diversity." *Id.*, at 314, 337. Several years later, in *Fisher* v. *University of Texas at Austin*, 579 U. S. 365, 376 (2016) (*Fisher II*), the Court upheld the admissions program at the University of Texas under this framework. *Id.*, at 380–388.

Bakke, *Grutter*, and *Fisher* are an extension of *Brown*'s legacy. Those decisions recognize that "'experience lend[s] support to the view that the contribution of diversity is substantial.'" *Grutter*, 539 U. S., at 324 (quoting *Bakke*, 438

U. S., at 313). Racially integrated schools improve cross-racial understanding, "break down racial stereotypes," and ensure that students obtain "the skills needed in today's increasingly global marketplace . . . through exposure to widely diverse people, cultures, ideas, and viewpoints." 539 U. S., at 330. More broadly, inclusive institutions that are "visibly open to talented and qualified individuals of every race and ethnicity" instill public confidence in the "legitimacy" and "integrity" of those institutions and the diverse set of graduates that they cultivate. *Id.*, at 332. That is particularly true in the context of higher education, where colleges and universities play a critical role in "maintaining the fabric of society" and serve as "the training ground for a large number of our Nation's leaders." *Id.*, at 331–332. It is thus an objective of the highest order, a "compelling interest" indeed, that universities pursue the benefits of racial diversity and ensure that "the diffusion of knowledge and opportunity" is available to students of all races. *Id.*, at 328–333.

This compelling interest in student body diversity is grounded not only in the Court's equal protection jurisprudence but also in principles of "academic freedom," which "'long [have] been viewed as a special concern of the First Amendment.'" *Id.*, at 324 (quoting *Bakke*, 438 U. S., at 312). In light of "the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment," this Court's precedents recognize the imperative nature of diverse student bodies on American college campuses. 539 U. S., at 329. Consistent with the First Amendment, student body diversity allows universities to promote "th[e] robust exchange of ideas which discovers truth out of a multitude of tongues [rather] than through any kind of authoritative selection." *Bakke*, 438 U. S., at 312 (internal quotation marks omitted). Indeed, as the Court recently reaffirmed in another

school case, "learning how to tolerate diverse expressive activities has always been 'part of learning how to live in a pluralistic society'" under our constitutional tradition. *Kennedy* v. *Bremerton School Dist.*, 597 U. S. ___, ___ (2022) (slip op., at 29); cf. *Khorrami* v. *Arizona*, 598 U. S. ___, ___ (2022) (GORSUCH, J., dissenting from denial of certiorari) (slip op., at 8) (collecting research showing that larger juries are more likely to be racially diverse and "deliberate longer, recall information better, and pay greater attention to dissenting voices").

In short, for more than four decades, it has been this Court's settled law that the Equal Protection Clause of the Fourteenth Amendment authorizes a limited use of race in college admissions in service of the educational benefits that flow from a diverse student body. From *Brown* to *Fisher*, this Court's cases have sought to equalize educational opportunity in a society structured by racial segregation and to advance the Fourteenth Amendment's vision of an America where racially integrated schools guarantee students of all races the equal protection of the laws.

D

Today, the Court concludes that indifference to race is the only constitutionally permissible means to achieve racial equality in college admissions. That interpretation of the Fourteenth Amendment is not only contrary to precedent and the entire teachings of our history, see *supra*, at 2–17, but is also grounded in the illusion that racial inequality was a problem of a different generation. Entrenched racial inequality remains a reality today. That is true for society writ large and, more specifically, for Harvard and the University of North Carolina (UNC), two institutions with a long history of racial exclusion. Ignoring race will not equalize a society that is racially unequal. What was true in the 1860s, and again in 1954, is true today: Equality requires acknowledgment of inequality.

1

After more than a century of government policies enforcing racial segregation by law, society remains highly segregated. About half of all Latino and Black students attend a racially homogeneous school with at least 75% minority student enrollment.[4] The share of intensely segregated minority schools (*i.e.*, schools that enroll 90% to 100% racial minorities) has sharply increased.[5] To this day, the U. S. Department of Justice continues to enter into desegregation decrees with schools that have failed to "eliminat[e] the vestiges of *de jure* segregation."[6]

Moreover, underrepresented minority students are more likely to live in poverty and attend schools with a high concentration of poverty.[7] When combined with residential segregation and school funding systems that rely heavily on local property taxes, this leads to racial minority students attending schools with fewer resources. See *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 72–86 (1973) (Marshall, J., dissenting) (noting school funding disparities that result from local property taxation).[8] In

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[4] See GAO, Report to the Chairman, Committee on Education and Labor, House of Representatives, K–12 Education: Student Population Has Significantly Diversified, but Many Schools Remain Divided Along Racial, Ethnic, and Economic Lines 13 (GAO–22–104737, June 2022) (hereinafter GAO Report).

[5] G. Orfield, E. Frankenberg, & J. Ayscue, Harming Our Common Future: America's Segregated Schools 65 Years After *Brown* 21 (2019).

[6] *E.g.*, *Bennett* v. *Madison Cty. Bd. of Ed.*, No. 5:63–CV–613 (ND Ala., July 5, 2022), ECF Doc. 199, p. 19; *id.*, at 6 (requiring school district to ensure "the participation of black students" in advanced courses).

[7] GAO Report 6, 13 (noting that 80% of predominantly Black and Latino schools have at least 75% of their students eligible for free or reduced-price lunch—a proxy for poverty).

[8] See also L. Clark, Barbed Wire Fences: The Structural Violence of Education Law, 89 U. Chi. L. Rev. 499, 502, 512–517 (2022); Albert Shanker Institute, B. Baker, M. DiCarlo, & P. Greene, Segregation and

turn, underrepresented minorities are more likely to attend schools with less qualified teachers, less challenging curricula, lower standardized test scores, and fewer extracurricular activities and advanced placement courses.[9] It is thus unsurprising that there are achievement gaps along racial lines, even after controlling for income differences.[10]

Systemic inequities disadvantaging underrepresented racial minorities exist beyond school resources. Students of color, particularly Black students, are disproportionately disciplined or suspended, interrupting their academic progress and increasing their risk of involvement with the criminal justice system.[11] Underrepresented minorities are less likely to have parents with a postsecondary education who may be familiar with the college application process.[12] Further, low-income children of color are less likely to attend preschool and other early childhood education programs that increase educational attainment.[13] All of these

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School Funding: How Housing Discrimination Reproduces Unequal Opportunity 17–19 (Apr. 2022).

[9] See Brief for 25 Harvard Student and Alumni Organizations as *Amici Curiae* 6–15 (collecting sources).

[10] GAO Report 7; see also Brief for Council of the Great City Schools as *Amicus Curiae* 11–14 (collecting sources).

[11] See J. Okonofua & J. Eberhardt, Two Strikes: Race and the Disciplining of Young Students, 26 Psychol. Sci. 617 (2015) (a national survey showed that "Black students are more than three times as likely to be suspended or expelled as their White peers"); Brief for Youth Advocates and Experts on Educational Access as *Amici Curiae* 14–15 (describing investigation in North Carolina of a public school district, which found that Black students were 6.1 times more likely to be suspended than white students).

[12] See, *e.g.*, Dept. of Education, National Center for Education Statistics, Digest of Education Statistics (2021) (Table 104.70) (showing that 59% of white students and 78% of Asian students have a parent with a bachelor's degree or higher, while the same is true for only 25% of Latino students and 33% of Black students).

[13] R. Crosnoe, K. Purtell, P. Davis-Kean, A. Ansari, & A. Benner, The Selection of Children From Low-Income Families into Preschool, 52 J.

interlocked factors place underrepresented minorities multiple steps behind the starting line in the race for college admissions.

In North Carolina, the home of UNC, racial inequality is deeply entrenched in K–12 education. State courts have consistently found that the State does not provide underrepresented racial minorities equal access to educational opportunities, and that racial disparities in public schooling have increased in recent years, in violation of the State Constitution. See, *e.g.*, *Hoke Cty. Bd. of Ed.* v. *State*, 2020 WL 13310241, *6, *13 (N. C. Super. Ct., Jan. 21, 2020); *Hoke Cty. Bd. of Ed.* v. *State*, 382 N. C. 386, 388–390, 879 S. E. 2d 193, 197–198 (2022).

These opportunity gaps "result in fewer students from underrepresented backgrounds even applying to" college, particularly elite universities. Brief for Massachusetts Institute of Technology et al. as *Amici Curiae* 32. "Because talent lives everywhere, but opportunity does not, there are undoubtedly talented students with great academic potential who have simply not had the opportunity to attain the traditional indicia of merit that provide a competitive edge in the admissions process." Brief for Harvard Student and Alumni Organizations as *Amici Curiae* 16. Consistent with this reality, Latino and Black students are less likely to enroll in institutions of higher education than their white peers.[14]

Given the central role that education plays in breaking the cycle of racial inequality, these structural barriers reinforce other forms of inequality in communities of color. See E. Wilson, Monopolizing Whiteness, 134 Harv. L. Rev.

Developmental Psychology 11 (2016); A. Kenly & A. Klein, Early Childhood Experiences of Black Children in a Diverse Midwestern Suburb, 24 J. African American Studies 130, 136 (2020).

[14] Dept. of Education, National Center for Education, Institute of Educational Science, The Condition of Education 2022, p. 24 (2020) (fig. 16).

2382, 2416 (2021) ("[E]ducational opportunities . . . allow for social mobility, better life outcomes, and the ability to participate equally in the social and economic life of the democracy"). Stark racial disparities exist, for example, in unemployment rates,[15] income levels,[16] wealth and homeownership,[17] and healthcare access.[18] See also *Schuette* v. *BAMN*, 572 U. S. 291, 380–381 (2014) (SOTOMAYOR, J., dissenting) (noting the "persistent racial inequality in society"); *Gratz*, 539 U. S., at 299–301 (Ginsburg, J., dissenting) (cataloging racial disparities in employment, poverty, healthcare, housing, consumer transactions, and education).

Put simply, society remains "inherently unequal." *Brown*, 347 U. S., at 495. Racial inequality runs deep to this very day. That is particularly true in education, the "'most vital civic institution for the preservation of a democratic system of government.'" *Plyler* v. *Doe*, 457 U. S. 202, 221, 223 (1982). As I have explained before, only with eyes open to this reality can the Court "carry out the guarantee of equal protection." *Schuette*, 572 U. S., at 381 (dissenting opinion).

2

Both UNC and Harvard have sordid legacies of racial exclusion. Because "[c]ontext matters" when reviewing race-conscious college admissions programs, *Grutter*, 539 U. S.,

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[15] ProQuest Statistical Abstract of the United States: 2023, p. 402 (Table 622) (noting Black and Latino adults are more likely to be unemployed).

[16] *Id.*, at 173 (Table 259).

[17] A. McCargo & J. Choi, Closing the Gaps: Building Black Wealth Through Homeownership (2020) (fig. 1).

[18] Dept. of Commerce, Census Bureau, Health Insurance Coverage in the United States: 2021, p. 9 (fig. 5); *id.*, at 29 (Table C–1), https://www.census.gov/library/publications/2022/demo/p60-278.html (noting racial minorities, particularly Latinos, are less likely to have health insurance coverage).

at 327, this reality informs the exigency of respondents' current admissions policies and their racial diversity goals.

i

For much of its history, UNC was a bastion of white supremacy. Its leadership included "slaveholders, the leaders of the Ku Klux Klan, the central figures in the white supremacy campaigns of 1898 and 1900, and many of the State's most ardent defenders of Jim Crow and race-based Social Darwinism in the twentieth century." 3 App. 1680. The university excluded all people of color from its faculty and student body, glorified the institution of slavery, enforced its own Jim Crow regulations, and punished any dissent from racial orthodoxy. *Id.*, at 1681–1683. It resisted racial integration after this Court's decision in *Brown*, and was forced to integrate by court order in 1955. 3 App. 1685. It took almost 10 more years for the first Black woman to enroll at the university in 1963. See Karen L. Parker Collection, 1963–1966, UNC Wilson Special Collections Library. Even then, the university admitted only a handful of underrepresented racial minorities, and those students suffered constant harassment, humiliation, and isolation. 3 App. 1685. UNC officials openly resisted racial integration well into the 1980s, years after the youngest Member of this Court was born.[19] *Id.*, at 1688–1690. During that period,

[19] In 1979, prompted by lawsuits filed by civil rights lawyers under Title VI, the U. S. Department of Health, Education, and Welfare "revoked UNC's federal funding for its continued noncompliance" with *Brown*. 3 App. 1688; see *Adams* v. *Richardson*, 351 F. Supp. 636, 637 (DC 1972); *Adams* v. *Califano*, 430 F. Supp. 118, 121 (DC 1977). North Carolina sued the Federal Government in response, and North Carolina Senator Jesse Helms introduced legislation to block federal desegregation efforts. 3 App. 1688. UNC praised those actions by North Carolina public officials. *Ibid.* The litigation ended in 1981, after the Reagan administration settled with the State. See *North Carolina* v. *Department of Education*, No. 79–217–CIV–5 (EDNC, July 17, 1981) (Consent Decree).

Black students faced racial epithets and stereotypes, received hate mail, and encountered Ku Klux Klan rallies on campus. 2 *id.*, at 781–784; 3 *id.*, at 1689.

To this day, UNC's deep-seated legacy of racial subjugation continues to manifest itself in student life. Buildings on campus still bear the names of members of the Ku Klux Klan and other white supremacist leaders. *Id.*, at 1683. Students of color also continue to experience racial harassment, isolation, and tokenism.[20] Plus, the student body remains predominantly white: approximately 72% of UNC students identify as white, while only 8% identify as Black. *Id.*, at 1647. These numbers do not reflect the diversity of the State, particularly Black North Carolinians, who make up 22% of the population. *Id.*, at 1648.

ii

UNC is not alone. Harvard, like other Ivy League universities in our country, "stood beside church and state as the third pillar of a civilization built on bondage." C. Wilder, Ebony & Ivy: Race, Slavery, and the Troubled History of America's Universities 11 (2013). From Harvard's founding, slavery and racial subordination were integral parts of the institution's funding, intellectual production, and campus life. Harvard and its donors had extensive financial ties to, and profited from, the slave trade, the labor of enslaved people, and slavery-related investments. As Harvard now recognizes, the accumulation of this wealth was "vital to the University's growth" and establishment as an

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[20] See 1 App. 20–21 (campus climate survey showing *inter alia* that "91 percent of students heard insensitive or disparaging racial remarks made by other students"); 2 *id.*, at 1037 (Black student testifying that a white student called him "the N word" and, on a separate occasion at a fraternity party, he was "told that no slaves were allowed in"); *id.*, at 955 (student testifying that he was "the only African American student in the class," which discouraged him from speaking up about racially salient issues); *id.*, at 762–763 (student describing that being "the only Latina" made it "hard to speak up" and made her feel "foreign" and "an outsider").

elite, national institution. Harvard & the Legacy of Slavery, Report by the President and Fellows of Harvard College 7 (2022) (Harvard Report). Harvard suppressed antislavery views, and enslaved persons "served Harvard presidents and professors and fed and cared for Harvard students" on campus. *Id.*, at 7, 15.

Exclusion and discrimination continued to be a part of campus life well into the 20th century. Harvard's leadership and prominent professors openly promoted "'race science,'" racist eugenics, and other theories rooted in racial hierarchy. *Id.*, at 11. Activities to advance these theories "took place on campus," including "intrusive physical examinations" and "photographing of unclothed" students. *Ibid.* The university also "prized the admission of academically able Anglo-Saxon students from elite backgrounds—including wealthy white sons of the South." *Id.*, at 44. By contrast, an average of three Black students enrolled at Harvard each year during the five decades between 1890 and 1940. *Id.*, at 45. Those Black students who managed to enroll at Harvard "excelled academically, earning equal or better academic records than most white students," but faced the challenges of the deeply rooted legacy of slavery and racism on campus. *Ibid.* Meanwhile, a few women of color attended Radcliffe College, a separate and overwhelmingly white "women's annex" where racial minorities were denied campus housing and scholarships. *Id.*, at 51. Women of color at Radcliffe were taught by Harvard professors, but "women did not receive Harvard degrees until 1963." *Ibid.*; see also S. Bradley, Upending the Ivory Tower: Civil Rights, Black Power, and the Ivy League 17 (2018) (noting that the historical discussion of racial integration at the Ivy League "is necessarily male-centric," given the historical exclusion of women of color from these institutions).

Today, benefactors with ties to slavery and white supremacy continue to be memorialized across campus through "statues, buildings, professorships, student houses, and the

like." Harvard Report 11. Black and Latino applicants account for only 20% of domestic applicants to Harvard each year. App. to Pet. for Cert. in No. 20–1199, p. 112. "Even those students of color who beat the odds and earn an offer of admission" continue to experience isolation and alienation on campus. Brief for 25 Harvard Student and Alumni Organizations as *Amici Curiae* 30–31; 2 App. 823, 961. For years, the university has reported that inequities on campus remain. See, *e.g.*, 4 App. 1564–1601. For example, Harvard has reported that "far too many black students at Harvard experience feelings of isolation and marginalization," 3 *id.*, at 1308, and that "student survey data show[ed] that only half of Harvard undergraduates believe that the housing system fosters exchanges between students of different backgrounds," *id.*, at 1309.

* * *

These may be uncomfortable truths to some, but they are truths nonetheless. "Institutions can and do change," however, as societal and legal changes force them "to live up to [their] highest ideals." Harvard Report 56. It is against this historical backdrop that Harvard and UNC have reckoned with their past and its lingering effects. Acknowledging the reality that race has always mattered and continues to matter, these universities have established institutional goals of diversity and inclusion. Consistent with equal protection principles and this Court's settled law, their policies use race in a limited way with the goal of recruiting, admitting, and enrolling underrepresented racial minorities to pursue the well-documented benefits of racial integration in education.

II

The Court today stands in the way of respondents' commendable undertaking and entrenches racial inequality in higher education. The majority opinion does so by turning

a blind eye to these truths and overruling decades of precedent, "content for now to disguise" its ruling as an application of "established law and move on." *Kennedy*, 597 U. S., at ___ (SOTOMAYOR, J., dissenting) (slip op., at 29). As JUSTICE THOMAS puts it, "*Grutter* is, for all intents and purposes, overruled." *Ante*, at 58.

It is a disturbing feature of today's decision that the Court does not even attempt to make the extraordinary showing required by *stare decisis*. The Court simply moves the goalposts, upsetting settled expectations and throwing admissions programs nationwide into turmoil. In the end, however, it is clear why the Court is forced to change the rules of the game to reach its desired outcome: Under a faithful application of the Court's settled legal framework, Harvard and UNC's admissions programs are constitutional and comply with Title VI of the Civil Rights Act of 1964, 42 U. S. C. §2000d *et seq*.[21]

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[21] The same standard that applies under the Equal Protection Clause guides the Court's review under Title VI, as the majority correctly recognizes. See *ante*, at 6, n. 2; see also *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 325 (1978) (Brennan, J., concurring). JUSTICE GORSUCH argues that "Title VI bears independent force" and holds universities to an even higher standard than the Equal Protection Clause. *Ante*, at 25. Because no party advances JUSTICE GORSUCH's argument, see *ante*, at 6, n. 2, the Court properly declines to address it under basic principles of party presentation. See *United States* v. *Sineneng-Smith*, 590 U. S. ___, ___ (2020) (slip op., at 3). Indeed, JUSTICE GORSUCH's approach calls for even more judicial restraint. If petitioner could prevail under JUSTICE GORSUCH's statutory analysis, there would be no reason for this Court to reach the constitutional question. See *Escambia County* v. *McMillan*, 466 U. S. 48, 51 (1984) (*per curiam*). In a statutory case, moreover, *stare decisis* carries "enhanced force," as it would be up to Congress to "correct any mistake it sees" with "our interpretive decisions." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 456 (2015). JUSTICE GORSUCH wonders why the dissent, like the majority, does not "engage" with his statutory arguments. *Ante*, at 16. The answer is simple: This Court plays "the role of neutral arbiter of matters the parties present." *Greenlaw* v. *United States*, 554 U. S. 237, 243 (2008). Petitioner made a

A

Answering the question whether Harvard's and UNC's policies survive strict scrutiny under settled law is straightforward, both because of the procedural posture of these cases and because of the narrow scope of the issues presented by petitioner Students for Fair Admissions, Inc. (SFFA).[22]

These cases arrived at this Court after two lengthy trials. Harvard and UNC introduced dozens of fact witnesses, expert testimony, and documentary evidence in support of their admissions programs. Brief for Petitioner 20, 40. SFFA, by contrast, did not introduce a single fact witness and relied on the testimony of two experts. *Ibid.*

After making detailed findings of fact and conclusions of law, the District Courts entered judgment in favor of Harvard and UNC. See 397 F. Supp. 3d 126, 133–206 (Mass. 2019) (*Harvard I*); 567 F. Supp. 3d 580, 588–667 (MDNC 2021) (*UNC*). The First Circuit affirmed in the *Harvard* case, finding "no error" in the District Court's thorough opinion. 980 F. 3d 157, 204 (2020) (*Harvard II*). SFFA then filed petitions for a writ of certiorari in both cases, which the Court granted. 595 U. S. ___ (2022).[23]

The Court granted certiorari on three questions: (1) whether the Court should overrule *Bakke*, *Grutter*, and

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strategic litigation choice, and in our adversarial system, it is not up to this Court to come up with "wrongs to right" on behalf of litigants. *Id.*, at 244 (internal quotation marks omitted).

[22] SFFA is a 501(c)(3) nonprofit organization founded after this Court's decision in *Fisher I*, 570 U. S. 297 (2013). App. to Pet. for Cert. in No. 20–1199, p. 10. Its original board of directors had three self-appointed members: Edward Blum, Abigail Fisher (the plaintiff in *Fisher*), and Richard Fisher. See *ibid.*

[23] Bypassing the Fourth Circuit's opportunity to review the District Court's opinion in the *UNC* case, SFFA sought certiorari before judgment, urging that, "[p]aired with *Harvard*," the *UNC* case would "allow the Court to resolve the ongoing validity of race-based admissions under both Title VI and the Constitution." Pet. for Cert. in No. 21–707, p. 27.

Fisher; or, alternatively, (2) whether UNC's admissions program is narrowly tailored, and (3) whether Harvard's admissions program is narrowly tailored. See Brief for Petitioner in No. 20–1199, p. i; Brief for Respondent in No. 20–1199, p. i; Brief for University Respondents in No. 21–707, p. i. Answering the last two questions, which call for application of settled law to the facts of these cases, is simple: Deferring to the lower courts' careful findings of fact and credibility determinations, Harvard's and UNC's policies are narrowly tailored.

B

1

As to narrow tailoring, the only issue SFFA raises in the *UNC* case is that the university cannot use race in its admissions process because race-neutral alternatives would promote UNC's diversity objectives. That issue is so easily resolved in favor of UNC that SFFA devoted only three pages to it at the end of its 87-page brief. Brief for Petitioner 83–86.

The use of race is narrowly tailored unless "workable" and "available" race-neutral approaches exist, meaning race-neutral alternatives promote the institution's diversity goals and do so at "'tolerable administrative expense.'" *Fisher I*, 570 U. S., at 312 (quoting *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 280, n. 6 (1986) (plurality opinion)). Narrow tailoring does not mean perfect tailoring. The Court's precedents make clear that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative." *Grutter*, 539 U. S., at 339. "Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Ibid.*

As the District Court found after considering extensive expert testimony, SFFA's proposed race-neutral alternatives do not meet those criteria. *UNC*, 567 F. Supp. 3d,

at 648. All of SFFA's proposals are methodologically flawed because they rest on "'terribly unrealistic'" assumptions about the applicant pools. *Id.*, at 643–645, 647. For example, as to one set of proposals, SFFA's expert "unrealistically assumed" that "all of the top students in the candidate pools he use[d] would apply, be admitted, and enroll." *Id.*, at 647. In addition, some of SFFA's proposals force UNC to "abandon its holistic approach" to college admissions, *id.*, at 643–645, n. 43, a result "in deep tension with the goal of educational diversity as this Court's cases have defined it," *Fisher II*, 579 U. S., at 386–387. Others are "largely impractical—not to mention unprecedented—in higher education." 567 F. Supp. 3d, at 647. SFFA's proposed top percentage plans,[24] for example, are based on a made-up and complicated admissions index that requires UNC to "access . . . real-time data for all high school students." *Ibid.* UNC is then supposed to use that index, which "would change every time any student took a standardized test," to rank students based on grades and test scores. *Ibid.* One of SFFA's top percentage plans would even "nearly erase the Native American incoming class" at UNC. *Id.*, at 646. The courts below correctly concluded that UNC is not required to adopt SFFA's unrealistic proposals to satisfy strict scrutiny.[25]

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[24] Generally speaking, top percentage plans seek to enroll a percentage of the graduating high school students with the highest academic credentials. See, *e.g.*, *Fisher II*, 579 U. S., at 373 (describing the University of Texas' Top Ten Percent Plan).

[25] SFFA and JUSTICE GORSUCH reach beyond the factfinding below and argue that universities in States that have banned the use of race in college admissions have achieved racial diversity through efforts such as increasing socioeconomic preferences, so UNC could do the same. Brief for Petitioner 85–86; *ante*, at 14. Data from those States disprove that theory. Institutions in those States experienced "'an immediate and precipitous decline in the rates at which underrepresented-minority students applied . . . were admitted . . . and enrolled.'" *Schuette* v. *BAMN*,

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Harvard's admissions program is also narrowly tailored under settled law. SFFA argues that Harvard's program is not narrowly tailored because the university "has workable race-neutral alternatives," "does not use race as a mere plus," and "engages in racial balancing." Brief for Petitioner 75–83. As the First Circuit concluded, there was "no error" in the District Court's findings on any of these issues. *Harvard II*, 980 F. 3d, at 204.[26]

Like UNC, Harvard has already implemented many of SFFA's proposals, such as increasing recruitment efforts and financial aid for low-income students. *Id.*, at 193. Also like UNC, Harvard "carefully considered" other race-neutral ways to achieve its diversity goals, but none of them are "workable." *Id.*, at 193–194. SFFA's argument before this Court is that Harvard should adopt a plan designed by SFFA's expert for purposes of trial, which increases preferences for low-income applicants and eliminates the use of race and legacy preferences. *Id.*, at 193; Brief for Petitioner

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572 U. S. 291, 384–390 (2014) (SOTOMAYOR, J., dissenting); see *infra*, at 63–64. In addition, UNC "already engages" in race-neutral efforts focused on socioeconomic status, including providing "exceptional levels of financial aid" and "increased and targeted recruiting." *UNC*, 567 F. Supp. 3d, at 665.

JUSTICE GORSUCH argues that he is simply "recount[ing] what SFFA has argued." *Ante*, at 14, n. 4. That is precisely the point: SFFA's arguments were not credited by the court below. "[W]e are a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005). JUSTICE GORSUCH also suggests it is inappropriate for the dissent to respond to the majority by relying on materials beyond the findings of fact below. *Ante*, at 14, n. 4. There would be no need for the dissent to do that if the majority stuck to reviewing the District Court's careful fact-finding with the deference it owes to the trial court. Because the majority has made a different choice, the dissent responds.

[26] SFFA also argues that Harvard discriminates against Asian American students. Brief for Petitioner 72–75. As explained below, this claim does not fit under *Grutter*'s strict scrutiny framework, and the courts below did not err in rejecting that claim. See *infra*, at 59–60.

81. Under SFFA's model, however, Black representation would plummet by about 32%, and the admitted share of applicants with high academic ratings would decrease, as would the share with high extracurricular and athletic ratings. 980 F. 3d, at 194. SFFA's proposal, echoed by JUSTICE GORSUCH, *ante*, at 14–15, requires Harvard to "make sacrifices on almost every dimension important to its admissions process," 980 F. 3d, at 194, and forces it "to choose between a diverse student body and a reputation for academic excellence," *Fisher II*, 579 U. S., at 385. Neither this Court's precedents nor common sense impose that type of burden on colleges and universities.

The courts below also properly rejected SFFA's argument that Harvard does not use race in the limited way this Court's precedents allow. The Court has explained that a university can consider a student's race in its admissions process so long as that use is "contextual and does not operate as a mechanical plus factor." *Id.*, at 375. The Court has also repeatedly held that race, when considered as one factor of many in the context of holistic review, "can make a difference to whether an application is accepted or rejected." *Ibid.* After all, race-conscious admissions seek to improve racial diversity. Race cannot, however, be "'decisive' for virtually every minimally qualified underrepresented minority applicant." *Gratz*, 539 U. S., at 272 (quoting *Bakke*, 438 U. S., at 317).

That is precisely how Harvard's program operates. In recent years, Harvard has received about 35,000 applications for a class with about 1,600 seats. 980 F. 3d, at 165. The admissions process is exceedingly competitive; it involves six different application components. Those components include interviews with alumni and admissions officers, as well as consideration of a whole range of information, such as grades, test scores, recommendation letters, and personal essays, by several committees. *Id.*, at 165–166. Consistent with that "individualized, holistic review process,"

admissions officers may, but need not, consider a student's self-reported racial identity when assigning overall ratings. *Id.*, at 166, 169, 180. Even after so many layers of competitive review, Harvard typically ends up with about 2,000 tentative admits, more students than the 1,600 or so that the university can admit. *Id.*, at 170. To choose among those highly qualified candidates, Harvard considers "plus factors," which can help "tip an applicant into Harvard's admitted class." *Id.*, at 170, 191. To diversify its class, Harvard awards "tips" for a variety of reasons, including geographic factors, socioeconomic status, ethnicity, and race. *Ibid.*

There is "no evidence of any mechanical use of tips." *Id.*, at 180. Consistent with the Court's precedents, Harvard properly "considers race as part of a holistic review process," "values all types of diversity," "does not consider race exclusively," and "does not award a fixed amount of points to applicants because of their race." *Id.*, at 190.[27] Indeed, Harvard's admissions process is so competitive and the use of race is so limited and flexible that, as "SFFA's own expert's analysis" showed, "Harvard rejects more than two-thirds of Hispanic applicants and slightly less than half of all African-American applicants who are among the top 10% most academically promising applicants." *Id.*, at 191.

The courts below correctly rejected SFFA's view that Harvard's use of race is unconstitutional because it impacts overall Hispanic and Black student representation by 45%. See Brief for Petitioner 79. That 45% figure shows that

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[27] JUSTICE GORSUCH suggests that only "applicants of certain races may receive a 'tip' in their favor." *Ante*, at 9. To the extent JUSTICE GORSUCH means that some races are not eligible to receive a tip based on their race, there is no evidence in the record to support this statement. Harvard "does not explicitly prioritize any particular racial group over any other and permits its admissions officers to evaluate the racial and ethnic identity of every student in the context of his or her background and circumstances." *Harvard I*, 397 F. Supp. 3d 126, 190, n. 56 (Mass. 2019).

eliminating the use of race in admissions "would reduce African American representation . . . from 14% to 6% and Hispanic representation from 14% to 9%." *Harvard II*, 980 F. 3d, at 180, 191. Such impact of Harvard's limited use of race on the makeup of the class is less than this Court has previously upheld as narrowly tailored. In *Grutter*, for example, eliminating the use of race would have reduced the underrepresented minority population by 72%, a much greater effect. 539 U. S., at 320. And in *Fisher II*, the use of race helped increase Hispanic representation from 11% to 16.9% (a 54% increase) and African-American representation from 3.5% to 6.8% (a 94% increase). 579 U. S., at 384.[28]

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[28] Relying on a single footnote in the First Circuit's opinion, the Court claims that Harvard's program is unconstitutional because it "has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard." *Ante*, at 27. The Court of Appeals, however, merely noted that the United States, at the time represented by a different administration, argued that "absent the consideration of race, [Asian American] representation would increase from 24% to 27%," an 11% increase. *Harvard II*, 980 F. 3d, at 191, n. 29. Taking those calculations as correct, the Court of Appeals recognized that such an impact from the use of race on the overall makeup of the class is consistent with the impact that this Court's precedents have tolerated. *Ibid*.

The Court also notes that "race is determinative for at least some—if not many—of the students" admitted at UNC. *Ante*, at 27. The District Court in the *UNC* case found that "race plays a role in a very small percentage of decisions: 1.2% for in-state students and 5.1% for out-of-state students." 567 F. Supp. 3d 580, 634 (MDNC 2021). The limited use of race at UNC thus has a smaller effect than at Harvard and is also consistent with the Court's precedents. In addition, contrary to the majority's suggestion, such effect does not prove that "race alone . . . explains the admissions decisions for hundreds if not thousands of applicants to UNC each year." *Ante,* at 28, n. 6. As the District Court found, UNC (like Harvard) "engages a highly individualized, holistic review of each applicant's file, which considers race flexibly as a 'plus factor' as one among many factors in its individualized consideration of each and every applicant." 567 F. Supp. 3d, at 662; see *id.,* at 658 (finding that UNC "rewards different kinds of diversity, and evaluates a candidate within

Finally, the courts below correctly concluded that Harvard complies with this Court's repeated admonition that colleges and universities cannot define their diversity interest "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). Harvard does not specify its diversity objectives in terms of racial quotas, and "SFFA did not offer expert testimony to support its racial balancing claim." *Harvard II*, 980 F. 3d, at 180, 186–187. Harvard's statistical evidence, by contrast, showed that the admitted classes across racial groups varied considerably year to year, a pattern "inconsistent with the imposition of a racial quota or racial balancing." *Harvard I*, 397 F. Supp. 3d, at 176–177; see *Harvard II*, 980 F. 3d, at 180, 188–189.

Similarly, Harvard's use of "one-pagers" containing "a snapshot of various demographic characteristics of Harvard's applicant pool" during the admissions review process is perfectly consistent with this Court's precedents. *Id.*, at 170–171, 189. Consultation of these reports, with no "specific number firmly in mind," "does not transform [Harvard's] program into a quota." *Grutter*, 539 U. S., at 335–336. Rather, Harvard's ongoing review complies with the Court's command that universities periodically review the necessity of the use of race in their admissions programs. *Id.*, at 342; *Fisher II*, 579 U. S., at 388.

The Court ignores these careful findings and concludes that Harvard engages in racial balancing because its "focus on numbers is obvious." *Ante*, at 31. Because SFFA failed to offer an expert and to prove its claim below, the majority

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the context of their lived experience"); *id.,* at 659 ("The parties stipulated, and the evidence shows, that readers evaluate applicants by taking into consideration dozens of criteria," and even SFFA's expert "concede[d] that the University's admissions process is individualized and holistic"). Stated simply, race is not "a defining feature of any individual application." *Id.,* at 662; see also *infra*, at 48.

is forced to reconstruct the record and conduct its own factual analysis. It thus relies on a single chart from SFFA's brief that truncates relevant data in the record. Compare *ibid.* (citing Brief for Petitioner in No. 20–1199, p. 23) with 4 App. in No. 20–1199, p. 1770. That chart cannot displace the careful factfinding by the District Court, which the First Circuit upheld on appeal under clear error review. See *Harvard II*, 980 F. 3d, at 180–182, 188–189.

In any event, the chart is misleading and ignores "the broader context" of the underlying data that it purports to summarize. *Id.*, at 188. As the First Circuit concluded, what the data actually show is that admissions have increased for all racial minorities, including Asian American students, whose admissions numbers have "increased roughly five-fold since 1980 and roughly two-fold since 1990." *Id.*, at 180, 188. The data also show that the racial shares of admitted applicants fluctuate more than the corresponding racial shares of total applicants, which is "the opposite of what one would expect if Harvard imposed a quota." *Id.*, at 188. Even looking at the Court's truncated period for the classes of 2009 to 2018, "the same pattern holds." *Ibid.* The fact that Harvard's racial shares of admitted applicants "varies relatively little in absolute terms for [those classes] is unsurprising and reflects the fact that the racial makeup of Harvard's applicant pool also varies very little over this period." *Id.*, at 188–189. Thus, properly understood, the data show that Harvard "does not utilize quotas and does not engage in racial balancing." *Id.*, at 189.[29]

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[29] The majority does not dispute that it has handpicked data from a truncated period, ignoring the broader context of that data and what the data reflect. Instead, the majority insists that its selected data prove that Harvard's "precise racial preferences" "operate like clockwork." *Ante*, at 31–32, n. 7. The Court's conclusion that such racial preferences must be responsible for an "unyielding demographic composition of [the]

III

The Court concludes that Harvard's and UNC's policies are unconstitutional because they serve objectives that are insufficiently measurable, employ racial categories that are imprecise and overbroad, rely on racial stereotypes and disadvantage nonminority groups, and do not have an end point. *Ante*, at 21–34, 39. In reaching this conclusion, the Court claims those supposed issues with respondents' programs render the programs insufficiently "narrow" under the strict scrutiny framework that the Court's precedents command. *Ante*, at 22. In reality, however, "the Court today cuts through the kudzu" and overrules its "higher-education precedents" following *Bakke*. *Ante*, at 22 (GORSUCH, J., concurring).

There is no better evidence that the Court is overruling the Court's precedents than those precedents themselves. "Every one of the arguments made by the majority can be found in the dissenting opinions filed in [the] cases" the majority now overrules. *Payne* v. *Tennessee*, 501 U. S. 808, 846 (1991) (Marshall, J., dissenting); see, *e.g.*, *Grutter*, 539 U. S., at 354 (THOMAS, J., concurring in part and dissenting in part) ("Unlike the majority, I seek to define with precision the interest being asserted"); *Fisher II*, 579 U. S., at 389 (THOMAS, J., dissenting) (race-conscious admissions

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class," *ibid.*, misunderstands basic principles of statistics. A number of factors (most notably, the demographic composition of the applicant pool) affect the demographic composition of the entering class. Assume, for example, that Harvard admitted students based solely on standardized test scores. If test scores followed a normal distribution (even with different averages by race) and were relatively constant over time, and if the racial shares of total applicants were also relatively constant over time, one would expect the same "unyielding demographic composition of [the] class." *Ibid.* That would be true even though, under that hypothetical scenario, Harvard does not consider race in admissions at all. In other words, the Court's inference that precise racial preferences must be the cause of relatively constant racial shares of admitted students is specious.

programs "res[t] on pernicious assumptions about race"); *id.*, at 403 (ALITO, J., joined by ROBERTS, C. J., and THOMAS, J., dissenting) (diversity interests "are laudable goals, but they are not concrete or precise"); *id.*, at 413 (race-conscious college admissions plan "discriminates against Asian-American students"); *id.*, at 414 (race-conscious admissions plan is unconstitutional because it "does not specify what it means to be 'African-American,' 'Hispanic,' 'Asian American,' 'Native American,' or 'White'"); *id.*, at 419 (race-conscious college admissions policies rest on "pernicious stereotype[s]").

Lost arguments are not grounds to overrule a case. When proponents of those arguments, greater now in number on the Court, return to fight old battles anew, it betrays an unrestrained disregard for precedent. It fosters the People's suspicions that "bedrock principles are founded . . . in the proclivities of individuals" on this Court, not in the law, and it degrades "the integrity of our constitutional system of government." *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986). Nowhere is the damage greater than in cases like these that touch upon matters of representation and institutional legitimacy.

The Court offers no justification, much less "a 'special justification,'" for its costly endeavor. *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. ___, ___ (2022) (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (slip op., at 31) (quoting *Gamble* v. *United States*, 587 U. S. ___, ___ (2019) (slip op., at 11)). Nor could it. There is no basis for overruling *Bakke*, *Grutter*, and *Fisher*. The Court's precedents were correctly decided, the opinion today is not workable and creates serious equal protection problems, important reliance interests favor respondents, and there are no legal or factual developments favoring the Court's reckless course. See 597 U. S., at ___ (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (slip op., at 31); *id.*, at ___–___ (KAVANAUGH, J., concurring) (slip

op., at 6–7). At bottom, the six unelected members of today's majority upend the status quo based on their policy preferences about what race in America should be like, but is not, and their preferences for a veneer of colorblindness in a society where race has always mattered and continues to matter in fact and in law.

A

1

A limited use of race in college admissions is consistent with the Fourteenth Amendment and this Court's broader equal protection jurisprudence. The text and history of the Fourteenth Amendment make clear that the Equal Protection Clause permits race-conscious measures. See *supra*, at 2–9. Consistent with that view, the Court has explicitly held that "race-based action" is sometimes "within constitutional constraints." *Adarand Constructors*, *Inc.* v. *Peña*, 515 U. S. 200, 237 (1995). The Court has thus upheld the use of race in a variety of contexts. See, *e.g.*, *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 737 (2007) ("[T]he obligation to disestablish a school system segregated by law can include race-conscious remedies—whether or not a court had issued an order to that effect"); *Johnson* v. *California*, 543 U. S. 499, 512 (2005) (use of race permissible to further prison's interest in "'security'" and "'discipline'"); *Cooper* v. *Harris*, 581 U. S. 285, 291–293 (2017) (use of race permissible when drawing voting districts in some circumstances).[30]

Tellingly, in sharp contrast with today's decision, the Court has allowed the use of race when that use burdens minority populations. In *United States* v. *Brignoni-Ponce*,

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[30] In the context of policies that "benefit rather than burden the minority," the Court has adhered to a strict scrutiny framework despite multiple Members of this Court urging that "the mandate of the Equal Protection Clause" favors applying a less exacting standard of review. *Schuette*, 572 U. S., at 373–374 (SOTOMAYOR, J., dissenting) (collecting cases).

422 U. S. 873 (1975), for example, the Court held that it is unconstitutional for border patrol agents to rely on a person's skin color as "a single factor" to justify a traffic stop based on reasonable suspicion, but it remarked that "Mexican appearance" could be "a relevant factor" out of many to justify such a stop "at the border and its functional equivalents." *Id.*, at 884–887; see also *id.*, at 882 (recognizing that "the border" includes entire metropolitan areas such as San Diego, El Paso, and the South Texas Rio Grande Valley).[31] The Court thus facilitated racial profiling of Latinos as a law enforcement tool and did not adopt a race-blind rule. The Court later extended this reasoning to border patrol agents selectively referring motorists for secondary inspection at a checkpoint, concluding that "even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, [there is] no constitutional violation." *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 562–563 (1976) (footnote omitted).

The result of today's decision is that a person's skin color may play a role in assessing individualized suspicion, but it cannot play a role in assessing that person's individualized contributions to a diverse learning environment. That indefensible reading of the Constitution is not grounded in law and subverts the Fourteenth Amendment's guarantee of equal protection.

2

The majority does not dispute that some uses of race are constitutionally permissible. See *ante*, at 15. Indeed, it agrees that a limited use of race is permissible in some college admissions programs. In a footnote, the Court exempts military academies from its ruling in light of "the potentially distinct interests" they may present. *Ante*, at 22, n. 4.

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[31] The Court's "dictum" that Mexican appearance can be one of many factors rested on now-outdated quantitative premises. *United States* v. *Montero-Camargo*, 208 F. 3d 1122, 1132 (CA9 2000).

To the extent the Court suggests national security interests are "distinct," those interests cannot explain the Court's narrow exemption, as national security interests are also implicated at civilian universities. See *infra*, at 64–65. The Court also attempts to justify its carveout based on the fact that "[n]o military academy is a party to these cases." *Ante*, at 22, n. 4. Yet the same can be said of many other institutions that are not parties here, including the religious universities supporting respondents, which the Court does not similarly exempt from its sweeping opinion. See Brief for Georgetown University et al. as *Amici Curiae* 18–29 (Georgetown Brief) (Catholic colleges and universities noting that they rely on the use of race in their holistic admissions to further not just their academic goals, but also their religious missions); see also *Harvard II*, 980 F. 3d, at 187, n. 24 ("[S]chools that consider race are diverse on numerous dimensions, including in terms of religious affiliation, location, size, and courses of study offered"). The Court's carveout only highlights the arbitrariness of its decision and further proves that the Fourteenth Amendment does not categorically prohibit the use of race in college admissions.

The concurring opinions also agree that the Constitution tolerates some racial classifications. JUSTICE GORSUCH agrees with the majority's conclusion that racial classifications are constitutionally permissible if they advance a compelling interest in a narrowly tailored way. *Ante*, at 23. JUSTICE KAVANAUGH, too, agrees that the Constitution permits the use of race if it survives strict scrutiny. *Ante*, at 2.[32] JUSTICE THOMAS offers an "originalist defense of the

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[32] JUSTICE KAVANAUGH agrees that the effects from the legacy of slavery and Jim Crow continue today, citing Justice Marshall's opinion in *Bakke*. *Ante*, at 7 (citing 438 U. S., at 395–402). As explained above, Justice Marshall's view was that *Bakke* covered only a portion of the Fourteenth Amendment's sweeping reach, such that the Court's higher education precedents must be expanded, not constricted. See 438 U. S.,

colorblind Constitution," but his historical analysis leads to the inevitable conclusion that the Constitution is not, in fact, colorblind. *Ante*, at 2. Like the majority opinion, JUSTICE THOMAS agrees that race can be used to remedy past discrimination and "to equalize treatment against a concrete baseline of government-imposed inequality." *Ante*, at 18–21. He also argues that race can be used if it satisfies strict scrutiny more broadly, and he considers compelling interests those that prevent anarchy, curb violence, and segregate prisoners. *Ante*, at 26. Thus, although JUSTICE THOMAS at times suggests that the Constitution only permits "directly remedial" measures that benefit "identified victims of discrimination," *ante*, at 20, he agrees that the Constitution tolerates a much wider range of race-conscious measures.

In the end, when the Court speaks of a "colorblind" Constitution, it cannot really mean it, for it is faced with a body of law that recognizes that race-conscious measures are permissible under the Equal Protection Clause. Instead, what the Court actually lands on is an understanding of the Constitution that is "colorblind" *sometimes*, when the Court so chooses. Behind those choices lie the Court's own value judgments about what type of interests are sufficiently compelling to justify race-conscious measures.

Overruling decades of precedent, today's newly constituted Court singles out the limited use of race in holistic college admissions. It strikes at the heart of *Bakke*, *Grutter*, and *Fisher* by holding that racial diversity is an "inescapably imponderable" objective that cannot justify race-conscious affirmative action, *ante*, at 24, even though respondents' objectives simply "mirror the 'compelling interest' this Court

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at 395–402 (opinion dissenting in part). Justice Marshall's reading of the Fourteenth Amendment does not support JUSTICE KAVANAUGH'S and the majority's opinions.

has approved" many times in the past. *Fisher II*, 579 U. S., at 382; see, *e.g.*, *UNC*, 567 F. Supp. 3d, at 598 ("the [university's admissions policy] repeatedly cites Supreme Court precedent as guideposts").[33] At bottom, without any new factual or legal justification, the Court overrides its longstanding holding that diversity in higher education is of compelling value.

To avoid public accountability for its choice, the Court seeks cover behind a unique measurability requirement of its own creation. None of this Court's precedents, however, requires that a compelling interest meet some threshold level of precision to be deemed sufficiently compelling. In fact, this Court has recognized as compelling plenty of interests that are equally or more amorphous, including the "intangible" interest in preserving "public confidence in judicial integrity," an interest that "does not easily reduce to precise definition." *Williams-Yulee* v. *Florida Bar*, 575 U. S. 433, 447, 454 (2015) (ROBERTS, C. J., for the Court); see also, *e.g.*, *Ramirez* v. *Collier*, 595 U. S. ___, ___ (2022) (ROBERTS, C. J., for the Court) (slip op., at 18) ("[M]aintaining solemnity and decorum in the execution chamber" is a "compelling" interest); *United States* v. *Alvarez*, 567 U. S. 709, 725 (2012) (plurality opinion) ("[P]rotecting the integrity of the Medal of Honor" is a "compelling interes[t]"); *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989) ("[P]rotecting the physical and psychological well-being of minors" is a "compelling interest"). Thus, although

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[33] There is no dispute that respondents' compelling diversity objectives are "substantial, long-standing, and well documented." *UNC*, 567 F. Supp. 3d, at 655; *Harvard II*, 980 F. 3d, at 186–187. SFFA did not dispute below that respondents have a compelling interest in diversity. See *id.*, at 185; *Harvard I*, 397 F. Supp. 3d, at 133; Tr. of Oral Arg. in No. 21–707, p. 121. And its expert agreed that valuable educational benefits flow from diversity, including richer and deeper learning, reduced bias, and more creative problem solving. 2 App. in No. 21–707, p. 546. SFFA's counsel also emphatically disclaimed the issue at trial. 2 App. in No. 20–1199, p. 548 ("Diversity and its benefits are not on trial here").

the Members of this majority pay lip service to respondents' "commendable" and "worthy" racial diversity goals, *ante*, at 23–24, they make a clear value judgment today: Racial integration in higher education is not sufficiently important to them. "Today, the proclivities of individuals rule." *Dobbs*, 597 U. S., at ___ (dissenting opinion) (slip op., at 6).

The majority offers no response to any of this. Instead, it attacks a straw man, arguing that the Court's cases recognize that remedying the effects of "societal discrimination" does not constitute a compelling interest. *Ante*, at 34–35. Yet as the majority acknowledges, while *Bakke* rejected that interest as insufficiently compelling, it upheld a limited use of race in college admissions to promote the educational benefits that flow from diversity. 438 U. S., at 311–315. It is that narrower interest, which the Court has reaffirmed numerous times since *Bakke* and as recently as 2016 in *Fisher II*, see *supra*, at 14–15, that the Court overrules today.

B

The Court's precedents authorizing a limited use of race in college admissions are not just workable—they have been working. Lower courts have consistently applied them without issue, as exemplified by the opinions below and SFFA's and the Court's inability to identify any split of authority. Today, the Court replaces this settled framework with a set of novel restraints that create troubling equal protection problems and share one common purpose: to make it impossible to use race in a holistic way in college admissions, where it is much needed.

1

The Court argues that Harvard's and UNC's programs must end because they unfairly disadvantage some racial groups. According to the Court, college admissions are a "zero-sum" game and respondents' use of race unfairly "ad-

vantages" underrepresented minority students "at the expense of" other students. *Ante*, at 27.

That is not the role race plays in holistic admissions. Consistent with the Court's precedents, respondents' holistic review policies consider race in a very limited way. Race is only one factor out of many. That type of system allows Harvard and UNC to assemble a diverse class on a multitude of dimensions. Respondents' policies allow them to select students with various unique attributes, including talented athletes, artists, scientists, and musicians. They also allow respondents to assemble a class with diverse viewpoints, including students who have different political ideologies and academic interests, who have struggled with different types of disabilities, who are from various socioeconomic backgrounds, who understand different ways of life in various parts of the country, and—yes—students who self-identify with various racial backgrounds and who can offer different perspectives because of that identity.

That type of multidimensional system benefits all students. In fact, racial groups that are not underrepresented tend to benefit disproportionately from such a system. Harvard's holistic system, for example, provides points to applicants who qualify as "ALDC," meaning "athletes, legacy applicants, applicants on the Dean's Interest List [primarily relatives of donors], and children of faculty or staff." *Harvard II*, 980 F. 3d, at 171 (noting also that "SFFA does not challenge the admission of this large group"). ALDC applicants are predominantly white: Around 67.8% are white, 11.4% are Asian American, 6% are Black, and 5.6% are Latino. *Ibid.* By contrast, only 40.3% of non-ALDC applicants are white, 28.3% are Asian American, 11% are Black, and 12.6% are Latino. *Ibid.* Although "ALDC applicants make up less than 5% of applicants to Harvard," they constitute "around 30% of the applicants admitted each year." *Ibid.* Similarly, because of achievement gaps that result from entrenched racial inequality in K–12 education, see *infra*, at

18–21, a heavy emphasis on grades and standardized test scores disproportionately disadvantages underrepresented racial minorities. Stated simply, race is one small piece of a much larger admissions puzzle where most of the pieces disfavor underrepresented racial minorities. That is precisely why underrepresented racial minorities remain *under*represented. The Court's suggestion that an already advantaged racial group is "disadvantaged" because of a limited use of race is a myth.

The majority's true objection appears to be that a limited use of race in college admissions does, in fact, achieve what it is designed to achieve: It helps equalize opportunity and advances respondents' objectives by increasing the number of underrepresented racial minorities on college campuses, particularly Black and Latino students. This is unacceptable, the Court says, because racial groups that are not underrepresented "would be admitted in greater numbers" without these policies. *Ante*, at 28. Reduced to its simplest terms, the Court's conclusion is that an increase in the representation of racial minorities at institutions of higher learning that were historically reserved for white Americans is an unfair and repugnant outcome that offends the Equal Protection Clause. It provides a license to discriminate against white Americans, the Court says, which requires the courts and state actors to "pic[k] the right races to benefit." *Ante*, at 38.

Nothing in the Fourteenth Amendment or its history supports the Court's shocking proposition, which echoes arguments made by opponents of Reconstruction-era laws and this Court's decision in *Brown*. *Supra*, at 2–17. In a society where opportunity is dispensed along racial lines, racial equality cannot be achieved without making room for underrepresented groups that for far too long were denied admission through the force of law, including at Harvard and UNC. Quite the opposite: A racially integrated vision of so-

ciety, in which institutions reflect all sectors of the American public and where "the sons of former slaves and the sons of former slave owners [are] able to sit down together at the table of brotherhood," is precisely what the Equal Protection Clause commands. Martin Luther King "I Have a Dream" Speech (Aug. 28, 1963). It is "essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U. S., at 332.[34]

By singling out race, the Court imposes a special burden on racial minorities for whom race is a crucial component of their identity. Holistic admissions require "truly individualized consideration" of the whole person. *Id.*, at 334. Yet, "by foreclosing racial considerations, colorblindness denies those who racially self-identify the full expression of their identity" and treats "racial identity as inferior" among all "other forms of social identity." E. Boddie, The Indignities of Colorblindness, 64 UCLA L. Rev. Discourse, 64, 67 (2016). The Court's approach thus turns the Fourteenth Amendment's equal protection guarantee on its head and creates an equal protection problem of its own.

There is no question that minority students will bear the burden of today's decision. Students of color testified at

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[34] The Court suggests that promoting the Fourteenth Amendment's vision of equality is a "radical" claim of judicial power and the equivalent of "pick[ing] winners and losers based on the color of their skin." *Ante*, at 38. The law sometimes requires consideration of race to achieve racial equality. Just like drawing district lines that comply with the Voting Rights Act may require consideration of race along with other demographic factors, achieving racial diversity in higher education requires consideration of race along with "age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw* v. *Reno*, 509 U. S. 630, 646 (1993) ("[R]ace consciousness does not lead inevitably to impermissible race discrimination"). Moreover, in ordering the admission of Black children to all-white schools "with all deliberate speed" in *Brown* v. *Board of Education*, 349 U. S. 294, 301 (1955), this Court did not decide that the Black children should receive an "advantag[e] . . . at the expense of" white children. *Ante*, at 27. It simply enforced the Equal Protection Clause by leveling the playing field.

trial that racial self-identification was an important component of their application because without it they would not be able to present a full version of themselves. For example, Rimel Mwamba, a Black UNC alumna, testified that it was "really important" that UNC see who she is "holistically and how the color of [her] skin and the texture of [her] hair impacted [her] upbringing." 2 App. in No. 21–707, p. 1033. Itzel Vasquez-Rodriguez, who identifies as Mexican-American of Cora descent, testified that her ethnoracial identity is a "core piece" of who she is and has impacted "every experience" she has had, such that she could not explain her "potential contributions to Harvard without any reference" to it. 2 App. in No. 20–1199, at 906, 908. Sally Chen, a Harvard alumna who identifies as Chinese American, explained that being the child of Chinese immigrants was "really fundamental to explaining who" she is. *Id.*, at 968–969. Thang Diep, a Harvard alumnus, testified that his Vietnamese identity was "such a big part" of himself that he needed to discuss it in his application. *Id.*, at 949. And Sarah Cole, a Black Harvard alumna, emphasized that "[t]o try to not see [her] race is to try to not see [her] simply because there is no part of [her] experience, no part of [her] journey, no part of [her] life that has been untouched by [her] race." *Id.*, at 932.

In a single paragraph at the end of its lengthy opinion, the Court suggests that "nothing" in today's opinion prohibits universities from considering a student's essay that explains "how race affected [that student's] life." *Ante*, at 39. This supposed recognition that universities can, in some situations, consider race in application essays is nothing but an attempt to put lipstick on a pig. The Court's opinion circumscribes universities' ability to consider race in any form by meticulously gutting respondents' asserted diversity interests. See *supra*, at 41–43. Yet, because the Court cannot escape the inevitable truth that race matters in students' lives, it announces a false promise to save face and appear

attuned to reality. No one is fooled.

Further, the Court's demand that a student's discussion of racial self-identification be tied to individual qualities, such as "courage," "leadership," "unique ability," and "determination," only serves to perpetuate the false narrative that Harvard and UNC currently provide "preferences on the basis of race alone." *Ante*, at 28–29, 39; see also *ante*, at 28, n. 6 (claiming without support that "race alone . . . explains the admissions decisions for hundreds if not thousands of applicants"). The Court's precedents already require that universities take race into account holistically, in a limited way, and based on the type of "individualized" and "flexible" assessment that the Court purports to favor. *Grutter*, 539 U. S., at 334; see Brief for Students and Alumni of Harvard College as *Amici Curiae* 15–17 (Harvard College Brief) (describing how the dozens of application files in the record "uniformly show that, in line with Harvard's 'whole-person' admissions philosophy, Harvard's admissions officers engage in a highly nuanced assessment of each applicant's background and qualifications"). After extensive discovery and two lengthy trials, neither SFFA nor the majority can point to a single example of an underrepresented racial minority who was admitted to Harvard or UNC on the basis of "race alone."

In the end, the Court merely imposes its preferred college application format on the Nation, not acting as a court of law applying precedent but taking on the role of college administrators to decide what is better for society. The Court's course reflects its inability to recognize that racial identity informs some students' viewpoints and experiences in unique ways. The Court goes as far as to claim that *Bakke*'s recognition that Black Americans can offer different perspectives than white people amounts to a "stereotype." *Ante*, at 29.

It is not a stereotype to acknowledge the basic truth that

young people's experiences are shaded by a societal structure where race matters. Acknowledging that there is something special about a student of color who graduates valedictorian from a predominantly white school is not a stereotype. Nor is it a stereotype to acknowledge that race imposes certain burdens on students of color that it does not impose on white students. "For generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them." *Utah* v. *Strieff*, 579 U. S. 232, 254 (2016) (SOTOMAYOR, J., dissenting). Those conversations occur regardless of socioeconomic background or any other aspect of a student's self-identification. They occur because of race. As Andrew Brennen, a UNC alumnus, testified, "running down the neighborhood . . . people don't see [him] as someone that is relatively affluent; they see [him] as a black man." 2 App. in No. 21–707, at 951–952.

The absence of racial diversity, by contrast, actually contributes to stereotyping. "[D]iminishing the force of such stereotypes is both a crucial part of [respondents'] mission, and one that [they] cannot accomplish with only token numbers of minority students." *Grutter*, 539 U. S., at 333. When there is an increase in underrepresented minority students on campus, "racial stereotypes lose their force" because diversity allows students to "learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students." *Id.*, at 319–320. By preventing respondents from achieving their diversity objectives, it is the Court's opinion that facilitates stereotyping on American college campuses.

To be clear, today's decision leaves intact holistic college admissions and recruitment efforts that seek to enroll diverse classes without using racial classifications. Universities should continue to use those tools as best they can to

recruit and admit students from different backgrounds based on all the other factors the Court's opinion does not, and cannot, touch. Colleges and universities can continue to consider socioeconomic diversity and to recruit and enroll students who are first-generation college applicants or who speak multiple languages, for example. Those factors are not "interchangeable" with race. *UNC*, 567 F. Supp. 3d, at 643; see, *e.g.*, 2 App. in No. 21–707, at 975–976 (Laura Ornelas, a UNC alumna, testifying that her Latina identity, socioeconomic status, and first-generation college status are all important but different "parts to getting a full picture" of who she is and how she "see[s] the world"). At SFFA's own urging, those efforts remain constitutionally permissible. See Brief for Petitioner 81–86 (emphasizing "race-neutral" alternatives that Harvard and UNC should implement, such as those that focus on socioeconomic and geographic diversity, percentage plans, plans that increase community college transfers, and plans that develop partnerships with disadvantaged high schools); see also *ante*, at 51, 53, 55–56 (THOMAS, J., concurring) (arguing universities can consider "[r]ace-neutral policies" similar to those adopted in States such as California and Michigan, and that universities can consider "status as a first-generation college applicant," "financial means," and "generational inheritance or otherwise"); *ante*, at 8 (KAVANAUGH, J., concurring) (citing SFFA's briefs and concluding that universities can use "race-neutral" means); *ante*, at 14, n. 4 (GORSUCH, J., concurring) ("recount[ing] what SFFA has argued every step of the way" as to "race-neutral tools").

The Court today also does not adopt SFFA's suggestion that college admissions should be a function of academic metrics alone. Using class rank or standardized test scores as the only admissions criteria would severely undermine multidimensional diversity in higher education. Such a system "would exclude the star athlete or musician whose grades suffered because of daily practices and training. It

would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class." *Fisher II*, 579 U. S., at 386. A myopic focus on academic ratings "does not lead to a diverse student body." *Ibid.*[35]

2

As noted above, this Court suggests that the use of race in college admissions is unworkable because respondents' objectives are not sufficiently "measurable," "focused," "concrete," and "coherent." *Ante*, at 23, 26, 39. How much more precision is required or how universities are supposed to meet the Court's measurability requirement, the Court's opinion does not say. That is exactly the point. The Court is not interested in crafting a workable framework that promotes racial diversity on college campuses. Instead, it announces a requirement designed to ensure all race-conscious plans fail. Any increased level of precision runs the risk of violating the Court's admonition that colleges and universities operate their race-conscious admissions policies with no "'specified percentage[s]'" and no "specific number[s] firmly in mind." *Grutter*, 539 U. S., at 324, 335. Thus, the majority's holding puts schools in an untenable position. It creates a legal framework where race-conscious plans *must* be measured with precision but also *must not* be measured with precision. That holding is not meant to infuse clarity into the strict scrutiny framework; it is designed to render strict scrutiny "'fatal in fact.'" *Id.*, at 326 (quoting *Adarand*

[35] Today's decision is likely to generate a plethora of litigation by disappointed college applicants who think their credentials and personal qualities should have secured them admission. By inviting those challenges, the Court's opinion promotes chaos and incentivizes universities to convert their admissions programs into inflexible systems focused on mechanical factors, which will harm all students.

Constructors, Inc., 515 U. S., at 237). Indeed, the Court gives the game away when it holds that, to the extent respondents are actually measuring their diversity objectives with any level of specificity (for example, with a "focus on numbers" or specific "numerical commitment"), their plans are unconstitutional. *Ante*, at 30–31; see also *ante*, at 29 (THOMAS, J., concurring) ("I highly doubt any [university] will be able to" show a "measurable state interest").

3

The Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they rely on racial categories that are "imprecise," "opaque," and "arbitrary." *Ante*, at 25. To start, the racial categories that the Court finds troubling resemble those used across the Federal Government for data collection, compliance reporting, and program administration purposes, including, for example, by the U. S. Census Bureau. See, *e.g.*, 62 Fed. Reg. 58786–58790 (1997). Surely, not all "'federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies'" that flow from census data collection, *Department of Commerce* v. *New York*, 588 U. S. ___, ___ (2019) (slip op., at 2), are constitutionally suspect.

The majority presumes that it knows better and appoints itself as an expert on data collection methods, calling for a higher level of granularity to fix a supposed problem of overinclusiveness and underinclusiveness. Yet it does not identify a single instance where respondents' methodology has prevented any student from reporting their race with the level of detail they preferred. The record shows that it is up to students to choose whether to identify as one, multiple, or none of these categories. See *Harvard I*, 397 F. Supp. 3d, at 137; *UNC*, 567 F. Supp. 3d, at 596. To the extent students need to convey additional information, students can select subcategories or provide more detail in

their personal statements or essays. See *Harvard I*, 397 F. Supp. 3d, at 137. Students often do so. See, *e.g.*, 2 App. in No. 20–1199, at 906–907 (student respondent discussing her Latina identity on her application); *id.*, at 949 (student respondent testifying he "wrote about [his] Vietnamese identity on [his] application"). Notwithstanding this Court's confusion about racial self-identification, neither students nor universities are confused. There is no evidence that the racial categories that respondents use are unworkable.[36]

4

Cherry-picking language from *Grutter*, the Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they do not have a specific expiration date. *Ante*, at 30–34. This new durational requirement is also not grounded in law, facts, or common sense. *Grutter* simply announced a general "expect[ation]" that "the use of racial preferences [would] no longer be necessary" in the future. 539 U. S., at 343. As even SFFA acknowledges, those remarks were nothing but aspirational statements by the *Grutter* Court. Tr. of Oral Arg. in No. 21–707, p. 56.

Yet this Court suggests that everyone, including the Court itself, has been misreading *Grutter* for 20 years.

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[36] The Court suggests that the term "Asian American" was developed by respondents because they are "uninterested" in whether Asian American students "are adequately represented." *Ante*, at 25; see also *ante*, at 5 (GORSUCH, J., concurring) (suggesting that "[b]ureaucrats" devised a system that grouped all Asian Americans into a single racial category). That argument offends the history of that term. "The term 'Asian American' was coined in the late 1960s by Asian American activists—mostly college students—to unify Asian ethnic groups that shared common experiences of race-based violence and discrimination and to advocate for civil rights and visibility." Brief for Asian American Legal Defense and Education Fund et al. as *Amici Curiae* 9 (AALDEF Brief).

Grutter, according to the majority, requires that universities identify a specific "end point" for the use of race. *Ante*, at 33. JUSTICE KAVANAUGH, for his part, suggests that *Grutter* itself automatically expires in 25 years, after either "the college class of 2028" or "the college class of 2032." *Ante*, at 7, n. 1. A faithful reading of this Court's precedents reveals that *Grutter* held nothing of the sort.

True, *Grutter* referred to "25 years," but that arbitrary number simply reflected the time that had elapsed since the Court "first approved the use of race" in college admissions in *Bakke*. *Grutter*, 539 U. S., at 343. It is also true that *Grutter* remarked that "race-conscious admissions policies must be limited in time," but it did not do so in a vaccum, as the Court suggests. *Id.*, at 342. Rather than impose a fixed expiration date, the Court tasked universities with the responsibility of periodically assessing whether their race-conscious programs "are still necessary." *Ibid.* *Grutter* offered as examples sunset provisions, periodic reviews, and experimenting with "race-neutral alternatives as they develop." *Ibid.* That is precisely how this Court has previously interpreted *Grutter*'s command. See *Fisher II*, 579 U. S., at 388 ("It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies").

Grutter's requirement that universities engage in periodic reviews so the use of race can end "as soon as practicable" is well grounded in the need to ensure that race is "employed no more broadly than the interest demands." 539 U. S., at 343. That is, it is grounded in strict scrutiny. By contrast, the Court's holding is based on the fiction that racial inequality has a predictable cutoff date. Equality is an ongoing project in a society where racial inequality persists. See *supra*, at 17–25. A temporal requirement that rests on the fantasy that racial inequality will end at a predictable hour is illogical and unworkable. There is a sound reason

why this Court's precedents have never imposed the majority's strict deadline: Institutions cannot predict the future. Speculating about a day when consideration of race will become unnecessary is arbitrary at best and frivolous at worst. There is no constitutional duty to engage in that type of shallow guesswork.[37]

Harvard and UNC engage in the ongoing review that the Court's precedents demand. They "use [their] data to scrutinize the fairness of [their] admissions program[s]; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures [they] dee[m] necessary." *Fisher II*, 579 U. S., at 388. The Court holds, however, that respondents' attention to numbers amounts to unconstitutional racial balancing. *Ante*, at 30–32. But "'[s]ome attention to numbers'" is both necessary and permissible. *Grutter*, 539 U. S., at 336 (quoting *Bakke*, 438 U. S., at 323). Universities cannot blindly operate their limited race-conscious programs without regard for any quantitative information. "Increasing minority enrollment [is] instrumental to th[e] educational benefits" that respondents seek to achieve, *Fisher II*, 579 U. S., at 381, and statistics, data, and numbers "have some value

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[37] JUSTICE KAVANAUGH's reading, in particular, is quite puzzling. Unlike the majority, which concludes that respondents' programs should have an end point, JUSTICE KAVANAUGH suggests that *Grutter* itself has an expiration date. He agrees that racial inequality persists, *ante*, at 7–8, but at the same time suggests that race-conscious affirmative action was only necessary in "another generation," *ante*, at 4. He attempts to analogize expiration dates of court-ordered injunctions in desegregation cases, *ante*, at 5, but an expiring injunction does not eliminate the underlying constitutional principle. His musings about different college classes, *ante*, at 7, n. 1, are also entirely beside the point. Nothing in *Grutter*'s analysis turned on whether someone was applying for the class of 2028 or 2032. That reading of *Grutter* trivializes the Court's precedent by reducing it to an exercise in managing academic calendars. *Grutter* is no such thing.

as a gauge of [respondents'] ability to enroll students who can offer underrepresented perspectives." *Id.*, at 383–384. By removing universities' ability to assess the success of their programs, the Court obstructs these institutions' ability to meet their diversity goals.

5

JUSTICE THOMAS, for his part, offers a multitude of arguments for why race-conscious college admissions policies supposedly "burden" racial minorities. *Ante*, at 39. None of them has any merit.

He first renews his argument that the use of race in holistic admissions leads to the "inevitable" "underperformance" by Black and Latino students at elite universities "because they are less academically prepared than the white and Asian students with whom they must compete." *Fisher I*, 570 U. S., at 332 (concurring opinion). JUSTICE THOMAS speaks only for himself. The Court previously declined to adopt this so-called "mismatch" hypothesis for good reason: It was debunked long ago. The decades-old "studies" advanced by the handful of authors upon whom JUSTICE THOMAS relies, *ante*, at 40–41, have "major methodological flaws," are based on unreliable data, and do not "meet the basic tenets of rigorous social science research." Brief for Empirical Scholars as *Amici Curiae* 3, 9–25. By contrast, "[m]any social scientists have studied the impact of elite educational institutions on student outcomes, and have found, among other things, that attending a more selective school is associated with higher graduation rates and higher earnings for [underrepresented minority] students—conclusions directly contrary to mismatch." *Id.*, at 7–9 (collecting studies). This extensive body of research is supported by the most obvious data point available to this institution today: The three Justices of color on this Court graduated from elite universities and law schools with race-

conscious admissions programs, and achieved successful legal careers, despite having different educational backgrounds than their peers. A discredited hypothesis that the Court previously rejected is no reason to overrule precedent.

JUSTICE THOMAS claims that the weight of this evidence is overcome by a single more recent article published in 2016. *Ante*, at 41, n. 8. That article, however, explains that studies supporting the mismatch hypothesis "yield misleading conclusions," "overstate the amount of mismatch," "preclude one from drawing any concrete conclusions," and rely on methodologically flawed assumptions that "lea[d] to an upwardly-biased estimate of mismatch." P. Arcidiacono & M. Lovenheim, Affirmative Action and the Quality-Fit Trade-off, 54 J. Econ. Lit. 3, 17, 20 (2016); see *id.*, at 6 ("economists should be very skeptical of the mismatch hypothesis"). Notably, this refutation of the mismatch theory was coauthored by one of SFFA's experts, as JUSTICE THOMAS seems to recognize.

Citing nothing but his own long-held belief, JUSTICE THOMAS also equates affirmative action in higher education with segregation, arguing that "racial preferences in college admissions 'stamp [Black and Latino students] with a badge of inferiority.'" *Ante*, at 41 (quoting *Adarand*, 515 U. S., at 241 (THOMAS, J., concurring in part and concurring in judgment)). Studies disprove this sentiment, which echoes "tropes of stigma" that "were employed to oppose Reconstruction policies." A. Onwuachi-Willig, E. Houh, & M. Campbell, Cracking the Egg: Which Came First—Stigma or Affirmative Action? 96 Cal. L. Rev. 1299, 1323 (2008); see, *e.g.*, *id.*, at 1343–1344 (study of seven law schools showing that stigma results from "racial stereotypes that have attached historically to different groups, regardless of affirmative action's existence"). Indeed, equating state-sponsored segregation with race-conscious admissions policies that promote racial integration trivializes the harms of segregation and offends

Brown's transformative legacy. School segregation "has a detrimental effect" on Black students by "denoting the inferiority" of "their status in the community" and by "'depriv[ing] them of some of the benefits they would receive in a racial[ly] integrated school system.'" 347 U. S., at 494. In sharp contrast, race-conscious college admissions ensure that higher education is "visibly open to" and "inclusive of talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U. S., at 332. These two uses of race are not created equal. They are not "equally objectionable." *Id.*, at 327.

Relatedly, JUSTICE THOMAS suggests that race-conscious college admissions policies harm racial minorities by increasing affinity-based activities on college campuses. *Ante*, at 46. Not only is there no evidence of a causal connection between the use of race in college admissions and the supposed rise of those activities, but JUSTICE THOMAS points to no evidence that affinity groups cause any harm. Affinity-based activities actually help racial minorities improve their visibility on college campuses and "decreas[e] racial stigma and vulnerability to stereotypes" caused by "conditions of racial isolation" and "tokenization." U. Jayakumar, Why Are All Black Students *Still* Sitting Together in the Proverbial College Cafeteria?, Higher Education Research Institute at UCLA (Oct. 2015); see also Brief for Respondent-Students in No. 21–707, p. 42 (collecting student testimony demonstrating that "affinity groups beget important academic and social benefits" for racial minorities); 4 App. in No. 20–1199, at 1591 (Harvard Working Group on Diversity and Inclusion Report) (noting that concerns "that culturally specific spaces or affinity-themed housing will isolate" student minorities are misguided because those spaces allow students "to come together . . . to deal with intellectual, emotional, and social challenges").

Citing no evidence, JUSTICE THOMAS also suggests that race-conscious admissions programs discriminate against

Asian American students. *Ante*, at 43–44. It is true that SFFA "allege[d]" that Harvard discriminates against Asian American students. *Ante*, at 43. Specifically, SFFA argued that Harvard discriminates against Asian American applicants vis-à-vis white applicants through the use of the personal rating, an allegedly "highly subjective" component of the admissions process that is "susceptible to stereotyping and bias." *Harvard II*, 980 F. 3d, at 196; see Brief for Professors of Economics as *Amici Curiae* 24. It is also true, however, that there was a lengthy trial to test those allegations, which SFFA lost. JUSTICE THOMAS points to no legal or factual error below, precisely because there is none.

To begin, this part of SFFA's discrimination claim does not even fall under the strict scrutiny framework in *Grutter* and its progeny, which concerns the use of racial classifications. The personal rating is a facially race-*neutral* component of Harvard's admissions policy.[38] Therefore, even assuming for the sake of argument that Harvard engages in racial discrimination through the personal rating, there is no connection between that rating and the remedy that SFFA sought and that the majority grants today: ending the limited use of race in the entire admissions process. In any event, after assessing the credibility of fact witnesses and considering extensive documentary evidence and expert testimony, the courts below found "no discrimination against Asian Americans." *Harvard II*, 980 F. 3d, at 195, n. 34, 202; see *id.*, at 195–204.

There is no question that the Asian American community continues to struggle against potent and dehumanizing stereotypes in our society. It is precisely because racial discrimination persists in our society, however, that the use of

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[38] Before 2018, Harvard's admissions procedures were silent on the use of race in connection with the personal rating. *Harvard II*, 980 F. 3d, at 169. Harvard later modified its instructions to say explicitly that "'an applicant's race or ethnicity should not be considered in assigning the personal rating.'" *Ibid.*

race in college admissions to achieve racially diverse classes is critical to improving cross-racial understanding and breaking down racial stereotypes. See *supra*, at 16. Indeed, the record shows that some Asian American applicants are actually "advantaged by Harvard's use of race," *Harvard II*, 980 F. 3d, at 191, and "eliminating consideration of race would significantly disadvantage at least some Asian American applicants," *Harvard I*, 397 F. Supp. 3d, at 194. Race-conscious holistic admissions that contextualize the racial identity of each individual allow Asian American applicants "who would be less likely to be admitted without a comprehensive understanding of their background" to explain "the value of their unique background, heritage, and perspective." *Id.*, at 195. Because the Asian American community is not a monolith, race-conscious holistic admissions allow colleges and universities to "consider the vast differences within [that] community." AALDEF Brief 4–14. Harvard's application files show that race-conscious holistic admissions allow Harvard to "valu[e] the diversity of Asian American applicants' experiences." Harvard College Brief 23.

Moreover, the admission rates of Asian Americans at institutions with race-conscious admissions policies, including at Harvard, have "been steadily increasing for decades." *Harvard II*, 980 F. 3d, at 198.[39] By contrast, Asian American enrollment declined at elite universities that are prohibited by state law from considering race. See AALDEF Brief 27; Brief for 25 Diverse, California-Focused Bar Associations et al. as *Amici Curiae* 19–20, 23. At bottom, race-conscious admissions benefit all students, including racial minorities. That includes the Asian American community.

Finally, JUSTICE THOMAS belies reality by suggesting that "experts and elites" with views similar to those "that

[39] At Harvard, "Asian American applicants are accepted at the same rate as other applicants and now make up more than 20% of Harvard's admitted classes," even though "only about 6% of the United States population is Asian American." *Harvard I*, 397 F. Supp. 3d, at 203.

motivated *Dred Scott* and *Plessy*" are the ones who support race conscious admissions. *Ante*, at 39. The plethora of young students of color who testified in favor of race-consciousness proves otherwise. See *supra*, at 46–47; see also *infra*, at 64–67 (discussing numerous *amici* from many sectors of society supporting respondents' policies). Not a single student—let alone any racial minority—affected by the Court's decision testified in favor of SFFA in these cases.

C

In its "radical claim to power," the Court does not even acknowledge the important reliance interests that this Court's precedents have generated. *Dobbs*, 597 U. S., at ___ (dissenting opinion) (slip op., at 53). Significant rights and expectations will be affected by today's decision nonetheless. Those interests supply "added force" in favor of *stare decisis*. *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202 (1991).

Students of all backgrounds have formed settled expectations that universities with race-conscious policies "will provide diverse, cross-cultural experiences that will better prepare them to excel in our increasingly diverse world." Brief for Respondent-Students in No. 21–707, at 45; see Harvard College Brief 6–11 (collecting student testimony).

Respondents and other colleges and universities with race-conscious admissions programs similarly have concrete reliance interests because they have spent significant resources in an effort to comply with this Court's precedents. "Universities have designed courses that draw on the benefits of a diverse student body," "hired faculty whose research is enriched by the diversity of the student body," and "promoted their learning environments to prospective students who have enrolled based on the understanding that they could obtain the benefits of diversity of all kinds." Brief for Respondent in No. 20–1199, at 40–41 (internal

quotation marks omitted). Universities also have "expended vast financial and other resources" in "training thousands of application readers on how to faithfully apply this Court's guardrails on the use of race in admissions." Brief for University Respondents in No. 21–707, p. 44. Yet today's decision abruptly forces them "to fundamentally alter their admissions practices." *Id.*, at 45; see also Brief for Massachusetts Institute of Technology et al. as *Amici Curiae* 25–26; Brief for Amherst College et al. as *Amici Curiae* 23–25 (Amherst Brief). As to Title VI in particular, colleges and universities have relied on *Grutter* for decades in accepting federal funds. See Brief for United States as *Amicus Curiae* in No. 20–1199, p. 25 (United States Brief); Georgetown Brief 16.

The Court's failure to weigh these reliance interests "is a stunning indictment of its decision." *Dobbs*, 597 U. S., at ___ (dissenting opinion) (slip op., at 55).

IV

The use of race in college admissions has had profound consequences by increasing the enrollment of underrepresented minorities on college campuses. This Court presupposes that segregation is a sin of the past and that race-conscious college admissions have played no role in the progress society has made. The fact that affirmative action in higher education "has worked and is continuing to work" is no reason to abandon the practice today. *Shelby County* v. *Holder*, 570 U. S. 529, 590 (2013) (Ginsburg, J., dissenting) ("[It] is like throwing away your umbrella in a rainstorm because you are not getting wet").

Experience teaches that the consequences of today's decision will be destructive. The two lengthy trials below simply confirmed what we already knew: Superficial color-blindness in a society that systematically segregates opportunity will cause a sharp decline in the rates at which underrepresented minority students enroll in our Nation's

colleges and universities, turning the clock back and undoing the slow yet significant progress already achieved. See *Schuette*, 572 U. S., at 384–390 (SOTOMAYOR, J., dissenting) (collecting statistics from States that have banned the use of race in college admissions); see also Amherst Brief 13 (noting that eliminating the use of race in college admissions will take Black student enrollment at elite universities back to levels this country saw in the early 1960s).

After California amended its State Constitution to prohibit race-conscious college admissions in 1996, for example, "freshmen enrollees from underrepresented minority groups dropped precipitously" in California public universities. Brief for President and Chancellors of the University of California as *Amici Curiae* 4, 9, 11–13. The decline was particularly devastating at California's most selective campuses, where the rates of admission of underrepresented groups "dropped by 50% or more." *Id.*, at 4, 12. At the University of California, Berkeley, a top public university not just in California but also nationally, the percentage of Black students in the freshman class dropped from 6.32% in 1995 to 3.37% in 1998. *Id.*, at 12–13. Latino representation similarly dropped from 15.57% to 7.28% during that period at Berkeley, even though Latinos represented 31% of California public high school graduates. *Id.*, at 13. To this day, the student population at California universities still "reflect[s] a persistent inability to increase opportunities" for all racial groups. *Id.*, at 23. For example, as of 2019, the proportion of Black freshmen at Berkeley was 2.76%, well below the pre-constitutional amendment level in 1996, which was 6.32%. *Ibid.* Latinos composed about 15% of freshmen students at Berkeley in 2019, despite making up 52% of all California public high school graduates. *Id.*, at 24; see also Brief for University of Michigan as *Amicus Curiae* 21–24 (noting similar trends at the University of Michigan from 2006, the last admissions cycle before Michigan's ban on race-conscious admissions took effect,

through present); *id.*, at 24–25 (explaining that the university's "experience is largely consistent with other schools that do not consider race as a factor in admissions," including, for example, the University of Oklahoma's most prestigious campus).

The costly result of today's decision harms not just respondents and students but also our institutions and democratic society more broadly. Dozens of *amici* from nearly every sector of society agree that the absence of race-conscious college admissions will decrease the pipeline of racially diverse college graduates to crucial professions. Those *amici* include the United States, which emphasizes the need for diversity in the Nation's military, see United States Brief 12–18, and in the federal workforce more generally, *id.*, at 19–20 (discussing various federal agencies, including the Federal Bureau of Investigation and the Office of the Director of National Intelligence). The United States explains that "the Nation's military strength and readiness depend on a pipeline of officers who are both highly qualified and racially diverse—and who have been educated in diverse environments that prepare them to lead increasingly diverse forces." *Id.*, at 12. That is true not just at the military service academies but "at civilian universities, including Harvard, that host Reserve Officers' Training Corps (ROTC) programs and educate students who go on to become officers." *Ibid.* Top former military leaders agree. See Brief for Adm. Charles S. Abbot et al. as *Amici Curiae* 3 (noting that in *amici*'s "professional judgment, the status quo—which permits service academies and civilian universities to consider racial diversity as one factor among many in their admissions practices—is essential to the continued vitality of the U. S. military").

Indeed, history teaches that racial diversity is a national security imperative. During the Vietnam War, for example, lack of racial diversity "threatened the integrity and perfor-

mance of the Nation's military" because it fueled "perceptions of racial/ethnic minorities serving as 'cannon fodder' for white military leaders." Military Leadership Diversity Comm'n, From Representation to Inclusion: Diversity Leadership for the 21st-Century Military xvi, 15 (2011); see also, *e.g.*, R. Stillman, Racial Unrest in the Military: The Challenge and the Response, 34 Pub. Admin. Rev. 221, 221–222 (1974) (discussing other examples of racial unrest). Based on "lessons from decades of battlefield experience," it has been the "longstanding military judgment" across administrations that racial diversity "is essential to achieving a mission-ready" military and to ensuring the Nation's "ability to compete, deter, and win in today's increasingly complex global security environment." United States Brief 13 (internal quotation marks omitted). The majority recognizes the compelling need for diversity in the military and the national security implications at stake, see *ante*, at 22, n. 4, but it ends race-conscious college admissions at civilian universities implicating those interests anyway.

Amici also tell the Court that race-conscious college admissions are critical for providing equitable and effective public services. State and local governments require public servants educated in diverse environments who can "identify, understand, and respond to perspectives" in "our increasingly diverse communities." Brief for Southern Governors as *Amici Curiae* 5–8 (Southern Governors Brief). Likewise, increasing the number of students from underrepresented backgrounds who join "the ranks of medical professionals" improves "healthcare access and health outcomes in medically underserved communities." Brief for Massachusetts et al. as *Amici Curiae* 10; see Brief for Association of American Medical Colleges et al. as *Amici Curiae* 5 (noting also that *all* physicians become better practitioners when they learn in a racially diverse environment). So too, greater diversity within the teacher workforce improves student academic achievement in primary public

schools. Brief for Massachusetts et al. as *Amici Curiae* 15–17; see Brief for American Federation of Teachers as *Amicus Curiae* 8 ("[T]here are few professions with broader social impact than teaching"). A diverse pipeline of college graduates also ensures a diverse legal profession, which demonstrates that "the justice system serves the public in a fair and inclusive manner." Brief for American Bar Association as *Amicus Curiae* 18; see also Brief for Law Firm Antiracism Alliance as *Amicus Curiae* 1, 6 (more than 300 law firms in all 50 States supporting race-conscious college admissions in light of the "influence and power" that lawyers wield "in the American system of government").

Examples of other industries and professions that benefit from race-conscious college admissions abound. American businesses emphasize that a diverse workforce improves business performance, better serves a diverse consumer marketplace, and strengthens the overall American economy. Brief for Major American Business Enterprises as *Amici Curiae* 5–27. A diverse pipeline of college graduates also improves research by reducing bias and increasing group collaboration. Brief for Individual Scientists as *Amici Curiae* 13–14. It creates a more equitable and inclusive media industry that communicates diverse viewpoints and perspectives. Brief for Multicultural Media, Telecom and Internet Council, Inc., et al. as *Amici Curiae* 6. It also drives innovation in an increasingly global science and technology industry. Brief for Applied Materials, Inc., et al. as *Amici Curiae* 11–20.

Today's decision further entrenches racial inequality by making these pipelines to leadership roles less diverse. A college degree, particularly from an elite institution, carries with it the benefit of powerful networks and the opportunity for socioeconomic mobility. Admission to college is therefore often the entry ticket to top jobs in workplaces where important decisions are made. The overwhelming majority

of Members of Congress have a college degree.[40] So do most business leaders.[41] Indeed, many state and local leaders in North Carolina attended college in the UNC system. See Southern Governors Brief 8. More than half of judges on the North Carolina Supreme Court and Court of Appeals graduated from the UNC system, for example, and nearly a third of the Governor's cabinet attended UNC. *Ibid.* A less diverse pipeline to these top jobs accumulates wealth and power unequally across racial lines, exacerbating racial disparities in a society that already dispenses prestige and privilege based on race.

The Court ignores the dangerous consequences of an America where its leadership does not reflect the diversity of the People. A system of government that visibly lacks a path to leadership open to every race cannot withstand scrutiny "in the eyes of the citizenry." *Grutter*, 539 U. S., at 332. "[G]ross disparity in representation" leads the public to wonder whether they can ever belong in our Nation's institutions, including this one, and whether those institutions work for them. Tr. of Oral Arg. in No. 21–707, p. 171 ("The Court is going to hear from 27 advocates in this sitting of the oral argument calendar, and two are women, even though women today are 50 percent or more of law school graduates. And I think it would be reasonable for a woman to look at that and wonder, is that a path that's open to me, to be a Supreme Court advocate?" (remarks of Solicitor General Elizabeth Prelogar)).[42]

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[40] K. Schaeffer, Pew Research Center, The Changing Face of Congress in 8 Charts (Feb. 7, 2023).

[41] See J. Martelli & P. Abels, The Education of a Leader: Educational Credentials and Other Characteristics of Chief Executive Officers, J. of Educ. for Bus. 216 (2010); see also J. Moody, Where the Top Fortune 500 CEOs Attended College, U. S. News & World Report (June 16, 2021).

[42] Racial inequality in the pipeline to this institution, too, will deepen. See J. Fogel, M. Hoopes, & G. Liu, Law Clerk Selection and Diversity: Insights From Fifty Sitting Judges of the Federal Courts of Appeals 7–8

By ending race-conscious college admissions, this Court closes the door of opportunity that the Court's precedents helped open to young students of every race. It creates a leadership pipeline that is less diverse than our increasingly diverse society, reserving "positions of influence, affluence, and prestige in America" for a predominantly white pool of college graduates. *Bakke*, 438 U. S., at 401 (opinion of Marshall, J.). At its core, today's decision exacerbates segregation and diminishes the inclusivity of our Nation's institutions in service of superficial neutrality that promotes indifference to inequality and ignores the reality of race.

* * *

True equality of educational opportunity in racially diverse schools is an essential component of the fabric of our democratic society. It is an interest of the highest order and a foundational requirement for the promotion of equal protection under the law. *Brown* recognized that passive race neutrality was inadequate to achieve the constitutional guarantee of racial equality in a Nation where the effects of segregation persist. In a society where race continues to matter, there is no constitutional requirement that institutions attempting to remedy their legacies of racial exclusion must operate with a blindfold.

Today, this Court overrules decades of precedent and imposes a superficial rule of race blindness on the Nation. The devastating impact of this decision cannot be overstated. The majority's vision of race neutrality will entrench racial

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(2022) (noting that from 2005 to 2017, 85% of Supreme Court law clerks were white, 9% were Asian American, 4% were Black, and 1.5% were Latino, and about half of all clerks during that period graduated from two law schools: Harvard and Yale); Brief for American Bar Association as *Amicus Curiae* 25 (noting that more than 85% of lawyers, more than 70% of Article III judges, and more than 80% of state judges in the United States are white, even though white people represent about 60% of the population).

segregation in higher education because racial inequality will persist so long as it is ignored.

Notwithstanding this Court's actions, however, society's progress toward equality cannot be permanently halted. Diversity is now a fundamental American value, housed in our varied and multicultural American community that only continues to grow. The pursuit of racial diversity will go on. Although the Court has stripped out almost all uses of race in college admissions, universities can and should continue to use all available tools to meet society's needs for diversity in education. Despite the Court's unjustified exercise of power, the opinion today will serve only to highlight the Court's own impotence in the face of an America whose cries for equality resound. As has been the case before in the history of American democracy, "the arc of the moral universe" will bend toward racial justice despite the Court's efforts today to impede its progress. Martin Luther King "Our God is Marching On!" Speech (Mar. 25, 1965).

SUPREME COURT OF THE UNITED STATES

Nos. 20–1199 and 21–707

STUDENTS FOR FAIR ADMISSIONS, INC.,
PETITIONER
20–1199 *v.*
PRESIDENT AND FELLOWS OF
HARVARD COLLEGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STUDENTS FOR FAIR ADMISSIONS, INC.,
PETITIONER
21–707 *v.*
UNIVERSITY OF NORTH CAROLINA, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 29, 2023]

JUSTICE JACKSON, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.*

Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations. Every moment these gaps persist is a moment in which this great country falls short of actualizing one of its foundational principles—the "self-evident" truth that all of us are created equal. Yet, today, the Court determines that

*JUSTICE JACKSON did not participate in the consideration or decision of the case in No. 20–1199, and issues this opinion with respect to the case in No. 21–707.

holistic admissions programs like the one that the University of North Carolina (UNC) has operated, consistent with *Grutter* v. *Bollinger*, 539 U. S. 306 (2003), are a problem with respect to achievement of that aspiration, rather than a viable solution (as has long been evident to historians, sociologists, and policymakers alike).

JUSTICE SOTOMAYOR has persuasively established that nothing in the Constitution or Title VI prohibits institutions from taking race into account to ensure the racial diversity of admits in higher education. I join her opinion without qualification. I write separately to expound upon the universal benefits of considering race in this context, in response to a suggestion that has permeated this legal action from the start. Students for Fair Admissions (SFFA) has maintained, both subtly and overtly, that it is *unfair* for a college's admissions process to consider race as one factor in a holistic review of its applicants. See, *e.g.*, Tr. of Oral Arg. 19.

This contention blinks both history and reality in ways too numerous to count. But the response is simple: Our country has never been colorblind. Given the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented "intergenerational transmission of inequality" that still plagues our citizenry.[1]

It is *that* inequality that admissions programs such as UNC's help to address, to the benefit of us all. Because the majority's judgment stunts that progress without any basis in law, history, logic, or justice, I dissent.

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[1] M. Oliver & T. Shapiro, Black Wealth/White Wealth: A New Perspective on Racial Inequality 128 (1997) (Oliver & Shapiro) (emphasis deleted).

I

A

Imagine two college applicants from North Carolina, John and James. Both trace their family's North Carolina roots to the year of UNC's founding in 1789. Both love their State and want great things for its people. Both want to honor their family's legacy by attending the State's flagship educational institution. John, however, would be the seventh generation to graduate from UNC. He is White. James would be the first; he is Black. Does the race of these applicants properly play a role in UNC's holistic merits-based admissions process?

To answer that question, "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921). Many chapters of America's history appear necessary, given the opinions that my colleagues in the majority have issued in this case.

Justice Thurgood Marshall recounted the genesis:

> "Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave." *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 387–388 (1978).

Slavery should have been (and was to many) self-evidently dissonant with our avowed founding principles. When the time came to resolve that dissonance, eleven States chose slavery. With the Union's survival at stake, Frederick Douglass noted, Black Americans in the South "were almost the only reliable friends the nation had," and "but for their help . . . the Rebels might have succeeded in

breaking up the Union."[2] After the war, Senator John Sherman defended the proposed Fourteenth Amendment in a manner that encapsulated our Reconstruction Framers' highest sentiments: "We are bound by every obligation, by [Black Americans'] service on the battlefield, by their heroes who are buried in our cause, by their patriotism in the hours that tried our country, we are bound to protect them and all their natural rights."[3]

To uphold that promise, the Framers repudiated this Court's holding in *Dred Scott* v. *Sandford*, 19 How. 393 (1857), by crafting Reconstruction Amendments (and associated legislation) that transformed our Constitution and society.[4] Even after this Second Founding—when the need to right historical wrongs should have been clear beyond cavil—opponents insisted that vindicating equality in this manner slighted White Americans. So, when the Reconstruction Congress passed a bill to secure all citizens "the same [civil] right[s]" as "enjoyed by white citizens," 14 Stat. 27, President Andrew Johnson vetoed it because it "discriminat[ed] . . . in favor of the negro."[5]

That attitude, and the Nation's associated retreat from Reconstruction, made prophesy out of Congressman Thaddeus Stevens's fear that "those States will all . . . keep up

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[2] An Appeal to Congress for Impartial Suffrage, Atlantic Monthly (Jan. 1867), in 2 The Reconstruction Amendments: The Essential Documents 324 (K. Lash ed. 2021) (Lash).

[3] Speech of Sen. John Sherman (Sept. 28, 1866) (Sherman), in *id.*, at 276; see also W. Du Bois, Black Reconstruction in America 162 (1998) (Du Bois).

[4] See Sherman 276; M. Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 48, 71–75, 91, 173 (1986).

[5] Message Accompanying Veto of the Civil Rights Bill (Mar. 27, 1866), in Lash 145.

this discrimination, and crush to death the hated freedmen."[6] And this Court facilitated that retrenchment.[7] Not just in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), but "in almost every instance, the Court chose to restrict the scope of the second founding."[8] Thus, thirteen years pre-*Plessy*, in the *Civil Rights Cases*, 109 U. S. 3 (1883), our predecessors on this Court invalidated Congress's attempt to enforce the Reconstruction Amendments via the Civil Rights Act of 1875, lecturing that "there must be some stage . . . when [Black Americans] tak[e] the rank of a mere citizen, and ceas[e] to be the special favorite of the laws." *Id.*, at 25. But Justice Harlan knew better. He responded: "What the nation, through Congress, has sought to accomplish in reference to [Black people] is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more." *Id.*, at 61 (dissenting opinion).

Justice Harlan dissented alone. And the betrayal that this Court enabled had concrete effects. Enslaved Black people had built great wealth, but only for enslavers.[9] No surprise, then, that freedmen leapt at the chance to control their own labor and to build their own financial security.[10] Still, White southerners often "simply refused to sell land to blacks," even when not selling was economically foolish.[11] To bolster private exclusion, States sometimes passed laws forbidding such sales.[12] The inability to build wealth

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[6] Speech Introducing the [Fourteenth] Amendment (May 8, 1866), in *id.*, at 159; see Du Bois 670–710.

[7] E. Foner, The Second Founding 125–167 (2019) (Foner).

[8] *Id.*, at 128.

[9] M. Baradaran, The Color of Money: Black Banks and the Racial Wealth Gap 9–11 (2017) (Baradaran).

[10] Foner 179; see also Baradaran 15–16; I. Wilkerson, The Warmth of Other Suns: The Epic Story of America's Great Migration 37 (2010) (Wilkerson).

[11] Baradaran 18.

[12] *Ibid.*

through that most American of means forced Black people into sharecropping roles, where they somehow always tended to find themselves in debt to the landowner when the growing season closed, with no hope of recourse against the ever-present cooking of the books.[13]

Sharecropping is but one example of race-linked obstacles that the law (and private parties) laid down to hinder the progress and prosperity of Black people. Vagrancy laws criminalized free Black men who failed to work for White landlords.[14] Many States barred freedmen from hunting or fishing to ensure that they could not live without entering *de facto* reenslavement as sharecroppers.[15] A cornucopia of laws (*e.g.*, banning hitchhiking, prohibiting encouraging a laborer to leave his employer, and penalizing those who prompted Black southerners to migrate northward) ensured that Black people could not freely seek better lives elsewhere.[16] And when statutes did not ensure compliance, state-sanctioned (and private) violence did.[17]

Thus emerged Jim Crow—a system that was, as much as anything else, a comprehensive scheme of economic exploitation to replace the Black Codes, which themselves had replaced slavery's form of comprehensive economic exploitation.[18] Meanwhile, as Jim Crow ossified, the Federal

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[13] R. Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America 154 (2017) (Rothstein); Baradaran 33–34; Wilkerson 53–55.

[14] Baradaran 20–21; Du Bois 173–179, 694–696, 698–699; R. Goluboff, The Thirteenth Amendment and the Lost Origins of Civil Rights, 50 Duke L. J. 1609, 1656–1659 (2001) (Goluboff); Wilkerson 152 (noting persistence of this practice "well into the 1940s").

[15] Baradaran 20.

[16] Goluboff 1656–1659 (recounting presence of these practices well into the 20th century); Wilkerson 162–163.

[17] Rothstein 154.

[18] C. Black, The Lawfulness of the Segregation Decisions, 69 Yale L. J. 421, 424 (1960); Foner 47–48; Du Bois 179, 696; Baradaran 38–39.

Government was "giving away land" on the western frontier, and with it "the opportunity for upward mobility and a more secure future," over the 1862 Homestead Act's three-quarter-century tenure.[19] Black people were exceedingly unlikely to be allowed to share in those benefits, which by one calculation may have advantaged approximately 46 million Americans living today.[20]

Despite these barriers, Black people persisted. Their so-called Great Migration northward accelerated during and after the First World War.[21] Like clockwork, American cities responded with racially exclusionary zoning (and similar policies).[22] As a result, Black migrants had to pay disproportionately high prices for disproportionately subpar housing.[23] Nor did migration make it more likely for Black people to access home ownership, as banks would not lend to Black people, and in the rare cases banks would fund home loans, exorbitant interest rates were charged.[24] With Black people still locked out of the Homestead Act giveaway, it is no surprise that, when the Great Depression arrived, race-based wealth, health, and opportunity gaps were the norm.[25]

Federal and State Governments' selective intervention further exacerbated the disparities. Consider, for example,

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[19] T. Shanks, The Homestead Act: A Major Asset-Building Policy in American History, in Inclusion in the American Dream: Assets, Poverty, and Public Policy 23–25 (M. Sherraden ed. 2005) (Shanks); see also Baradaran 18.

[20] Shanks 32–37; Oliver & Shapiro 37–38.

[21] Wilkerson 8–10; Rothstein 155.

[22] *Id.*, at 43–50; Baradaran 90–92.

[23] *Ibid.*; Rothstein 172–173; Wilkerson 269–271.

[24] Baradaran 90.

[25] I. Katznelson, When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America 29–35 (2005) (Katznelson).

the federal Home Owners' Loan Corporation (HOLC), created in 1933.[26] HOLC purchased mortgages threatened with foreclosure and issued new, amortized mortgages in their place.[27] Not only did this mean that recipients of these mortgages could gain equity while paying off the loan, successful full payment would make the recipient a homeowner.[28] Ostensibly to identify (and avoid) the riskiest recipients, the HOLC "created color-coded maps of every metropolitan area in the nation."[29] Green meant safe; red meant risky. And, regardless of class, every neighborhood with Black people earned the red designation.[30]

Similarly, consider the Federal Housing Administration (FHA), created in 1934, which insured highly desirable bank mortgages. Eligibility for this insurance required an FHA appraisal of the property to ensure a low default risk.[31] But, nationwide, it was FHA's established policy to provide "no guarantees for mortgages to African Americans, or to whites who might lease to African Americans," irrespective of creditworthiness.[32] No surprise, then, that "[b]etween 1934 and 1968, 98 percent of FHA loans went to white Americans," with whole cities (ones that had a disproportionately large number of Black people due to housing segregation) sometimes being deemed ineligible for FHA intervention on racial grounds.[33] The Veterans Administration operated similarly.[34]

One more example: the Federal Home Loan Bank Board

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[26] D. Massey & N. Denton, American Apartheid: Segregation and the Making of the Underclass 51–53 (1993); Oliver & Shapiro 16–18.
[27] Rothstein 63.
[28] *Id.*, at 63–64.
[29] *Id.*, at 64; see Oliver & Shapiro 16–18; Baradaran 105.
[30] Rothstein 64.
[31] *Ibid.*
[32] *Id.*, at 67.
[33] Baradaran 108; see Rothstein 69–75.
[34] *Id.*, at 9, 13, 70.

"chartered, insured, and regulated savings and loan associations from the early years of the New Deal."[35] But it did "not oppose the denial of mortgages to African Americans until 1961" (and even then opposed discrimination ineffectively).[36]

The upshot of all this is that, due to government policy choices, "[i]n the suburban-shaping years between 1930 and 1960, fewer than one percent of all mortgages in the nation were issued to African Americans."[37] Thus, based on their race, Black people were "[l]ocked out of the greatest mass-based opportunity for wealth accumulation in American history."[38]

For present purposes, it is significant that, in so excluding Black people, government policies affirmatively operated—one could say, affirmatively acted—to dole out preferences to those who, if nothing else, were not Black. Those past preferences carried forward and are reinforced today by (among other things) the benefits that flow to homeowners and to the holders of other forms of capital that are hard to obtain unless one already has assets.[39]

This discussion of how the existing gaps were formed is merely illustrative, not exhaustive. I will pass over Congress's repeated crafting of family-, worker-, and retiree-protective legislation to channel benefits to White people, thereby excluding Black Americans from what was otherwise "a revolution in the status of most working Americans."[40] I will also skip how the G. I. Bill's "creation of . . .

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[35] *Id.*, at 108.

[36] *Ibid.*

[37] R. Schragger, The Limits of Localism, 100 Mich. L. Rev. 371, 411, n. 144 (2001); see also Rothstein 182–183.

[38] Oliver & Shapiro 18.

[39] *Id.*, at 43–44; Baradaran 109, 253–254; A. Dickerson, Shining a Bright Light on the Color of Wealth, 120 Mich. L. Rev. 1085, 1100 (2022) (Dickerson).

[40] Katznelson 53; see *id.*, at 22, 29, 42–48, 53–61; Rothstein 31, 155–156.

middle-class America" (by giving $95 billion to veterans and their families between 1944 and 1971) was "deliberately designed to accommodate Jim Crow."[41] So, too, will I bypass how Black people were prevented from partaking in the consumer credit market—a market that helped White people who could access it build and protect wealth.[42] Nor will time and space permit my elaborating how local officials' racial hostility meant that even those benefits that Black people could formally obtain were unequally distributed along racial lines.[43] And I could not possibly discuss every way in which, in light of this history, facially race-blind policies *still* work race-based harms today (*e.g.*, racially disparate tax-system treatment; the disproportionate location of toxic-waste facilities in Black communities; or the deliberate action of governments at all levels in designing interstate highways to bisect and segregate Black urban communities).[44]

The point is this: Given our history, the origin of persistent race-linked gaps should be no mystery. It has never been a deficiency of Black Americans' desire or ability to, in Frederick Douglass's words, "stand on [their] own legs."[45] Rather, it was always simply what Justice Harlan recognized 140 years ago—the persistent and pernicious denial of "what had already been done in every State of the Union for the white race." *Civil Rights Cases*, 109 U. S., at 61 (dissenting opinion).

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[41] Katznelson 113–114; see *id.*, at 113–141; see also, *e.g.*, *id.*, at 139–140 (Black veterans, North and South, were routinely denied loans that White veterans received); Rothstein 167.

[42] Baradaran 112–113.

[43] Katznelson 22–23; Rothstein 167.

[44] *Id.*, at 54–56, 65, 127–131, 217; Stanford Institute for Economic Policy Research, Measuring and Mitigating Disparities in Tax Audits 1–7 (2023); Dickerson 1096–1097.

[45] What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865, in 4 The Frederick Douglass Papers 68 (J. Blassingame & J. McKivigan eds. 1991).

B

History speaks. In some form, it can be heard forever. The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark.

Start with wealth and income. Just four years ago, in 2019, Black families' median wealth was approximately $24,000.[46] For White families, that number was approximately eight times as much (about $188,000).[47] These wealth disparities "exis[t] at every income and education level," so, "[o]n average, white families with college degrees have over $300,000 more wealth than black families with college degrees."[48] This disparity has also accelerated over time—from a roughly $40,000 gap between White and Black household median net worth in 1993 to a roughly $135,000 gap in 2019.[49] Median income numbers from 2019 tell the same story: $76,057 for White households, $98,174 for Asian households, $56,113 for Latino households, and $45,438 for Black households.[50]

These financial gaps are unsurprising in light of the link

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[46] Dickerson 1086 (citing data from 2019 Federal Reserve Survey of Consumer Finances); see also Rothstein 184 (reporting, in 2017, even lower median-wealth number of $11,000).

[47] Dickerson 1086; see also Rothstein 184 (reporting even larger relative gap in 2017 of $134,000 to $11,000).

[48] Baradaran 249; see also Dickerson 1089–1090; Oliver & Shapiro 94–95, 100–101, 110–111, 197.

[49] See Brief for National Academy of Education as *Amicus Curiae* 14–15 (citing U. S. Census Bureau statistics).

[50] *Id.*, at 14 (citing U. S. Census Bureau statistics); Rothstein 184 (reporting similarly stark White/Black income gap numbers in 2017). Early returns suggest that the COVID–19 pandemic exacerbated these disparities. See E. Derenoncourt, C. Kim, M. Kuhn, & M. Schularick, Wealth of Two Nations: The U. S. Racial Wealth Gap, 1860–2020, p. 22 (Fed. Reserve Bank of Minneapolis, Opportunity & Inclusive Growth Inst., Working Paper No. 59, June 2022) (Wealth of Two Nations); L. Bollinger & G. Stone, A Legacy of Discrimination: The Essential Constitutionality of Affirmative Action 103 (2023) (Bollinger & Stone).

between home ownership and wealth. Today, as was true 50 years ago, Black home ownership trails White home ownership by approximately 25 percentage points.[51] Moreover, Black Americans' homes (relative to White Americans') constitute a greater percentage of household wealth, yet tend to be worth less, are subject to higher effective property taxes, and generally lost more value in the Great Recession.[52]

From those markers of social and financial unwellness flow others. In most state flagship higher educational institutions, the percentage of Black undergraduates is lower than the percentage of Black high school graduates in that State.[53] Black Americans in their late twenties are about half as likely as their White counterparts to have college degrees.[54] And because lower family income and wealth force students to borrow more, those Black students who do graduate college find themselves four years out with about $50,000 in student debt—nearly twice as much as their White compatriots.[55]

As for postsecondary professional arenas, despite being about 13% of the population, Black people make up only about 5% of lawyers.[56] Such disparity also appears in the business realm: Of the roughly 1,800 chief executive officers to have appeared on the well-known Fortune 500 list, fewer than 25 have been Black (as of 2022, only six are Black).[57] Furthermore, as the COVID–19 pandemic raged, Black-owned small businesses failed at dramatically higher rates

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[51] *Id.*, at 87; Wealth of Two Nations 77–79.
[52] *Id.*, at 78, 89; Bollinger & Stone 94–95; Dickerson 1101.
[53] Bollinger & Stone 99–100.
[54] *Id.*, at 99, and n. 58.
[55] Dickerson 1088; Bollinger & Stone 100, and n. 63.
[56] ABA, Profile of the Legal Profession 33 (2020).
[57] Bollinger & Stone 106; Brief for HR Policy Association as *Amicus Curiae* 18–19.

than White-owned small businesses, partly due to the disproportionate denial of the forgivable loans needed to survive the economic downturn.[58]

Health gaps track financial ones. When tested, Black children have blood lead levels that are twice the rate of White children—"irreversible" contamination working irremediable harm on developing brains.[59] Black (and Latino) children with heart conditions are more likely to die than their White counterparts.[60] Race-linked mortality-rate disparity has also persisted, and is highest among infants.[61]

So, too, for adults: Black men are twice as likely to die from prostate cancer as White men and have lower 5-year cancer survival rates.[62] Uterine cancer has spiked in recent years among all women—but has spiked highest for Black women, who die of uterine cancer at nearly twice the rate of "any other racial or ethnic group."[63] Black mothers are up to four times more likely than White mothers to die as a result of childbirth.[64] And COVID killed Black Americans at higher rates than White Americans.[65]

"Across the board, Black Americans experience the highest rates of obesity, hypertension, maternal mortality, infant mortality, stroke, and asthma."[66] These and other disparities—the predictable result of opportunity disparities—

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[58] Dickerson 1102.

[59] Rothstein 230.

[60] Brief for Association of American Medical Colleges et al. as *Amici Curiae* 8 (AMC Brief).

[61] C. Caraballo et al., Excess Mortality and Years of Potential Life Lost Among the Black Population in the U. S., 1999–2020, 329 JAMA 1662, 1663, 1667 (May 16, 2023) (Caraballo).

[62] Bollinger & Stone 101.

[63] S. Whetstone et al., Health Disparities in Uterine Cancer: Report From the Uterine Cancer Evidence Review Conference, 139 Obstetrics & Gynecology 645, 647–648 (2022).

[64] AMC Brief 8–9.

[65] Bollinger & Stone 101; Caraballo 1663–1665, 1668.

[66] Bollinger & Stone 101 (footnotes omitted).

lead to at least 50,000 excess deaths a year for Black Americans vis-à-vis White Americans.[67] That is 80 million excess years of life lost from just 1999 through 2020.[68]

Amici tell us that "race-linked health inequities pervad[e] nearly every index of human health" resulting "in an overall reduced life expectancy for racial and ethnic minorities that cannot be explained by genetics."[69] Meanwhile—tying health and wealth together—while she lays dying, the typical Black American "pay[s] more for medical care and incur[s] more medical debt."[70]

C

We return to John and James now, with history in hand. It is hardly John's fault that he is the seventh generation to graduate from UNC. UNC should permit him to honor that legacy. Neither, however, was it James's (or his family's) fault that he would be the first. And UNC ought to be able to consider why.

Most likely, seven generations ago, when John's family was building its knowledge base and wealth potential on the university's campus, James's family was enslaved and laboring in North Carolina's fields. Six generations ago, the North Carolina "Redeemers" aimed to nullify the results of the Civil War through terror and violence, marauding in hopes of excluding all who looked like James from equal citizenship.[71] Five generations ago, the North Carolina Red Shirts finished the job.[72] Four (and three) generations ago, Jim Crow was so entrenched in the State of North Carolina

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[67] Caraballo 1667.

[68] *Ibid.*

[69] AMC Brief 9.

[70] Bollinger & Stone 100.

[71] See Report on the Alleged Outrages in the Southern States, S. Rep. No. 1, 42d Cong., 1st Sess., I–XXXII (1871).

[72] See D. Tokaji, Realizing the Right To Vote: The Story of *Thornburg v. Gingles*, in Election Law Stories 133–139 (J. Douglas & E. Mazo eds. 2016); see Foner xxii.

that UNC "enforced its own Jim Crow regulations."[73] Two generations ago, North Carolina's Governor still railed against "'integration for integration's sake'"—and UNC Black enrollment was minuscule.[74] So, at bare minimum, one generation ago, James's family was six generations behind because of their race, making John's six generations ahead.

These stories are not every student's story. But they are many students' stories. To demand that colleges ignore race in today's admissions practices—and thus disregard the fact that racial disparities may have mattered for where some applicants find themselves today—is not only an affront to the dignity of those students for whom race matters.[75] It also condemns our society to never escape the past that explains *how and why* race matters to the very concept of who "merits" admission.

Permitting (not requiring) colleges like UNC to assess merit fully, without blinders on, plainly advances (not thwarts) the Fourteenth Amendment's core promise. UNC considers race as one of many factors in order to best assess the entire unique import of John's and James's individual lives and inheritances *on an equal basis*. Doing so involves acknowledging (not ignoring) the seven generations' worth of historical privileges and disadvantages that each of these applicants was born with when his own life's journey started a mere 18 years ago.

II

Recognizing all this, UNC has developed a holistic review process to evaluate applicants for admission. Students

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[73] 3 App. 1683.

[74] *Id.*, at 1687–1688.

[75] See O. James, Valuing Identity, 102 Minn. L. Rev. 127, 162 (2017); P. Karlan & D. Levinson, Why Voting Is Different, 84 Cal. L. Rev. 1201, 1217 (1996).

must submit standardized test scores and other conventional information.[76] But applicants are *not* required to submit demographic information like gender and race.[77] UNC considers whatever information each applicant submits using a nonexhaustive list of 40 criteria grouped into eight categories: "academic performance, academic program, standardized testing, extracurricular activity, special talent, essay criteria, background, and personal criteria."[78]

Drawing on those 40 criteria, a UNC staff member evaluating John and James would consider, with respect to each, his "engagement outside the classroom; persistence of commitment; demonstrated capacity for leadership; contributions to family, school, and community; work history; [and his] unique or unusual interests."[79] Relevant, too, would be his "relative advantage or disadvantage, as indicated by family income level, education history of family members, impact of parents/guardians in the home, or formal education environment; experience of growing up in rural or center-city locations; [and his] status as child or stepchild of Carolina alumni."[80] The list goes on. The process is holistic, through and through.

So where does race come in? According to UNC's admissions-policy document, reviewers may also consider "the race or ethnicity of any student" (if that information is provided) in light of UNC's interest in diversity.[81] And, yes, "the race or ethnicity of *any* student may—or may not—receive a 'plus' in the evaluation process depending on the in-

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[76] 567 F. Supp. 3d 580, 595 (MDNC 2021).

[77] *Id.*, at 596; 1 App. 348; Decl. of J. Rosenberg in No. 1:14–cv–954 (MDNC, Jan. 18, 2019), ECF Doc. 154–7, ¶10 (Rosenberg).

[78] 1 App. 350; see also 3 *id.*, at 1414–1415.

[79] *Id.*, at 1414.

[80] *Id.*, at 1415.

[81] *Id.*, at 1416; see also 2 *id.*, at 706; Rosenberg ¶22.

dividual circumstances revealed in the student's application."[82] Stephen Farmer, the head of UNC's Office of Undergraduate Admissions, confirmed at trial (under oath) that UNC's admissions process operates in this fashion.[83]

Thus, to be crystal clear: *Every* student who chooses to disclose his or her race is eligible for such a race-linked plus, just as any student who chooses to disclose his or her unusual interests can be credited for what those interests might add to UNC. The record supports no intimation to the contrary. Eligibility is just that; a plus is never automatically awarded, never considered in numerical terms, and never automatically results in an offer of admission.[84] There are no race-based quotas in UNC's holistic review process.[85] In fact, during the admissions cycle, the school prevents anyone who knows the overall racial makeup of the admitted-student pool from reading any applications.[86]

More than that, every applicant is also eligible for a diversity-linked plus (beyond race) more generally.[87] And, notably, UNC understands diversity broadly, including "socioeconomic status, first-generation college status . . . political beliefs, religious beliefs . . . diversity of thoughts, experiences, ideas, and talents."[88]

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[82] 3 App. 1416 (emphasis added); see also 2 *id.*, at 631–639.

[83] 567 F. Supp. 3d, at 591, 595; 2 App. 638 (Farmer, when asked how race could "b[e] a potential plus" for "students other than underrepresented minority students," pointing to a North Carolinian applicant, originally from Vietnam, who identified as "Asian and Montagnard"); *id.*, at 639 (Farmer stating that "the whole of [that student's] background was appealing to us when we evaluated her applicatio[n]," and noting how her "story reveals sometimes how hard it is to separate race out from other things that we know about a student. That was integral to that student's story. It was part of our understanding of her, and it played a role in our deciding to admit her").

[84] 3 *id.*, at 1416; Rosenberg ¶25.

[85] 2 App. 631.

[86] *Id.*, at 636–637, 713.

[87] 3 *id.*, at 1416; 2 *id.*, at 699–700.

[88] *Id.*, at 699; see also Rosenberg ¶24.

A plus, by its nature, can certainly matter to an admissions case. But make no mistake: When an applicant chooses to disclose his or her race, UNC treats that aspect of identity on par with other aspects of applicants' identity that affect who they are (just like, say, where one grew up, or medical challenges one has faced).[89] And race is considered alongside any other factor that sheds light on what attributes applicants will bring to the campus and whether they are likely to excel once there.[90] A reader of today's majority opinion could be forgiven for misunderstanding how UNC's program really works, or for missing that, under UNC's holistic review process, a White student could receive a diversity plus while a Black student might not.[91]

UNC does not do all this to provide handouts to either John or James. It does this to ascertain who among its tens

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[89] 2 App. 706, 708; 3 *id.*, at 1415–1416.

[90] 2 *id.*, at 706, 708; 3 *id.*, at 1415–1416.

[91] A reader might miss this because the majority does not bother to drill down on how UNC's holistic admissions process operates. Perhaps that explains its failure to apprehend (by reviewing the evidence presented at trial) that everyone, no matter their race, is eligible for a diversity-linked plus. Compare *ante*, at 5, and n. 1, with 3 App. 1416, and *supra*, at 17. The majority also repeatedly mischaracterizes UNC's holistic admissions-review process as a "race-based admissions system," and insists that UNC's program involves "separating students on the basis of race" and "pick[ing only certain] races to benefit." *Ante*, at 5, and n. 1, 26, 38. These claims would be concerning if they had any basis in the record. The majority appears to have misunderstood (or categorically rejected) the established fact that UNC treats race as merely one of the many aspects of an applicant that, in the real world, matter to understanding the whole person. Moreover, its holistic review process involves reviewing a wide variety of personal criteria, not just race. Every applicant competes against thousands of other applicants, each of whom has personal qualities that are taken into account and that other applicants do not—and could not—have. Thus, the elimination of the race-linked plus would *still* leave SFFA's members competing against thousands of other applicants to UNC, each of whom has potentially plus-conferring qualities that a given SFFA member does not.

of thousands of applicants has the capacity to take full advantage of the opportunity to attend, and contribute to, this prestigious institution, and thus merits admission.[92] And UNC has concluded that ferreting this out requires understanding the *full* person, which means taking seriously not just SAT scores or whether the applicant plays the trumpet, but also any way in which the applicant's race-linked experience bears on his capacity and merit. In this way, UNC is able to value what it means for James, whose ancestors received no race-based advantages, to make himself competitive for admission to a flagship school nevertheless. Moreover, recognizing this aspect of James's story does not preclude UNC from valuing John's legacy or any obstacles that his story reflects.

So, to repeat: UNC's program permits, but does not require, admissions officers to value both John's and James's love for their State, their high schools' rigor, and whether either has overcome obstacles that are indicative of their "persistence of commitment."[93] It permits, but does not require, them to value John's identity as a child of UNC alumni (or, perhaps, if things had turned out differently, as a first-generation White student from Appalachia whose family struggled to make ends meet during the Great Recession). And it permits, but does not require, them to value James's race—not in the abstract, but as an element of who he is, no less than his love for his State, his high school courses, and the obstacles he has overcome.

Understood properly, then, what SFFA caricatures as an unfair race-based preference cashes out, in a holistic system, to a personalized assessment of the advantages and disadvantages that every applicant might have received by accident of birth plus all that has happened to them since. It ensures a full accounting of everything that bears on the

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[92] See 3 App. 1409, 1414, 1416.

[93] *Id.*, at 1414–1415.

individual's resilience and likelihood of enhancing the UNC campus. It also forecasts his potential for entering the wider world upon graduation and making a meaningful contribution to the larger, collective, societal goal that the Equal Protection Clause embodies (its guarantee that the United States of America offers genuinely equal treatment to every person, regardless of race).

Furthermore, and importantly, the fact that UNC's holistic process ensures a full accounting makes it far from clear that any particular applicant of color will finish ahead of any particular nonminority applicant. For example, as the District Court found, a higher percentage of the most academically excellent in-state Black candidates (as SFFA's expert defined academic excellence) were denied admission than similarly qualified White and Asian American applicants.[94] That, if nothing else, is indicative of a genuinely

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[94] See 567 F. Supp. 3d, at 617, 619; 3 App. 1078–1080. The majority cannot deny this factual finding. Instead, it conducts its own back-of-the-envelope calculations (its numbers appear nowhere in the District Court's opinion) regarding "the *overall* acceptance rates of academically excellent applicants to UNC," in an effort to trivialize the District Court's conclusion. *Ante*, at 5, n. 1. I am inclined to stick with the District Court's findings over the majority's unauthenticated calculations. Even when the majority's ad hoc statistical analysis is taken at face value, it hardly supports what the majority wishes to intimate: that Black students are being admitted based on UNC's myopic focus on "race—and race alone." *Ante*, at 28, n. 6. As the District Court observed, if these Black students "were largely defined in the admissions process by their race, one would expect to find that *every*" such student "demonstrating academic excellence . . . would be admitted." 567 F. Supp. 3d, at 619 (emphasis added). Contrary to the majority's narrative, "race does not even act as a tipping point for some students with otherwise exceptional qualifications." *Ibid.* Moreover, as the District Court also found, UNC does not even use the bespoke "academic excellence" metric that SFFA's expert "'invented'" for this litigation. *Id.*, at 617, 619; see also *id.*, at 624–625. The majority's calculations of overall acceptance rates by race on *that* metric bear scant relationship to, and thus are no indictment of, how UNC's admissions process actually works (a recurring theme in its opinion).

holistic process; it is evidence that, both in theory and in practice, UNC recognizes that race—like any other aspect of a person—may bear on where both John and James start the admissions relay, but will not fully determine whether either eventually crosses the finish line.

III

A

The majority seems to think that race blindness solves the problem of race-based disadvantage. But the irony is that requiring colleges to ignore the initial race-linked opportunity gap between applicants like John and James will inevitably widen that gap, not narrow it. It will delay the day that every American has an equal opportunity to thrive, regardless of race.

SFFA similarly asks us to consider how much longer UNC will be able to justify considering race in its admissions process. Whatever the answer to that question was yesterday, today's decision will undoubtedly extend the duration of our country's need for such race consciousness, because the justification for admissions programs that account for race is inseparable from the race-linked gaps in health, wealth, and well-being that still exist in our society (the closure of which today's decision will forestall).

To be sure, while the gaps are stubborn and pernicious, Black people, and other minorities, have generally been doing better.[95] But those improvements have only been made possible because institutions like UNC have been willing to grapple forthrightly with the burdens of history. SFFA's complaint about the "indefinite" use of race-conscious admissions programs, then, is a non sequitur. These programs respond to deep-rooted, objectively measurable problems; their definite end will be when we succeed, together, in solving those problems.

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[95] See Bollinger & Stone 86, 103.

Accordingly, while there are many perversities of today's judgment, the majority's failure to recognize that programs like UNC's carry with them the seeds of their own destruction is surely one of them. The ultimate goal of recognizing James's full story and (potentially) admitting him to UNC is to give him the necessary tools to contribute to closing the equity gaps discussed in Part I, *supra*, so that he and his progeny—and therefore all Americans—can compete without race mattering in the future. That intergenerational project is undeniably a worthy one.

In addition, and notably, that end is not fully achieved just because James is admitted. Schools properly care about preventing racial isolation on campus because research shows that it matters for students' ability to learn and succeed while in college if they live and work with at least some other people who look like them and are likely to have similar experiences related to that shared characteristic.[96] Equally critical, UNC's program ensures that students who don't share the same stories (like John and James) will interact in classes and on campus, and will thereby come to understand each other's stories, which *amici* tell us improves cognitive abilities and critical-thinking skills, reduces prejudice, and better prepares students for postgraduate life.[97]

Beyond campus, the diversity that UNC pursues for the betterment of its students and society is not a trendy slogan. It saves lives. For marginalized communities in North Carolina, it is critically important that UNC and other area institutions produce highly educated professionals of color. Research shows that Black physicians are more likely to accurately assess Black patients' pain tolerance and treat

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[96] See, *e.g.*, Brief for University of Michigan as *Amicus Curiae* 6, 24; Brief for President and Chancellors of University of California as *Amici Curiae* 20–29; Brief for American Psychological Association et al. as *Amici Curiae* 14–16, 21–23 (APA Brief).

[97] *Id.*, at 14–20, 23–27.

them accordingly (including, for example, prescribing them appropriate amounts of pain medication).[98] For high-risk Black newborns, having a Black physician more than doubles the likelihood that the baby will live, and not die.[99] Studies also confirm what common sense counsels: Closing wealth disparities through programs like UNC's—which, beyond diversifying the medical profession, open doors to every sort of opportunity—helps address the aforementioned health disparities (in the long run) as well.[100]

Do not miss the point that ensuring a diverse student body in higher education helps *everyone*, not just those who, due to their race, have directly inherited distinct disadvantages with respect to their health, wealth, and well-being. *Amici* explain that students of every race will come to have a greater appreciation and understanding of civic virtue, democratic values, and our country's commitment to equality.[101] The larger economy benefits, too: When it comes down to the brass tacks of dollars and cents, ensuring diversity will, if permitted to work, help save hundreds of billions of dollars annually (by conservative estimates).[102]

Thus, we should be celebrating the fact that UNC, once a stronghold of Jim Crow, has now come to understand this.

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[98] AMC Brief 4, 14; see also Brief for American Federation of Teachers as *Amicus Curiae* 10 (AFT Brief) (collecting further studies on the "tangible benefits" of patients' access to doctors who look like them).

[99] AMC Brief 4.

[100] National Research Council, New Horizons in Health: An Integrative Approach 100–111 (2001); Pollack et al., Should Health Studies Measure Wealth? A Systematic Review, 33 Am. J. Preventative Med. 250, 252, 261–263 (2007); see also Part I–B, *supra*.

[101] See APA Brief 14–20, 23–27 (collecting studies); AFT Brief 11–12 (same); Brief for National School Boards Association et al. as *Amici Curiae* 6–11 (same); see also 567 F. Supp. 3d, at 592–593, 655–656 (factual findings in this case with respect to these benefits).

[102] LaVeist et al., The Economic Burden of Racial, Ethnic, and Educational Health Inequities in the U. S., 329 JAMA 1682, 1683–1684, 1689, 1691 (May 16, 2023).

The flagship educational institution of a former Confederate State has embraced its constitutional obligation to afford genuine equal protection to applicants, and, by extension, to the broader polity that its students will serve after graduation. Surely that is progress for a university that once engaged in the kind of patently offensive race-dominated admissions process that the majority decries.

With its holistic review process, UNC now treats race as merely one aspect of an applicant's life, when race played a totalizing, all-encompassing, and singularly determinative role for applicants like James for most of this country's history: No matter what else was true about him, being Black meant he had no shot at getting in (the ultimate race-linked uneven playing field). Holistic programs like UNC's reflect the reality that Black students have only relatively recently been permitted to get into the admissions game at all. Such programs also reflect universities' clear-eyed optimism that, one day, race *will* no longer matter.

So much upside. Universal benefits ensue from holistic admissions programs that allow consideration of *all* factors material to merit (including race), and that thereby facilitate diverse student populations. Once trained, those UNC students who have thrived in the university's diverse learning environment are well equipped to make lasting contributions in a variety of realms and with a variety of colleagues, which, in turn, will steadily decrease the salience of race for future generations. Fortunately, UNC and other institutions of higher learning are already on this beneficial path. In fact, all that they have needed to continue moving this country forward (toward full achievement of our Nation's founding promises) is for this Court to get out of the way and let them do their jobs. To our great detriment, the majority cannot bring itself to do so.

B

The overarching reason the majority gives for becoming

an impediment to racial progress—that its own conception of the Fourteenth Amendment's Equal Protection Clause leaves it no other option—has a wholly self-referential, two-dimensional flatness. The majority and concurring opinions rehearse this Court's idealistic vision of racial equality, from *Brown* forward, with appropriate lament for past indiscretions. See, *e.g.*, *ante*, at 11. But the race-linked gaps that the law (aided by this Court) previously founded and fostered—which indisputably define our present reality—are strangely absent and do not seem to matter.

With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces "colorblindness for all" by legal fiat. But deeming race irrelevant in law does not make it so in life. And having so detached itself from this country's actual past and present experiences, the Court has now been lured into interfering with the crucial work that UNC and other institutions of higher learning are doing to solve America's real-world problems.

No one benefits from ignorance. Although formal race-linked legal barriers are gone, race still matters to the lived experiences of all Americans in innumerable ways, and today's ruling makes things worse, not better. The best that can be said of the majority's perspective is that it proceeds (ostrich-like) from the hope that preventing consideration of race will end racism. But if that is its motivation, the majority proceeds in vain. If the colleges of this country are required to ignore a thing that matters, it will not just go away. It will take *longer* for racism to leave us. And, ultimately, ignoring race just makes it matter more.[103]

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[103] JUSTICE THOMAS's prolonged attack, *ante*, at 49–55 (concurring opinion), responds to a dissent I did not write in order to assail an admissions program that is not the one UNC has crafted. He does not dispute any historical or present fact about the origins and continued existence of race-based disparity (nor could he), yet is somehow persuaded that these realities have no bearing on a fair assessment of "individual achieve-

The only way out of this morass—for all of us—is to stare at racial disparity unblinkingly, and then do what evidence and experts tell us is required to level the playing field and march forward together, collectively striving to achieve true equality for all Americans. It is no small irony that the judgment the majority hands down today will forestall the end of race-based disparities in this country, making the colorblind world the majority wistfully touts much more difficult to accomplish.

* * *

As the Civil War neared its conclusion, General William T. Sherman and Secretary of War Edwin Stanton convened a meeting of Black leaders in Savannah, Georgia. During the meeting, someone asked Garrison Frazier, the group's spokesperson, what "freedom" meant to him. He answered, "'placing us where we could reap the fruit of our own labor, and take care of ourselves . . . to have land, and turn it and

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ment," *ante*, at 51. JUSTICE THOMAS's opinion also demonstrates an obsession with race consciousness that far outstrips my or UNC's holistic understanding that race can be a factor that affects applicants' unique life experiences. How else can one explain his detection of "an organizing principle based on race," a claim that our society is "fundamentally racist," and a desire for Black "victimhood" or racial "silo[s]," *ante*, at 49–52, in this dissent's approval of an admissions program that advances all Americans' shared pursuit of true equality by treating race "on par with" other aspects of identity, *supra*, at 18? JUSTICE THOMAS ignites too many more straw men to list, or fully extinguish, here. The takeaway is that those who demand that no one think about race (a classic pink-elephant paradox) refuse to see, much less solve for, the elephant in the room—the race-linked disparities that continue to impede achievement of our great Nation's full potential. Worse still, by insisting that obvious truths be ignored, they prevent our problem-solving institutions from directly addressing the real import and impact of "social racism" and "government-imposed racism," *ante*, at 55 (THOMAS, J., concurring), thereby deterring our collective progression toward becoming a society where race no longer matters.

till it by our own labor.'"[104]

Today's gaps exist because that freedom was denied far longer than it was ever afforded. Therefore, as JUSTICE SOTOMAYOR correctly and amply explains, UNC's holistic review program pursues a righteous end—legitimate "'because it is defined by the Constitution itself. The end is the maintenance of freedom.'" *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 443–444 (1968) (quoting Cong. Globe, 39th Cong., 1st Sess., 1118 (1866) (Rep. Wilson)).

Viewed from this perspective, beleaguered admissions programs such as UNC's are not pursuing a patently unfair, ends-justified ideal of a multiracial democracy at all. Instead, they are engaged in an earnest effort to secure a more functional one. The admissions rubrics they have constructed now recognize that an individual's "merit"—his ability to succeed in an institute of higher learning and ultimately contribute something to our society—cannot be fully determined without understanding that individual in full. There are no special favorites here.

UNC has thus built a review process that *more accurately* assesses merit than most of the admissions programs that have existed since this country's founding. Moreover, in so doing, universities like UNC create pathways to upward mobility for long excluded and historically disempowered racial groups. Our Nation's history more than justifies this course of action. And our present reality indisputably establishes that such programs are still needed—for the general public good—because after centuries of state-sanctioned (and enacted) race discrimination, the aforementioned intergenerational race-based gaps in health, wealth, and well-being stubbornly persist.

Rather than leaving well enough alone, today, the majority is having none of it. Turning back the clock (to a time before the legal arguments and evidence establishing the

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[104] Foner 179.

soundness of UNC's holistic admissions approach existed), the Court indulges those who either do not know our Nation's history or long to repeat it. Simply put, the race-blind admissions stance the Court mandates from this day forward is unmoored from critical real-life circumstances. Thus, the Court's meddling not only arrests the noble generational project that America's universities are attempting, it also launches, in effect, a dismally misinformed sociological experiment.

Time will reveal the results. Yet the Court's own missteps are now both eternally memorialized and excruciatingly plain. For one thing—based, apparently, on nothing more than Justice Powell's initial say so—it drastically discounts the primary reason that the racial-diversity objectives it excoriates are needed, consigning race-related historical happenings to the Court's own analytical dustbin. Also, by latching onto arbitrary timelines and professing insecurity about missing metrics, the Court sidesteps unrefuted proof of the compelling benefits of holistic admissions programs that factor in race (hard to do, for there is plenty), simply proceeding as if no such evidence exists. Then, ultimately, the Court surges to vindicate equality, but Don Quixote style—pitifully perceiving itself as the sole vanguard of legal high ground when, in reality, its perspective is not constitutionally compelled and will hamper the best judgments of our world-class educational institutions about who they need to bring onto their campuses right now to benefit every American, no matter their race.[105]

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[105] JUSTICE SOTOMAYOR has fully explained why the majority's analysis is legally erroneous and how UNC's holistic review program is entirely consistent with the Fourteenth Amendment. My goal here has been to highlight the interests at stake and to show that holistic admissions programs that factor in race are warranted, just, and universally beneficial. All told, the Court's myopic misunderstanding of what the Constitution permits will impede what experts and evidence tell us is required (as a matter of social science) to solve for pernicious race-based inequities that are themselves rooted in the persistent denial of equal protection. "[T]he

The Court has come to rest on the bottom-line conclusion that racial diversity in higher education is only worth potentially preserving insofar as it might be needed to prepare Black Americans and other underrepresented minorities for success in the bunker, not the boardroom (a particularly awkward place to land, in light of the history the majority opts to ignore).[106] It would be deeply unfortunate if the Equal Protection Clause actually demanded this perverse, ahistorical, and counterproductive outcome. To impose this result in that Clause's name when it requires no such thing, and to thereby obstruct our collective progress toward the full realization of the Clause's promise, is truly a tragedy for us all.

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potential consequences of the [majority's] approach, as measured against the Constitution's objectives . . . provides further reason to believe that the [majority's] approach is legally unsound." *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 858 (2007) (Breyer, J., dissenting). I fear that the Court's folly brings our Nation to the brink of coming "full circle" once again. *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 402 (1978) (opinion of Marshall, J.).

[106] Compare *ante*, at 22, n. 4, with *ante*, at 22–30, and *supra*, at 3–4, and nn. 2–3.

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United States District Court, S.D. New York.

STUDENTS FOR FAIR ADMISSIONS, Plaintiff,
v.
The UNITED STATES MILITARY ACADEMY AT WEST POINT, et al., Defendants.

23-CV-08262 (PMH)
|
Signed January 3, 2024

Synopsis

Background: Nonprofit organization brought action against military academy, Department of Defense, Secretary of Defense, Secretary of the Army, superintendent of academy, and director of admissions at academy, alleging that academy's admissions policy violated the Fifth Amendment Due Process clause because it used race as a factor in making admission decisions. Organization moved for preliminary injunction.

Holdings: The District Court, Philip M. Halpern, J., held that:

sought preliminary injunction was mandatory, rather than prohibitive;

organization had organizational standing;

court was required to analyze admissions program under strict scrutiny rubric while giving great deference to the professional judgment of military authorities;

organization did not meet its burden to show clear, or otherwise preponderant, likelihood of success on the merits;

organization failed to demonstrate irreparable harm;

organization's theory of irreparable harm was too speculative and conjectural to supply predicate for prospective injunctive relief; and

public interest and balancing the equities weighed against issuing preliminary injunction.

Motion denied.

Procedural Posture(s): Motion for Preliminary Injunction.

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OPINION AND ORDER

PHILIP M. HALPERN, United States District Judge:

***1** Students for Fair Admissions ("Plaintiff" or "SFFA") commenced this action on September 19, 2023 against the United States Military Academy at West Point ("West Point" or the "Academy"); the United States Department of Defense; Lloyd Austin, in his official capacity as Secretary of Defense; Christine Wormuth, in her official capacity as Secretary of the Army; Lieutenant General Steven Gilland, in his official capacity as Superintendent of the United States Military Academy; and Lieutenant Colonel Rance Lee, in his official capacity as Director of Admissions for the United States Military Academy at West Point (collectively, "Defendants"). [1] (Doc. 1, "Compl."). Plaintiff presses a single claim for relief alleging that West Point's admissions policy violates the Fifth Amendment. Specifically, Plaintiff alleges that West Point's reliance on racial classifications in the admissions process fails to satisfy the strict scrutiny test as considered and applied in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 143 S.Ct. 2141, 216 L.Ed.2d 857 (2023) ("*Harvard*").

Pending before the Court is Plaintiff's motion for a preliminary injunction under Fed. R. Civ. P. 65(a), which seeks an order "enjoining the defendants during the pendency of this action from considering race as a factor when making admissions decisions." (Doc. 32). Plaintiff first filed its motion for a preliminary injunction on September 19, 2023, contemporaneous with the filing of the Complaint. (Doc. 6—Doc. 10). After service of process was completed and on October 30, 2023, pursuant to the Court's directives at a telephone conference on October 24, 2023, Plaintiff filed a proposed Order to Show Cause, which the Court subsequently entered as modified, together with a revised memorandum of law in support of its preliminary injunction motion. (Doc. 30; Doc. 31, "Pl. Br."; Doc. 32). Defendants filed a memorandum of law in opposition, together with declarations and exhibits (Doc. 47, "Def. Br."; Doc. 48—Doc. 53), and the motion was fully submitted with the filing of Plaintiff's reply brief and affidavit (Doc. 60, "Reply"; Doc. 61). On December 18, 2023, three days before appearing for oral argument on the motion, Plaintiff supplemented its motion with two additional declarations. (Doc. 68; Doc. 69).[2, 3] The Court heard oral argument on December 21, 2023 ("Dec. 21, 2023 Tr.").

***2** For the reasons set forth below, Plaintiff's motion for preliminary injunction is DENIED.

BACKGROUND

On June 29, 2023, the Supreme Court ruled that the race-based admissions policies of Harvard College ("Harvard") and the University of North Carolina ("UNC") violated the equal protection clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. The Supreme Court noted (in a footnote) in the majority opinion that "[t]he United States as *amicus curiae* contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present." *Harvard*, 600 U.S. at 213 n.4, 143 S.Ct. 2141. Given that carveout in *Harvard* with respect to military academies, less than three months later, Plaintiff commenced the instant action against West Point, contending that West Point's race-based admissions process violates the Fifth Amendment's equal protection principles.[4] Plaintiff calls upon this Court to enjoin, for the pendency of this action, West Point's consideration of race in its admissions process. The Court, in order to properly frame the issue before it, summarizes below the allegations in the Complaint, and information taken from the various declarations and exhibits proffered on this motion concerning West Point and its admissions process, including its consideration of race in admissions.

I. Becoming an Officer in the Army

West Point was established in 1802 and prepares students to become leaders and officers in the United States Army. (Doc. 53, "McDonald Decl." ¶ 7). To become an officer in the Army, an individual must (1) graduate from West Point; (2) attend a civilian college or university while participating in a Reserve Officers' Training Corps ("ROTC") program; (3) attend Officer Candidate School after graduating from college; (4) receive a direct commission after earning a professional degree; or (5) advance through the enlisted ranks and then complete one of these officer training programs. (Def. Br. at 11 (citing McDonald Decl. ¶ 103 n.9)). Defendants emphasize that "West Point is a vital pipeline to the officer corps, and especially senior leadership, in the Armed Forces." (*Id.* at 12 (citing Doc. 49, "Stitt Decl." ¶¶ 38-40)). West Point is a significant source of officer commissions for the Army, historically providing approximately 20% of those commissions. (McDonald Decl. ¶ 9; Stitt Decl. ¶ 37). "West Point graduates comprise 33% of general officers in the Army" and almost 50% of the Army's current four-star generals. (McDonald Decl. ¶ 9; Stitt Decl. ¶¶ 38-39).

***3** Admission to West Point is highly selective. In the most recent class, fewer than ten percent of applicants were given the honor of joining the Long Gray Line. (Compl. ¶ 18 (citing West Point Public Affairs, Class of 2027 to Enter West Point, (June 21, 2023), perma.cc/4QY3-5BK6)). Congress has set the size of the Corps of Cadets of the Academy at a limit of 4,400. 10 U.S.C. § 7442. As such, each incoming class currently consists of approximately 1,200 cadets before attrition. (Compl. ¶ 19 (citation omitted); Def. Br. at 11 (citing McDonald Decl. ¶ 10)). Cadets who graduate from West Point, under current law, are commissioned as active-duty officers with an obligation to serve a minimum of five years. (Def. Br. at 11 (citing McDonald Decl. ¶ 9)); 10 U.S.C. § 7448(a)(2).

II. West Point's Admissions Process

West Point's admissions process is governed by, *inter alia*, federal statute (10 U.S.C. §§ 7442–46), Army regulations (Regulation 150-1, Chapter 3-4), and internal guidance. (Def. Br. at 12 (citing McDonald Decl. ¶ 11)). Plaintiff alleges that West Point's admissions process involves two stages: first, an applicant must pass medical examinations and a physical-fitness test and secure a "nomination" from a member of Congress, the Vice President, or the President; and at the second stage, applicants must be accepted by West Point's admissions office. (Compl. ¶ 17). Plaintiff alleges that at this second stage, once applicants have received a qualifying nomination, West Point unconstitutionally considers race. (*Id.* ¶¶ 17, 27-60).

Defendants, in opposition, explain in detail the West Point admissions process. To be admitted to West Point, a candidate must successfully complete (i) a candidate questionnaire, (ii) a second step kit, (iii) a candidate physical fitness assessment, (iv) a medical evaluation, and (v) an interview, and must receive (vi) a nomination. (Def. Br. at 12 (citing McDonald Decl. ¶ 19)). [5] These steps must be completed by January 31st of the year the candidate would enter West Point. (*Id.* at 12-13 (citing McDonald Decl. ¶ 29)).

As noted *supra*, candidates seeking admission to West Point must also secure a nomination. *See* 10 U.S.C. § 7442; (Compl. ¶ 17; Def. Br. at 13). There are two types of nominations: those from a "statutory nominating authority" and "service-connected" nominations. 10 U.S.C. § 7442; (Def. Br. at 13 (citing McDonald Decl. ¶ 31)). Statutory nominating authorities include Members of the United States House of Representatives and Senate; the Vice President; Delegates to Congress from American Samoa, the District of Columbia, Guam, the Virgin Islands, and the Commonwealth of the Northern Marianas Islands; the Governor and the Resident Commissioner of Puerto Rico; and the Superintendent of West Point. (*Id.*).

***4** Generally, individuals who received nominations from Members of Congress, the Vice President, Delegates to Congress, and the Governor and Resident Commissioner of Puerto Rico account for 75% of West Point's Corps of Cadets. (*Id.* (citing McDonald Decl. ¶ 32)). If a candidate is appointed to West Point pursuant to nomination by a Member of Congress, that candidate is "charged" to that Member. (*Id.*). Each Member of Congress may have five "charges" at West Point at any one time. (*Id.*). When a Member has fewer than five charges at the end of the academic year, the Member is considered to have a "vacancy" for the following admissions cycle. (*Id.*). For each vacancy, Members can nominate up to ten candidates, and in a typical year, each Member of Congress will have one vacancy at West Point. (*Id.*). Like Members of Congress, the Vice President is provided with five West Point vacancies. (McDonald Decl. ¶ 39). The District of Columbia and the various U.S. territories are provided with three to six West Point vacancies. (*Id.* ¶ 40). Finally, the Superintendent may nominate up to 50 candidates per year from the country at large, so long as the cap on authorized strength of the total Corps of Cadets of the Academy is not exceeded. (*Id.* ¶ 41).

Service-connected nominations include a selection of 100 cadets per year by the President. The Secretary of the Army may nominate 85 candidates per year from enlisted members of the regular Army, 85 candidates per year from enlisted members of the reserve component of the Army, and 20 candidates per year from members of ROTC and Junior ROTC. 65 candidates may be nominated per year who are children of members of the armed forces who were, *inter alia*, killed in action; and finally the President is authorized to appoint children of persons who have been awarded the Medal of Honor. (McDonald Decl. ¶¶ 45-48).

Congressional nominating authorities, the District of Columbia, and the various U.S. territories, may nominate their slate of candidates using one of three methods: (1) "competitive"—where the Member submits nominees to West Point without any order of preference, allowing the Admissions Office to select the best qualified candidate within that slate; (2) "principal-competing alternate"—where the Member identifies a principal nominee and a list of unranked alternates; and (3) "principal-numbered alternate"—in which the Member identifies a principal nominee and a list of ranked alternates. (Def. Br. at 13-14 (citing Army Regulation 150-1, Chapter 3-4(a); McDonald Decl. ¶¶ 34–36); McDonald Decl. ¶ 40).

Once an applicant to West Point completes the candidate questionnaire, the Admissions Office assigns the candidate an initial numerical score, known as the "Whole Candidate Score" ("WCS"), which is calculated based on academic qualifications (60%), a "community leader score" (30%), and the candidate's fitness assessment (10%). (Def Br. at 14 (citing McDonald Decl. ¶¶ 49, 51-54)). Defendants assert that neither race nor ethnicity factors into the WCS. (*Id.* (citing McDonald Decl. ¶¶ 55, 58, Ex. A)).

Once the Admissions Office assigns a WCS, it then determines whether a candidate is "qualified" or "not qualified." (*Id.* (citing McDonald Decl. ¶ 59)). Three different reviewers in the Admissions Office evaluate the candidate's file and each separately determines whether the candidate meets the academic, leadership, and physical standards as reflected in the WCS, as well as the subjective components of the application. (*Id.* at 14-15 (citing McDonald Decl. ¶¶ 59-60)). If any of the three reviewers disagree as to whether the candidate is qualified, the candidate is reviewed by the Admissions Committee, whose decisions are determined by a simple majority vote. (*Id.*). Defendants assert that the Admissions Office does not consider a candidate's race or ethnicity in determining whether a candidate is qualified. (*Id.* at 15 (citing McDonald Decl. ¶ 64)).

Defendants contend that the vast majority of West Point's incoming cadet class is based on an "order of merit," as determined by the WCS, within the category of nomination obtained by the candidate. (*Id.* (citing McDonald Decl. ¶ 65)). For candidates nominated by a Member of Congress under the "competitive" method, West Point will offer an appointment to the fully qualified nominee from that Member's slate with the highest WCS. (*Id.* (citing McDonald Decl. ¶ 66)). For candidates nominated by a Member of Congress under the "principal competing" or "principal-numbered" alternate methods, West Point must consider the order specified by the Member of Congress. (*Id.* (citing McDonald Decl. ¶¶ 35-38, 68)). Where the principal nominee is either deemed unqualified or declines admission under the "principal-competing" method, West Point must offer admission to the fully qualified candidate on the Member's list with the next highest WCS; and under the "principal-numbered" method, West Point must offer admission to the fully qualified candidate who ranks next highest on the Member's list, even if that candidate has a lower WCS than others on the Member's list. (*Id.* (citing McDonald Decl. ¶¶ 35-36)). Defendants assert that in these instances, race and ethnicity also play no role in West Point's selection process. (*Id.* (citing McDonald Decl. ¶¶ 55, 68)).

***5** If a qualified candidate is not appointed to the vacancy for which they were nominated, the candidate may be offered an appointment under two other statutory provisions. (*Id.* at 16). First, West Point may appoint up to 150 "qualified alternates"—qualified candidates who received a statutory nomination but did not win the vacancy. 10 U.S.C. § 7442(b)(5). West Point appoints qualified alternates solely based on WCS, which does not consider race or ethnicity. (*Id.* (citing McDonald Decl. ¶¶ 55, 70(a))).

Second, if West Point has filled each nomination vacancy, admitted 150 qualified alternates, and has still not filled its class, it may offer appointment to other remaining qualified nominees, known as "Additional Appointees." (*Id.* (citing McDonald Decl. ¶ 70(b))). For at least the last 15 years, West Point has provided offers of appointment to Additional Appointees to meet its class size of around 1,200 cadets. (*Id.* (citing McDonald Decl. ¶¶ 6, 70(b))). For Additional Appointees, the Admissions Office may consider race and ethnicity as one factor in a holistic assessment in extending offers. (*Id.*).

The Admissions Office also uses a recruiting tool referred to as a Letter of Assurance ("LOA"), in light of statutory, regulatory, and policy constraints preventing West Point from providing early admission decisions. (McDonald Decl. ¶ 71). Between July and September of the year before a candidate would enter West Point (a candidate's senior year if applying directly from high school), the Admissions Office will issue LOAs to approved candidates. (*Id.* ¶ 77). An LOA constitutes a firm commitment from West Point to the candidate that the candidate will be admitted—provided that the candidate meets the conditions in the letter. (*Id.* ¶ 73). After West Point provides an LOA to a candidate, the candidate has 60 days from the date of issuance to complete their application, except for securing a nomination and the medical qualification which must be completed by April 15. (*Id.* ¶¶ 73, 79). If the candidate does not complete their application within 60 days, the LOA is revoked. (*Id.* ¶ 79).

III. West Point's Consideration of Race in Admissions

Plaintiff notes that West Point openly states that "[t]he United States Military Academy is fully committed to affirmative action." (Compl. ¶ 27 (citing *Cadet Consumer Information/ Right to Know*, United States Military Academy at West Point, perma.cc/H38P-JY3J)). Plaintiff contends that said " 'commitment' plays out across all areas of the Academy's admissions policy." (*Id.* ¶ 28). West Point counters that it "considers race and ethnicity flexibly as a plus factor in an individualized, holistic assessment of African American, Hispanic, and Native American candidates at three limited stages of the admissions process." (Def. Br. at 16). The stages when West Point considers race and ethnicity are: (1) when offering LOAs; (2) when extending Superintendent nominations; and (3) when extending offers to Additional Appointees. (*Id.* at 16-18). West Point asserts that it uses

race and ethnicity in these three limited circumstances "only to further the military's distinct operational interest in developing a diverse officer corps to ultimately ensure that the military can meet its critical national security mission." (*Id.* at 18 (citing McDonald Decl. ¶¶ 80, 95; Doc. 48, "Vazirani Decl." ¶¶ 8-30)). In other words, Defendants contend, "the military has concluded that a diverse officer corps is critical to the military's ability to defend our nation," in that "it (1) fosters cohesion and lethality; (2) aids in recruitment of top talent; (3) increases retention; and (4) bolsters the Army's legitimacy in the eyes of the nation and the world." (*Id.* at 29, 30).

***6** Thus, West Point considers race in three limited circumstances as noted *supra.* First, the Admissions Office may extend an LOA to a candidate who has submitted a candidate questionnaire, official transcripts and standardized test scores, and has been interviewed, following an individualized review of the candidate's record. (*Id.* at 16 (citing McDonald Decl. ¶¶ 72, 73, 75, 77, 91)). As previously stated, LOAs are conditional offers of admission —the candidate must still complete their application, pass physical fitness standards, become medically qualified, and receive a nomination. (*Id.* at 16-17 (citing McDonald Decl. ¶ 73)). If a candidate satisfies those conditions but is not selected to fill a congressional vacancy, non-congressional vacancy, or qualified alternate slot, they will receive an admissions offer as an Additional Appointee. (*Id.* at 17 n.1 (citing McDonald Decl. ¶ 93(a))). West Point's Diversity Outreach Office conducts this review for African American, Hispanic, and Native American candidates, while regional teams conduct this review for other candidates. (*Id.* (citing McDonald Decl. ¶ 78)).

Second, race or ethnicity could be one of many nondeterminative factors considered in extending Superintendent nominations. (*Id.* (citing McDonald Decl. ¶ 94)). Although the Superintendent may nominate up to 50 candidates per year, since 2008, the Superintendent has never exhausted his nominations in any given year. (*Id.* (citing McDonald Decl. ¶¶ 41-42)). Most Superintendent nominations are used for sought-after athletes, for candidates that are highly qualified and motivated to attend the Academy, and for candidates applying to other service academies. (*Id.* at 17-18 (citing McDonald Decl. ¶ 41)).

Third, at the end of the admissions cycle, if West Point has not reached its class size, in extending offers to Additional Appointees, the Admissions Office may consider race and ethnicity flexibly as a plus factor for African American, Hispanic, and Native American candidates in its holistic assessment of candidates to identify those who are expected to make valuable contributions to the cadet environment. (*Id.* at 18 (citing McDonald Decl. ¶ 93)).

STANDARD OF REVIEW

"A preliminary injunction 'is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.' " *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007). A party seeking a preliminary injunction, in the Second Circuit, generally must establish: (1) irreparable harm absent injunctive relief; (2) a likelihood of success on the merits; and (3) that a preliminary injunction is in the public interest. [6] *Keil v. City of New York*, No. 21-3043, 2022 WL 619694, at *1 (2d Cir. Mar. 3, 2022); *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 279 (2d Cir. 2021).

"The typical preliminary injunction is prohibitory and generally seeks only to maintain the status quo pending a trial on the merits." *Tom Doherty Assocs., Inc. v. Saban Ent., Inc.*, 60 F.3d 27, 34 (2d Cir. 1995). "A mandatory injunction, in contrast, is said to alter the status quo by commanding some positive act." *Id.* "This distinction is important because [the Second Circuit has] held that a mandatory injunction should issue 'only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief.' " *Id.* In other words, the movant is held to a heightened standard and must show a "clear" or "substantial" likelihood of success on the merits, and must make a "strong showing" of irreparable harm, in addition to showing that the preliminary injunction is in the public interest. *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015); *see also JTH Tax, LLC v. Agnant*, 62 F.4th 658, 667 (2d Cir. 2023) ("A heightened standard is imposed, in part, because injunctions of those sorts tend to be particularly burdensome to the defendants subject to them."). "The 'clear' or 'substantial' showing requirement —the variation in language does not reflect a variation in meaning—thus alters the traditional formula by requiring that the movant demonstrate a greater likelihood of success." *Tom Doherty Assocs.*, 60 F.3d at 34.

***7** The distinction between mandatory and prohibitory injunctions is, however, "not without ambiguities." *Id.*

"Indeed, the typical method of differentiating the two—by examining whether the moving party is being ordered to act or refrain from action—is often 'more semantical than substantive.' " *Velez v. Prudential Health Care Plan of New York, Inc.*, 943 F. Supp. 332, 338 (S.D.N.Y. 1996) (quoting *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985)). Plaintiff attempts to frame the relief sought as prohibitory —an order to stop West Point from considering race as a factor in the admissions process (Pl. Br. at 9). The gravamen of the request, however, is not for an order "prohibiting" an act, but rather for an order directing the performance of an act, *i.e.*, for West Point to affirmatively change and remodel its admissions process. Defendants explained at oral argument that in order to cease consideration of race in the admissions process, West Point would have to convene the Academic Board; examine its current policy and decide how to untangle a complicated knot; change the policy and apply a new policy to the current applicant pool; possibly withdraw already offered appointments and LOAs; and a legion of written material would have to be changed. (Dec. 21, 2023 Tr. at 46:10-25). Simply put, granting Plaintiff's requested injunction would require myriad acts be undertaken, not prohibited.

Plaintiff also argues that it merely seeks to restore the status quo ante, and therefore commands a prohibitory injunction standard. When an injunction seeks "to require a party who has *recently disturbed* the status quo to reverse its actions," it seeks to "restore[ ], rather than disturb[ ], the status quo ante, and is thus not an exception to the rule" that is typically applied in evaluating motions for a preliminary injunction. *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F. Supp. 3d 253, 275 (S.D.N.Y.) (emphasis added), *aff'd*, 788 F. App'x 85 (2d Cir. 2019). The status quo was not, however, "recently disturbed"—West Point has been utilizing a race-based admissions process for over four decades. (McDonald Decl. ¶ 81). Indeed, "[b]ecause the proposed injunction's effect on the status quo drives the standard," the Court must ascertain "the last actual, peaceable uncontested status which preceded the pending controversy." *A.H. by & through Hester v. French*, 985 F.3d 165, 177 (2d Cir. 2021). It was four decades ago, and prior to *Harvard*, when West Point's admissions regime did not include consideration of race. Plaintiff's argument that the status quo has been "recently disturbed" is therefore unavailing.

Plaintiff also argues that the mandatory injunction standard does not apply because a preliminary injunction would not give it the ultimate relief sought in the action. Although the description of the relief sought in the Complaint differs slightly from that requested on this motion, it is in effect identical. (*Compare* Compl. at 27, *with* Doc. 32). Ultimate relief is being sought by this motion. Plaintiff's reliance on choice language in *Christa McAuliffe Intermediate Sch. PTO, Inc.*, does not alter this Court's conclusion. 364 F. Supp. 3d at 274 (the "all-relief-sought" exception does not apply because the preliminary injunction affects "this year's admissions, while if Plaintiffs win at trial, Defendants would be enjoined from using the changed Discovery procedure in future admissions cycles"). The injunction sought in *Christa McAuliffe Intermediate Sch. PTO, Inc.* would have *prohibited* the use of a new admissions process not yet implemented. Here, because the injunction would command the installation and use of a new process—it is not at all clear how the requested injunction would, as Plaintiff suggests, affect but one year of admissions at West Point. Because the admissions cycle begins on February 1st of any given year and ends on April 15th of the following year, at least several years of admissions cycles would be impacted; and if appeals, discovery, and a trial took longer than a year, multiple admissions cycles could be impacted.

The issue of whether to apply a heightened standard is largely academic, however, because regardless of the standard applied, for the reasons discussed herein, Plaintiff has failed to establish a likelihood of success warranting the extraordinary and drastic remedy sought.

ANALYSIS

I. Standing

***8** Before considering the elements that Plaintiff must demonstrate for a preliminary injunction, the Court must first examine standing. A party invoking federal court jurisdiction must have standing to sue "for each claim and form of relief sought." *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011). "Standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 141 S. Ct. 2190, 2208, 210 L.Ed.2d 568 (2021). "A court may only provide proposed injunctive relief, for instance, if a plaintiff can demonstrate his entitlement to that specific relief." *Doe v. Columbia Univ.*, No. 20-CV-06770, 2022 WL 4537851, at *16 (S.D.N.Y. Sept. 28, 2022). At the preliminary injunction stage, "a plaintiff's burden to demonstrate standing will normally be no less than that required on a motion

for summary judgment." *Green Haven Prison Preparative Meeting of Religious Soc'y of Friends v. New York State Dep't of Corr. & Cmty. Supervision*, 16 F.4th 67, 78 (2d Cir. 2021). "To establish standing for a preliminary injunction, a plaintiff cannot rest on mere allegations but must set forth by affidavit or other evidence specific facts that establish the three familiar elements of standing: injury in fact, causation, and redressability." *Id.*

To invoke organizational standing, "an organization must demonstrate that (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Harvard*, 600 U.S. at 199, 143 S.Ct. 2141 (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)).

Defendants press only one argument attacking Plaintiff's standing: that Plaintiff's use of pseudonyms for its injured members is insufficient to establish the standing of those members. (Def. Br. at 23-24). Defendants contend that Plaintiff must identify Members A and C by name in order to demonstrate "how[ ] race and ethnicity would play a role in West Point's consideration of Plaintiff's members' applications." (*Id.* at 24). The requirement that Defendants would have this Court impose upon Plaintiff appears to be based on an overreading of the Supreme Court's decision in *Summers v. Earth Island Inst.*, which instructs that a plaintiff claiming an organizational standing must identify members who have suffered the requisite harm. 555 U.S. 488, 499, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009). The associations in *Summers* lacked standing because they failed to identify a specific member who had standing, pointing instead to their membership generally and speculating that one of those members likely had standing. *Id.* at 497-99, 129 S.Ct. 1142. Here, identification of specific members with standing, supported by a verified complaint, declaration from Plaintiff's president, and those members' declarations—albeit anonymous—suffices under *Summers* to "establish[ ] that at least one identified member ha[s] suffered or would suffer harm." 555 U.S. at 498, 129 S.Ct. 1142. Identification by name is not necessary where, as here, a name will not inform the pertinent inquiry of whether a person will be denied the opportunity to compete for admission at West Point on an equal basis.

Moreover, identification of these members by name as opposed to pseudonym does not comport with the Supreme Court's conclusion concerning standing in *Harvard*, which was that SFFA had standing at the commencement of those underlying litigations. 600 U.S. at 200, 143 S.Ct. 2141. There, like here, the members were referred to by pseudonym. *See Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 14-CV-14176, Doc. 1 (D. Mass. Nov. 17, 2014); *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, No. 14-CV-00954, Doc. 1 (M.D.N.C. Nov. 17, 2014). Accordingly, this Court rejects this line of Defendants' attack on Plaintiff's standing at this stage of the action. [7]

II. Likelihood of Success on the Merits

***9** "Consideration of the merits is virtually indispensable" in the context of an alleged Constitutional violation, "where the likelihood of success on the merits is the dominant, if not the dispositive, factor." *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). Plaintiff presses a single claim against Defendants for violation of the Fifth Amendment's equal protection principles. [8]

The Court's examination of an alleged equal protection violation concerning governmental classifications based on race involves "a daunting two-step examination known in our cases as 'strict scrutiny.' " *Harvard*, 600 U.S. at 206, 143 S.Ct. 2141 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). The "strict scrutiny" standard requires the Court to determine "first, whether the racial classification is used to 'further compelling governmental interests.' " *Id.* at 206-07, 143 S.Ct. 2141 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003)). If the answer to the first question is yes, the second inquiry is "whether the government's use of race is 'narrowly tailored'—meaning 'necessary'—to achieve that interest." *Id.* at 207, 143 S.Ct. 2141 (quoting *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 311-312, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013)).

A likelihood of success on the merits of its Fifth Amendment claim, therefore, requires that Plaintiff, in this procedural context, establish it is likely to prevail on its claim that Defendants *cannot* prove their consideration of race is used to further compelling governmental interests and is narrowly tailored to achieve those interests. Plaintiff, by electing to proceed with the instant motion at this early stage and without even the benefit of an answer to its Complaint, [9] has foisted

an almost impossible burden on itself. That is, for Plaintiff to prove a negative now and without the benefit of a developed factual record—much less knowing and pleading the actual compelling governmental interests asserted by Defendants and how they are narrowly tailored.

***10** The Supreme Court in *Harvard* considered whether the affirmative action admissions programs at Harvard and UNC violated the equal protection clause of the Fourteenth Amendment. "While the Court declined to overturn its 2003 decision in *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), which held that consideration of an applicant's race as one factor in admissions did not violate the Constitution, the Court determined the schools' programs fell short of satisfying the burden that their programs be sufficiently measurable to permit judicial review under the rubric of strict scrutiny." *Naval Academy*, —— F.Supp.3d at ——, 2023 WL 8806668, at *2 (quoting *Harvard*, 600 U.S. at 214, 143 S.Ct. 2141). The Court, in a footnote, expressly declined to address "the propriety of race-based admissions systems in [the military academy] context ... in light of the potentially distinct interests that military academies may present." *Harvard*, 600 U.S. at 213 n.4, 143 S.Ct. 2141.

Thus, guided by the Supreme Court's decision in *Harvard*, Plaintiff took a patchwork of information from the Government's submissions in *Harvard*, [10] newspaper articles, press releases, websites, agency reports, reports of the West Point Board of Visitors, and studies, coupled with the declarations of two of its members, to make an educated guess at what West Point would assert are its compelling governmental interests. (Compl. ¶ 97). Plaintiff alleged in its Complaint, and moved for a preliminary injunction on the basis, that "West Point asserts compelling interests in [1] facilitating organizational cohesion, [2] forming culturally aware leaders, [3] ensuring societal 'legitimacy' (circularly defined by the Academy), and [4] safeguarding the public trust." (Compl. ¶ 97). It contends that each of the foregoing has been, in sum and substance, rejected by the Supreme Court's decision in *Harvard*. While, of course, there is nothing wrong with compiling information needed to make good faith allegations in a complaint, each of the four purported interests, when compared to those asserted by Defendants, were imprecise and clearly not what West Point alleged.

At oral argument Plaintiff reiterated its position that it did not believe it was unusual for it bring this motion without full information and noted that Defendants, in opposition to this motion, indicated what they contend are their compelling interests. (Dec. 21, 2023 Tr. at 12:15-13:16). West Point's brief contends that "[t]he Army has concluded that diversity in the officer corps is vital to national security because it (1) fosters cohesion and lethality; (2) aids in recruitment of top talent; (3) increases retention; and (4) bolsters the Army's legitimacy in the eyes of the nation and the world." (Def. Br. at 30).

Defendants also submitted six declarations with their opposition to this motion. Acting Under Secretary of Defense for Personnel and Readiness for the Department of Defense, Ashish S. Vazirani, posits that a racially diverse officer corps (1) is critical to mission readiness and efficacy (Vazirani Decl. ¶ 12); (2) provides a broader range of thoughts and innovative solutions (*id.* ¶ 19); (3) helps military recruitment and retention which is vital to national security interests (*id.* ¶¶ 22, 25); (4) helps maintain the public trust and its belief that the military serves all of the nation and its population (*id.* ¶ 26); and (5) protects the U.S. militaries' legitimacy among international partners (*id.* ¶ 28). Colonel Deborah J. McDonald, the former Director of Admissions at West Point, states that diversity at West Point (1) helps cadets lead a multicultural force and fight alongside diverse partners and allies; (2) is essential for military cohesion; (3) is critical to maintaining diversity in the officer corps; and (4) is necessary to attract top talent. (McDonald Decl. ¶¶ 101-104).

***11** While perhaps two possible interests raised by Defendants align generally with Plaintiff's allegations in its Complaint, it is clear to this Court that the allegations offered on each side are simply different. More specificity is needed to be alleged in the Complaint and a partial analysis of the compelling governmental interests would not be sufficient for preliminary injunction purposes. An additional issue arises with respect to compelling governmental interests as well: Does the Court consider West Point's articulation, the Army's articulation, or both?

Indeed, once Defendants posited their list of allegedly compelling governmental interests supported by those six declarations and exhibits, Plaintiff countered with a reply affidavit from Lieutenant General (Ret.) Thomas W. Spoehr, for the first time reacting specifically to the interests claimed by Defendants, and "disagree[ing] with all [of Defendants'] key conclusions supporting racial preferences in selecting candidates for West Point." (Doc. 61, "Spoehr Decl." ¶ 2). Thus, on its face, the procedural posture demands the Court to resolve this significant issue based upon, in effect, reply papers.

The problems do not end there. Plaintiff demands that "real strict scrutiny" be applied, and "not some watered-down version that gives the government special deference." (Pl. Br. at 15). But, the reality is that this Court must analyze West Point's admissions program under the strict scrutiny rubric *together with* the Supreme Court's instruction to give "great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). [11] Simply put, West Point "is due more deference than were the private and public universities in *Harvard* given the explicit caveat in footnote 4 of *Harvard*." *Naval Academy*, —— F.Supp.3d at ——, 2023 WL 8806668, at *11.

At best, Plaintiff has highlighted an issue of fact as to the nature of the asserted reasons for considering race, whether those reasons satisfy a strict scrutiny analysis, and whose interests are actually at stake. [12] The reply does not solidify Plaintiff's conclusion—it creates questions of fact which falls far short of the clear showing required for the extraordinary and drastic remedy sought.

***12** Plaintiff's argument at its core is that any alleged compelling interest asserted by Defendants is unconstitutional under *Harvard*. [13] The procedural posture created by Plaintiff on this application, proving a negative, makes it impossible for the Court to determine whether Plaintiff has made a clear showing entitling it to an injunction. It is possible that *Harvard's* equal protection conclusions with respect to the civilian universities apply to West Point. Contrariwise, the reasons given by Defendants may all be compelling governmental interests which are narrowly tailored: what was not compelling to the Supreme Court as regards civilian universities may in fact be compelling when raised in the context of West Point and national security interests. Indeed, these possibilities are precisely what *Harvard* itself left open, by declining to address the issue altogether, "in light of the *potentially* distinct interests that military academies *may* present." *Harvard*, 600 U.S. at 213 n.4, 143 S.Ct. 2141 (emphasis added). But to grant a motion of this importance with so much left open would be imprudent.

A full factual record is vital to answering this critical question whether the use of race in the admissions process at West Point furthers compelling governmental interests and whether the government's use of race is narrowly tailored to achieve that interest. The Court cannot enjoin West Point's use of race in admissions without a full understanding, informed by a complete factual predicate, as to what exactly are the compelling interests asserted, to whom those compelling interests belong, and how in this specific case they are or are not narrowly tailored to achieve those interests. [14] Accordingly, Plaintiff has not met its burden, on the present record, to show a clear, or otherwise preponderant, likelihood of success on the merits.

Although the other preliminary injunction factors need not be addressed in view of the above, the Court briefly addresses the remaining preliminary injunction requirements to complete its review.

III. Irreparable Harm

"The burden of proof and persuasion rests squarely on the party moving for a preliminary injunction to show that irreparable harm is likely." *JBR, Inc. v. Keurig Green Mountain, Inc.*, 618 F. App'x 31, 34 (2d Cir. 2015). To satisfy its burden to show irreparable harm, a plaintiff "must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *JTH Tax*, 62 F.4th at 672.

Plaintiff argues, with respect to irreparable harm, that the alleged unconstitutional racial discrimination is itself strong irreparable harm, because it bars SFFA's members from fairly competing for a whole admissions cycle. (Pl. Br. at 9 (citing *Yang v. Kosinski*, 960 F.3d 119, 128 (2d Cir. 2020)), 19-20). While the Second Circuit has held that pleading an alleged constitutional violation itself constitutes irreparable harm, *Connecticut Dep't of Envtl. Prot. v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("it is the alleged violation of a constitutional right that triggers a finding of irreparable harm"), the presumption of irreparable harm afforded constitutional claims appears to be impacted by the outcome of the Court's analysis of the likelihood of success on the merits element. *See, e.g.*, *We The Patriots USA, Inc.*, 17 F.4th at 294 ("Although Plaintiffs are subject to meaningful burdens on their religious practice if they choose to obtain the COVID-19 vaccine, because they have failed to demonstrate a likelihood of success on their First Amendment or other constitutional claims, their asserted harm is not of a constitutional dimension. Thus, Plaintiffs fail to meet the irreparable harm element simply by alleging an impairment of their Free Exercise right."); *see also Brock v.*

City of New York, No. 21-CV-11094, 2022 WL 479256, at *4 (S.D.N.Y. Jan. 28, 2022) ("[T]he favorable presumption of irreparable harm arises only after a plaintiff has shown a likelihood of success on the merits of the constitutional claim.... Thus, when a plaintiff seeks injunctive relief based on an alleged constitutional deprivation, 'the two prongs of the preliminary injunction threshold merge into one ... in order to show irreparable injury, plaintiff must show a likelihood of success on the merits.' " (quoting *Turley v. Giuliani*, 86 F. Supp. 2d 291, 295 (S.D.N.Y. 2000))); *Andre-Rodney v. Hochul*, 569 F. Supp. 3d 128, 141-42 (N.D.N.Y. 2021) ("While an allegation of a constitutional violation is insufficient to automatically trigger a finding of irreparable harm, if the constitutional deprivation is convincingly shown and that violation carries noncompensable damages, a finding of irreparable harm is warranted.... To determine whether the constitutional deprivation is convincingly shown the Court must assess the likelihood of success on the merits."). In other words, once the Court considers and concludes that the likelihood of success element has not been met, as it does here, the mere allegation of a constitutional violation is insufficient to establish irreparable harm.

***13** Plaintiff also argues that "the loss of an opportunity to attend a particular school is irreparable injury in the sense that monetary damages cannot readily be fixed or, for that matter, compensate for the lost opportunity." (Reply at 22 (citing *Foulke by Foulke v. Foulke*, 896 F. Supp. 158, 161 (S.D.N.Y. 1995)). Defendants argue, persuasively, that there is no actual imminent harm as this Court is not precluded from issuing an effective remedy at the end of a final trial on the merits with the benefit of a full trial record before it.[15] Here, Member A is not yet 18 years old, and is a high-school senior who is applying to colleges now. (Doc. 8, "Member A Decl." ¶¶ 1, 2, 6). Member C is 18 years old and presently enrolled in college. (Doc. 25, "Member C Decl." ¶¶ 1, 4). To be eligible for admission to West Point, "a candidate must be at least 17 years of age and must not have passed his twenty-third birthday on July 1 of the year in which he enters the Academy." 10 U.S.C. § 7446. Because Member A and Member C are far away from their twenty-third birthdays, there is significant time to remedy the alleged constitutional injury. Because Plaintiff has not sufficiently established that Member A and member C will "lose a year" of their lives and never catch up to their peers "in terms of military seniority" (Pl. Br. at 20), and because it is unclear whether Plaintiff is likely to succeed on the merits, Plaintiff has not established it will be irreparably harmed absent the requested injunction.[16]

IV. Public Interest and Balancing the Equities

"Under the last injunction factor, [the Court] must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief, as well as the public consequences in employing the extraordinary remedy of injunction." *Yang*, 960 F.3d at 135-36; *We The Patriots USA, Inc.*, 17 F.4th at 295 ("When the government is a party to the suit, our inquiries into the public interest and the balance of the equities merge"). A balancing of the equities has been described as "the hardship imposed on one party outweigh[ing] the benefit to the other." *Ligon v. City of New York*, 925 F. Supp. 2d 478, 540 (S.D.N.Y. 2013).

West Point is mid-admissions cycle. As of February 1, 2024, a new admissions cycle begins at West Point. But the prior year's admissions cycle, which began on February 1, 2023, continues into April of 2024 (*see* McDonald Decl., Ex. B). The requested injunction, to take effect on February 1, 2024, would require the entire admissions policy to be changed, and a new policy be applied to the current applicant pool midstream, as well as to applicants to the new admissions cycle beginning on February 1, 2024. This result would not only affect the students who previously applied and are currently applying, but could require West Point to withdraw already offered appointments and LOAs. (McDonald Decl. ¶ 117; Dec. 21, 2023 Tr. 46:20-24). The requested preliminary injunction does more than disrupt a single admissions cycle; it impacts the carryover admissions process from the prior admissions year which began on February 1, 2023. Because Plaintiff has not clearly demonstrated a likelihood of success on the merits or that its members will suffer irreparable harm absent injunctive relief, the balance of the equities does not tip in Plaintiff's favor. As Plaintiff has not shown a likelihood of success on the merits of its constitutional violation claim, it has also failed to show that a preliminary injunction serves the public interest. *We The Patriots USA, Inc.*, 17 F.4th at 296.

***14** Accordingly, Plaintiff has not met its burden of proof with respect to likelihood of success on the merits of its claim, irreparable harm, or that the public interest weighs in favor of granting injunctive relief.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for a preliminary injunction is DENIED.

All Citations

--- F.Supp.3d ----, 2024 WL 36026

Footnotes

1 At oral argument on December 21, 2023, the Court directed the parties to meet and confer in an effort to eliminate any defendants that are unnecessary to the litigation so as to limit the field to necessary and proper parties only. At this early stage in the proceedings, the Court is unable to determine, based upon the Complaint and motion papers, which of the named Defendants is actually necessary to the proper adjudication of the issues herein.

2 Defendants, when asked at oral argument whether they would move to strike the supplemental declarations served long after the motion was fully briefed, "reserved," and noted that consideration of the supplemental records would not alter the Court's analysis on the motion. (Dec. 21, 2023 Tr. at 56:17-24).

3 On November 29, 2023, the Court received two letter-motions, one from the National Association of Black Military Women, ACLU, NYCLU, and NAACP LDF (Doc. 56), and one from 107 West Point Graduates (Doc. 57). The parties do not oppose the requests to file amicus briefs in this matter. The letter-motions are hereby GRANTED and the Court accepts the briefs annexed to the letter-motions as amici curiae in opposition to the motion for a preliminary injunction.

4 SFFA filed a similar complaint and motion for preliminary injunction against the United States Naval Academy on October 5, 2023. That court ruled from the bench on December 14, 2023, denying SFFA's motion for a preliminary injunction, and later issued a written Memorandum Opinion explaining its reasoning. *See Students for Fair Admissions v. United States Naval Academy, et al.*, No. RDB-23-2699, —— F.Supp.3d ——, 2023 WL 8806668 (D. Md. Dec. 20, 2023) ("*Naval Academy*").

5 A candidate must complete a "[c]andidate [q]uestionnaire," reporting their high school GPA, standardized test scores, extra-curricular activities, athletic participation, and "basic demographic information," which includes race and gender. (Def. Br. at 12 (citing McDonald Decl. ¶ 19)). Candidates may submit the candidate questionnaire as early as February 1st of the year before they would enter West Point (their junior year for candidates applying directly from high school). (*Id.* (citing McDonald Decl. ¶ 20)). The Admissions Office reviews this questionnaire to determine if a candidate meets West Point's basic statutory eligibility requirements and is likely to be competitive for admission, and if so, an admissions officer will permit the candidate to proceed to the next step in the process. (*Id.* (citing McDonald Decl. ¶¶ 23-24)). The next step of the admissions process, known as the "second step kit," requires submission of official high school transcripts, standardized test scores, essays, and teacher evaluations. (*Id.* (citing McDonald Decl. ¶ 25)). Candidates are also asked to provide background information, including whether they are the first member of their immediate family to attend college, their combined family income, and whether they speak any foreign languages. (*Id.*).

6 Unless otherwise indicated, case quotations omit all internal citations, quotation marks, footnotes, and alterations.

7 Defendants rely on a decision currently on appeal in the Second Circuit in which the district court, *inter alia*, denied a motion for a preliminary injunction that was supported by anonymous declarants and dismissed the action for lack of Article III standing. *Do No Harm v. Pfizer Inc.*, 646 F. Supp. 3d 490, 501 (S.D.N.Y. 2022). The court in that case noted the rule that a plaintiff's burden to establish standing on a preliminary injunction motion

is normally no less than that required on a motion for summary judgment. *Id.* at 500. Although this Court holds that the member-declarants identified by SFFA need not be named in order to sufficiently establish their standing, the principle that a more fulsome factual record—as would be required on a motion for summary judgment—is necessary for a motion of this ilk, rings true for the other reasons described herein forming the basis for this Court's decision.

8 "As this case involves federal, not state, legislation, the applicable equality guarantee is not the Fourteenth Amendment's explicit Equal Protection Clause, it is the guarantee implicit in the Fifth Amendment's Due Process Clause." *Sessions v. Morales-Santana*, 582 U.S. 47, 52, 137 S.Ct. 1678, 198 L.Ed.2d 150 (2017) (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n.2, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975) ("[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.")). The Supreme Court has held that the method of analyzing equal protection claims brought under the Fifth Amendment is no different than the analysis of such claims under the Fourteenth Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 93, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); *see also Fullilove v. Kreps*, 584 F.2d 600, 603 n.2 (2d Cir. 1978) (same), *aff'd sub nom. Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). The parties in this case agree. (*See* Pl. Br. at 10 (describing applicable standard as the test applied in *Harvard*); Def. Br. at 12 (same)).

9 Defendants requested, and Plaintiff did not oppose, a stay of the time for Defendants to file an answer to the Complaint "pending decision on [the] preliminary injunction motion, including any appeals." (Doc. 37). The Court granted that request on November 2, 2023. (Doc. 40).

10 The submissions included an amicus brief from 34 top former military leaders. *See* Brief of Adm. Charles S. Abbot et al. as Amici Curiae in Support of Respondents, *Students for Fair Admissions v. Pres. & Fellows of Harv. Coll.*, 600 U.S. 181, 143 S.Ct. 2141, 216 L.Ed.2d 857 (2023) (Nos. 20-1199, 21-707).

11 Deference in this context is not judicial abdication, but rather simple recognition that "in the area of military affairs .... the Constitution itself requires such deference." *Rostker v. Goldberg*, 453 U.S. 57, 67, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981). When pressed at oral argument to explain, as a practical matter, how this Court should properly analyze strict scrutiny while granting deference, Defendants argued in sum and substance that the Court should view the deference inquiry as the weight afforded the evidence presented. Defendants argued that the Court has on the one hand six declarations proffered by Defendants, made by senior military leaders based upon their collective experience, among other things (Doc. 48—Doc. 53); and on the other hand, from Plaintiff in reply, a single declaration from a retired general who bases his opinion on his own robust experience, among other things (Doc. 61). (Dec. 21, 2023 Tr. at 36:13-37:1, 39:1-40:4). Defendants thus urge the Court to give great deference to their evidence, especially where it is the result of exhaustive inquiry. *Able v. United States*, 155 F.3d 628, 634 (2d Cir. 1998). The Court agrees that the weight of the evidence here does not suggest Defendants lack potentially compelling governmental interests; it suggests just the opposite. Plaintiff urges that the Court grant no deference at all to Defendants when considering strict scrutiny. The ultimate determination of how deference operates here remains uncertain.

12 The parties appear to agree that the Army and West Point are indistinct for purposes of this analysis. In other words, while the challenged admissions process occurs at West Point, the interests being served include what happens once those cadets leave the Academy grounds. The Court continues to question whether and to what extent the interests of the military inform the strict scrutiny analysis with respect to the military academy's use of racial classifications in its admissions process.

13 The underlying litigations in *Harvard* were adjudicated after full trials, not at the pre-answer stage. The procedure employed here does not permit a proper consideration and development of the facts at issue; and is insufficient based on the evidence currently available.

14 Plaintiff points out that the present record lacks evidence of West Point's consideration of race-neutral alternatives, necessary to establish narrow tailoring. (Pl. Br. at 18 (citing *Grutter*, 539 U.S. at 339, 123 S.Ct. 2325)). It suggests that West Point could follow the example of the Coast Guard Academy and its own Merchant Marine Academy. (*Id.*). The Coast Guard Academy, until 2010, was prohibited from using racial preferences in its admissions process and, in the two years before it began considering race, launched an aggressive advertising and recruiting campaign targeting minorities which increased minority enrollment by 60%, from 15% to 24%. (*Id.*). The Merchant Marine Academy does not use race for most of admissions. (*Id.*). While Defendants' opposition discusses some of the race-neutral alternatives it has considered and implemented, it is clear that both Plaintiff and Defendants need to further develop a factual record on this issue as well.

15 Defendants also argue, effectively, that Plaintiff's "theory of irreparable harm is premised on nothing more than 'an accumulation of inferences' ... [which] 'is simply too speculative and conjectural to supply a predicate for prospective injunctive relief." (Def. Br. at 16 (quoting *Nachshen v. E. 14 Realty, LLC*, No. 18-CV-08304, 2019 WL 5460787, at *2 (S.D.N.Y. Oct. 9, 2019)). The steps required for Member A and Member C to suffer irreparable injury, all of which must come to pass, would be: (1) to "complete their West Point applications before January 31, 2024"; (2) "be qualified"; (3) "not be selected to fill a vacancy or qualified alternate slot"; (4) "be considered for selection as Additional Appointees or Superintendent nominations"; and (5) "ultimately not be selected for appointment because of West Point's limited consideration of race." (*Id.*; *see also* Dec. 21, 2023 Tr. at 57:21-59:15). This "highly attenuated chain of possibilities," *Superb Motors Inc. v. Deo*, No. 23-CV-06188, 2023 WL 5952145, at *4 (E.D.N.Y. Aug. 25, 2023), is insufficient to establish irreparable harm under the circumstances.

16 The Court is not persuaded by Defendants' argument that Plaintiff's alleged delay in filing this action and seeking emergency relief for the 2023-24 admissions cycle undercuts its claim of irreparable harm. Plaintiff sued and moved for a preliminary injunction only three months after the Supreme Court decided *Harvard*.

2023 WL 8806668
Only the Westlaw citation is currently available.
United States District Court, D. Maryland.

STUDENTS FOR FAIR ADMISSIONS, Plaintiff,
v.
The UNITED STATES NAVAL ACADEMY, et al., Defendants.

Civil Action No. RDB-23-2699
|
Signed December 20, 2023

Synopsis

Background: Nonprofit organization dedicated to ending the use of a student's race or ethnicity as a factor in university admissions brought action against the United States Naval Academy, its Acting Superintendent, and the Secretaries of Defense and the Navy, alleging that the Naval Academy's race-conscious admissions practices violated the Fifth Amendment's equal-protection principles and seeking declaratory and injunctive relief. Organization moved for a preliminary injunction barring the Naval Academy from considering race in making admissions decisions.

Holdings: The District Court, Richard D. Bennett, Senior District Judge, held that:

organization had associational standing despite its failure to identify by name members who organization alleged had applied to, and had been rejected by, the Naval Academy;

organization did not show that there was no compelling government interest supporting the challenged practices, and organization thus did not show, as would support the grant of a preliminary injunction, that it was likely to succeed in establishing that the absence of such an interest rendered the challenged practices unconstitutional;

organization did not show that it was impossible to measure the interests of cohesion, recruitment, retention, and legitimacy that the Navy put forward as a basis for the challenged practices, and organization thus did not show, as would support the grant of a preliminary injunction, that it was likely to succeed in establishing that the impossibility of measuring those interests rendered the challenged practices unconstitutional;

organization did not show that the Naval Academy's use of race was not narrowly tailored to further legitimate government interests, and organization thus did not show, as would support the grant of a preliminary injunction, that it was likely to succeed in showing that the lack of narrow tailoring rendered the challenged practices unconstitutional;

organization did not show that it was likely to suffer irreparable harm in the absence of a preliminary injunction, and such an injunction thus was not warranted;

organization did not show that the balance of equities favored a preliminary injunction, and such an injunction thus was not warranted; and

organization did not show that the public interest favored a preliminary injunction, and such an injunction thus was not warranted.

Motion denied.

Procedural Posture(s): Motion for Preliminary Injunction.

Attorneys and Law Firms

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MEMORANDUM OPINION

Richard D. Bennett, United States Senior District Judge

***1** Plaintiff Students for Fair Admissions ("Plaintiff" or "SFFA") brings this action against Defendants United States Naval Academy (the "Naval Academy," "USNA," or "the Academy"); Lloyd Austin, in his official capacity as Secretary of Defense; Carlos Del Toro, in his official capacity as Secretary of the Navy; Bruce Latta, in his official capacity as Dean of Admissions for the United States Naval Academy; and Rear Admiral Fred Kacher, in his official capacity as Acting Superintendent of the United States Naval Academy (collectively, "Defendants"). (ECF No. 1.) [1] Students for Fair Admissions alleges that the Naval Academy's race-conscious admissions practice violates the Fifth Amendment's equal protection principles. [2] (*Id.* ¶¶ 88–109.)

This matter comes before the Court on Plaintiff's Motion for Preliminary Injunction (the "Motion") (ECF No. 9). The Motion has been briefed (ECF Nos. 46, 54, 55), [3] and the Court heard oral argument on December 14, 2023. (ECF No. 56.) At the conclusion of oral argument, the Court ruled from the bench and DENIED the Motion (ECF No. 9), promising an opinion to follow. (ECF Nos. 57, 58.) This Memorandum Opinion expounds upon the Court's reasoning.

A preliminary injunction is an "extraordinary remed[y] involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (internal quotations omitted). "[M]andatory preliminary injunctions—those that alter rather than preserve the status quo—are disfavored," and should only be granted where "the applicants' right to relief [is] indisputably clear." *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197, 216 n.8 (4th Cir. 2019) (internal quotations omitted).

This Court's analysis is clearly guided by the Supreme Court's recent decision in *Students for Fair Admissions v. President & Fellows of Harvard College* ("*Harvard*"), 600 U.S. 181, 143 S.Ct. 2141, 216 L.Ed.2d 857 (2023). Specifically, as reflected in oral argument at the hearing on December 14, 2023, great focus must be placed upon a footnote in the *Harvard* opinion noting that there may be "potentially distinct interests" presented by military academies. *Id.* at 213 n.4, 143 S.Ct. 2141. SFFA's requested injunctive relief would undoubtedly alter the status quo, and at this stage, SFFA has not made a clear showing that it will succeed in its claim that the Naval Academy's race conscious admissions practice violates the Fifth Amendment's equal protection principles. As discussed below, it is imperative that a factual record be developed in this matter such that this Court can determine whether the "potentially distinct interests that military academies may present" allow the Naval Academy's admissions practices to survive strict scrutiny. *Id.*

BACKGROUND

I. Background on Students for Fair Admissions

***2** According to its Complaint, Students for Fair Admissions is a "nonprofit membership group of tens of thousands of individuals across the country who believe that racial preferences in college admissions, including the [military] academies, are unfair, unnecessary, and unconstitutional." (ECF No. 1 ¶ 7.) The organization's website describes their mission as "support[ing] and participat[ing] in litigation that will restore the original principles of our nation's civil rights movement: *A student's race and ethnicity should not be factors that either harm or help that student to gain admission to a competitive university.*' " *See Help Us Eliminate Race and Ethnicity from College Admissions*, STUDENTS FOR FAIR ADMISSIONS, available at https://studentsforfairadmissions.org/ (emphasis in original). As further detailed *infra*, it was SFFA's prior lawsuits against Harvard and the University of North Carolina ("UNC") that led the Supreme Court to declare race-based admissions policies unlawful at civilian universities and colleges earlier this year.

II. *Students for Fair Admissions v. Presidents and Fellows of Harvard College*

On June 29, 2023, the Supreme Court issued its decision in *Students for Fair Admissions v. President and Fellows of Harvard College* ("*Harvard*"), 600 U.S. 181, 143 S.Ct. 2141, 216 L.Ed.2d 857 (2023), holding that affirmative action programs at Harvard and UNC violated the Equal Protection Clause of the Fourteenth Amendment. While the Court declined to overturn its 2003 decision in *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), [4] which held that consideration of an applicant's race as one factor in admissions did not violate the Constitution, the Court determined the schools' programs fell "short of satisfying the burden" that their programs be " 'sufficiently measurable to permit judicial review' under the rubric of strict scrutiny." 600 U.S. at 214, 143 S.Ct. 2141 (citation omitted). The majority opinion authored by Chief Justice John Roberts

declared, " '[c]lassifying and assigning' students based on their race 'requires more than ... an amorphous end to justify it.' " *Id.* (citation omitted).

***3** Of import to SFFA's instant case against the Naval Academy, the Court included a footnote expressly declining to opine on the use of race in admissions within the nation's military academies, noting that the "opinion ... does not address the issue, in light of the potentially distinct interests that military academies may present." *Id.* at 213 n.4, 143 S.Ct. 2141. The footnote appeared to respond to an amicus brief from 34 top former military leaders. *See* Brief of Adm. Charles S. Abbot *et al.* as Amici Curiae in Support of Respondents, *Students for Fair Admissions v. Pres. & Fellows of Harv. Coll.*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707). Therein, the military's highest leadership noted that "[d]iversity in the halls of academia directly affects performance in the theaters of war." *Id.* at 1. The brief outlined the specific interests of the military in cultivating "a diverse, highly qualified officer corps." *Id.* at 1–2. It emphasized the military's unique interest in maintaining diverse leadership, the absence of which would "seriously undermine its institutional legitimacy and operational effectiveness." *Id.* at 3. The brief also explained that the military's international presence and engagement abroad with both foreign military and civilians "requires diversity in the officer corps." *Id.* at 9–14.

III. The Instant Lawsuit

Appearing to respond to the limitation in the *Harvard* opinion with respect to military academies, SFFA initiated the instant lawsuit on October 5, 2023, filing a one-count Complaint against Defendants, alleging the Naval Academy's race-conscious admissions practice violates the Fifth Amendment's equal protection principles. (ECF No. 1.) In general, the Complaint questions the measurability of the need for diversity proffered by the Naval Academy. (*Id.* ¶¶ 93–95.) The Complaint outlines the highly competitive and unique admissions process for the Naval Academy, which enrolls fewer than 1,200 midshipmen in each class. (*Id.* ¶¶ 17–30.) The Complaint provides an overview of the Academy's admissions process, which SFFA alleges involves two stages: (1) a medical examination and physical fitness test, along with a nomination from a Member of Congress, the Vice President, President, or Secretary of the Navy; and (2) acceptance by the Naval Academy's admissions office. (*Id.* ¶ 17.) Plaintiff alleges this second stage unconstitutionally considers race. (*Id.* ¶¶ 17, 31–62.) Plaintiff's Complaint notes that "SFFA has members who are ready and able to apply to the [Academy]." (*Id.* ¶ 7.)

On October 6, 2023—the day after SFFA filed its Complaint—SFFA filed a Motion for Preliminary Injunction, urging the Court to issue an injunction prohibiting Defendants from considering applicants' race when making admissions decisions by December 1, 2023. (ECF No. 9.) Attached thereto are declarations of "Member A" (ECF No. 9-3) and "Member B" (ECF No. 9-4), declaring both members previously applied to the Naval Academy after securing nominations from members of Congress and were subsequently rejected. (ECF No. 9-3 ¶ 3; ECF No. 9-4 ¶ 3.) Both members note they are currently in college, under the age of 23, medically qualified, U.S. citizens, and "ready and able to apply to the Naval Academy were a court to order it to cease the use of race and ethnicity as a factor in admissions." (ECF No. 9-3 ¶¶ 2, 4; ECF No. 9-4 ¶¶ 2, 4.)

IV. Factual Overview

The Court's factual findings are based on Plaintiff's Complaint and the parties' sworn declarations and exhibits submitted in support of their positions. The Court's factual findings here are provisional and not binding in future proceedings. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981) ("[F]indings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits[.]") (citations omitted).

In support of its Motion, Plaintiff submitted four declarations—the aforementioned declarations from Members A and B (ECF No. 9-3; ECF No. 9-4), as well as declarations from SFFA's President Edward Blum (ECF No. 9-5) and Plaintiff's Counsel James Hasson of the law firm Consovoy McCarthy PLLC (ECF No. 9-6)—and attached over 550 pages of exhibits.[5] In support of their Reply, Plaintiff submitted a "Rebuttal Declaration" of Lieutenant General (Ret.) Thomas W. Spoehr, a retired three-star general who served in the U.S. Army from 1980 to 2016. (ECF No. 54-1.) In support of their Opposition, Defendants submitted eight declarations—one from Defendant Bruce Latta, including 30 pages of exhibits (ECF No. 46-2); Vice Admiral John V. Fuller, the Naval Inspector General (ECF No. 46-3); Lisa M. Truesdale, the Deputy Assistant Secretary of the Navy for Military Manpower and Personnel (ECF No. 46-4); Ashish S. Vazirani, the Acting Deputy Under Secretary of Defense for Personnel and Readiness ("P&R") for the Department of Defense ("DoD") (ECF No. 46-5); Jeannette Haynie,

Ph.D., Senior Adviser to the Office of the Under Secretary of P&R at the DoD on matters relating to diversity and inclusion and the Department's mission (ECF No. 46-6); John Sherwood, Ph.D., a historian (GS-13) with the Naval History and Heritage Command, which is part of the Department of the Navy (ECF No. 46-7); Beth Bailey, Ph.D., a Foundation Distinguished Professor and founding director of the Center for Military, War, and Society Studies at the University of Kansas, who currently serves, by appointment of the Secretary of the Army, as chair of the Department of the Army Historical Advisory Subcomittee (ECF No. 46-8); and Jason Lyall, Ph.D., the James Wright Chair of Transnational Studies and Associate Professor of the Department of Government at Dartmouth College and director of the Police Violence FieldLab (ECF No. 46-9)—as well as over 300 pages of exhibits. [6] Information relevant to the matter presently before the Court is summarized below.

A. Becoming an Officer in the Navy or Marine Corps

***4** To become a Navy or Marine Corps officer, an individual must (1) graduate from the Naval Academy; (2) attend a civilian college or university and participate in the Reserve Officers' Training Corps ("ROTC") program; (3) attend Officer Candidate School after graduating from college; (4) receive a direct commission after earning a professional degree; or (5) advance through the enlisted ranks and then complete officer training. (ECF No. 46 at 12 (citing ECF No. 46-2 ¶ 90 n.8).) The Defendants' response emphasizes that the Naval Academy is a "vital pipeline to the officer corps, and especially to senior leadership, in the Navy and Marine Corps." (*Id.* at 13 (citing ECF No. 46-3 ¶ 15; ECF No. 46-4 ¶¶ 20–21; ECF No. 46-2 ¶¶ 10, 69, 90).) Defendants note that each year, approximately 28% of the new Navy and Marine Corps officers in warfighting communities are Naval Academy graduates, (*id.* at 12 (ECF No. 46-2 ¶¶ 10, 90)); that Naval Academy graduates "account for a disproportionate percentage of senior officers (40% of flag officers) in the Navy," (*id.*); and that 91% of Chiefs of Naval Operations—one of the highest-ranking officers in the Navy—to present date have been graduates of the Academy. (*Id.* at 12–13 (citing ECF No. 46-7 ¶ 60).)

B. The United States Naval Academy

The Naval Academy was established on October 10, 1845 to "prepare[ ] [midshipmen] to become professional Officers of competence, character[,] and compassion in the U.S. Navy and Marine Corps." *See History of USNA*, U.S. NAVAL ACAD., available at https://www.usna.edu/USNAHistory/index.php; *About USNA*, U.S. NAVAL ACAD., available at https://www.usna.edu/About/index.php. The Naval Academy is highly selective—for example, fewer than ten percent of applicants for the class of 2027 were admitted. (ECF No. 1 ¶ 18 (citing *Class Portrait: Class of 2027*, U.S. NAVAL ACAD., available at https://www.usna.edu/Admissions/Apply/Class-Portrait.php).) Congress has set the size of the Brigade of Midshipmen at a limit of 4,400. 10 U.S.C. § 8454. As such, each incoming class currently consists of approximately 1,180 midshipmen before attrition. (ECF No. 1 ¶ 19 (citation omitted); ECF No. 46 at 12 (citing ECF No. 46-2 ¶ 11).) Under current law, midshipmen who graduate from the Academy will receive a commission in either the Navy or Marine Corps and are obligated to a 5-year active duty service commitment following commissioning. 10 U.S.C. § 8459(a)(2)(A).

C. An Overview of the Academy's Admissions Process

The admissions process at the United States Naval Academy is governed by (1) federal statute—10 U.S.C. §§ 8453–8458; (2) Department of Defense directives—DoDI 1322.22; (3) Department of Navy regulations—SECNAVINST 1531.2D and OPNAVINST 5450.330B; and (4) internal guidance. (ECF No. 46 at 13 (citing ECF No. 46-2 ¶ 12).) It functions as follows.

1. The Application Process in General

Candidates may begin the application process as early as January of the year before matriculation. (*Id.* (citing ECF No. 46-2 ¶ 19).) For the current admissions cycle—the class of 2028—new applications will not be accepted after December 31, 2023, and applications must be completed by January 31, 2024. (*Id.*)

SFFA alleges that the Academy's admissions process involves two stages: (1) a medical examination and physical fitness test, along with a nomination from a Member of Congress, the Vice President, President, or Secretary of the Navy; and (2) acceptance by the Naval Academy's admissions office. (ECF No. 1 ¶ 17.) Plaintiff alleges this second stage unconstitutionally considers race. (*Id.* ¶¶ 17, 31–62.)

Defendants' response provides additional insight. It explains that there are five steps for admission to the Naval Academy, in addition to the nomination requirement. (ECF No. 46 at 13.) In addition to receiving a nomination, an applicant must complete the following steps to be eligible for admission: (1) complete a two-part application;[7] (2) pass a fitness assessment; (3) pass a medical evaluation; (4) interview with Blue and Gold Officer; and (5) submit college entrance exam scores (absent a testing unavailability exemption).[8] (*Id.* at 13–14 (citing ECF No. 46-2 ¶¶ 21–27).) All of these requirements must be completed by January 31 of the matriculation year. *See Steps for Admission*, U.S. NAVAL ACAD., available at https://www.usna.edu/Admissions/Apply/index.php#fndtn-panel9-Steps-for.

2. The Nomination Requirement

***5** As noted *supra*, candidates must also secure a nomination for the admissions cycle in which they wish to be considered. 10 U.S.C. § 8454; (ECF No. 1 ¶ 17; ECF No. 46 at 14 (citing ECF No. 46-2 ¶¶ 29–30).) There are two types of nominations: (1) nominations from a "statutory nominating authority" (or congressional nominations); and (2) "service-connected" nominations. 10 U.S.C. § 8454. Statutory nominating authorities include Members of Congress, the Vice President, Delegates to Congress from U.S. territories and the District of Columbia, and the Governor and the Resident Commissioner of Puerto Rico. *Id.* Service-connected nominations are reserved for children of certain servicemembers, candidates who are already members of the Navy or Marine Corps or members of ROTC programs, and candidates selected by the Naval Academy's Superintendent. *Id.*

Generally, individuals that received congressional nominations account for more than 80% of the Brigade of Midshipmen. (ECF No. 1 ¶ 23; ECF No. 46 at 14–15 (citing ECF No. 46-2 ¶ 31).) If a candidate is appointed to the Naval Academy pursuant to a nomination by a Member of Congress, that candidate is "charged" to that Member. (ECF No. 46 at 14–15 (citing ECF No. 46-2 ¶ 31).) Each Member may have five "charges" at the Naval Academy at one time. (*Id.*); 10 U.S.C. § 8454(a). When a Member has fewer than five charges at the end of the academic year, the Member has a "vacancy" for the following admissions cycle. (ECF No. 46 at 14–15 (citing ECF No. 46-2 ¶ 31)); 10 U.S.C. § 8454(a). For each vacancy, Members can nominate up to ten candidates, and in a typical year, any given Member will have one vacancy. (ECF No. 1 ¶ 21; ECF No. 46 at 14–15 (citing ECF No. 46-2 ¶ 31)); 10 U.S.C. § 8454(a).

Congressional nominating authorities may nominate their slate of candidates using one of three methods: (1) "competitive"—where the Member submits nominees to the Academy without any order of preference, allowing the Academy to select the best qualified candidate within that slate; (2) "principal competitive-alternate"—where the Member identifies a principal nominee and a list of unranked alternates; and (3) "principal numbered-alternate"—where the Member identifies a principal nominee and a ranked list of alternates. (ECF No. 1 ¶ 22; ECF No. 46 at 15 (citing ECF No. 46-2 ¶¶ 34–36)); 10 U.S.C. § 8454(a).

3. Selecting the Brigade of Midshipmen

Once an application to the Naval Academy is completed, a computer-generated score known as the "Whole Person Multiple" ("WPM") is calculated based on a candidate's records. (ECF No. 46 at 15 (citing ECF No. 46-2 ¶¶ 50–56).) WPMs are based on both objective and subjective factors, such as class rank, GPA, extracurricular activities, athletic and non-athletic achievements, teacher evaluations, leadership, fitness, letters of recommendation, life experiences, ability to overcome adversity or hardship, low socioeconomic status, first-generation status, unique cultural experiences, and employment experience. (*Id.* (citing ECF No. 46-2 ¶ 53).) Defendants assert that neither race nor ethnicity factors into the WPM. (*Id.* at 15–16 (citing ECF No. 46-2 ¶¶ 53, 55).)

WPMs generally range from 40,000 to 80,000. (*Id.* at 15 (citing ECF No. 46-2 ¶ 50).) Candidates normally need a WPM of at least 58,000 to be considered "qualified" for admission to the Naval Academy, with scores of 70,000 or above considered highly qualified. (*Id.* (citing ECF No. 46-2 ¶¶ 51–53).)

Each candidate file is then randomly assigned to a Board member for further review. (*Id.* at 16 (citing ECF No. 46-2 ¶ 55).) The reviewing Board member may seek an upwards or downwards adjustment by up to 9,000 points of the candidate's WPM based on factors like high school courses, demonstrated interest in science and mathematics, leadership potential, and character-building experiences. (*Id.*) Defendants assert that race and ethnicity cannot justify a WPM adjustment. (*Id.*) If an adjustment is recommended, the

Board member recommending the adjustment must make the case to the full Board for consideration and approval. (*Id.*)

***6** The Naval Academy asserts that it "selects the majority of its incoming class based on the WPM, within the category of nomination obtained by the candidate." (*Id.* (citing ECF No. 46-2 ¶¶ 57–58).) For candidates nominated by a congressional authority under the "competitive" method, the Academy generally offers appointment to the fully qualified nominee from that Member's slate with the highest WPM. (*Id.* (citing ECF No. 46-2 ¶ 58).) For candidates nominated by a Member of Congress under the "principal competitive-alternate" or "principal numbered-alternate" methods, the Naval Academy must consider the order specified by the Member. (*Id.* (citing ECF No. 46-2 ¶¶ 35–36).) Where the principal nominee is either deemed unqualified or declines admission under the "competitive-alternate" method, the Naval Academy usually offers admission to the fully qualified candidate on the Member's list with the highest WPM. (*Id.* (citing ECF No. 46-2 ¶ 58).) Under the "numbered-alternate" method, if the principal nominee is determined unqualified or declines admission, the Naval Academy must offer admission to the fully qualified candidate who ranks next highest on the Member's list, even if that candidate has a lower WPM than others on the Member's list. (*Id.* (citing ECF No. 46-2 ¶¶ 35, 60).)

In some limited circumstances under the "competitive" method and "principal-competitive" method (when the principal candidate is determined unqualified or declines admission), qualified candidates with slightly lower WPMs are occasionally selected over candidates with slightly higher WPMs. (*Id.*) The Naval Academy notes "[t]hese decisions are made based on the strength of the candidates' entire record with the key considerations being the candidates' progression through academic subjects, leadership experiences, life experiences, and teacher recommendations." (*Id.*) As further explained below, race or ethnicity could potentially be one of many nondeterminative factors for these decisions. (*Id.*)

If a qualified candidate is not appointed to the vacancy for which they were nominated, the candidate may be offered an appointment under two other statutory provisions. First, the Naval Academy may appoint up to 150 "qualified alternates"—qualified candidates who receive a statutory nomination but did not win the vacancy. 10 U.S.C. § 8454(b)(5). The Naval Academy appoints qualified alternates solely based on WPM, which does not consider race or ethnicity. (*Id.* at 17 (citing ECF No. 46-2 ¶¶ 53, 55, 62(a)).)

Second, if the Naval Academy has filled each nomination vacancy, admitted 150 qualified alternates, and has still not filled its class, it may offer appointment to other remaining qualified nominees, known as "additional appointees," so long as at least three-fourths are selected from the qualified alternate pool.[9] 10 U.S.C. § 8456; (ECF No. 46 at 17 (citing ECF No. 46-2 ¶ 62(b)).) For additional appointees, the Naval Academy may consider race or ethnicity as a nondeterminative factor in a holistic assessment in extending offers to additional appointees. (ECF No. 46 at 17–18.)

4. The Naval Academy's Consideration of Race and Ethnicity in Admissions

Plaintiff's Complaint and Motion for Preliminary Injunction note that the Naval Academy "openly admits that 'race' is a factor that it considers" when making admissions decisions, though it "disclaims racial quotas and characterizes its use of race as 'holistic.' " (ECF No. 1 ¶ 31; ECF No. 9-1 at 6.) Students for Fair Admissions asserts that "the [Naval] Academy's focus on race plays out across all areas of its admissions policy." (ECF No. 1 ¶ 32; ECF No. 9-1 at 7.)

In its response, the Naval Academy asserts that it considers race and ethnicity "[a]t four limited parts of the admissions process" as one of many nondeterminative factors in an individualized, holistic assessment of candidate. (ECF No. 46 at 18.) Specifically, the Naval Academy may consider race and ethnicity (1) when offering letters of assurance; (2) when deciding between two candidates with very close WPMs for nominations using the "competitive" method, service-connected nominations, and in some circumstances the "principal competitive-alternate" method; (3) when extending Superintendent nominations; and (4) when extending offers to additional appointees. (*Id.* at 18–20.) The Naval Academy asserts that it uses race and ethnicity in these four limited circumstances "only to further the military's distinct operational interest in developing a diverse officer corps that enables the military to meet its critical national security mission, by enhancing cohesion and readiness, assisting recruitment and retention, and ensuring domestic and international legitimacy." (*Id.* at 20.).

***7** First, the Board may extend a letter of assurance ("LOA") to an outstanding qualified candidate following an individualized review of the candidate's record. (*Id.* at 18 (citing ECF No. 46-2 ¶¶ 63–64, 66).) Candidates that receive

LOAs typically have WPM scores above 70,000, but those with a WPM below that number can still receive an LOA if they are qualified and their record is particularly compelling. (*Id.* (citing ECF No. 46-2 ¶ 67).) LOAs are conditional offers of admission—the candidate must still pass physical fitness standards, become medically qualified, receive a nomination, and complete any remaining requirements for admission. (*Id.* (citing ECF No. 46-2 ¶ 64).) Defendants note that race or ethnicity could be one of the many nondeterminative factors that inform the Board's decision to extend a qualified candidate an LOA. (*Id.* (citing ECF No. 46-2 ¶ 73).)

Second, for nominations using the "competitive" method, the "principal competitive-alternate" method (when the principal candidate is deemed unqualified or declines an offer of appointment), and service-connected nominations, candidates are ranked in their respective slate in WPM order and the candidate with the highest score is typically selected. (*Id.* at 18–19 (citing ECF No. 46-2 ¶ 77).) In limited circumstances—where the highest WPM scores are very close—the qualified candidate with a slightly lower WPM may be selected over the qualified candidate with the slightly higher WPM after an in-depth review of their entire records. (*Id.*) The key considerations in making this decision include class rank, grades, academic progression, leadership, life experiences, and teachers' recommendations. (*Id.* at 19 (citing ECF No. 46-2 ¶ 58).) Race or ethnicity may also be one of many nondeterminative factors that inform this decision, but the Naval Academy asserts that such selections are based on the strength of the candidate's overall record. (*Id.*)

Third, race or ethnicity could be one of many nondeterminative factors considered in extending Superintendent nominations, though the Naval Academy claims that it has not played a factor in a Superintendent nomination since at least 2009. (*Id.* (citing ECF No. 46-2 ¶ 76).) On the rare occasions in which Superintendent nominations are used, they are typically used for sought-after athletes, for candidates that are highly qualified and motivated to attend the Academy, and for candidates applying to other service academies. (*Id.*)

Fourth, at the end of the admissions cycle, if the Naval Academy has not reached its class size, USNA may consider race and ethnicity as one of many nondeterminative factors in its holistic assessment of candidates to identify those who are expected to make valuable contributions in extending offers to additional appointees. (*Id.* at 19–20 (citing ECF No. 46-2 ¶¶ 62(b), 75).)

V. Students for Fair Admissions' Requested Injunctive Relief

Through its Motion for Preliminary Injunction, Students for Fair Admissions sought to enjoin the Naval Academy from considering race as a factor in admissions. After the Motion for Preliminary Injunction was fully briefed, (ECF Nos. 46, 52, 54, 55), the Court heard oral argument from counsel on December 14, 2023. (ECF No. 58.) Based on the parties' filings and oral argument presented, the Court denied Plaintiff Students for Fair Admissions' Motion for Preliminary Injunction (ECF No. 9) at the conclusion of the December 14 hearing. (ECF Nos. 57, 58 at 115 ¶ 3.) The remainder of this Memorandum Opinion expounds on that holding.

STANDARD OF REVIEW

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *United States v. South Carolina*, 720 F.3d 518, 524 (4th Cir. 2013) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981)). A preliminary injunction is an "extraordinary remed[y] involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 816 (4th Cir. 1992)). "[M]andatory preliminary injunctions—those that alter rather than preserve the status quo—are disfavored," and should only be granted where "the applicants' right to relief [is] indisputably clear." *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197, 216 n.8 (4th Cir. 2019) (internal quotation marks omitted); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (explaining that a preliminary injunction may be characterized as either prohibitory, "aim[ing] to maintain the status quo," or mandatory, "alter[ing] the status quo," and noting the status quo has been defined for this purpose as "the last uncontested status between the parties which preceded the controversy") (citing *Pashby v. Delia*, 709 F.3d 307, 319–20 (4th Cir. 2013)).

***8** In determining whether to issue a preliminary injunction, the Court must follow the test set forth by the Supreme Court in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008), which requires

a showing that: (1) the movant is likely to succeed on the merits; (2) the movant is likely to suffer irreparable harm absent preliminary relief; (3) the balance of equities favors the movant; and (4) an injunction is in the public interest. 555 U.S. at 20, 129 S.Ct. 365; *accord Roe v. Dep't of Def.*, 947 F.3d 207, 219 (4th Cir. 2020); *League of Women Voters*, 769 F.3d at 236.

A court cannot issue a preliminary injunction absent a "clear showing" that all four requirements are satisfied. *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 979 F.3d 219, 226 (4th Cir. 2020), *rev'd on other grounds*, 2 F.4th 330 (4th Cir. 2021) (en banc); *accord Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013). The plaintiff "bears the burden of establishing that each of these factors supports granting the injunction." *Direx*, 952 F.2d at 812 (citation omitted). Thus, a court need not address all four *Winter* factors if one or more factors is not satisfied. *Henderson ex rel. NLRB v. Bluefield Hosp. Co., LLC*, 902 F.3d 432, 439 (4th Cir. 2018).

ANALYSIS

Through its Motion for Preliminary Injunction, Students for Fair Admissions sought to enjoin the Naval Academy from considering race as a factor in admissions, which it contends violates the equal protection component of the Fifth Amendment. In their opposition, Defendants challenge SFFA's organizational standing, (ECF No. 46 at 24–26), and further argue that SFFA cannot satisfy any of the four *Winter* factors. (*Id.* at 26–68.) Before turning to the merits of SFFA's request for injunctive relief, the Court first addresses Defendants' challenge to SFFA's standing to ensure this Court's jurisdiction.

I. Standing

In their opposition, Defendants challenge SFFA's organizational standing. (ECF No. 46 at 24–26.) "As the Supreme Court has consistently emphasized, Article III of the Constitution limits the jurisdiction of federal courts to Cases and Controversies." *Hutton v. Nat'l Bd. of Exam'rs in Optometry, Inc.*, 892 F.3d 613, 619 n.5 (4th Cir. 2018) (internal quotation marks omitted). "The requirement that a [p]laintiff possess standing to sue emanates from that constitutional provision." *Id.* (internal quotation marks omitted).

To possess standing to sue under Article III, a plaintiff must have "(1) ... suffered an injury-in-fact that was concrete and particularized and either actual or imminent; (2) there [must have been] a causal connection between the injury and the defendant's conduct (i.e.[,] traceability); and (3) the injury [must have been] likely to be redressable by a favorable judicial decision." *Hutton*, 892 F.3d at 618–19 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). The burden of sufficiently establishing these three elements falls on the party invoking federal jurisdiction—here, Students for Fair Admissions. *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130; *Hutton*, 892 F.3d at 619. An organization like SFFA can assert standing based on two distinct theories. It can assert standing in its own right to seek judicial relief for injury to itself and as a representative of its members who have been harmed. *See S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 182 (4th Cir. 2013). It is the latter option—known as representational or organizational standing—that is at issue here.

***9** To invoke organizational standing, an organization must demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). Defendants challenge whether the first requirement of organizational standing is met. (ECF No. 46 at 24–26).

Defendants appear to argue that SFFA must identify Members A and B by name in order to have organizational standing to pursue claims on their behalf. This challenge to SFFA's standing—which significantly overreads the Supreme Court's decision in *Summers v. Earth Island Institute*, 555 U.S. 488, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009)—does not have merit.

An organization can satisfy the first prong of the associational standing analysis by offering proof "establishing that at least one identified member ha[s] suffered or would suffer harm." *Summers*, 555 U.S. at 498, 129 S.Ct. 1142. To require an organization to name the member who might have standing in his or her own right overreads the word "identified" in this context. First, such specific identifying information is often unnecessary to determine whether a person would have Article III standing. For example, as in this case, whether a person will be denied the opportunity to compete for

admission at the Naval Academy on an equal basis does not depend on his or her name. Where those (or other relevant) facts are proved, a court need look no further to conclude that the organization has members who would have standing to pursue a particular claim in their own right. Second, to hold that Article III requires an organization to name those of its members who would have standing would be in tension with one of the fundamental purposes of the organizational standing doctrine—namely, protecting individuals who might prefer to remain anonymous. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458–60, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).

Here, SFFA has identified specific—though unnamed—members who applied to and were rejected by the Naval Academy. As such, this Court is satisfied, at this stage, [10] that SFFA has alleged "facts sufficient to establish that one or more of its members has suffered, or is threatened with, an injury." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State Inc.*, 454 U.S. 464, 487 n.23, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982).

II. Motion for Preliminary Injunction

As noted *supra*, in determining whether a preliminary injunction is appropriate, the Court must follow the test set forth by the Supreme Court in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008), which requires a showing that:

(1) the movant is likely to succeed on the merits;

(2) the movant is likely to suffer irreparable harm absent preliminary relief;

(3) the balance of equities favors the movant; and

(4) an injunction is in the public interest.

555 U.S. at 20, 129 S.Ct. 365. Preliminary injunctions that alter the status quo—such as the one sought here—are "disfavored," and should only be granted where "the applicants' right to relief [is] indisputably clear." *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197, 216 n.8 (4th Cir. 2019) (internal quotation marks omitted).

***10** Students for Fair Admissions contends that it is entitled to a preliminary injunction enjoining the Naval Academy from considering race in its admissions process. Defendants argue that SFFA cannot satisfy any of the four factors, though both parties' arguments are chiefly focused on the first factor: whether SFFA is likely to succeed on the merits. The parties' arguments are discussed below in turn.

A. Likelihood of Success on the Merits

Students for Fair Admissions argues that the Naval Academy's use of race in admissions violates the equal protection component of the Fifth Amendment. [11] (ECF No. 1.) "Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known [as] 'strict scrutiny.' " *Students for Fair Admissions v. Pres. & Fellows of Harv. Coll.* ("*Harvard*"), 600 U.S. 181, 206–07, 143 S.Ct. 2141, 216 L.Ed.2d 857 (2023) (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). Under that standard, courts must ask, first, whether the racial classification is used to "further compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). Second, if so, courts ask whether the government's use of race is "narrowly tailored"—meaning "necessary"—to achieve that interest. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311–12, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013) (internal quotation marks omitted).

In *Harvard*, the Supreme Court held that affirmative action programs at Harvard and UNC violated the Equal Protection Clause of the Fourteenth Amendment. 600 U.S. at 213, 143 S.Ct. 2141. While the Court declined to overturn its 2003 decision in *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), which held that consideration of an applicant's race as one factor in admissions policy did not violate the Constitution, the Court determined the schools' program fell "short of satisfying the burden" that their programs be " 'sufficiently measurable to permit judicial review' under the rubric of strict scrutiny." 600 U.S. at 214, 143 S.Ct. 2141 (citation omitted). The Court explained that " '[c]lassifying and assigning' students based on their race 'requires more than ... an amorphous end to justify it.' " *Id.* (citation omitted). However, as Defendants note, and SFFA concedes, the Supreme Court's ruling in *Harvard* explicitly excluded military academies, noting that military academies may have "potentially distinct interests" from other institutions. *Id.* at 213 n.4, 143 S.Ct. 2141.

While the burden of demonstrating the constitutionality of the Naval Academy's consideration of race and ethnicity in admissions would fall on the government in the usual course of business, when a plaintiff seeks a preliminary injunction,

the burden switches to the movant to prove that he is likely to succeed on the merits. *Winter*, 555 U.S. at 20, 129 S.Ct. 365. Students for Fair Admissions has not satisfied that burden.

1. Compelling Government Interest

***11** Here, Defendants submit that the Naval Academy's consideration of race and ethnicity in admissions serves a compelling national security interest. Specifically, Defendants submit that they have a compelling national security interest in a diverse officer corps, as the military's senior leadership has determined that a diverse officer corps is critical to cohesion and lethality, to recruitment, to retention, and to the military's legitimacy in the eyes of the nation and the world. (ECF No. 46 at 30–47.) In support of this position, they attach, among other things, declarations of a three-star Vice Admiral of the Navy (ECF No. 46-3), the Deputy Assistant Secretary of the Department of the Navy for Manpower and Personnel (ECF No. 46-4), the Acting Under Secretary of Defense for Personnel and Readiness (ECF No. 46-5), and the Under Secretary's Senior Advisor. (ECF No. 46-6.)

Plaintiff argues that none of the Defendants' proffered interests—cohesion, recruitment, retention, and legitimacy—are compelling government interests that justify explicit racial classifications. (ECF No. 9-1 at 12–18; ECF No. 54 at 22–27.) In support of this position, Students for Fair Admissions attaches the declaration of a retired three-star general who served in the U.S. Army from 1980 to 2016. (ECF No. 54-1.) Plaintiff also points out that after *Harvard*, the Supreme Court's precedents identify "only two compelling interests that permit resort to race-based government action": "remediating specific, identified instances of past discrimination that violated the Constitution or a statute," *Harvard*, 600 U.S. at 207, 143 S.Ct. 2141 (citing *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 727, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007); *Shaw v. Hunt*, 517 U.S. 899, 909–10, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996)), and "avoiding imminent and serious risks to human safety in prisons, such as a race riot." *Id.* (citing *Johnson v. California*, 543 U.S. 499, 512–13, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005)).

While it is true that "acceptance of race-based state action has been rare for a reason," *Harvard*, 600 U.S. at 208, 143 S.Ct. 2141, this Court is not convinced that Plaintiff has met its burden in demonstrating that it is likely to succeed in showing that the Naval Academy's consideration of race and ethnicity in admissions does not serve a compelling national security interest. First, and most significantly, in overturning the legality of race-based affirmative action at higher education institutions, the Supreme Court excluded military service academies, acknowledging "the potentially distinct interests that military academies may present." *Id.* at 213 n.4, 143 S.Ct. 2141. That language employed in footnote 4 of *Harvard* suggests that compelling government interests may justify affirmative action at military academies.

Second, "[c]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of Navy v. Egan*, 484 U.S. 518, 530, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988) (citations omitted). While Students for Fair Admissions contends that "[w]hen courts apply strict scrutiny to the military's racial classifications, they apply real strict scrutiny—not some watered-down version that gives the government special deference," (ECF No. 54 at 17–20), courts have consistently deferred to the military regarding its personnel decisions. *Roe v. Dep't of Def.*, 947 F.3d 207, 219 (4th Cir. 2020). Accordingly, the Naval Academy is due more deference than were the private and public universities in *Harvard* given the explicit caveat in footnote 4 of *Harvard,* 600 U.S. at 213 n.4, 143 S.Ct. 2141 (explaining that the "opinion ... does not address the issue, in light of the potentially distinct interests that military academies may present").

In *Winter*, the Supreme Court considered preliminary injunction relief aimed at the military. 555 U.S. at 12, 129 S.Ct. 365. As was noted by the Supreme Court in that case, "[t]his case involves 'complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force.' " *Id.* at 24, 129 S.Ct. 365 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973)); *see also Roe*, 947 F.3d at 219. Accordingly, "[this Court] 'give[s] great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.' " *Winter*, 555 U.S. at 24, 129 S.Ct. 365 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986)). Still, this Court is mindful that "military interests do not always trump other considerations." *Id.* at 26, 129 S.Ct. 365.

***12** Relatedly, this Court briefly addresses Students for Fair Admissions' argument that the Naval Academy's position is "unsupported," attacking the sources cited by Defendants as "flawed, irrelevant, or misinterpreted." [12] The factual record

has yet to be developed in this matter. It is appropriate to note that both the Plaintiff and Defendants need the opportunity to develop the appropriate record in this case. At this stage, SFFA bears the burden to prove that it is likely to succeed on the merits. *Winter*, 555 U.S. at 20, 129 S.Ct. 365. In light of the language employed in *Harvard* and judicial deference due to the military, at this stage this Court is unpersuaded that the evidence proffered by Plaintiff overwhelms the evidence advanced by Defendants. Quite simply, the issue of a compelling government interest requires development of a factual record.

2. Sufficiently Measurable

Defendants argue that "the military's interest in diversity at military academies is of an entirely different nature than a civilian university's interest in educational diversity," as the Naval Academy prepares students for war, provides a vital pipeline to the military's officer corps—a closed-personnel system; and the military has determined that "a diverse officer corps is critical to mission success and national security." (ECF No. 46 at 47–49.) Defendants further argue that "[u]nlike the 'elusive' goals identified [in *Harvard*], whether the military has achieved the benefits that flow from a diverse midshipmen—and eventually officer—corps is clear and measurable." (*Id.* at 49.) Defendants assert that "[t]he military's consideration of race and ethnicity is therefore no less measurable than in the prison context, where success is measured by "prevent[ion] [of] harm." (*Id.* at 50 (citing *Johnson v. California*, 543 U.S. 499, 512–13, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005)).) To determine whether the Navy is meeting their goals, Defendants assert that courts can examine: "whether internal race riots have occurred since the [military] made an effort to diversify their officer corps," (*id.* at 50); "the views of senior military leadership," (*id.* at 50–51); "feedback from current servicemembers," (*id.* at 51–52); "demographic data," (*id.* at 52–53); and "whether the same type of public perception crisis resulting from the racial tensions around the Vietnam War plagues the military today ... and whether there have been international incidents as occurred previously from racial tensions." (*Id.* at 53.)

Students for Fair Admissions contends that the Navy's proffered interests are immeasurable such that they cannot be subjected to meaningful judicial review. (ECF No. 54 at 23–34.) They note that the Supreme Court rejected UNC's suggestion that courts could measure their interest in pursuing the educational benefits of diversity via survey in the *Harvard* decision. (*Id.* (citing *Harvard*, 600 U.S. at 214, 143 S.Ct. 2141).) SFFA also rejects the Defendants' suggestion that the government's interests are more analogous to those in *Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005), noting that *Johnson* did not involve admissions, affirmative action, or the military, but rather prisons, and further that the Supreme Court found that the prison's interests were compelling only because the means for achieving them were "temporary" and "measurable." (ECF No. 54 at 24.)

***13** While Plaintiff attacks Defendants' position that courts can examine whether there have been any internal race riots since the military made an effort to diversify their officer corps and feedback from current servicemembers, Students for Fair Admissions does not meaningfully address the other means of measurement proffered by Defendants, and this Court is confident that, at a minimum, a court could examine demographic data to determine whether the government is meeting its goals.

Moreover, the Supreme Court's determination that Harvard and UNC's interests were "inescapably imponderable" was based on a factual record much further developed than that of the instant case. 600 U.S. at 215, 143 S.Ct. 2141. The record in the *Harvard* case was developed during a fifteen-day bench trial, *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harv. Coll.*, No. 1:14cv14176 (D. Mass. Filed Nov. 17, 2014), and the record in the UNC case was developed during an eight-day bench trial. *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 1:14cv954 (M.D.N.C. filed Nov. 17, 2014). [13] At present, this Court is unpersuaded by Plaintiff's conclusory assertions that the Navy's interests of cohesion, recruitment, retention, and legitimacy are immeasurable.

3. Narrowly Tailored

"To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot 'insulate each category of applicants with certain desired qualifications from competition with all other applicants.' " *Grutter*, 539 U.S. at 334, 123 S.Ct. 2325 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978)). Instead, a university may consider race or ethnicity only as a plus in a particular applicant's file, without insulating the individual from comparison with all other candidates for the available seats. *Bakke*, 438 U.S. 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." *Id.*

Here, SFFA asserts that the Naval Academy's use of race is not narrowly tailored. It alleges that the Naval Academy uses race as a negative; the USNA's racial categories are "incoherent;" the Navy's racial preferences rely on "impermissible racial stereotypes;" the Navy's use of race in admissions has no end date; and the Navy has not sufficiently considered race-neutral alternatives. (ECF No. 9-1 at 14–21; ECF No. 54 at 27–32.) The Naval Academy emphasizes that each candidate is evaluated as an individual in the admissions process; that it does not use quotas to achieve its goals; that race and ethnicity are not used as a negative or stereotype; that race-neutral alternatives are not sufficient; and that they do not intend to use race and ethnicity as a factor in its admissions process indefinitely. (ECF No. 46 at 53–67.)

This Court first considers SFFA's argument that the Naval Academy uses race as a negative. In *Harvard*, the Supreme Court stressed that the "twin commands" required that race may never be used as a negative or a stereotype. 600 U.S. at 218, 143 S.Ct. 2141. The Court noted that the United States Court of Appeals for the First Circuit had found that Harvard's consideration of race had led to a 11.1% decrease in the number of Asian-Americans admitted to Harvard. *Id.* In rejecting the *Harvard* respondents' contention that an individual's race was never a negative factor in their admissions program, the Supreme Court explained: "College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." *Id.* at 218–19, 143 S.Ct. 2141. Here, the Naval Academy submits:

> ***14** [R]ace and ethnicity "may only be considered as one of many non-determinative factors in the applicant's file" when considering a candidate for admission at USNA. However, neither race nor ethnicity can "be the basis for 'points' in favor of or against an applicant" at any "point during the admissions process." In other words, a candidate's racial or ethnic background may provide context to ensure a fulsome evaluation of his or her application but candidates may not be admitted (or denied) *because of* their race or ethnicity.

(ECF No. 46-2 ¶ 70 (internal citations omitted).) The Naval Academy's admissions policy is distinguishable from the admissions policies at issue in *Harvard*, where the respondents "maintain[ed] that the demographics of their admitted classes would meaningfully change if race-based admissions were abandoned" and "acknowledge[d] that race is determinative for at least some ... of the students they admit." 600 U.S. at 219, 143 S.Ct. 2141. This Court is unpersuaded, at this stage, that the Naval Academy's use of race in admissions, which Defendants assert is limited and never determinative, is inherently negative.

SFFA's argument that the USNA's racial categories are "incoherent" relies on the *Harvard* Court's rejection of the same categories. *Id.* at 216–18, 143 S.Ct. 2141. The context of that rejection is critical. In *Harvard*, the Supreme Court explained: "It is far from evident ... how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue." *Id.* at 216, 143 S.Ct. 2141. An entirely different interest is before this Court, namely one of national security rather than educational benefits, and this distinction undermines SFFA's argument at this stage.

Considering SFFA's argument that the Navy's racial preferences rely on "impermissible racial stereotypes," the Supreme Court has long held that universities may not operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U.S. at 333, 123 S.Ct. 2325 (internal quotation marks omitted). In *Harvard*, the Court asserted that the respondents' admissions programs promoted stereotypes because they assume that "a black student can usually bring something that a white person cannot offer." 600 U.S. at 220, 143 S.Ct. 2141 (citing *Bakke*, 438 U.S. at 316, 98 S.Ct. 2733). Here, the Naval Academy submits: "USNA further does not consider race or ethnicity on a belief that diverse students always express stereotypically characteristic viewpoints on an issue. USNA's application process centers on a candidates' individualized experiences." (ECF No. 46-2 ¶ 79.) At this stage, Students for Fair Admissions has not convinced this Court that it is likely to succeed in its argument that the Naval Academy's admissions policy ascribes an inherent benefit in race *qua* race.

With respect to SFFA's argument that the Naval Academy's use of race in admissions has no end date, Defendants note that Plaintiff's contention wholly ignores the distinct military interest at issue here. In *Harvard*, the Court explained:

> *Grutter* thus concluded with the following caution: "It has been 25 years since Justice Powell first approved the use

> of race to further an interest in student body diversity in the context of public higher education.... We expect that 25 years from now, *the use of racial preferences will no longer be necessary to further the interest approved today.*" Twenty years later, no end is in sight.... But we have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end.

***15** 600 U.S. at 213, 143 S.Ct. 2141 (internal citations omitted) (emphasis added). In light of this language, this Court is unpersuaded that *Harvard* applies automatically and without thought to the Naval Academy given the "potentially distinct interests that [it] may present." *Id.* at 213 n.4, 143 S.Ct. 2141.

Lastly, considering SFFA's argument that the Naval Academy has not sufficiently considered race-neutral alternatives, the Naval Academy submits that it has considered several race-neutral alternatives, yet none have been effective to date. (ECF No. 46-2 ¶¶ 91–99.) Such alternatives include: targeted recruiting efforts to increase Naval Academy applications from Fleet Sailors and Marines; hosting a Summer Seminar and a Science, Technology, Engineering, and Mathematics Camp for rising ninth-to-eleventh graders; marketing to specific underrepresented demographics through an enrollment management companies; consideration of socio-economic status during the application process; prioritizing first-generation college candidates; adjusting admission metrics and consideration of standardized tests; and increased outreach to low-density congressional districts and encouraging Members of Congress to increase the number of nominations and to sponsor informational Academy Days. (*Id.*) This Court is unpersuaded by SFFA's assertion that no "serious, good faith consideration" appears anywhere in the record. *Grutter*, 539 U.S. at 349, 123 S.Ct. 2325.

While SFFA encourages this Court to find that the Naval Academy's use of race in admissions fails strict scrutiny's narrow tailoring requirement, it would be imprudent to make such a determination at the preliminary injunction stage, as it is imperative that the factual record in this matter be developed. Simply stated, it is unclear whether SFFA is likely to succeed on the merits at this stage. As a preliminary injunction is an extraordinary remedy, Plaintiff "must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Miranda v. Garland*, 34 F.4th 338, 358 (4th Cir. 2022) (quoting *Winter*, 555 U.S. at 20, 129 S.Ct. 365). Courts cannot issue a preliminary injunction absent a "clear showing" that all four requirements are satisfied. *Leaders of a Beautiful Struggle*, 979 F.3d at 226. Thus, a court need not address all four *Winter* factors if one or more factors is not satisfied. *Henderson ex rel. NLRB v. Bluefield Hosp. Co., LLC*, 902 F.3d 432, 439 (4th Cir. 2018). As SFFA has failed to satisfy its burden on likelihood of success on the merits, this Court need not address the remaining three parts of the preliminary injunction test. Nevertheless, the Court for completeness also addresses irreparable harm, balance of the equities, and public interest.

B. Irreparable Harm

Having found that Students for Fair Admissions has failed to carry its burden to clearly show a likelihood of success on the merits, this Court briefly considers the extent to which Plaintiff has shown irreparable harm. "It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.' " *Mills v. Dist. of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)); *see also Leaders of a Beautiful Struggle*, 2 F.4th at 346. Because it is unclear whether the Naval Academy's use of race and ethnicity in admissions is unconstitutional, the irreparable harm factor is not automatically satisfied in this instance.

***16** Nevertheless, delayed admission to a university can cause irreparable injury when the person harmed has no comparable opportunities elsewhere. *See Faulkner v. Jones*, 10 F.3d 226, 233 (4th Cir. 1993). Here, Member A is "currently attending college ... and is a Midshipman in the Naval Reserve Officers Training Corps," and "Member B is now a freshman in college." (ECF No. 9-1 at 11.) While the ages of Member A and Member B have not been revealed, 10 U.S.C. § 7446 provides that to be eligible for admission to the Naval Academy, "a candidate must be at least 17 years of age and must not have passed his twenty-third birthday on July 1 of the year in which he enters the Academy." Member A and Member B are presently enrolled in college and SFFA appears to concede that both are far away from their twenty-third birthdays. As such, and because it is unclear whether Plaintiff is likely to succeed on the merits, this Court finds that SFFA has not satisfied the requirement that it is likely to suffer irreparable harm in the absence of preliminary relief.

C. Balance of Equities

Having found that Students for Fair Admissions has failed to carry its burden to clearly show a likelihood of success on the merits and irreparable harm, this Court briefly addresses the balance of the equities. In considering the balance of the equities, this Court is required to consider the harm that will befall SFFA if the injunction fails to be issued against the harm that will result to Defendants from being enjoined. Stated another way, the court must balance the "harm to the plaintiff if the injunction is erroneously denied versus harm to the defendant if the injunction is erroneously granted." *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 980 (7th Cir. 2019); *see also Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 923 (6th Cir. 2020). Here, the Naval Academy is mid-admissions cycle. Moreover, SFFA has not clearly demonstrated a likelihood of success on the merits or that its members will suffer irreparable harm absent injunctive relief. Accordingly, this Court would be hard-pressed to find that the balance of the equities favors SFFA.

D. Public Interest

For similar reasons noted above and addressed at the hearing in this case, public interest simply does not favor an injunction at this stage of the proceedings. Serious issues remain in the wake of the Supreme Court's opinion in *Harvard*. This compels a careful establishment of a record in this case.

CONCLUSION

For the reasons stated above, and in accordance with the Court's decision from the bench on December 14, 2023 (ECF No. 58) and Order dated December 15, 2023 (ECF No. 57), Plaintiff's Motion for Preliminary Injunction (ECF No. 9) has been DENIED.

All Citations

--- F.Supp.3d ----, 2023 WL 8806668

Footnotes

1 For clarity, this Memorandum Opinion cites to the ECF generated page number, rather than the page number at the bottom of the parties' various submissions, unless otherwise indicated.

2 SFFA filed a similar complaint and motion for preliminary injunction against the United States Military Academy at West Point ("West Point"). *Students for Fair Admissions v. United States Military Academy at West Point*, No. 7:23-cv-08262 (S.D.N.Y. filed Sept. 19, 2023).

3 In addition to the parties' submissions, the National Association of Black Military Women ("NABMW"), the American Civil Liberties Union ("ACLU"), the American Civil Liberties Union of Maryland ("ACLU of Maryland"), and the NAACP Legal Defense Fund ("LDF") (collectively, "amici") submitted a brief as Amici Curiae in Opposition to Plaintiff's Motion for a Preliminary Injunction (ECF No. 52).

4 SFFA suggests that *Harvard* "eviscerated" *Grutter*, (ECF No. 54 at 12–13), and that *Grutter* is no longer good law. (ECF No. 58 at 100 ¶ 17.) SFFA called for an overruling of *Grutter* in *Harvard*. *See* Brief for Petitioner at 49–71, *Students for Fair Admissions v. Pres. & Fellows of Harv. Coll.*, 600 U.S. 181, 143 S.Ct. 2141, 216 L.Ed.2d 857 (2023) (Nos. 20-1199, 21-707). While the Supreme Court decided that Harvard and UNC's admissions programs were unlawful, 600 U.S. at 230, 143 S.Ct. 2141, the Court did not expressly say it was overruling *Grutter* and its progeny in *Harvard*. The majority opinion relied heavily on *Grutter* as authority. *Id.* at 211–13, 143 S.Ct. 2141 (reasoning that the Court had permitted race-based admissions "only within the confines of narrow restrictions" and that the respondents' admissions programs failed each of these criteria), 220 ("Yet by accepting race-based admissions programs in which some students may obtain preferences on

the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping."), 221 (reasoning that the respondent's admissions programs were unconstitutional under *Grutter* because they lacked a logical end point). Justice Brett Kavanaugh wrote separately "explain[ing] why the Court's decision ... is consistent with and follows from ... the Court's precedents on race-based affirmative action." *Id.* at 311, 143 S.Ct. 2141 (Kavanaugh, J., concurring). This Court notes that Justice Clarence Thomas wrote separately and stated "*Grutter* is, for all intents and purposes, overruled," *id.* at 287, 143 S.Ct. 2141 (Thomas, J., concurring), and Justice Sonia Sotomayor's dissent accused the majority of "overruling decades of precedent" while " 'disguis[ing]' its rulings as an application of 'established law.' " *Id.* at 341–42, 143 S.Ct. 2141 (Sotomayor, J., dissenting). Still, given that *Harvard* relied heavily on *Grutter* as authority, this Court finds it prudent to note that *Harvard*, at most, partially overruled *Grutter*.

5 Plaintiff's exhibits include material from the websites of USNA, the U.S. Navy, the Department of Defense ("DoD"), West Point, the White House, and Senator Mark Warner (D-VA); a 2016 report from the Congressional Research Service ("CRS") on congressional nominations to military academies; a 2011 report from the Military Leadership Diversity Commission ("MLDC") on diverse leadership in the military; a report on 2019, 2022, and 2023 surveys conducted by the Pew Research Center on American public opinion of affirmative action; a 2011 study by Sayce Falk and Sasha Rogers on retention of junior military officers; a 2022 survey by the Ronald Regan Institute on national defense; a 1993 report by the United States General Accounting Office (now General Accountability Office) on gender and racial disparities at the Naval Academy; and several articles and op-eds. (ECF Nos. 9-6, 9-7.)

6 Defendants' exhibits include the defense budget request from fiscal year 2023 (ECF No. 46-10); DoD demographics from 2010 and 2022 (ECF Nos. 46-11, 46-17); U.S. census data from 2022 (ECF No. 46-18); a 2019 report from the CRS on diversity, inclusion, and equal opportunity in the Armed Forces (ECF No. 46-12); the 2020 DoD diversity and inclusion report (ECF No. 46-13); a memo from the Secretary of Defense dated April 9, 2021 (ECF No. 46-14); an October 2020 executive report from the DoD Office of People Analytics on the return of investment for diversity and inclusion in the military (ECF No. 46-15); and a December 2021 AP News article by Aaron Morris titled *'We Just Feel It': Racism Plagues US Military Academies* (ECF No. 46-16).

7 The preliminary application (part one) is used as a screening tool to determine whether a candidate meets the basic statutory eligibility requirements and is likely to meet minimum academic standards. (ECF No. 46 at 13 (citing ECF No. 46-2 ¶¶ 21–23).) Applicants meeting the age eligibility and citizenship requirements may then complete the remaining application requirements (part two), which include an essay, personal history, and family background information; teacher recommendations; transcripts; and notation whether the student is a member of a minority group or comes from a disadvantaged background. (*Id.*)

8 Defendants note that the Academy can grant an exception to this requirement where standardized testing is unavailable to a candidate, and race and ethnicity are not considered when deciding whether to grant an exception. (ECF No. 46 at 14 n.2 (citing ECF No. 46-2 ¶ 18 n.5).)

9 For the classes of 2026 and 2027 respectively, the Naval Academy admitted 310 candidates (53% of whom were minority candidates) and 255 candidates (56% of whom were minority candidates) as additional appointees. (ECF No. 55-1 ¶ 3.)

10 Of course, Defendants are free to challenge standing if, during discovery, it becomes apparent that SFFA cannot prove that its members would otherwise have standing to sue in their own right.

11 Although the Fifth Amendment does not contain an explicit equal protection clause as is provided in the Fourteenth Amendment, the Supreme Court has interpreted the Fifth Amendment's due process clause as incorporating an equal protection aspect. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (discussing equal protection aspect of the Fifth Amendment's due process

clause). The Supreme Court has held that the method of analyzing equal protection claims brought under the Fifth Amendment is no different than the analysis of such claims under the Fourteenth Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 93, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); *see also United States v. Jones*, 735 F.2d 785, 792 n.8 (4th Cir. 1984) (same).

12 SFFA also attacks the Navy's proffered interests as "inconsistent," noting that strict scrutiny does not allow the use of race for benefits that are minimal at best. (ECF No. 54 at 27 (citing *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 727, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007)).) Plaintiff appears to argue that the Navy is a 343,000 person fighting force, and the Naval Academy's use of race in admissions affects at most only a few hundred officers every year, and unless Navy chose to admit only racial minorities, the racial composition of the ranks would hardly change. (*Id.*) This Court is unpersuaded by SFFA's suggestion that because the Navy could only achieve its proffered goals by admitting only racial minorities—something the Navy legally cannot do (e.g., use racial quotas)—its current use of race in admissions does not serve a compelling government interest. Moreover, claiming that the Navy has not met its goal of mirroring the racial diversity of its enlisted ranks does not negate the existence of the goal itself.

13 By separate Order, this case shall be set for a bench trial commencing within the next nine months on September 9, 2024.

End of Document

2022 WL 579809
Only the Westlaw citation is currently available.
United States District Court, E.D. Virginia,
Alexandria Division.

COALITION FOR TJ, Plaintiff,
v.
FAIRFAX COUNTY SCHOOL BOARD, Defendant.

Civil Action No. 1:21cv296
|
Signed 02/25/2022

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MEMORANDUM OPINION

CLAUDE M. HILTON, UNITED STATES DISTRICT JUDGE

***1** This matter comes before the Court on Plaintiff The Coalition for TJ's (hereinafter "Coalition") and Defendant Fairfax County School Board's (hereinafter "Board") Cross-Motions for Summary Judgment.

Thomas Jefferson High School for Science & Technology (hereinafter "TJ") is a high school in Fairfax County, Virginia, designated as an academic-year Governor's School. In 2020-21, the racial makeup of TJ's student body was 71.97% Asian American, 18.34% white, 3.05% Hispanic, and 1.77% Black.

TJ is part of Fairfax County Public Schools (hereinafter "FCPS"). FCPS is operated by the Board, a public body comprised of twelve elected members. According to FCPS, the county-wide racial makeup of FCPS students is: 36.8% white, 27.1% Hispanic, 19.8% Asian American, and 10% Black.

In 2020, Board members were: Ricardy Anderson, Karen Keys-Gamarra, Karen Corbett Sanders, Megan McLaughlin, Melanie K. Meren, Karl Frisch, Elaine Tholen, Stella Petarsky, Tamara Derenak Kaufax, Abrar Omeish, Rachna Sizemore Heizer, and Laura Jane Cohen. FCPS' superintendent was Scott Brabrand, TJ's admissions director was Jeremy Shughart, and TJ's principal was Ann Bonitatibus.

The Coalition for TJ has more than 200 members, including seventeen members of its core team and ten members of its leadership team. The Coalition was founded in August 2020 to oppose changes to admissions at TJ. The Coalition was concerned that admissions changes at TJ would discriminate against Asian-American students, and the leadership and core teams decided to pursue this case by unanimous consensus.

Coalition members include Asian-American parents with children who have applied to TJ or plan to do so in the near future. Among these are Dipika Gupta (whose son, A.G., is in eighth grade at Carson Middle School and has applied to TJ) and Ying McCaskill (whose daughter, S.M., is in seventh grade at Carson and plans to apply to TJ). Another member is Harry Jackson, whose daughter, V.J., an eighth grader at Carson, identifies as Black but is half Asian American.

Students must apply to TJ in order to be admitted. Students residing in five participating school divisions are eligible to apply to TJ: Fairfax County, Loudoun County, Prince William County, Arlington County, and Falls Church City. In the fall of 2020, the Board altered the TJ admissions process.

Before the Board's fall 2020 changes, applicants to TJ were required to (a) reside in one of the five participating school divisions; (b) be enrolled in 8th grade; (c) have a minimum core 3.0 grade point average (GPA); (d) have completed or be enrolled in Algebra I; and (e) pay a $100 application fee, which could be waived based on financial need.

Applicants who satisfied those criteria were administered three standardized tests: the Quant-Q, the ACT Inspire Reading, and the ACT Inspire Science. Those applicants who achieved certain minimum scores on the tests advanced to a "semifinalist" round. Students were selected for admission from the semifinalist pool based on a holistic review that considered GPA, test scores, teacher recommendations, and responses to three writing prompts and a problem-solving essay.

***2** The Board's fall 2020 changes to admission at TJ removed the standardized tests requirement and altered the minimum requirements to apply. To be eligible for TJ under the new policy, students must: (a) maintain a 3.5 GPA; (b) be enrolled in a full-year honors Algebra I course or higher; (c) be enrolled in an honors science course; and (d) be enrolled in at least one other honors course or the Young Scholars program.

The Board also changed the evaluation process, moving from a multi-stage process to a one-round holistic evaluation that considers GPA, a Student Portrait Sheet, a Problem Solving Essay, and certain "Experience Factors," which include an applicant's (a) attendance at a middle school deemed historically underrepresented at TJ; (b) eligibility for free and reduced price meals;(c) status as an English language learner; and (d) status as a special education student.

In addition to the changes to the eligibility and the evaluation criteria, the new process guarantees seats for students at each public middle school in participating school division equivalent to 1.5% of the school's eighth grade class size, with seats offered in the first instance to the highest-evaluated applicants from each school. After the guaranteed seats are filled, about 100 unallocated seats remain for students who do not obtain an allocated seat. The highest-evaluated remaining students are offered admission.

For the Class of 2025–the first year under the new system–the admitted class size increased by 64 students. Nevertheless, TJ admitted 56 fewer Asian-American students than it had the prior year. For the previous five years, Asian-American students never made up less than 65% of the admitted class. For the Class of 2024, Asian-American students earned approximately 73% of the seats. Following the admissions changes, the proportion of Asian-American students admitted for the Class of 2025 fell to about 54%. For the Class of 2025, 48.59% of eligible applicants to TJ were Asian American.

In May 2020, the Virginia General Assembly enacted a requirement that Governor's Schools develop diversity goals and submit a report to the Governor by October 1, 2020. 2020 Va. Acts ch. 1289, item 145.C.27(i). The report must include the status of the school's diversity goals, including a description of admission processes in place or under consideration that promote access for historically underserved students; and outreach and communication efforts deployed to recruit historically underserved students.

On May 25, 2020, George Floyd was murdered by a police officer in Minneapolis. Nationwide protests followed, including in Fairfax County and the greater metropolitan Washington D.C. area.

On June 1, 2020, the Class of 2024 TJ admissions statistics were made public, showing that the number of Black students admitted was too small to report. On June 7, Bonitatibus wrote a message to the TJ community that "recent events in our nation with black citizens facing death and continued injustices remind us that we each have a responsibility to our community to speak up and take actions that counter racism and discrimination in our society." She went on to comment that the TJ community "did not reflect the racial composition in FCPS" and that if TJ did reflect FCPS's racial demographics, it "would enroll 180 black and 460 Hispanic students, filling nearly 22 classrooms."

In June emails, Corbett Sanders promised intentional action. In an email to Brabrand, Corbett Sanders wrote that "the Board and FCPS need to be explicit in how we are going to address the under-representation of Black and Hispanic students." At a June 18 Board meeting, Keys-Gamarra said that "in looking at what has happened to George Floyd, we now know that our shortcomings are far too great ... so we must recognize the unacceptable numbers of such things as the unacceptable numbers of African Americans that have been accepted to T.J."

***3** In the summer of 2020, Keys-Gamarra, Brabrand, Bonitatibus, and Shughart all attended at least one meeting of a state-level task force on diversity, equity, and inclusion at Governor's Schools. The task force discussed solutions for admissions to Virginia's Governor's Schools. Among the solutions discussed was a potential state plan to require each school's diversity metrics to be within 5% of the system it represents within four years.

Brabrand testified that he perceived that there was "State-level dynamics, one, reflected by the October 1 report, and, two, by the Secretary of Education's task force that simple status quo, a report with just, we're just doing the same thing we've always done was not going to be received well." Corbett Sanders and Omeish stressed the reporting deadline in emails.

FCPS staff then developed a proposal for a "Merit Lottery" for TJ admissions, which they presented to the Board on September 15. The proposal stated that "TJ should reflect the diversity of FCPS, the community and Northern Virginia."

The proposal discussed the use of "regional pathways" that would cap the number of offers each region in FCPS (and the other participating jurisdictions) could receive. It included the results of Shughart's modeling, which showed the projected racial effect of applying the lottery with regional pathways to three previous TJ classes. Each of the three classes would have admitted far fewer Asian-American students under the proposed lottery system.

At an October 6 Board work session, FCPS staff proposed using a holistic review to admit the top 100 applicants, but otherwise retain the lottery and regional pathways. The presentation introduced consideration of "Experience Factors," and noted an "advantage" of the proposal was that it "statistically should provide some increase in admittance for underrepresented groups."

The Board also took several votes, which it typically does not do during work sessions. One vote unanimously directed Brabrand to eliminate the TJ admissions examination. Another required that the diversity plan submitted to the state "shall state that the goal is to have TJ's demographics represent the NOVA region." The public description of the work session did not provide notice that votes would be taken, and no public comment was permitted before either vote. At the October 8 regular Board meeting, by a 6-6 vote, the Board rejected a motion that would have directed Brabrand to engage stakeholders regarding changes to TJ admissions for the 2021 freshman class prior to bringing the updated plan to the Board in December, and allow for more thorough community input and dialogue on TJ admissions.

Following this vote, multiple Board members expressed concern with the speed of the process and the adequacy of public engagement. Tholen wrote in her October newsletter to constituents that "the outreach to date has been one-sided and did not solicit input from all of our communities." Meren wrote in an October 6 email that she "was not okay with the rushed situation we are in." Sizemore Heizer wrote on October 4 that "personally I think we need to wait to implement anything [un]til next school year."

Beginning in November, FCPS staff presented an entirely holistic plan for the Board to consider alongside the revised merit lottery. Board discussion of the new holistic plan was originally scheduled for November 17, but Corbett Sanders and Derenak Kaufax complained to Brabrand via email that they had only received the white paper containing analysis and modeling the night before. The discussion was postponed until December 7, when staff presented it to the Board alongside the revised merit lottery. The holistic plan retained the use of regional pathways, which capped the number of offers from each region.

***4** Following the December 7 work session, Board members exchanged several draft motions in anticipation of the December 17 regular meeting. However, on December 16, Keys-Gamarra emailed Brabrand to express concern that "there were no posted motions for us to vote on." McLaughlin wrote that "it is unacceptable that no motions/amendments/follow-ons were posted nor provided to the full Board until 4:30 p.m.," which was 30 minutes before the Board went into Closed Session.

At the December 17 meeting, the Board voted down the revised merit lottery proposal. The Board ultimately voted 10-1-1 (with McLaughlin abstaining and Anderson, who had supported the lottery, voting no) for a version of the proposed holistic plan. The Board's enacted plan rejected the proposed regional pathways in favor of guaranteed admission for 1.5% of each eighth-grade class. Because it was a variation on staff's proposed holistic plan, the public did not see the 1.5% plan until motions were posted just before the Board meeting.

Board member communications show a consensus that, in their view, the racial makeup of TJ was problematic and should be changed. Some Board members also expressed the belief that the process of revising TJ admissions had been shoddy and rushed along, with McLaughlin writing in emails that "this is not how the Board should conduct its business" and "in my 9 years, I cannot recall a messier execution of Board-level work." In an email after the final vote, she said she had "abstained largely because of the substandard process."

After the vote, several Board members were not sure whether the 1.5% guarantee would be based on the school a student actually attended or the one she was zoned to attend. Brabrand insisted that the Board had voted for "attending school," which "produced the geographic distribution the Board wanted."

Summary judgment "is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " ACLU v. Mote, 423 F.3d 438, 442 (4th Cir. 2005) (quoting Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 247 (1986)). "A genuine issue of material fact is one 'that might affect the outcome of the suit under the governing law.' " Metric/Kvaerner Fayetteville v. Fed. Ins. Co., 403 F.3d 188, 197 (4th Cir. 2005) (quoting Anderson, 477 U.S. at 248). There are no material facts in dispute and the parties agree that this case is ripe for summary judgment.

An association may sue 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); see also Md. Highways Contractors Ass'n, Inc. v. Maryland, 933 F.2d 1246, 1251 (4th Cir. 1991). The Coalition satisfies these requirements.

The Coalition is a membership organization with more than 200 members. Its leadership and core teams chose to pursue this case by unanimous consensus. It has members with children in seventh and eighth grade who have applied, or plan to apply, to TJ. These members would have standing to sue in their own right because the challenged policy renders their children unable to compete on a level playing field for a racial purpose. See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 719 (2007).

***5** The remaining Hunt factors are also not in dispute. The Coalition was formed precisely to oppose the Board's effort to change admissions at TJ. Because the Coalition seeks only prospective injunctive relief, individual participation of members as parties is not necessary. United Food and Com. Workers Union Local 751 v. Brown Grp., Inc., 517 U.S. 544, 546 (1996). The Coalition has standing to bring this action on behalf of its members.

Throughout this process, Board members and high-level FCPS officials expressed their desire to remake TJ admissions because they were dissatisfied with the racial composition of the school. A means to accomplish their goal of achieving racial balance was to decrease enrollment of the only racial group "overrepresented" at TJ–Asian Americans. The Board employed proxies that disproportionately burden Asian-American students. Asian Americans received far fewer offers to TJ after the Board's admissions policy overhaul.

Strict scrutiny applies to government actions "not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." Miller v. Johnson, 515 U.S. 900, 913 (1995). The record demonstrates that the Board harbored such a purpose. Strict scrutiny therefore applies, and the Board cannot show that its actions meet this demanding standard of judicial scrutiny.

Determining racial purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 266 (1977). Relevant factors include: (1) the impact of the official action; (2) the historical background of the decision; (3) the specific sequence of events leading up to the challenged decision; and (4) the legislative or administrative history ... especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports. Id. at 266-68. Impermissible racial intent need only be a motivating factor. It need not be the dominant or primary one. Id. at 265-66. The Board members need not harbor racial animus to act with discriminatory intent. See N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 233 (4th Cir. 2016). To trigger strict scrutiny, the Board need only pursue a policy at least in part because of, not merely in spite of, the policy's adverse effects upon an identifiable group. Pers. Adm'r of Mass, v. Feeney, 442 U.S. 256, 279 (1979).

Once strict scrutiny applies, the burden shifts to the Board to prove that the changes are narrowly tailored to further a compelling government interest. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). "This most exacting standard 'has proven automatically fatal' in almost every case." Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 316 (2013) (Scalia, J., concurring) (quoting Missouri v. Jenkins, 515 U.S. 70, 121 (1995) (Thomas, J., concurring)).

Here, no dispute of material fact exists regarding any of the Arlington Heights factors, nor as to the ultimate question that the Board acted with discriminatory intent. Under Arlington Heights, disparate impact is the starting point for determining whether the Board acted with discriminatory intent. The Board's overhaul of TJ admissions has had, and will have, a substantial disparate impact on Asian-American applicants to TJ.

***6** A comparison of publicly available data for the Class of 2025 with earlier classes tells much of the story. As depicted in the table below, the number and proportion of Asian-

American students offered admission to TJ fell following the challenged changes.

Class	Offers to Asian-American students	Asian American proportion of offers (rounded)
2025	299	54%
2024	355	73%
2023	360	73%
2022	316	65%
2021	367	75%
2020	335	69%

The proper method for determining the "impact of the official action," Arlington Heights, 429 U.S. at 266, is a simple before-and-after comparison. See McCrory, 831 F.3d at 231(finding impact sufficient to support an inference of discriminatory intent where African Americans disproportionately used each of the removed mechanisms to vote).

This case presents substantial evidence of disparate impact. The undisputed evidence demonstrates precisely how the Board's actions caused, and will continue to cause, a substantial racial impact. The Board instituted a system that does not treat all applicants to TJ equally. The new process sets aside seats for students at each middle school amounting to 1.5% of the school's eighth-grade class. The highest-evaluated students at each school–so long as they meet the minimum admissions requirements–gain admission to TJ. Those applicants who do not attain one of the allocated seats at their school are relegated to compete for about 100 total unallocated seats. The set-aside disproportionately forces Asian-American students to compete against more eligible and interested applicants (often each other) for the allocated seats at their middle schools.

The set-aside is only part of the equation. When applicants outside the top 1.5% are thrown into the unallocated pool, students are again treated unequally. This became publicly known when FCPS announced consideration of "Experience Factors" in the holistic evaluation. One of these factors is whether a student attends a middle school deemed "historically underrepresented at TJ." None of the six major FCPS TJ feeder schools qualify, so students at these schools are placed at a significant disadvantage in the unallocated pool compared to their peers at underrepresented schools.

It is clear that Asian-American students are disproportionately harmed by the Board's decision to overhaul TJ admissions. Currently and in the future, Asian-American applicants are disproportionately deprived of a level playing field in competing for both allocated and unallocated seats.

Placing the Board's actions in historical context leaves little doubt that its decision to overhaul the TJ admissions process was racially motivated. In a November 2020 white paper presented to the Board, staff noted that over the past ten years, the admissions process has undergone a series of changes that were intended to impact issues of diversity and inclusion, but these changes have not made a significant impact on the diversity of the applicants or admitted students. The supposed ineffectiveness of this decade-long tinkering provides the basis for understanding how 2020 events effected the Board's admissions changes.

Two specific triggering events accelerated the Board's process and timeline. First, the Virginia General Assembly passed a budget bill in March that required Governor's Schools to submit a report to the Governor on the existence of and progress towards diversity goals, including a description of admission processes in place or under consideration that promote access for historically underserved students; and outreach and communication efforts deployed to recruit historically underserved students. Second, the murder of George Floyd on May 25, 2020, shortly followed the release of the Class of 2024 admissions data on June 1, showing that the number of Black students admitted was too small to be reported.

***7** The Board and FCPS reacted by pushing TJ admissions changes. On June 7, Bonitatibus sent a statement to the TJ community that referenced the George Floyd murder and lamented that TJ "does not reflect the racial composition in FCPS," specifically noting the number of Black and Hispanic students TJ would have if it truly reflected FCPS. Around the same time, Corbett Sanders stated in a series of emails that she was "angry and disappointed" about the TJ admissions results and expected "intentful action forthcoming." She relayed a similar message to Brabrand, writing that "the Board and FCPS needed to be explicit in how we are going to address the under-representation of Black and Hispanic students." Cohen told a constituent that the number of Black students admitted was "completely unacceptable," and that the Board was "committed to examining and bettering" the admissions process. Later that month, Keys-Gamarra said at a Board meeting "in looking at what has happened to George Floyd, we now know that our shortcomings are far too great ... so we must recognize the unacceptable numbers of such things

as the unacceptable numbers of African Americans that have been accepted to TJ."

Over the summer of 2020, Keys-Gamarra, Brabrand, and Shughart participated in state-level task force meetings on admissions to Governor's Schools, after which Brabrand told the Board there "was talk about the state creating a four-year timeline for diversity, requiring Governor's schools to be within 5% of diversity in their local districts." The looming specter of a Richmond takeover pushed the Board to act quickly to change TJ admissions with an explicit eye towards its racial composition. As Brabrand testified, he believed this October 1 requirement to submit a report meant "we needed to look at our admissions process at TJ." In August, he told Corbett Sanders via email that "whatever the Board decides to do or not do in September will ultimately influence what the Governor and the Secretary of Education decide in January." Omeish wrote in a September email that she had "come to understand that the Virginia Department of Education plans to intervene if we do not."

The impetus to overhaul TJ admissions came from several sources, all of which confirm that the Board and high-level FCPS actors set out to increase and decrease the representation of certain racial groups at TJ to align with districtwide enrollment data. Board members promised action on TJ admissions that would specifically address the school's racial makeup. After the summer state task force, FCPS officials scrambled to meet a perceived deadline from Richmond to overhaul admissions with race in mind.

Arlington Heights requires consideration of "the 'specific sequence of events leading up to the challenged decision.' " McCrory, 831 F.3d at 227 (quoting Arlington Heights, 429 U.S. at 267). "In doing so, a court must consider '[d]epartures from the normal procedural sequence,' which may demonstrate that 'improper purposes are playing a role.' " Id. (quoting Arlington Heights, 429 U.S. at 267). Here, there are several indications that (1) the process for changing TJ admissions was unreasonably hurried and (2) there was a noticeable lack of public engagement and transparency–even among Board members. While the Board does not appear to have broken any procedural rules, the evidence shows that, for such a significant set of actions, the procedure was remarkably rushed and shoddy. All this suggests that the Board sought to move quickly because, as Board member Omeish put it in a November email, the Board was "currently incurring reputational/political risks" meaning that "now is better timing."

After they participated in the state task force, Brabrand, Shughart, and other staff developed a "Merit Lottery" proposal for TJ admissions. Brabrand presented the proposal at a Board work session on September 15, 2020. The presentation detailed a proposal to select TJ students via a lottery with regional pathways for five separate FCPS regions and the remaining jurisdictions that TJ serves. The presentation focused on the projected racial effect, presenting the results of modeling Shughart had run to demonstrate the effect of applying the lottery to three previous TJ classes. Namely, a drastic drop in Asian-American students at TJ. Brabrand's PowerPoint indicated that a final decision on implementing the lottery could be made as early as the October 8, 2020, regular Board meeting.

***8** The Board disrupted these plans. Three days after the September 15 work session, Corbett Sanders told Brabrand in an email that the plan released on Monday "has caused confusion in the community because of the over-reliance on the term lottery vs. merit." Once it became clear that most of the Board members were opposed to a lottery for various reasons, Brabrand told the Board on September 27 that staff would prepare and present an alternative admissions proposal. Corbett Sanders expressed hope that, unlike the first proposal, "[i]deally we will be able to look at the plan in advance of the meeting."

There was also the issue of the October state reporting deadline. Corbett Sanders emailed Brabrand on September 19 that "it is not the timing of the work session that is energizing the community. It is the timing of looking at TJ." She suggested that "we make it clear that we are responding to a statutory mandate." In an earlier email to Brabrand, she suggested that he "clarify that we have a statutory requirement to submit a plan to the state by 9 October." Yet other Board members questioned whether the Board had to overhaul admissions in such a short timeframe. McLaughlin told a constituent that "Brabrand has created a false urgency that FCPS must drastically overhaul the TJ Admissions process within a three week decision-making window." Tholen forwarded to Board colleague Pekarsky an email from a member of the community who said she had talked to the Virginia Department of Education and was told that the plan submitted to the state could be "aspirational" and "general" and there was "no mandate for Governor's Schools to produce a more diverse population."

Nevertheless, the Board pursued admissions policy changes. At an October 6 work session, the Board viewed a presentation from Brabrand that proposed a revised merit lottery. It would have set aside seats for the 100 highest-evaluated applicants and selected the remaining seats via lottery among the students who met the minimum requirements after holistic review. The Board also took several votes at the work session, something it has acknowledged it does not typically do. Among these, it unanimously voted to remove the longstanding admissions exam without any public notice that such a vote would occur. Then, while Board members expressed concern at a process that was moving too fast, the Board, at its regular meeting two days later, rejected a motion that would have directed Brabrand to engage stakeholders and allow for more community input before presenting a final plan. Tholen lamented to her constituents that the motion had failed and "the outreach to date has been one-sided and did not solicit input from all of our communities."

After the October 6 work session, with support for any sort of lottery waning, the Board sought an entirely holistic proposal. A next-step for the staff was to bring to the Board a holistic admissions approach that did not contain a lottery as an alternative plan. On November 16, FCPS staff released a white paper detailing a holistic option alongside the hybrid merit lottery. The white paper included voluminous racial modeling and discussion of efforts to obtain racial diversity at TJ. These plans were initially to be discussed at a November 17 work session, but multiple Board members protested that the white paper was posted far too late for proper consideration.

The TJ discussion was ultimately postponed until December 7, when Brabrand presented the hybrid merit lottery and the new holistic plan at another work session. The holistic method involved consideration of GPA, the Student Portrait Sheet, the Problem Solving Essay, and the "Experience Factors," including attendance at an underrepresented middle school, with regional caps similar to those in the Merit Lottery. Thereafter, Board members exchanged draft motions almost right up until the Board met to make a final decision on December 17. In the early morning of December 16, Keys-Gamarra emailed Brabrand and expressed concern that there were "no posted motions for us to vote on." McLaughlin chastised the Board both during the December 17 meeting and afterward, noting the failure to post any motions to the public or for the full Board until a half hour before the closed session began.

***9** At the December 17 meeting, the Board voted down the hybrid merit lottery proposal by a vote of 4-8. Then it voted on a motion to direct Brabrand to implement the holistic proposal, except replacing the regional pathways with guaranteed admission to the top 1.5% of the 8th grade class at each public middle school who meet the minimum standards. The 1.5% plan had not been presented publicly in any meeting before it was voted on. The vote passed by a margin of 10-1-1, with Anderson (who had voted for the lottery) voting no and McLaughlin abstaining. McLaughlin later wrote that she abstained at least in part because of the problematic process. She later wrote that "this is not how the Board should conduct its business," and that she "could not recall a messier execution of Board-level work in her nine years on the Board."

After the vote, Board members were unsure whether the top 1.5% was to be selected by a student's base school or attending school–a question with significant ramifications because some FCPS schools have Advanced Academic Program (AAP) Level IV centers that draw in students from other middle school zones to attend them. Multiple Board members questioned staff regarding this topic after the Board voted to implement the holistic plan. Brabrand insisted that the Board had voted for "attending school," which represented the "geographic distribution the Board wanted." In the rush to overhaul admissions, some Board members were confused about what they had done.

The evidence shows the process was rushed, not transparent, and more concerned with simply doing something to alter the racial balance at TJ than with public engagement. The decision to vote on eliminating the TJ admissions examination at a work session without public notice is an unusual procedure. The same can be said for the lack of public engagement. The Board held full, public meetings on renaming Mosby Woods Elementary School and Lee High School, but the public did not even see the proposed plan that the Board actually adopted for TJ admissions until 30 minutes before the final meeting.

"The legislative history leading to a challenged provision 'may be highly relevant, especially where there are contemporaneous statements by members of the decisionmaking body, minutes of its meetings, or reports.' " McCrory, 831 F.3d at 229 (quoting Arlington Heights, 429 U.S. at 268). Here, emails and text messages between Board members and high-ranking FCPS officials leave no material

dispute that, at least in part, the purpose of the Board's admissions overhaul was to change the racial makeup to TJ to the detriment of Asian-Americans.

The discussion of TJ admissions changes was infected with talk of racial balancing from its inception. This was apparent from the first proposal FCPS staff released after Brabrand attended the state task force and told the Board about a potential state plan to require demographic balance at Governor's Schools. The second slide of the initial merit lottery presentation declared that TJ should reflect the diversity of FCPS, the community and Northern Virginia. The subsequent slides, comparing historical TJ admissions data by race with the racial makeup of FCPS and focusing on the racial effect of implementing a lottery, make clear that diversity primarily meant racial diversity.

While a majority of the Board did not support Brabrand's lottery proposal, the dissenters nonetheless embraced racial balancing. McLaughlin, who opposed the lottery, proposed her own plan based on her experience as a university admissions officer. Referencing that the Supreme Court has ruled that diversity is a compelling state interest, Mclaughlin's proposal was designed to mimic those universities that use holistic admissions to ensure their accepted student pools reflect both the demographic diversity and the high-achievement of their applicant pools. To help the acceptance pool more closely reflect the applicant pool's demographic diversity, the proposal set aside seats for demographically diverse students. Tholen responded to McLaughlin's plan with similar skepticism of a lottery, stating that a lottery "seems to leave too much to chance" and asking: "will chance give us the diversity we are after?" Some Board members opposition to the lottery was at least in part due to a fear that a lottery might not go far enough to achieve racial balancing.

***10** At the next work session on October 6, the Board adopted a resolution requiring that FCPS' annual diversity report to the state "shall clarify that the goal is to have TJ's demographics represent the NOVA region." It passed 11-0-1, with only Meren abstaining. This was more than an aspirational goal to be achieved by encouraging Black and Hispanic students to apply to TJ. Board members sought to use geography to obtain their desired racial outcome. Corbett Sanders advised Brabrand in late September that "it will be important to better communicate why a geographic distribution of students across the county will result in a change in demographics to include more students that are FRM [qualify for free or reduced-price meals], ELL [English language learners], black, Hispanic, or twice exceptional." The day before the work session, she emailed a constituent that she was "urging the superintendent to modify his plan to take into account geographic diversity as well as students on free and reduced lunch, which should result in greater diversity in the demographics." Sizemore Heizer wrote to Brabrand to suggest that he frame his plan as "increasing diversity through redefining merit." Omeish used more aggressive language, writing that she planned to "support the proposal towards greater equity, to be clearly distinguished from equality."

Even aside from the statements confirming that the Board's goal was to bring about racial balance at TJ, the Board's requests for and consideration of racial data demonstrate discriminatory intent under McCrory. This does not mean "that any member of the [Board] harbored racial hatred or animosity toward [Asian Americans]." McCrory, 831 F.3d at 233. Discriminatory intent does not require racial animus. What matters is that the Board acted at least in part because of, not merely in spite of, the policy's adverse effects upon an identifiable group. Feeney, 442 U.S. at 279. That is the case here–the Board's policy was designed to increase Black and Hispanic enrollment, which would, by necessity, decrease the representation of Asian-Americans at TJ. Ass'n for Educ. Fairness, 2021 WL 4197458, at *17; see also Doe ex rel. Doe v. Lower Merion Sch. Dist., 665 F.3d 524, 553 (3d Cir. 2011) (discriminatory intent exists when a facially neutral policy was "developed or selected because it would assign benefits or burdens on the basis of race"); Lewis v. Ascension Parish Sch. Bd., 662 F.3d 343, 354 (5th Cir. 2011) (Jones, J., concurring) ("[t]o allow a school district to use geography as a virtually admitted proxy for race, and then claim that strict scrutiny is inapplicable because" it is facially race-neutral "is inconsistent with the Supreme Court's holdings"). Therefore, strict scrutiny applies.

The burden then shifts to the Board to demonstrate that the Board's actions were narrowly tailored to further a compelling interest. Adarand, 515 U.S. at 227. Strict scrutiny applies to facially neutral actions "motivated by a racial purpose or object" in the same manner as when they contain "express racial classifications." Miller, 515 U.S. at 913. The Board has not argued that its actions satisfy strict scrutiny.

The Supreme Court has recognized only two interests as sufficiently compelling to justify race-based action remedying past intentional discrimination and obtaining the benefits of diversity in higher education. Parents Involved,

551 U.S. at 720-23. No remedial interest exists here. In Parents Involved, the Court refused to extend the diversity rationale to K-12 schools, writing instead that Grutter had "relied upon considerations unique to institutions of higher education," and that lower courts that had applied it "to uphold race-based assignments in elementary and secondary schools" had "largely disregarded" Grutter's limited holding. Id. at 724-25.

The Board's main problem is its focus on the goal to have TJ reflect the demographics of the surrounding area, described primarily in racial terms. Far from a compelling interest, racial balancing for its own sake is "patently unconstitutional." Fisher, 570 U.S. at 311 (quoting Grutter, 539 U.S. at 330). The Board cannot transform racial balancing into a compelling interest "simply by relabeling it 'racial diversity.' " Id. (quoting Parents Involved, 551 U.S. at 732 (plurality opinion)). The school districts in Parents Involved tried various verbal formulations to deflect from their intent to racially balance schools through race-based transfers. See Id. at 725, 732 (plurality opinion). The Board here did not even bother with such "verbal formulations." Board members and high-level FCPS actors did not disguise their desire for TJ to represent the racial demographics of Fairfax County or Northern Virginia as a whole. Whether accomplished overtly or via proxies, racial balancing is not a compelling interest.

***11** Even if the Board could identify a compelling interest that might justify its racially discriminatory changes to the TJ admissions process, it still must prove that the changed admissions policy is "necessary" to accomplish that interest. Fisher, 570 U.S. at 312 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978)). The plan must be a "last resort" to accomplish the purportedly compelling interest. Parents Involved, 551 U.S. at 790 (Kennedy, J., concurring in part and concurring in the judgment). These steps and others, like further increasing the size of TJ or providing free test prep, could have been implemented before the Board defaulted to a system that treats applicants unequally in hopes of engineering a particular racial outcome. Since overhauling the process was not the last resort for the Board to accomplish its goals, the Board's actions were not narrowly tailored.

The Fourth Circuit has repeated that "once a plaintiff has established the violation of a constitutional or statutory right in the civil rights area, ... court[s] ha[ve] broad and flexible equitable powers to fashion a remedy that will fully correct past wrongs." McCrory, 831 F.3d at 239 (quoting Smith v. Town of Clarkton, 682 F.2d 1055, 1068 (4th Cir. 1982)). The proper remedy for a legal provision enacted with discriminatory intent is invalidation.

For the foregoing reasons, Plaintiff The Coalition for TJ is entitled to summary judgment, and the Defendant Fairfax County School Board's Motion for Summary Judgment should be denied. An appropriate Order shall issue.

All Citations

Not Reported in Fed. Supp., 2022 WL 579809

68 F.4th 864
United States Court of Appeals, Fourth Circuit.

COALITION FOR TJ, Plaintiff – Appellee,
v.
FAIRFAX COUNTY SCHOOL BOARD, Defendant – Appellant.
NAACP Legal Defense and Education Fund, Inc.; CASA Virginia; Asian American Youth Leadership Empowerment and Development; National Coalition on School Diversity; Poverty & Race Research Action Counsel; American Civil Liberties Union Foundation; American Civil Liberties Union Foundation of Virginia; Lawyers Committee for Civil Rights; Washington Lawyers Committee for Civil Rights; TJ Alumni for Racial Justice; Virginia State Conference of the NAACP; CASA, Inc.; Hispanic Federation; Hamkae Center; Massachusetts; California; Colorado; Delaware; District of Columbia; Hawaii; Illinois; Maine; Maryland; Michigan; Minnesota; New Mexico; New York; Oregon; Vermont; Washington; Professors of Social Science and Education Policy; United States of America, Amici Supporting Appellant.
Commonwealth of Virginia; Southeastern Legal Foundation; Judicial Watch, Incorporated; Allied Educational Foundation; the American Civil Rights Project; the Manhattan Institute; American Hindu Coalition; Chinese American Citizens Alliance, - Greater New York; Friends of Lowell Foundation; No Left Turn in Education; Parent Leaders for Accelerated Curriculum and Education NYC; The Richmond Jewish Coalition; United Against Antisemitism-Nova; Liberty Justice Center; the Asian American Coalition for Education; the Asian American Legal Foundation; Commonwealth of Virginia and 15 Other States; Fairfax County Parents Association; Fairfax County Association for the Gifted, Amici Supporting Appellee.

No. 22-1280
|
Argued: September 16, 2022
|
Decided: May 23, 2023

Synopsis

Background: Advocacy organization of public school parents brought action alleging that school board's admissions policy for magnet high school purposefully discriminated against Asian American students, in contravention of Fourteenth Amendment's Equal Protection Clause. The United States District Court for the Eastern District of Virginia, Claude M. Hilton, Senior District Judge, 2022 WL 579809, entered summary judgment in organization's favor, and board appealed.

Holdings: The Court of Appeals, King, Circuit Judge, held that:

school's race-neutral admissions policy did not have disparate impact on Asian American applicants, and

board's revision of school's admission policy was not motivated by invidious discriminatory intent against Asian American applicants.

Reversed and remanded.

Heytens, Circuit Judge, concurred and filed opinion.

Rushing, Circuit Judge, dissented and filed opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

***867** Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, Senior District Judge. (1:21-cv-00296-CMH-JFA)

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The Asian American Legal Foundation. Shawnna M. Yashar, Dunn Loring, Virginia, for Amici Fairfax County Parents Association and Fairfax County Association for the Gifted.

Before KING, RUSHING, and HEYTENS, Circuit Judges.

Opinion

Reversed and remanded by published opinion. Judge King wrote the majority opinion, in which Judge Heytens joined. Judge Heytens wrote a concurring opinion. Judge Rushing wrote a dissenting opinion.

KING, Circuit Judge:

***871** In this appeal, we are called upon to address a single question: whether the admissions policy (hereinafter the "challenged admissions policy," or the "policy") adopted by Virginia's Fairfax County School Board (the "Board") in 2020 for use at Thomas Jefferson High School for Science & Technology ("TJ") purposefully discriminates against Asian American students, in contravention of the Fourteenth Amendment's Equal Protection Clause. In March 2021, the Coalition for TJ (the "Coalition") — an advocacy organization of Fairfax County public school parents — commenced this litigation against the Board in the Eastern District of Virginia, seeking to have the challenged admissions policy invalidated as unconstitutional.

In February 2022, following the submission by the parties of cross-motions for summary judgment, the district court ruled that the challenged admissions policy violates the Fourteenth Amendment's guarantee of equal protection. More specifically, the court concluded that the policy exacts a disparate impact on Asian American applicants to TJ, that it was adopted by the Board with invidious discriminatory intent, and that it fails to satisfy strict scrutiny review. On that basis, the court awarded summary judgment to the Coalition, denied the Board's summary judgment motion, and enjoined the Board from any further use of the policy.

The Board thereafter sought a stay in this Court of the district court's order pending appeal, which we granted in March 2022. After thorough consideration of the record and the appellate contentions, we are satisfied that the challenged admissions policy does not disparately impact Asian American students and that the Coalition cannot establish that the Board adopted its race-neutral policy with any discriminatory intent. Moreover, we are satisfied that the policy passes constitutional muster under a rational basis standard of review. Accordingly, it is the Board — not the Coalition — that is entitled to summary judgment on the Equal Protection claim. As explained herein, we reverse the judgment of the district court and remand for entry of summary judgment in favor of the Board.

I.

A.

1.

Consistently ranked among the nation's best public high schools, TJ is a highly ***872** selective magnet school located in Alexandria, Virginia. TJ is one of Virginia's 19 so-called "Academic-Year Governor's Schools" — specialized schools that focus on advanced studies and require students to apply for admission — and it is operated by Fairfax County Public Schools ("FCPS"). *See* J.A. 30.[1] The majority of TJ's students reside in Fairfax County, but TJ also accepts applications from students in nearby Arlington, Loudoun, and Prince William counties, and from the City of Falls Church.

TJ's historically rigorous admissions standards are established by the Board, a 12-member elected body that oversees the public schools of Fairfax County. Prior to the Board's 2020 adoption of the challenged admissions policy, applicants seeking to enroll at TJ in the ninth grade were required to reside in one of the five above-mentioned participating school divisions; to possess a minimum grade point average of 3.0; and to have taken a course in algebra. Following payment of a $100 application fee, the eligible students were administered three standardized tests. Applicants who achieved certain rankings on the standardized tests would proceed to a "semi-finalist" selection round, wherein they would sit for an additional examination comprised of various writing prompts and a problem-solving essay. *See* J.A. 41. The semi-finalists were also to submit two teacher recommendations. At the conclusion of the process, students were selected from the semi-finalist group based on an "holistic review" of their application materials. *Id.* at 42.

The pre-2020 admissions process at TJ tended to produce incoming classes that were drawn principally from a limited group of "feeder" middle schools in Fairfax County. Those TJ classes also included very few low-income students, few English-language learners, few students receiving free or

reduced-price meals, few special education students, and just a few Black, Hispanic, or multiracial students. In an effort to advance TJ's student body diversity by "improv[ing] the potential for underrepresented students to gain admissions," the Board made numerous revisions to TJ's admissions system between 2010 and 2020. *See* J.A. 445. Yet the Board's adjustments failed to produce any "significant impact on the diversity of the applicants or admitted students" at TJ. *Id.* In 2019, for example, 71.5% of TJ's student body was comprised of Asian American students, and white students accounted for another 19.5%. *Id.* at 587.

2.

In May 2020, the FCPS staff presented the Board with a series of potential revisions to TJ's admissions process that were designed to "promote diversity in many forms." *See* J.A. 779. FCPS's proposed "admissions pathways" sought to "maintain[ ] a high level of rigor" in the application process while also "providing fair and equitable access to all students who have the potential to succeed at TJ," specifically by increasing the number of offers extended to students at middle schools that were historically poorly represented at TJ; to low-income and special education students; and to students engaged in community service and in school leadership activities. *Id.* at 780-84.

Shortly after the Board's May 2020 consideration of the proposed "admissions pathways," FCPS published the admissions statistics for TJ's incoming class of ***873** 2024. [2] That data indicated that the number of Black students admitted to TJ's incoming freshman class was "too small for reporting" — a designation meaning that "10 or fewer" Black students had been extended offers of admission to TJ's class of 2024. *See* J.A. 561-63. Following the release of those admissions statistics as well as the highly-publicized police killing of George Floyd in Minnesota, TJ's Principal, Ms. Ann Bonitatibus, wrote in a June 2020 message to the school's students and families that "recent events in our nation with black citizens facing death and continued injustices remind us that we each have a responsibility to our community to speak up and take actions that counter racism and discrimination in our society." *Id.* at 516. Principal Bonitatibus went on to observe that the TJ community did "not reflect the racial composition in FCPS," and her message called for adopting a curriculum geared toward "prepar[ing] TJ graduates for a truly diverse and culturally responsive world." *Id.* at 517.

Also in June 2020, the Board received correspondence from then-Virginia Secretary of Education Atif Qarni and state Senator Scott Surovell calling attention to a recently enacted state budget that required each Academic-Year Governor's School to "set diversity goals for its student body," to "develop a plan to meet said goals," and to "submit a report to the Governor by October 1 of each year on its goals." *See* J.A. 789, 795. Qarni and Surovell expressed concern that Virginia's Governor's Schools — and TJ in particular — had historically admitted few underserved and disadvantaged students. Following receipt of those comments, members of the Board likewise voiced their frustrations with the TJ student body's lack of diversity. The Board's Chair, Karen Corbett Sanders, stated that the Board and FCPS "needed to be explicit in how we are going to address the underrepresentation" of Black and Hispanic students at TJ, and Board member Karen Keys-Gamarra insisted at a June meeting that, "in looking at what has happened to George Floyd, we know that our shortcomings are far too great ... so we must recognize the ... unacceptable numbers of African Americans that have been accepted to TJ." *Id.* at 259, 426.

Later in the Summer of 2020, Education Secretary Qarni convened a statewide task force intended to address the Commonwealth's concerns with admissions standards and barriers to access at the Governor's Schools. Various members of the Board, FCPS staff members, and FCPS Superintendent Dr. Scott Braband attended those task force meetings.

The plaintiff Coalition, meanwhile, was organized during the summer by Asian American parents with children who had either applied to or planned to apply to TJ. The Coalition's members were primarily concerned with potential modifications to the TJ admissions process, and charged that the Commonwealth's task force possessed an "Anti-Asian" motivation. *See* J.A. 800. In an August 2020 email responding to the Coalition's early criticisms, Secretary Qarni — who explained his perspective as "an Asian American who has faced racism and understand[s] the challenges of marginalized groups" — rejected the Coalition's "outrageous claims" and emphasized TJ's "huge problem" with student diversity and inclusion matters, including its share of "children from Asian working-class families." *Id.*

3.

At a public "work session" conducted by the Board on September 15, 2020, Superintendent ***874** Braband

proposed a set of modifications to TJ's admissions process that he termed the "merit lottery proposal." *See* J.A. 291. Dr. Braband's merit lottery proposal advocated for a "comprehensive approach" to admissions that would "enhance diversity and inclusion at TJ," urging that TJ "should reflect the diversity of FCPS, the community and Northern Virginia." *Id.* at 293. Pursuant to the merit lottery proposal, the application fee, standardized test, problem-solving essay, and teacher recommendation components would be removed from TJ's admissions process, while the minimum required grade point average would increase from 3.0 to 3.5. The lottery proposal also would have assigned applicants to regional "lottery pathways" based on their residence. *Id.* at 303-04. Those "pathways" would receive an equal number of seats in each incoming TJ class, and qualified students would be randomly selected from each regional group. Dr. Braband's presentation included graphs projecting the merit lottery proposal's impact on TJ's racial demographics, its share of economically disadvantaged students, and the proportion of English-language learners expected in the incoming freshman class.

Following discussion of the merit lottery proposal, the Board requested that Dr. Braband engage in "community outreach," evaluate a "school-based ... approach in place of one based on region," and bring a revised admissions proposal to the Board's October 2020 meeting. *See* J.A. 883-84. The merit lottery proposal proved to be controversial in the TJ community, and the Coalition vocally opposed it, issuing a September 23, 2020, press release contending that "[a]ll racial minorities will lose in the new lottery system." *Id.* at 886. [3]

On October 6, 2020, Dr. Braband presented a "revised merit lottery proposal" to the Board. *See* J.A. 520. His revised proposal retained the merit lottery proposal's use of regional, merit-based "pathways" for all but 100 of the seats in each incoming class at TJ. Those 100 seats would be filled first by the overall "highest-evaluated" applicants, who would be identified by "a holistic review of their application." *Id.* at 530. The "holistic review" was to be based on a "portrait sheet" describing the applicant's skills; a problem-solving essay; and four "Experience Factors," including the applicant's special education status, eligibility for free or reduced-price meals, status as an English-language learner, and attendance at a historically underrepresented public middle school. *Id.* at 528. Dr. Braband also proposed a variety of "targeted outreach" methods to engage with the public about the revised proposal, including offering presentations to eighth grade students and parents. *Id.* at 535. The Board, however, took no direct action on the revised merit lottery proposal. It instead voted to remove the $100 application fee and the standardized tests from TJ's admissions process, and asked Dr. Braband to develop a ***875** non-lottery admissions plan for the Board's consideration.

Following additional Board meetings throughout October 2020 at which public comments on the proposed TJ admissions policies were received, Dr. Braband prepared and presented a new, standalone "holistic review" proposal to the Board. *See* J.A. 1100. Under that proposal, a certain number of applicant seats would be allocated to each of TJ's five participating school divisions, and all applicants within those divisions would then be assessed based on the aforementioned student "portrait sheet," the problem-solving essay, and the four "Experience Factors." Relevant here, unlike his presentation describing the original merit lottery proposal, Dr. Braband's presentation of the "holistic review" proposal made no projections of the proposed policy's impact on TJ's student demographics, whether racial or otherwise.

The Board met again on December 17, 2020, at which time it heard additional comments from community members regarding TJ's admissions process. During that meeting, the Board rejected Dr. Braband's merit lottery proposal by a vote of 8-4. It ultimately voted 10-1-1, however, to adopt a modified version of the new "holistic review" proposal — that being the challenged admissions policy at issue in this appeal. Under the Board's adopted policy, which was used to select TJ's class of 2025, each public middle school within TJ's participating school divisions is allocated a number of seats in the incoming freshman class equal to 1.5% of that school's eighth grade student population. Within each middle school, prospective students are evaluated on the basis of grade point average, the "portrait sheet," the problem-solving essay, and the "Experience Factors." After each middle school's allocated seats are filled, all remaining applicants — regardless of their attending middle school, and including private-and home-school students — compete under the same criteria for the roughly 100 remaining seats.

Importantly, in adopting the challenged admissions policy, the Board resolved that "[t]he admission process must use only race-neutral methods that do not seek to achieve any specific racial or ethnic mix, balance or targets." *See* J.A. 2224. That race-neutral mandate was subsequently codified in regulations promulgated by Dr. Braband to implement the policy. The policy thus provides in part that "[c]andidate name, race, ethnicity, or sex collected on the application form

will not be provided to admissions evaluators. Each applicant will be identified to the evaluators only by an applicant number." *Id.* at 697.

4.

With the challenged admissions policy in place by the Spring of 2021, the number of applications for TJ's class of 2025 increased by nearly 1,000 students over the prior application cycle. The mean grade point average among those applicants was higher than it had been in five years and, in terms of demographics, the class of 2025 included markedly more low-income students, English-language learners, and girls than had prior classes at TJ. Notably, for the first time in more than a decade, all 28 middle schools in Fairfax County sent students to TJ in 2021. By contrast, in 2020, eight of the County's middle schools had received zero offers of admission to TJ.

As to the challenged admissions policy's impact on Asian American students, while slightly less than half of TJ's applicants in 2021 identified as Asian American (specifically, 48.59%), well over half of the offers extended (54.36%) went to those students. That share of offers far outpaced the proportion of seats awarded to the other racial and ethnic groups represented in the applicant pool. Specifically, Black students ***876** received 7.9% of offers, and comprised 10% of applicants; Hispanic students were given 11.27% of offers, and made up 10.95% of applicants; white students received 22.36% of offers while representing 23.86% of applicants; and "multiracial/other" students received 4.91% of offers while making up 6.6% of applicants. *See* J.A. 44. As the Coalition emphasizes in these proceedings, the 54.36% of offers extended to Asian American students in 2021 was somewhat lower than it had been in the previous five application cycles, when the share of offers awarded to those students ranged from 65% to 75%. Nevertheless, in the 2021 application cycle, Asian American students attending middle schools historically underrepresented at TJ saw a sixfold increase in offers, and the number of low-income Asian American admittees to TJ increased to 51 — from a mere *one* in 2020.

B.

1.

In March 2021, as TJ's class of 2025 was being assembled, the Coalition initiated this civil action against the Board in the Eastern District of Virginia. *See Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21-cv-00296 (E.D. Va. Mar. 25, 2022), ECF No. 1 (the "Complaint").[4] The Complaint pursues a single claim under 42 U.S.C. § 1983, alleging that the challenged admissions policy runs afoul of the Equal Protection Clause. Seeking injunctive and declaratory relief, the Complaint specifically alleges that, although the policy is facially race-neutral, the Board adopted it with a racially discriminatory purpose, insofar as the Board "specifically intended to reduce the percentage of Asian-American students who enroll in TJ," and "intended [for the policy] to act as a proxy in order to racially balance TJ." *Id.* at 1, 23. Accordingly, the Complaint alleges that, under the Equal Protection framework established by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979), the challenged admissions policy is subject to, and necessarily fails, strict scrutiny review.

On December 3, 2021, following the district court's denial of the Coalition's request for a preliminary injunction and the Board's motion to dismiss the Complaint, the parties filed cross-motions for summary judgment. For its part, the Coalition maintained that the challenged admissions policy imposes a "significant disparate impact" on Asian American applicants to TJ, principally because a "before-and-after admissions data comparison" reveals that the proportion of Asian American students offered admission to TJ "plummeted" following the policy's 2020 adoption. *See Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21-cv-00296, at 14 (E.D. Va. Dec. 3, 2021), ECF No. 98. The Coalition further asserted that the Board's adoption of the policy was "motivated by an impermissible racial purpose," identifying as support alleged procedural irregularities in the Board's process and comments made by individual Board members. *Id.* at 19. Finally, the Coalition reiterated its position that the policy cannot survive strict scrutiny review, rendering summary judgment on its behalf appropriate.

The Board, meanwhile, argued that the Coalition is unable to maintain a claim of ***877** intentional discrimination against Asian American students, given that the Coalition's

favored before-and-after data comparison does not prove a cognizable "disparate impact." It also emphasized that there is no evidence that the Board adopted the challenged admissions policy in order to intentionally reduce the number of Asian American students enrolled at TJ.

2.

By its memorandum opinion and order of February 25, 2022, the district court granted the Coalition's summary judgment motion, denied the Board's motion, and enjoined the Board from any further use of the challenged admissions policy. *See Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21-cv-00296 (E.D. Va. Feb. 25, 2022), ECF Nos. 143 & 144 (the "Summary Judgment Opinion" and the "Summary Judgment Order," respectively). The court first ruled that the policy "has had, and will have, a substantial disparate impact on Asian-American applicants." *See* Summary Judgment Opinion 14. Citing our decision in *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), the court related that "[t]he proper method for determining the impact of the official action is a simple before-and-after comparison." *Id.* at 14-15 (internal quotation marks omitted). And with that year-over-year metric in mind, the court concluded that the proportional decline in offers extended to Asian American students after the policy's adoption "tells much of the story." *Id.* at 14. Additionally, the court decided that the policy's 1.5% seat set-aside for each middle school's eighth grade class, plus the "Experience Factor" weighing an applicant's attendance at a historically underrepresented public middle school, combined to "deprive[ ] [Asian American applicants] of a level playing field in competing" for seats at TJ. *Id.* at 16.

Moving on, the district court concluded that the Board sought to achieve a "racial balance" at TJ by increasing the school's representation of Black and Hispanic students at the expense of Asian American students, and that the Board's actions in that regard revealed an invidious discriminatory intent. *See* Summary Judgment Opinion 24. The court relied on the 2020 Virginia budget's requirement for Governor's Schools to report annually on "diversity goals" as a "triggering event" for the Board's "racially motivated" decision to refine the TJ admissions process, and resolved that the Board's "discussion of TJ admissions changes was infected with talk of racial balancing from its inception." *Id.* at 17, 25. The court focused extensively on what it called the Board's "shoddy" and "unreasonably hurried" process and a "lack of public engagement" during its consideration of the various admissions proposals. *Id.* at 19. And the court concluded that the Board's "requests for and consideration of racial data" — in the form of Dr. Braband's September 2020 presentation of the rejected merit lottery proposal and its projections of that proposal's effects on TJ's racial and economic demographics — demonstrated that "diversity primarily meant racial diversity." *Id.* at 25, 27. Ultimately, the court based its ruling that "the Board acted at least in part because of ... the policy's adverse effects upon" Asian American students on its separate conclusion that "the Board's policy was designed to increase Black and Hispanic enrollment, which would, by necessity, decrease the representation of Asian-Americans at TJ." *Id.* at 27-28.

After concluding that the challenged admissions policy is subject to — and fails — strict scrutiny review, the district court awarded summary judgment to the Coalition, denying the Board's cross-motion for ***878** summary judgment in so ruling. The Board sought a stay of the Summary Judgment Order pending appeal, which the district court denied on March 11, 2022. On March 14, the Board noticed this appeal, and on March 18 the Board requested a stay pending appeal from this Court. We granted a stay of the Summary Judgment Order on March 31, 2022, and at the same time expedited the proceedings. We possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

On appeal, the Board contends that the undisputed facts preclude the Coalition from proving its Equal Protection claim, in that the challenged admissions policy levies no racially disparate impact on Asian American students and the Board possessed no intent to strike a "racial balance" — or to otherwise target Asian American students — in its adoption of the policy. Accordingly, the Board maintains that we should reverse the district court's judgment and remand for judgment to be entered in the Board's favor.

We review an award of summary judgment de novo. *See King v. Rumsfeld*, 328 F.3d 145, 148 (4th Cir. 2003). Where, as here, "cross-motions for summary judgment are before a court, the court examines each motion separately, employing the familiar standard under Rule 56 of the Federal Rules of Civil Procedure." *See Fusaro v. Howard*, 19 F.4th 357, 366 (4th Cir. 2021) (internal quotation marks omitted). Pursuant to that standard, summary judgment is appropriate when —

viewing the facts in the light most favorable to the nonmoving party — the movant shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See FDIC v. Cashion*, 720 F.3d 169, 173 (4th Cir. 2013) (quoting Fed. R. Civ. P. 56(a)). Critically, the nonmoving party is obliged to "set out specific facts showing a genuine issue for trial," *id.* at 180, and, in the event of "a complete failure of proof concerning an essential element of the nonmoving party's case," summary judgment will serve to "isolate and dispose of factually unsupported claims or defenses," *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

III.

Public education is among the domains "where states historically have been sovereign," *see United States v. Lopez*, 514 U.S. 549, 564, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), and "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools," *see Milliken v. Bradley*, 418 U.S. 717, 741, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). Indeed, "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint." *See Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). Nevertheless, the actions of public school boards and administrators may still be subject to constitutional inquiry.

In that regard, the Fourteenth Amendment's Equal Protection Clause bars "any State" from "deny[ing] to any person within its jurisdiction the equal protection of the laws." *See* U.S. Const. amend. XIV, § 1. The Supreme Court has explained that the "central purpose" of the Equal Protection Clause is to "prevent the States from purposefully discriminating between individuals on the basis of race." *See Shaw v. Reno*, 509 U.S. 630, 642, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). Yet "[t]he equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification" ***879** — indeed, so long as "the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern." *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271-72, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). Purposeful racial discrimination may occur where state action expressly classifies individuals on the basis of their race, *see Grutter v. Bollinger*, 539 U.S. 306, 326-27, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); where a facially race-neutral policy "impartial in appearance" is in fact applied unevenly based on race, *see Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); or where a race-neutral policy which is applied evenhandedly results in a racially disproportionate impact and was motivated by discriminatory intent, *see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *see also Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

Thus, to demonstrate that an evenhanded, facially race-neutral policy like that challenged here is constitutionally suspect, the plaintiff pursuing an Equal Protection challenge must show (1) that the policy exacts a disproportionate impact on a certain racial group, and (2) that such impact is traceable to an "invidious" discriminatory intent. *See Arlington Heights*, 429 U.S. at 264-65, 97 S.Ct. 555; *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 302 (4th Cir. 2020); *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 543-44 (3d Cir. 2011). Only then will such a policy be subject to strict scrutiny review, in which event the state entity defending the challenged policy bears the burden of showing that its policy is "narrowly tailored to serve a compelling interest." *See Hunt v. Cromartie*, 526 U.S. 541, 543, 546, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999). Otherwise, if the plaintiff is unable to demonstrate purposeful racial discrimination, the rational basis standard of review applies, where the plaintiff must establish that the challenged policy is not "rationally related to legitimate government interests." *See Feeney*, 442 U.S. at 272, 99 S.Ct. 2282; *Doe*, 665 F.3d at 544, 556.

Against that backdrop, we are satisfied that the Board's adoption of the challenged admissions policy fully comports with the Fourteenth Amendment's demand of equal protection under the law. On this record, and with application of the proper legal standard, the policy visits no racially disparate impact on Asian American students. Indeed, those students have had greater success in securing admission to TJ under the policy than students from any other racial or ethnic group. Moreover, the Coalition fails to identify any evidence suggesting that the Board adopted the policy "at least in part because of" some calculated adverse effect on Asian American students — that is, the Coalition makes no showing of discriminatory intent by the Board. *See Feeney*, 442 U.S. at 277, 279, 99 S.Ct. 2282. Finally, the challenged admissions policy faces no obstacle under rational basis review, and so the Coalition has failed to meet its burden with respect to an Equal Protection claim. In these circumstances, we are constrained to reverse the district court's judgment and remand for entry of summary judgment in favor of the Board.

A.

1.

We begin with the question of whether the challenged admissions policy imposes any "racially disproportionate" or "disparate" impact on Asian American students. *See Arlington Heights*, 429 U.S. at 265, 97 S.Ct. 555. To establish such an effect — ***880** which serves as an "important starting point" for the ultimate inquiry as to "invidious racial discrimination" — an Equal Protection plaintiff must prove that the challenged state action "bears more heavily on one race than another." *Id.* at 265-66, 97 S.Ct. 555 (quoting *Davis*, 426 U.S. at 242, 96 S.Ct. 2040). In this situation, the district court based its determination that the policy "has had, and will have, a substantial disparate impact on Asian-American applicants to TJ" on the fact that "a simple before-and-after comparison" reveals that "the number and proportion of Asian-American students offered admission to TJ fell following the challenged changes." *See* Summary Judgment Opinion 14-15. In other words, the court focused *solely* on how Asian American applicants fared in attaining offers of admission prior to and following the policy's adoption — it paid no mind to how *other* racial or ethnic groups made out under the policy. The court's analysis went fatally awry in that regard.

The Coalition defends the district court's flawed calculus on appeal, insisting that the Supreme Court's decision in *Arlington Heights* compels such a narrow comparison between the old and the new in searching for a disparate impact. *See* Br. of Appellee 25. *Arlington Heights*, however, mandates nothing of the sort. Nor does our 2016 decision in *North Carolina State Conference of the NAACP v. McCrory*, which the district court erroneously relied on as sanctioning its chosen before-and-after evaluation.

To the contrary, *McCrory* — which weighed an Equal Protection challenge to North Carolina election law provisions — declined to apply an election-to-election voter turnout comparison in assessing alleged disproportionate impacts on Black voters. *See* 831 F.3d 204, 230-32 (4th Cir. 2016) (concluding that the district court "erred in suggesting that Plaintiffs had to prove that the challenged provisions prevented African Americans from voting at the same levels they had in the past," in part because the relevant elections were "highly sensitive to factors likely to vary from election to election"). And *McCrory*, to be certain, is no outlier among our sister circuits in rejecting a year-over-year approach to a disparate impact analysis. *See, e.g., Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 46 (1st Cir. 2021) (assessing an Equal Protection challenge to a Boston public school admissions policy, and concluding that "comparing the projected admissions under the Plan to prior admissions under the predecessor plan" was not "apt for purposes of determining adverse disparate impact"); *Lewis v. Ascension Par. Sch. Bd.*, 806 F.3d 344, 361-62 (5th Cir. 2015) (disapproving a before-and-after approach to disparate impact in an Equal Protection challenge to a school redistricting plan because of "difficulty isolating the operative factor").

Ultimately, the Coalition identifies no precedent standing for the proposition that a particular racial or ethnic group's performance under a prior policy is "the proper baseline for comparison" in a disparate impact inquiry concerning a newly enacted policy. *See Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 22-1280, at 7 (4th Cir. Mar. 31, 2022), ECF No. 27 (Heytens, J., concurring). And that should come as no surprise, because an assessment of the attainments of one group in isolation will not answer the question of whether a challenged policy "bears more heavily *on one race than another.*" *See Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555 (emphasis added). Moreover, as the Board convincingly explains, it would make little sense for us to use a prior government policy as the "proper baseline" for scrutinizing a ***881** replacement version of the same. That approach would simply turn "the previous status quo into an immutable quota," thereby opening a new policy that might impact a public institution's racial demographics — even if by wholly neutral means — to a constitutional attack. *See* Br. of Appellant 25.

The district court thus erred in applying a strictly temporal method for assessing racially disparate impact. The proper metric in these circumstances requires, first, an evaluation of a given racial or ethnic group's share of the number of applications to TJ versus that group's share of the offers extended — in other words, the group's "success rate" in gaining admission to TJ under the challenged admissions policy. That rate of success, in turn, must then be compared to how separate, otherwise similarly situated groups fared in securing offers of admission. *See McCrory*, 831 F.3d at 231, 233 (concluding that proper method for assessing disparate impact under *Arlington Heights* was whether, relative to other racial groups, "African Americans disproportionately used"

voting mechanisms removed by challenged election laws and "disproportionately lacked" required voter identification); *see also Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-51, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (explaining that, in an employment discrimination action, the "proper basis" for inquiring into disparate impact was comparing "the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs"); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977) (same). The Coalition, in sum, was obliged to show that, under the challenged admissions policy, Asian American students face proportionally more difficulty in securing admission to TJ than do students from other racial or ethnic groups. Only then could it be evident whether the policy "bears more heavily on one race than another." *See Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555. Put most simply, searching for a racially "disproportionate" impact necessitates a relative inquiry among racial groups, not a simple appraisal of one group's performance over time.

2.

When the proper disparate impact analysis is applied in this situation, it is clear that Asian American applicants to TJ suffer from no such detriment. The admissions data for TJ's class of 2025, the first class selected using the challenged admissions policy, tells much of — if not all of — the story. In 2021, Asian American students accounted for 48.59% of the applications to TJ's class of 2025, but actually secured 54.36% of the admission offers made for that class. By contrast, 10% of the TJ applicants in 2021 identified as Black, while only 7.9% of offers went to Black students; Hispanic students comprised 10.95% of the applicant pool and received 11.27% of offers; white students represented 23.86% of applicants and received 22.36% of offers; and 6.6% of applicants were "multiracial/other" students, whereas only 4.91% of the offers extended went to those students. *See* J.A. 44. Asian American applicants were thus the only racial or ethnic group to receive offers notably in excess of its share of the applicant pool in 2021, producing the highest admissions "success rate" of any such group. And we observe that the Coalition's preferred use of year-over-year admissions statistics for assessing disparate impact does not paint a grim picture for Asian American students. After the challenged admission policy's adoption, low-income Asian American students, as well as Asian American students attending middle schools theretofore poorly represented at ***882** TJ, saw far more offers of admission to TJ than they had in earlier years.

The district court also resolved that the challenged admissions policy's reservation of seats for each middle school equivalent to 1.5% of the specific middle school's eighth grade class — and its "Experience Factor" that takes stock of an applicant's attendance at a historically underrepresented middle school — somehow contribute to the policy's perceived adverse blow to Asian American applicants. But neither the Summary Judgment Opinion nor the Coalition on appeal have meaningfully explained how Asian American students are differently situated from others when it comes to the operation of those two features of the policy.[5] In any event — and critically for purposes of summary judgment — an application of elementary arithmetic shows that Asian American students, as a class, experience no material disadvantage under the policy's functioning. In fact, they do better in securing admission to TJ than students from any other racial or ethnic group.

That being so, the Coalition's core assertion that the challenged admissions policy disproportionately impairs Asian American students' ability to enroll and study at TJ is without merit. Because the Coalition cannot establish that essential element of its Equal Protection claim, the claim fails as a matter of law and the Board is entitled to summary judgment for that reason. *See Arlington Heights*, 429 U.S. at 264-65, 97 S.Ct. 555; *Palmer v. Thompson*, 403 U.S. 217, 224, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971) ("[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.... If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons."); *Raymond*, 981 F.3d at 302 (explaining that, in order to prevail on an Equal Protection challenge to a voter identification law, plaintiffs had to prove that the measure "was passed with discriminatory intent and has an actual discriminatory impact").

B.

Though we recognize that we could end our analysis of the Coalition's Equal Protection Claim at this juncture, we are also satisfied that, if the challenged admissions policy actually imposed a disparate impact on Asian American applicants

to TJ, the undisputed facts would preclude the Coalition from proving that the impact was driven by an invidious discriminatory intent. The evidence relied on by the Coalition in furtherance of its discriminatory intent contention is far too sparse to permit an inference of nefarious design and, crucially, the reasoning applied by the district court — and advanced by the Coalition on appeal — to deduce such an intent is proscribed by well-established Equal Protection doctrine. Consequently, the discriminatory intent aspect of the Coalition's Equal Protection claim must also fail.

***883** 1.

As explained heretofore, a racially disproportionate impact, while necessary to an Equal Protection claim, is not alone sufficient to render a race-neutral state law or policy unconstitutional — impact, that is, "is not the sole touchstone of an invidious racial discrimination." *See Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Rather, proof of a racially discriminatory intent is also required. *See Arlington Heights*, 429 U.S. at 265-66, 97 S.Ct. 555. In that regard, an Equal Protection plaintiff need not establish that the challenged policy "rested solely on discriminatory purposes," or even that "a particular purpose was the 'dominant' or 'primary' one." *Id.* at 265, 97 S.Ct. 555. But if a discriminatory purpose "has been a motivating factor in the decision ... judicial deference is no longer justified." *Id.* at 265-66, 97 S.Ct. 555.

Determining whether such a "motivating factor" was at play calls for "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *See Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555. Absent a policy that is "unexplainable on grounds other than race," the reviewing courts are entitled to look to, inter alia, the "historical background" of the challenged policy; the "specific sequence of events leading up to" the policy's enactment; any "departures from the normal procedural sequence"; and the "legislative or administrative history" pertaining to the policy. *Id.* at 266-68, 97 S.Ct. 555. Ultimately, proving discriminatory intent requires more than sheer "awareness of consequences." *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). The "decisionmaker" — here, the Board — must instead be shown to have "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* Stated differently, that a given law or policy may foreseeably have some adverse impact on a particular racial or ethnic group is not sufficient to demonstrate invidious discriminatory intent — the "decisionmaker" must set out with that very purpose in mind. *Id.*

2.

The Complaint alleges that "[o]verhwelming public evidence" demonstrates that the challenged admissions policy was "adopted with the purpose of disadvantaging Asian-American students" and that the policy specifically seeks "to reduce the percentage of Asian-American students who enroll in TJ." *See* Complaint 1-2. But the Coalition has never identified any direct evidence of discriminatory intent. To the contrary, the record is devoid of any statements by Board members, meeting minutes, or other documentation showing that the policy was adopted "because of" a specific intent to reduce the number of Asian American students at TJ or to otherwise bring hardship to bear on those students. *See Feeney*, 442 U.S. at 279, 99 S.Ct. 2282. The policy itself stands directly and forcibly in the way of such a finding. Not only is the policy facially race-neutral, it is fully race-*blind*, providing that "[t]he admission process must use only race-neutral methods" and that "[c]andidate name, race, ethnicity, or sex ... will not be provided to admissions evaluators." *See* J.A. 697, 2224. The Board's adoption of the policy is therefore amply "explainable on grounds other than race." *See Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555. In that circumstance, the district court could only claim to infer discriminatory intent from the Board's supposed "goal of achieving racial balance" at TJ, and its alleged use of "proxies that disproportionately burden ***884** Asian-American students." *See* Summary Judgment Opinion 12.

a.

The facts assembled by the district court fall well short of supporting its conclusion that the Board was motivated by impermissible "racial balancing" when it adopted the challenged admissions policy, and the Coalition's appellate argument to that effect faces the same dilemma. The Supreme Court has defined "racial balancing" as seeking to obtain in some cohort a "specified percentage of a particular group merely because of its race or ethnic origin," and the Court has dismissed that practice as "patently unconstitutional." *See Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013). The challenged

admissions policy, however, contains no racial quotas, goals, or other standards that would make for a straightforward case of "racial balancing."[6]

Instead, as evidence of the Board's purported efforts to admit "specified percentage[s]" of students from certain racial groups in order to "balance" TJ's racial demographics, the district court turned to what it called the Board's "remarkably rushed and shoddy process" in adopting the challenged admissions policy; its "lack of public engagement and transparency"; statements and text messages from individual Board members regarding TJ's admissions standards; and Dr. Braband's "consideration of racial data" in his presentation of the rejected merit lottery proposal. *See* Summary Judgment Opinion 19-20, 27. But neither individually nor collectively do those matters reveal any intent to adjust TJ's student population along racial lines — let alone to scale down its share of Asian American students.

The district court's characterization of the Board's "process" as "rushed" and "unreasonably hurried" makes little sense. *See* Summary Judgment Opinion 19. The Board studied TJ's admissions process for more than four months, not to mention its work with the FCPS staff and Virginia's education department in the Summer of 2020. And, in any event, nothing about the Board's "procedural sequence" reveals "that improper purposes [were] playing a role." *See Arlington Heights*, 429 U.S. at 267, 97 S.Ct. 555. The court's assertion that the Board "scrambled to meet a perceived deadline ... with race in mind" regarding the Virginia state budget's request for annual October reports on "diversity goals" is not persuasive at all. *See* Summary Judgment Opinion 17, 19. The FCPS staff actually did submit such a report on October 9, 2020, and the Board then continued to study TJ's admissions standards for another two months.

As to the matter of "public engagement and transparency," the Board clearly engaged with the public on a grand scale — the various proposed admissions policies were considered at public meetings, at which public comments were received, and the Board's proposals were presented to community members through "targeted outreach" methods. *See* J.A. 535. The comments of individual Board members that are used by the district court and the Coalition as evidence of an intent to strike a "racial balance" at TJ, meanwhile, reveal — at most — individual aspirations to improve student diversity. Moreover, many of the statements identified by the ***885** court were made in October 2020, during the period when Dr. Braband's rejected merit lottery proposal was under consideration. Finally, the court's focus on Dr. Braband's "racial data" moves its "balancing" accusation no further: it ignores that (1) Dr. Braband's September 2020 presentation of the rejected merit lottery proposal assessed that proposal's impact on TJ's representation of low-income students and English-language learners, not just its racial demographics, and (2) the merit lottery proposal was specifically voted down by the Board in December 2020. In sum, nothing about the Board's adoption of the challenged admissions policy exposes some covert effort to "balance" the racial makeup of TJ's student body.

b.

Thus lacking genuine evidentiary support for its claim that the Board adopted the challenged admissions policy "because of" a desire to "racially balance" TJ and to shrink the school's Asian American student population, the Coalition embraces the district court's ultimate, "Hail-Mary" line of reasoning: that the Board must have discriminated against Asian American students "by proxy." *See* Br. of Appellee 15; Summary Judgment Opinion 12. Specifically, that proposition maintains that the Board sought to increase the number of Black and Hispanic students enrolled at TJ and, in the "zero-sum environment" of school admissions where the number of available seats is finite, that effort naturally led to fewer overall Asian American students enrolling at TJ — thus exposing a discriminatory intent toward those students. *See* Br. of Appellee 56. As the court put it, the challenged admissions policy "was designed to increase Black and Hispanic enrollment, which would, *by necessity*, decrease the representation of Asian-Americans at TJ." *See* Summary Judgment Opinion 27-28 (emphasis added). Accordingly, the court related, "the Board acted at least in part because of, not merely in spite of, the policy's adverse effects" on Asian American students. *Id.* at 27 (citing *Feeney*, 442 U.S. at 279, 99 S.Ct. 2282).

But that inferential leap rests on unsteady ground, because its basic rationale has been pointedly rejected by the Supreme Court. In its 1979 decision in *Personnel Administrator of Massachusetts v. Feeney*, the Court rebuffed a gender discrimination challenge to Massachusetts' civil service hiring preference for qualified veterans — a policy that operated disproportionately to the benefit of men — resolving that, despite the State's general knowledge that veterans were overwhelmingly male at the time of the policy's approval, mere "awareness of consequences" is not sufficient for

proving a discriminatory purpose. *See* 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). In other words, the assertion that "a person intends the natural and foreseeable consequences of his voluntary actions" does little to prove intentional discrimination in the Equal Protection context. *Id.* at 278, 99 S.Ct. 2282. As the *Feeney* Court explained, the Massachusetts statute's adverse impact on women seeking civil service positions was, at most, a secondary impact of the State's legitimate and gender-neutral aim to assist veterans in securing employment. The *Feeney* plaintiffs therefore failed to prove that state action was taken "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon" women in the Massachusetts workforce. *Id.* at 279, 99 S.Ct. 2282.

To the extent the Board may have adopted the challenged admissions policy out of a desire to increase the rates of Black and Hispanic student enrollment at TJ — that is, to improve racial diversity and inclusion by way of race-neutral measures ***886** — it was utilizing a practice that the Supreme Court has consistently declined to find constitutionally suspect. *See, e.g., Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 545, 135 S.Ct. 2507, 192 L.Ed.2d 514 (2015) (citing *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (Kennedy, J., concurring in part and concurring in the judgment)). But more importantly on the Coalition's "proxy" argument, the simple fact that the Board may have been able to discern that expanding TJ's Black and Hispanic student population might — as a "natural and foreseeable consequence" — impact the enrollment figures for Asian American students (or students of another racial group) is, under *Feeney*, wholly insufficient from which to infer constitutionally impermissible intent. *See* 442 U.S. at 278-79, 99 S.Ct. 2282; *see also Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 48 (1st Cir. 2021) ("The fact that public school officials are well aware that race-neutral selection criteria ... are correlated with race and that their application would likely promote diversity does not automatically require strict scrutiny of a school system's decision to apply those neutral criteria."). [7] An Equal Protection plaintiff alleging purposeful racial discrimination must show at least some specific intent to target a certain racial group and to inflict adverse effects upon that group. In this situation, the undisputed facts show only that the Board intended to improve the overall socioeconomic and geographic diversity of TJ's student body. As in *Feeney*, "nothing in the record demonstrates" that the challenged action by the Board "was originally devised ... because it would accomplish the collateral goal" of excluding Asian American students from TJ. *See* 442 U.S. at 279, 99 S.Ct. 2282. [8]

* * *

In sum, the Coalition cannot satisfy its burden of proving that the Board's adoption of the race-neutral challenged admissions policy was motivated by an invidious discriminatory intent, whether by way of "racial balancing," "proxies," or otherwise. The Coalition has failed to marshal any evidence that the Board adopted the policy in order to disadvantage Asian American students — let alone the quantity of evidence that would entitle it to judgment as a matter of law on that question. Instead, we have "a complete failure of proof concerning" the second "essential element" of the Coalition's claim, and the Board is entitled to summary judgment twice over. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

***887** C.

It is settled, as the Supreme Court said, that "the Fourteenth Amendment guarantees equal laws, not equal results." *See Feeney*, 442 U.S. at 273, 99 S.Ct. 2282. Doubtlessly, there are some unequal results at play here. Under the challenged admissions policy, Asian American applicants to TJ enjoy far greater success in securing offers of admission than do prospective students from any other racial or ethnic group. Thus, the Coalition's remarkable efforts to twist TJ's admissions statistics and to prove a disproportionate, adverse impact on Asian Americans students fall flat. By the same token, the Coalition's contention that the Board's aim to expand access to TJ and to enhance the overall diversity of TJ's student population constitutes per se intentional racial discrimination against Asian American students simply runs counter to common sense.

Because the Coalition cannot prove invidious racial discrimination by the Board, the challenged admissions policy is assessed by us under the rational basis standard of review. *See Lewis v. Ascension Par. Sch. Bd.*, 806 F.3d 344, 361-62 (5th Cir. 2015) ("[W]here there is no proof of *either* discriminatory purpose *or* discriminatory effect, the government action is subject to rational basis review."). The policy therefore comes to us "bearing a strong presumption of validity," and we have no difficulty in concluding that it is rationally related to a legitimate state interest — indeed, the parties do not dispute that fact. *See Giarratano v.*

Johnson, 521 F.3d 298, 303 (4th Cir. 2008). Moreover, we have recognized that the "federal courts should not lightly interfere with the day-to-day operation of schools," given that "school officials are far more intimately involved with running schools" than are judges. *See Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 440 (4th Cir. 2013). In that regard, the Supreme Court has instructed the judiciary not to "intervene in the resolution of conflicts which arise in the daily operation of school systems," unless those conflicts "directly and sharply implicate basic constitutional values" — which, as we have explained, is by no means the situation presented here. *See Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

On this record, the challenged admissions policy's central aim is to equalize opportunity for those students hoping to attend one of the nation's best public schools, and to foster diversity of all stripes among TJ's student body. The Supreme Court has recognized that — in the context of higher education — promoting a broad spectrum of student diversity qualifies as a *compelling* state interest, in view of the "substantial," "important," and "laudable ... educational benefits that flow from a diverse student body." *See Grutter v. Bollinger*, 539 U.S. 306, 330, 343, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); *see also Parents Involved*, 551 U.S. at 783, 127 S.Ct. 2738 (Kennedy, J., concurring in part and concurring in the judgment) ("Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."). Expanding the array of student backgrounds in the classroom serves, at minimum, as a legitimate interest in the context of public primary and secondary schools. And that is the primary and essential effect of the challenged admissions policy. Accordingly, the policy is rationally based, and the challenge interposed against it by the Coalition must be rejected.

IV.

Pursuant to the foregoing, we reverse the judgment of the district court and ***888** remand for entry of summary judgment in favor of the Board.

REVERSED AND REMANDED

TOBY HEYTENS, Circuit Judge, concurring:

I write to underscore the unusual nature of the Coalition's claim, and the troubling consequences of accepting it.

* * *

It is a "fundamental principle that racial discrimination in public education" violates the Constitution. *Brown v. Board of Educ.*, 349 U.S. 294, 298, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). In the decisions culminating in *Brown*, the Supreme Court invalidated policies excluding Black students from educational spaces.[1] Since *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), its decisions have most often involved policies seeking to increase or maintain racial diversity.[2] But what those cases have in common—and share with two others now before the Court[3]—is that the challenged policies, on their face, classified or considered students based on race. Those cases thus directly invoked "[t]he moral imperative of racial neutrality [that] is the driving force of the Equal Protection Clause." *City of 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 the judgment).

This case is different. Under the policy challenged here, no students are told "where they [can] and [can] not go to school based on the color of their skin." *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (plurality op.). No seats are reserved based on race. See *Bakke*, 438 U.S. at 269–70, 98 S.Ct. 2733. No points are awarded based on race, see *Gratz v. Bollinger*, 539 U.S. 244, 271, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003), nor do evaluators consider race as part of a "holistic-review calculus," *Fisher v. University of Tex. at Austin*, 579 U.S. 365, 375, 136 S.Ct. 2198, 195 L.Ed.2d 511 (2016); see *Grutter v. Bollinger*, 539 U.S. 306, 312–16, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). Instead, this case involves a school whose governing Board decided to replace one facially race-neutral policy with another. Cf. *Gomillion v. Lightfoot*, 364 U.S. 339, 341, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (challenged policy replaced previously square-shaped city with "an uncouth twenty-eight-sided figure"). When it did so, the Board also adopted—by supermajority vote—a rule saying "[t]he admission process must use only race-neutral methods that do not seek to achieve any specific racial or ethnic mix, balance, or targets." JA 2224.[4]

***889** The policy challenged here is not just race neutral: It is race blind. To ensure race does not impact an individual student's chance for admission, evaluators are not told the race or ethnicity of applicants they are considering. Evaluators are

not even given applicant *names*, lest they betray some hint about a student's race or ethnicity. This case is thus, at best, a distant cousin to those involving challenges to race-conscious admissions policies.

* * *

Of course, a facially neutral policy is still constitutionally suspect if it was "motivated by a racial purpose or object." *Hunt v. Cromartie*, 526 U.S. 541, 546, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (quotation marks omitted). But here too, the Coalition's claim is a poor fit with traditional equal protection doctrine.

I am aware of no decision from the Supreme Court or this one applying strict scrutiny to a facially neutral admissions policy. To be sure, such scrutiny would be warranted if a plaintiff rebutted the "presumption of legislative good faith" by providing evidence that a challenged policy was motivated "at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Abbott v. Perez*, —— U.S. ——, 138 S. Ct. 2305, 2324–25, 201 L.Ed.2d 714 (2018) (first quote); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (second quote) (quotation marks omitted). The Coalition's efforts, however, fall far short of meeting that standard.

Most tellingly, the Coalition offers no statements from any decisionmaker suggesting a purpose of disadvantaging any applicant based on race. See *Hunter v. Underwood*, 471 U.S. 222, 229, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985) (quoting president of state constitutional convention: "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."). In its attempt to show discriminatory purpose, the Coalition points to text messages between various Board members. Some of the texts reflect concern that the superintendent's plan—a plan the Board *rejected*—would unfairly disadvantage Asian American applicants. See JA 119 (complaining lottery proposal "will whiten our schools and kick ou[t] Asians. How is that achieving the goals of diversity?"). Some reveal Board members' frustration with, or condemnation of, certain remarks by the superintendent—a non-Board member who had no vote. See JA 128 ("[The superintendent] [c]ame right out of the gate blaming [Asian Americans]"); JA 119, 125 (criticizing the superintendent's remarks as "demeaning" and "[s]o racist"). Still others show Board members' desire "to honor" the "huge sacrifices" Asian American families make to "prioritize education." JA 119. None of these conversations contain any hint that any Board member intended or desired to create a policy that would adversely affect Asian American students.

The Coalition also points to demographic models prepared by the superintendent analyzing several potential admissions ***890** plans. As the Court notes, the Board rejected every proposal for which such estimates were provided. See JA 294–95 (rejected lottery proposal); JA 1951 (same). Just as important, the Board ultimately adopted a policy the superintendent advised was not susceptible to demographic modeling. See JA 1246 ("For holistic, we really had no way to know what the modeling would be, so we didn't present any modeling for that."). This lack of statistical information deflates the Coalition's assertion that the Board disadvantaged "feeder" schools and elevated "underrepresented schools" in a surreptitious pretextual bid to discriminate against Asian Americans. Coalition Br. 11, 15, 28–29. Indeed, the numbers show that, in the first year using the challenged policy, Asian American applicants accounted for the largest share of admitted students who benefitted from the underrepresented school factor.

Nor has the Coalition shown any disparate impact, at least as that term is normally understood. Under the challenged policy, more than half of admitted students identify as Asian American. In addition, such applicants were one of only two populations (the other being Hispanic students) whose admission rates were higher than their application rates. Cf. *Feeney*, 442 U.S. at 270, 99 S.Ct. 2282 (rejecting constitutional challenge to facially neutral policy whose potential beneficiaries were "over 98%" male); *Washington v. Davis*, 426 U.S. 229, 237, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (rejecting constitutional challenge to facially neutral test that weeded out Black applicants at "four times" the rate it disqualified white applicants). This too emphasizes the unsure grounding for the Coalition's plea for strict scrutiny.

* * *

Throughout this litigation, the Coalition has been coy about the full implications of its claims. But it seems to me the Coalition cannot win its case unless at least one of two premises is true. Accepting either would require major alterations to current law and have troubling consequences.

The first possibility is that the challenged policy is constitutionally suspect because Asian American applicants, as a group, appear somewhat less likely to be admitted under

the current race-neutral policy than under the race-neutral policy it replaced. That cannot be right. The Coalition cites no authority suggesting past policy creates a floor against which all future ones will be judged—an approach that could make it difficult to alter *any* existing policy, even those that have a real (perhaps unintentional) disparate impact on some groups.

Fortunately, the Supreme Court has disclaimed the notion that the Constitution commits public officials "irrevocably to legislation that has proved unsuccessful or even harmful in practice." *Crawford v. Board of Educ. of Los Angeles*, 458 U.S. 527, 539, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982). Of particular note, the Court has held state and local governments may eliminate otherwise lawful race conscious measures in the education context, even when a foreseeable (if not inevitable) result will be to alter a class's racial composition. See *Schuette v. Coalition to Def. Affirmative Action*, 572 U.S. 291, 134 S.Ct. 1623, 188 L.Ed.2d 613 (2014); see also *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977).

Or go back to the Supreme Court's foundational cases about the difference between discriminatory purpose and disparate impact. The Court determined the Constitution did not require retiring the veterans' preference that overwhelmingly benefitted male applicants in *Feeney* or the test that disproportionately weeded out Black applicants in *Davis*. But that does not mean the Constitution would have ***891** barred policymakers from deciding to do so if they later came to question the policies' wisdom or effectiveness. See *Feeney*, 442 U.S. at 280–81, 99 S.Ct. 2282 (noting the challenged law's "troubled history" and that it "may reflect unwise policy"). The same is true about the Board's decision to reconsider its previous admission policy—a policy that, in its last year, generated a class with so few Black students the number could not be reported without implicating student privacy laws.

A second possibility is that the challenged policy is unconstitutional because the Board hoped it would increase the number of Black and Hispanic students at TJ. The Coalition has waived that argument here,[5] and rightly so. Any such argument would be no more tenable than the previous one.

The Supreme Court has repeatedly blessed seeking to increase racial diversity in government programs through race-neutral means. In fact, the Court and individual Justices have spent more than three decades encouraging—and sometimes insisting—government officials do precisely that before considering race-conscious ones. See *Croson*, 488 U.S. at 509, 109 S.Ct. 706 (plurality op.) ("[T]he city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races."); *id.* at 526, 109 S.Ct. 706 (Scalia, J., concurring in the judgment) (noting that government may "act to undo the effects of past discrimination in many permissible ways that do not involve classification by race" even if such methods "may well have racially disproportionate impact" (quotation marks omitted)); see also *Grutter*, 539 U.S. at 362, 123 S.Ct. 2325 (Thomas, J., concurring in part and dissenting in part) ("the Law School could achieve its vision of a racially aesthetic student body without the use of racial discrimination"); *Parents Involved*, 551 U.S. at 735, 127 S.Ct. 2738 (school districts seeking to increase diversity *must* engage in "serious, good faith consideration of workable race-neutral alternatives" before turning to "explicit racial classifications" (quotation marks omitted)); *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 545, 135 S.Ct. 2507, 192 L.Ed.2d 514 (2015) (local housing authorities may "choose to foster diversity ... with race-neutral tools").

In truth, the policy challenged here bears more than a passing resemblance to one proposed by a dissenting Justice who objected to the race-conscious policy upheld in *Fisher*. See 579 U.S. at 426–27, 136 S.Ct. 2198 (Alito, J., dissenting) (asserting Texas could achieve its diversity goals "without injecting race into the process" by combining a system guaranteeing admission of each public high school's students along "with race-blind, holistic review"). Having spent decades telling school officials they must consider race-neutral methods for ensuring a diverse student body before turning to race-conscious ones, it would be quite the judicial bait-and-switch to say such race-neutral efforts are also presumptively unconstitutional.

RUSHING, Circuit Judge, dissenting:

Our Constitution guarantees every person equal treatment under the law regardless of race. That guarantee would be hollow ***892** if governments could intentionally achieve discriminatory ends under cover of neutral means. Therefore, even facially neutral laws are subject to the highest level of judicial scrutiny if they are passed with discriminatory intent and disproportionately impact a particular racial group. The Fairfax County School Board did just that when it passed the new admissions policy (Policy) for Thomas Jefferson

High School (TJ). The Policy reduced offers of enrollment to Asian students at TJ by 26% while increasing enrollment of every other racial group. [*] This was no accident. The Board intended to alter the racial composition of the school in exactly this way—as demonstrated by a resolution it adopted saying as much, the racial data it requested and considered in the process, the means it selected, and the candor of individual Board members' internal discussions. In the face of this evidence, the Board does not attempt to justify its Policy under strict scrutiny.

The majority, however, refuses to look past the Policy's neutral varnish. Because the evidence shows an undisputed racial motivation and an undeniable racial result, I respectfully dissent.

I.

The Equal Protection Clause prohibits a State from denying "any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "Its central mandate is racial neutrality in governmental decisionmaking." *Miller v. Johnson*, 515 U.S. 900, 904, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). "At the heart" of the Clause's guarantee of equal treatment "lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups." *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 316, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013) (*Fisher I*) (Thomas, J., concurring) (internal quotation marks omitted); *see also Miller*, 515 U.S. at 911, 115 S.Ct. 2475.

Racial balancing offends the Equal Protection Clause. It is "patently unconstitutional" for a public school to undertake to achieve within its student body "some specified percentage of a particular group merely because of its race or ethnic origin." *Grutter v. Bollinger*, 539 U.S. 306, 329–330, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (internal quotation marks omitted); *Fisher I*, 570 U.S. at 311, 133 S.Ct. 2411. Indeed, the Supreme Court has "repeatedly condemned" the objective of "racial balance" as "illegitimate." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (plurality opinion); *see id.* at 729–730, 127 S.Ct. 2738 ("We have many times over reaffirmed that '[r]acial balance is not to be achieved for its own sake.' " (brackets in original) (quoting *Freeman v. Pitts*, 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992))).

This principle "is one of substance, not semantics." *Id.* at 732, 127 S.Ct. 2738. Racial balance "cannot be the goal, whether labeled 'racial diversity' or anything else." *Id.* at 733, 127 S.Ct. 2738; *see Fisher I*, 570 U.S. at 311, 133 S.Ct. 2411 ("Racial balancing is not transformed from patently unconstitutional to a compelling state interest simply by relabeling it racial diversity." (internal quotation marks omitted)). For example, the Supreme Court has condemned as impermissible racial balancing a school district's goal of "attaining a level of diversity within the schools that approximates the district's overall demographics." *Parents Involved*, 551 U.S. at 727, 127 S.Ct. 2738 (plurality opinion) (internal quotation marks omitted); ***893** *see also id.* at 766–767, 127 S.Ct. 2738 (Thomas, J., concurring) ("Environmental reflection ... is just another way to say racial balancing."); *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 136 S. Ct. 2198, 2225, 195 L.Ed.2d 511 (2016) (*Fisher II*) (Alito, J., dissenting) ("[P]ursuing parity with [local] demographics ... is nothing more than 'outright racial balancing[.]' " (quoting *Fisher I*, 570 U.S. at 311, 133 S.Ct. 2411)). Our Court has similarly identified as racial balancing a policy that sought "to achieve racial and ethnic diversity in ... classes in proportions that approximate the distribution of students from racial groups in the district's overall student population." *Tuttle v. Arlington Cnty. Sch. Bd.*, 195 F.3d 698, 707 (4th Cir. 1999) (internal quotation marks and brackets omitted). We found that policy unconstitutional even though it did not "explicitly set aside spots solely for certain minorities," because it worked toward "the same result by skewing the odds of selection" in favor of certain racial groups. *Id.* As these cases illustrate, even supposedly well-intentioned racial balancing is a discriminatory purpose. *See Parents Involved*, 551 U.S. at 741–742, 127 S.Ct. 2738; *cf. N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016) (acknowledging that a finding of discriminatory purpose does not require proof that any government actor "harbored racial hatred or animosity toward any minority group").

A school board's motivation to racially balance its schools, even using the means of a facially neutral policy, must be tested under exacting judicial scrutiny. *See, e.g., Lewis v. Ascension Parish Sch. Bd.*, 662 F.3d 343, 354 (5th Cir. 2011) (Jones, J., concurring). After all, "[i]f discriminatorily motivated, such [facially neutral] laws are just as abhorrent, and just as unconstitutional, as laws that expressly discriminate on the basis of race." *McCrory*, 831 F.3d at 220. A challenger need not prove that discriminatory purpose was the school board's " 'sole[ ]' or even ... 'primary'

motive," "just that it was a motivating factor" in the decision. *Id.* (brackets in original) (emphasis removed) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)). It is not enough, however, to show that the school board was "aware of racial considerations"—it must have been "motivated by them." *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. In other words, we ask if the school board acted "at least in part 'because of,' not merely 'in spite of,' " the expected discriminatory effect of its action upon a particular racial group. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979).

The Supreme Court has set forth a nonexhaustive list of factors to consider in making the "sensitive inquiry" into whether discriminatory intent motivated a facially neutral law. *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555; *see Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts ...."). These include "(1) historical background; (2) the specific sequence of events leading to the law's enactment, including any departures from the normal legislative process; (3) the law's legislative history; and (4) whether the law 'bears more heavily on one race than another.' " *N.C. State Conference of NAACP v. Raymond*, 981 F.3d 295, 303 (4th Cir. 2020) (quoting *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555).

Once it is shown that racial discrimination was a motivating factor behind enactment of the law, then the law's defenders may attempt to prove that "the law would have been enacted without this factor." ***894** *Hunter v. Underwood*, 471 U.S. 222, 228, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985); *see Arlington Heights*, 429 U.S. at 270 n.21, 97 S.Ct. 555. At this step, the court "must scrutinize the legislature's *actual* non-racial motivations to determine whether they *alone* can justify the legislature's choices" or whether, instead, "race constituted a but-for cause" of the law. *McCrory*, 831 F.3d at 221, 238.

A law " 'motivated by a racial purpose or object,' " even if facially neutral, warrants strict judicial scrutiny. *Hunt v. Cromartie*, 526 U.S. 541, 546, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (quoting *Miller*, 515 U.S. at 913, 115 S.Ct. 2475). Only laws that are "narrowly tailored to achieve a compelling interest" survive this "most rigorous and exacting standard of constitutional review." *Miller*, 515 U.S. at 920, 115 S.Ct. 2475.

II.

Applying this well-established framework to the undisputed facts of this case on summary judgment compels the conclusion that the Board adopted the Policy with an impermissible purpose of racially balancing TJ to reduce Asian student enrollment. With the Policy in place, Asian student enrollment decreased while enrollment of every other racial group increased. "[T]he surest explanation" for this disproportionate impact is found in the Board's discriminatory purpose for revising TJ's admissions policy. *Feeney*, 442 U.S. at 275, 99 S.Ct. 2282.

A.

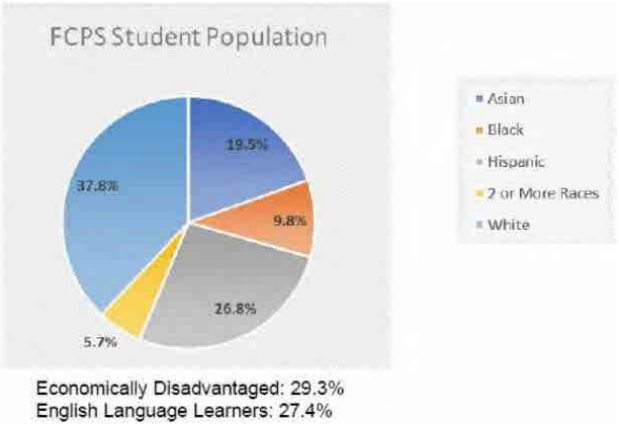
"Proving the motivation behind official action is often a problematic undertaking," as outright admissions of impermissible racial motivation are rare and circumstantial evidence about the purposes of a multimember deliberative body often cuts both ways. *Hunter*, 471 U.S. at 228, 105 S.Ct. 1916. But here, the twelve-member Board plainly stated its intention to craft an admissions policy for TJ that would reform the racial composition of the student body to reflect the racial demographics of the district. The Board unanimously approved a resolution saying as much. In addition, throughout the process of designing the new Policy, the Board repeatedly requested and received detailed racial data and modeling that it used to make its decisions. Then, in the final Policy, the Board allocated seats at TJ by middle school—specifically, the school applicants attend, not the school to which they are zoned—knowing that choice would significantly reduce the number of students admitted from "feeder" schools, which historically sent large percentages of Asian students to TJ. And finally, Board members' private messages reveal their understanding that the process discriminates against Asian students. This "highly relevant" evidence, taken together, leaves no doubt about the Board's discriminatory purpose. *Arlington Heights*, 429 U.S. at 268, 97 S.Ct. 555 (noting that legislative history "may be highly relevant, especially where," as here, "there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports").

1.

Consider first the Board's stated purpose in changing TJ's admissions policy.

By way of background, the Board classifies all children in the school district as either "Asian," "Black," "Hispanic," "White," or "2 or More Races," sometimes also using a catch-all labeled "Multiracial/Other" to account for other ethnicities. When admissions statistics for TJ's class of 2024 were released in June 2020, the numbers revealed that Asian students made up 73% of the class, while White ***895** students were 17.7%, Hispanic students were 3.3%, Multiracial/Other students were 6%, and the percentage of Black students was "too small for reporting"—meaning 10 or fewer students. J.A. 563. These figures quickly sparked disapproval. In a message to TJ students and families, school principal Ann Bonitatibus stressed that the student body did "not reflect the racial composition in FCPS [Fairfax County Public Schools]," and if it did, the school "would enroll 180 black and 460 Hispanic students." J.A. 517. School Board members echoed this reaction. For example, Board Chair Karen Corbett Sanders called the admissions data "unacceptable" and vowed the Board would take "intentful [sic] action." J.A. 192, 414, 426. She told Superintendent Scott Brabrand that the Board "needed to be explicit in how [it was] going to address the under-representation." J.A. 426. Board member Karen Keys-Gamarra similarly urged her colleagues to "recognize the unacceptable numbers ... of African Americans that have been accepted to T.J." and take action. J.A. 259.

The Board met on September 15, 2020, to consider TJ's admissions policy. Brabrand began with a slide presentation stating that the purpose of changing TJ's admissions policy was to make TJ "reflect the diversity of FCPS, the community and Northern Virginia." J.A. 293. The next slide illustrated this goal and "frame[d] [the Board's] discussion for the remainder of the day." J.A. 808. It showed the racial composition of the school district student population as of the fall of 2019:



J.A. 294. Looking at this chart, FCPS staff explained, "as Dr. Brabrand said earlier, the diversity at TJ doesn't currently reflect the diversity of Northern Virginia." J.A. 808. Based on this chart, only Asian students were "over-represented" at TJ. The percentage of Multiracial students at TJ approximated that of the school district generally. But, according to this chart, students of all other races were "under-represented" at TJ.

The Board subsequently adopted this statement of purpose for itself. Recall that in the summer of 2020, the Virginia General Assembly passed a new law requiring each Governor's School, like TJ, to "set ***896** diversity goals for its student body and faculty, and develop a plan to meet said goals." 2020 Va. Acts 183. Each school's annual diversity report had to include the school's admission processes that "promote access for historically underserved students" and "the racial/ethnic make-up and socioeconomic diversity of its students, faculty, and applicants." *Id.* At its October 6 meeting, the Board unanimously (with one abstention) approved a resolution directing Brabrand to submit an annual report to the Commonwealth which "shall state that the goal is to have TJ's demographics represent the NOVA region." J.A. 909.

Thus, the Board unanimously articulated its "goal" for TJ's new admissions policy: to bring the school's demographics in line with the demographics of the region the school serves. In other words, to racially balance the school. *See Parents Involved*, 551 U.S. at 727, 732, 127 S.Ct. 2738 (plurality opinion) (characterizing the school board's goal of "attaining a level of diversity within the schools that approximates the district's overall demographics" as "racial balance" (internal quotation marks omitted)); *see also id.* at 766–767, 127 S.Ct. 2738 (Thomas, J., concurring) ("Environmental reflection ... is just another way to say racial balancing."). We need not guess at the Board's purpose when it stated it explicitly.

The Board hewed to this goal throughout the admissions overhaul process. At its November 17 meeting, the Board's presentation again highlighted its "goal" of "improving ethnic, racial, and socioeconomic diversity" at TJ. J.A. 270. A November white paper prepared by FCPS staff at the Board's request explained that changes to TJ's admissions policy over the prior decade "did not have the desired impacts with respect to diversity," "as described in the data below." J.A. 445. The data beneath this statement showed that, over the prior 15 years, offers of admission to Asian students skyrocketed while offers to White students fell and offers to students of all other races remained consistently low. The white paper summarized this trajectory as "a steady failure to improve ethnic, racial, and socio-economic diversity." J.A. 447. And it projected that the proposed changes to the admissions process would fix this failure by causing TJ's student population to "reflect, more closely," the population of the school districts eligible to send students to TJ. J.A. 458.

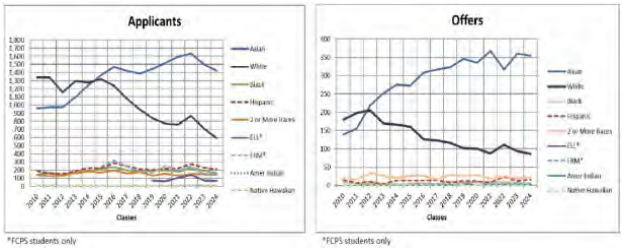
For the Board, therefore, increased Asian student enrollment was not "improving ethnic[or] racial ... diversity." J.A. 270. To the contrary, for TJ's student body to more closely reflect the surrounding region in line with the Board's explicit purpose, the number of Asian students would need to be significantly reduced.

This undisputed evidence demonstrates that the Board as a whole, and FCPS officials more broadly, intended to racially balance TJ. The majority's assertion that the evidence does not "reveal any intent to adjust TJ's student population along racial lines," *supra*, at 884, cannot be squared with the Board's own expression of its purpose to alter TJ's racial demographics to "represent the NOVA region," J.A. 909. The Board repeatedly, consistently, and forthrightly declared its racial motivation; no objective appraisal of the evidence could deny it. Still, the Coalition provided more evidence of the Board's discriminatory intent.

2.

The Board's extensive use of racial data and modeling further demonstrates its racial purpose. *See McCrory*, 831 F.3d at 230 (finding "requests for and use of race data" relevant to discriminatory intent). Throughout the decisionmaking process, new admissions policy proposals were assessed ***897** for whether they would achieve the desired racial demographics.

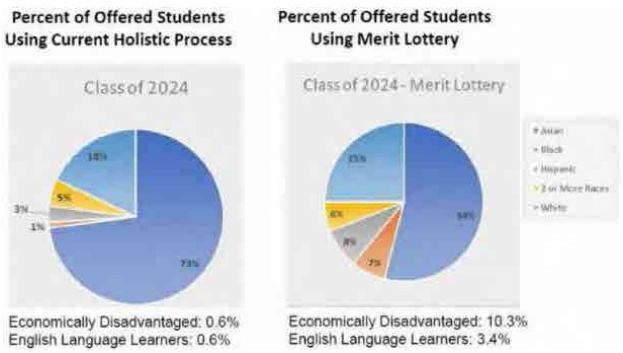
As discussed, the process of changing TJ's admissions policy began with identifying the problem the Board was trying to fix. At their September 15 meeting, Board members reviewed these graphs of historical admissions data divided by race:



J.A. 295. Like the data mentioned above, these graphs reflect a dramatic increase in offers to Asian students over the past 15 years while offers to White students declined and offers to students of other races remained consistently low. The presentation explained that changes to the admissions process over the past decade had "not made a significant impact on the application pool or admitted student demographics." J.A. 296. Board members next reviewed pie charts labeled "Impact of Testing" that compared the racial composition of the applicants and semifinalists for the classes of 2015, 2019, and 2024. Those charts showed that Asian students consistently performed better than students of other races on the TJ standardized admissions tests, which the slides called "a barrier for historically underrepresented students." J.A. 298–300. A few weeks later, the Board voted unanimously to eliminate standardized testing from the admissions process.

Also at the Board's September 15 meeting, Brabrand presented data on how his merit lottery proposal would change the racial composition of TJ's student body. This modeling showed that, had the merit lottery been in effect for the class of 2024, the racial makeup of the class would have been drastically different:

***898**



J.A. 310. Offers to White students would have *increased* 7 percentage points, offers to Black students would have *increased* 6 percentage points, offers to Hispanic students would have *increased* 5 percentage points, and offers to students of "2 or More Races" would have *increased* 1 percentage point, while offers to Asian students would have *decreased* 19 percentage points. These were not the only racial projections Brabrand presented. He also provided similar models showing the racial impact of his proposal for the classes of 2015 and 2019. The one thing every model had in common? A significant decrease in offers to Asian students.

The Board ultimately rejected the merit lottery proposal, with some members saying it left "too much to chance" and could not "guarantee an increase in racial/SES [socioeconomic status] diversity." J.A. 101, 406. But—contrary to the majority's insinuation, *see supra*, at 884–85—the Board certainly did not stop considering racial data. In fact, after the September 15 presentation and over the following weeks, the Board requested more demographic data about the applicant pool and admitted students as well as updated statistical modeling for each new proposal and numerous variations on those proposals. FCPS staff worked to compile this data. Staff also developed the "experience factors" ultimately incorporated into the Policy and studied how much weight to give those factors in order to "change who got in," J.A. 182, given research showing that several portions of the TJ application "historically favored White and Asian candidates," J.A. 176.

FCPS staff delivered more of the requested data to the Board in the November white paper, one month before the Board adopted the new Policy. The 43-page white paper contained 21 graphs and tables of racial data and racial modeling of the student body and applicants, plus one more table analyzing TJ's faculty and staff by race. Some of the data and surrounding discussion of race was quite granular. For example, the white paper analyzed "eighth grade students' mathematics courses by race/ethnicity." J.A. 452. In addition to specifying the racial breakdown of each eighth-grade math course, the white paper went on to analyze the percentage of students of each race enrolled in those classes who chose to apply to TJ. For instance, after crunching the numbers, the white paper concluded that "while a majority of ***899** Asian students in Geometry opted to apply for admission to [TJ], a majority of Black and Hispanic (and White) students enrolled in the same course during eighth grade chose *not* to apply for admissions." J.A. 452.

The white paper also included extensive racial modeling of new admissions policy proposals. For example, it modeled how the new hybrid lottery proposal would impact the "[d]emographic [m]ake-up" of TJ students:

Table 9: Demographic Make-up of FCPS Students in the TJHSST Class of 2025, based on Modeling the Hybrid Lottery [10]

Student Group	Number of Students Meeting Applicant Requirements	Average Percent of Admitted Class [11]	Minimum Percent of Admitted Class	Maximum Percent of Admitted Class	Average Number of Admitted Students
Asian	1,425	31%	23%	38%	121
Black	270	7%	3%	11%	27
Hispanic	439	11%	6%	15%	42
White	1,895	44%	35%	51%	168
English Learners	3	0%	0%	1%	0
Economically Disadvantaged	510	12%	8%	18%	48

Students with Disabilities	91	2%	0%	4%	8

J.A. 461. Other models measured the effect that changes to certain eligibility requirements would have on student demographics and presented the evidence in tables similar to the one above. In commentary, FCPS staff analyzed which races performed better in which simulations. And yet other models compared the "[d]emographic [m]ake-up" of admitted students from each regional pathway under a hybrid lottery approach.

As this evidence demonstrates, the Board was keenly interested in data about the racial effect of the policy proposals and admissions variables it considered. Board members requested, received, and considered extensive racial data during their deliberations. Given the Board's goal of altering TJ's racial composition to more closely reflect the demographics of the surrounding area, it is unsurprising that the Board was committed to measuring whether the policy changes it considered would achieve the desired racial balance. The Board notes that FCPS staff did not model the racial impact of the Policy it ultimately adopted, which was a last-minute revision of the white paper proposals. But the absence of yet another racial model does not sanitize the record. Even without a model of the exact policy adopted, the Board's intense interest in racial data and results during its decisionmaking is another indicator it was acting with the discriminatory intent of racially balancing TJ, just as it said it was doing.

It bears mention that the majority's account of the factual record cannot be reconciled with the evidence described and excerpted above. According to the majority, "the undisputed facts show *only* that the Board intended to improve the overall ***900** *socioeconomic* and *geographic* diversity of TJ's student body." *Supra*, at 886 (emphases added). But much to the contrary, the record is replete with evidence of the Board's concern to reform the *racial* diversity of TJ's student body. The fact that the Board also considered the impact on low-income and English-learner students, *see supra*, at 884–85, in no way disproves that racial balancing was at least "a motivating factor" in the Board's decision, *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555.

3.

"[T]he choices the [Board] made with this [racial] data in hand" are additional evidence of discriminatory intent. *McCrory*, 831 F.3d at 230. One choice is particularly noteworthy. After receiving voluminous racial data, the Board allocated seats at TJ based on the middle school an applicant attends. The data showed that this change would indisputably disadvantage so-called "feeder" schools that had historically sent many students to TJ, the vast majority of whom were Asian.

Under the old admissions plan, students from all participating school divisions competed against each other for seats in the incoming ninth-grade class at TJ. A handful of Fairfax County middle schools became "feeder" schools, sending a large number of students to TJ each year. For example, half of the offers extended to the class of 2024 came from six feeder schools. Each feeder school was an Advanced Academic Program Level IV center, which is a selective school that admits students who are zoned to attend other middle schools based on their residential address. A significant majority of applicants from these feeder schools were Asian, and the overwhelming majority of offers of admission to TJ from the top six feeder schools were extended to Asian students. For example, for the class of 2024, 84% of the offers to TJ from these feeder schools went to Asian students.

The new admissions proposals that Brabrand and FCPS staff presented to the Board divided Fairfax County geographically into "regional pathways" and allocated or capped seats at TJ per each region. A student's regional pathway was determined by his or her "base school," the middle school the student was zoned to attend based on residence. J.A. 306. Brabrand touted the regional approach's potential to "create[ ] geographic diversity across Fairfax and participating jurisdictions." J.A. 811. Demographic modeling showed that "Asian and White students make up the largest percentage" of students meeting the application requirements in every region but one. J.A. 468–469. Brabrand warned the Board that a "concern[ ]" with proportional regional pathways was that they "[m]ay continue to admit more students from a few top-performing FCPS middle schools," a reference to feeder schools. J.A. 533.

Board members expressed interest in allocating seats at TJ by middle school rather than by region. In response, FCPS staff provided the requested data but warned the Board that a school-pathway approach "would disadvantage schools that

traditionally admit large numbers of students," i.e., feeder schools. J.A. 458.

The Board then voted to adopt the Policy, which allocates seats at TJ to 1.5% of each middle school's eighth-grade class. Each middle school's allocated seats are offered to the highest evaluated students at that school based on the Policy's metrics. Remaining applicants then compete for about 100 unallocated seats based on the same metrics, with bonus points going to students in "underrepresented schools" that have not historically sent many students to TJ. Students from feeder schools cannot receive these bonus points.

***901** Community members immediately recognized the effect per-school allocation would have on students at feeder schools. Some constituents expressed concern that basing the allocation on school attended, rather than base (i.e., zoned) school, would hurt gifted students in less affluent communities, who attend feeder schools outside their own community and now must compete with those students for admission to TJ rather than competing with their neighbors. Others expressed concern that the allocation imposed a "special penalty" on students from traditionally low-performing regions who pursued placement at a feeder school. J.A. 332.

In response, Brabrand clarified that the Board was indeed aware of this consequence and intended to allocate seats by school attended, not by zoned school. A zoned-school approach, he said, did not "represent[ ] the geographic distribution the [B]oard wanted." J.A. 323.

The Board's insistence on allocating seats by attended school to promote "geographic distribution" is suspect. Allocating seats by zoned school, of course, would have produced actual geographic distribution throughout Fairfax County. Students in the same neighborhood—a measure of socioeconomic and geographic diversity—would have competed with each other for admission. But in some regions, students attending feeder schools would likely win many of their region's allocated seats. Allocating seats by attended school, by contrast, would result in some geographic distribution but would also "disadvantage" applicants from feeder schools, J.A. 458, the great majority of whom were Asian. Armed with that knowledge, the Board chose the approach that better targeted a reduction of Asian student enrollment.

4.

Finally, in private discussions, some of the twelve Board members candidly admitted their belief that the process targeted Asian students.

For example, in text messages, Board members Stella Pekarsky and Abrar Omeish agreed that "there has been an anti [A]sian feel underlying some of this, hate to say it lol" and that Asian students were "discriminated against in this process." J.A. 119. They observed that Brabrand "ha[d] made it obvious" with "racist" and "demeaning" remarks and that he "[c]ame right out of the gate blaming" Asian students and parents. J.A. 119, 125, 128. They reasoned that Brabrand's proposals would "whiten our schools and kick ou[t] Asians," J.A. 119, while another Board member thought Brabrand was "trying to be responsive to the times—BLM [Black Lives Matter] and a super progressive [B]oard," J.A. 116. In the end, they believed, "Asians hate us." J.A. 128.

These sentiments demonstrate that some Board members saw the process as deeply discriminatory toward Asian students and families. The majority does not engage with these text messages beyond its conclusory remark that they do not support a finding of "intent to adjust TJ's student population along racial lines" or "scale down its share of Asian American students." *Supra*, at 884. But the messages, and the evidence as a whole, tell a different story.

* * * *

In sum, the undisputed contemporaneous evidence makes plain the Board's intent to racially balance TJ to reduce Asian student enrollment. Not only did the Board explicitly state its purpose to alter TJ's racial composition to reflect the demographics of the region, but race was central to its decisionmaking. Its insistence that seats for TJ's incoming class be allocated based on which school the applicant ***902** attended targeted Asian admissions from feeder schools. And Board members acknowledged, among themselves, that the process discriminated against Asian students. As will be seen, the Policy's impact confirms this discriminatory intent.

B.

The undisputed evidence shows that the Board successfully engineered the Policy to reduce Asian student enrollment at

TJ—while increasing enrollment of every other racial group—consistent with the Board's discriminatory purpose. This is further evidence of the Board's discriminatory intent.

1.

When assessing "[t]he impact of the official action," we consider "whether it bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555 (internal quotation marks omitted). For example, in *Arlington Heights*, the Supreme Court found that the Village's refusal to rezone a parcel for multiple-family low-income housing "d[id] arguably bear more heavily on racial minorities," who constituted 18% of the area population and 40% of the income groups said to be eligible for the proposed housing project. *Id.* at 269, 97 S.Ct. 555.

Similarly, in *McCrory*, we found sufficient disproportionate impact on African Americans by observing that, before the new law, "African Americans disproportionately used" the voting mechanisms the new law removed and "disproportionately lacked the photo ID" the new law required. 831 F.3d at 231. We faulted the district court for focusing on "the options remaining" for African Americans "after enactment of the legislation." *Id.* at 230 (internal quotation marks omitted). We also criticized the district court for suggesting that the plaintiffs had to show the new law prevented African Americans from voting at the same levels after the law as they had before. As we explained, plaintiffs are not required to make "such an onerous showing" to prove disparate impact. *Id.* at 232. For example, the district court gave significant weight to the 1.8% increase in African American voter turnout under the new law. *Id.* We clarified that the plaintiffs were not required to show a year-over-year drop in voter turnout and, moreover, the 1.8% figure "actually represent[ed] a significant *decrease* in the *rate* of change" because, before the new law, African American voter turnout had increased by 12.2% over a four-year period. *Id.*

2.

By any metric, the new admissions Policy adversely—and disproportionately—affected the enrollment of Asian students at TJ. In the five years before the Policy, Asian students averaged 71% of the annual offers to TJ, with offers to Asian students never falling below 65% of the class. In the year immediately before the new Policy was implemented, Asian students received 73% of offers for the incoming class. Under the new Policy, however, offers to Asian students fell to 54%. That's a 26% decrease in Asian student enrollment and a drop of 19 percentage points.

Perhaps most telling, Asian students were the *only* race to experience any decrease in admissions numbers while offers to all other races measured by the Board increased. Whether reported in whole numbers or percentage of the incoming class, White, Black, and Hispanic students all saw a notable increase in offers under the new Policy. (The Multiracial/Other category, which combines multiple different racial groups, saw a slight decrease.) Offers to White students increased from 17% ***903** to 22%; offers to Black students increased from nonreportable to 7%; and offers to Hispanic students increased from 3% to 11%. In other words, the new Policy "bore not just *more* heavily on one race than another," it "bore *exclusively* on one race." *Williams v. Hansen*, 326 F.3d 569, 585 (4th Cir. 2003) (King, J., dissenting).

This result correlated with the Board's decisions to allocate seats at TJ by middle school attended and to award bonus points to underrepresented schools—both choices that disproportionately affected feeder schools, whose offers had gone overwhelmingly to Asian students. In 2021, Asian students from the top six feeder schools received 96 fewer offers to TJ than they did in 2020, despite an increase in the size of the ninth-grade class. Even with the increased class size and accounting for offers to Asian students at non-feeder schools, that difference mirrors the drop in Asian student enrollment under the Policy.

The foreseeability of the Policy's consequences for Asian students raises a reasonable inference that "the adverse effects were desired." *Feeney*, 442 U.S. at 279 n.25, 99 S.Ct. 2282. When that anticipated result is considered alongside the other evidence of the Board's racial purpose in changing the TJ admissions policy, that inference "ripen[s] into proof." *Id.*

3.

The majority rejects this before-and-after assessment in favor of an exclusively "after" assessment. *See supra*, at 879–82. Under the majority's approach, a court may consider Asian students' chance of success only after the Policy's implementation and must ignore the larger context that would demonstrate whether the Policy decreased that chance of success. That echoes the approach we rejected in *McCrory*,

which focused "on the options remaining after enactment of the legislation," and neglected the importance of considering the options available to African American voters before the legislation and which the legislation removed. 831 F.3d at 230 (internal quotation marks omitted). Such analysis is untenable, we explained, because an "individual piece of evidence can seem innocuous when viewed alone, but gains an entirely different meaning when considered in context." *Id.* at 233.

For example, even using the majority's preferred "success rate" metric, Asian students fared worse after the Policy than before. The success rate for Asian students under the Policy dropped from 24.94% in 2020 (and a five-year historical average of 22.71%) to 17.73% in 2021. By comparison, the success rate for every other race measured by the Board improved. The success rate for White students increased from 14.45% to 14.85%; the success rate for Black students increased from 5% to 11.23%; and the success rate for Hispanic students increased from 7.69% to 16.31%. (The success rate for the catch-all "Multi/Other" group decreased.) This analysis demonstrates the *Policy's* impact on each racial group's success rate, something that the majority's "after-only" approach cannot do.

Indeed, the majority rejects the very possibility that a State could ever discriminate against a racial group by intentionally reducing its success in a competitive process to a level equal with that of other races. According to the majority, the Board could not have discriminated against Asian students by reducing their success rate—even intentionally and with a discriminatory purpose—so long as Asian students remain no *less* successful than students of other races. I don't see why not. "Invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude." *Feeney*, 442 U.S. at 277, 99 S.Ct. 2282. If a ***904** State enacts a policy with the purpose and effect of trimming down the success of one particular racial group to a level the State finds more appropriate, it has discriminated against that racial group.

To hold otherwise misses the point of discriminatory-intent claims under the Equal Protection Clause. These claims are meant to root out government action that, while facially neutral, is motivated by a racially discriminatory purpose. *See Arlington Heights*, 429 U.S. at 265, 97 S.Ct. 555; *Davis*, 426 U.S. at 238–242, 96 S.Ct. 2040. But in the majority's view, governments are free to pass facially neutral laws explicitly motivated by racial discrimination, as long as the law's negative effect on the targeted racial group pushes it no lower than other racial groups. Under the majority's approach, we would not even consider the other evidence of discriminatory intent—no matter how strong—because the group challenging the law would fail to show discriminatory impact. *See supra*, at 882. It would not matter, for example, if a new law cut a racial group's success rate from 90% to 30% and the legislature was open about its discriminatory purpose, as long as no other racial group succeeded at a higher rate. The Equal Protection Clause, however, does not permit such blatant government discrimination. *See Davis*, 426 U.S. at 239, 96 S.Ct. 2040 ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.").

Nor does case law reject a before-and-after comparison, as the majority suggests. *See supra*, at 880–81. As explained above, our Court in *McCrory* found "sufficient disproportionate impact" based on evidence that *before* the new law's enactment, African Americans disproportionately used the voting mechanisms the new law *removed* and disproportionately lacked the photo ID the new law *required.* 831 F.3d at 231. The Court cautioned against reading too much into the increase in African American voter turnout after the new law because contextual evidence suggested that statistic was misleading and because of problems with comparing voter turnout across two midterm elections. *See id.* at 232. In doing so, the Court explained that the Fourteenth Amendment did not require plaintiffs to prove the new law "prevented African Americans from voting at the same levels as they had in the past," which would set *too high a standard. Id.* at 232. Today, the majority turns *McCrory*'s analysis on its head. *See supra*, at 880. Although evidence proving a year-over-year reduction (or, as here, a comparison with five prior years) may not be necessary, it is certainly relevant.

The two out-of-circuit cases on which the majority relies similarly do not rule out the relevance of before-and-after analysis to show disproportionate impact. *See supra*, at 880–81 (citing *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of the City of Bos.*, 996 F.3d 37 (1st Cir. 2021), and *Lewis v. Ascension Par. Sch. Bd.*, 806 F.3d 344 (5th Cir. 2015)). In *Boston Parent Coalition*, the First Circuit found the plaintiff's impact evidence "weak[ ]" because the plaintiff "offer[ed] no analysis or argument" in support of its comparators. 996 F.3d at 46. And in *Lewis*, the Fifth Circuit found the plaintiff failed to prove his theory that the school redistricting plan had a discriminatory effect on nonwhite

students by funneling "at risk" students into certain schools with a resulting negative effect on academic performance. 806 F.3d at 361–362. Among other things, the plaintiff's statistical evidence about academic performance was limited and showed mixed results that did not clearly support his theory. *Id.* at 362. Neither ***905** court categorically rejected before-and-after comparison.

Finally, none of this "turn[s] 'the previous status quo into an immutable quota.' " *Supra*, at 881 (quoting Opening Br. at 25). The reason is obvious. Disproportionate impact is not " 'the sole touchstone' " of an intentional discrimination claim—"[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Arlington Heights*, 429 U.S. at 265, 97 S.Ct. 555 (quoting *Davis*, 426 U.S. at 242, 96 S.Ct. 2040). And discriminatory purpose requires the decisionmaker to have acted "in part 'because of,' not merely 'in spite of,' " a foreseeable adverse effect upon an identifiable group. *Feeney*, 442 U.S. at 279, 99 S.Ct. 2282. States remain free to change the status quo, and even in ways that disproportionately affect protected groups, but States may not intentionally discriminate on the basis of race.

C.

Because the Coalition has established race was a factor that motivated the Board to adopt the Policy, the burden now shifts to the Board "to demonstrate that the [Policy] would have been enacted" absent the Board's purpose of racially balancing TJ to reduce Asian student enrollment. *Hunter*, 471 U.S. at 228, 105 S.Ct. 1916; *Arlington Heights*, 429 U.S. at 271 n.21, 97 S.Ct. 555. In other words, the Board now has an opportunity to prove that, despite its discriminatory purpose, it also acted with "actual nonracial motivations" that can, by themselves, justify the Policy. *Raymond*, 981 F.3d at 303 (internal quotation marks and emphasis omitted).

The Board has not attempted to carry its burden. In its briefing, the Board occasionally refers to a dual purpose of "improving racial diversity, along with other types of diversity." *See, e.g.*, Opening Br. at 51. But neither in our Court nor in the district court has the Board argued that, if the Coalition proved the existence of a racial motivation, the Board's actual nonracial motivations were sufficiently strong to independently support enactment of the Policy. *See McCrory*, 831 F.3d at 234 (describing this analysis). We therefore have no basis to conclude that the Board would have adopted the Policy "without considerations of race." *Id.*

III.

Having determined that the Policy was "motivated by a racial purpose or object," the remaining analysis is straightforward. *Hunt*, 526 U.S. at 546, 119 S.Ct. 1545 (internal quotation marks omitted). All such laws "warrant[ ] strict scrutiny." *Id.*; *see Miller*, 515 U.S. at 913, 115 S.Ct. 2475. To satisfy strict scrutiny, the Board must demonstrate that the Policy is "narrowly tailored" to achieve a "compelling governmental interest[ ]." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

The Board has not attempted to defend the Policy under strict scrutiny. And for good reason: The Policy cannot withstand such rigorous examination. The Supreme Court has endorsed two interests as sufficiently compelling to justify race-based decisionmaking in public education. *Parents Involved*, 551 U.S. at 720, 127 S.Ct. 2738. The first is "remedying the effects of past intentional discrimination." *Id.* No one claims the racial imbalance at TJ was the result of past intentional discrimination.

The second is "the interest in diversity in higher education." *Id.* at 722, 127 S.Ct. 2738; *see Grutter*, 539 U.S. at 328–329, 123 S.Ct. 2325. According to the Supreme Court, this interest is "unique to institutions of higher education" and does not apply to "elementary and secondary ***906** schools." *Parents Involved*, 551 U.S. at 724–725, 127 S.Ct. 2738; *see also id.* at 725, 127 S.Ct. 2738 (calling "the unique context of higher education" and "a specific type of broad-based diversity" "key limitations on [the] holding" of *Grutter*); *id.* at 770–771, 127 S.Ct. 2738 (Thomas J., concurring) (*Grutter*'s holding "was critically dependent upon features unique to higher education."). Obviously, that interest cannot apply to TJ. The Policy therefore cannot survive strict scrutiny.

IV.

Because the new admissions Policy for TJ violates the rights of Asian students under the Equal Protection Clause, I would affirm the district court's order granting summary judgment to the Coalition.

None of this freezes the TJ admissions policy in its prior form or forecloses future changes to the school's admissions plan. The Policy's discriminatory purpose and effect are what render it unconstitutional. *Cf. Hunter*, 471 U.S. at 233, 105 S.Ct. 1916 (distinguishing the separate question "whether [the law] would be valid if enacted today without any impermissible motivation"). But past discrimination does not, "in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbott v. Perez*, —— U.S. ——, 138 S. Ct. 2305, 2324, 201 L.Ed.2d 714 (2018) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74, 100 S.Ct. 1519, 64 L.Ed.2d 47 (1980)). If in the future the Board finds legitimate justifications counsel modification of TJ's admissions policy, the Board is free to act in its best judgment. The Constitution constrains it, however, from making decisions based on race.

All Citations

68 F.4th 864, 416 Ed. Law Rep. 114

Footnotes

1 Citations herein to "J.A. __" refer to the contents of the Joint Appendix filed by the parties in this appeal.

2 We observe that the "class of 2024" refers to those students who are expected to graduate from TJ in 2024. References herein to the "class of 2025" are consistent therewith.

3 After the issuance of its September 2020 press release, the Coalition proposed its own "Second-Look Semifinalist" admissions policy. *See* J.A. 892. Like the merit lottery proposal, the Coalition's plan sought to address geographic diversity among the community's middle schools and would have a student's "underrepresented background" be "evaluated favorably and weighted" as part of an "holistic" evaluation. *Id.* at 892, 895. The Coalition maintained that its proposal would "materially increase both the geographic and the socioeconomic diversity at TJ" and "would result in disproportionately more Black and more Hispanic students" receiving offers of admission. *Id.* at 730, 894. That is, the Coalition explicitly suggested what it now labels and opposes as a "facially neutral proxy" for racial discrimination against Asian American students. *See* Br. of Appellee 13; *infra* note 7.

4 In its Complaint, the Coalition named Dr. Braband as a defendant, in his official capacity as Superintendent. The district court dismissed Dr. Braband from the proceedings on May 26, 2021, leaving the Board as the only defendant.

5 The Coalition, by way of example, urges that the 1.5% seat allocation is "designed to limit access to TJ" for students attending six Fairfax County "feeder" middle schools, and that a 2021 drop in the number of Asian American students attending those schools who were offered admission to TJ "was by design." *See* Br. of Appellee 29. Yet, as the Board points out, the Asian American percentage of the student bodies at those "feeder" schools is roughly proportional to that of other County middle schools. It is thus far from clear how the 1.5% seat allocation could disproportionately impact the fortunes of Asian American students, whether "by design" or otherwise.

6 Notably, if the Board actually sought to "balance" the student population at TJ, it did a terrible job. For example, in the Fall of 2019, Asian American students comprised some 19.5% of Fairfax County's student population, and Hispanic students made up another 26.8%; but the Asian American students received 54.36% of TJ's offers of admission in 2021, and the Hispanic students received only 11.27% of the offers.

7 We again emphasize that, if the challenged admissions policy had indeed been adopted to promote TJ's representation of Black and Hispanic students as the Coalition insists, the Coalition actually received what it asked for. Its own proposed "Second-Look" admissions policy, after all, was intended — as the Coalition

said — to "result in disproportionately more Black and more Hispanic students" receiving offers of admission to TJ. *See supra* note 3.

8 The *Feeney* ruling thus bars the district court's discriminatory intent analysis in this case. And that makes good sense, insofar as — much like the court's before-and-after approach to the disparate impact inquiry — the court's method of reasoning would open a whole host of government policies to invalidation on Equal Protection grounds. *See Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (recognizing that "[a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes").

1 See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938); *Sipuel v. Board of Regents of Univ. of Okla.*, 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 for Higher Educ.*, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950).

2 See *Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007); *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013); *Fisher v. University of Tex. at Austin*, 579 U.S. 365, 136 S.Ct. 2198, 195 L.Ed.2d 511 (2016).

3 See *Students for Fair Admissions, Inc. v. University of N.C.*, No. 21–707 (argued Oct. 31, 2022); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 20–1199 (argued Oct. 31, 2022).

4 This directive makes it difficult to swallow the Coalition's repeated accusations of racial balancing, see Coalition Br. 2–3, 5, 12, 34, 37–38, 47, which is when a decisionmaker "define[s] diversity as some specified percentage of a particular group merely because of its race or ethnic origin," *Fisher*, 570 U.S. at 311, 133 S.Ct. 2411 (quotation marks omitted). Nor are the Coalition's allegations substantiated by reference to broad statements—only one of which was uttered by the Board or its members—suggesting TJ should "reflect the diversity of" the community. See JA 293 (non-Board member), JA 458 (same), JA 517 (same), JA 808 (same); see also JA 909 (Board resolution stating "TJ's demographics [should] represent the NOVA region" with no mention of race or ethnicity.).

5 Throughout this litigation, the Coalition has refrained from saying it thinks such ambitions render a facially neutral plan unconstitutional. Indeed, the Coalition's representative testified during a deposition that "there has been a failure, by Fairfax County Public Schools, to ... pair [*sic*] students from Black and Hispanic communities to gain admission to TJ," and endorsed "increasing the diversity of Black and Hispanic students at TJ through merit-based admissions." JA 2638.

* This opinion uses the racial terms the Board used when designing the Policy.

2024 WL 674659
Supreme Court of the United States.

COALITION FOR TJ
v.
FAIRFAX COUNTY SCHOOL BOARD

No. 23-170
|
Decided February 20, 2024

Opinion
The petition for a writ of certiorari is denied.

Justice ALITO, with whom Justice THOMAS joins, dissenting from the denial of certiorari.

***1** The Court of Appeals' decision in this case is based on a patently incorrect and dangerous understanding of what a plaintiff must show to prove intentional race discrimination. A group representing applicants for admission to a highly competitive public magnet school brought suit, claiming that changes in the school's admissions requirements violated the Equal Protection Clause. They alleged that the changes were made for the purpose of discriminating on the basis of race, to the detriment of Asian-American applicants. The District Court found that direct and circumstantial evidence supported that claim and issued an injunction against implementation of the changes. On appeal, however, a divided Fourth Circuit panel reversed and held that the plaintiff 's claim failed simply because the challenged changes did not reduce the percentage of AsianAmerican admittees below the percentage of AsianAmerican students in the schools in the jurisdictions served by the magnet school. What the Fourth Circuit majority held, in essence, is that intentional racial discrimination is constitutional so long as it is not too severe. This reasoning is indefensible, and it cries out for correction.

I

A

Thomas Jefferson High School for Science and Technology (TJ), is a magnet school that draws students from Fairfax County and other jurisdictions in northern Virginia. Widely recognized as one of the best public high schools in the Nation, [1] the school has exceptional resources, including 13 on-campus research laboratories and a student-produced scientific research journal, and it features a rigorous curriculum. All students must study computer science and complete a science or technology research project, and the school offers 26 advanced placement and 20 "post-AP" courses. [2]

The Fairfax County School Board (Board), an elected 12-member body, sets the school's admissions policy. Until 2020, the school had a highly competitive race-blind admissions process that relied heavily on standardized tests. Eighth grade students were eligible to apply if they had at least a 3.0 GPA and had taken a course in algebra. All applicants then took three standardized tests, and after that, the highest ranked students took a fourth exam and submitted two teacher recommendations. The class was selected from that group based on a holistic review of these inputs. Admission to TJ has been very competitive. From 2012 to 2020, the admissions rate varied between 14 and 20 percent. [3]

***2** In recent years, this race-neutral competitive process produced classes with a high percentage of Asian-American students. In 2019, Asian Americans constituted 71.5 percent of TJ's class, and the 2020 entering class was similar, with a 73 percent Asian-American student body.

Asian-American students, many of whom are immigrants or the children of immigrants, [4] have often seen admission to TJ as a ticket to the American dream. In this respect, their aspirations mirror those of young people from other immigrant groups. Public magnet schools with competitive admissions based on standardized tests have served as engines of social mobility by providing unique opportunities for minorities and the children of immigrants, and these students' subsequent careers have in turn richly contributed to our country's success. For example, one such school in New York City has produced no fewer than nine Nobel laureates. [5]

While Asian Americans have striven to attend TJ, their strong representation in the student body attracted criticism from education officials. In June 2020, TJ students received an email from their principal lamenting that the school did " 'not reflect the racial composition in [the Fairfax County Public Schools].' " App. to Pet. for Cert. 90a. A member of the Board wrote in an email that she was " 'angry and disappointed' " at TJ's admissions results and that she expected " 'intentful [*sic*] action forthcoming.' " *Id.*, at 100a. That Board member also

contacted Scott Braband, the superintendent of the Fairfax County Public Schools, demanding that the Board and the public school system " 'be explicit in how we are going to address the under-representation of [b]lack and Hispanic students.' " *Ibid.*

The Board answered the call. In December 2020, it adopted the current admissions policy, which no longer relies on standardized tests. The policy fills around 450 of the 550 seats in each incoming class by allocating a specified number of seats to each public middle school in the qualifying region. [6] The remaining 100 seats are open to the entire applicant pool. Applicants for these seats are evaluated based on their grades, a "portrait sheet," a problem-solving essay, and "Experience Factors." The portrait sheet is meant to describe the applicant's "soft" skills (such as the ability to work with other students). The four "Experience Factors" are (1) eligibility for free or reduced price meals; (2) status as an English language learner; (3) eligibility for special education services; and (4) attendance at a public middle school that previously sent few students to TJ.

***3** This new policy had an immediate effect. The percentage of white, Hispanic, and black students increased, [7] while the percentage and number of Asian-American students sharply dropped. In prior years, the offer rate for Asian-American students had hovered between 65 and 75 percent of the school's total offers. Under the new policy, Asian Americans received 54.36 percent of the offers. In fact, even though the entering class expanded by 64 seats, the number of seats offered to Asian Americans decreased by 56. *Id.*, at 89a.

B

The Coalition for TJ (Coalition), an organization that includes parents of children who have applied or will apply to TJ, filed suit in Federal District Court under 42 U. S. C. § 1983, against the Board. The Coalition alleged that the new admissions policy was based on intentional racial discrimination and therefore violates the Equal Protection Clause.

After a careful review of the record, the District Court agreed. It found that both direct and circumstantial evidence clearly showed that the changes in the admissions process were motivated by racial discrimination. The court found that the Board's decision-making process was "rushed, not transparent, and more concerned with simply doing something to alter the racial balance at TJ than with public engagement." App. to Pet. for Cert. 106a. "The discussion of TJ admissions changes was infected with talk of racial balancing from its inception," and "emails and text messages between Board members and high-ranking [Fairfax County Public School] officials leave no material dispute that, at least in part, the purpose of the Board's admissions overhaul was to change the racial makeup [of] TJ to the detriment of Asian-Americans." *Ibid.* The court also found that "Asian-American students [were] disproportionately harmed by the Board's decision to overhaul TJ admissions," *id.*, at 99a, and it viewed this disparate impact as circumstantial evidence of unlawful discrimination. Based on this view of the evidence, the court granted summary judgment for the Coalition and enjoined use of the new policy.

The Fourth Circuit reversed the District Court in a startling 2 to 1 decision. 68 F.4th 864 (2023). The panel majority held that the Coalition could not prevail because, as the majority saw things, the new policy "visit[ed] no racially disparate impact on Asian American students" since, even after use of the new policy began, Asian Americans still received 54.36 percent of the admissions offers. *Id.*, at 879–881. This percentage exceeded the percentage of Asian-American students in the applicant pool, and therefore, according to the panel majority's reasoning, Asian-American students had no cause to complain. As the panel majority put it, "an application of elementary arithmetic shows that Asian American students, as a class, experience no material disadvantage under the policy's functioning" and in fact perform "better in securing admission to TJ than students from any other racial or ethnic group." *Id.*, at 882. Although the panel also went on to discuss the Coalition's other evidence, the panel majority concluded that it "could end [its] analysis of the Coalition's Equal Protection Claim at th[at] juncture." *Id.*, at 879–880, 882. As I will explain below, the panel's "elementary arithmetic" was elementary error.

II

***4** The "central purpose" of the Equal Protection Clause is to prohibit "official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); see also, *e.g.*, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 206, 143 S.Ct. 2141, 216 L.Ed.2d 857 (2023) (SFFA) (the "core purpose" of the Equal Protection Clause is "doing away with all governmentally imposed discrimination based on race" (internal quotation marks and alterations

omitted)). When a party claims that a law or policy is racially discriminatory, that party must show that it was adopted for "a racially discriminatory purpose." *Davis*, 426 U.S., at 240, 96 S.Ct. 2040. A facially discriminatory policy is automatically subject to heightened review. Even a policy that is race neutral on its face may be unconstitutional if it is adopted for a "racially discriminatory intent or purpose." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265–266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). A party who challenges such a policy on equal protection grounds can show intentional discrimination by proffering a combination of direct and circumstantial evidence.

In *Arlington Heights*, we listed four factors that, among others, have a bearing on the assessment of circumstantial evidence: (1) the law's historical background, (2) the sequence of events leading to the law's enactment, including any departures from the normal legislative process, (3) the law's legislative history, and (4) whether the law " 'bears more heavily on one race than another.' " *Id.*, at 265–269, 97 S.Ct. 555. We have emphasized that disparate impact, by itself, does not establish intentional discrimination. *Davis*, 426 U.S. at 239–240, 96 S.Ct. 2040.

The District Court faithfully employed this framework. In addition to noting that the record contains direct evidence of racial intent, the court noted the stark change effected by the new policy, the unusual decisionmaking process that led to the change, and the fact that the change bore "more heavily on" Asian Americans than members of other groups.

The Fourth Circuit panel majority, by contrast, completely distorted the meaning of disparate impact. Even though the new policy bore "more heavily" on Asian-American applicants (because it diminished their chances of admission while improving the chances of every other racial group), the panel majority held that there was no disparate impact because they were still overrepresented in the TJ student body.

That is a clearly mistaken understanding of what it means for a law or policy to have a disparate effect on the members of a particular racial or ethnic group. Under the old policy, each Asian-American applicant had a certain chance of admission. Under the new policy, that chance has been significantly reduced, while the chance of admission for members of other racial and ethnic groups has increased. Accordingly, the new admissions policy bore more heavily on Asian-American applicants.

The panel majority, however, thought that this did not matter. The simple fact that Asian Americans were still overrepresented in the TJ student body was enough to doom the Coalition's equal protection claim. As far as the Fourth Circuit was concerned, the Board could have adopted a policy designed solely to reduce the Asian-American offer rate and still evaded liability. The holding below effectively licenses official actors to discriminate against any racial group with impunity as long as that group continues to perform at a higher rate than other groups.

That is indefensible. As Judge Rushing explained in dissent, under the Fourth Circuit's view, the Constitution permits "facially neutral laws explicitly motivated by racial discrimination, as long as the law's negative effect on the targeted racial group pushes it no lower than other racial groups." 68 F.4th at 904. "It would not matter, for example, if a new law cut a racial group's success rate from 90% to 30% and the legislature was open about its discriminatory purpose, as long as no other racial group succeeded at a higher rate." *Ibid.* This rule defies law and logic.

***5** Consider the following hypothetical case. Suppose that white parents in a school district where 85 percent of the students are white and 15 percent are black complain because 10 of the 12 players (83 percent) on the public high school basketball team are black. Suppose that the principal emails the coach and says: "You have too many black players. You need to replace some of them with white players." And suppose the coach emails back: "Ok. That will hurt the team, but if you insist, I'll do it." The coach then takes five of his black players aside and kicks them off the team for some contrived—but facially neutral—reason. For instance, as cover, he might institute a policy that reserves a set number of spots on the roster for each of the middle schools who feed to the high school. According to the reasoning of the Fourth Circuit majority, this action would not violate equal protection because the percentage of black players left on the team (approximately 42 percent) would exceed the percentage of black students in the school. [8] I cannot imagine this Court's sustaining such discrimination, but in principle there is no difference between that imaginary case and one now before us.

III

The Fourth Circuit's decision is based on a theory that is flagrantly wrong and should not be allowed to stand. I

would not reach the question whether the District Court correctly analyzed all the evidence in this case, but I would summarily reject the holding discussed above. If the District Court's evaluation of the evidence is correct, the panel majority's fallacious reasoning works a grave injustice on diligent young people who yearn to make a better future for themselves, their families, and our society. In addition, the Fourth Circuit's reasoning is a virus that may spread if not promptly eliminated. Indeed, the First Circuit has already favorably cited the Fourth Circuit's analysis to disparage the use of a before-and-after comparison in a similar equal protection challenge to a facially neutral admissions policy. See *Boston Parent Coalition for Academic Excellence Corp. v. School Comm. for Boston*, 89 F.4th 46, 57–58 (2023). And TJ's model itself has been trumpeted to potential replicators as a blueprint for evading *SFFA*. [9]

* * *

The Court's willingness to swallow the aberrant decision below is hard to understand. We should wipe the decision off the books, and because the Court refuses to do so, I must respectfully dissent.

All Citations

--- S.Ct. ----, 2024 WL 674659 (Mem), 2024 Daily Journal D.A.R. 1375, 30 Fla. L. Weekly Fed. S 40

Footnotes

1 U. S. News & World Report, Thomas Jefferson High School for Science and Technology, https://www.usnews.com/education/best-high-schools/virginia/districts/fairfax-county-public-schools/thomas-jefferson-high-school-for-science-and-technology-20461.

2 Thomas Jefferson High School for Science and Technology 2022–2023, https://tjhsst.fcps.edu/sites/default/files/media/inline-files/2022-23% 20TJHSST% 20Profile_0.pdf; Fairfax County Public Schools, School Summary, https://schoolprofiles.fcps.edu/schlprfl/f?p=108% 3A50% 3A% 3A% 3A% 3A% 3AP0_CURRENT_SCHOOL_ID% 3A300.

3 See, *e.g.*, TJHSST Admissions Statistics for Class of 2016, https://web.archive.org/web/20150404073947/https://www.fcps.edu/cco/pr/tj/tjadmissions0412.pdf; Fairfax County Public Schools, TJHSST Offers Admission to 486 Students, https://web.archive.org/web/20220824023116/ https://www.fcps.edu/news/tjhsst-offers-admission-486students.

4 The percentage of foreign-born residents in the jurisdictions in question is well above the national average. For example, immigrants make up approximately 30 percent of the population of Fairfax County, which is the most populous county in Virginia. And of the top five countries from which these immigrants came, four (India, Korea, Vietnam, and China) are in Asia. Fairfax County, Our Immigrant Neighbors, https://www.fairfaxcounty.gov/demographics/our-immigrant-neighbors.

5 Bronx Science Foundation, Celebrating Bronx Science Luminaries, https://alumni.bxscience.edu/hall-of-fame-2.

6 Specifically, the number of seats given to each such school is equal to 1.5 percent of the school's eighth grade population.

7 White students received 22.36 percent of admission offers, up from 17.7 percent. Hispanic students received 11.27 percent of offers, up from 3.3 percent. Black students received 7.9 percent of offers, up from less than 3 percent. Parties' Stipulation of Uncontested Facts in No. 1:21–cv–296 (ED Va., Dec. 3, 2021), ECF Doc. 95, pp. 4–5; 2 App. in No. 22–1280 (CA4, May 11, 2022), ECF Doc. 44–2, pp. 96–98.

8 Should the Fourth Circuit's reasoning be adopted elsewhere, the same would also hold true in other circuits where the court of appeals considers disparate impact to be a necessary element of a successful challenge to a facially neutral policy. See *Lewis v. Ascension Parish School Bd.*, 806 F.3d 344, 358–359 (CA5 2015); *Doe v. Lower Merion School Dist.*, 665 F.3d 524, 549 (CA3 2011); *Anderson v. Boston*, 375 F.3d 71, 89 (CA1 2004).

9 Less than two weeks after *SFFA* was decided, the dean of UC Berkeley School of Law and the general counsel for the University of Michigan, to name just a couple of examples, openly advocated for schools to emulate TJ's new admissions model. See Brief for Cato Institute as *Amicus Curiae* 4–7. Just as TJ offers a roadmap for other selective schools to skirt the Equal Protection Clause, so too does the Fourth Circuit's reasoning offer a roadmap for other federal courts to provide cover.

89 F.4th 46
United States Court of Appeals, First Circuit.

BOSTON PARENT COALITION FOR ACADEMIC EXCELLENCE CORP., Plaintiff, Appellant,

v.

The SCHOOL COMMITTEE FOR the CITY OF BOSTON; Alexandra Oliver-Dávila; Michael O'Neill; Hardin Coleman; Lorna Rivera; Jeri Robinson; Quoc Tran; Ernani Dearaujo; Brenda Cassellius, Defendants, Appellees,

The Boston Branch of the NAACP; The Greater Boston Latino Network; Asian Pacific Islander Civic Action Network; Asian American Resource Workshop; Maireny Pimental; H.D., Defendants, Intervenors, Appellees.

Nos. 21-1303, 22-1144
|
December 19, 2023

Synopsis

Background: Nonprofit corporation acting on behalf of parents and students against public school committee, its members, and superintendent of city public schools, seeking declaratory and injunctive relief for claim alleging that city public schools' new plan for admissions to three selective exam schools, which was based on grades and zip code with preference given to students with top grades from lower-income zip codes, violated the Equal Protection Clause. The United States District Court for the District of Massachusetts, Young, Senior District Judge, 2021 WL 1422827, entered judgment for defendants. Corporation appealed and moved for injunction preventing implementation of the plan. The United States Court of Appeals for the First Circuit, Kayatta, Circuit Judge, 996 F.3d 37, denied the interim request for injunctive relief. After a newspaper article published text messages between committee members, corporation filed motion for relief from the judgment based on newly discovered evidence that could not have been discovered earlier. United States District Court for the District of Massachusetts, Young, Senior District Judge, 2021 WL 4489840, denied the motion. Corporation appealed.

Holdings: The Court of Appeals, Kayatta, Circuit Judge, held that:

claim for equitable relief was justiciable;

corporation failed to show that plan had disparate impact;

strict scrutiny review on equal protection challenge was not warranted;

corporation failed to show that text messages were newly discovered evidence that could not have been discovered earlier; and

newly discovered evidence of the text messages was not of such a nature that it would probably change result were a new trial to be granted.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Relief from Order or Judgment.

***50** APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. William G. Young, U.S. District Judge]

Attorneys and Law Firms

Christopher M. Kieser, Joshua P. Thompson, and Pacific Legal Foundation, with whom William H. Hurd, and Eckert Seamans Cherin & Mellott, LLC, were on brief for appellant.

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Foster, Attorneys, Civil Rights Division, were on brief for the United States of America, amicus curiae.

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Maura Healey, Attorney General of Massachusetts, Elizabeth N. Dewar, State Solicitor, Ann E. Lynch, and David Ureña, Assistant Attorneys General of Massachusetts, were on brief for Massachusetts, California, Colorado, the District of Columbia, Hawai'i, Illinois, Maine, Maryland, Minnesota, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, and Washington, amici curiae.

Michael Sheetz, Adam S. Gershenson, Michael McMahon, Robby K.R. Saldaña, and Cooley LLP, were on brief for the Anti-Defamation League, Black Economic Council of Massachusetts, Inc., Boston Bar Association, The Greater Boston Chamber of Commerce, Jewish Alliance for Law and Social Action, King Boston, and Massachusetts Immigrant and Refugee Advocacy Coalition, amici curiae.

Sarah Hinger, Woo Ri Choi, Matthew Segal, Ruth A. Bourquin, Jon Greenbaum, David Hinojosa, and Genevieve Bonadies Torres, were on brief for the American Civil Liberties Union Foundation, American Civil Liberties Union of Massachusetts, Inc., Lawyers' Committee for Civil Rights Under Law, and National Coalition on School Diversity, amici curiae.

Paul Lantieri III, and Ballard Spahr LLP, were on brief for the National Association for Gifted Children, amicus curiae.

Before Kayatta, Howard, and Thompson, Circuit Judges.

Opinion

KAYATTA, Circuit Judge.

***51** We consider for a second time this appeal challenging on equal protection grounds a temporary admissions plan (the "Plan") for three selective Boston public schools. Previously, we denied a motion by plaintiff Boston Parent Coalition to enjoin use of the Plan until this appeal could be decided on the merits. In so doing, we held that the Coalition failed to show that it would likely prevail in establishing that defendants' adoption of the Plan violated the equal protection rights of the Coalition's members.

We turn our attention now to the merits of the appeal after full briefing and oral argument. For the following reasons, we find our previously expressed skepticism of the Coalition's claim to be well-founded. We therefore affirm the judgment below. We also explain why events since we last opined in this case do not mandate a different resolution.

I.

A full discussion of the facts and litigation giving rise to this appeal can be found in the prior opinions of this court and the district court. See Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos. (Boston Parent I), 996 F.3d 37, 41–43 (1st Cir. 2021); Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos. (Indicative Ruling), No. CV 21-10330, 2021 WL 4489840, at *3–4 (D. Mass. Oct. 1, 2021); Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos., No. 21-10330, 2021 WL 1422827 (D. Mass. Apr. 15, 2021) withdrawn by Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos., No. 21-10330, 2021 WL 3012618 (D. Mass. July 9, 2021). We provide now only an abbreviated review of the record, focusing on those points pertinent to the appeal before us.

Boston Latin Academy, Boston Latin School, and the John D. O'Bryant School (collectively known as the "Exam Schools") are three of Boston's selective public schools. For the twenty years preceding the 2021–2022 school year, admission to the Exam Schools was based on applicants' GPAs and their performance on a standardized test. The schools combined each applicant's GPA and standardized test score to establish a composite score ranking applicants citywide. Exam School seats ***52** were then filled in order, beginning with the student with the highest composite score, based on the students' ranked preferences among the three schools. The racial/ethnic demographics for the students offered admission to the Exam Schools for the 2020–2021 school year were:

White (39%); Asian (21%); Latinx (21%); Black (14%); and mixed race (5%). By contrast, the racial/ethnic demographics for the citywide school-age population in Boston that same year were: White (16%); Asian (7%); Latinx (36%); Black (35%); and mixed race (5%). [1]

During the summer of 2019, Boston Public Schools conducted several analyses of how potential changes to admissions criteria would affect racial/ethnic demographics at the Exam Schools. Following this process, Boston Public Schools developed a new exam to be administered to Exam School applicants beginning with the 2021–2022 school year. However, when COVID-19 struck, the Boston School Committee determined that the Exam School admissions criteria for 2021–2022 needed revision in light of the pandemic's impact on applicants during both the 2019-2020 and the prospective 2020–2021 school years.

In March 2020, citing the COVID-19 pandemic, Massachusetts Governor Charlie Baker suspended all regular, in-person instruction and other educational operations at K–12 public schools through the end of the 2019–2020 school year. Schools transitioned to full remote learning. Pandemic-related gathering restrictions made administering the in-person test difficult.

The Boston School Committee convened a Working Group to recommend revised admissions procedures for the 2021–2022 school year. This group met regularly from August to October 2020, reviewing extensive data regarding the existing Exam School admissions process, alternative selection methods used in other cities, and potential impacts of different proposed methodologies on students. As part of its process, the Working Group completed a so-called "equity impact statement" that stated the desired outcomes of the revised admissions criteria recommendation as follows:

> Ensure that students will be enrolled (in the three exam high schools) through a clear and fair process for admission in the 21–22 school year that takes into account the circumstances of the COVID-19 global pandemic that disproportionately affected families in the city of Boston.
>
> Work towards an admissions process that will support student enrollment at each of the exam schools such that it better reflects the racial, socioeconomic and geographic diversity of all students (K–12) in the city of Boston.

As part of its process, the Working Group reviewed multiple simulations of the racial compositions that would result from different potential admissions criteria.

The Working Group presented its initial recommendations to the Boston School Committee on October 8, 2020. During this meeting, members of the Working Group discussed historical racial inequities in the Exam Schools, and previous efforts to increase equity across the Exam Schools. The Working Group also discussed a substantial disparity in the increase in fifth grade GPAs for White and Asian students as compared to Black and Latinx students, the disproportionate negative impact of the COVID-19 pandemic on minority and low-income students, a desired outcome of "rectifying historic racial inequities afflicting ***53** exam school admissions for generations," and, as one School Committee member stated, the "need to figure out again how we could increase these admissions rates, especially for Latinx and Black students." Another School Committee member stated that she "want[ed] to see [the Exam Schools] reflect the District[,]" and that "[t]here's no excuse ... for why they shouldn't reflect the District, which has a larger Latino population and Black African-American population."

The School Committee met on October 21, 2020, to discuss the Working Group's plan. At that meeting, race again became a topic of discussion. Some School Committee members voiced concerns that the revised plan, while an improvement, "actually [did not] go far enough" because it would likely still result in a greater percentage of White and Asian students in exam schools than in the general school-age population. During this meeting, School Committee chairperson Michael Loconto made comments mocking the names of some Asian parents. Two members of the School Committee, Alexandra Oliver-Dávila and Lorna Rivera, texted each other regarding the comments, with one saying "I think he was making fun of the Chinese names! Hot mic!!!" and another responding that she "almost laughed out loud." The chairperson apologized and resigned the following day.

Subsequently, the Working Group recommended and the School Committee adopted the Plan. With test administration not feasible during the COVID-19 pandemic, the Plan relied on GPAs to select Exam School admittees for the 2021–2022 school year. It first awarded Exam School slots to those students who, citywide, had the top 20% of the rank-ordered GPAs. The remaining applicants were then divided into groups based on the zip codes in which they resided (or,

in the case of students without homes or in state custody, to a designated zip code).

Next, starting with the highest ranked applicants living in the zip code with the lowest median family income (for families with school age children), and continuing with applicants in each zip code in ascending order of the zip code's median family income, 10% of the remaining seats at each of the three Exam Schools were filled based on GPA and student preferences. Ten rounds of this process filled more or less all remaining available seats in the three schools.

The Coalition, a corporation acting on behalf of some parents and their children who reside in Boston, sued the School Committee, its members, and the Boston Public Schools superintendent. The Coalition asserted that the Plan violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and chapter 76, section 5 of the Massachusetts General Laws by intentionally discriminating against White and Asian students. Boston Parent I, 996 F.3d at 43. After the Coalition moved for a preliminary injunction to bar the School Committee from implementing the Plan, the district court consolidated a hearing on the motion with a trial on the merits following the parties' submission of a Joint Agreed Statement of Facts. The district court found the Plan to be constitutional. The Coalition subsequently appealed that decision on the merits and sought interim injunctive relief from this Court pending resolution of the merits appeal. We denied the interim request for injunctive relief, in large part because we determined the Coalition was unlikely to succeed on the merits. Id. at 48.

Following our decision, on June 7, 2021, the Boston Globe published previously undisclosed evidence of an additional text-message exchange between School Committee ***54** members Oliver-Dávila and Rivera during the Board Meeting at which the Committee adopted the Plan. Reacting to the Committee chairman's mocking of Asian parent names, Oliver-Dávila texted Rivera "[b]est s[chool] c[ommittee] m[ee]t[in]g ever I am trying not to cry." Rivera responded, "Me too!! Wait til the White racists start yelling [a]t us!" Oliver-Dávila then responded "[w]hatever ... they are delusional." Additionally, Oliver-Dávila texted "I hate WR," which the parties seem to agree is short for West Roxbury, a predominantly White neighborhood. Rivera then responded "[s]ick of westie whites," to which Oliver-Dávila replied "[m]e too I really feel [l]ike saying that!!!!"

Armed with these revelations, the Coalition moved for relief under Federal Rule of Civil Procedure 60(b), asking the district court to reconsider its judgment or at least allow more discovery. Following an indicative ruling by the district court pursuant to Federal Rule of Civil Procedure 12.1, we remanded the case to the district court so that it could rule formally on the Coalition's Rule 60(b) motion. The district court deemed the text messages "racist," and found that they showed that "[t]hree of the seven School Committee members harbored some form of racial animus." Bos. Parent Coal., 2021 WL 4489840, at *15. The district court nonetheless denied the Coalition's motion, finding that relief under Rule 60(b) was not warranted on at least two grounds. Id. at *13–16. First, the district court found that the Coalition could have discovered the new evidence earlier with due diligence, and that it was only the result of the Coalition's deliberate litigation strategy -- namely, its theory that it need not show animus to prove intentional discrimination -- that no such evidence was discovered. Id. at *15. Second, the district court found that the new evidence would not change the result were a new trial to be granted. Id. at *15–16.

As to the second finding, the district court noted that "it is clear from the new record that the race-neutral criteria were chosen precisely because of their effect on racial demographics," that is, "but for the increase in Black and Latinx students at the Exam Schools, the Plan's race-neutral criteria would not have been chosen." Id. at *15. However, the court concluded that the new evidence in question did not cure the Coalition's persistent failure to show any legally cognizable disparate impact on White or Asian students under the facially neutral Plan. Id. The district court thus denied the Coalition's Rule 60(b) motion. Id. at *17.

Meanwhile, following our earlier denial of the Coalition's request for injunctive relief, Boston Public Schools implemented the Plan for admissions to the Exam Schools for the 2021–2022 school year. Shortly thereafter, the challenged Plan was replaced with a plan based on GPA, a new standardized examination, and census tracts. The Coalition does not challenge the current admissions plan in this appeal.

With its request to enjoin use of the Plan now moot, the Coalition still persists with this appeal, pointing to five children of its members who were denied admission to the Exam Schools in 2021 despite allegedly having higher GPAs than those of some students in other zip codes who were admitted. The Coalition asks that we remand the case to the district court with instructions to order the School

Committee to admit these five students to an Exam School. [2] Additionally, the Coalition appeals ***55** the district court's denial of its Rule 60(b) motion.

II.

Before we turn to the merits, we address a threshold question of justiciability. The Coalition argues that if the Plan had not been adopted, the City would have based invites to the Exam Schools on GPA in a citywide competition, just as it did for 20% of the slots. And in that event, all five students for whom the Coalition seeks relief would have been admitted. The School Committee argues that the Coalition has no Article III standing to seek relief on behalf of five students who are not parties to this lawsuit, and that even if it did, there is no basis for granting the requested relief.

An association has standing to bring suit on behalf of its individual 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." Coll. of Dental Surgeons of P.R. v. Conn. Gen. Life Ins. Co., 585 F.3d 33, 40 (1st Cir. 2009) (quoting Hunt v. Wash. State Apple Advertising Comm'n, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)). Here, only the third of these so-called Hunt factors is in dispute. The School Committee contends that, because the Coalition now seeks injunctive relief for five individual members who are not themselves plaintiffs in this action, their individual participation in the lawsuit is required. Therefore, they argue, the Coalition lacks independent associational standing under Hunt.

"There is no well-developed test in this circuit as to how the third prong of the Hunt test -- whether 'the claim asserted [or] the relief requested requires the participation of individual members in the lawsuit,' -- applies in cases where injunctive relief is sought." Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 313–14 (1st Cir. 2005) (Boudin, J. & Dyk, J., concurring) (quoting Hunt, 432 U.S. at 343, 97 S.Ct. 2434). Here, granting the Coalition's requested remedy would certainly require some factual showing that some or all of the five students would have been admitted to an Exam School but for the adoption of the Plan. However, given the documented and apparently uncontested nature of the student-specific facts likely to be included in such a showing (i.e., GPA and school preference), it seems unlikely that any of the students would need to do much, if anything, in the lawsuit. Moreover, the Coalition's requested remedy, if granted, would clearly "inure to the benefit of those members of the association actually injured." Id. at 307 (quoting Warth v. Seldin, 422 U.S. 490, 515, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

The School Committee responds that if it did not use zip codes, it would not have chosen to use GPAs citywide as its sole selection criterion instead. It notes that such a GPA-only admissions plan has not been used for over twenty years, and therefore that the basis for the Coalition members' asserted injuries is purely speculative. Moreover, the School Committee questions the evidentiary basis of the assertions on behalf of the unnamed children.

These arguments strike us as better suited to challenging the merits of the ***56** Coalition's claims, not its standing to assert those claims. In substance, the School Committee disputes what would have happened had it not used the Plan. And on that point, the record is not clear enough to dismiss the Coalition's position as speculative. Moreover, at this stage, we need only note that courts have broad authority to fashion equitable relief following a finding of an equal protection violation. See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."). Therefore, we see no bar -- at least at the threshold of justiciability -- to the Coalition's claim for equitable relief on behalf of some of its individual members. We now turn to the merits.

III.

A.

When reviewing the merits of a district court's decision on a stipulated record, we review legal conclusions de novo and factual findings for clear error. See Consumer Data Indus. Ass'n v. Frey, 26 F.4th 1, 5 (1st Cir. 2022). Yet, "when the issues on appeal 'raise[ ] either questions of law or questions about how the law applies to discerned facts,' such as whether the proffered evidence establishes a discriminatory purpose or a disproportionate racial impact, 'our review is essentially plenary.' " Boston Parent I, 996 F.3d at 45 (quoting Anderson ex rel. Dowd v. City of Bos., 375 F.3d 71, 80 (1st Cir. 2004)). "Similarly, we review de novo the district court's other legal

conclusions, including the level of scrutiny it applied when evaluating the constitutionality of the challenged action." Id.

B.

The Fourteenth Amendment prohibits "all governmentally imposed discrimination based on race," save for those rare and compelling circumstances that can survive the daunting review of strict scrutiny. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 206, 143 S.Ct. 2141, 216 L.Ed.2d 857 (2023) (quoting Palmore v. Sidoti, 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984)). The Equal Protection Clause's "central purpose" is to "prevent the States from purposefully discriminating between individuals on the basis of race." See Shaw v. Reno, 509 U.S. 630, 642, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). Generally, purposeful racial discrimination violative of the Equal Protection Clause falls into three categories of state action that merit strict scrutiny: (1) where state action expressly classifies individuals by race (see, e.g., Students for Fair Admissions, 600 U.S. at 194–95, 143 S.Ct. 2141; Grutter v. Bollinger, 539 U.S. 306, 327–28, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003)); (2) where a policy is facially neutral but is in fact unevenly implemented based on race (see Yick Wo v. Hopkins, 118 U.S. 356, 373–74, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)); and (3) where a facially race-neutral, and evenly applied, policy results in a racially disparate impact and was motivated by discriminatory intent (see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); Washington v. Davis, 426 U.S. 229, 242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)).

The Coalition's principal arguments for challenging the Plan fall into category (3) -- an evenly applied, facially race-neutral plan that was motivated by a discriminatory purpose and has a disparate impact. But the record provides no evidence of a relevant disparate impact. And the evidence ***57** of defendants' intent to reduce racial disparities is not by itself enough to sustain the Coalition's claim. Our reasoning follows.

1.

The Coalition makes two attempts to show that the School Committee's use of the Plan to determine Exam School admissions had a disparate impact on the Coalition's members. We address each in turn.

a.

To prove that the Plan had a disparate impact on its members, the Coalition first points out that White and Asian students made up a smaller percentage of the students invited to join the Exam Schools under the Plan than in the years before the Plan was implemented. Specifically, with respect to the prior year, the percentages of invited students classified as White dropped from 40% to 31%, while the percentage classified as Asian dropped from 21% to 18%.

The Coalition's reliance on these raw percentages without the benefit of some more robust expert analysis serves poorly as proof that the observed changes were caused by the Plan rather than by chance. See Boston Parent I, 996 F.3d at 46 (noting that the Coalition "offers no analysis or argument for why these particular comparators, rather than a plan based on random selection, are apt for purposes of determining adverse disparate impact"); see also Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 881 (4th Cir. 2023).

Nevertheless, given the size of the overall pool, the reductions cited by the Coalition may be at least minimally significant. Notably, when the defendants applied the Plan to the prior year's admission applications in a test-run simulation, it produced virtually the same percentage changes. And defendants have never claimed that the changes were entirely random. To the contrary, the Plan's effects were expected, at least in part, by those who knew the schools best: the defendants themselves. We therefore do not rest our decision on the lack of expert evidence that changes in the racial makeup of the admitted class in 2021–2022, as compared to 2020–2021, were not the result of mere chance.

Rather, we find that the Coalition fails to show disparate impact for another, more fundamental reason. To see why this is so, we find it instructive to consider disparate impact theory in its most customary form -- a statutory cause of action for unintentional discrimination in certain settings, such as employment. See, e.g., Jones v. City of Bos., 752 F.3d 38, 53 (1st Cir. 2014) (applying Title VII, 42 U.S.C. § 2000e–2(k)). A theory of unintentional discrimination cannot, by itself, establish liability in an equal protection case such as this, which requires proof of both disparate impact and discriminatory intent. See Arlington Heights, 429 U.S. at 266–68, 97 S.Ct. 555. Our point, instead, is that even when sufficient to establish liability in its native habitat of Title

VII, disparate impact theory does not call into question the introduction of facially neutral, and otherwise valid, selection criteria that reduce racial disparities in the selection process. In fact, where applicable, disparate-impact discrimination jurisprudence does just the opposite. As between alternative, equally valid selection criteria, it encourages the use of the criterion expected to create the least racial disparity unless there is some good reason to do otherwise. Cf. 42 U.S.C. § 2000e–2(k)(1)(A)(ii) and (C).

In this manner, disparate-impact analysis aims to counter the use of facially neutral policies that " 'freeze' the status quo of prior discriminatory ... practices." ***58** Griggs v. Duke Power Co., 401 U.S. 424, 430, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). That is to say, it encourages precisely what the Coalition claims the Plan has done here: as between equally valid selection processes that meet the selector's legitimate needs, to use the one that reduces under-representation (and therefore over-representation as well). So, in seeking to leverage a disparate-impact theory of discrimination against the Plan for its alleged reduction -- but not reversal -- of certain races' stark over-representation among Exam School invitees, the Coalition has it backwards.

To be sure, where race itself is used as a selection criterion, certainly a before-and-after comparison would provide relevant support for an equal protection challenge. In that context, any "negative" effect resulting from the use of race would be relevant because "race may never be used as a 'negative.' " Students for Fair Admissions, 600 U.S. at 218, 143 S.Ct. 2141. Here, though, the Plan did not use the race of any individual student to determine his or her admission to an Exam School. And the Coalition offers no evidence that geography, family income, and GPA were in any way unreasonable or invalid as selection criteria for public-school admissions programs.

In sum, even assuming the Coalition's statistics show non-random demographic changes in the pool of Exam School invitees between 2020–2021 and 2021–2022 as a result of the Plan's implementation, those changes simply show that as between equally valid, facially neutral selection criteria, the School Committee chose an alternative that created less disparate impact, not more.[3] To rule otherwise would turn "the previous status quo into an immutable quota" and risk subjecting any new policy that "might impact a public institution's racial demographics -- even if by wholly neutral means -- to a constitutional attack." Coal. for TJ, 68 F.4th at 881 (internal quotation omitted).

b.

This brings us to the Coalition's alternative attempt to employ disparate-impact theory to prove prohibited intentional race discrimination. The Coalition contends that the Plan, even when measured against a process of random selection, had a disparate impact on White and Asian applicants. To make this argument, the Coalition first notes that the overall acceptance rate for applicants for the 2021–2022 school year was 58.5%. And it posits that a random distribution would result in an even application of that 58.5% rate across each zip code. The Coalition then isolates certain zip codes where the population was either "predominantly" (as in 55% or greater) White/Asian or Black/Latinx, and juxtaposes those zip codes' respective acceptance rates under the Plan with those under a hypothetical 58.5% comparator. Following this logic, the Coalition concludes that the Plan resulted in 66 fewer than expected spots allocated across ten predominantly White/Asian zip codes, and 57 more spots across seven predominantly Black/Latinx zip codes. Using this same data, the Coalition also argues that because the average GPA of the admitted students from the predominantly White/Asian zip codes was higher than that from the predominantly Black/Latinx zip codes, the Plan made it disproportionally more difficult for White and Asian students to gain acceptance.

In our view, this backfilled analysis -- crafted by counsel in an appellate brief -- falls woefully short of the mark. The analysis ***59** uses GPA data from only ten of the twenty zip codes that the Coalition identifies as "predominantly" White and Asian. It also neglects another two zip codes where, ostensibly, there was neither a predominantly White/Asian nor Black/Latinx population under the Coalition's definition. And all the while, the Coalition never explains why 55% should be the relevant threshold, nor why aggregating populations of separate racial groups is methodologically coherent.[4]

Moreover, the Coalition's analysis rests on a sleight of hand. It counterfactually assumes that if White/Asian students comprised 55% or more of the students in a given zip code, then every marginal student in that zip code who just missed out on acceptance was also White or Asian. Suffice it to say, there is zero evidence for this assumption. The bottom line remains the same: White and Asian students respectively made up approximately 16% and 7% of the eligible school-age population and 31% and 40% of the successful applicants. Use of the Plan caused no relevant disparate impact on

those groups.[5] Cf. Coal. for TJ, 68 F.4th at 879 (finding no disparate impact on Asian-American students under school admissions policy where "those students have had greater success in securing admission to [the school] under the policy than students from any other racial or ethnic group").

2.

We turn next to the Coalition's argument that it need not prove a disparate impact per se. Rather, the Coalition contends that any change in the racial composition of admitted students is unconstitutional if the change was intended -- even if it is the result of facially neutral and valid selection criteria that merely reduce, but do not reverse, the numerical over-representation of a particular race. There are several problems with this theory.

First, the Coalition points to no case in which a facially neutral selection process was found to violate the Equal Protection Clause based on evidence of intent without any corollary disparate impact. To the contrary, to successfully challenge the use of a facially neutral, and otherwise bona fide, selection criterion, the Coalition must prove both improper intent and disparate impact. Anderson ex rel. Dowd, 375 F.3d at 89 (noting that "[c]ourts can only infer that an invidious racial purpose motivated a facially neutral policy when that policy creates disproportionate racial results"); see also Lewis v. Ascension Parish Sch. Bd., 806 F.3d 344, 359 (5th Cir. 2015) ("To subject a facially race neutral government action to strict scrutiny, the plaintiff must establish both discriminatory intent and a disproportionate adverse effect upon the targeted group."); Coal. for TJ, 68 F.4th at 882 (quoting ***60** Palmer v. Thompson, 403 U.S. 217, 224, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971)) (agreeing and noting that "[n]o case in [the Supreme] Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it ...."); Doe ex rel. Doe v. Lower Merion Sch. Dist., 665 F.3d 524, 549 (3d Cir. 2011) ("Although disproportionate impact, alone, is not dispositive, a plaintiff must show discriminatory impact in order to prove an equal protection violation.").

Second, the Coalition's "intent only" theory runs counter to what appears to be the view of a majority of the members of the Supreme Court as expressed in Students for Fair Admissions. There, the Court found that Harvard and UNC's race-conscious admissions programs violated the Equal Protection Clause. 600 U.S. at 213, 143 S.Ct. 2141. But in rejecting the universities' use of an applicant's race as a means to achieve a racially diverse student body, three of the six justices in the majority -- with no disagreement voiced by the three dissenters -- separately stressed that universities can lawfully employ valid facially neutral selection criteria that tend towards the same result. See id. at 299–300, 143 S.Ct. 2141 (Gorsuch, J., with Thomas, J., concurring) (recounting the argument that the universities "could obtain significant racial diversity without resorting to race-based admissions practices," and noting that "Harvard could nearly replicate [its] current racial composition without resorting to race-based practices" if it increased tips for "socioeconomically disadvantaged applicants" and eliminated tips for "children of donors, alumni, and faculty"); id. at 280, 143 S.Ct. 2141 (Thomas, J., concurring) ("If an applicant has less financial means (because of generational inheritance or otherwise), then surely a university may take that into account."); id. at 317, 143 S.Ct. 2141 (Kavanaugh, J., concurring) (universities " 'can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race' ") (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 526, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (Scalia, J., concurring in the judgment)).

Granted, no concurring opinion expressly held that a school may adopt a facially neutral admissions policy precisely because it would reduce racial disparities in the student body as compared to the population of eligible applicants. But the message is clear. Justice Gorsuch, and indeed plaintiff Students for Fair Admissions itself, identified use of socio-economic status indicators -- i.e., family income -- as a tool for universities who "sought" to increase racial diversity. See id. at 299–300, 143 S.Ct. 2141 (Gorsuch, J., with Thomas, J., concurring). And Justice Kavanaugh wrote that "universities still 'can, of course, act to undo the effects of past discrimination in many permissible ways.' " Id. at 317, 143 S.Ct. 2141 (Kavanaugh, J., concurring) (emphasis added).

Nor is there any reason to suppose that these assurances do not apply to admission to selective public schools. As Justice Kennedy wrote in his pivotal concurring opinion in Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, "[i]n the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition." 551 U.S. 701, 788, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (Kennedy, J., concurring) (internal citation omitted).

Third, holding school officials liable for any reduction in the statistical over-representation of any racial group, merely because the change was the intended result of a new facially neutral and valid selection policy, would deter efforts to reduce unnecessary ***61** racial disparities. A school might base admission on residence in geographical proximity to the school, on attendance at specific schools in a lower grade, on tests or GPA, or some combination of the myriad indicia of students' prior success. A school might even decide to rely only on a lottery. It hardly would be surprising to find that a change from one of those selection criteria to another significantly altered the racial composition of the pool of successful applicants.

Nor would a lack of intent provide any safe harbor given that responsible school officials would likely attempt to predict the effects of admissions changes, if for no other reason than to avoid increasing disparities. And many honest school officials would admit that as between two equally valid selection criteria, they preferred the one that resulted in less rather than greater demographic disparities. In short, any distinction between adopting a criterion (like family income) notwithstanding its tendency to increase diversity, and adopting the criterion because it likely increases diversity, would, in practice, be largely in the eye of the labeler. Cf. Coal. for TJ, 68 F.4th at 882 (quoting Palmer, 403 U.S. at 224, 91 S.Ct. 1940) ("If the law is struck down for [intent alone] ... it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.").

To be sure, in striking down Harvard and UNC's race-conscious plans in Students for Fair Admissions, the Supreme Court noted that "[w]hat cannot be done directly cannot be done indirectly," such that "universities may not simply establish through application essays or other means the regime [the Court found unlawful]." 600 U.S. at 230, 143 S.Ct. 2141 (citation omitted). But we do not read that admonition as calling into question the use of a bona fide, race-neutral selection criterion merely because it bears a marginal but significant statistical correlation with race.

Certainly, Justices Gorsuch, Thomas, and Kavanaugh, in joining the majority opinion, did not read the Court's opinion to foreclose use of the very selection criteria to which their concurrences pointed as permissible race-neutral alternatives to the race-conscious admissions programs before the Court.

Of course, at some point, facially neutral criteria might be so highly correlated with an individual's race and have so little independent validity that their use might fairly be questioned as subterfuge for indirectly conducting a race-based selection process. In that event, nothing in this opinion precludes a person harmed by such a scheme from pursuing an equal protection claim under the authority of Students for Fair Admissions. Here, though, admission under the Plan correlated positively with being White or Asian, the only groups numerically over-represented under the Plan. And the Plan's prosaic selection criteria -- residence, family income, and GPA -- can hardly be deemed otherwise unreasonable. Nor is this a case in which a school committee settled on and employed a valid selection criterion, and then simply threw out the results because the committee did not like the racial demographics of the individuals selected.

Thus, we find no reason to conclude that Students for Fair Admissions changed the law governing the constitutionality of facially neutral, valid secondary education admissions policies under equal protection principles. For such policies to merit strict scrutiny, the challenger still must demonstrate (1) that the policy exacts a disparate impact on a particular racial group and (2) that such impact is traceable to an invidious discriminatory intent. See Arlington Heights, 429 U.S. at 264–65, 97 S.Ct. 555; see also ***62** Coal. for TJ, 68 F.4th at 879; Lower Merion Sch. Dist., 665 F.3d at 549; Hayden v. County of Nassau, 180 F.3d 42, 48 (2d Cir. 1999); Raso v. Lago, 135 F.3d 11, 16 (1st Cir. 1998).

As we previously stated:

> [O]ur most on-point controlling precedent, Anderson ex rel. Dowd v. City of Boston, makes clear that a public school system's inclusion of diversity as one of the guides to be used in considering whether to adopt a facially neutral plan does not by itself trigger strict scrutiny. See 375 F.3d at 85–87 (holding that strict scrutiny did not apply to attendance plan adopted based on desire to promote student choice, equitable access to resources for all students, and racial diversity). In Anderson, we expressly held that "the mere invocation of racial diversity as a goal is insufficient to subject [a facially neutral school selection plan] to strict scrutiny." Id. at 87.

Boston Parent I, 996 F.3d at 46. Our view has not changed. There is nothing constitutionally impermissible about a school district including racial diversity as a consideration and goal in the enactment of a facially neutral plan. To hold otherwise would "mean that that any attempt to use neutral criteria to enhance diversity ... would be subject to strict scrutiny." Boston Parent I, 996 F.3d at 48.

"The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is not like treating them differently because they are from a city or from a suburb ...." Students for Fair Admissions, 600 U.S. at 220, 143 S.Ct. 2141. So too here, treating students differently based on the zip codes in which they reside was not like treating them differently because of their skin color.

C.

Because we find that the Plan is not subject to strict scrutiny, we would normally proceed to consider its constitutionality under rational basis review. But the Coalition, for good reason, does not argue that the Plan fails rational basis review. So we deem any such claim waived.

IV.

Finally, the Coalition appeals the district court's denial of its motion under Federal Rule of Civil Procedure 60(b), which allows for relief from a final judgment in "exceptional circumstances ... favoring extraordinary relief." See Karak v. Bursaw Oil Corp., 288 F.3d 15, 19 (1st Cir. 2002). We review the district court's denial of the Coalition's Rule 60(b) motion for abuse of discretion. Fisher v. Kadant, Inc., 589 F.3d 505, 512 (1st Cir. 2009).

Pursuant to Rule 60(b), a "court may relieve a party ... from a final judgment, order, or proceeding" based on, inter alia, "newly discovered evidence that, with reasonable diligence, could not have been discovered in time." Fed. R. Civ. P. 60(b)(2). The newly discovered evidence to which the Coalition pointed was the text messages, discussed above, between Oliver-Dávila and Rivera, particularly their agreement that they were "[s]ick of westie whites."

"Under this rule, a party moving for relief ... must persuade the district court that: (1) the evidence has been discovered since the trial; (2) the evidence could not by due diligence have been discovered earlier by the movant; (3) the evidence is not merely cumulative or impeaching; and (4) the evidence is of such a nature that it would probably change the result were a new trial to be granted." González–Piña v. Rodríguez, 407 F.3d 425, 433 (1st Cir. 2005) (internal quotation and ***63** citation omitted). Here, the district court concluded, among other things, that the Coalition failed to meet the second and fourth requirements. See Bos. Parent Coal., 2021 WL 4489840, at *15–16.

As to the second requirement, the district court found that the Coalition failed to show that "the evidence could not by due diligence have been discovered earlier." González–Piña, 407 F.3d at 433. The district court -- buttressed by its experience closely supervising this litigation and the parties' arguments along the way -- reasonably determined that the Coalition made a deliberate decision to forgo discovery, despite its apparent suspicion that the two School Committee members harbored racial animus, and even discouraged further development of the record at trial. Bos. Parent Coal., 2021 WL 4489840, at *15. The Coalition purportedly did so because it was, and remains, adamant that it did not need to make a showing of racial animus to prevail. See id. Additionally, the district court found that the School Committee's failure to disclose the text messages in its response to various third parties' public records requests did not constitute the kind of misconduct -- such as that occurring within the judicially imposed discovery process -- that warrants Rule 60(b) relief. See id. at *14. We see no abuse of discretion in any of these findings.

As to the fourth requirement, the district court found that the text-message evidence was not "of such a nature that it would probably change the result were a new trial to be granted," González–Piña, 407 F.3d at 433, principally on the grounds that the evidence did not rectify the Coalition's failure to make a proper showing of the Plan's disparate impact. See Bos. Parent Coal., 2021 WL 4489840, at *15–16. The district court did not abuse its discretion in reaching this conclusion. More evidence of intent does not change the result of this case, given that our analysis assumes that the Plan was chosen precisely to alter racial demographics. We recognize that the text messages evince animus toward those White parents who opposed the Plan. But the district court supportably found as fact that the added element of animus played no causal role that was not fully and sufficiently played by the motive of reducing the under-representation of Black and Latinx students. Id. at *15. In the district court's words, what drove the Plan's selection was the expected "increase in Black and Latinx students." Id. (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 258, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979)) (distinguishing "action taken because of animus" from action taken "in spite of [its] necessary effect on a group") (emphasis in original). So, we need not decide what to make of a case in which a school district took action

to reduce a numerically over-represented group's share of admissions because of animus toward that group.

Consequently, we find that the district court did not abuse its discretion in denying the Coalition relief under Rule 60(b).

V.

For the foregoing reasons, we affirm the district court's denial of the Coalition's motion under Rule 60(b), and its judgment rejecting the Coalition's challenges to the Plan.

All Citations

89 F.4th 46

Footnotes

1 We use the listed racial classifications only to be consistent with the district court's usage, to which neither party lodges any objection.

2 Defendants contend that it is too late for the Coalition to revise its request for relief. But the Coalition promptly revised its request as events unfolded in the district court. And in these circumstances, granting such a revised request is not beyond the court's "broad and flexible" power to fashion an equitable remedy. See Morgan v. Kerrigan, 530 F.2d 431, 432 (1st Cir. 1976).

3 Moreover, by not using zip codes to award 20% of the invitations, the School Committee opted not to use an approach that would have reduced racial disparities even more.

4 Intervenors-appellees raise additional alarms about the Coalition's data, noting that several zip codes cited by the Coalition as "predominantly" White and Asian actually have a greater Black or Latinx population than Asian.

5 The district court found that "the Coalition's evidence of disparate impact was a projection of a prior plan that showed White students going from representing 243 percent of their share of the school-age population in Boston to 200 percent, and Asian students going from representing 300 percent of their share of the school-age population in Boston to 228 percent." Bos. Parent Coal., 2021 WL 4489840, at *15. As to the actual admissions data, the district court made no such findings, but we take notice that for seventh-grade applicants, the Plan resulted in White students, who constitute 16% of the Boston school-age population, receiving 31% of the invitations, and Asian students, who constitute 7% of that population, receiving 18% of the invitations.

996 F.3d 37
United States Court of Appeals, First Circuit.

BOSTON PARENT COALITION FOR ACADEMIC EXCELLENCE CORP., Plaintiff, Appellant,
v.
The SCHOOL COMMITTEE OF the CITY OF BOSTON; Alexandra Oliver-Davila; Michael O'Neill; Hardin Coleman; Lorna Rivera; Jeri Robinson; Quoc Tran; Ernani Dearaujo; Brenda Cassellius, Defendants, Appellees,
The Boston Branch of the NAACP; the Greater Boston Latino Network; Asian Pacific Islander Civic Action Network; Asian American Resource Workshop; Maireny Pimental; H.D., Defendants, Intervenors, Appellees.

No. 21-1303
|
April 28, 2021

Synopsis

Background: Corporation acting on behalf of 15 parents and their children filed suit against city's school committee, its members, and superintendent of public schools, claiming violation of Equal Protection Clause and Massachusetts General Laws by city public schools' new plan, and its use of zip codes ranked in reverse order by family income, that allegedly discriminated against white and Asian students in admitting students to three schools known for strength of their academic programs. Following bench trial, the United States District Court for the District of Massachusetts, William G. Young, J., 2021 WL 1422827, entered judgment in favor of defendants. Corporation appealed and moved for injunction preventing defendants from implementing plan pending completion of appeal.

Holdings: The Court of Appeals, Kayatta, Circuit Judge, held that:

seeking injunction first in district court would have been impracticable;

corporation lacked strong likelihood of prevailing on merits;

balance of harms weighed against injunction; and

public interest would not be served by injunction.

Motion denied.

Procedural Posture(s): On Appeal; Judgment; Motion for Preliminary Injunction.

***40** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, [Hon. William G. Young, U.S. District Judge]

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Before Howard, Chief Judge, Thompson and Kayatta, Circuit Judges.

Opinion

KAYATTA, Circuit Judge.

***41** Plaintiff, a corporation acting on behalf of fourteen parents and children who reside in Boston, alleges that a plan promulgated by the Boston Public Schools for admitting students to Boston Latin School, Boston Latin Academy, and John D. O'Bryant School of Mathematics and Science for the 2021–2022 school year violates the Equal Protection Clause of the Fourteenth Amendment and chapter 76, section 5 of the Massachusetts General Laws. After considering the agreed-upon facts and the parties' arguments, the district court entered judgment in defendants' favor. Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of Boston (Boston Parent Coalition), —— F. Supp. 3d ——, ——, Civil Action No. 21-10330-WGY, 2021 WL 1422827, at *17 (D. Mass. Apr. 15, 2021). Plaintiff has appealed the district court's judgment and moves in this court for an injunction preventing the

implementation of the 2021-2022 admissions plan pending resolution of the appeal. For the following reasons, we deny plaintiff's motion.

I.

A thorough summary of the facts appears in the district court's opinion, which in turn relied on the parties' agreed-upon statement of facts. We provide the broad framework and then address in our analysis those particular facts deemed significant by the parties in their motion papers on appeal.

Known for the strength of their academic programs, the three above-mentioned schools (what the parties call the "Exam Schools") have fewer admission slots than there are Boston students who wish to attend them; for the 2020-2021 school year, over 4,000 students applied for about 1,400 slots. For the past twenty years or so, they have selected students for admission based on the students' grade point averages in English Language Arts and Math courses, scores on a standardized admissions test, and their school preferences. Boston Parent Coalition, —— F. Supp. 3d at ——, 2021 WL 1422827, at *3.

The onset of the COVID-19 pandemic threatened the schools' ability to conduct the admissions process as in recent years, prompting the School Committee of the City of Boston, the group responsible for managing the Boston Public Schools, to create a Working Group charged with "[d]evelop[ing] and submit[ting] a recommendation to the Superintendent [of the Boston Public Schools, Dr. Brenda Cassellius,] on revised exam school admissions criteria for [the 2021-2022 school year]." Id. at ——, ——, 2021 WL 1422827 at *1, 3 (first and last alterations in original). After the Working Group studied the issue, proposed a new plan, and modified that plan based on feedback from School Committee members, the School Committee adopted the 2021-2022 Admissions Plan at a meeting on October 21, 2020. Id. at —— – ——, 2021 WL 1422827 at *3–5.

The Plan as adopted conditions a student's eligibility to compete for admission to the Exam Schools on three criteria: (1) residence in one of Boston's twenty-nine zip codes (or inclusion in a special zip code ***42** created for students who are homeless or in the custody of the Department of Children and Families); (2) maintenance of a B average or better in English Language Arts and Math during the fall and winter of the 2019-2020 school year or receipt of a "Meets Expectations" or "Exceeds Expectations" score in English Language Arts and Math on the Spring 2019 Massachusetts Comprehensive Assessment System test; and (3) performance at grade level under the Massachusetts Curriculum standards. Eligible students seeking admission must submit a ranked list of school preferences.

The Plan's admissions process plays out in two phases. In phase one, all eligible students are ranked city-wide by grade point average accumulated in English Language Arts and Math courses during the fall and winter of the 2019-2020 school year. The highest-ranking students are assigned to their first-choice schools until twenty percent of each school's seats are full. If twenty percent of the seats at a high-ranking student's first-choice school are already full, that student's application is considered during the process's second phase.

Phase two begins with the allotment of the remaining eighty percent of seats among the various zip codes based on the proportion of Boston schoolchildren residing in each zip code. Then, the remaining eligible students are ranked by grade point average within their zip code rather than city-wide as in phase one. Phase two assigns each zip code's allotted seats over the course of ten rounds. Each round fills ten percent of the seats remaining after phase one. In the first round, starting with the zip code that has the lowest median household income with children under age eighteen (hereinafter "family income"), the highest-ranking applicants in that zip code receive seats at their first-choice schools until ten percent of the zip code's allotted seats are filled. The first round continues by filling ten percent of the seats allotted to the zip code with the next-lowest family income and the round ends with the assignment of ten percent of the seats allotted to the zip code with the highest family income. In each round, if an applicant's first-choice school is full, that applicant gets an open seat at his or her next-choice school, if one is available. After this process cycles through nine more rounds, the Exam Schools are fully enrolled.

The Plan opened applications for admissions for the Exam Schools on November 23, 2020, and closed applications on January 15, 2021. It anticipated invitations being issued to successful applicants in March 2021, a date subsequently pushed back, we are told, to no later than the end of this week.

Because the invitations have not yet issued, neither party is in a position to say with conviction what the demographic results of the admissions process will be. The Working Group, however, prepared a projection based on a non-final version

of the Plan that was used in public meetings. The projection estimates that White students, who constitute 16 percent of the city's school-age population, will receive 32 percent of the invitations to the three schools; Asian students, who constitute 7 percent of the school-age population, will receive 16 percent of the invitations; Black students, who constitute 35 percent of the school-age population, will receive 22 percent of the invitations; and Latinx students, who constitute 36 percent of the school-age population, will receive 24 percent of invitations. [1]

***43** At this point the careful reader might well assume that the plaintiff represents Black and Latinx students, who, as a group, are projected to receive many fewer admissions invitations than one might expect would result under, for example, a lottery or other random method. In fact, plaintiff sues on behalf of White and Asian students who prefer an admissions procedure (e.g., use of GPA only) that would result in even more invitations going to White and Asian students, with correspondingly fewer invitations to Black and Latinx students. [2]

Suing the School Committee, its members, and the Superintendent of the Boston Public Schools, plaintiff alleges that the Plan, and its use of zip codes ranked in reverse order by family income, violates the Equal Protection Clause of the Fourteenth Amendment and chapter 76, section 5 of the Massachusetts General Laws because defendants intended for the Plan to discriminate against White and Asian students. Boston Parent Coalition, —— F. Supp. 3d at ——, 2021 WL 1422827, at *1. Plaintiff's operative complaint seeks injunctive relief barring the defendants from implementing the Plan, using zip codes as a factor in any future admissions decisions, or making use of race or ethnicity in future admissions decisions.

Upon receipt of the parties' Joint Agreed Statement of Facts, the district court advanced the case to a trial on the merits, consolidated with a hearing on the plaintiff's motion for a preliminary injunction. Id. (citing Fed. R. Civ. P. 65(a)). Treating the Joint Agreed Statement as containing the entirety of plaintiff's proffered evidence, the court made findings of fact, stated its conclusions of law, and entered final judgment against plaintiff under Federal Rules of Civil Procedure 52(a) and 58. The court managed to do all of this, and produce a detailed and thoughtful forty-eight-page opinion, in less than two months. Plaintiff promptly appealed and moved pursuant to Federal Rule of Civil Procedure 62(d) for an order enjoining defendants from implementing the Plan during the pendency of this appeal.

II.

Before turning to plaintiff's request for injunctive relief, we must answer a preliminary procedural question. Ordinarily, a litigant must seek an injunction pending appeal first in the district court before asking a court of appeals to issue such an injunction. Fed. R. App. P. 8(a)(1)(C). This requirement may be overlooked when the party seeking relief "show[s] that moving first in the district court would be impracticable." Fed. R. App. P. 8(a)(2)(A)(i). Here, plaintiff argues that it would have been impracticable to seek injunctive relief in the district court before moving in this court because the issuance of admissions decisions under the Plan is imminent and the district court's decision was "fundamentally inconsistent with the issuance of an injunction."

We disagree with plaintiff that the district court's rejection of plaintiff's claims on the merits suffices to show that moving first in the district court would have been impracticable. See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844-45 (D.C. Cir. 1977) ("Prior recourse to the initial decisionmaker would hardly be required as a general matter if it could properly grant ***44** interim relief only on a prediction that it has rendered an erroneous decision."); Bayless v. Martine, 430 F.2d 873, 879 n.4 (5th Cir. 1970) ("It does not follow from the refusal to grant a preliminary injunction pending a trial in the court below that the district court would refuse injunctive relief pending an appeal.").

Nevertheless, plaintiff also contends that the action sought to be enjoined is so imminent that insufficient time would remain to seek relief on appeal if plaintiff -- or this court -- gave the district court first crack at plaintiff's request for an injunction pending completion of the appeal. To support this contention, plaintiff points to statements by defendants suggesting that invitations might go out by April 15, and more recently indicating that they need to go out by the end of this month. Cf. Commonwealth v. Beshear, 981 F.3d 505, 508 (6th Cir. 2020) (finding that "[m]oving first in the district court" to stay preliminary injunctive relief that would have permitted activity at issue to occur within a few days "would ... have been impracticable"); Gonzalez ex rel. Gonzalez v. Reno, No. 00-11424-D, 2000 WL 381901, at *1 n.4 (11th Cir. Apr. 19, 2000) (finding that "Plaintiff has sufficiently shown that it

would have been impracticable to move first in the district court" in part because of "the time-sensitive nature of the proceedings").

As we will explain in Part V of this opinion, plaintiff itself bears considerable responsibility for creating this exigency. It nevertheless seems best to consider the ramifications of that responsibility in weighing the request for injunctive relief rather than in deciding whether to entertain the request. We therefore agree with plaintiff that the tight timeframe present here renders prior recourse to the district court sufficiently impracticable, albeit just barely so, to allow plaintiff to proceed with its motion in this court.

III.

In reviewing a motion to stay a judgment pending appeal, we consider the following factors: "(1) [W]hether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Nken v. Holder, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (quoting Hilton v. Braunskill, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987)). The first two factors "are the most critical." Id. "It is not enough that the chance of success on the merits be better than negligible. ... By the same token, simply showing some possibility of irreparable injury fails to satisfy the second factor." Id. at 434–35, 129 S.Ct. 1749 (citations and internal quotation marks omitted).

When considering a request for injunctive relief pending appeal, we consider the same factors, but the bar is harder to clear. Respect Maine PAC v. McKee, 562 U.S. 996, 996, 131 S.Ct. 445, 178 L.Ed.2d 346 (2010) (explaining that obtaining injunctive relief from an appellate court "'demands a significantly higher justification' than a request for a stay" pending appeal (quoting Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312, 1313, 107 S.Ct. 682, 93 L.Ed.2d 692 (1986) (Scalia, J., in chambers))). This is so because an injunction "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by [a] lower court[ ]." Id. (quoting Ohio Citizens, 479 U.S. at 1313, 107 S.Ct. 682 (Scalia, J., in chambers)).

The trial court's findings of fact for the most part track the Joint Agreed ***45** Statement of Facts, see Boston Parent Coalition, —— F. Supp. 3d at ——, 2021 WL 1422827, at *2, and are therefore treated by the parties as largely uncontroversial. Nevertheless, "when the issues on appeal 'raise[ ] either questions of law or questions about how the law applies to discerned facts,' such as whether the proffered evidence establishes a discriminatory purpose or a disproportionate racial impact, 'our review is essentially plenary.' " Anderson ex rel. Dowd v. City of Boston, 375 F.3d 71, 80 (1st Cir. 2004) (alteration in original) (emphasis added) (quoting Wessmann v. Gittens, 160 F.3d 790, 795 (1st Cir. 1998)). "Similarly, we review de novo the district court's other legal conclusions, including the level of scrutiny it applied when evaluating the constitutionality of" the challenged action. Id. (citation omitted).

IV.

As is often the case in equal protection litigation, the district court's judgment largely turned on the degree of scrutiny brought to bear on the challenged governmental action. For reasons it carefully explained, the district court concluded that rational basis review, rather than strict scrutiny, applied. Boston Parent Coalition, —— F. Supp. 3d at —— – ——, 2021 WL 1422827, at *10–16. Plaintiff trains its focus on that conclusion in claiming that it is likely to prevail on appeal.

To begin, the district court found that the admissions criteria employed under the Plan (zip codes rank-ordered by family income, grade point average, and school preference) "are completely race neutral" on their face. Id. at ——, 2021 WL 1422827 at *1. Plaintiff does not challenge this conclusion in its submission to this court. Absent a showing of discriminatory purpose, we review an equal protection challenge to race-neutral selection criteria for a rational basis only. Anderson, 375 F.3d at 90. And plaintiff tenders no argument that its claim can prevail under rational basis review.

Plaintiff must therefore argue that notwithstanding the exclusive use of race-neutral admissions criteria, a discriminatory purpose motivated the Plan's adoption, requiring the application of strict scrutiny in assessing the vulnerability of the Plan to plaintiff's equal protection challenge. See Washington v. Davis, 426 U.S. 229, 241, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (placing the burden on the plaintiff to establish a "prima facie case of discriminatory purpose"). In general, a plaintiff may establish

that a discriminatory purpose motivated a facially neutral governmental action -- and thus that strict scrutiny of that action is warranted -- in two ways. See Anderson, 375 F.3d at 82–83. The first is to show that "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action." Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). Plaintiff makes no attempt to prove unlawful discriminatory purpose in this manner. Rather, plaintiff urges us to follow a second approach described in Arlington Heights, calling for " a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266, 97 S.Ct. 555. Factors bearing on discriminatory intent may include "the degree of disproportionate racial effect, if any, of the policy; the justification, or lack thereof, for any disproportionate racial effect that may exist; and the legislative or administrative historical background of the decision." Anderson, 375 F.3d at 83 (citing Arlington Heights, 429 U.S. at 266–68, 97 S.Ct. 555).

Looking at the degree of disproportionate racial effect resulting from the ***46** challenged practice is doubly problematic for plaintiff. First, as compared to a random distribution of invitations, the Plan has no adverse disparate impact on White and Asian students. Rather, plaintiff is able to generate a supposed adverse impact principally by comparing the projected admissions under the Plan to prior admissions under the predecessor plan. Alternatively, plaintiff compares projections under the Plan to projections of admissions based only on GPA. Either comparator does produce even higher percentages of White and Asian students than does the Plan. But plaintiff offers no analysis or argument for why these particular comparators, rather than a plan based on random selection, are apt for purposes of determining adverse disparate impact. Cf. Jones v. City of Boston, 752 F.3d 38, 47 (1st Cir. 2014) (explaining that Title VII plaintiffs seeking to prove disparate impact must show that a policy produced results "that are not randomly distributed by race").

Second, even as to its preferred comparators, plaintiff offers no evidence establishing that the numerical decrease in the overrepresentation of Whites and Asians under the Plan is statistically significant. A party claiming a disparate impact generally does not even get to first base without such evidence. Cf. id. at 43-44, 48, 53 (discussing evidence of statistical significance in evaluating a Title VII disparate impact claim).

Whether either or both of these weaknesses doom plaintiff's appeal on the merits we need not decide. Rather, for present purposes we need only observe that these weaknesses certainly cut against finding that the degree of disproportionate effect contributes to plaintiff's likelihood of success on the merits.

Having thus forgone any serious engagement with how to analyze the implications of the numerical data, plaintiff points to the district court's finding that defendants employed "socioeconomic, racial, and geographic diversity as interests to help guide" the Plan's development. Boston Parent Coalition, —— F. Supp. 3d at ——, 2021 WL 1422827, at *14. Plaintiff argues that this finding -- that one of the guides informing the Plan's development was a preference for racial diversity -- categorically mandates strict scrutiny. But our most on-point controlling precedent, Anderson ex rel. Dowd v. City of Boston, makes clear that a public school system's inclusion of diversity as one of the guides to be used in considering whether to adopt a facially neutral plan does not by itself trigger strict scrutiny. See 375 F.3d at 85–87 (holding that strict scrutiny did not apply to attendance plan adopted based on desire to promote student choice, equitable access to resources for all students, and racial diversity). In Anderson, we expressly held that "the mere invocation of racial diversity as a goal is insufficient to subject [a facially neutral school selection plan] to strict scrutiny." Id. at 87.

Plaintiff relies on our opinion in Wessmann v. Gittens, which predated Anderson, to argue that the Plan is subject to strict scrutiny because it "induces schools to grant preferences based on race and ethnicity." 160 F.3d at 794. In Wessmann, though, the plan at issue was not at all race-neutral on its face. Rather, that plan explicitly used race as an admission selection criterion: "[D]uring the selection of the second half of each incoming class ... the [plan] relies on race and ethnicity, and nothing else, to select a subset of entrants." Id. Here, by contrast, all selection criteria are indisputably facially neutral.

Moving on from its assault on the defendants' admitted aim of enhancing three forms -- socioeconomic, racial, and geographic -- of diversity, plaintiff presses its ***47** major point: There is evidence that some of the persons involved in developing the Plan sought to achieve racial balancing, rather than racial diversity.

Plaintiff points to the Working Group's "Recommendation of Exam Schools Admissions Criteria for SY21-22." Under

the heading "Equity Impact," the Recommendation notes two "Desired Outcomes":

- Ensure that students will be enrolled through a clear and fair process for admission in the 21-22 school year that takes into account the circumstances of the COVID-19 global pandemic that disproportionately affected families in the city of Boston.

- Work towards an admissions process that will support student enrollment at each of the exam schools such that it better reflects the racial, socioeconomic[,] and geographic diversity of all students (K-12) in the city of Boston.

In crafting its recommendation and assessing the Plan's "Equity Impact," the Group consulted the Boston Public Schools' Racial Equity Planning Tool, which points to "opportunity gaps ... for Black and Latinx communities in Boston Public Schools," and in that context contains a statement calling for "a hard pivot away from a core value of equality -- everyone receives the same -- to equity: those with the highest needs are prioritized."

We find these statements to be significantly less telling than plaintiff suggests. To begin, the Group's Recommendation simply does not claim as its aim the balancing of racial demographics in the Exam Schools so that they equal the numeric demographics of the city or any other specified proportion. Rather, the stated aim is to "better reflect[ ]" the city's "diversity" in the three stated respects. Similarly, the resulting decision to use neutral criteria that take into consideration those "opportunity gaps" is hardly an expression of racial bias. Indeed, equity was one of the principal goals of the plan we reviewed for a rational basis in Anderson. See 375 F.3d at 91.

In arguing that the Plan's legislative history reveals its discriminatory purpose, plaintiff also stresses that three School Committee members made statements reflecting a goal of achieving for each racial group a percentage share of admissions comparable to that group's percentage of Boston's population. Such a Plan might have been the equivalent of a quota, meaning that at some point in the admissions process some students with a given GPA, but not others with the same GPA, would be denied admission because of their race. But the Plan poses no such scenario. At the margins of GPA scores, students may be denied admission because of the family income in their zip code. But no student's race will be the reason for admission or rejection. While the defendants clearly viewed increasing geographic, socioeconomic, and racial diversity as goals, the district court observed that the Plan ultimately employed (in addition to GPA and preference) only geography and family income -- not race -- as selection factors.

> [T]he Plan principally anchors itself to geographic diversity by equally apportioning seats to the City's zip codes according to the criterion of the zip code's percentage of the City's school-age children. The Plan similarly anchors itself to socioeconomic diversity by ordering the zip codes within each round by their median family income. The Plan is devoid, however, of any anchor to race.

Boston Parent Coalition, —— F. Supp. 3d at ——, 2021 WL 1422827, at *13 (citations omitted). In rejecting plaintiff's argument that the chosen criteria masked a discriminatory purpose, the district court found that the Plan's criteria genuinely reflected the School Committee's priorities:

> ***48** The School Committee's goal of a more racially representative student body, although more often discussed and analyzed, did not commandeer the Plan, and it in fact necessarily took a back seat to the Plan's other goals, which the Plan more aptly achieved. Consequently, any effect on the racial diversity of the Exam Schools is merely derivative of the Plan's effect on geographic and socioeconomic diversity -- not the reverse.

Id. We see no likely error in the district court's conclusion that a discriminatory purpose did not motivate the Plan's adoption. The fact that public school officials are well aware that race-neutral selection criteria -- such as zip code and family income -- are correlated with race and that their application would likely promote diversity does not automatically require strict scrutiny of a school system's decision to apply those neutral criteria.

Plaintiff's argument to the contrary contorts the Supreme Court's opinion in Arlington Heights. In that case, the Court rejected an equal protection challenge to a race-neutral refusal to rezone that caused an impact on Black residents but concerning which there was no evidence of any discriminatory purpose. 429 U.S. at 268–71, 97 S.Ct. 555. From that holding -- that a successful challenge to disparate results of applying race-neutral rules requires proof that a racially discriminatory purpose was a factor motivating the adoption of those rules, accord Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 484–85, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982) -- plaintiff infers a different rule nowhere expressed in the Court's opinion. Under plaintiff's purported "rule," a selection process based solely on facially neutral criteria that results in an increase in the percentage representation of an underrepresented group is subject to strict scrutiny if those designing the program sought to achieve that result. Such a rule would pretty much mean that any attempt to use neutral criteria to enhance diversity -- not just measures aimed at achieving a particular racial balance -- would be subject to strict scrutiny. And that is just what plaintiff says.

The pertinent case law says otherwise. As we have already noted, our own precedent applying Arlington Heights does not subject to strict scrutiny a race-neutral attendance plan implemented to promote diversity as one of several ends. See Anderson, 375 F.3d at 87. The most on-point decision from the Supreme Court since our decision in Anderson is Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). In both their filings in the district court and their motion papers on appeal, the parties treat Justice Kennedy's concurring opinion in Parents Involved as controlling. Not all courts have done the same. Compare Spurlock v. Fox, 716 F.3d 383, 395 (6th Cir. 2013) (referring to "Justice Kennedy's controlling concurrence" in Parents Involved), with Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio, 364 F. Supp. 3d 253, 282 n.25 (S.D.N.Y.) (collecting cases concluding that Justice Kennedy's opinion controls but reaching the opposite conclusion), aff'd, 788 F. App'x 85 (2d Cir. 2019), and Doe ex rel. Doe v. Lower Merion Sch. Dist., 665 F.3d 524, 544 n.32 (3d Cir. 2011) (stating that "Justice Kennedy's proposition that strict scrutiny is 'unlikely' to apply to race[-]conscious measures that do not lead to treatment based on classification does not 'explain[ ] the result' of [Parents Involved]"). Regardless of whether all aspects of his opinion are binding, Justice Kennedy's concurrence reinforces, rather than undercuts, our reasoning and holding in Anderson. The concurrence explains that school districts may pursue diversity without engaging in individual racial classification ***49** by drawing "attendance zones with general recognition of the demographics of neighborhoods." Parents Involved, 551 U.S. at 789, 127 S.Ct. 2738 (Kennedy, J., concurring); see also Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 545, 135 S.Ct. 2507, 192 L.Ed.2d 514 (2015) ("While the automatic or pervasive injection of race into public and private transactions covered by the [Fair Housing Act] has special dangers, it is also true that race may be considered in certain circumstances and in a proper fashion." (citing Parents Involved, 551 U.S. at 789, 127 S.Ct. 2738 (Kennedy, J., concurring))). Plaintiff attempts to distinguish Parents Involved by pointing out that it did not concern "magnet schools." But nothing in Justice Kennedy's opinion suggests that public magnet schools must be treated differently from public schools generally when evaluating whether a school district has violated the Equal Protection Clause.

Since Parents Involved, other courts of appeals have recognized that a school district's consideration of the effect of a proposed plan on a school's racial makeup does not require strict scrutiny of that plan in the same way that would be required if such a plan classified students based on race. See Doe, 665 F.3d at 548 ("The [Supreme] Court has never held that strict scrutiny should be applied to a school plan in which race is not a factor merely because the decisionmakers were aware of or considered race when adopting the policy."); Spurlock, 716 F.3d at 394–95; Lewis v. Ascension Par. Sch. Bd., 806 F.3d 344, 357–58 (5th Cir. 2015).

To be sure, as is the case with most increases in diversity, the projected numbers in this case tended in the direction of decreasing the numerical underrepresentation of a racial group. But there is no likely controlling reason why one cannot prefer to use facially neutral and otherwise valid admissions criteria that cause underrepresented races to be less underrepresented. The Supreme Court itself has pointed to the use of fair, race-neutral selection criteria as a way to address perceived underrepresentation of minorities in obtaining certain benefits. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509–10, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion); id. at 507, 109 S.Ct. 706 ("If [minority business enterprises] disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, a fortiori, lead to greater minority participation.").

This is not a situation where a racially discriminatory purpose is the only plausible explanation for the Plan's adoption. Far from it: The Plan employs only uncontrived criteria that could easily be adopted in a world in which there were no races. One can readily see why a school system would prefer to curry city-wide support for high-profile, pace-setting schools. And one can easily see why selective schools might favor students who achieve academic success without the resources available to those who are capable of paying for summer schooling, tutoring, and the like.

Plaintiff points finally to comments of the School Committee chair who resigned after being heard making fun of the names of several Asian Americans who spoke at a public meeting. Boston Parent Coalition, —— F. Supp. 3d at ——, 2021 WL 1422827, at *16. But as the district court concluded, none of the evidence to which plaintiff points reasonably suggests that any other School Committee members were supportive of the Chairperson's offensive statements. We therefore see no likely error in the district court's conclusion that those sophomoric and hurtful comments by the Chairperson did not establish racial animus ***50** as a factor motivating the School Committee as a whole to adopt the Plan. Id. at ——, 2021 WL 1422827 at *16–17.

Ultimately, the role of motive need be assessed within the context of the means employed and the results achieved. Here, officials expressed a variety of concerns regarding how best to award seats in the Exam Schools. But the means they chose were race-neutral and apt. And the result on its face manifested no starkly disparate impact concerning which plaintiff can complain. To find such conduct subject to strict scrutiny would render any school admissions criteria subject to strict scrutiny if anyone involved in designing it happened to think that its effect in reducing the underrepresentation of a group was a good effect. Plaintiff cites no case so holding.

For the foregoing reasons, plaintiff has not shown a strong likelihood that it will prevail on the merits. Failure to satisfy this critical prerequisite for obtaining injunctive relief pending appeal counsels strongly against granting an injunction preventing defendants from implementing the Plan.

V.

In assessing plaintiff's request for an injunction, we consider also the balance of potential harms that confront us as a result of plaintiff sitting on its collective hands. Plaintiff waited over four months after the Plan's long-anticipated adoption before filing this lawsuit, even though all involved knew that admissions invitations needed to go out to families early this spring. Notwithstanding the district court's Herculean efforts, plaintiff has put itself in the position of now asking us on short notice to enjoin implementation of the Plan, just days before parents are to be informed of the admissions results. The school system would then be left with no plan at a time when it would normally be assigning teachers and resources across the city based on how attendance figures pan out at each school in the wake of matriculation decisions at the Exam Schools.

This court has previously withheld injunctive relief that would have altered election procedures where a plaintiff filed suit less than three months before ballots were to be cast. See Colón-Marrero v. Conty-Pérez, 703 F.3d 134, 139 (1st Cir. 2012) (noting that plaintiff filed complaint "less than two months before" an election); Respect Maine PAC v. McKee, 622 F.3d 13, 16 (1st Cir. 2010) (noting that plaintiffs sued just under three months before election was to begin). We do not lightly grant emergency relief, especially where the "'emergency' is largely one of [plaintiff's] own making" and the relief sought would interfere with processes on which many others have reasonably relied. Respect Maine PAC, 622 F.3d at 16. These principles as applied in election cases have force here, too. See Benisek v. Lamone, —— U.S. ——, 138 S. Ct. 1942, 1944, 201 L.Ed.2d 398 (2018) (per curiam) (explaining that the requirement that a party seeking injunctive relief "must generally show reasonable diligence" applies "in election law cases as elsewhere").

Due to plaintiff's delay, plaintiff's requested injunctive relief threatens to injure the other interested parties and the public. Enjoining defendants from making Exam School admissions decisions based on the Plan at this juncture would unsettle important expectations and the plans of thousands of families awaiting those decisions. The public interest is best served by permitting defendants to finalize and communicate admissions decisions based on the Plan, not by entering plaintiff's proposed ***51** injunction and throwing the Exam School admissions process into chaos.

VI.

For each of the foregoing two reasons, we deny plaintiff's motion for an injunction pending the completion of this appeal.

All Citations

996 F.3d 37, 109 Fed.R.Serv.3d 799, 389 Ed. Law Rep. 64

Footnotes

1 To track the record compiled below, we follow the parties in using the terms White, Black, Asian, and Latinx, as well as the term Multi-Race/Other to refer to the group of students projected to receive the remainder of the invitations.

2 Plaintiff asserts that sixty-five more White and Asian students would be admitted under its preferred selection procedure, using GPA only.

Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC

United States Court of Appeals for the Eleventh Circuit

September 30, 2023, Filed

No. 23-13138

Reporter
2023 U.S. App. LEXIS 26854 *: 2023 WL 6520763

AMERICAN ALLIANCE FOR EQUAL RIGHTS, Plaintiff-Appellant, versus FEARLESS FUND MANAGEMENT, LLC, FEARLESS FUND II, GP, LLC, FEARLESS FUND II, LP, FEARLESS FOUNDATION, INC., Defendants-Appellees.

Prior History: [*1] Appeal from the United States District Court for the Northern District of Georgia. D.C. Docket No. 1:23-cv-03424-TWT.

Am. All. for Equal Rights v. Fearless Fund Mgmt., LLC, 2023 U.S. Dist. LEXIS 172392, 2023 WL 6295121 (N.D. Ga., Sept. 27, 2023)

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For FEARLESS FUND MANAGEMENT, LLC, FEARLESS FUND II, GP, LLC, FEARLESS FUND II, LP, FEARLESS FOUNDATION, INC., Defendants - Appellees: Jason C. Schwartz, Naima Lillian Farrell, Zakiyyah Salim, Molly Senger, Gibson Dunn & Crutcher, LLP, WASHINGTON, DC; Alexandra Garrison Barnett, Leila N. Knox, Byung J. Pak, Alston & Bird, LLP, ATLANTA, GA; Brooke Cluse, Ben Crump Law, PLLC, WASHINGTON, DC; Lee Ross Crain, Mylan L. Denerstein, Gibson Dunn & Crutcher, LLP, NEW YORK, NY; Benjamin L. Crump, Ben Crump Law, PLLC, TALLAHASSEE, FL; Alphonso David, Law Office of Alphonso David, BROOKLYN, NY; Terance A. Gonsalves, Katten Muchin Rosenman, LLP, CHICAGO, IL; Katherine Marquart, Gibson Dunn & Crutcher, LLP, LOS ANGELES, CA.

Judges: Before WILSON, LUCK, and BRASHER, Circuit Judges. WILSON, J, Dissenting.

Opinion

BY THE COURT:

The plaintiff's [*2] motion for an injunction pending appeal is **GRANTED**. An appellant may secure an injunction pending appeal if it establishes a substantial likelihood of success on the merits, irreparable injury in the absence of an injunction, and that the balance of the equities and public interest weigh in favor of an injunction. *See Tandon v. Newsom, 141 S. Ct. 1294, 1297, 209 L. Ed. 2d 355 (2021)*. For the reasons stated in the plaintiffs motion for an injunction, we conclude that the plaintiff has established that the defendants' racially exclusionary program—the "Fearless Strivers Grant Contest"—is substantially likely to violate *42 U.S.C. § 1981*.

The district court held that the plaintiff "clearly" has standing and has "clearly shown the existence of a contractual regime that brings this case within the realm of *§ 1981*." But the district court reasoned that *Section 1981* was likely unconstitutional under the *First Amendment* as applied to the defendants. We disagree. The defendants do not provide "expressive services" or otherwise engage in "pure speech." *303 Creative LLC v. Elenis, 600 U.S. 570, 143 S. Ct. 2298, 2318, 216 L. Ed. 2d 1131 (2023)*. Although the *First Amendment* protects the defendants' right to promote beliefs about race, it does not give the defendants the right to exclude persons from a contractual regime based on their race. *Runyon v. McCrary, 427 U.S. 160, 176, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976)*.

Unlike the district court, our dissenting colleague concludes that the [*3] plaintiffs *Section 1981* claim is unlikely to succeed because the organization is supposedly "bringing a *§ 1981* claim on behalf of white members." Our dissenting colleague reasons that "[t]he inclusion of Asian business owners, while a racial minority, does not cure the inclusion of white business owners." We disagree. The Supreme Court has held that *Section 1981* "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, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976)*. We find no support in our caselaw to limit the standing of a membership organization to

file a Section 1981 claim because it has members of many different races.

In light of the plaintiffs' likelihood of success on the merits, the plaintiffs have established an irreparable injury and that the balance of equities and public interest favor an injunction. *See Gresham v. Windrush Partners, 730 F.2d 1417, 1424 (11th Cir. 1984).*

Accordingly, the defendants Fearless Fund Management, LLC, Fearless Fund II, GP, LLC, Fearless Fund II, LP, and the Fearless Foundation, Inc., are **ENJOINED** from closing the application window or picking a winner for the "Fearless Strivers Grant Contest" until further order of this Court.

The Clerk is directed to treat any motion for reconsideration of this order as a non-emergency **[*4]** matter.

Dissent by: WILSON

Dissent

WILSON, Circuit Judge, dissenting from the order granting an injunction pending appeal.

I would deny AAER's motion for an injunction pending appeal.

An injunction pending appeal is an "*extraordinary* and *drastic* remedy." *Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000)* (en banc) (emphasis added). We may not enter one "unless the movant clearly established the burden of persuasion as to each of the four prerequisites." *Id.* To obtain relief, the movant must establish the following: "(1) a substantial likelihood that it will prevail on the merits of the appeal; (2) a substantial risk of irreparable injury to the movant unless the injunction is granted; (3) no substantial harm to other interested persons; and (4) no harm to the public interest." *Florida v. Dep't of Health & Hum. Servs., 19 F.4th 1271, 1279 (11th Cir. 2021)* (alteration adopted) (quotation marks omitted). Our subsequent review requires the exercise of judicial humility, where "[w]e follow the traditional path of limited review." *See Harbourside Place, LLC v. Town of Jupiter, 958 F.3d 1308, 1314 (11th Cir. 2020).*

We review the district court's grant or denial of a preliminary injunction for abuse of discretion. *Horton v. City of St. Augustine, 272 F.3d 1318, 1326 (11th Cir. 2001); see also Brown v. Chote, 411 U.S. 452, 457, 93 S. Ct. 1732, 36 L. Ed. 2d 420 (1973)* ("In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion. . . . In doing so, we intimate *no view as to the ultimate [*5] merits*." (emphasis added)). Here, the district court conducted a hearing on AAER's request for a preliminary injunction and determined that AAER failed to meet the requirements. As the Supreme Court has noted, we should be very careful to grant requests for an injunction pending appeal because they do "not simply suspend judicial alteration of the status quo but grant[] judicial intervention that has been *withheld* by the lower courts." *Hobby Lobby Stores, Inc. v. Sebelius, 568 U.S. 1401, 1403, 133 S. Ct. 641, 184 L. Ed. 2d 448 (2012)* (So-tomayor, J., in chambers) (emphasis added) (quoting *Respect Maine PAC v. McKee, 562 U.S. 996, 131 S. Ct. 445, 178 L. Ed. 2d 346 (2010)*). More often than not, we know better than to intervene with such extraordinary and drastic relief.

I turn to the district court's order and cannot say that the district court abused its discretion in denying AAER's motion, finding that AAER failed to meet its burden of establishing its entitlement to a preliminary injunction.[1] Like the district court, I will focus on the first two prerequisites: 1) substantial likelihood of success on the merits, and 2) substantial risk of irreparable injury. I address each in turn.

First, AAER does not establish a substantial likelihood of success on the merits.[2] Such a conclusion ignores this

[1] I don't want to wade too deep into the district court's standing analysis, but I am skeptical that AAER has standing. To me, AAER stands on shaky precedent by relying on an unpublished case, *American College of Emergency Physicians v. BCBS of Georgia, 833 F. App'x 235 (11th Cir. 2020)* (per curiam). But we have binding precedent with which AAER failed to engage. *See Ga. Republican Party v. SEC, 888 F.3d 1198, 1204 (11th Cir. 2018)*

[2] The majority ignores *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 6 F.4th 1247 (11th Cir. 2021)*, which should guide a *First Amendment* analysis concerning monetary expressive conduct. In *Coral Ridge*, a group brought a religious discrimination claim under Title II of the Civil Rights Act regarding its exclusion as a possible charity recipient. *Id. at 1253-54*. We found that the *First Amendment* protected Amazon's right to engage in expressive conduct by selecting which charities were eligible to receive donations. *Id. at 1256*. Similarly, Fearless Fund's decision to provide grants to Black women is protected expressive conduct because Fearless Fund intended to convey the importance of Black women-owned business, which is clear to reasonable persons who view the message. *See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235, 1240 (11th Cir. 2018)*. Because the Contest is expressive conduct protected by the *First Amendment*, Fearless Fund cannot be compelled to change its speech by a third party for a cause it does not wish to support. *See Coral Ridge, 6 F.4th at 1254*. And yet that is exactly what AAER is impermissibly trying to do in direct contravention of the *First Amendment*.

Circuit's precedent for claims under *42 U.S.C. § 1981* and fails to consider the very **[*6]** purpose of *§ 1981*.

Plaintiffs bringing a cause of action under *§ 1981* must show that: 1) they are a member of a racial minority; 2) the defendant intended to discriminate on the basis of race; and 3) the discrimination concerned one or more of the activities enumerated in the statute. *See Lopez v. Target Corp., 676 F.3d 1230, 1233 (11th Cir. 2012); see also Kimon v. Arcoub, Gopman & Assocs., Inc., 490 F.3d 886, 891 (11th Cir. 2007); Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1270 (11th Cir. 2004)*. AAER fails as an organization bringing a *§ 1981* claim on behalf of white members. The inclusion of Asian business owners, while a racial minority, does not cure the inclusion of white business owners. *See Jackson, 372 F.3d at 1270 n.21* (recognizing where the white plaintiff was excluded from a *§ 1981* claim yet included in all remaining claims).

Next, to best understand the Civil Rights Act of 1866, we must consider its place within the chronology of Reconstruction—after the ratification of the *Thirteenth Amendment* but before the Fourteenth. The Civil Rights Act of 1866 attempted to address harms Black Americans faced "under circumstances so extremely unfavorable" to their economic participation throughout the United States. *Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 411, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982)* (Marshall, J., dissenting) (quoting 39th Cong., 1st Sess. (1865), *reprinted* in The Reconstruction Amendments' Debates 88 (Virginia Comm'n on Constitutional Government (1967))).

The Civil Rights Act of 1866 granted Freedmen basic economic rights, including the right to make and enforce contracts, to sue **[*7]** and be sued, and to purchase and lease property. Congress enacted *§ 1981* as the remedial mechanism for bringing these protections to life. It is a perversion of Congressional intent to use *§ 1981* against a remedial program whose purpose is to "bridge the gap in venture capital funding for women of color founders"—a gap that is the result of centuries of intentional racial discrimination.

Here, AAER weaponizes *Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968)*, which confirmed that the Civil Rights Act of 1866 intended to reach instances of discrimination within private conduct. In *Jones*, the Court wrote that "the freedom that Congress is empowered to secure under the *Thirteenth Amendment* includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live." *Id. at 443*. Irreparable harm that will result from the granting of this injunction will not be felt by AAER—Black women will suffer irreparable harm.

Second, AAER has not demonstrated a substantial risk of irreparable injury. It relies heavily on *Gresham v. Windrush Partners, Ltd., 730 F.2d 1417 (11th Cir. 1984)*, where the "strong national policy against race discrimination in housing' led the Court to presume irreparable injury. *Id. at 1423*. Here, the strong national policy undergirding *§ 1981* was to vindicate the rights of Black Americans. AAER and the majority misunderstand the purpose of the **[*8]** statute, which informs what constitutes an injury.

When considering granting an injunction, the inquiry is twofold: whether an injury occurred, and whether the injury was *irreparable*. In the context of fair housing, because real property is unique, the inquiry is made one.[3] When certain specific fair housing violations occur, we have found that an irreparable injury occurs in tandem. AAER is asking us to extend the condensed inquiry considered in fair housing discrimination to alleged contract violations under *§ 1981*. We do not have established precedent that invites or compels us to take this step, and we should decline to do so here.

Moreover, AAER delayed in seeking injunctive relief, given that the Fearless Strivers Grant Contest (the Contest) began in 2021 and the 2023 Contest was first advertised in February of this year. We have held that an inexplicable delay mitigates a finding of irreparable harm. *See Wreal, LLC v. Amazon.com, Inc., 840 F.3d 1244, 1248-49 (11th Cir. 2016)*. Here, we have no justification as to why AAER waited until the August entry period when the Contest is offered four times a year since 2021.

Because I would have denied AAER's motion for an injunction pending appeal, I respectfully dissent.

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[3] *Rogers v. Windmill Pointe Vill. Club Ass'n, Inc., 967 F.2d 525, 528-29 (11th Cir. 1992)* (finding housing displacement issues following from a Fair Housing Act violation make the injury also, inextricably, irreparable).

Am. All. for Equal Rights v. Fearless Fund Mgmt., LLC

United States District Court for the Northern District of Georgia, Atlanta Division

September 27, 2023, Decided; September 27, 2023, Filed

CIVIL ACTION FILE NO. 1:23-CV-3424-TWT

Reporter
2023 U.S. Dist. LEXIS 172392 *; 2023 WL 6295121

AMERICAN ALLIANCE FOR EQUAL RIGHTS, Plaintiff, v. FEARLESS FUND MANAGEMENT, LLC, et al., Defendants.

Subsequent History: Appeal filed, 09/26/2023

Injunction granted at *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC, 2023 U.S. App. LEXIS 26854, 2023 WL 6520763 (11th Cir. Ga., Sept. 30, 2023)*

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For Black Economic Alliance Foundation, Amicus: Aria Christine Branch, LEAD ATTORNEY, Elias Law Group LLP, Washington, DC; Jonathan Patrick Hawley, LEAD ATTORNEY, PRO HAC VICE, Elias Law Group LLP, Seattle, WA; Meaghan Elysia Mixon, LEAD ATTORNEY, PRO HAC VICE, Elias Law Group LLP, Washington, DC; Joyce Gist Lewis, Krevolin & Horst, LLC, Atlanta, GA.

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Judges: THOMAS W. THRASH, JR., United States District Judge.

Opinion by: THOMAS W. THRASH, JR.

Opinion

OPINION AND ORDER

This is an action brought under *Section 1981 of the Civil Rights Act of 1866*. It is before the Court on the Plaintiff's Motion for Preliminary Injunction [Doc. 2]. For the reasons

set forth below, the Plaintiff's Motion for Preliminary Injunction [Doc. 2] is DENIED.

I. Background

The Defendant Fearless Foundation (the "Foundation")[1] seeks to "bridge the gap in venture capital funding for women of color founders building scalable, growth aggressive companies." (Compl. ¶ 14; *About*, Fearless Fund, https://www.fearless.fund/about [https://perma.cc/66QA-62VK]). To bridge this gap, the Foundation operates the Fearless Strivers **[*4]** Grant Contest (the "Contest"), which awards $20,000 grants to small businesses owned by Black women. (*Id.* ¶¶ 13, 15). The Contest is open only to Black women whose businesses are at least 51% owned by Black women, among other eligibility requirements. (*Id.* ¶¶ 25-26). To apply for the Foundation's grant, a contestant must agree to the Contest's Official Rules, which include details on how the contest works, how to enter, judging procedure, and other criteria. (*Id.* ¶ 23; *Official Rules*, Fearless Fund, https://www.fearless.fund/official-rules1 [https://perma.cc/3ZFP-VCNF]).[2] Contestants have the opportunity to apply for a grant during several promotion periods each year, the fourth and final one closing on September 30, 2023. (Compl. ¶ 16; Defs.' Resp. Br. in Opp'n to Pl.'s Mot. for PI, at 7).

The Plaintiff American Alliance for Equal Rights (the "Alliance") is "a nationwide membership organization dedicated to challenging distinctions and preferences made on the basis of race and ethnicity." (Compl. ¶ 6). It claims that the Contest excludes several of its members from eligibility because of their race. (*Id.* ¶ 5). The Alliance lists purportedly injured members in the Complaint as Owners **[*5]** A, B, and C, and describes them as small business owners ready to apply for the Contest but for their ineligibility due to their race. (*Id.* ¶¶ 31-66). The Alliance asserts one claim in its Complaint against the Defendants for violation of *Section 1981 of the Civil Rights Act of 1866*. It seeks a declaratory judgment that the Contest violates *§ 1981* and injunctive relief barring the Defendants from continuing their grant program. The Alliance now moves for a preliminary injunction.

II. Legal Standard

"A party seeking a preliminary injunction bears the burden of establishing its entitlement to relief." *Scott v. Roberts, 612 F.3d 1279, 1290 (11th Cir. 2010)*. "To obtain such relief, the moving party must show: (1) a substantial likelihood of success on the merits; (2) that it will suffer irreparable injury unless the injunction is issued; (3) that the threatened injury outweighs possible harm that the injunction may cause the opposing party; and (4) that the injunction would not disserve the public interest." *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs, 788 F.3d 1318, 1322 (11th Cir. 2015)*.

Importantly, a "preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant clearly carries its burden of persuasion on each of these prerequisites." *SunTrust Bank v. Houghton Mifflin Co., 252 F.3d 1165, 1166 (11th Cir. 2001)*.

III. Discussion

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States **[*6]** shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." *42 U.S.C. § 1981*. Congress passed *§ 1981* shortly after it ratified the *Thirteenth Amendment*, abolishing slavery. *Gen. Bldg. Contractors Ass'n, Inc. v. Penn., 458 U.S. 375, 384, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982)*. "The principal object of the legislation was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen." *Id. at 386*. And "the Act 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, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976)*.

The Plaintiff alleges that the Foundation's Contest violates *§ 1981* by excluding non-Black applicants from the program because of their race. (Br. in Supp. of Pl.'s Mot. for PI, at 7). It contends that the Contest falls within the scope of *§ 1981* because contestants enter a contractual arrangement with the Foundation when they apply for the grant. (*Id.* at 8). And it contends that the discrimination itself constitutes irreparable harm and that the balance of the harms and public interest merit a preliminary injunction. (*Id.* at 9-10). Whether the Plaintiff is entitled to a preliminary injunction depends on if it has clearly shown a likelihood of success on the merits, irreparable harm, and **[*7]** that the balance of the harms and

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[1] The Complaint refers to the "Fearless Fund" as the primary Defendant, but the Defendants clarify that the Foundation solely manages the Contest. (Defs.' Resp. Br. in Opp'n to Pl.'s Mot. for PI, at 6 n.1). The Court thus refers to the Foundation as the primary Defendant.

[2] The Foundation revised its Official Rules in response to this lawsuit, and therefore, the Complaint's allegations do not match the information currently shown on the Contest website. (Defs.' Resp. Br. in Opp'n to Pl.'s Mot. for PI, at 19).

public interest favor an injunction.

A. Likelihood of Success on the Merits

This motion presents several principal issues implicating the Plaintiff's ability to show a likelihood of success on the merits: first, whether it has organizational standing on behalf of its purportedly injured members; second, whether the Foundation's Contest constitutes a contractual agreement that places this case within the *§ 1981* realm; third, whether the *First Amendment* bars the Plaintiff's claim; and fourth, whether the Contest is a valid affirmative action plan. The Court considers these issues in turn.

1. Organizational Standing

The parties first clash over whether the Plaintiff has standing to bring the present case. For an organization to establish standing on behalf of its members, it must show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. ("SFFA"), 600 U.S. 181, 143 S. Ct. 2141, 2157, 216 L. Ed. 2d 857 (2023)* (quoting *Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)*). The Foundation disputes all three requirements.

Regarding the first, the Foundation faults the Plaintiff **[*8]** for failing to specifically identify its injured members by name. (Defs.' Resp. Br. in Opp'n to Pl.'s Mot. for TRO, at 9). Such a failure, it claims, precludes a finding of organizational standing. (*Id.* at 9-10 (citing *Ga. Republican Party v. SEC, 888 F.3d 1198, 1204 (11th Cir. 2018)*)). In reply, the Plaintiff counters that the anonymity of its injured members does not bar its standing. (Reply Br. in Supp. of Pl.'s Mot. for PI, at 5-6 (citing *Am. Coll. of Emergency Physicians v. BCBS of Ga., 833 F. App'x 235, 241 n.8 (11th Cir. 2020)*)). And it refutes the Foundation's reliance on several district court cases holding otherwise as being contrary to Eleventh Circuit precedent. (*Id.* at 7-8).

The Court agrees with the Plaintiff that it need not identify its injured members by name in order to have organizational standing. "[F]or prospective equitable relief, organizational plaintiffs need not 'name names' to establish standing. An organizational plaintiff seeking retrospective relief may be required to list at least one name, but only after some discovery. In other words, requiring specific names at the motion to dismiss stage is inappropriate." *Am. Coll. of Emergency Physicians, 833 F. App'x at 241 n.8* (quotation marks and citations omitted). Therefore, at the preliminary injunction stage, the Plaintiff does not lack standing for failing to name its injured members by name.

The Foundation's reliance **[*9]** on *Georgia Republican Party v. SEC* in support of its position that the Plaintiff must identify at least one member by name is misplaced. (Defs.' Resp. Br. in Opp'n to Pl.'s Mot. for TRO, at 9-10). In that case, the Eleventh Circuit faulted the organizational plaintiff for "fail[ing] to allege that a specific member [would] be injured by" a proposed SEC regulation. *Ga. Republican Party, 888 F.3d at 1203*. The plaintiff claimed generally that certain members (placement agents and state and local officials) would potentially face consequences for making or receiving contributions under the regulation. But the plaintiff's lone affidavit identified only one member without alleging that the proposed rule would even regulate his conduct, much less injure him. Under these circumstances, the Eleventh Circuit concluded that the plaintiff failed to establish standing because its lone "affidavit [did] not aver that at least one of the Georgia Party's members [was] certain to be injured by" the proposed rule. *Id. at 1204*. Here, the Court faces no such problem: the Plaintiff clearly avers that three members of its organization are injured by the Contest, making *Georgia Republican Party* inapposite.

In the same case, the Eleventh Circuit also recognized **[*10]** that the Supreme Court in *Summers v. Earth Island Institute* rejected the notion of "probabilistic standing":

> In *Summers*, the majority rejected the dissent's theory that an organization could establish standing if "there [was] a statistical probability that some of [its] members [were] threatened with concrete injury." The Supreme Court reasoned that probabilistic standing ignores the requirement that organizations must "make specific allegations establishing that at least one identified member had suffered or would suffer harm."

Id. (quoting *Summers v. Earth Island Inst., 555 U.S. 488, 497-98, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009)*). Accordingly, *Summers* does not require that the Plaintiff name its injured members by name either. Rather, as the Eleventh Circuit made clear in *American College of Emergency Physicians*, the Plaintiff here need not name specific names to establish standing.

Turning to the second prong of organizational standing, the Foundation argues that the Alliance is a recently created sham organization, bearing no "indicia of a traditional membership organization" and "serves no discrete, stable group of persons with a definable set of common interests." (Defs.' Resp. Br. in

Opp'n to Pl.'s Mot. for PI, at 11-12 (quoting *Am. Legal Found. v. F.C.C., 808 F.2d 84, 90, 257 U.S. App. D.C. 189 (D.C. Cir. 1987)*). The Plaintiff argues, in reply, that its **[*11]** claim is germane to its purpose of ridding the country of racial classifications, a mission "no broader than saving the environment (Sierra Club), protecting civil liberties (ACLU), or seeking racial equity (NAACP)." (Reply Br. in Supp. of Pl.'s Mot. for PI, at 4).

The Court again agrees with the Plaintiff. "The indicia of membership analysis employed in *Hunt* has no applicability in [this] case[]. Here, [the Alliance] is indisputably a voluntary membership organization with identifiable members—it is not, as in *Hunt*, a state agency that concededly has no members." *SFFA, 143 S. Ct. at 2158*. Accordingly, "[w]here, as here, an organization has identified members and represents them in good faith, our cases do not require further scrutiny into how the organization operates." *Id.*

Regarding the third and final prong, the Foundation contends that the Plaintiff has failed to show that this case could be tried without the participation of its individual members. (Defs.' Resp. Br. in Opp'n to Pl.'s Mot. for PI, at 12-14 (citing *Ga. Cemetery Ass'n, Inc. v. Cox, 353 F.3d 1319, 1322 (11th Cir. 2003)*, and *Greater Atlanta Home Builders Ass'n, Inc. v. City of Atlanta, Ga., 149 F. App'x 846, 848 (11th Cir. 2005)*)). The Foundation argues that, to the contrary, the Plaintiff's claim will depend on the circumstances of each of its injured members because they will have to prove that but-for their race, they **[*12]** would have been eligible to apply and be considered for the grant funding. (*Id.* at 13 (citing *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1013, 206 L. Ed. 2d 356 (2020)*)). On the other hand, the Plaintiff frames its members' injuries as their "'inability to compete on an equal footing' for a 'benefit.'" (Reply Br. in Supp. of Pl.'s Mot. for PI, at 4 (citing *Gratz v. Bollinger, 539 U.S. 244, 262, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003)*)). In the Plaintiff's view, its members' injuries are more so their inability to apply for the grant funding, as opposed to their ultimate inability to obtain the grant funding.

The Foundation aims to distinguish this case from a line of equal protection cases implicating affirmative action, which establish as follows:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "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.

Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993). The Foundation claims that the Plaintiff fails to cite any authority extending **[*13]** this reasoning to private-sector charitable donations. (Defs.' Resp. Br. in Opp'n to Pl.'s Mot. for PI, at 14). In reply, the Plaintiff reasons that the principle applies here, as it applied in *SFFA* where Harvard was the defendant. (Reply Br. in Supp. of Pl.'s Mot. for PI, at 3).

The Supreme Court in *Comcast* clarified that in a *§ 1981* case, the "plaintiff bears the burden of showing that race was a but-for cause of its injury." *Comcast, 140 S. Ct. at 1014*. But Supreme Court's opinion in *Comcast* did not consider the issue of standing at all, much less organizational standing. As the Court understands the issue, an organizational plaintiff could not bring a *§ 1981* claim under the Foundation's proposed interpretation because it would be required to show but-for causation on behalf of all of its injured members—an inherently individualized inquiry that would likely run afoul of the third element required to establish organizational standing. At the preliminary injunction stage, the Court concludes that such an interpretation seems unlikely to govern. As the Plaintiff points out, no authority before the Court suggests that the "inability to compete on equal footing" reasoning from *Gratz* should not extend to challenges to affirmative action **[*14]** programs brought under *§ 1981*. Moreover, the Supreme Court in *Gratz* stated that "purposeful discrimination that violates the *Equal Protection Clause of the Fourteenth Amendment* will also violate *§ 1981*." *Gratz, 539 U.S. at 276 n.23*. If the harm to the Plaintiff's members was indeed their inability to compete on equal footing (and not their ultimate inability to obtain the grant), then the relief requested would not require the participation of the Plaintiff's individual members, unlike the plaintiffs who failed to establish standing in *Georgia Cemetery* and *Great Atlanta Home Builders*, which arose outside the *§ 1981* context. Under these circumstances, the Court concludes that the Plaintiff has clearly shown that it likely has standing to pursue its claim.

2. Contract Formation

The parties next dispute whether the Contest constitutes a contractual arrangement that brings this case within the scope of *§ 1981*. The Foundation contends that its "provision of a charitable donation is a discretionary gift, not a contractual award," and clarifies that although the Contest's rules previously used the term 'contract' to describe its application process, such a label is not determinative of its legal relationship with contestants. (Defs.' Resp. Br. in Opp'n to Pl.'s Mot. for PI, at 18-19). The Foundation **[*15]** also notes

that it has amended the Contest's Official Rules to clarify that they merely set forth criteria under which individuals may apply for a grant under the program. Without any underlying contractual activity, the Plaintiff cannot state a claim under *§ 1981*, the Foundation claims. In reply, the Plaintiff argues that the Foundation's attempt to recast its Contest as a charitable donation, rather than a contractual award, fails because courts construe contests as offers for a unilateral contract. (Reply Br. in Supp. of Pl.'s Mot. for PI, at 8-9 (citing *United States v. Chandler, 376 F.3d 1303, 1308 (11th Cir. 2004)*)).

Both parties rely on authority setting forth that "the labels ascribed by a contract are not determinative of the parties' legal relationship." *Lee v. Satilla Health Servs., Inc., 220 Ga. App. 885, 886, 470 S.E.2d 461 (1996)*. And they appear to agree that referring to a prospective arrangement as a "contract" does not necessarily make it one. The Court finds that the Plaintiff has carried its burden at the preliminary injunction stage to show that the case clearly falls within the scope of *§ 1981*. All of the allegations before the Court point to the conclusion that the Contest operates as a unilateral offer to contestants that they may accept by completing their entry. And even under the Contest's new rules, contestants **[*16]** relinquish rights to the Foundation that amount to legal detriments. (Reply Br. in Supp. of Pl.'s Mot. for PI, at 11 (citing Doc. 59-3, at 22)). Under these circumstances, the Plaintiff has clearly shown the existence of a contractual regime that brings this case within the realm of *§ 1981*.

3. ***First Amendment***

The Foundation contends that the *First Amendment's* right to free speech and expression bars the Plaintiff's *§ 1981* claim. (Defs.' Resp. Br. in Opp'n to Pl.'s Mot. for PI, at 14-18). It relies on several cases in support of its position that antidiscrimination statues cannot be used to compel an organization's expressive conduct. *See, e.g., 303 Creative LLC v. Elenis, 600 U.S. 570, 143 S. Ct. 2298, 2308, 216 L. Ed. 2d 1131 (2023)* (holding that the state of Colorado could not "use its [antidiscrimination] law to compel an individual to create speech she does not believe"); *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 6 F.4th 1247, 1254 (11th Cir. 2021)* (holding that a Christian group's interpretation of Title II of the Civil Rights Act "would violate the *First Amendment* by essentially forcing Amazon to donate to organizations it does not support"); *Claybrooks v. Am. Broad. Cos., Inc., 898 F. Supp. 2d 986, 1000 (M.D. Tenn. 2012)* (holding that a group of minority plaintiffs' *§ 1981* challenge to ABC's disproportionate casting of minority applicants on *the Bachelor* would, in effect, force ABC "to employ race-neutral criteria in their casting decisions in order to 'showcase' a more progressive **[*17]** message" in violation of the *First Amendment*). The Plaintiff distinguishes these cases on the ground that they apply antidiscrimination laws to actual speech, as opposed to the contracting at issue here. (Reply Br. in Supp. of Pl.'s Mot. for PI, at 13). It also notes that the Supreme Court has held that "[i]nvidious private discrimination . . . has never been accorded affirmative constitutional protections." *Runyon v. McCrary, 427 U.S. 160, 176, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976)* (citation omitted) (finding that two Black students' successful *§ 1981* challenge to a private, segregated school's admission policy in the 1970s did not violate the school's *First Amendment's* right to free association).

With respect to private grant funding for minority groups, "it appears that no federal court has addressed the relationship between anti-discrimination laws and the *First Amendment*." *Claybrooks, 898 F. Supp. 2d at 996*. The Court "does not interpret the absence of precedent on this issue as suggesting any particular result here." *Id.* The first question to address, then, is whether the Contest constitutes expressive conduct that merits *First Amendment* protection in the first place.

"Doubtless, determining what qualifies as expressive activity protected by the *First Amendment* can sometimes raise difficult questions." *303 Creative, 143 S. Ct. at 2319*. But as in *303 Creative*, "this case presents no complication of that kind." **[*18]** *Id.* To begin with, the Eleventh Circuit has made clear that "donating money qualifies as expressive conduct." *Coral Ridge, 6 F.4th at 1254*. Indeed, "except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Id.* (citation omitted).

Determinations on the expressivity of conduct turn on "(1) whether an intent to convey a particularized message was present; and (2) whether in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235, 1240 (11th Cir. 2018)* (quotations marks, alteration, and citation omitted). "[I]n determining whether conduct is expressive, we ask whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Id.* (citation omitted). "If we find that the conduct in question is expressive, any law regulating that conduct is subject to the *First Amendment*." *Coral Ridge, 6 F.4th at 1254*.

Here, the Foundation clearly intends to convey a particular message in promoting and operating its grant program: "Black women-owned businesses are vital to our economy." *Fearless Strivers Grant Contest*, Fearless Fund, https://www.fearless.fund/strivers-grant-contest **[*19]**

[https://perma.cc/274A-R4SY]. And it carries out its commitment to that group by supporting "entrepreneurs who might otherwise lack the access to capital necessary to bring their businesses to life." (Defs.' Resp. Br. in Opp'n to Pl.'s Mot. for PI, at 16). The Court likewise finds nothing that would suggest the Foundation's message was unclear such that it would not be understood by those who viewed it. That grant applicants enter a contract with the Foundation upon entry into the Contest does nothing to remove this case from the realm of *First Amendment* expressive conduct. *See Claybrooks, 898 F. Supp. 2d at 992* (evaluating a *First Amendment* defense in the *§ 1981* context). The Foundation's conduct at issue is, therefore, expressive and subject to the *First Amendment*.

Turning to the merits of the Defendants' proffered *First Amendment* defense, the Court acknowledges at the outset that the holdings of *303 Creative* and *Runyon* are difficult to square. The former held that a State could not "use its [antidiscrimination] law to compel an individual to create speech she does not believe," *303 Creative, 143 S. Ct. at 2308*, while the latter held that "[i]nvidious private discrimination . . . has never been accorded affirmative constitutional protections." *Runyon, 427 U.S. at 176*. Granted, the plaintiff in the former brought her case seeking injunctive relief from **[*20]** the application of a state antidiscrimination law that abridged her *First Amendment* speech and expression rights, while the plaintiffs in the latter brought their case seeking injunctive relief under a federal antidiscrimination law that ultimately did not abridge the defendant-schools' *First Amendment* association rights. But the difference in the law giving rise to the plaintiffs' claims and the constitutional provision of the *First Amendment* invoked as a defense seem unlikely to warrant such a divergent result on the merits.

This case contains elements of both *303 Creative* and *Runyon*. The Plaintiff seeks injunctive relief under the same federal antidiscrimination law as the plaintiff in *Runyon*, though on behalf of non-Black as opposed to Black plaintiffs. But the Foundation here seeks *First Amendment* protection for its speech and expressive conduct, like the plaintiff in *303 Creative* and as opposed to the school in *Runyon* who sought protection for its associative conduct. Under such a hybrid circumstance, and considering the recency of the *303 Creative* decision, the Court is compelled to apply the standard governing that opinion. *Cf. 303 Creative, 143 S. Ct. at 2315* ("When a state public accommodations law and the Constitution collide, there can be no question which must prevail." (citing *U.S. Const., Art. VI, cl. 2.*)). Applying *§ 1981* as the Plaintiff proposes **[*21]** would impermissibly "'modify the content of [the Foundation's] expression—and thus modify [its] 'speech itself.'" *Coral Ridge, 6 F.4th at 1256* (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573, 578, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995)*). Accordingly, because the *First Amendment* may bar the Plaintiff's claim, the Court cannot conclude that it has carried its heavy burden of showing a clear likelihood of success on the merits at this stage.

Practical applications support the Court's finding on this point. Take the example from the *Claybrooks* case, where the court questioned whether "anti-discrimination laws [would] require a playwright to consider white actors to play Othello." *Claybrooks, 898 F. Supp. 2d at 998*. At oral argument in this case, the Plaintiff's counsel suggested that such a circumstance would be different because "the end product that they're promoting would be pure speech." (Doc. 114 ("Hearing Transcript"), at 23:14-15). But the Court disagrees with the Plaintiff's characterization. Such a circumstance would indeed implicate contracts for acting services between actors and the theater company, just like the Plaintiff claims the Contest implicates contracts for grant funding between contestants and the Foundation. Contracts, of course, also governed the commercial transactions between Amazon and its customers in *Coral Ridge*, even though the plaintiff **[*22]** in that case did not bring a *§ 1981* challenge. Amazon customers exchange money for goods, including when they buy products through AmazonSmile and are allowed to designate a charity to receive a portion of the proceeds from their purchase. *Coral Ridge, 6 F.4th at 1250*; (*see also* Hearing Transcript, at 38:17-25). Under the circumstances, the Court cannot conclude that *§ 1981* allows the Plaintiff injunctive relief prohibiting the Foundation's chosen speech and expression.

4. Affirmative Action Plan

Regarding its final point against a finding of a likelihood of success on the merits, the Foundation contends that its grant program is a valid affirmative action plan under *Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 626-27, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987)*, which defeats the Plaintiff's *§ 1981* claim. (Defs.' Resp. Br. in Opp'n to Pl.'s Mot. for PI, at 20). The Alliance takes issue with the Foundation's casting of the Contest as an affirmative action plan under *Johnson* for several reasons. First, it claims that the affirmative action exception to *§ 1981* is atextual and should thus be overruled. (Reply Br. in Supp. of Pl.'s Mot. for PI, at 15 n.6). Second, it contends that, regardless of the exception's validity, the Foundation is ineligible for the defense because its grant program is not a valid affirmative action plan. (*Id.* at 15). **[*23]** It notes that such plans apply to employers, not grant funds, and chides the Foundation's grant program as lacking formality. Third, the Alliance argues that strict scrutiny under *Gratz* and *SFFA* replaced *Johnson*'s

affirmative action plan test and that the Foundation fails to make a "sufficiently coherent" showing that would satisfy strict scrutiny. (*Id.* at 16). And fourth, the Alliance contends that even assuming *Johnson* applies, the Contest fails to meet the requisite elements for a valid affirmative action plan. (*Id.* at 16-20).

The extent to which *SFFA* overruled the affirmative action plan defense to *§ 1981* under *Johnson*, if at all, is unclear. Nevertheless, the following principle from *Johnson*, articulated first in *United Steelworkers of Am. v. Weber, 443 U.S. 193, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (1979)*, holds true to this day:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Johnson, 480 U.S. at 628-29 (quoting *Weber, 443 U.S. at 204*) (quotation marks omitted).

Regardless of such a potential implied overruling, the Court concludes that, at the preliminary **[*24]** injunction stage, the Foundation's Contest does not appear to be an affirmative action program of the sort that would fit within an employer's traditional affirmative action plan under the exception to *§ 1981*. The Foundation cites no authority applying the defense to a grant fund, rather than an employer. And even if it has made a showing of a manifest racial imbalance in access to capital for Black women-owned businesses and a showing that its grant fund does not bar the advancement of other non-Black women, its means of achieving balance in that realm seem unlikely to satisfy the narrow tailoring requirement of the strict scrutiny analysis (assuming strict scrutiny applies after *SFFA*). *See Doe v. Kamehameha Sch., 470 F.3d 827, 842-45 (9th Cir. 2006)*. Accordingly, the Court concludes that the affirmative action plan defense does not preclude a showing of a likelihood of success on the merits on the Plaintiff's part.

B. Irreparable Harm

Having found that the Plaintiff has failed to carry its burden to show a likelihood of success on the merits, the Court briefly considers the extent to which it has shown irreparable harm. The Plaintiff contends that facing a racial barrier in itself constitutes irreparable injury. (Br. in Supp. of Pl.'s Mot. for PI, at **[*25]** 8-9). It notes the approaching application deadline for the Contest, suggesting that its members will be irreparably harmed in their lost opportunity to apply for a grant under the program. (*Id.* at 9).

In response, the Foundation points out that no case law supports the Plaintiff's position that the "denial of the opportunity to compete for funding on the basis of race in the context of private, charitable giving is *per se* irreparable." (Defs.' Resp. Br. in Opp'n to Pl.'s Mot. for PI, at 22). The Foundation goes on to cite a similar case arising under *§ 1981* where the court declined to preliminarily enjoin a program supporting minority-owned businesses during the COVID-19 pandemic because the plaintiffs failed to show irreparable harm. (*Id.* at 23 (citing *Moses v. Comcast Cable Commc'ns Mgmt., LLC, 2022 U.S. Dist. LEXIS 101312, 2022 WL 2046345, at *4 (S.D. Ind. June 7, 2022)*)). The court in *Moses* found no presumption of irreparable harm because courts ordinarily presume such harm "only when a party is seeking an injunction under a statute that *mandates* injunctive relief as a remedy." *Moses, 2022 U.S. Dist. LEXIS 101312, 2022 WL 2046345, at *3* (quoting *First W. Cap. Mgmt. Co. v. Malamed, 874 F.3d 1136, 1140 (10th Cir. 2017)*). The court then noted that no such mandatory injunctive relief existed under *§ 1981*. *Id.*

In reply, the Plaintiff argues that the Court must follow binding Eleventh Circuit precedent in *Gresham v. Windrush Partners, Ltd., 730 F.2d 1417, 1424 (11th Cir. 1984)*, which held that "[d]iscrimination in **[*26]** housing, when proved, almost always results in irreparable injury." (Reply Br. in Supp. of Pl.'s Mot. for PI, at 21). The court in *Gresham* found a presumption of irreparable injury both because the plaintiff had demonstrated a likelihood of success on the merits and because the governing statute authorized injunctive relief. *Gresham, 730 F.2d at 1423*. Here, the Plaintiff has not shown a likelihood of success on the merits, nor does *§ 1981* authorize injunctive relief. And as the Foundation's counsel pointed out at oral argument, the Plaintiff does not allege that its members will be irreparably harmed unless they receive the money from the Foundation's grant. (Hearing Transcript, at 34:9). Accordingly, the Court cannot conclude that the Plaintiff has carried its burden to clearly show irreparable injury flowing from the Foundation's alleged harm.

C. Balance of Harms and Public Interest

Having found that the Plaintiff has failed to carry its burden to clearly show a likelihood of success on the merits and irreparable harm, the Court declines to address whether it has also shown that the balance of equities and public interest favor a preliminary injunction.

IV. Conclusion

For the reasons set forth above, the Plaintiff's Motion **[*27]** for Preliminary Injunction [Doc. 2] is DENIED.

SO ORDERED, this 27th day of September, 2023.

/s/ Thomas W. Thrash, Jr.

THOMAS W. THRASH, JR.

United States District Judge

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Correll v. Amazon.com, Inc.

United States District Court for the Southern District of California

September 18, 2023, Decided; September 19, 2023, Filed

Case No.: 3:21-cv-01833-BTM-MDD

Reporter
2023 U.S. Dist. LEXIS 166936 *; 2023 WL 6131080

JONATHAN CORRELL, on behalf of himself and all others similarly situated, Plaintiffs, v. AMAZON.COM, INC., and DOES 1-10, Defendants.

Prior History: *Correll v. Amazon.Com, Inc., 2022 U.S. Dist. LEXIS 183736, 2022 WL 5264496 (S.D. Cal., Oct. 6, 2022)*

Counsel: **[*1]** For Jonathan Correll, on behalf of himself and all others similarly situated, Plaintiff: Gregory Lee Adler, LEAD ATTORNEY, Greg Adler, P.C., Newark, CA.

For Amazon.com, Inc., Defendant: Charles S. Dameron, Roman Martinez, LEAD ATTORNEYS, PRO HAC VICE, Latham & Watkins, Washington, DC; Daniel Meron, LEAD ATTORNEY, PRO HAC VICE, Peter E. Davis, Latham & Watkins LLP, Washington, DC; Elizabeth Lee Deeley, LEAD ATTORNEY, Latham & Watkins LLP, San Francisco, CA; Colleen Carlton Smith, Latham and Watkins, San Diego, CA.

Judges: Hon. Barry Ted. Moskowitz, United States District Judge.

Opinion by: Barry Ted. Moskowitz

Opinion

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT AMAZON.COM, INC.'S MOTION TO DISMISS

[ECF NO. 25]

Defendant Amazon.com, Inc ("Amazon") has filed a Motion to Dismiss Plaintiff's Amended Complaint. (ECF No. 25 ("Def.'s MTD").) In response, Plaintiff Jonathan Correll ("Correll") filed an opposition. (ECF No. 26 ("Pls.' Opp'n")). Defendant Amazon then filed a reply. (ECF No. 28 ("Def.'s Reply").) For the reasons discussed below, the Court **grants in part and denies in part** Defendant's Motion to Dismiss.

I. BACKGROUND

Correll, on behalf of himself and a potential class, filed suit against Amazon alleging unequal **[*2]** treatment and discrimination in Amazon's Seller Certification program, Guided Buying policy, and other orientation-based incentive programs for retailers. (ECF No. 1 ("Complaint").) Amazon filed a Motion to Dismiss (ECF No. 13), which the Court granted under *Federal Rule of Civil Procedure 12(b)(1)* with leave to amend. (ECF No. 17 ("Order").) Correll filed an Amended Complaint alleging an additional claim for a Violation of the *Civil Rights Act of 1866 (42 U.S.C. § 1981)* and additional facts. (ECF No. 20 ("FAC").)

Correll's Amended Complaint asks for declaratory and injunctive relief and damages under *42 U.S.C. § 1981* and *California Civil Code Sections 51* and *51.5 ("Unruh Civil Rights Act")*. (ECF No. 20.) The parties agree that Amazon has programs and policies in place to promote, encourage, and incentivize minority certified sellers ("Amazon's programs"). (ECF No. 20, 3-7, 13-15; ECF No. 25, 4-5.) The Amended Complaint alleges that through these programs, Amazon "direct[s] consumers away from Amazon's disfavored sellers...and towards Amazon's preferred and privileged sellers" based on the sellers' identity. (ECF No. 20, 2-3.) Correll pleads that he visited Amazon's website in the summer and fall of 2021 with the intent to use Amazon's sales services. (Id. at 17.) There, Correll encountered Amazon's programs which he asserts "denied and deprived **[*3]** heterosexual White males," among other groups, "the full and equal accommodations, advantages, facilities, privileges, or services based on their sexual orientation, race, and sex." (Id. at 18.) After viewing Amazon's programs, Correll did not open an Amazon Sellers account and did not sell any products on Amazon.com. (Id. at 21.)

II. STANDARD

Amazon moves to dismiss under *Federal Rule of Civil Procedure 12(b)(1)* for lack of subject-matter jurisdiction and *12(b)(6)* for failure to state a claim. (ECF No. 25.) For the reasons discussed below, the Court holds that it will not decide this factual challenge to standing on a motion to

dismiss. The Court then analyzes Correll's claims to determine whether they should be dismissed under *Rule 12(b)(6)*.

A. Motion to Dismiss for lack of subject-matter jurisdiction under *12(b)(1)*

Amazon challenges the Amended Complaint, in part, on the ground that Correll lacks Article III standing. (Id.) Standing is an element of subject matter jurisdiction. Accordingly, Amazon moves to dismiss Correll's Amended Complaint for lack of subject matter jurisdiction pursuant to *Federal Rule of Civil Procedure 12(b)(1)*.

A *Rule 12(b)(1)* jurisdictional attack may be facial or factual. *Fed. R. Civ. P. 12(b)(1)*. In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face **[*4]** to invoke federal jurisdiction. *Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)*. Generally, on a 12(b)(1) motion regarding subject matter jurisdiction, unlike a 12(b)(6) motion, a court need not defer to a plaintiff's factual allegations. *Id.* But the Supreme Court has held that where a 12(b)(1) motion to dismiss is based on lack of standing, the court must defer to the plaintiff's factual allegations and must "presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Id. at 560*. In short, a 12(b)(1) motion to dismiss for lack of standing can only succeed if the plaintiff has failed to make "general factual allegations of injury resulting from the defendant's conduct." *Id.*

B. Motion to Dismiss for failure to state a claim under *12(b)(6)*

A motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* should be granted only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient facts to support a cognizable legal theory. *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988)*. When reviewing a motion to dismiss, the allegations of material fact in plaintiff's complaint are taken as true and construed in the light most favorable to the plaintiff. *See Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995)*. Although **[*5]** detailed factual allegations are not required, factual allegations "must be enough to raise a right to relief above the speculative level." *Bell Atlantic v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Only a complaint that states a plausible claim for relief will survive a motion to dismiss. *Id.*

III. DISCUSSION

A. Motion to Dismiss for lack of subject-matter jurisdiction under *Fed. R. Civ. P. 12(b)(1)*

I. Article III Standing

Amazon first argues that Correll's Amended Complaint should be dismissed for lack of subject matter jurisdiction under *Federal Rule of Civil Procedure 12(b)(1)* because Correll lacks Article III standing.

Standing is a necessary element of federal court jurisdiction under Article III of the U.S. Constitution. *Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*. Accordingly, standing is a "threshold question in every federal case." *Thomas v. Mundell, 572 F.3d 756, 760 (9th Cir. 2009)* (citing *Warth, 422 U.S. at 498*.). "The party invoking federal jurisdiction, not the district court, bears the burden of establishing Article III standing." *Carroll v. Nakatani, 342 F.3d 934, 945 (9th Cir. 2003)*.

Standing requires that the plaintiff (1) suffered an injury in fact; (2) show the defendant's causal connection to the injury; and (3) demonstrate that the injury would be redressed by a favorable decision. *Spokeo, Inc. v. Robins, 578 U.S. 330, 337, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016)*. That is, a plaintiff must allege "such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth, 422 U.S. at 498-99*. A plaintiff **[*6]** must have suffered an 'injury in fact'—"'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, 578 U.S. at 339* (quoting *Lujan, 504 U.S. at 560*). A "particularized" injury is one that "affect[s] the plaintiff in a personal and individual way." *Id.*

Correll contends that because he viewed identity-based incentive programs on the Amazon Seller site that he could not qualify for, he was subject to discrimination, and accordingly suffered an injury in fact. (ECF No. 20 at 17-18.) Correll further contends that he "had and continues to have the direct and specific intent to establish an Amazon Professional Seller account and sell his products on Amazon.com," and he "was and continues to be able and ready to sell his collectibles on Amazon.com" since the

summer and fall of 2021. (Id. at 17, 21.) However, upon noticing Amazon's programs, Correll "knew his business would be at a competitive disadvantage" as a result of his identity. (Id. at 21.)

The products Correll contends he intended to sell on Amazon.com are collectible coins and comic books. (Id. at 21.) In response, Amazon argues Correll was never "'able' to sell collectible coins and comics **[*7]** in Amazon's store, because both categories have been closed to new sellers since well before the summer of 2021." (ECF No. 25, 11.) As Correll did not apply to become a seller for either category while it was accepting new sellers, Amazon argues, Correll cannot and could not have sold these products regardless of Amazon's diversity programs. (Id. at 11-12.) Finally, Correll responds by alleging Amazon.com currently has listings for numerous collectible coin products which appear to be in violation of Amazon's policies regarding sale of such products. (ECF No. 26, 11-13.) Correll therefore argues that "[t]here is at least some evidence that the rules and requirements Amazon declares to be in effect are either not in effect, or are not being enforced," and so "Plaintiff may very well have been able to sell his coins too." (Id.)

In order to allege a particularized injury here, Correll must plead facts showing that he was "able and ready" to sell products on Amazon.com. *Compare Carroll, 342 F.3d at 947* (affirming dismissal on summary judgment for lack of standing where plaintiff "offers no evidence that he is 'able and ready' to compete for, or receive" the challenged benefit), *with White v. Square, 891 F.3d 1174, 1175-77 (9th Cir. 2018)* (holding plaintiff who "sought **[*8]** to use Square's services, but was unable to do so because of its discriminatory policy against bankruptcy attorneys" met constitutional standing requirements). Correll has added such allegations into his Amended Complaint. (ECF 20, 20-21.) However, the additional facts presented by Amazon in its Motion to Dismiss the Amended Complaint put standing into question. If Amazon's allegations that it has banned all new sellers in the only categories Correll intended to sell products in since before Correll's intent to sell on Amazon.com began, Correll could not possibly have been able to sell products on Amazon.com.

Because the Court cannot resolve these factual issues on a Motion to Dismiss, discovery is necessary to verify these allegations and determine whether Correll has standing. *See Safe Air for Everyone, 373 F.3d at 1039-40*. Accordingly, the Court **DENIES** Amazon's *Fed. R. Civ. P. 12(b)(1)* Motion to Dismiss without prejudice. The parties are to conduct discovery only into the issue of standing by November 22, 2023. Amazon may raise this issue again on summary judgment after discovery is complete. The Court will set aside a date for oral argument on a Motion for Summary Judgment on December 21, 2023, at 1 pm.

B. Motion to Dismiss for failure to state [*9] a claim under *Fed. R. Civ. P. 12(b)(6)*

I. Sufficiency of *42 U.S.C. § 1981* Claim

Section 1981 provides that that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." *42 U.S.C. § 1981(a)*. Accordingly, *Section 1981* "offers relief" when "racial discrimination" either: (1) "impairs an existing contractual relationship" or (2) "blocks the creation of a contractual relationship." *Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 476, 126 S. Ct. 1246, 163 L. Ed. 2d 1069 (2006)*. A plaintiff asserting a *Section 1981* claim must plead that "but for the defendant's unlawful conduct," such an injury "would not have occurred." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1014, 206 L. Ed. 2d 356 (2020)*. A plaintiff asserting a *Section 1981* claim must generally either "identify an impaired contractual relationship under which the plaintiff has rights," *Astre v. McQuaid, 804 F. App'x 665, 666 (9th Cir. 2020)* (citing *Domino's Pizza, 546 U.S. at 476*), or allege that they were "block[ed]" from entering into a new contractual relationship on account of race. *Domino's Pizza, 546 U.S. at 476*.

To survive the motion to dismiss, Correll would need to plead either an existing or future contract which Amazon impaired or blocked. First, Correll does not have an existing contract with Amazon or any Amazon customers as he never set up an Amazon Sellers account. Second, Correll could not have a future contract with Amazon or any Amazon customers because he voluntarily stopped **[*10]** engaging Amazon to enter into a contract when he stopped before making a seller account. Additionally, depending on the outcome of the discovery into the standing issue, there remains the question of whether Correll would have been able to contract with Amazon or its customers depending on whether he could sell any of his products on Amazon.com.

Next, the question of whether deterrence from contracting is sufficient under *Section 1981* is an issue of first impression for the Ninth Circuit. Several other circuits have held that a defendant must preclude the plaintiff from entering into a contract to establish a *Section 1981* claim, whereas mere deterrence is insufficient. *See Arguello v. Conoco, Inc., 330 F.3d 355, 358-59 (5th Cir. 2003)* ("a *§ 1981* claim must allege that the plaintiff was *'actually prevented, and not merely*

deterred,'" from entering into a contractual relationship on account of race) (emphasis in original) (quoting *Morris v. Dillard Dep't Stores, Inc., 277 F.3d 743, 752 (5th Cir. 2001)*); *Alston v. Spiegel, 988 F.3d 564, 572 (1st Cir. 2021)* ("*section 1981* affords relief when racial discrimination *precludes* a plaintiff from entering a contractual relationship") (emphasis added); *Green v. Dillard's, Inc., 483 F.3d 533, 539 (8th Cir. 2007)* ("In order to prevail in their *§ 1981* case the Greens must also show actionable interference with their contractual interest. . . [such as by] a series of actions which a trier of fact could find as a whole *thwarted* their attempt **[*11]** to make and close a contract") (emphasis added). This interpretation corresponds with the language used by the Supreme Court in describing *Section 1981* liability: in *Runyon v. McCrary, 427 U.S. 160, 172, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976)*, where the Court "subjected defendants to liability under *§ 1981* when, for racially motivated reasons, they *prevented* individuals who 'sought to enter into contractual relationships' from doing so." *Domino's Pizza., 546 U.S. at 476* (emphasis added and omitted).

According to Correll's pleadings, Amazon's programs did not preclude him from contracting with Amazon as a seller. Rather, Correll did not desire to participate in a marketplace which provided some benefit programs only to minorities. (ECF No. 20, 21.) Correll argues this deterrence can be sufficient to support a claim under *Section 1981*, but the only caselaw he cites is not a *Section 1981* case, but rather a case about employment discrimination where the existence or formation of a contract is not at issue. (ECF No. 26, 15 (citing *Teamsters v. United States, 431 U.S. 324, 365-366, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977)*.) Here, assuming Correll was able to contract with Amazon, Amazon's programs did not preclude his entering into that contract—Correll's own actions did.

Correll has failed to plead an existing or future contract which Amazon impaired or blocked through racial discrimination. Accordingly, the Court **GRANTS** Amazon's **[*12]** *Fed. R. Civ. P. 12(b)(6)* Motion to Dismiss the *Section 1981* claim with leave to amend.

II. Sufficiency of Claims under *California Civil Code Sections 51* and *51.5 ("Unruh Civil Rights Act")*

The Court should not decide questions of state law while standing is questionable. Accordingly, the Court **DENIES** Amazon's *Fed. R. Civ. P. 12(b)(6)* Motion to Dismiss the claims under *California Civil Code Sections 51* and *51.5* without prejudice.

IV. CONCLUSION

For the reasons discussed above, Defendant's Motion to Dismiss Plaintiff's *42 U.S.C. § 1981* claim under *Fed. R. Civ. P. 12(b)(6)* is **GRANTED**. Defendant's motions under *Fed. R. Civ. P. 12(b)(1)* and under *Fed. R. Civ. P. 12(b)(6)* regarding the claims under the Unruh Civil Rights Act are **DENIED** without prejudice. The parties will conduct discovery into the issue of standing until November 22, 2023, and Amazon may raise its challenge to standing again on a motion for summary judgment, for which the Court has set aside time for oral argument on December 21, 2023, at 1 pm. The Plaintiff has leave to file an amended complaint as to the *Section 1981* claim by November 1, 2023. The parties shall cooperate in discovery. Failure to cooperate will be sanctioned.

IT IS SO ORDERED.

Dated: September 18, 2023

/s/ Barry Ted. Moskowitz

Hon. Barry Ted. Moskowitz

United States District Judge

End of Document

Do No Harm v. Pfizer Inc.

United States Court of Appeals for the Second Circuit

October 3, 2023, Argued; March 6, 2024, Decided

Docket No. 23-15

Reporter
2024 U.S. App. LEXIS 5428 *

DO NO HARM, Plaintiff-Appellant, -v.- PFIZER INC., Defendant-Appellee.

Prior History: [*1] Plaintiff-Appellant Do No Harm challenges a December 16, 2022 order of the United States District Court for the Southern District of New York (Rochon, J.) denying its request for a preliminary injunction and dismissing the case without prejudice because Do No Harm lacked Article III standing.

Do No Harm alleges that a Pfizer fellowship program unlawfully excludes white and Asian-American applicants on the basis of race in violation of federal and state laws. As a membership organization, it bases its standing on injuries to two pseudonymous white or Asian-American members who indicated they would apply for the fellowship if they were not excluded from eligibility. The district court concluded that Do No Harm lacked standing because, among other reasons, it failed to identify a single injured member by name.

Two conclusions drive our decision to affirm: First, for purposes of establishing Article III standing under the summary judgment standard applicable to a motion for a preliminary injunction, *Cacchillo v. Insmed, Inc., 638 F.3d 401, 404 (2d Cir. 2011)*, an association that relies on injuries to individual members to establish its standing must name at least one injured member. This does not prevent the association from seeking to protect the identities [*2] of its named members from public disclosure using existing legal frameworks. Second, if a plaintiff fails to establish Article III standing in the context of a motion for a preliminary injunction, the district court must dismiss their claims without prejudice for lack of standing, rather than allow the case to proceed in the ordinary course if the plaintiff alleged sufficient facts to establish standing under the less onerous standard applicable at the pleading stage. Because Do No Harm moved for a preliminary injunction and failed to name at least one injured member, we AFFIRM.

Do No Harm v. Pfizer Inc., 646 F. Supp. 3d 490, 2022 U.S. Dist. LEXIS 227006, 2022 WL 17740157 (S.D.N.Y., Dec. 16, 2022)

Case Summary

Overview

HOLDINGS: [1]- The district court did not err in concluding that a nationwide membership organization lacked U.S. Const. art. III standing to seek a preliminary injunction because it did not identify by name a single member injured by a corporation's alleged discrimination. An association had to identify by name at least one injured member for purposes of establishing Article III standing under a summary judgment standard; [2]-Because the organization did not disclose the names of two of its members, who anonymously submitted declarations, it failed to demonstrate it had at least one member with Article III standing; [3]- Once the district court concluded that the organization lacked standing, dismissal, not further proceedings, was the logical next step, *Fed. R. Civ. P. 12(h)(3)*. When it determined it lacked subject matter jurisdiction it could not consider the merits of the motion.

Outcome

Organization's motion to supplement record on appeal denied as moot and district court's dismissal of organization's claims dismissed without prejudice.

Counsel: CAMERON T. NORRIS (Thomas R. McCarthy, Frank H. Chang, C'Zar Bernstein, on the brief), Consovoy McCarthy PLLC, Arlington, VA, for Plaintiff-Appellant.

SAMANTHA LEE CHAIFETZ, DLA Piper LLC, Washington, DC (Loretta E. Lynch, Liza M. Velazquez, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY; Jeannie S. Rhee, Martha L. Goodman, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC, on the brief), for Defendant-Appellee.

Judges: Before: JACOBS, WESLEY, and ROBINSON, Circuit Judges. Judge Wesley concurs in part, and in the judgment, in a separate opinion.

Opinion by: ROBINSON

Opinion

ROBINSON, *Circuit Judge*:

Defendant-Appellee Pfizer Inc. **[*3]** ("Pfizer") sponsors a Breakthrough Fellowship Program (the "Fellowship") that seeks "to advance students and early career colleagues of Black/African American, Latino/Hispanic, and Native American descent." J. App'x 45. Do No Harm, a nationwide membership organization, filed suit against Pfizer on behalf of its members, alleging that Pfizer unlawfully excludes white and Asian-American applicants from the Fellowship in violation of federal and state laws.

When Do No Harm moved for a preliminary injunction, the district court dismissed the suit for lack of subject matter jurisdiction. *Do No Harm v. Pfizer Inc., 646 F. Supp. 3d 490, 517-18 (S.D.N.Y. 2022)*.[1] In particular, the district court concluded that Do No Harm lacked Article III standing because, among other reasons, it failed to identify a single injured member by name. *Id. at 504-05*.

The decisive issues in this appeal are (1) whether, for purposes of establishing Article III standing under the summary judgment standard applicable to a motion for a preliminary injunction, *Cacchillo v. Insmed, Inc., 638 F.3d 401, 404 (2d Cir. 2011)*, an association that relies on injuries to individual members to establish its standing must name at least one injured member; and (2) whether, if a plaintiff fails to establish Article III standing in the context of a motion for a preliminary injunction, the district court **[*4]** must dismiss their claims without prejudice for lack of standing, or whether the court should simply deny the preliminary injunction and allow the case to proceed in the ordinary course if the plaintiff alleged sufficient facts to establish standing under the less onerous standard applicable at the pleading stage.

We conclude that the district court did not err in determining that Do No Harm lacked Article III standing because it did not identify by name a single member injured by Pfizer's alleged discrimination, and that the district court properly dismissed Do No Harm's claims after reaching that conclusion. We therefore **AFFIRM**.

BACKGROUND

I. Facts[2]

Pfizer is a corporation headquartered in New York City that researches, manufactures, and sells biopharmaceutical products. In 2021, Pfizer launched the Breakthrough Fellowship Program: a nine-year, "first-of-its-kind" opportunity designed "to increase minority representation at Pfizer" and "enhance [its] pipeline of diverse leaders." J. App'x 45.

The Fellowship consists of five parts: a ten-week summer internship for rising college seniors; two years of full-time employment after graduation; a fully paid scholarship to a full-time, two-year MBA, MPH, **[*5]** or MS Statistics program; summer internships between the first and second years of the fellow's master's program; and, finally, a return to Pfizer for postgraduate employment.

Individuals are only eligible to apply for the Fellowship during their junior year of college. At the time this suit was filed in September 2022, the Fellowship webpage listed the following "Requirements" for potential applicants:

- Be a U.S. citizen or a U.S. Permanent Resident
- Be an undergraduate student enrolled in a full-time university program (an accredited college / university degree program at the time of award) and graduate December '23 or Spring 2024
- Committed interest & intent to pursue an MBA, MPH or MS Statistics program
- Apply to a Breakthrough Fellowship Intern opportunity via Pfizer.com/Careers search 'Breakthrough' [hyperlink omitted]
- Have a 3.0 GPA or above

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[1] The district court did not enter judgment on a separate document as required by *Federal Rule of Civil Procedure 58(a)*. Nevertheless, pursuant to *Rule 58(c)(2)(B)*, the judgment became final 150 days after the order was entered on the docket, and we deem Do No Harm's notice of appeal to have been timely filed as of that date. *See **Fed. R. App. P. 4(a)(2)***. Moreover, we note that "failure to set forth a judgment or order on a separate document when required by *Federal Rule of Civil Procedure 58(a)* does not affect the validity of an appeal from that judgment or order." ***Fed. R. App. P. 4(a)(7)(B)***. We also note that "[w]here an order appealed from clearly represents a final decision and the appellees do not object to the taking of an appeal, the separate document rule is deemed to have been waived and the assumption of appellate jurisdiction is proper." *Selletti v. Carey, 173 F.3d 104, 109-10 (2d Cir. 1999)*. Pfizer has not objected to the taking of this appeal; it has waived the separate document requirement. We therefore exercise jurisdiction pursuant to *28 U.S.C. § 1291*.

[2] Our account of the facts is drawn from Do No Harm's Complaint and accompanying attachments. For the purpose of reviewing the district court's order dismissing Do No Harm's claims, we credit Do No Harm's allegations. *Novak v. Kasaks, 216 F.3d 300, 305 (2d Cir. 2000)*.

- Meet the program's goals of increasing the pipeline for Black/African American, Latino/Hispanic and Native Americans.
- Demonstrate exceptional leadership potential
- Willingness to work in NYC or other Pfizer location as indicated by the job posting

Id. at 48-49.

The webpage also contained an "FAQs" section that directed potential applicants **[*6]** to a separate PDF document. One frequently asked question read: "I'm not from a minority group identified for the Breakthrough Fellowship Program; what opportunities are available to me?" *Id.* at 51. Pfizer answered:

> Pfizer is an equal opportunity employer. We have multiple programs and opportunities throughout the year for undergraduate and graduate students and for Pfizer colleagues generally. For example, any colleague can pursue an MBA or MPH through Pfizer Benefits' Education Assistance Program. We also host MBA students each summer, more information on this program can be found here [hyperlink omitted]. Undergraduates and graduate students who are not eligible or interested in the Breakthrough Fellows Program but would like to pursue a career at Pfizer can apply to the Summer Growth Experience Program and/or create a job alert on our Pfizer.com/Careers page to receive email or text notifications when positions are opened.

Id. at 51. The webpage further stated that "[a]pplications for the 2023 Breakthrough Fellowship Program will open shortly end [sic] of Summer 2022/beginning Fall 2022." *Id.* at 48.

Do No Harm is a Virginia-based, nationwide membership organization whose stated mission is **[*7]** "to protect healthcare from radical, divisive, and discriminatory ideologies, including the recent rise in explicit racial discrimination in graduate and postgraduate medical programs." *Id.* at 9. Its members include "physicians, healthcare professionals, medical students, patients, and policymakers." *Id.* Do No Harm pursues its mission through education and advocacy, including litigation.

II. District Court Proceedings

On September 15, 2022, Do No Harm filed suit against Pfizer, alleging violations of *42 U.S.C. § 1981*, *Title VI of the Civil Rights Act*, *Section 1557 of the Affordable Care Act (the "ACA")*, and the New York State and New York City Human Rights Laws. Do No Harm asserts that Pfizer's Fellowship unlawfully "excludes white and Asian-American" applicants, as evidenced by the Fellowship's FAQs page, advertising materials, and requirement that applicants "[m]eet the program's goals of increasing the pipeline for Black/African American, Latino/Hispanic and Native Americans." J. App'x 8, 11-14 (alteration in original). Do No Harm alleged it had "at least two members" who were "ready and able to apply for the 2023 class" if Pfizer eliminated its allegedly discriminatory criteria. *Id.* at 9.

Concurrent with its complaint, Do No Harm filed a motion for a temporary restraining order and **[*8]** preliminary injunction barring Pfizer from selecting the 2023 Fellowship class until further order of the district court. In support of its motion, Do No Harm submitted anonymous declarations from two of its members identified by the pseudonyms "Member A" and "Member B."[3] In their respective declarations, Members A and B affirmed that they "[met] all the eligibility requirements set by Pfizer," including that they were undergraduate juniors, maintained GPAs of 3.0 or higher, and were "involved in campus life and [held] leadership positions" in various campus activities. *Id.* at 36-41. Members A and B, who self-identified as white and Asian-American, respectively, averred that Pfizer "categorically exclud[ed]" white and Asian-Americans like them from the Fellowship. *Id.* at 37, 40. Both Members swore they were "able and ready to apply to the 2023 class of the Fellowship" if Pfizer eliminated its allegedly discriminatory criteria. *Id.*

Do No Harm also submitted a declaration from Kristina Rasmussen, Do No Harm's Executive Director. Rasmussen asserted that "Do No Harm has at least two members who are white and Asian American and in their junior year of college **[*9]** who are ready and able to apply to the Pfizer Breakthrough Fellowship Program if Pfizer stops discriminating against white and Asian-American applicants." *Id.* at 34. She further declared that "Do No Harm also has at

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[3] In the context of cases in which parties who are identified by name *to the court* seek to keep their names confidential from the public or other parties, this Court routinely uses the terms "anonymous" and "pseudonymous" interchangeably. *See, e.g.*, *Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 189 (2d Cir. 2008)* ("[W]hen determining whether a plaintiff may be allowed to maintain an action under a pseudonym, the plaintiff's interest in anonymity must be balanced against both the public interest in disclosure and any prejudice to the defendant."); *United States v. Pilcher, 950 F.3d 39, 41-42 (2d Cir. 2020)* (referring to defendant's motion as both a "motion to proceed anonymously" and a "motion to file a habeas petition under a pseudonym"); *Doe v. Delta Airlines Inc., 672 Fed. Appx. 48, 52 (2d Cir. 2016)* (referring to plaintiff's motion as both "an application to litigate under a pseudonym" and an "application to proceed to trial anonymously"). We use the two terms interchangeably here and emphasize that in contrast to the above cases, the names of the anonymous members have not been disclosed to the court, even *in camera*.

least one member who is a sophomore who will be ready and able to apply to the Pfizer Breakthrough Fellowship next year if Pfizer stops discriminating against white and Asian-American applicants." *Id.* at 34-35.

During a conference held on September 21, 2022, Do No Harm withdrew its request for a temporary restraining order based on Pfizer's representation that the application window for the 2023 class would not open before January 2023. At the same conference, the district court observed that Do No Harm had not identified Members A or B by name, and asked that it address this issue in its further submissions. Briefing on the preliminary injunction motion was completed in November 2022. Both parties addressed the naming issue in their filings.

On December 16, 2022, the district court issued an opinion and order denying Do No Harm's motion for a preliminary injunction and dismissing the case without prejudice for lack of subject matter jurisdiction. *Do No Harm, 646 F. Supp. 3d at 517-18*.

As a preliminary matter, **[*10]** the court noted that a plaintiff's burden to show Article III standing on a motion for a preliminary injunction "will normally be no less than that required on a motion for summary judgment." *Id. at 500* (quoting *Cacchillo, 638 F.3d at 404*). Applying that standard, the court held that Do No Harm lacked standing because it failed to identify any of its injured members by name. *Id. at 504-05* (citing *Summers v. Earth Island Institute, 555 U.S. 488, 498-99, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009)*). Even if it had identified its members by name, the court concluded that Do No Harm failed to establish that any of its members suffered a cognizable injury because they did not "provide any information, facts or prior experience that show a committed interest and intent to pursue [the opportunity]." *Id. at 507* (internal quotation marks omitted).

In an alternative analysis, the court considered Do No Harm's "claim-specific" standing to pursue its federal claims.[4] *Id. at 508*. The court concluded that Do No Harm could not pursue its *§ 1981* claim for the additional reason that associations such as Do No Harm lack standing to assert claims on behalf of their members under *§ 1981*. *Id. at 508-09*. The court further concluded that Pfizer is not subject to the prohibitions of Title VI or *Section 1557 of the ACA*. *Id. at 509-17*. Having rejected Do No Harm's federal claims for claim-specific reasons, the court declined to exercise supplemental **[*11]** jurisdiction over the remaining state law claims and dismissed the case without prejudice. *Id. at 518*.

III. Motion to Supplement the Record on Appeal

Do No Harm filed a timely notice of appeal on January 3, 2023. Pfizer represents that it opened its application window for the 2023 Fellowship class on February 15, 2023, and closed it on March 1, 2023.

When it filed its brief and joint appendix, Do No Harm moved to supplement the record on appeal with another declaration of Kristina Rasmussen and a declaration of a third anonymous member identified by the pseudonym "Member C." Member C, then a college sophomore, states, "I meet all the eligibility requirements [for the Fellowship] set by Pfizer, except I am Asian," and declares, "I am able and ready to apply for the 2024 class of the Fellowship if Pfizer" eliminates its allegedly discriminatory criteria. App. Ct. Dkt. 38 at 11. Rasmussen swears, among other things, that Member C is a member of Do No Harm. *Id.* at 13. Pfizer opposes the motion. App. Ct. Dkt. 50. The motion was referred to this panel for consideration alongside the merits.

DISCUSSION

An association may have standing to sue as the representative of its members, "[e]ven in the absence **[*12]** of injury to itself." *Warth v. Seldin, 422 U.S. 490, 511, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*. To establish associational standing, an association must show: (1) "its members would otherwise have standing to sue in their own right"; (2) "the interests it seeks to protect are germane to the organization's purpose"; and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)*.

At issue here is the first of these requirements—that at least one association member must have standing to sue in their own right. To establish individual standing, a plaintiff must show: (1) they suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, as opposed to

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[4] The district court's discussion of "claim-specific" standing appears to focus on Article III standing with respect to the *§ 1981* claim, and "statutory standing" with respect to the Title VI and ACA claims. "Statutory standing," as distinct from Article III standing, relates to the merits, that is whether a particular plaintiff "has a cause of action under the statute." *American Psychiatric Association v. Anthem Health, 821 F.3d 352, 359 (2d Cir. 2016)* (quoting *Lexmark International, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)*). Because so-called statutory standing does not implicate "the court's statutory or constitutional *power* to adjudicate the case," this term is "misleading." *Id.* (quoting *Lexmark, 573 U.S. at 128 n.4*).

conjectural or hypothetical; (2) there is a "causal connection between the injury and the conduct complained of"; and (3) it is "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, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* (internal quotation marks omitted).

Ordinarily, to establish standing to challenge an allegedly discriminatory program, a plaintiff must apply to that program. *Jackson-Bey v. Hanslmaier, 115 F.3d 1091, 1096 (2d Cir. 1997)*. But a plaintiff need not go through the motions of formally applying when that would be a "futile gesture." *International Brotherhood of Teamsters v. United States, 431 U.S. 324, 365-66, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977)* ("If an employer should **[*13]** announce [its] policy of discrimination by a sign reading 'Whites Only' on the hiring-office door, [its] victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs."). In such circumstances, a plaintiff need only demonstrate that they are able and ready to apply, but a discriminatory policy prevents them from doing so on equal footing. *Gratz v. Bollinger, 539 U.S. 244, 262, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003)*.

On appeal, Do No Harm argues that, after the district court concluded that Do No Harm lacked standing for purposes of its preliminary injunction motion, the district court should not have dismissed the claims altogether unless Do No Harm failed to establish standing under the less onerous standard applicable at the pleading stage. Applying that standard, Do No Harm contends that it sufficiently alleged facts to establish its standing. In particular, it argues that, at the pleading stage, it is not required to name its members to establish Article III standing, and it sufficiently alleged that its pseudonymous members were ready and able to apply to the Fellowship. Even applying the more rigorous standard applicable at the preliminary injunction stage, Do No Harm argues it presented sufficient evidence to establish **[*14]** its members' standing.

Finally, Do No Harm asserts the district court erred by dismissing its federal claims pursuant to its "claim-specific" analyses without first giving Do No Harm notice or an opportunity to be heard. It disputes the district court's conclusion that associations like Do No Harm lack standing to sue on behalf of their members under *§ 1981*, and it challenges the court's assessment of the merits of its Title VI and ACA claims.

"We review the dismissal of claims for lack of standing *de novo*," meaning without deference to the district court. *Ross v. Bank of America, N.A. (USA), 524 F.3d 217, 222 (2d Cir. 2008)*. Applying that standard, we conclude that (1) the district court did not err in concluding that Do No Harm lacked Article III standing to seek a preliminary injunction because it did not identify by name a single member injured by Pfizer's alleged discrimination, and (2) the district court properly dismissed Do No Harm's claims after reaching that conclusion. We therefore **AFFIRM**.

I. Identifying Do No Harm Members

We require plaintiffs claiming associational standing "to identify members who have suffered the requisite harm." *Summers, 555 U.S. at 499*. The Supreme Court explored what it means to "identify" members in *Summers*. There, environmental organizations challenged US **[*15]** Forest Service regulations exempting certain timber sales from notice and comment procedures. *Id. at 490-92*. The parties settled their claim insofar as it related to a specific identified project in which the Forest Service applied those regulations, leaving the organizational plaintiffs with no specific actual or threatened application of the regulations that would impact the recreational or aesthetic interests of at least one identified member. *Id. at 491-92*. The Court accordingly concluded that the plaintiff organizations lacked Article III standing. *Id. at 495-96*.

In announcing its holding, the Court rejected the suggestion that an organization may premise its standing on the "statistical probability" that some of its members are threatened with concrete injury. *Id. at 497-98*. Such an approach would, in the majority's view, "make a mockery of our prior cases, which have required plaintiff-organizations to make specific allegations establishing that at least one *identified member* had suffered or would suffer harm." *Id. at 498* (emphasis added). This aspect of the Court's opinion was central to the district court's conclusion that Do No Harm failed to adequately identify a harmed member because it didn't *name names*. *See Do No Harm, 646 F. Supp. 3d at 501-02*.

Do No Harm argues that **[*16]** *Summers* is irrelevant to this case. It contends that the standard set in *Summers* is inapplicable at the pleading stage, and that *Summers* does not, in any event, require associations to identify specific injured members *by name*.

We disagree on both points. Whether *Summers* requires naming names at the *pleading stage* is irrelevant; the district court made its standing determination here in the context of a motion for a *preliminary injunction*, not at the pleading stage. And a requirement that a plaintiff association seeking to establish standing on the basis of injuries to its members identify at least one injured member by name best aligns with Supreme Court precedent, including *Summers*, is most

consistent with the principles underlying organizational standing, and is bolstered by the conclusions of numerous other courts.

A. Standing and Preliminary Injunctions

It is well settled that "[a] plaintiff's burden to demonstrate standing increases over the course of litigation." *Cacchillo, 638 F.3d at 404*. As with any other matter on which the plaintiff bears the burden of proof, each element of standing must be supported "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan, 504 U.S. at 561*.

In [*17] *Cacchillo*, we held that "[w]hen a preliminary injunction is sought, a plaintiff's burden to demonstrate standing will normally be no less than that required on a motion for summary judgment." *638 F.3d at 404* (internal quotation marks omitted). Consequently, to establish standing on a motion for a preliminary injunction, "a plaintiff cannot rest on such mere allegations as would be appropriate at the pleading stage but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true." *Id.* (cleaned up).

The district court made its standing determination in the context of addressing Do No Harm's preliminary injunction motion. Do No Harm bore the burden of demonstrating standing subject to at least a summary judgment standard. That's the frame in which we review the district court's standing determination. To determine whether Do No Harm met its burden, we need not and do not decide whether, at the *pleading* stage, Do No Harm was required to name names. *Cf. Building & Construction Trades Council of Buffalo, New York & Vicinity v. Downtown Development, Inc., 448 F.3d 138, 145 (2d Cir. 2006)* (concluding that an organizational plaintiff need not identify specific injured members by name at the pleading stage, but recognizing that a naming requirement "might have some [*18] validity . . . at the summary judgment stage").[5]

B. Naming Names

Summers, and the precedent upon which it relies, support the view that an association cannot just *describe* the characteristics of specific members with cognizable injuries; it must identify at least one by name. That makes sense where an association's standing rests on alleged injuries to its members, and is consistent with persuasive decisions from a number of courts.

In rejecting the suggestion that a plaintiff organization could rely on a statistical likelihood that its members are injured by the challenged regulation, the *Summers* Court noted that "this requirement of naming the affected members has never been dispensed with in light of statistical probabilities, but only where *all* the members of the organization are affected by the challenged activity." *Summers, 555 U.S. at 498-99*. Thus, plaintiffs claiming associational standing must "identify members who have suffered the requisite harm." *Id. at 499*.

Do No Harm is right that *Summers* does not squarely address the specific issue here. The core holding of *Summers* is that an association relying on injuries to its members to establish its standing must identify *specific* members injured [*19] by the challenged conduct. *Id. at 498-99*. It does not directly address whether those members must be identified *by name*.

Nevertheless, a rule requiring an associational plaintiff to name at least one injured member, at least at the summary judgment stage, best aligns with the Court's guidance in *Summers* and the caselaw on which *Summers* relies—specifically, *FW/PBS, Inc. v. Dallas, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990)*.

In *FW/PBS*—a case arising in a summary judgment posture—groups of individuals and businesses challenged the constitutionality of a city ordinance. *Id. at 221*. Plaintiffs premised their standing on, among other things, the affidavit of a named police officer who claimed that "two licenses" were revoked because of the challenged ordinance. *Id. at 235*. Although the Court would not rely on the affidavit because it was introduced for the first time on appeal, it said:

> Even if we could take into account the facts as alleged in the city's affidavit, it fails to identify the individuals

[5] The concurrence suggests there is tension between requiring names at summary judgment and leaving open the possibility that names may not be required at the pleading stage. Concurrence at 9. As mentioned above, "[a] plaintiff's burden to demonstrate standing increases over the course of litigation," such that each element of standing "must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation." *Cacchillo v. Insmed, Inc., 638 F.3d 401, 404 (2d Cir. 2011)*. In other words, what is enough to establish standing at the pleading stage will not necessarily be enough to establish standing at summary judgment. *See* I.A., above. For that reason, there is nothing incongruous about suggesting that allegations that may be sufficient to survive a motion to dismiss are not enough to defeat a motion for summary judgment. *See, e.g., Ball v Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 199 (2d Cir. 1990)* (in personal jurisdiction context, "bare legal allegations may be sufficient to withstand a 12(b)(6) motion, but, without factual support, fail to make a *prima facie* showing at the summary judgment stage, once discovery has occurred").

> whose licenses were revoked and, therefore, falls short of establishing that any petitioner before this Court has had a license revoked under the [challenged ordinance].

Id. We do not read the Court's statement as suggesting that the affidavit was insufficient because it failed to describe **[*20]** the circumstances of the harmed individuals in sufficient detail. Rather, we read it as stating that the affidavit was insufficient because it did not include the individuals' *names*.

The Court's subsequent treatment of *FW/PBS* in *Summers* confirms our view. The *Summers* Court explained that the affidavit in *FW/PBS* was insufficient "because it did not *name* individuals who were harmed" by the challenged program. *555 U.S. at 498* (emphasis added). It stated: "This requirement of *naming* the affected members has never been dispensed with in light of statistical probabilities." *Id. at 498-99* (emphasis added). Although *Summers* focused on the necessity of identifying members with greater specificity than mere statistical probabilities, it also recognized the necessity of *naming* members actually harmed by a challenged program. A contrary interpretation would ignore the decision's clear language and undermine the Supreme Court precedent upon which it relied. We are not, as the concurrence implies, merely "pluck[ing]" the word "name" from *Summers* to craft a naming requirement. Concurrence at 6. Rather, we assume the Supreme Court said what it meant and meant what it said.

A naming requirement makes sense as an element of associational **[*21]** standing. An association that premises its standing on harm to its members must demonstrate that those members suffered an injury in fact that is concrete and particularized and actual or imminent, as opposed to conjectural or hypothetical. *Lujan, 504 U.S. at 560*. In this case, it requires proof that members are ready and able to apply to the challenged program but for its allegedly discriminatory criteria. *Gratz, 539 U.S. at 262*. Although a name on its own is insufficient to confer standing, disclosure to the court of harmed members' real names is relevant to standing because it shows that identified members are genuinely ready and able to apply, and are not merely enabling the organization to lodge a hypothetical legal challenge. A member's name does not merely check a box; it is a demonstration of the sincerity of the member's interest in applying for a fellowship. These are quintessential Article III standing concerns. *See Carney v. Adams, 592 U.S. 53, 64, 141 S. Ct. 493, 208 L. Ed. 2d 305 (2020)* (noting "longstanding legal doctrine preventing this Court from providing advisory opinions at the request of one who, without other concrete injury, believes that the government is not following the law").

Plus, in order to actually *apply* for the Fellowship, an applicant has to disclose their *name*, in addition to **[*22]** the other listed requirements. It thus makes sense that a would-be applicant's willingness to disclose their name—at least to the court—is an essential component of the ready-and-able showing.

Moreover, a naming requirement flows from the rationale underlying associational standing. We allow an association to sue on behalf of its members only when those individuals "would otherwise have standing to sue in their own right." *Hunt, 432 U.S. at 343*. While procedures exist to allow parties to proceed anonymously to the *public* when certain conditions are met, *see, e.g., United States v. Pilcher, 950 F.3d 39, 42 (2d Cir. 2020)*, we do not allow parties to remain anonymous *to the court*, *Publicola v. Lomenzo, 54 F.4th 108, 111-12 (2d Cir. 2022)* (citing *Fed. R. App. P. 32(d)*, *Fed. R. Civ. P. 10(a)*, and *Fed. R. Civ. P. 11(a)*). *See also Doe v. Federal Republic of Germany, 2023 U.S. Dist. LEXIS 184678, 2023 WL 6785813, at *11 (S.D.N.Y. Oct. 13, 2023)* (collecting cases) ("In this District . . . parties proceeding anonymously must reveal their names (and other identifying information) under seal to the court."). Although the caselaw requiring plaintiffs to identify themselves to the court typically turns on an analysis of federal procedural rules rather than Article III, it would nevertheless be incongruous, especially at the summary judgment stage, to allow an association to rest its standing on anonymous member declarations when we would not allow those members, as individual parties, to proceed anonymously to the **[*23]** court in their own right.[6]

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[6] The concurrence suggests that, had Members A and B filed suit themselves and refused to provide their real names to the court, their complaint would be dismissed "on *pleading grounds*, not jurisdictional ones." Concurrence at 10. We agree with the concurrence that the unidentified members' complaint would face immediate dismissal pursuant to *Fed. R. Civ. P. 10(a)*, but do not adopt the concurrence's position that those unnamed would-be plaintiffs would have Article III standing to get past summary judgment but for the Federal Rules of Civil Procedure. That a court may dismiss a party's complaint on procedural grounds if they refuse to provide their name to the court at the pleading stage does not mean the unnamed party would otherwise have Article III standing to secure a judgment. *Cf. Fund Liquidation Holdings LLC v. Bank of America Corporation, 991 F.3d 370, 383 n.7 (2d Cir. 2021)* (even though Federal Rules of Civil Procedure do not require the legal existence of a corporate entity to be pleaded affirmatively in every case, "the nonexistence of the supposed claimant is a problem of constitutional magnitude"). We can't test the concurrence's hypothesis that unnamed plaintiffs who are precluded by the Federal Rules of Civil Procedure from proceeding with their claims would have constitutional standing at the judgment stage because as far as we can tell, cases in which a party has been allowed to proceed to judgment without disclosing their identity to the court don't exist.

Finally, the only sister circuit to squarely address the question agrees that an association must name its injured members to establish Article III standing. *See Draper v. Healey, 827 F.3d 1, 3 (1st Cir. 2016)* (Souter, *J.*) ("[T]he Supreme Court has said that an affidavit provided by an association to establish standing is insufficient unless it names an injured individual." (citing *Summers, 555 U.S. at 498*)).[7] District courts in this Circuit have held similarly. *See, e.g., Pen American Center, Inc. v. Trump, 448 F. Supp. 3d 309, 320-321 (S.D.N.Y. 2020)* ("Plaintiff is required to identify at least one affected member by name."); *Equal Vote American Corp. v. Congress, 397 F. Supp. 3d 503, 509 (S.D.N.Y. 2019)* ("[I]n order to bring claims on behalf of its members under the 'associational standing' doctrine, an organizational plaintiff . . . must identify, by name, at least one member with standing.").

The cases cited by Do No Harm do not convince us otherwise. In *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, a district court permitted an association to keep its membership list secret from the public *after* it submitted the list for *in camera* review. *291 F. Supp. 2d 269, 286 n.6 (D.N.J. 2003)*. While the district court in *NAACP v. Trump* allowed the NAACP's members to proceed **[*24]** anonymously, it ultimately declined to decide the naming issue because the government failed to renew the argument in its reply to the NAACP's motion for summary judgment. *298 F. Supp. 3d 209, 225 n.10 (D.D.C. 2018)*. And neither *Speech First v. Sands* nor *SFFA v. Harvard* contain any reasoning as to whether an association must name its members in order to establish standing. *See Speech First, Inc. v. Sands, 69 F.4th 184, 188 (4th Cir. 2023)*; *Students for Fair Admissions, Inc. v. Harvard, 600 U.S. 181, 198-201, 143 S. Ct. 2141, 216 L. Ed. 2d 857 (2023)*.

For the above reasons, we hold that an association must identify by name at least one injured member for purposes of establishing Article III standing under a summary judgment standard. Our holding in no way precludes an organization from seeking to protect its members' identities—either from the public or the opposing party—pursuant to existing legal procedures and standards. *See Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 190 (2d Cir. 2008)*; *Pilcher, 950 F.3d at 42*. An organization's ability to shield from disclosure the identities of members upon whom it relies to establish its standing is a separate matter. At issue here is whether an organization can proceed without even disclosing *to the court* the names of the members whose Article III injuries support the organization's standing. We hold that, because Do No Harm did not disclose the names of Members A or B to the district court, it failed to demonstrate that it has at least one

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In suggesting otherwise, the concurrence relies on cases in which individuals are allowed to proceed pseudonymously *to the public or other parties*. Those cases are entirely beside the point. Concurrence at 10-11. As noted above, even when parties proceed anonymously to the public or the opposing party, their names and other identifying information must still be disclosed *to the court*. *See, e.g., Doe v. Federal Republic of Germany, 2023 U.S. Dist. LEXIS 184678, 2023 WL 6785813, at *11 (S.D.N.Y. Oct. 13, 2023)* ("In this District, too, parties proceeding anonymously must reveal their names (and other identifying information) under seal to the court.") (collecting cases); *One Std. of Justice, Inc. v. City of Bristol, 2022 U.S. Dist. LEXIS 226040, 2022 WL 17688053, at *7 (D. Conn. Dec. 9, 2022)* (granting plaintiff's motion to proceed under a pseudonym but still requiring all documents containing plaintiff's name to be filed under seal with the court); *Publicola v. Lomenzo, 54 F.4th 108, 112 (2d Cir. 2022)* (dismissing appeal where anonymous plaintiff refused to refile his briefs under his real name or to seek permission from the Court to file copies of his briefs under seal in order to preserve his anonymity). This requirement serves logistical purposes, such as allowing the court to check for conflicts of interest, but, whether viewed through the lens of constitutional injury (who is injured?) or redressability (whose name would be on a judgment favorable to the plaintiff?), the requirement of a named (to the court) plaintiff at the judgment stage is one of constitutional dimension.

[7] The Ninth Circuit has held that an association lacked standing where it failed to "identify any affected members by name [or submit] declarations by any of its members attesting to harm they have suffered or will suffer." *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, 713 F.3d 1187, 1194 (9th Cir. 2013)*. The concurrence relies on discussion from a later Ninth Circuit case that was decided at the *pleading stage*, and in which the organization's primary basis for standing rested on *its own diversion-of-resources injury*, rather than injury to its members, to support the contention that the Ninth Circuit would not require Do No Harm to name names. Concurrence at 6-7 (citing *National Council of La Raza v. Cegavske, 800 F.3d 1032, 1038 (9th Cir. 2015)*). Given the different postures of the *Associated General Contractors* and *National Council of La Raza* cases, we cannot ascribe to the Ninth Circuit a clear position as to whether an organization relying on injuries to its members to support its standing must "name names" at the summary judgment stage to establish a cognizable injury. *See also California Restaurant Association v. City of Berkeley, 89 F.4th 1094, 1116 n.5 (9th Cir. 2024)* (Baker, *J.*, concurring) (recognizing circuit split as to whether plaintiff associations must "name names" at pleading stage, but asserting that "under *Lujan, Summers*, and [*Associated General Contractors*], at summary judgment or trial an organizational plaintiff is undoubtedly obligated to identify one or more of its injured members--among other 'specific facts' detailing the nature of their asserted injury."). The concurrence also relies on a Tenth Circuit case to support its position that *Summers* did not create a naming requirement. Concurrence at 6 (citing *Speech First, Inc. v. Shrum, 92 F.4th 947, 948-52 (10th Cir. 2024)*). But that case, like *National Council of La Raza*, was decided at the pleading stage. *Shrum, 92 F.4th at 947*.

member with Article III standing. **[*25]** [8]

II. The Dismissal Order

Do No Harm argues that even if it failed to establish standing in connection with its motion for a preliminary injunction, the district court should have simply denied the preliminary injunction motion rather than dismiss its claims altogether. It argues that it successfully alleged standing under a motion-to-dismiss standard, and that's the standard that applies to the question of dismissal.

A splintered D.C. Circuit decision from 2015, *Obama v. Klayman*, effectively illustrates the divergent approaches to this question. *800 F.3d 559, 419 U.S. App. D.C. 199 (D.C. Cir. 2015)*. All three panelists in *Klayman* agreed that the district court erred in granting plaintiffs a preliminary injunction because they concluded the plaintiffs lacked standing; but they disagreed as to whether the case should be dismissed. Judge Williams reasoned that a party seeking a preliminary injunction must show "a likelihood of success on the merits," which includes a likelihood of success in establishing jurisdiction. *Id. at 565* (opinion of Williams, *J.*). On his view, a determination that the plaintiff cannot show a likelihood of establishing standing defeats its request for a preliminary injunction, but does not require dismissal of the case. *Id. at 568*. **[*26]** Rather, on remand, the plaintiff might be able to collect sufficient evidence to establish standing. *Id.* Judge Brown likewise would have remanded for the possibility of "limited discovery to explore jurisdictional facts." *Id. at 564* (opinion of Brown, *J.*).

The third panelist, Judge Sentelle, took a different view. He explained:

> I agree with the conclusion of my colleagues that plaintiffs have not shown themselves entitled to the preliminary injunction granted by the district court. However, we should not make that our judicial pronouncement, since we do not have jurisdiction to make *any determination* in the cause. I therefore would vacate the preliminary injunction as having been granted without jurisdiction by the district court, and I would remand the case, not for further proceedings, but for dismissal.

Id. at 570 (opinion of Sentelle, *J.*) (emphasis added). Judge Sentelle emphasized: "Without standing there is no jurisdiction. Without jurisdiction, we cannot act." *Id.*

The D.C. Circuit subsequently endorsed the majority view from *Klayman*, holding that "an inability to establish a substantial likelihood of standing requires denial of the motion for preliminary injunction, not dismissal of the case." *Food & Water Watch, Inc. v. Vilsack, 808 F.3d 905, 913, 420 U.S. App. D.C. 366 (D.C. Cir. 2015)*.

In **[*27]** our view, Judge Sentelle captured the correct order of operations for a case like ours: as a general matter, when a court determines it lacks subject matter jurisdiction, it *cannot* consider the merits of the preliminary injunction motion and should dismiss the action in its entirety.

Our conclusion relies heavily on our description in *Cacchillo* about the nature of the standing determination in the context of a preliminary injunction motion: it is a determination of whether the plaintiff *has standing*, not whether the plaintiff has demonstrated a "substantial likelihood" of showing standing. *638 F.3d at 404*. Given that understanding, it follows that, upon determining in the context of a preliminary injunction motion that a plaintiff lacks standing, a court should generally dismiss the plaintiff's claims.

In *Cacchillo*, this Court considered a plaintiff's appeal from the district court's denial of her motion for a preliminary injunction for lack of standing. *Id. at 403*. In assessing the

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[8] The concurrence would sidestep the naming issue by ruling instead that Do No Harm produced insufficient evidence to support readiness and ability to apply for the Fellowship. But apart from their failure to disclose their names, the showing made by Members A and B is at least arguably sufficient. *See Carney v. Adams, 592 U.S. 53, 64, 141 S. Ct. 493, 208 L. Ed. 2d 305 (2020)* (limiting holding to the particular record, and stating, "[w]e do not decide whether a statement of intent alone under other circumstances could be enough to show standing"). The record contains sworn affidavits that Do No Harm's members satisfy each of Pfizer's stated application requirements—that is, they are enrolled as juniors in college, maintain above a 3.0 GPA, hold leadership positions, etc. The concurrence would require more information about how the members have prepared themselves to apply for the Fellowship, but it is unclear what concrete preparatory steps would be required to amplify on very broad application requirements that require no particular academic background or work experience. And because the record reflects that at the time Do No Harm filed this suit Pfizer had not yet described or provided any application materials, it is unclear what materials Members A and B might be expected to have prepared.

We don't purport to decide these questions here. Because we agree with the district court that Do No Harm lacks standing because it did not identify any injured member by name, we need not review the court's alternate holding that the affidavits of Member A and Member B were insufficiently detailed to show that either member was ready and able to apply to the Fellowship for purposes of establishing Do No Harm's standing. *Do No Harm v. Pfizer Inc., 646 F. Supp. 3d 490, 505-07 (S.D.N.Y. 2022)*.

standing question, we recited the established rules that "[a] plaintiff's burden to demonstrate standing increases over the course of litigation," and that each element of standing "must be supported . . . with the manner and degree **[*28]** of evidence required at the successive stages of the litigation." *Id. at 404*. We held that a plaintiff's burden when seeking a preliminary injunction is normally "no less than that required on a motion for summary judgment." *Id.* Thus, we held that "to establish standing for a preliminary injunction, a plaintiff cannot rest on such mere allegations as would be appropriate at the pleading stage but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true." *Id.* (cleaned up).

We repeat the *Cacchillo* analysis to emphasize what it did *not* say. We did not suggest that the operative question is whether the plaintiff mustered sufficient evidence to *show a substantial likelihood* of establishing standing; we framed the question in *Cacchillo* as whether the plaintiff *had standing* under the standard applicable at that stage of the litigation. That's a different approach from the D.C. Circuit's, and it may explain in part our divergent conclusions. *Cf. Klayman, 800 F.3d at 565* (opinion of Williams, *J.*) (explaining that a plaintiff seeking a preliminary injunction must show a substantial likelihood of success in establishing standing); *Food & Water Watch, 808 F.3d at 913* (same).

Once we understand **[*29]** that the no-standing determination is just that—a determination that the plaintiff lacks standing—the rest isn't complicated. Article III standing is "always an antecedent question," such that a court cannot "resolve contested questions of law when its jurisdiction is in doubt." *Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 101, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)*. Once a federal court determines it lacks subject matter jurisdiction, "the court must dismiss the complaint in its entirety." *Arbaugh v. Y&H Corp., 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)*; *see also U.S. Const. art. III, § 2* (limiting jurisdiction of Article III courts to "Cases" or "Controversies").[9]

We note one additional factor that simplifies our analysis: this is not a case in which a plaintiff seeks or needs limited discovery on jurisdictional facts in order to establish standing. We need not and do not decide whether dismissal would be proper in such a posture. *Cf. Klayman, 800 F.3d at 564* (opinion of Brown, *J.*) (noting that, on remand, the district court could determine whether to allow limited discovery to explore jurisdictional facts); *id. at 569* (opinion of Williams, *J.*) (same). That would present a different set of issues. *See Katz v. Donna Karan Company Co., 872 F.3d 114, 121 (2d Cir. 2017)* ("[P]recisely because the plaintiff bears the burden of alleging facts demonstrating standing, we have encouraged district courts to 'give the plaintiff ample opportunity to secure and present evidence **[*30]** relevant to the existence of jurisdiction' where necessary." (quoting *Amidax Trading Group v. S.W.I.F.T. SCRL, 671 F.3d 140, 149 (2d Cir. 2011)*)).

The impediment to Do No Harm's standing is not a lack of information relating to jurisdictional facts in Pfizer's exclusive possession. To the contrary, Do No Harm knows the identities of Members A and B—it doesn't need discovery to figure that out. The impediment to Do No Harm's standing is its own choice to withhold that information.

When Do No Harm moved for a preliminary injunction, it subjected itself to the heightened burden of demonstrating standing under a summary judgment standard. *Cacchillo, 638 F.3d at 404*. Do No Harm argues that dismissing its claims upon a determination in that context that it lacks standing amounts to "fast-forward[ing] this case to another stage." Appellant's Reply Br. at 9. To the contrary, Do No Harm's approach would amount to *reversing* the case to a *prior* stage. Once the court concluded that Do No Harm lacked standing, dismissal, not further proceedings, was the logical next step here. *See Fed. R. Civ. P. 12(h)(3)*.

CONCLUSION

For the above reasons, we **DENY** Do No Harm's motion to supplement the record on appeal as moot,[10] and **AFFIRM** the district court's dismissal of Do No Harm's claims without prejudice.

Concur by: WESLEY (In Part)

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[9] To the extent the district court issued alternative rulings rejecting Do No Harm's federal claims on the merits, that was error. Although we affirm the district court's dismissal of Do No Harm's claims because the organization lacks standing, the district court's alternate bases for dismissing Do No Harm's Title VI and ACA claims are void for lack of jurisdiction. To the extent the district court offered an alternative basis for concluding that Do No Harm lacks Article III standing to pursue its *§ 1981* claim, we do not reach that alternate holding because we affirm based on Do No Harm's general lack of Article III standing to pursue *any* of its claims.

[10] Even if we allowed Do No Harm to generate standing, and thus subject matter jurisdiction, by accepting new declarations into the record on appeal, granting Do No Harm's motion to supplement the record with Member C's declaration would not change our conclusion as to Article III standing because Member C is also unnamed.

Concur

WESLEY, *Circuit [*31] Judge*, concurring in part and concurring in the judgment:

The same day it filed this case, Do No Harm chose to seek an "extraordinary" remedy. *Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)*. It asked the district court to freeze Pfizer's Breakthrough Fellowship program—and reconfigure the Fellowship's selection process—through a preliminary injunction. Do No Harm did so knowing that it faced a demanding burden to prove its connection to the harm alleged, that it lacked a developed factual record, and that its members who claimed injury used pseudonyms. It also knew that none of its members had applied for the Fellowship in the first place.

I agree with the majority that Do No Harm lacks Article III standing. I fully endorse two important aspects of the majority's standing framework: (1) once it moved for a preliminary injunction, Do No Harm had to prove standing under a summary judgment standard, *see Cacchillo v. Insmed, Inc., 638 F.3d 401, 404 (2d Cir. 2011)*; and (2) when Do No Harm failed to meet its heightened standing burden, the proper action was to dismiss the case.

But I part ways with the majority as to *why* Do No Harm lacks standing. In my view, Members A and B did not show an imminent injury from the Fellowship's selection process. As our precedents require, neither member provided sufficient **[*32]** evidence to show they were "ready" to apply to the Fellowship. That is the fundamental way that we analyze standing; it suffices to end this case. The majority passes on that analysis, and instead holds that to check the standing box, an organizational plaintiff relying on injury to some of its members must *also* provide those members' actual names. We have no basis to impose this new constitutional rule.

I concur in the judgment affirming dismissal, but I cannot concur in full because the majority pronounces an unfounded "real name" test for associational standing. That is an unfortunate ruling for organizations everywhere.

I

When it comes to Article III cases and controversies, a person's name does not describe whether they have been injured. Do No Harm's lawsuit contends that Pfizer's Fellowship discriminates on the basis of race, not on the basis of names. We know that Member A is white, and Member B is Asian-American. Both claim they will be injured by the Fellowship because of their race. Their names bear not on standing.

The general rules for standing are well-established. As an organization which seeks "associational" standing, Do No Harm must show that "its members would otherwise have standing **[*33]** to sue in their own right." *Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard Coll., 600 U.S. 181, 199, 143 S. Ct. 2141, 216 L. Ed. 2d 857 (2023)* (quoting *Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)*). "[S]tanding requires an injury in fact that must be concrete and particularized, as well as actual or imminent. It cannot be conjectural or hypothetical." *Carney v. Adams, 592 U.S. 53, 60, 141 S. Ct. 493, 208 L. Ed. 2d 305 (2020)* (citation and quotation marks omitted). That injury must also be "fairly traceable to the challenged conduct of the defendant" and "likely to be redressed by a favorable judicial decision." *Students for Fair Admissions, 600 U.S. at 199* (quoting *Spokeo, Inc. v. Robins, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016)*). In the oft-repeated three-part test for standing—injury, traceability, and redressability—the Supreme Court has not included an *additional* requirement that plaintiffs must provide their names.

Indeed, at the pleading stage, our Court lets organizations establish standing without providing the name of an injured member. *See Building & Construction Trades Council of Buffalo v. Downtown Dev., Inc., 448 F.3d 138, 144-45 (2d Cir. 2006)* (rejecting the notion that an organization must "name names" in its complaint to obtain standing). We did suggest, however, that there might be "some validity" to a naming requirement "at the summary judgment stage." *Id.*

Now, at the preliminary injunction stage (which incorporates the summary judgment burden), the majority takes that dictum and imposes a bright-line rule: A plaintiff organization must provide the real name of at least one injured member or the case will be **[*34]** dismissed for lack of jurisdiction. In my view, neither Supreme Court precedent invoked by the majority supports this result.

In *Summers v. Earth Island Institute, 555 U.S. 488, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009)*, an organizational plaintiff sought to challenge regulations concerning Sequoia National Forest. The issue was whether a single member of the organization would visit that national forest and thus incur injury from the regulations. No member had come forward; the organization instead maintained that it was statistically likely that *some* of its 700,000 members would be injured. *See id. at 497*. In rejecting that argument, the Supreme Court used the words "name" and "identify" interchangeably—to observe that the case didn't involve *any* individual members of the

organization. *Id. at 498-99*. *Summers* wasn't concerned with the members' names because those names wouldn't indicate whether the members would visit Sequoia National Forest and incur an injury. A person's name says nothing about their interests, their habits, or their conduct from which a court could conclude the individual will incur an injury from the defendant's act. Instead, by suggesting that the organization "name" its members, the *Summers* Court wanted to confirm that individual injured members *existed* in the first place. **[*35]**

Unlike in *Summers*, Do No Harm does not rely on statistical probabilities about its membership. It has identified individual members—Members A and B—who claim they are able and ready to apply to Pfizer's Fellowship. The real first and last names of those members have no connection to whether they could apply to the Fellowship and incur an injury.

The same injury principle from *Summers* animated its predecessor, *FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990)*. Once again, *FW/PBS* didn't involve pseudonymous members of organizations. In fact, it didn't use the word "name" at all. Instead, the Supreme Court rejected an affidavit which failed to "identify" which individuals in the city had their business licenses revoked—*i.e.*, whether *any* of the individuals in the case had suffered an injury. *Id. at 235*.

In sum, these cases didn't require organizations to "name names" to establish their members' injuries. They simply echoed longstanding Article III concerns about identifying a particular person to ensure that at least one member of the plaintiff organization had an injury. Even the majority admits that these cases do "not directly address" whether names are necessary. Maj. Op. at 21. Despite one or two passing uses of the verb "name," the opinion in *Summers* **[*36]** cannot "be parsed as though we were dealing with the language of a statute," and we should expect a far clearer statement from the Supreme Court before imposing a naming rule ourselves. *Brown v. Davenport, 596 U.S. 118, 120, 142 S. Ct. 1510, 212 L. Ed. 2d 463 (2022)* (citation and brackets omitted). After all, the Supreme Court itself regularly allows organizations to sue on behalf of unnamed members. *See, e.g., Students for Fair Admissions, 600 U.S. at 200-01* (organization had standing "when it filed suit" where it "identified" individual harmed members but did not provide their real names). The Supreme Court's own practice speaks volumes: It has not read *Summers* to create a naming requirement; neither should we.

To be sure, at least one circuit seems to have plucked the word "name" from *Summers* to craft a naming requirement for injured members of organizations. *See Draper v. Healey, 827 F.3d 1, 3 (1st Cir. 2016)* (Souter, *J.*). But others have remained focused on identifying a member's injury (as *Summers* and *FW/PBS* did), not a member's name. *See Speech First, Inc. v. Shrum, 92 F.4th 947, 948-52 (10th Cir. 2024)* (concluding that organization had standing despite relying on injuries to "Student A, Student B, and Student C," and explaining why *Summers* did not require those students to provide their real names); *Advocates for Highway & Auto Safety v. FMCSA, 41 F.4th 586, 594, 458 U.S. App. D.C. 161 & n.2 (D.C. Cir. 2022)* (unnamed members submitted survey statements which supported their injuries, yet their lack of names was "no barrier to [organizational] standing on this record"). The Ninth Circuit, notwithstanding the majority's contention, has maintained similarly. *See Associated Gen. Contractors of Am., San Diego Chapter, Inc., v. California Dep't of Transp., 713 F.3d 1187, 1194-95 (9th Cir. 2013)* ("*Caltrans*"). Just like in *Summers*, *Caltrans* didn't hold that members needed to provide their real names—because *no* member had come forward. The organization had failed to identify "any specific **[*37]** members . . . who would be harmed by Caltrans' program." *Id. at 1195*. Even if there were any lingering doubt about the meaning of *Caltrans*, the Ninth Circuit subsequently explained why names don't bear on standing:

> Where it is relatively clear, rather than merely speculative, that one or more members have been or will be adversely affected by a defendant's action, and where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury, we see no purpose to be served by requiring an organization to identify by name the member or members injured.

Nat'l Council of La Raza v. Cegavske, 800 F.3d 1032, 1038 (9th Cir. 2015). We should reaffirm the same.

With precedent absent, the majority is left to say that a constitutional naming requirement "makes sense." Maj. Op. at 21-22. The majority assures us that names show that members "are not merely enabling the organization to lodge a hypothetical legal challenge." *Id.* No doubt, we need "a real controversy with real impact on real persons." *TransUnion LLC v. Ramirez, 594 U.S. 413, 424, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021)* (citation omitted). Yet this rationale for names—to ensure that Members A and B are real individuals and not fictitious enablers of the organization—is belied by the record. Both members declared that they are real students and **[*38]** real members of Do No Harm. The organization's Executive Director confirmed the same in her own declaration. As the majority observes, for standing purposes, we must take these statements *as true*. *See Cacchillo, 638 F.3d at 404*. In other words, we have already accepted that

Members A and B are real people.[1]

Along the same vein, the majority claims that real names are "relevant" to standing because they show a real controversy. Apparently, they show "members are genuinely ready and able to apply" to the Fellowship and incur an injury. Maj. Op. at 21. This ready-and-able showing, as discussed below, is indeed the proper inquiry for standing. But the majority doesn't hold that members' names are merely "relevant" to this inquiry. Instead, in the very next paragraph, it says names are henceforth "an essential component" of a member's standing. *Id.* at 22. Notice the unexplained leap—from names being "relevant," to names being "essential." It is unclear why someone must *always* give their name to a court to show they are genuine about applying to a program. What's more, according to the majority, names are essential not only in cases where members haven't yet applied to a program (the supposed justification for the rule), **[*39]** but also in the garden-variety of associational standing cases where members have *already* been injured. *Cf.* *NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958)* (NAACP members were threatened with violence after opening an Alabama office to support desegregation; the *First Amendment* protected those members' right to associate without disclosing their names to authorities). That rule will sweep broadly.

And the justification is particularly awkward here, because the majority says it *won't* decide whether Members A and B are genuine about applying to this Fellowship. The majority suggests that if it did, it would hold that the members *are* ready and able to apply. *See* Maj. Op. at 27 n.8. Ironically, that holding would demonstrate why "naming names" is an empty gesture. By implying that Do No Harm would have standing if its members had just told us their real names, the majority reveals that we didn't need those names for standing after all.

In fact, if members' real names implicated Article III jurisdiction, then it would "make sense" to require those names at the pleading stage, too. But the majority doesn't purport to question our holding from *Building & Construction* that members can plead an injury without their real names. One is left wondering why **[*40]** these concerns suddenly become important enough to justify the opposite rule at summary judgment. Aside from a general observation that the burden of proof has increased, the majority never says.

The majority finally declares that a naming requirement will avoid "incongru[ity]" between plaintiff individuals and plaintiff organizations. Maj. Op. at 23. I agree with my colleagues that when an organization presses claims on behalf of its members, "at least one association member must have standing to sue in their own right." *Id.* at 13. Thus, an organization's claim to standing is the same as that of its members—as if those members were themselves party to the litigation. But when (and only when) the *organization* is the party, the majority sees fit to add a naming requirement to standing, as a "demonstration of the sincerity of the member's interest" in the litigation. *Id.* at 22.

Yet in the interest of avoiding incongruities, the majority creates one. Consider the following: Members A and B sue Pfizer individually—not as members of Do No Harm—and refuse to give their real names to the court. So long as they showed an injury, a court would dismiss the complaint on *pleading grounds*, not jurisdictional **[*41]** ones. *See* *Fed. R. Civ. P. 10(a)* (requiring the complaint to "name all the parties"); *Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 188-89 (2d Cir. 2008)* (setting forth a multi-factor test for an individual plaintiff to proceed under a pseudonym despite *Rule 10*).[2]

By failing to give their names, the members would have run afoul of *Rule 10*, not Article III. Why, then, does Do No Harm instead run afoul of Article III, not *Rule 10*? Do No Harm's standing is dependent upon, and congruent with, that of its members. One would think the standing requirements we impose upon each should be the same. Instead, our Circuit has transformed a procedural rule into a bedrock constitutional

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[1] In any event, we already have procedural rules to address these concerns. An organization can face serious consequences, for example, if it goes to court with fake injuries to fake members. *See* *Fed. R. Civ. P. 11*.

[2] We impose *Rule 10* (and related rules of procedure) for a myriad of practical reasons, not to determine whether someone has an Article III injury. We have explained that *Rule 10* "facilitates public scrutiny of judicial proceedings and the public's right to know who is using their courts. It also serves to ensure that a readily identifiable attorney or party takes responsibility for every paper, thus enabling the Court to exercise its authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions. Moreover, the Court cannot fulfill its statutory obligations to check for conflicts of interest or to give preclusive effect to state-court judgments in suits between the same parties without knowing the true identity of the parties at the outset of a case." *Publicola v. Lomenzo, 54 F.4th 108, 112 (2d Cir. 2022)* (cleaned up).

None of this speaks to whether someone has incurred an injury to invoke our jurisdiction. Our naming rules focus on "matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution." *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc., 517 U.S. 544, 556-57, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996)*.

obstacle.

What will be the upshot of this new rule? Adding a naming element to standing—to ensure that members are "sincere" in their claims of injury—will constrict access to the courts for organizations who seek redress of wrongs done to those members. Regardless of what organizations one joins or what causes one believes in, that is a troubling result.

II

That result becomes doubly troubling because it is doubly unnecessary. We don't need to write a naming rule into the Constitution; in fact, we don't need a naming rule to resolve this case at all. We could have determined standing the way we always have: By analyzing the members' injuries themselves. **[*42]**

Members A and B did not prove they suffered actual or imminent injuries. Pseudonyms aside, the members offered precious little information about their lives and their future plans. The only standing evidence they submitted were virtually identical declarations about their intentions to apply for Pfizer's Fellowship—a program to which they would dedicate at least five years of their lives. Those declarations are not insufficient because they don't bear the members' real names. They are insufficient because they are vague and conclusory.

When it comes to applying to discriminatory programs, the law allows a plaintiff to assert harm without formally applying. The harm "is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993)*.

Pre-application standing, however, does not offer a blank check for anyone to challenge a discriminatory program they think violates the law. The plaintiff (or, in the organizational context, the plaintiff's members) must show they are "able and ready" to apply to the program. *Carney*, 592 U.S. at 60. That burden helps distinguish the plaintiff's grievance as something "more than an abstract and generalized harm to **[*43]** a citizen's interest in the proper application of the law." *Id. at 59* (citation omitted).

In my view, Do No Harm has not met that burden. Most of the declarations' contents address the "ability" prong: The qualifications of Members A and B which make them eligible for the Fellowship. Those qualifications are pitched at a high level of generality. Both are Ivy League students (schools unknown), hold leadership positions (specifics unknown), and hold GPAs above 3.0 (majors, classes, extracurriculars, work history, etc., all unknown). But there will be many white and Asian-American juniors in the Ivy League—by my guess, thousands—who meet these same qualifications for the Fellowship. Once we set qualifications aside, the declarations have very little to offer on the "readiness" prong: The evidence that would truly distinguish Members A and B from the generalized Ivy League student population.

It is at this "readiness" prong that the declarations fall short. In total, I count five statements about readiness:

> • "**I would like to apply** to the Pfizer Breakthrough Fellowship Program."
>
> • "**I am interested in applying** to the Fellowship because it is a prestigious program. And **it seems like a great professional [*44] development opportunity**. I would benefit greatly from working in Pfizer's New York City office next summer and making professional connections and finding mentors through this Fellowship."
>
> • "**I am also drawn by the fact that Pfizer will pay a full scholarship** for an MBA program. A fully funded MBA program would be a wonderful way to enrich my professional experience."
>
> • "**I am able and ready to apply** to the 2023 class of the Fellowship if Pfizer stops categorically excluding white [or Asian-American] applicants like me from the Fellowship."
>
> • "If I get accepted and join the Fellowship, **I am prepared to meet the program's requirements** and expectations."

Joint App'x at 36-41 (emphases added).

Even read liberally, these are a "few words of general intent" which do not suffice to prove readiness. *Carney*, 592 U.S. at 64. Our essential guidance regarding such statements comes from *Carney*, a case, like this one, involving a summary judgment burden to prove standing. There, a lawyer sought to challenge the constitutionality of judicial positions to which he had not applied. He nevertheless argued that he was ready to apply because he swore that he "would apply for any judicial position that [he] thought [he] was qualified **[*45]** for," and "would seriously consider and apply for any judicial position for which he feels qualified." *Id. at 61*. The Supreme Court concluded that these statements were too generalized to prove standing—they had not "differentiated" the lawyer "from a general population of individuals affected in the abstract" by the constitutional provision. *Id. at 64*.

Those statements in *Carney* (that the lawyer "would apply"

and "would seriously consider and apply") are effectively indistinguishable from the statements here (that Members A and B "would like to apply" and are "interested in applying"). And when the members say they are "able and ready to apply," they simply "parrot" the legal standard. *Calcano v. Swarovski N. Am. Ltd., 36 F.4th 68, 76 (2d Cir. 2022)* (dismissing for lack of standing based on conclusory statements of intent). If those conclusory statements of intent alone were enough to show standing, then thousands of students could claim injury in this case—just so long as they sign a short declaration saying they are interested in Pfizer's Fellowship.

True, *Carney* did not decide for all time "whether [] statement[s] of intent alone . . . could" ever "be enough to show standing." 592 U.S. at 64. But it put a thumb on the scale against them. It required some additional evidence **[*46]** to support the plaintiff's intent beyond his own statements—and identified several examples. For one, he had never applied to a similar position before. *Id. at 61*. Nor had he identified "an anticipated timeframe" for applying, any "prior relevant conversations," any "efforts to determine likely openings," any "other preparations or investigations," or plainly, "any other supporting evidence." *Id. at 63*.

What bolstering evidence have Members A and B put forth that would be similar to *Carney*'s examples? They have referenced an anticipated timeframe in that they had to apply during the Fellowship's 2023 cycle. But that's it. There is no "other supporting evidence" accompanying their words of general intent.

Carney therefore cuts decisively against Do No Harm. The Supreme Court's other "ready and able" cases are of no help either. They relied upon each plaintiff's history of previous applications to recurring programs to bolster standing. *See Gratz v. Bollinger, 539 U.S. 244, 261-62, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003)*; *Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211-12, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995)*; *Ne. Fla. Chapter of Associated Gen. Contractors, 508 U.S. at 668-69*. Members A and B, of course, cannot rely on these cases or similar historical evidence—they can only apply to Pfizer's Fellowship once, during their junior year. Yet just because these cases are distinguishable does not mean we should invert their holdings **[*47]** to *excuse* plaintiffs from providing some evidence besides historical applications when their own programs do not recur.

In *Carney*'s mold, our own precedents have required not just a stated intent to apply to a program, but some indicia of action—and crucially, have done so under a *lesser* burden at the pleading stage. For instance, we have held that members of an organization who alleged that they "intend[ed]" to apply for jobs at a university or "intend[ed]" to submit law review articles for publication failed to establish standing to challenge several of the university's allegedly discriminatory programs. *FASORP v. New York Univ., 11 F.4th 68, 76-77 (2d Cir. 2021)*. Those members described no "concrete plans" to actually apply; they just expressed "some day intentions" to apply. *Id. at 77* (quoting *Summers, 555 U.S. at 496*). They had not identified anything they had done to apply for employment or submit an article (for example, by drafting an article for submission). *Id. at 76*. We have also held that a casino developer did not plead standing where it claimed to be "interested" in developing a casino and had even "made initial studies of the viability" of doing so, but had "not alleged any concrete plans to enter into a development agreement . . . or demonstrated any serious attempts **[*48]** at negotiation." *MGM Resorts Int'l Glob. Gaming Dev., LLC v. Malloy, 861 F.3d 40, 47 (2d Cir. 2017)*.

This case is missing those same indicia of action. Members A and B described no concrete plans for applying to the Fellowship if it stopped discriminating against them tomorrow. Did they prepare any materials to submit to the Fellowship? Did they ask Pfizer for more specifics about the program, or talk to any Pfizer employees? Did they adjust their studies to strengthen their candidacies—perhaps by taking courses in biotechnology or business administration? Neither of them identified these or any other preparatory steps, big or small, to signal a concrete readiness to apply to the Fellowship—a life-changing program in which they would dedicate their careers to Pfizer for the next five years or more.[3]

Perspective is important here: On day one of this case, the plaintiff asked the district court to immediately alter a program, based solely on several members' claims that they "would like" to apply or were "interested" **[*49]** in applying to that program at some time in the future. In this context, to establish a case or controversy, these aspirational statements come up short.

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[3] Like in *Carney*, these examples are not intended to be exhaustive. This is a "highly fact-specific" inquiry, and the record is not developed enough to determine every possible step that Members A and B could have taken to show they were ready to apply. *Carney*, 592 U.S. at 63. But we need not speculate about every piece of "supporting evidence" that the members could have provided. *Id.* The burden to do so was on Do No Harm.

United Steelworkers v. Weber

Supreme Court of the United States

March 28, 1979, Argued ; June 27, 1979, Decided [*]

No. 78-432

[*] Together with No. 78-435, Kaiser Aluminum & Chemical Corp. v. Weber et al., and No. 78-436, United States et al. v. Weber et al., also on certiorari to the same court.

Reporter
443 U.S. 193 *; 99 S. Ct. 2721 **; 61 L. Ed. 2d 480 ***; 1979 U.S. LEXIS 40 ****; 20 Fair Empl. Prac. Cas. (BNA) 1; 20 Empl. Prac. Dec. (CCH) P30,026

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC v. WEBER ET AL.

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Disposition: *563 F.2d 216*, reversed.

Case Summary

Procedural Posture
Petitioners, an employer and a union, filed an application for a writ of certiorari to review a judgment from the United States Court of Appeals for the Fifth Circuit to contest its affirmance of the judgment that a collectively bargained affirmative action plan violated the rights of respondent, a white employee, under Title VII of the Civil Rights Act of 1964.

Overview

The employer and the union collectively bargained for an affirmative action plan that reserved for black employees 50 percent of the openings in a training program until the percentage of black craftworkers in the plant was commensurate with the percentage of blacks in the local labor force. Respondent, a white employee, challenged the legality of the plan under Title VII of the Civil Rights Act of 1964 (Title VII), *42 U.S.C.S. § 2000e et seq.* The district court held that the plan violated Title VII, and the court of appeals affirmed. The United States Supreme Court reversed, holding that Title VII's prohibition against racial discrimination did not condemn all private, voluntary, race-conscious affirmative action plans. The Court also noted that petitioners' plan in particular did not violate Title VII because no state action was involved, the purposes of the plan mirrored Title VII's, and the plan did not unnecessarily trammel the interests of the white employees. The plan did not require the discharge of white workers and their replacement with new black hirees. Nor did it create an absolute bar to the advancement of white employees. Moreover, the plan was a temporary measure.

Outcome
The Court reversed the appellate court's affirmance of the district court's finding that a collectively bargained affirmative action plan violated Title VII of the Civil Rights Act of 1964.

Syllabus

In 1974, petitioners United Steelworkers of America (USWA) and Kaiser Aluminum & Chemical Corp. (Kaiser) entered into a master collective-bargaining agreement covering terms and conditions of employment at 15 Kaiser plants. The agreement included an affirmative action plan designed to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craftwork forces by reserving for black employees 50% of the openings in in-plant craft-training programs until the percentage of black craftworkers in a plant is commensurate with the percentage of blacks in the local labor force. This litigation arose from the operation of the affirmative action plan at one of Kaiser's plants where, prior to 1974, only 1.83% of the skilled craftworkers were black, even though the local work force was approximately 39% black. Pursuant to the national agreement, Kaiser, rather than continuing its practice of hiring trained outsiders, established a training program to train its production workers to fill craft openings, selecting trainees on the basis of seniority, with the **[****2]** proviso that at least 50% of the trainees were to be black until the percentage of black skilled craftworkers in the plant approximated the percentage of blacks in the local labor force. During the plan's first year of operation, seven black and six white craft trainees were selected from the plant's production work force, with the most senior black trainee having less seniority than several white production workers whose bids for admission were rejected. Thereafter, respondent Weber, one of those white production workers, instituted this class action in Federal District Court, alleging that because the affirmative action program had resulted in junior black employees' receiving training in preference to senior white employees, respondent and other similarly situated white employees had been discriminated against in violation of the provisions of §§ 703 (a) and (d) of Title VII of the Civil Rights Act of 1964 that make it unlawful to "discriminate . . . because of . . . race" in hiring and in the selection of apprentices for training programs. The District Court held that the affirmative action plan violated Title VII, entered judgment in favor of the plaintiff class, and granted **[****3]** injunctive relief. The Court of Appeals affirmed, holding that all employment preferences based upon race, including those preferences incidental to bona fide affirmative action plans, violated Title VII's prohibition against racial discrimination in employment.

Held:

1. Title VII's prohibition in §§ 703 (a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans. Pp. 200-208.

(a) Respondent Weber's reliance upon a literal construction of the statutory provisions and upon *McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273*, which held, in a case not involving affirmative action, that Title VII protects whites as well as blacks from certain forms of racial discrimination, is misplaced, since the Kaiser-USWA plan is an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation. "[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers," *Holy Trinity Church v. United States, 143 U.S. 457, 459*, and, thus, the prohibition **[****4]** against racial discrimination in §§ 703 (a) and (d) must be read against the background of the legislative history of Title VII and the historical context from which the Act arose. P. 201.

(b) Examination of those sources makes clear that an interpretation of §§ 703 (a) and (d) that forbids all race-conscious affirmative action would bring about an end completely at variance with the purpose of the statute and must be rejected. Congress' primary concern in enacting the prohibition against racial discrimination in Title VII was with the plight of the Negro in our economy, and the prohibition against racial discrimination in employment was primarily addressed to the problem of opening opportunities for Negroes in occupations which have been traditionally closed to them. In view of the legislative history, the very statutory words intended as a spur or catalyst to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," *Albemarle Paper Co. v. Moody, 422 U.S. 405, 418*, cannot be interpreted **[****5]** as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges. Pp. 201-204.

(c) This conclusion is further reinforced by examination of the language and legislative history of § 703 (j) of Title VII, which provides that nothing contained in Title VII "shall be interpreted to *require* any employer . . . to grant preferential treatment . . . to any group because of the race . . . of such . . . group on account of" a *de facto* racial imbalance in the employer's work force. Had Congress meant to prohibit all race-conscious affirmative action, it could have provided that Title VII would not require or *permit* racially preferential integration efforts. The legislative record shows that § 703 (j) was designed to prevent § 703 from being interpreted in such a way as to lead to undue federal regulation of private businesses, and thus use of the word "require" rather than the phrase "require or permit" in § 703 (j) fortifies the conclusion that Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action. Pp. 204-207.

[**6]** 2. It is not necessary in these cases to define the line of demarcation between permissible and impermissible affirmative action plans; it suffices to hold that the challenged Kaiser-USWA plan falls on the permissible side of the line. The purposes of the plan mirror those of the statute, being designed to break down old patterns of racial segregation and hierarchy, and being structured to open employment opportunities for Negroes in occupations which have been traditionally closed to them. At the same time, the plan does not unnecessarily trammel the interests of white employees, neither requiring the discharge of white workers and their replacement with new black hirees, nor creating an absolute bar to the advancement of white employees since half of those trained in the program will be white. Moreover, the plan is a temporary measure, not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Pp. 208-209.

Counsel: Michael H. Gottesman argued the cause for petitioner in No. 78-432. With him on the briefs were Robert M. Weinberg, Elliot Bredhoff, Bernard Kleiman, Carl Frankel, Jerome A. Cooper, John C. Falkenberry, J. Albert Woll, and Laurence Gold. **[****7]** Thompson Powers argued the cause for petitioner in No. 78-435. With him on the briefs was Jane McGrew. Deputy Solicitor General Wallace argued the cause for the United States et al., petitioners in No. 78-436. With him on the briefs were Solicitor General McCree, Assistant Attorney General Days, William C. Bryson, Brian K. Landsberg, and Robert J. Reinstein.

Michael R. Fontham argued the cause and filed a brief for respondent Weber in all cases. [+]

[+] Briefs of amici curiae urging reversal in all cases were filed by Arthur Kinoy and Doris Peterson for the Affirmative Action Coordinating Center et al.; by E. Richard Larson, Burt Neuborne, and Frank Askin for the American Civil Liberties Union et al.; by Richard B. Sobol, Jerome Cohen, Harrison Combs, John Fillion, Winn Newman, Carole W. Wilson, David Rubin, John Tadlock, James E. Youngdahl, A. L. Zwerdling, and Janet Kohn for the American Federation of State, County and Municipal Employees, AFL-CIO, et al.; by Samuel Yee, Charles Stephen Ralston, and Bill Lann Lee for the Asian American Legal Defense and Education Fund et al.; by James F. Miller and Stephen V. Bomse for the California Fair Employment Practice Commission et al.; by Charles A. Bane, Thomas D. Barr, Norman Redlich, Robert A. Murphy, Richard T. Seymour, Norman J. Chachkin, and Richard S. Kohn for

[****8]

Judges: BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BLACKMUN, J., filed a concurring opinion, post, 209. BURGER, C. J., filed a dissenting opinion, post, p. 216. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, post, p. 219. POWELL and STEVENS, JJ., took no part in the consideration or decision of the cases.

Opinion by: BRENNAN

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the Lawyers' Committee for Civil Rights Under Law; by Nathaniel R. Jones for the National Association for the Advancement of Colored People; by Jack Greenberg, James M. Nabrit III, Eric Schnapper, Lowell Johnston, Barry L. Goldstein, Vernon E. Jordan, Jr., and Wiley A. Branton for the N. A. A. C. P. Legal Defense and Educational Fund, Inc., et al.; by Herbert O. Reid and John W. Davis for the National Medical Association, Inc., et al.; by Robert Hermann and Evan A. Davis for the National Puerto Rican Coalition et al.; by Jerome Tauber for the National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO; and by Eileen M. Stein and Pat Eames for Patricia Schroeder et al.; Sybille C. Fritzsche filed a brief for the Women's Caucus, District 31 of the United Steelworkers of America, as amicus curiae in No. 78-432 urging reversal.

Briefs of amici curiae urging affirmance in all cases were filed by J. D. Burdick and Ronald E. Yank for the California Correctional Officers Association; by Gerard C. Smetana for the Government Contract Employers Association; by Ronald A. Zumbrun and John H. Findley for the Pacific Legal Foundation; by Leonard F. Walentynowicz for the Polish American Congress et al.; and by Wayne T. Elliott for the Southeastern Legal Foundation, Inc. Jack N. Rogers filed a brief for the United States Justice Foundation as amicus curiae in No. 78-432 urging affirmance.

Briefs of amici curiae in all cases were filed by Vilma S. Martinez, Morris J. Baller, and Joel G. Contreras for the American G. I. Forum et al.; by Philip B. Kurland, Larry M. Lavinsky, Arnold Forster, Harry J. Keaton, Meyer Eisenberg, Justin J. Finger, Jeffrey P. Sinensky, Richard A. Weisz, Themis N. Anastos, Dennis Rapps, and Julian E. Kulas for the Anti-Defamation League of B'nai B'rith et al.; by John W. Finley, Jr., Michael Blinick, Deyan R. Brashich, and Eugene V. Rostow for the Committee on Academic Nondiscrimination and Integrity; by Kenneth C. McGuiness, Robert E. Williams, and Douglas S. McDowell for the Equal Employment Advisory Council; by Mark B. Bigelow for the National Coordinating Committee for Trade Union Action and Democracy; by Philips B. Patton for the Pacific Civil Liberties League; by Frank J. Donner for the United Electrical, Radio and Machine Workers of America; by Paul D. Kamenar for the Washington Legal Foundation; and by Gloria R. Allred for the Women's Equal Rights Legal Defense and Education Fund. Burt Pines and Cecil W. Marr filed a brief for the city of Los Angeles as amicus curiae in No. 78-435.

Opinion

[*197] [*485] [**2724]** MR. JUSTICE BRENNAN delivered the opinion of the Court.

[1A]Challenged here is the legality of an affirmative action plan -- collectively bargained by an employer and a union -- that reserves for black employees 50% of the openings in an in-plant craft-training program until the percentage of black craftworkers in the plant is commensurate with the percentage of blacks in the local labor force. The question for decision is whether Congress, in Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, *42 U. S. C. § 2000e et seq.*, left employers and unions in the private sector free to take such race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories. We hold that Title VII does not prohibit **[****9]** such race-conscious affirmative action plans.

I

In 1974, petitioner United Steelworkers of America (USWA) and petitioner Kaiser Aluminum & Chemical Corp. (Kaiser) **[*198]** entered into a master collective-bargaining agreement covering terms and conditions of employment at 15 Kaiser plants. The agreement contained, *inter alia*, an affirmative action plan designed to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craftwork forces. Black craft-hiring goals were set for each Kaiser plant equal to the percentage of blacks in the respective local labor forces. To enable plants to meet these goals, on-the-job training programs were established to teach unskilled production workers -- black and white -- the skills necessary to become craftworkers. The plan reserved for black **[***486]** employees 50% of the openings in these newly created in-plant training programs.

[2A]This case arose from the operation of the plan at Kaiser's plant in Gramercy, La. Until 1974, Kaiser hired as craftworkers for that plant only persons who had had **[**2725]** prior craft experience. Because blacks had long been excluded from craft unions, [1] few were able to present

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[1] [2B]Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice. See, *e. g.*, *United States v. Elevator Constructors, 538 F.2d 1012 (CA3 1976)*; *Associated General Contractors of Massachusetts v. Altschuler, 490 F.2d 9 (CA1 1973)*; *Southern Illinois Builders Assn.* v. *Ogilvie, 471 F.2d 680 (CA7 1972)*; *Contractors Assn. of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (CA3*

[**10]** such credentials. As a consequence, prior to 1974 only 1.83% (5 out of 273) of the skilled craftworkers at the Gramercy plant were black, **[*199]** even though the work force in the Gramercy area was approximately 39% black.

[**11]** Pursuant to the national agreement Kaiser altered its craft-hiring practice in the Gramercy plant. Rather than hiring already trained outsiders, Kaiser established a training program to train its production workers to fill craft openings. Selection of craft trainees was made on the basis of seniority, with the proviso that at least 50% of the new trainees were to be black until the percentage of black skilled craftworkers in the Gramercy plant approximated the percentage of blacks in the local labor force. See *415 F.Supp. 761, 764*.

During 1974, the first year of the operation of the Kaiser-USWA affirmative action plan, 13 craft trainees were selected from Gramercy's production work force. Of these, seven were black and six white. The most senior black selected into the program had less seniority than several white production workers whose bids for admission were rejected. Thereafter one of those white production workers, respondent Brian Weber (hereafter respondent), instituted this class action in the United States District Court for the Eastern District of Louisiana.

The complaint alleged that the filling of craft trainee positions at the Gramercy plant pursuant **[****12]** to the affirmative action program had resulted in junior black employees' receiving training in preference to senior white employees, thus discriminating against respondent and other similarly situated white employees in violation of §§ 703 (a) [2] **[****13]** **[***487]** and **[*200]** (d) [3] of Title VII. The District Court held that the plan violated Title VII, entered a judgment in favor of the plaintiff class, and granted a permanent injunction prohibiting Kaiser and the USWA "from denying plaintiffs, Brian F. Weber and all other members of the class, access to on-the-job training programs on the basis of race." App. 171. A divided **[**2726]** panel of the Court of Appeals for the Fifth Circuit affirmed, holding that all employment preferences based upon race, including those preferences incidental to bona fide affirmative action plans, violated Title VII's prohibition against racial discrimination in employment. *563 F.2d 216 (1977)*. We granted certiorari. *439 U.S. 1045 (1978)*. We reverse.

II

We emphasize at the outset the narrowness of our inquiry. Since the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the *Equal Protection Clause of the Fourteenth Amendment*. Further, since the Kaiser-USWA plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act. The only question before us is the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord **[****14]** racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan. That question was **[*201]** expressly left open in *McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 281 n. 8 (1976)*, which held, in a case not involving affirmative action, that Title VII protects whites as well as blacks from certain forms of racial discrimination.

Respondent argues that Congress intended in Title VII to

1971); *Insulators & Asbestos Workers v. Vogler, 407 F.2d 1047 (CA5 1969)*; *Buckner v. Goodyear Tire & Rubber Co., 339 F.Supp. 1108 (ND Ala. 1972)*, aff'd without opinion, ***476 F.2d 1287 (CA5 1973)***. See also U.S. Commission on Civil Rights, The Challenge Ahead: Equal Opportunity in Referral Unions 58-94 (1976) (summarizing judicial findings of discrimination by craft unions); G. Myrdal, An American Dilemma 1079-1124 (1944); F. Marshall & V. Briggs, The Negro and Apprenticeship (1967); S. Spero & A. Harris, The Black Worker (1931); U.S. Commission on Civil Rights, Employment 97 (1961); State Advisory Committees, U.S. Commission on Civil Rights, 50 States Report 209 (1961); Marshall, The Negro in Southern Unions, in The Negro and the American Labor Movement 145 (J. Jacobson ed. 1968); App. 63, 104.

[2] Section 703 (a), 78 Stat. 255, as amended, 86 Stat. 109, *42 U. S. C. § 2000e-2 (a)*, provides:

"(a) . . . It shall be an unlawful employment practice for an employer --

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[3] Section 703 (d), 78 Stat. 256, *42 U. S. C. § 2000e-2 (d)*, provides:

"It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."

prohibit all race-conscious affirmative action plans. Respondent's argument rests upon a literal interpretation of §§ 703 (a) and (d) of the Act. Those sections make it unlawful to "discriminate . . . because of . . . race" in hiring and in the selection of apprentices for training programs. Since, the argument runs, *McDonald v. Santa Fe Trail Transp. Co., supra*, settled that Title VII forbids discrimination against whites as well as blacks, and since the Kaiser-USWA affirmative action plan operates to discriminate against white employees solely because they are white, it follows that the Kaiser-USWA plan violates Title VII.

[1B][3]Respondent's argument is not without force. But it overlooks the significance of the fact that **[****15]** the Kaiser-USWA plan is an affirmative action plan voluntarily adopted by **[***488]** private parties to eliminate traditional patterns of racial segregation. In this context respondent's reliance upon a literal construction of §§ 703 (a) and (d) and upon *McDonald* is misplaced. See *McDonald v. Santa Fe Trail Transp. Co., supra, at 281 n. 8*. It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)*. The prohibition against racial discrimination in §§ 703 (a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose. See *Train v. Colorado Public Interest Research Group, 426 U.S. 1, 10 (1976)*; *National Woodwork Mfrs. Assn.* v. *NLRB, 386 U.S. 612, 620 (1967)*; *United States v. American Trucking Assns., 310 U.S. 534, 543-544 (1940)*. Examination of those sources makes **[*202]** clear **[****16]** that an interpretation of the sections that forbade all race-conscious affirmative action would "bring about an end completely at variance with the purpose of the statute" and must be rejected. *United States v. Public Utilities Comm'n, 345 U.S. 295, 315 (1953)*. See *Johansen v. United States, 343 U.S. 427, 431 (1952)*; *Longshoremen v. Juneau Spruce Corp., 342 U.S. 237, 243 (1952)*; *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co., 204 U.S. 426 (1907)*.

Congress' primary concern in enacting the prohibition against racial discrimination **[**2727]** in Title VII of the Civil Rights Act of 1964 was with "the plight of the Negro in our economy." 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey). Before 1964, blacks were largely relegated to "unskilled and semi-skilled jobs." *Ibid.* (remarks of Sen. Humphrey); *id.*, at 7204 (remarks of Sen. Clark); *id.*, at 7379-7380 (remarks of Sen. Kennedy). Because of automation the number of such jobs was rapidly decreasing. See *id.*, at 6548 (remarks of Sen. Humphrey); *id.*, at 7204 (remarks of Sen. Clark). As a consequence, "the relative **[****17]** position of the Negro worker [was] steadily worsening. In 1947 the nonwhite unemployment rate was only 64 percent higher than the white rate; in 1962 it was 124 percent higher." *Id.*, at 6547 (remarks of Sen. Humphrey). See also *id.*, at 7204 (remarks of Sen. Clark). Congress considered this a serious social problem. As Senator Clark told the Senate:

"The rate of Negro unemployment has gone up consistently as compared with white unemployment for the past 15 years. This is a social malaise and a social situation which we should not tolerate. That is one of the principal reasons why the bill should pass." *Id.*, at 7220.

Congress feared that the goals of the Civil Rights Act -- the integration of blacks into the mainstream of American society -- could not be achieved unless this trend were reversed. And Congress recognized that that would not be possible **[*203]** unless blacks were able to secure jobs "which have a future." *Id.*, at **[***489]** 7204 (remarks of Sen. Clark). See also *id.*, at 7379-7380 (remarks of Sen. Kennedy). As Senator Humphrey explained to the Senate:

"What good does it do a Negro to be able to eat in a fine restaurant if he cannot afford **[****18]** to pay the bill? What good does it do him to be accepted in a hotel that is too expensive for his modest income? How can a Negro child be motivated to take full advantage of integrated educational facilities if he has no hope of getting a job where he can use that education?" *Id.*, at 6547.

"Without a job, one cannot afford public convenience and accommodations. Income from employment may be necessary to further a man's education, or that of his children. If his children have no hope of getting a good job, what will motivate them to take advantage of educational opportunities?" *Id.*, at 6552.

These remarks echoed President Kennedy's original message to Congress upon the introduction of the Civil Rights Act in 1963.

"There is little value in a Negro's obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job." 109 Cong. Rec. 11159.

Accordingly, it was clear to Congress that "[the] crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them," 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition **[****19]** against racial discrimination in employment was primarily addressed.

It plainly appears from the House Report accompanying the Civil Rights Act that Congress did not intend wholly to

prohibit private and voluntary affirmative action efforts as one method of solving this problem. The Report provides:

"No bill can or should lay claim to eliminating all of **[*204]** the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems *will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination*." H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963). (Emphasis supplied.)

Given this legislative history, we cannot agree with respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve. The very statutory words intended **[**2728]** as a spur or catalyst to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor **[****20]** to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," *Albemarle Paper Co.* v. *Moody, 422 U.S. 405, 418 (1975)*, cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of **[***490]** such vestiges. [4] It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

[**21]** [1C]Our conclusion is further reinforced by examination of the **[*205]** language and legislative history of § 703 (j) of Title VII. [5] Opponents of Title VII raised two related arguments against the bill. First, they argued that the Act would be interpreted to *require* employers with racially imbalanced work forces to grant preferential treatment to racial minorities in order to integrate. Second, they argued that employers with racially imbalanced work forces would grant preferential treatment to racial minorities, even if not required to do so by the Act. See 110 Cong. Rec. 8618-8619 (1964) (remarks of Sen. Sparkman). Had Congress meant to prohibit all race-conscious affirmative action, as respondent urges, it easily could have answered both objections by providing that Title VII would not require or *permit* racially preferential integration efforts. But Congress did not choose such a course. Rather, Congress added § 703 (j) which addresses only the first objection. The section provides that nothing contained in Title VII "shall be interpreted to *require* any **[*206]** employer . . . to grant preferential treatment . . . to any group because of the race . . . of such **[****22]** . . . group on account of" a *de facto* racial imbalance in the employer's work force. The section does *not* state that "nothing in Title VII shall be interpreted to *permit*" voluntary affirmative efforts to correct racial imbalances. The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action.

[**23]** The reasons for this choice are evident from the legislative record. Title VII could not have been enacted into law without substantial **[***491]** support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives, and union freedoms . . . be left undisturbed **[**2729]** to the greatest extent possible." H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963). Section 703 (j) was proposed by Senator Dirksen to allay any fears that the Act might be interpreted in such a way as to upset this compromise. The section was designed to prevent § 703 of Title VII from being interpreted in such a way as to lead to undue "Federal Government interference with private businesses because of some Federal

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[4] The problem that Congress addressed in 1964 remains with us. In 1962, the nonwhite unemployment rate was 124% higher than the white rate. See 110 Cong. Rec. 6547 (1964) (remarks of Sen. Humphrey). In 1978, the black unemployment rate was 129% higher. See Monthly Labor Review, U.S. Department of Labor, Bureau of Labor Statistics 78 (Mar. 1979).

[5] Section 703 (j) of Title VII, 78 Stat. 257, *42 U. S. C. § 2000e-2 (j)*, provides:

"Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

Section 703 (j) speaks to substantive liability under Title VII, but it does not preclude courts from considering racial imbalance as evidence of a Title VII violation. See *Teamsters v. United States, 431 U.S. 324, 339-340, n. 20 (1977)*. Remedies for substantive violations are governed by § 706 (g), *42 U. S. C. § 2000e-5 (g)*.

employee's ideas about racial balance or racial imbalance." 110 Cong. Rec. 14314 (1964) (remarks of Sen. Miller). [6] **[****25]** See also *id.*, at 9881 (remarks of **[*207]** Sen. Allott); *id.*, at 10520 (remarks of Sen. Carlson); *id.*, at 11471 (remarks of Sen. Javits); *id.*, at 12817 (remarks of Sen. Dirksen). Clearly, a prohibition against all voluntary, race-conscious, **[****24]** affirmative action efforts would disserve these ends. Such a prohibition would augment the powers of the Federal Government and diminish traditional management prerogatives while at the same time impeding attainment of the ultimate statutory goals. In view of this legislative history and in view of Congress' desire to avoid undue federal regulation of private businesses, use of the word "require" rather than the phrase "require or permit" in § 703 (j) fortifies the conclusion that Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action. [7]

[6] Title VI of the Civil Rights Act of 1964, considered in *University of California Regents v. Bakke, 438 U.S. 265 (1978)*, contains no provision comparable to § 703 (j). This is because Title VI was an exercise of federal power over a matter in which the Federal Government was already directly involved: the prohibitions against race-based conduct contained in Title VI governed "[programs] or [activities] receiving Federal financial assistance." *42 U. S. C. § 2000d*. Congress was legislating to assure federal funds would not be used in an improper manner. Title VII, by contrast, was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the *Fifth* and *Fourteenth Amendments*. Title VII and Title VI, therefore, cannot be read *in pari materia*. See 110 Cong. Rec. 8315 (1964) (remarks of Sen. Cooper). See also *id.*, at 11615 (remarks of Sen. Cooper).

[7] Respondent argues that our construction of § 703 conflicts with various remarks in the legislative record. See, *e. g.*, 110 Cong. Rec. 7213 (1964) (Sens. Clark and Case); *id.*, at 7218 (Sens. Clark and Case); *id.*, at 6549 (Sen. Humphrey); *id.*, at 8921 (Sen. Williams). We do not agree. In Senator Humphrey's words, these comments were intended as assurances that Title VII would not allow establishment of systems "to *maintain* racial balance in employment." *Id.*, at 11848 (emphasis added). They were not addressed to temporary, voluntary, affirmative action measures undertaken to eliminate manifest racial imbalance in traditionally segregated job categories. Moreover, the comments referred to by respondent all preceded the adoption of § 703 (j), *42 U. S. C. § 2000e-2 (j)*. After § 703 (j) was adopted, congressional comments were all to the effect that employers would not be *required* to institute preferential quotas to avoid Title VII liability, see, *e. g.*, 110 Cong. Rec. 12819 (1964) (remarks of Sen. Dirksen); *id.*, at 13079-13080 (remarks of Sen. Clark); *id.*, at 15876 (remarks of Rep. Lindsay). There was no suggestion after the adoption of § 703 (j) that wholly voluntary, race-conscious, affirmative action efforts would in themselves constitute a violation of Title VII. On the contrary, as Representative MacGregor told the House shortly before the final vote on Title VII:

"Important as the scope and extent of this bill is, it is also vitally important that all Americans understand what this bill does not cover.

"Your mail and mine, your contacts and mine with our constituents, indicates a great degree of misunderstanding about this bill. People complain 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 closer to the American people and by communities and individuals themselves." 110 Cong. Rec. 15893 (1964).

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[*208] [1D]We **[***492]** therefore hold that Title VII's prohibition in §§ 703 (a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans.

III

We need not today define in detail the line of demarcation between permissible **[**2730]** and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line. The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to "open employment opportunities for Negroes in occupations which have been traditionally closed to them." 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey). [8]

[1E]At the same time, the **[****27]** plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees. Cf. *McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976)*.Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craftworkers in the Gramercy plant approximates the

[8] See n. 1, *supra*. This is not to suggest that the freedom of an employer to undertake race-conscious affirmative action efforts depends on whether or not his effort is motivated by fear of liability under Title VII.

[*209] percentage of blacks in the local labor force. See *415 F.Supp., at 763*.

We conclude, therefore, that the adoption of the Kaiser-USWA plan for the Gramercy plant falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories. [9] Accordingly, the judgment of the Court of Appeals for the Fifth Circuit is

[**28]** *Reversed.*

MR. JUSTICE POWELL and MR. JUSTICE STEVENS took no part in the consideration or decision of these cases.

Concur by: BLACKMUN

Concur

MR. JUSTICE BLACKMUN, concurring.

While I share some of the misgivings expressed in MR. JUSTICE REHNQUIST's **[***493]** dissent, *post*, p. 219, concerning the extent to which the legislative history of Title VII clearly supports the result the Court reaches today, I believe that additional considerations, practical and equitable, only partially perceived, if perceived at all, by the 88th Congress, support the conclusion reached by the Court today, and I therefore join its opinion as well as its **[****29]** judgment.

I

In his dissent from the decision of the United States Court of Appeals for the Fifth Circuit, Judge Wisdom pointed out that this litigation arises from a practical problem in the administration of Title VII. The broad prohibition against discrimination places the employer and the union on what he accurately **[*210]** described as a "high tightrope without a net beneath them." *563 F.2d 216, 230*. If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.

In this litigation, Kaiser denies prior discrimination but concedes that its past hiring practices may be subject to question. Although the labor force in the Gramercy area was approximately 39% black, Kaiser's work force was less than 15% black, and its craftwork force was less than 2% black. Kaiser had made some effort to recruit black painters, carpenters, insulators, and **[**2731]** other craftsmen, but it continued to insist that those hired have five years' prior industrial experience, a requirement that **[****30]** arguably was not sufficiently job related to justify under Title VII any discriminatory impact it may have had. See *Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1389 (CA5 1978)*, cert. denied *sub nom. Steelworkers v. Parson, 441 U.S. 968 (1979)*. The parties dispute the extent to which black craftsmen were available in the local labor market. They agree, however, that after critical reviews from the Office of Federal Contract Compliance, Kaiser and the Steelworkers established the training program in question here and modeled it along the lines of a Title VII consent decree later entered for the steel industry. See *United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (CA5 1975)*. Yet when they did this, respondent Weber sued, alleging that Title VII prohibited the program because it discriminated against him as a white person and it was not supported by a prior judicial finding of discrimination against blacks.

Respondent Weber's reading of Title VII, endorsed by the Court of Appeals, places voluntary compliance with Title VII in profound jeopardy. The only way for the employer and **[****31]** the union to keep their footing on the "tightrope" it creates would be to eschew all forms of voluntary affirmative action. Even **[*211]** a whisper of emphasis on minority recruiting would be forbidden. Because Congress intended to encourage private efforts to come into compliance with Title VII, see *Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974)*, Judge Wisdom concluded that employers and unions who had committed "arguable violations" of Title VII should be free to make reasonable **[***494]** responses without fear of liability to whites. *563 F.2d, at 230*. Preferential hiring along the lines of the Kaiser program is a reasonable response for the employer, whether or not a court, on these facts, could order the same step as a remedy. The company is able to avoid identifying victims of past discrimination, and so avoids claims for backpay that would inevitably follow a response limited to such victims. If past victims should be benefited by the program, however, the company mitigates its liability to those persons. Also, to the extent that Title VII liability is predicated on the "disparate effect" of an employer's past hiring **[****32]** practices, the program makes it less likely that such an effect could be demonstrated. Cf. *County of Los Angeles v. Davis, 440 U.S. 625, 633-634 (1979)* (hiring could moot a past Title VII claim). And the Court has recently held that work-force

[9] Our disposition makes unnecessary consideration of petitioners' argument that their plan was justified because they feared that black employees would bring suit under Title VII if they did not adopt an affirmative action plan. Nor need we consider petitioners' contention that their affirmative action plan represented an attempt to comply with Exec. Order No. 11246, 3 CFR 339 (1964-1965 Comp.).

statistics resulting from private affirmative action were probative of benign intent in a "disparate treatment" case. *Furnco Construction Corp.* v. *Waters, 438 U.S. 567, 579-580 (1978)*.

The "arguable violation" theory has a number of advantages. It responds to a practical problem in the administration of Title VII not anticipated by Congress. It draws predictability from the outline of present law and closely effectuates the purpose of the Act. Both Kaiser and the United States urge its adoption here. Because I agree that it is the soundest way to approach this case, my preference would be to resolve this litigation by applying it and holding that Kaiser's craft training program meets the requirement that voluntary affirmative action be a reasonable response to an "arguable violation" of Title VII.

[*212] II

The Court, however, declines to consider the narrow "arguable violation" approach **[****33]** and adheres instead to an interpretation of Title VII that permits affirmative action by an employer whenever the job category in question is "traditionally segregated." *Ante*, at 209, and n. 9. The sources cited suggest that the Court considers a job category to be "traditionally segregated" when there has been a societal history of purposeful exclusion of blacks from the job category, resulting in a persistent disparity between the proportion of blacks in the labor **[**2732]** force and the proportion of blacks among those who hold jobs within the category. *

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* The jobs in question here include those of carpenter, electrician, general repairman, insulator, machinist, and painter. App. 165. The sources cited, *ante*, at 198 n. 1, establish, for example, that although 11.7% of the United States population in 1970 was black, the percentage of blacks among the membership of carpenters' unions in 1972 was only 3.7%. For painters, the percentage was 4.9, and for electricians, 2.6. U.S. Commission on Civil Rights, The Challenge Ahead: Equal Opportunity in Referral Unions 274, 281 (1976). Kaiser's Director of Equal Opportunity Affairs testified that, as a result of discrimination in employment and training opportunity, blacks were underrepresented in skilled crafts "in every industry in the United States, and in every area of the United States." App. 90. While the parties dispute the cause of the relative underrepresentation of blacks in Kaiser's craftwork force, the Court of Appeals indicated that it thought "the general lack of skills among available blacks" was responsible. *563 F.2d 216, 224 n. 13*. There can be little doubt that any lack of skill has its roots in purposeful discrimination of the past, including segregated and inferior trade schools for blacks in Louisiana, U.S. Commission on Civil Rights, 50 States Report 209 (1961); traditionally all-white craft unions in that State, including the electrical workers and the plumbers, *id., at 208*; union nepotism, *Asbestos Workers v. Vogler, 407 F.2d 1047 (CA5 1969)*; and segregated apprenticeship programs, F. Marshall & V. Briggs, The Negro and Apprenticeship 27 (1967).

[**34]** "Traditionally **[***495]** segregated job categories," where they exist, sweep far more broadly than the class of "arguable violations" of Title VII. The Court's expansive approach is somewhat **[*213]** disturbing for me because, as MR. JUSTICE REHNQUIST points out, the Congress that passed Title VII probably thought it was adopting a principle of nondiscrimination that would apply to blacks and whites alike. While setting aside that principle can be justified where necessary to advance statutory policy by encouraging reasonable responses as a form of voluntary compliance that mitigates "arguable violations," discarding the principle of nondiscrimination where no countervailing statutory policy exists appears to be at odds with the bargain struck when Title VII was enacted.

A closer look at the problem, however, reveals that in each of the principal ways in which the Court's "traditionally segregated job categories" approach expands on the "arguable violations" theory, still other considerations point in favor of the broad standard adopted by the Court, and make it possible for me to conclude that the Court's reading of the statute is an acceptable one.

A. The first point at which **[****35]** the Court departs from the "arguable violations" approach is that it measures an individual employer's capacity for affirmative action solely in terms of a statistical disparity. The individual employer need not have engaged in discriminatory practices in the past. While, under Title VII, a mere disparity may provide the basis for a prima facie case against an employer, *Dothard v. Rawlinson, 433 U.S. 321, 329-331 (1977)*, it would not conclusively prove a violation of the Act. *Teamsters v. United States, 431 U.S. 324, 339-340, n. 20 (1977)*; see § 703 (j), *42 U. S. C. § 2000e-2 (j)*. As a practical matter, however, this difference may not be that great. While the "arguable violation" standard is conceptually satisfying, in practice the emphasis would be on "arguable" rather than on "violation." The great difficulty in the District Court was that no one had any incentive to prove that Kaiser had violated the Act. Neither Kaiser nor the Steelworkers wanted to establish a past violation, nor did Weber. The blacks harmed had never sued and so had no established representative. The Equal Employment Opportunity **[*214]** Commission **[****36]** declined to intervene, and cannot be expected to intervene in every case of this nature. To make the "arguable violation" standard work, it would have to be set low enough to permit the employer to prove it without obligating himself to pay a damages award. The inevitable tendency would be to avoid hairsplitting litigation by simply concluding that a mere disparity between the racial composition of the employer's

work force and the composition of the qualified local labor force would be **[**2733]** an "arguable violation," even though actual liability could not be established on that basis alone. See Note, 57 N. C. L. Rev. 695, 714-719 (1979).

[*496]** B. The Court also departs from the "arguable violation" approach by permitting an employer to redress discrimination that lies wholly outside the bounds of Title VII. For example, Title VII provides no remedy for pre-Act discrimination, *Hazelwood School District v. United States, 433 U.S. 299, 309-310 (1977)*; yet the purposeful discrimination that creates a "traditionally segregated job category" may have entirely predated the Act. More subtly, in assessing a prima facie case of Title VII **[****37]** liability, the composition of the employer's work force is compared to the composition of the pool of workers who meet valid job qualifications. *Hazelwood, 433 U.S., at 308* and n. 13; *Teamsters v. United States, 431 U.S., at 339-340*, and n. 20. When a "job category" is traditionally segregated, however, that pool will reflect the effects of segregation, and the Court's approach goes further and permits a comparison with the composition of the labor force as a whole, in which minorities are more heavily represented.

Strong considerations of equity support an interpretation of Title VII that would permit private affirmative action to reach where Title VII itself does not. The bargain struck in 1964 with the passage of Title VII guaranteed equal opportunity for white and black alike, but where Title VII provides no remedy for blacks, it should not be construed to foreclose private affirmative action from supplying relief. It seems unfair for respondent Weber to argue, as he does, that the **[*215]** asserted scarcity of black craftsmen in Louisiana, the product of historic discrimination, makes Kaiser's training program illegal because **[****38]** it ostensibly absolves Kaiser of all Title VII liability. Brief for Respondents 60. Absent compelling evidence of legislative intent, I would not interpret Title VII itself as a means of "locking in" the effects of segregation for which Title VII provides no remedy. Such a construction, as the Court points out, *ante*, at 204, would be "ironic," given the broad remedial purposes of Title VII.

MR. JUSTICE REHNQUIST'S dissent, while it focuses more on what Title VII does not require than on what Title VII forbids, cites several passages that appear to express an intent to "lock in" minorities. In mining the legislative history anew, however, the dissent, in my view, fails to take proper account of our prior cases that have given that history a much more limited reading than that adopted by the dissent. For example, in *Griggs v. Duke Power Co., 401 U.S. 424, 434-436, and n. 11 (1971)*, the Court refused to give controlling weight to the memorandum of Senators Clark and Case which the dissent now finds so persuasive. See *post*, at 239-241. And in quoting a statement from that memorandum that an employer would not be "permitted . . . to prefer Negroes **[****39]** for future vacancies," *post*, at 240, the dissent does not point out that the Court's opinion in *Teamsters v. United States, 431 U.S., at 349-351*, implies that that language is limited to the protection of established seniority systems. Here, seniority is not in issue because the craft training program is new and does not involve an abrogation of pre-existing seniority rights. In **[***497]** short, the passages marshaled by the dissent are not so compelling as to merit the whip hand over the obvious equity of permitting employers to ameliorate the effects of past discrimination for which Title VII provides no direct relief.

III

I also think it significant that, while the Court's opinion does not foreclose other forms of affirmative action, the Kaiser **[*216]** program it approves is a moderate one. The opinion notes that the program does not afford an absolute preference for blacks, and that it ends when the racial composition of Kaiser's craftwork force matches the racial composition of the local population. **[**2734]** It thus operates as a temporary tool for remedying past discrimination without attempting to "maintain" a previously achieved balance. **[****40]** See *University of California Regents v. Bakke, 438 U.S. 265, 342 n. 17 (1978)* (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). Because the duration of the program is finite, it perhaps will end even before the "stage of maturity when action along this line is no longer necessary." *Id., at 403* (opinion of BLACKMUN, J.). And if the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses.

Dissent by: BURGER; REHNQUIST

Dissent

MR. CHIEF JUSTICE BURGER, dissenting.

The Court reaches a result I would be inclined to vote for were I a Member of Congress considering a proposed amendment of Title VII. I cannot join the Court's judgment, however, because it is contrary to the explicit language of the statute and arrived at by means wholly incompatible with long-established principles of separation of powers. Under the guise of statutory "construction," the Court effectively rewrites Title VII to achieve what it regards as a desirable result. It "amends" the statute to do precisely what both its sponsors and its opponents agreed the statute was *not* intended to do.

When **[****41]** Congress enacted Title VII after long study and searching debate, it produced a statute of extraordinary clarity, which speaks directly to the issue we consider in this case. In § 703 (d) Congress provided:

"It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or **[*217]** retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training." *42 U. S. C. § 2000e-2 (d)*.

Often we have difficulty interpreting statutes either because of imprecise drafting or because legislative compromises have produced genuine ambiguities. But here there is no lack of clarity, no ambiguity. The quota embodied in the collective-bargaining agreement between Kaiser and the Steelworkers unquestionably discriminates on the basis of race against individual employees seeking admission to on-the-job training programs. And, under the plain language **[***498]** of § 703 (d), that is "an *unlawful* employment practice."

[**42]** Oddly, the Court seizes upon the very clarity of the statute almost as a justification for evading the unavoidable impact of its language. The Court blandly tells us that Congress could not really have meant what it said, for a "literal construction" would defeat the "purpose" of the statute -- at least the congressional "purpose" as five Justices divine it today. But how are judges supposed to ascertain the *purpose* of a statute except through the words Congress used and the legislative history of the statute's evolution? One need not even resort to the legislative history to recognize what is apparent from the face of Title VII -- that it is specious to suggest that § 703 (j) contains a negative pregnant that permits employers to do what §§ 703 (a) and (d) unambiguously and unequivocally *forbid* employers from doing. Moreover, as MR. JUSTICE REHNQUIST'S opinion -- which I join -- conclusively demonstrates, the legislative history makes equally clear that the supporters and opponents of Title VII reached an agreement about the statute's intended effect. That agreement, expressed so clearly in the language of the statute that no one should doubt its meaning, forecloses **[****43]** the reading which the Court gives the statute today.

[*218] Arguably, Congress may not have gone far enough in correcting the effects of past discrimination when it enacted Title VII. The gross discrimination against minorities to which the Court adverts -- particularly against Negroes in the building trades and **[**2735]** craft unions -- is one of the dark chapters in the otherwise great history of the American labor movement. And, I do not question the importance of encouraging voluntary compliance with the purposes and policies of Title VII. But that statute was conceived and enacted to make discrimination against *any* individual illegal, and I fail to see how "voluntary compliance" with the no-discrimination principle that is the heart and soul of Title VII as currently written will be achieved by permitting employers to discriminate against some individuals to give preferential treatment to others.

Until today, I had thought the Court was of the unanimous view that "[discriminatory] preference for any group, minority or majority, is precisely and only what Congress has proscribed" in Title VII. *Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)*. **[****44]** Had Congress intended otherwise, it very easily could have drafted language allowing what the Court permits today. Far from doing so, Congress expressly *prohibited* in §§ 703 (a) and (d) the very discrimination against Brian Weber which the Court today approves. If "affirmative action" programs such as the one presented in this case are to be permitted, it is for Congress, not this Court, to so direct.

It is often observed that hard cases make bad law. I suspect there is some truth to that adage, for the "hard" cases always tempt judges to exceed the limits of their authority, as the Court does today by totally rewriting a crucial part of Title VII to reach a "desirable" result. Cardozo no doubt had this type of case in mind when he wrote:

"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not **[***499]** a knight-errant, roaming at will in pursuit of his own ideal of **[*219]** beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined **[****45]** by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains." The Nature of the Judicial Process 141 (1921).

What Cardozo tells us is beware the "good result," achieved by judicially unauthorized or intellectually dishonest means on the appealing notion that the desirable ends justify the improper judicial means. For there is always the danger that the seeds of precedent sown by good men for the best of motives will yield a rich harvest of unprincipled acts of others also aiming at "good ends."

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

In a very real sense, the Court's opinion is ahead of its time: it

could more appropriately have been handed down five years from now, in 1984, a year coinciding with the title of a book from which the Court's opinion borrows, perhaps subconsciously, at least one idea. Orwell describes in his book a governmental official of Oceania, one of the three great world powers, denouncing the current enemy, Eurasia, to an assembled crowd:

"It was almost impossible to listen to him without being first convinced and then maddened. . **[****46]** . . The speech had been proceeding for perhaps twenty minutes when a messenger hurried onto the platform and a scrap of paper was slipped into the speaker's hand. He unrolled and read it without pausing in his speech. Nothing altered in his voice or manner, or in the context of what he was saying, but suddenly the names were different. Without words **[*220]** said, a wave of understanding rippled through the crowd. Oceania was at war with Eastasia! . . . The banners and posters with which the square was decorated were all wrong! . . .

"[The] speaker had switched from one line to the other actually in mid-sentence, not only without a pause, but without **[**2736]** even breaking the syntax." G. Orwell, Nineteen Eighty-Four 181-182 (1949).

Today's decision represents an equally dramatic and equally unremarked switch in this Court's interpretation of Title VII.

The operative sections of Title VII prohibit racial discrimination in employment *simpliciter*. Taken in its normal meaning, and as understood by all Members of Congress who spoke to the issue during the legislative debates, see *infra*, at 231-251, this language prohibits a covered employer from considering race when **[****47]** making an employment decision, whether the race be black or white. Several years ago, however, a United States District Court held that "the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted." *McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278* ***[***500]*** *(1976)*. This Court unanimously reversed, concluding from the "uncontradicted legislative history" that "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes . . . ." *Id., at 280*.

We have never wavered in our understanding that Title VII "prohibits *all* racial discrimination in employment, without exception for any group of particular employees." *Id., at 283* (emphasis in original). In *Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)*, our first occasion to interpret Title VII, a unanimous Court observed that "[discriminatory] preference, for any group, minority or majority, is precisely and **[****48]** only what Congress has proscribed." And in our most **[*221]** recent discussion of the issue, we uttered words seemingly dispositive of this case: "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Furnco Construction Corp.* v. *Waters, 438 U.S. 567, 579 (1978)* (emphasis in original). [1]

Today, however, the Court behaves much like the Orwellian speaker earlier described, as if it had been handed a note indicating that Title VII would lead to a result unacceptable to the Court if interpreted here as it was in our prior decisions. Accordingly, without even a break in syntax, the Court rejects "a literal construction of § **[****49]** 703 (a)" in favor of newly discovered "legislative history," which leads it to a conclusion directly contrary to that compelled by the "uncontradicted legislative history" unearthed in *McDonald* and our other prior decisions. Now we are told that the legislative history of Title VII shows that employers are free to discriminate on the basis of race: an employer may, in the Court's words, "trammel the interests of the white employees" in favor of black employees in order to eliminate "racial imbalance." *Ante*, at 208. Our earlier interpretations of Title VII, like the banners and posters decorating the square in Oceania, were all wrong.

As if this were not enough to make a reasonable observer question this Court's adherence to the oft-stated principle that our duty is to construe rather than rewrite legislation, *United States v. Rutherford, 442 U.S. 544, 555 (1979)*, the Court also seizes upon § 703 (j) of Title VII as an independent, or at least partially independent, basis for its holding. Totally ignoring the wording of that section, which is obviously addressed to those charged with the responsibility of interpreting **[*222]** the law rather than **[****50]** those who are subject to its proscriptions, and totally ignoring the months of legislative debates preceding the section's introduction and passage, which demonstrate clearly that it was enacted to prevent precisely what occurred **[***501]** in **[**2737]** this case, the Court infers from § 703 (j) that "Congress chose not to forbid all voluntary race-conscious affirmative action." *Ante*, at 206.

Thus, by a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, "uncontradicted" legislative history, and uniform precedent in

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[1] Our statements in *Griggs* and *Furnco Construction*, patently inconsistent with today's holding, are not even mentioned, much less distinguished, by the Court.

concluding that employers are, after all, permitted to consider race in making employment decisions. It may be that one or more of the principal sponsors of Title VII would have preferred to see a provision allowing preferential treatment of minorities written into the bill. Such a provision, however, would have to have been expressly or impliedly excepted from Title VII's explicit prohibition on all racial discrimination in employment. There is no such exception in the Act. And a reading of the legislative debates concerning Title VII, in which proponents **[****51]** and opponents alike uniformly denounced discrimination in favor of, as well as discrimination against, Negroes, demonstrates clearly that any legislator harboring an unspoken desire for such a provision could not possibly have succeeded in enacting it into law.

I

Kaiser opened its Gramercy, La., plant in 1958. Because the Gramercy facility had no apprenticeship or in-plant craft training program, Kaiser hired as craftworkers only persons with prior craft experience. Despite Kaiser's efforts to locate and hire trained black craftsmen, few were available in the Gramercy area, and as a consequence, Kaiser's craft positions were manned almost exclusively by whites. In February 1974, under pressure from the Office of Federal Contract Compliance to increase minority representation in craft positions **[*223]** at its various plants, [2] **[****53]** and hoping to deter the filing of employment discrimination claims by minorities, Kaiser entered into a collective-bargaining agreement with the United Steelworkers of America **[***502]** (Steelworkers) which created a new on-the-job craft training program at 15 Kaiser facilities, including the Gramercy plant. The agreement required that no less than one **[****52]** minority applicant be admitted to the training program for every nonminority applicant until the percentage of blacks in craft positions equaled the percentage of blacks in the local work force. [3] Eligibility for the craft **[**2738]**

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[2] The Office of Federal Contract Compliance (OFCC), subsequently renamed the Office of Federal Contract Compliance Programs (OFCCP), is an arm of the Department of Labor responsible for ensuring compliance by Government contractors with the equal employment opportunity requirements established by Exec. Order No. 11246, 3 CFR 339 (1964-1965 Comp.), as amended by Exec. Order No. 11375, 3 CFR 684 (1966-1970 Comp.), and by Exec. Order No. 12086, 3 CFR 230 (1979).

Executive Order No. 11246, as amended, requires all applicants for federal contracts to refrain from employment discrimination and to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." § 202 (1), 3 CFR 685 (1966-1970 Comp.), note following *42 U. S. C. § 2000e*. The Executive Order empowers the Secretary of Labor to issue rules and regulations necessary and appropriate to achieve its purpose. He, in turn, has delegated most enforcement duties to the OFCC. See *41 CFR § 60-20.1 et seq.*, § 60-2.24 (1978).

The affirmative action program mandated by *41 CFR § 60-2* (Revised Order No. 4) for nonconstruction contractors requires a "utilization" study to determine minority representation in the work force. Goals for hiring and promotion must be set to overcome any "underutilization" found to exist.

The OFCC employs the "power of the purse" to coerce acceptance of its affirmative action plans. Indeed, in this action, "the district court found that the 1974 collective bargaining agreement reflected less of a desire on Kaiser's part to train black craft workers than a self-interest in satisfying the OFCC in order to retain lucrative government contracts." *563 F.2d 216, 226 (CA5 1977)*.

[3] The pertinent portions of the collective-bargaining agreement provide:

"It is further agreed that the Joint Committee will specifically review the minority representation in the existing Trade, Craft and Assigned Maintenance classifications, in the plants set forth below, and, where necessary, establish certain goals and time tables in order to achieve a desired minority ratio:

"[Gramercy Works listed, among others]

"As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates. . . .

. . . .

"The term 'minority' as used herein shall be as defined in EEOC Reporting Requirements." *415 F.Supp. 761, 763 (ED La. 1976)*.

The "Joint Committee" subsequently entered into a "Memorandum of Understanding" establishing a goal of 39% as the percentage of blacks that must be represented in each "craft family" at Kaiser's Gramercy plant. *Id., at 764*. The goal of 39% minority representation was based on the percentage of minority workers available in the Gramercy area.

Contrary to the Court's assertion, it is not at all clear that Kaiser's admission quota is a "temporary measure . . . not intended to maintain racial balance." *Ante*, at 208. Dennis E. English, industrial relations superintendent at the Gramercy plant, testified at trial:

"Once the goal is reached of 39 percent, or whatever the figure will be down the road, I think it's subject to change, once the goal is reached in each of the craft families, at that time, we will then revert to a ratio of what that percentage is, if it remains at 39 percent and we attain 39 percent someday, we will then continue placing trainees in the program at that percentage. The idea, again, being to have a minority representation in the plant that is equal to that

training programs **[*224]** was to be determined on the basis of plant seniority, with black and white applicants to be selected on the basis of their relative seniority within their racial group.

[**54]** Brian Weber is white. He was hired at Kaiser's Gramercy plant in 1968. In April 1974, Kaiser announced that it was offering a total of nine positions in three on-the-job training programs for skilled craft jobs. Weber applied for all three programs, but was not selected. The successful candidates -- five black and four white applicants -- were chosen in accordance **[*225]** with the 50% minority admission quota mandated under the 1974 collective-bargaining agreement. Two of the successful black applicants had less seniority than Weber. [4] **[****55]** Weber brought the instant class action [5] in the United States **[***503]** District Court for the Eastern District of Louisiana, alleging that use of the 50% minority admission quota to fill vacancies in Kaiser's craft training programs violated Title VII's prohibition on racial discrimination in employment. The District Court and the Court of Appeals for the Fifth Circuit agreed, enjoining further use of race as a criterion in admitting applicants to the craft training programs. [6]

[**56]** **[*226]** II

[2739]** Were Congress to act today specifically to prohibit the type of racial discrimination suffered by Weber, it would be hard pressed to draft language better tailored to the task than that found in § 703 (d) of Title VII:

"It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training." 78 Stat. 256, *42 U. S. C. § 2000e-2 (d)*.

[*227] Equally suited to the task would be § 703 (a)(2), which makes it unlawful for an employer to classify his employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status **[***504]** as an employee, because of such individual's race, color, religion,

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representation in the community work force population." App. 69.

[4] In addition to the April programs, the company offered three more training programs in 1974 with a total of four positions available. Two white and two black employees were selected for the programs, which were for "Air Conditioning Repairman" (one position), "Carpenter-Painter" (two positions), and "Insulator" (one position). Weber sought to bid for the insulator trainee position, but he was not selected because that job was reserved for the most senior qualified black employee. *Id., at 46*.

[5] The class was defined to include the following employees:

"All persons employed by Kaiser Aluminum & Chemical Corporation at its Gramercy, Louisiana, works who are members of the United Steelworkers of America, AFL-CIO Local 5702, who are not members of a minority group, and who have applied for or were eligible to apply for on-the-job training programs since February 1, 1974." *415 F.Supp., at 763*.

[6] In upholding the District Court's injunction, the Court of Appeals affirmed the District Court's finding that Kaiser had not been guilty of any past discriminatory hiring or promotion at its Gramercy plant. The court thus concluded that this finding removed the instant action from this Court's line of "remedy" decisions authorizing fictional seniority in order to place proved victims of discrimination in as good a position as they would have enjoyed absent the discriminatory hiring practices. See *Franks v. Bowman Transp. Co., 424 U.S. 747 (1976)*. "In the absence of prior discrimination," the Court of Appeals observed, "a racial quota loses its character as an equitable *remedy* and must be banned as an unlawful racial *preference* prohibited by Title VII, §§ 703 (a) and (d). Title VII outlaws preferences for any group, minority or majority, if based on race or other impermissible classifications, but it does not outlaw preferences favoring victims of discrimination." *563 F.2d, at 224* (emphasis in original). Nor was the Court of Appeals moved by the claim that Kaiser's discriminatory admission quota is justified to correct a lack of training of Negroes due to past societal discrimination: "Whatever other effects societal discrimination may have, it has had -- by the specific finding of the court below -- *no effect* on the seniority of any party here." *Id., at 226* (emphasis in original). Finally, the Court of Appeals rejected the argument that Kaiser's admission quota does not violate Title VII because it is sanctioned, indeed compelled, by Exec. Order No. 11246 and regulations issued by the OFCC mandating affirmative action by all Government contractors. See n. 2, *supra*. Citing *Youngstown Sheet & Tube Co.* v. *Sawyer, 343 U.S. 579 (1952)*, the court concluded that "[if] Executive Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser, *in the absence of any prior hiring or promotion discrimination*, the Executive Order must fall before this direct congressional prohibition [of § 703 (d)]." *563 F.2d, at 227* (emphasis in original).

Judge Wisdom, in dissent, argued that "[if] an affirmative action plan, adopted in a collective bargaining agreement, is a reasonable remedy for an *arguable* violation of Title VII, it should be upheld." *Id., at 230*. The United States, in its brief before this Court, and MR. JUSTICE BLACKMUN, *ante*, p. 209, largely adopt Judge Wisdom's theory, which apparently rests on the conclusion that an employer is free to correct *arguable* discrimination against his black employees by adopting measures that he *knows* will discriminate against his white employees.

sex, or national origin." 78 Stat. 255, *42 U. S. C. § 2000e-2 (a)(2)*. [7]

[**57]** Entirely consistent with these two express prohibitions is the language of § 703 (j) of Title VII, which provides that the Act is not to be interpreted "to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group" to correct a racial imbalance in the employer's work force. *42 U. S. C. § 2000e-2 (j)*. [8] Seizing on the word "require," the Court **[*228]** infers that Congress must have intended to "permit" this type of racial discrimination. Not only is this reading of § 703 (j) outlandish in the light of the flat prohibitions of §§ 703 (a) and (d), but, **[**2740]** as explained in Part III, it is also totally belied by the Act's legislative history.

[**58]** Quite simply, Kaiser's racially discriminatory admission quota is flatly prohibited by the plain language of Title VII. This normally dispositive fact, [9] **[****60]** however, gives the Court only momentary pause. An "interpretation" of the statute upholding Weber's claim would, according to the Court, "'bring about an end completely at variance with the purpose of the statute.'" *Ante*, at 202, quoting *United States v. Public Utilities Comm'n, 345 U.S. 295, 315 (1953)*. To support this conclusion, the Court calls upon the "spirit" of the Act, which it divines from passages in Title VII's legislative history indicating that enactment of the statute was prompted by Congress' desire "'to open employment opportunities for Negroes in occupations which [had] been traditionally closed to them.'" *Ante*, at 203, quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey). [10]

[*505]** But the legislative history invoked by **[*229]** the Court to avoid the plain language of §§ 703 (a) and (d) simply misses the point. To be sure, the reality of employment discrimination against Negroes provided the primary impetus for passage of Title VII. But this fact by no means **[****59]** supports the proposition that Congress intended to leave employers free to discriminate against white persons. [11]

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[7] Section 703 (a)(1) provides the third express prohibition in Title VII of Kaiser's discriminatory admission quota:

"It shall be an unlawful employment practice for an employer --

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 78 Stat. 255, *42 U. S. C. § 2000e-2 (a)(1)*.

[8] The full text of § 703 (j), 78 Stat. 257, *42 U. S. C. § 2000e-2 (j)*, provides as follows:

"Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

[9] "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.

". . . [When] words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn . . . from any extraneous source." *Caminetti v. United States, 242 U.S. 470, 490 (1917)*.

[10] In holding that Title VII cannot be interpreted to prohibit use of Kaiser's racially discriminatory admission quota, the Court reasons that it would be "ironic" if a law inspired by the history of racial discrimination in employment against blacks forbade employers from voluntarily discriminating against whites in favor of blacks. I see no irony in a law that prohibits *all* voluntary racial discrimination, even discrimination directed at whites in favor of blacks. The evil inherent in discrimination against Negroes is that it is based on an immutable characteristic, utterly irrelevant to employment decisions. The characteristic becomes no less immutable and irrelevant, and discrimination based thereon becomes no less evil, simply because the person excluded is a member of one race rather than another. Far from ironic, I find a prohibition on all preferential treatment based on race as elementary and fundamental as the principle that "two wrongs do not make a right."

[11] The only shred of legislative history cited by the Court in support of the proposition that "Congress did not intend wholly to prohibit private and voluntary affirmative action efforts," *ante*, at 203, is the following excerpt from the Judiciary Committee Report accompanying the civil rights bill reported to the House:

"No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems *will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination*." H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963) (hereinafter H. R. Rep.), quoted *ante*, at 203-204.

The Court seizes on the italicized language to support its conclusion

[*506]** In most **[*230]** **[**2741]** cases, "[legislative] history . . . is more vague than the statute we are called upon to interpret." *United States v. Public Utilities Comm'n, supra, at 320* (Jackson, J., concurring). Here, however, the legislative history of Title VII is as clear as the language of §§ 703 (a) and (d), and it irrefutably demonstrates that Congress meant precisely what it said in §§ 703 (a) and (d) -- that *no* racial discrimination in employment is permissible under Title VII, not even preferential treatment of minorities to correct racial imbalance.

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that Congress did not intend to prohibit voluntary imposition of racially discriminatory employment quotas. The Court, however, stops too short in its reading of the House Report. The words immediately following the material excerpted by the Court are as follows:

"It is, however, possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating *the most serious types of discrimination*. This H. R. 7152, as amended, would achieve in a number of related areas. It would reduce discriminatory obstacles to the exercise of the right to vote and provide means of expediting the vindication of that right. It would make it possible to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public. It would guarantee that there will be no discrimination upon recipients of Federal financial assistance. It would prohibit discrimination in employment, and provide means to expedite termination of discrimination in public education. It would open additional avenues to deal with redress of denials of equal protection of the laws on account of race, color, religion, or national origin by State or local authorities." H. R. Rep., pt. 1, p. 18 (emphasis added).

When thus read in context, the meaning of the italicized language in the Court's excerpt of the House Report becomes clear. By dealing with "the most serious types of discrimination," such as discrimination in voting, public accommodations, employment, etc., H. R. 7152 would hopefully inspire "voluntary or local resolution of other forms of discrimination," that is, forms other than discrimination in voting, public accommodations, employment, etc.

One can also infer from the House Report that the Judiciary Committee hoped that federal legislation would inspire voluntary elimination of discrimination against minority groups other than those protected under the bill, perhaps the aged and handicapped to name just two. In any event, the House Report does not support the Court's proposition that Congress, by banning racial discrimination in employment, intended to permit racial discrimination in employment.

Thus, examination of the House Judiciary Committee's report reveals that the Court's interpretation of Title VII, far from being compelled by the Act's legislative history, is utterly without support in that legislative history. Indeed, as demonstrated in Part III, *infra*, the Court's interpretation of Title VII is totally refuted by the Act's legislative history.

[**61]** III

In undertaking to review the legislative history of Title VII, I am mindful that the topic hardly makes for light reading, **[*231]** but I am also fearful that nothing short of a thorough examination of the congressional debates will fully expose the magnitude of the Court's misinterpretation of Congress' intent.

A

Introduced on the floor of the House of Representatives on June 20, 1963, the bill -- H. R. 7152 -- that ultimately became the Civil Rights Act of 1964 contained no compulsory provisions directed at private discrimination in employment. The bill was promptly referred to the Committee on the Judiciary, where it was amended to include Title VII. With two exceptions, the bill reported by the House Judiciary Committee contained §§ 703 (a) and (d) as they were ultimately enacted. Amendments subsequently adopted on the House floor added § 703's prohibition against sex discrimination and § 703 (d)'s coverage of "on-the-job training."

After noting that "[the] purpose of [Title VII] is to eliminate . . . discrimination in employment based on race, color, religion, or national origin," the Judiciary Committee's Report simply paraphrased the provisions of Title VII without **[****62]** elaboration. H. R. Rep., pt. 1, p. 26. In a separate Minority Report, however, opponents of the measure on the Committee advanced a line of attack which was reiterated throughout the debates in both the House and Senate and which ultimately led to passage of § 703 (j). Noting that the word "discrimination" was nowhere defined in H. R. 7152, the Minority Report charged that the absence from Title VII of any reference to "racial imbalance" was a "public relations" ruse and that "the administration intends to rely upon its own construction of 'discrimination' as including the lack of racial balance. . . ." H. R. Rep., pt. 1, pp. 67-68. To demonstrate how the bill would operate in practice, the Minority Report posited a number of hypothetical employment situations, concluding in each example that the employer *"may be forced to hire according to race*, to 'racially balance' those who work for **[*232]** him *in every job classification* or be in violation of Federal law." *Id., at 69* (emphasis in original). [12]

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[12] One example has particular relevance to the instant litigation:

"Under the power granted in this bill, if a carpenters' hiring hall, say, had 20 men awaiting call, the first 10 in seniority being white carpenters, the union could be forced to pass them over in favor of carpenters beneath them in seniority but of the stipulated race. And if the union roster did not contain the names of the carpenters of the race needed to 'racially balance' the job, the union agent must, then,

[**63]** When **[***507]** **[**2742]** H. R. 7152 reached the House floor, the opening speech in support of its passage was delivered by Representative Celler, Chairman of the House Judiciary Committee and the Congressman responsible for introducing the legislation. A portion of that speech responded to criticism "seriously [misrepresenting] **[*233]** what the bill would do and grossly [distorting] its effects":

"[The] charge has been made that the Equal Employment Opportunity Commission to be established by title VII of the bill would have the power to prevent a business from employing and promoting the people it wished, and that a 'Federal inspector' could then order the hiring and promotion only of employees of certain races or religious groups. This description of the bill is entirely wrong. . . .

. . . .

"Even [a] court could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end of discrimination. The statement that a Federal inspector could order the employment and promotion only of members of a specific racial or religious group is therefore patently erroneous.

. . . .

". . . The Bill would do no more than **[****64]** prevent . . . employers from discriminating against *or in favor* of workers because of their race, religion, or national origin.

"It is likewise not true that the Equal Employment Opportunity Commission would have power to rectify existing 'racial or religious imbalance' in employment by requiring the hiring of certain people without regard to their qualifications simply because they are of a given race or religion. Only actual discrimination could be stopped." 110 Cong. Rec. 1518 (1964) (emphasis added).

Representative Celler's construction of Title VII was repeated by several **[***508]** other supporters during the House debate. [13]

[**65]** **[*234]** Thus, **[**2743]** the battle lines were drawn early in the legislative struggle over Title VII, with opponents of the measure charging that agencies of the Federal Government such as the Equal Employment Opportunity Commission (EEOC), by interpreting the word "discrimination" to mean the existence of "racial imbalance," would "require" employers to grant preferential treatment to

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go into the street and recruit members of the stipulated race in sufficient number to comply with Federal orders, else his local could be held in violation of Federal law." H. R. Rep., pt. 1, p. 71.

From this and other examples, the Minority Report concluded: "That this is, in fact, a not too subtle system of racism-in-reverse cannot be successfully denied." *Id., at 73*.

Obviously responding to the Minority Report's charge that federal agencies, particularly the Equal Employment Opportunity Commission would equate "discrimination" with "racial imbalance," the Republican sponsors of the bill on the Judiciary Committee stated in a separate Report:

"It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. . . . Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices. Its primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification." *Id.*, pt. 2, p. 29.

The Republican supporters of the bill concluded their remarks on Title VII by declaring that "[all] vestiges of inequality based solely on race must be removed . . . ." *Id., at 30*.

[13] Representative Lindsay had this to say:

"This legislation . . . does not, as has been suggested heretofore both on and off the floor, force acceptance of people in . . . jobs . . . because they are Negro. It does not impose quotas or any special privileges of seniority or acceptance. There is nothing whatever in this bill about racial balance as appears so frequently in the minority report of the Committee.

"What the bill does do is prohibit discrimination because of race . . . ." 110 Cong. Rec. 1540 (1964).

Representative Minish added: "Under title VII, employment will be on the basis of merit, not of race. This means that no quota system will be set up, no one will be forced to hire incompetent help because of race or religion, and no one will be given a vested right to demand employment for a certain job." *Id.*, at 1600. Representative Goodell, answering the charge that Title VII would be interpreted "to [require] a racial balance," *id.*, at 2557, responded: "There is nothing here as a matter of legislative history that would require racial balancing. . . . We are not talking about a union having to balance its membership or an employer having to balance the number of employees. There is no quota involved. It is a matter of an individual's rights having been violated, charges having been brought, investigation carried out and conciliation having been attempted and then proof in court that there was discrimination and denial of rights on the basis of race or color." *Id.*, at 2558. After H. R. 7152 had been passed and sent to the Senate, Republican supporters of the bill in the House prepared an interpretative memorandum making clear that "title VII *does not permit* the ordering of racial quotas in businesses or unions and does not permit interferences with seniority rights of employees or union members." *Id.*, at 6566 (emphasis added).

minorities, and supporters responding that the EEOC would be granted no such power and that, indeed, Title VII prohibits discrimination "in favor of workers because of their race." Supporters of H. R. 7152 in the House ultimately prevailed by a vote of 290 to 130, [14] and the measure was sent to the Senate to begin what became the longest debate in that body's history.

[*235] B

The Senate debate was broken into three phases: the debate on sending the bill to Committee, the general debate on the bill prior to invocation of cloture, and the debate following cloture.

1

When debate on the motion to **[****66]** refer the bill to Committee opened, opponents of Title VII in the Senate immediately echoed the fears expressed by their counterparts in the House, as is demonstrated by the following colloquy between Senators Hill and Ervin:

"Mr. ERVIN. I invite attention to . . . Section [703 (a)] . . . .

. . . .

"I ask the Senator from Alabama if the Commission could not tell an employer that he had too few employees, that he had limited his employment, and enter an order, under [Section 703 (a)], requiring him to hire more persons, not because the employer thought he needed more persons, but because the Commission wanted to **[***509]** compel him to employ persons of a particular race.

"Mr. HILL. The Senator is correct. That power is written into the bill. The employer could be forced to hire additional persons . . . ." 110 Cong. Rec. 4764 (1964). [15] **[****68]**

[*236] **[**2744]** Senator Humphrey, perhaps the primary moving force behind H. R. 7152 in the Senate, was the first to state the proponents' understanding of Title VII. Responding to a political advertisement charging that federal agencies were at liberty to interpret the word "discrimination" in Title VII to require racial balance, Senator **[****67]** Humphrey stated: "[The] meaning of racial or religious discrimination is perfectly clear. . . . [It] means a distinction in treatment given to different individuals because of their different race, religion, or national origin." *Id.*, at 5423. [16] Stressing that Title VII "does not limit the employer's freedom to hire, fire, promote or demote for any reasons -- or no reasons -- so long as his action is not **[*237]** based on race," Senator Humphrey further stated that "nothing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group." *Ibid.* [17]

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[14] Eleven Members did not vote.

[15] Continuing with their exchange, Senators Hill and Ervin broached the subject of racial balance:

"Mr. ERVIN. So if the Commissioner . . . should be joined by another member of the Commission in the finding that the employer had too high a percentage, in the Commission's judgment, of persons of the Caucasian race working in his business, they could make the employer either hire, in addition to his present employees, an extra number of Negro employees, or compel him to fire employees of the Caucasian race in order to make a place for Negro employees?

"Mr. HILL. The Senator is correct, although the employer might not need the additional employees, and although they might bring his business into bankruptcy." 110 Cong. Rec. 4764 (1964).

This view was reiterated by Senator Robertson:

"It is contemplated by this title that the percentage of colored and white population in a community shall be in similar percentages in every business establishment that employs over 25 persons. Thus, if there were 10,000 colored persons in a city and 15,000 whites, an employer with 25 employees would, in order to overcome racial imbalance, be required to have 10 colored personnel and 15 white. And if by chance that employer had 20 colored employees, he would have to fire 10 of them in order to rectify the situation. Of course, this works the other way around where whites would be fired." *Id.*, at 5092.

Senator Humphrey interrupted Senator Robertson's discussion, responding: "The bill does not require that at all. If it did, I would vote against it. . . . There is no percentage quota." *Ibid.*

[16] This view was reiterated two days later in the "Bipartisan Civil Rights Newsletter" distributed to the Senate on March 19 by supporters of H. R. 7152:

"3. Defining discrimination: Critics of the civil rights bill have charged that the word 'discrimination' is left undefined in the bill and therefore the door is open for interpretation of this term according to 'whim or caprice.' . . .

. . . .

"There is no sound basis for uncertainty about the meaning of discrimination in the context of the civil rights bill. It means a distinction in treatment given to different individuals because of their different race, religion, or national origin." *Id.*, at 7477.

[17] Earlier in the debate, Senator Humphrey had introduced a newspaper article quoting the answers of a Justice Department "expert" to the "10 most commonly expressed objections to [Title VII]." Insofar as is pertinent here, the article stated:

"Objection: The law would empower Federal 'inspectors' to require employers to hire by race. White people would be fired to make room for Negroes. Seniority rights would be destroyed. . . .

"Reply: The bill requires no such thing. The five-member Equal

[**69]** After **[***510]** 17 days of debate, the Senate voted to take up the bill directly, without referring it to a committee. *Id.*, at 6455. Consequently, there is no Committee Report in the Senate.

2

Formal debate on the merits of H. R. 7152 began on March 30, 1964. Supporters of the bill in the Senate had made elaborate preparations for this second round. Senator Humphrey, the majority whip, and Senator Kuchel, the minority whip, were selected as the bipartisan floor managers on the entire civil rights bill. Responsibility for explaining and defending each important title of the bill was placed on bipartisan "captains." Senators Clark and Case were selected as the bipartisan captains responsible for Title VII. Vaas, Title VII: Legislative History, 7 B. C. Ind. & Com. L. Rev. 431, 444-445 (1966) (hereinafter Title VII: Legislative History).

In the opening speech of the formal Senate debate on the bill, Senator Humphrey addressed the main concern of Title **[*238]** VII's opponents, advising that not only does Title VII not require use of racial quotas, *it does not permit* their use. "The truth," stated the floor leader of the bill, "is that this title forbids **[****70]** discriminating against anyone on account of race. This is the simple and complete truth about title VII." 110 Cong. Rec. 6549 (1964). Senator Humphrey continued:

"Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order **[**2745]** to meet a racial 'quota' or to achieve a certain racial balance.

"That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, *the very opposite is true. Title VII prohibits discrimination*. In effect, it says that race, religion and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion." *Ibid.* (emphasis added).

At the close of his speech, Senator Humphrey returned briefly to the subject of employment quotas: "It is claimed that the bill would require racial quotas for all hiring, when in fact it provides that race shall not be a basis for making personnel decisions." *Id.*, at 6553.

Senator Kuchel delivered the second major speech in support of H. **[****71]** R. 7152. In addressing the concerns of the opposition, he observed that "[nothing] could be further from the truth" than the charge that "Federal inspectors" would be empowered under Title VII to dictate racial balance and preferential advancement of minorities. *Id.*, at 6563. Senator Kuchel emphasized that seniority rights would in no way be affected by Title VII: "Employers and labor organizations could not discriminate **[***511]** *in favor of or against* a person because of his race, his religion, or his national origin. In such matters . . . the bill now before us . . . is color-blind." *Id.*, at 6564 (emphasis added).

[*239] A few days later the Senate's attention focused exclusively on Title VII, as Senators Clark and Case rose to discuss the title of H. R. 7152 on which they shared floor "captain" responsibilities. In an interpretative memorandum submitted jointly to the Senate, Senators Clark and Case took pains to refute the opposition's charge that Title VII would result in preferential treatment of minorities. Their words were clear and unequivocal:

"There is no requirement in title VII that an employer maintain a racial balance in his work force. On the **[****72]** contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual." *Id.*, at 7213. [18] **[****74]**

Employment Opportunity Commission that would be created would have no powers to order anything . . . .

". . . The bill would not authorize anyone to order hiring or firing to achieve racial or religious balance. An employer will remain wholly free to hire on the basis of his needs and of the job candidate's qualifications. What is prohibited is the refusal to hire someone because of his race or religion. Similarly, the law will have no effect on union seniority rights." *Id.*, at 5094.

[18] In obvious reference to the charge that the word "discrimination" in Title VII would be interpreted by federal agencies to mean the absence of racial balance, the interpretative memorandum stated:

"[Section 703] prohibits discrimination in employment because of race, color, religion, sex, or national origin. It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment *or favor*, and those distinctions or differences in treatment *or favor* which are prohibited by [Section 703] are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin." *Id.*, at 7213 (emphasis added).

Earlier in his speech, Senator Clark introduced a memorandum prepared at his request by the Justice Department with the purpose of responding to criticisms of Title VII leveled by opponents of the measure, particularly Senator Hill. With regard to racial balance, the Justice Department stated:

[*240] Of particular relevance to the instant litigation were their observations regarding seniority rights. As if directing their comments at Brian Weber, the Senators said:

"Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, **[**2746]** for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged -- *or indeed permitted* -- to fire whites in order to hire Negroes, *or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of* **[***512]** *the white workers hired earlier." Ibid.* (emphasis added). **[****73]** [19]

"Finally, it has been asserted that title VII would impose a requirement for 'racial balance.' This is incorrect. There is no provision . . . in title VII . . . that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance. . . . No employer is required to maintain any ratio of Negroes to whites . . . . On the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoul of Title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What title VII seeks to accomplish, what the civil rights bill seeks to accomplish is equal treatment for all." *Id.*, at 7207.

[19] A Justice Department memorandum earlier introduced by Senator Clark, see n. 18, *supra*, expressed the same view regarding Title VII's impact on seniority rights of employees:

"Title VII would have no effect on seniority rights existing at the time it takes effect. . . . This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. . . . [Assuming] that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of Title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race." 110 Cong. Rec. 7207 (1964).

The interpretation of Title VII contained in the memoranda introduced by Senator Clark totally refutes the Court's implied suggestion that Title VII would prohibit an employer from discriminating on the basis of race in order to *maintain* a racial balance in his work force, but would permit him to do so in order to *achieve* racial balance. See *ante*, at 208, and n. 7.

The maintain-achieve distinction is analytically indefensible in any event. Apparently, the Court is saying that an employer is free to *achieve* a racially balanced work force by discriminating against whites, but that once he has reached his goal, he is no longer free to discriminate in order to maintain that racial balance. In other words, once Kaiser reaches its goal of 39% minority representation in craft positions at the Gramercy plant, it can no longer consider race in admitting employees into its on-the-job training programs, even if the programs become as "all-white" as they were in April 1974.

[**75]** **[*241]** Thus, with virtual clairvoyance the Senate's leading supporters of Title VII anticipated precisely the circumstances of this case and advised their colleagues that the type of minority preference employed by Kaiser would violate Title VII's ban on racial discrimination. To further accentuate the point, Senator Clark introduced another memorandum dealing with common criticisms of the bill, including the charge that racial quotas would be imposed under Title VII. The answer was simple and to the point: "Quotas are themselves discriminatory." *Id.*, at 7218.

Despite these clear statements from the bill's leading and most knowledgeable proponents, the fears of the opponents **[*242]** were not put to rest. Senator Robertson reiterated the view that "discrimination" could be interpreted by a federal "bureaucrat" to require hiring quotas. *Id.*, at 7418-7420. [20] Senators Smathers and **[***513]** Sparkman, while conceding that Title VII does not in so many words require the use of hiring quotas, repeated the opposition's view that employers **[**2747]** would be coerced to grant preferential hiring treatment to minorities by agencies of the Federal

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Obviously, the Court is driven to this illogical position by the glaring statement, quoted in text, of Senators Clark and Case that "any deliberate attempt to *maintain* a racial balance . . . would involve a violation of title VII because *maintaining* such a balance would require an employer to hire or to refuse to hire on the basis of race." 110 Cong. Rec. 7213 (1964) (emphasis added). Achieving a certain racial balance, however, no less than maintaining such a balance, would require an employer to hire or to refuse to hire on the basis of race. Further, the Court's own conclusion that Title VII's legislative history, coupled with the wording of § 703 (j), evinces a congressional intent to leave employers free to employ "private, voluntary, race-conscious affirmative action plans," *ante*, at 208, is inconsistent with its maintain-achieve distinction. If Congress' primary purpose in enacting Title VII was to open employment opportunities previously closed to Negroes, it would seem to make little difference whether the employer opening those opportunities was achieving or maintaining a certain racial balance in his work force. Likewise, if § 703 (j) evinces Congress' intent to permit imposition of race-conscious affirmative action plans, it would seem to make little difference whether the plan was adopted to achieve or maintain the desired racial balance.

[20] Senator Robertson's observations prompted Senator Humphrey to make the following offer: "If the Senator can find in title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color . . . I will start eating the pages one after another, because it is not in there." 110 Cong. Rec. 7420 (1964).

Government. [21] **[****78]** Senator **[****76]** Williams was quick to respond:

"Those opposed to H. R. 7152 should realize that to hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy. Both forms of discrimination are prohibited by Title VII of this bill. The language of that title simply states that race is not a qualification for employment. . . . Some people charge that H. R. 7152 favors the Negro, at the expense of the white majority. But how can the language of equality favor one race or one religion over another? Equality can have only one meaning, and that meaning is self-evident to reasonable men. Those who say that equality means favoritism do violence to common sense." *Id.*, at 8921.

[*243] Senator Williams concluded his remarks by noting that Title VII's only purpose is "the elimination of racial and religious discrimination in employment." *Ibid.* [22] On May 25, Senator Humphrey again took the floor to defend the bill against "the well-financed drive by certain opponents to confuse and mislead the American people." *Id.*, at 11846. Turning once again to the issue of preferential treatment, Senator Humphrey remained faithful to the **[****77]** view that he had repeatedly expressed:

"The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, *the title would prohibit preferential treatment for any particular group*, and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices." *Id.*, at 11848 (emphasis added).

While the debate in the Senate raged, a bipartisan coalition under the leadership of Senators Dirksen, Mansfield, Humphrey, and Kuchel was working with House leaders and representatives of the Johnson administration on a number of amendments to H. R. 7152 designed to enhance **[***514]** its prospects of passage. The so-called "Dirksen-Mansfield" amendment was introduced on May 26 by Senator Dirksen as a substitute for the entire House-passed bill. The substitute bill, which ultimately became law, left unchanged the basic prohibitory language of §§ 703 (a) and (d), as well as the remedial provisions in § 706 (g). It added, however, several provisions defining and clarifying the scope of Title VII's substantive prohibitions. **[*244]** One of those clarifying **[****79]** amendments, § 703 (j), was specifically directed at the opposition's concerns regarding racial balancing and preferential treatment of minorities, providing in pertinent part: "Nothing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of" a racial imbalance in the employer's work force. *42 U. S. C. § 2000e-2 (j)*; quoted in full in n. 8, *supra*.

The Court draws from the language of § 703 (j) primary support for its conclusion that Title VII's blanket prohibition on racial **[**2748]** discrimination in employment does not prohibit preferential treatment of blacks to correct racial imbalance. Alleging that opponents of Title VII had argued (1) that the Act would be interpreted to require employers with racially imbalanced work forces to grant preferential treatment to minorities and (2) that "employers with racially imbalanced work forces would grant preferential treatment to racial minorities, even if not required to do so by the Act," *ante*, at 205, the Court concludes that § 703 (j) is responsive only to the opponents' **[****80]** first objection and that Congress therefore must have intended to permit voluntary, private discrimination against whites in order to correct racial imbalance.

Contrary to the Court's analysis, the language of § 703 (j) is precisely tailored to the objection voiced time and again by Title VII's opponents. Not once during the 83 days of debate in the Senate did a speaker, proponent or opponent, suggest that the bill would allow employers *voluntarily* to prefer racial minorities over white persons. [23] **[****82]** In light of Title

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[21] Referring to the EEOC, Senator Smathers argued that Title VII "would make possible the creation of a Federal bureaucracy which would, in the final analysis, cause a man to hire someone whom he did not want to hire, not on the basis of ability, but on the basis of religion, color, or creed . . . ." *Id.*, at 8500. Senator Sparkman's comments were to the same effect. See n. 23, *infra*. Several other opponents of Title VII expressed similar views. See 110 Cong. Rec. 9034-9035 (1964) (remarks of Sens. Stennis and Tower); *id.*, at 9943-9944 (remarks of Sens. Long and Talmadge); *id.*, at 10513 (remarks of Sen. Robertson).

[22] Several other proponents of H. R. 7152 commented briefly on Title VII, observing that it did not authorize the imposition of quotas to correct racial imbalance. See *id.*, at 9113 (remarks of Sen. Keating); *id.*, at 9881-9882 (remarks of Sen. Allott); *id.*, at 10520 (remarks of Sen. Carlson); *id.*, at 11776 (remarks of Sen. McGovern).

[23] The Court cites the remarks of Senator Sparkman in support of its suggestion that opponents had argued that employers would take it upon themselves to balance their work forces by granting preferential treatment to racial minorities. In fact, Senator Sparkman's comments accurately reflected the opposition's "party line." He argued that while the language of Title VII does not expressly require imposition of racial quotas (no one, of course, had ever argued to the contrary), the law would be applied by federal

[*515]** VII's flat **[*245]** prohibition on discrimination "against any individual . . . because of such individual's race," § 703 (a), *42 U. S. C. § 2000e-2 (a)*, such a contention would have been, in any event, too preposterous to warrant response. Indeed, speakers on both sides of the issue, as the legislative history makes clear, recognized that Title VII would tolerate no *voluntary* racial preference, whether in favor of blacks or whites. The complaint consistently voiced by the opponents was that Title VII, particularly the word "discrimination," would be *interpreted* by federal agencies such as the EEOC to *require* the **[*246]** correction of **[****81]** racial imbalance through the granting of preferential treatment to minorities. Verbal assurances that Title VII would not require -- indeed, would not permit -- preferential treatment of blacks having failed, supporters of H. R. 7152 responded by proposing an amendment carefully worded to meet, and put to rest, the opposition's charge. Indeed, unlike §§ 703 (a) and (d), which are by their terms directed at entities -- *e. g.*, employers, labor unions -- whose actions are restricted by Title VII's prohibitions, the language of § 703 (j) is specifically directed at entities -- federal agencies and courts -- charged with **[**2749]** the responsibility of interpreting Title VII's provisions. [24]

In light of the background and purpose of § 703 (j), the irony of invoking the section to justify the result in this case is obvious. The Court's frequent references to the "voluntary" nature of Kaiser's racially discriminatory admission quota bear no relationship to the facts of this case. Kaiser and the Steelworkers acted under pressure from an agency of the Federal Government, the Office of Federal Contract Compliance, which found that minorities were being "underutilized" at Kaiser's plants. See n. 2, *supra*. That is, Kaiser's work force was racially imbalanced. Bowing to that pressure, Kaiser instituted an admissions quota preferring blacks over whites, thus confirming that the fears of Title VII's opponents were well founded. Today, § 703 (j), adopted to allay those fears, is invoked by the Court to uphold imposition of a racial quota under the very circumstances **[****83]** that the section was intended to prevent. [25]

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agencies in such a way that "some kind of quota system will be used." *Id.*, at 8619. Senator Sparkman's view is reflected in the following exchange with Senator Stennis:

"Mr. SPARKMAN. At any rate, when the Government agent came to interview an employer who had 100 persons in his employ, the first question would be, 'How many Negroes are you employing?' Suppose the population of that area was 20 percent Negro. Immediately the agent would say, 'You should have at least 20 Negroes in your employ, and they should be distributed among your supervisory personnel and in all the other categories'; and the agent would *insist* that that be done immediately.

. . . .

"Mr. STENNIS. . . .

"The Senator from Alabama has made very clear his point about employment on the quota basis. Would not the same basis be applied to promotions?

"Mr. SPARKMAN. Certainly it would. As I have said, when the Federal agents came to check on the situation in a small business which had 100 employees, and when the agents said to the employer, 'You must hire 20 Negroes, and some of them must be employed in supervisory capacities,' and so forth, and so on, the agent would also say, 'And you must promote the Negroes, too, in order to distribute them evenly among the various ranks of your employees.'" *Id.*, at 8618 (emphasis added).

Later in his remarks, Senator Sparkman stated: "Certainly the suggestion will be made to a small business that may have a small Government contract . . . that if it does not carry out the suggestion that has been made to the company by an inspector, its Government contract will not be renewed." *Ibid.* Except for the size of the business, Senator Sparkman has seen his prophecy fulfilled in this case.

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[24] Compare § 703 (a), *42 U. S. C. § 2000e-2 (a)* ("It shall be an unlawful employment practice for an employer . . ."), with § 703 (j), *42 U. S. C. § 2000e-2 (j)* ("Nothing contained in this subchapter shall be interpreted . . .").

[25] In support of its reading of § 703 (j), the Court argues that "a prohibition against all voluntary, race-conscious, affirmative action efforts would disserve" the important policy, expressed in the House Report on H. R. 7152, that Title VII leave "management prerogatives, and union freedoms . . . undisturbed to the greatest extent possible." H. R. Rep., pt. 2, p. 29, quoted *ante*, at 206. The Court thus concludes that "Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action." *Ante*, at 207.

The sentences in the House Report immediately following the statement quoted by the Court, however, belie the Court's conclusion:

"Internal affairs of employers and labor organizations must not be interfered with *except to the limited extent that correction is required in discrimination practices*. Its primary task is to make certain that the channels of employment are open to persons *regardless of their race* and that jobs in companies or membership in unions are strictly filled on the basis of qualification." H. R. Rep., pt. 2, p. 29 (emphasis added).

Thus, the House Report invoked by the Court is perfectly consistent with the countless observations elsewhere in Title VII's voluminous legislative history that employers are free to make employment decisions without governmental interference, so long as those decisions are made *without regard to race*. The whole purpose of

[**84]** **[*247]** Section **[***516]** 703 (j) apparently calmed the fears of most of the opponents; after its introduction, complaints concerning racial balance and preferential treatment died down considerably. [26] **[****85]** Proponents of the bill, however, continued to reassure the opposition that its concerns were unfounded. In a lengthy defense of the entire civil rights bill, Senator Muskie emphasized that the opposition's "torrent of words . . . cannot obscure this basic, simple truth: Every American citizen has the right to equal treatment -- not favored treatment, not complete **[*248]** individual equality – just equal treatment." 110 Cong. Rec. 12614 (1964). With particular reference to Title VII, Senator Muskie noted that the measure "seeks to afford to all Americans equal opportunity in employment without discrimination. Not equal pay. Not 'racial balance.' Only equal opportunity." *Id.*, at 12617. [27]

Senator **[**2750]** Saltonstall, Chairman of the Republican Conference of Senators participating in the **[****86]** drafting of the Dirksen-Mansfield amendment, spoke at length on the substitute bill. He advised the Senate that the Dirksen-Mansfield substitute, which included § 703 (j), "provides no preferential treatment for any group of citizens. In fact, *it specifically prohibits* **[***517]** *such treatment.*" 110 Cong. Rec. 12691 (1964) (emphasis added). [28]

[**87]** **[*249]** On June 9, Senator Ervin offered an amendment that would entirely delete Title VII from the bill. In answer to Senator Ervin's contention that Title VII "would make the members of a particular race special favorites of the laws," *id.*, at 13079, Senator Clark retorted:

"The bill does not make anyone higher than anyone else. It establishes no quotas. It leaves an employer free to select whomever he wishes to employ. . . .

"All this is subject to one qualification, and that qualification, is to state: 'In your activity as an employer . . . you must not discriminate because of the color of a man's skin . . . ."

"That is all this provision does. . . .

"It merely says, 'When you deal in interstate commerce, you must not discriminate on the basis of race . . . .'" *Id.*, at 13080.

The Ervin amendment was defeated, and the Senate turned its attention to an amendment proposed by Senator Cotton to limit application of Title VII to employers of at least 100 employees. During the course of the Senate's deliberations on the amendment, Senator Cotton had a revealing discussion with Senator Curtis, also an opponent of Title VII. Both men expressed dismay that Title VII would **[****88]** prohibit preferential hiring of "members of a minority race in order to enhance their opportunity":

"Mr. CURTIS. Is it not the opinion of the Senator that any individuals who provide jobs for a class of people who have perhaps not had sufficient opportunity for jobs should be commended rather than outlawed?

Title VII was to deprive employers of their "traditional business freedom" to discriminate on the basis of race. In this case, the "channels of employment" at Kaiser were hardly "open" to Brian Weber.

[26] Some of the opponents still were not satisfied. For example, Senator Ervin of North Carolina continued to maintain that Title VII "would give the Federal Government the power to go into any business or industry in the United States . . . and tell the operator of that business whom he had to hire." 110 Cong. Rec. 13077 (1964). Senators Russell and Byrd remained of the view that pressures exerted by federal agencies would compel employers "to give priority definitely and almost completely, in most instances, to the members of the minority group." *Id.*, at 13150 (remarks of Sen. Russell).

[27] Senator Muskie also addressed the charge that federal agencies would equate "discrimination," as that word is used in Title VII, with "racial balance":

"[Some] of the opposition to this title has been based upon its alleged vagueness [and] its failure to define just what is meant by discrimination . . . . I submit that, on either count, the opposition is not well taken. Discrimination in this bill means just what it means anywhere: a distinction in treatment given to different individuals because of their race . . . [and], as a practical matter, we all know what constitutes racial discrimination." *Id.*, at 12617.

Senator Muskie then reviewed the various provisions of § 703, concluding that they "provide a clear and definite indication of the type of practice which this title seeks to eliminate. Any serious doubts concerning [Title VII's] application would, it seems to me, stem at least partially from the predisposition of the person expressing such doubt." 110 Cong. Rec. 12618 (1964).

[28] The Court states that congressional comments regarding § 703 (j) "were all to the effect that employers would not be *required* to institute preferential quotas to avoid Title VII liability." *Ante*, at 207 n. 7 (emphasis in original). Senator Saltonstall's statement that Title VII of the Dirksen-Mansfield substitute, which contained § 703 (j), "specifically prohibits" preferential treatment for any racial group disproves the Court's observation. Further, in a major statement explaining the purpose of the Dirksen-Mansfield substitute amendments, Senator Humphrey said of § 703 (j): "This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning." 110 Cong. Rec. 12723 (1964). What Senator Humphrey had "maintained all along about the bill's intent and meaning," was that it neither required *nor permitted* imposition of preferential quotas to eliminate racial imbalances.

[*250] "Mr. COTTON. Indeed it is." *Id.*, at 13086. [29]

[*518]** **[**2751]** Thus, in the only exchange on the Senate floor raising the possibility that an employer might wish to reserve jobs for minorities in order to assist them in overcoming their employment disadvantage, both speakers concluded that Title VII prohibits such, in the words of the Court, "voluntary, private, race-conscious efforts to abolish traditional patterns of racial **[*251]** segregation and hierarchy." *Ante*, at 204. Immediately after this discussion, both Senator Dirksen and Senator Humphrey took the floor in defense of the 25-employee limit contained in the Dirksen-Mansfield substitute bill, and neither Senator disputed the conclusions of Senators Cotton and Curtis. The Cotton amendment was defeated.

[**89]** 3

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[29] The complete exchange between Senators Cotton and Curtis, insofar as is pertinent here, is as follows:

"Mr. COTTON. . . .

. . . .

"I would assume that anyone who will administer the laws in future years will not discriminate between the races. If I were a Negro, and by dint of education, training, and hard work I had amassed enough property as a Negro so that I had a business of my own – and there are many of them in this country -- and I felt that, having made a success of it myself, I wanted to help people of my own race to step up as I had stepped up, I think I should have the right to do so. I think I should have the right to employ Negroes in my own establishment and put out a helping hand to them if I so desired. I do not believe that anyone in Washington should be permitted to come in and say, 'You cannot employ all Negroes. You must have some Poles. You must have some Yankees.' . . .

. . . .

"Mr. CURTIS. . . .

"The Senator made reference to the fact that a member of a minority race might become an employer and should have a right to employ members of his race in order to give them opportunity. Would not the same thing follow, that a member of a majority race might wish to employ almost entirely, or entirely, members of a minority race in order to enhance their opportunity? And is it not true that under title VII as written, that would constitute discrimination?

"Mr. COTTON. It certainly would, if someone complained about it and felt that he had been deprived of a job, and that it had been given to a member of a minority race because of his race and not because of some other reason." *Id.*, at 13086.

This colloquy refutes the Court's statement that "[there] was no suggestion after the adoption of § 703 (j) that wholly voluntary, race-conscious, affirmative action efforts would in themselves constitute a violation of Title VII." *Ante*, at 207 n. 7.

On June 10, the Senate, for the second time in its history, imposed cloture on its Members. The limited debate that followed centered on proposed amendments to the Dirksen-Mansfield substitute. Of some 24 proposed amendments, only 5 were adopted.

As the civil rights bill approached its final vote, several supporters rose to urge its passage. Senator Muskie adverted briefly to the issue of preferential treatment: "It has been said that the bill discriminates in favor of the Negro at the expense of the rest of us. It seeks to do nothing more than to lift the Negro from the status of inequality to one of *equality* of treatment." 110 Cong. Rec. 14328 (1964) (emphasis added). Senator Moss, in a speech delivered on the day that the civil rights bill was finally passed, had this to say about quotas:

"The bill does not accord to any citizen advantage or preference – it does not fix quotas of employment or school population -- it does not force personal association. What it does is to prohibit public officials and those who invite the public generally to patronize their businesses or to apply for employment, to utilize the offensive, humiliating, and cruel practice of discrimination **[****90]** on the basis of race. In short, the bill does not accord special consideration; it establishes *equality." Id.*, at 14484 (emphasis added).

Later that day, June 19, the issue was put to a vote, and the Dirksen-Mansfield substitute bill was passed.

[*252] C

The Act's return engagement in the House was brief. The House Committee on Rules reported the Senate version without amendments on June 30, 1964. By a vote of 289 to 126, the House adopted H. Res. 789, thus agreeing to the Senate's **[***519]** amendments of H. R. 7152. [30] Later that same day, July **[**2752]** 2, the President signed the bill and the Civil Rights Act of 1964 became law.

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[30] Only three Congressmen spoke to the issue of racial quotas during the House's debate on the Senate amendments. Representative Lindsay stated: "[We] wish to emphasize also that this bill does not require quotas, racial balance, or any of the other things that the opponents have been saying about it." 110 Cong. Rec. 15876 (1964). Representative McCulloch echoed this understanding, remarking that "[the] bill does not permit the Federal Government to require an employer or union to hire or accept for membership a quota of persons from any particular minority group." *Id.*, at 15893. The remarks of Representative MacGregor, quoted by the Court, *ante*, at 207-208, n. 7, are singularly unhelpful. He merely noted that by adding § 703 (j) to Title VII of the House bill, "[the] Senate . . . spelled out [the House's] intentions more specifically." 110 Cong. Rec. 15893 (1964).

[**91]** IV

Reading the language of Title VII, as the Court purports to do, "against the background of [its] legislative history . . . and the historical context from which the Act arose," *ante*, at 201, one is led inescapably to the conclusion that Congress fully understood what it was saying and meant precisely what it said. Opponents of the civil rights bill did not argue that employers would be permitted under Title VII voluntarily to grant preferential treatment to minorities to correct racial imbalance. The plain language of the statute too clearly prohibited such racial discrimination to admit of any doubt. They argued, tirelessly, that Title VII would be interpreted by federal agencies and their agents to require unwilling employers to racially balance their work forces by granting preferential treatment to minorities. Supporters of H. R. 7152 **[*253]** responded, equally tirelessly, that the Act would not be so interpreted because not only does it not require preferential treatment of minorities, it also does not *permit* preferential treatment of any race for any reason. It cannot be doubted that the proponents of Title VII understood the meaning of their words, for "[seldom] **[****92]** has similar legislation been debated with greater consciousness of the need for 'legislative history,' or with greater care in the making thereof, to guide the courts in interpreting and applying the law." Title VII: Legislative History, at 444.

To put an end to the dispute, supporters of the civil rights bill drafted and introduced § 703 (j). Specifically addressed to the opposition's charge, § 703 (j) simply enjoins federal agencies and courts from interpreting Title VII to require an employer to prefer certain racial groups to correct imbalances in his work force. The section says nothing about voluntary preferential treatment of minorities because such racial discrimination is plainly proscribed by §§ 703 (a) and (d). Indeed, had Congress intended to except voluntary, race-conscious preferential treatment from the blanket prohibition of racial discrimination in §§ 703 (a) and (d), it surely could have drafted language better suited to the task than § 703 (j). It knew how. Section 703 (i) provides:

"Nothing contained in [Title VII] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such **[****93]** business or enterprise under which a preferential treatment is given to any individual **[***520]** because he is an Indian living on or near a reservation." 78 Stat. 257, *42 U. S. C. § 2000e-2 (i)*.

V

Our task in this case, like any other case involving the construction of a statute, is to give effect to the intent of Congress. To divine that intent, we traditionally look first to the **[*254]** words of the statute and, if they are unclear, then to the statute's legislative history. Finding the desired result hopelessly foreclosed by these conventional sources, the Court turns to a third source -- the "spirit" of the Act. But close examination of what the Court proffers as the spirit of the Act reveals it as the spirit animating the present majority, not the 88th Congress. For if the spirit of the Act eludes the cold words of the statute itself, it rings out with unmistakable clarity in the words of the elected representatives who made the Act law. It is *equality*. Senator Dirksen, I think, captured that spirit in a speech delivered on the floor of the Senate just moments before the bill was passed:

". . . [Today] we come to grips finally with a bill that advances the enjoyment **[****94]** of living; but, more than that, it advances the equality of opportunity.

"I do not emphasize the word 'equality' standing by itself. It means equality of opportunity in the field of education. It means equality of opportunity in the field of employment. It means equality of opportunity in the field of participation in the affairs of government . . . .

[2753]** "That is it.

"Equality of opportunity, if we are going to talk about conscience, is the mass conscience of mankind that speaks in every generation, and it will continue to speak long after we are dead and gone." 110 Cong. Rec. 14510 (1964).

There is perhaps no device more destructive to the notion of equality than the *numerus clausus* -- the quota. Whether described as "benign discrimination" or "affirmative action," the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another. In passing Title VII, Congress outlawed *all* racial discrimination, recognizing that no discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative. With today's holding, the Court introduces into **[*255]** Title VII a tolerance **[****95]** for the very evil that the law was intended to eradicate, without offering even a clue as to what the limits on that tolerance may be. We are told simply that Kaiser's racially discriminatory admission quota "falls on the permissible side of the line." *Ante*, at 208. By going not merely *beyond*, but directly *against* Title VII's language and legislative history, the Court has sown the wind. Later courts will face the impossible task of reaping the whirlwind.

References

15 Am Jur 2d, Civil Rights 98, *137*, *209*

2 Am Jur Proof of Facts 2d 187, Racial Discrimination in Employment (In General; Use of Statistics); 4 Am Jur Proof of Facts 2d 477, Racial Discrimination in Employment-Post Hiring Practices

21 Am Jur Trials 1, Employment Discrimination Action Under Federal Civil Rights Acts

42 USCS 2000e-2

FRES, Job Discrimination 2:16

US L Ed Digest, Civil Rights 7.5

L Ed Index to Annos, Civil Rights; Discrimination; Labor and Employment

ALR Quick Index, Discrimination

Federal Quick Index, Civil Rights; Fair Employment Practices

Annotation References:

[**96]** Racial discrimination in labor and employment. *28 L Ed 2d 928*.

Race discrimination . *94 L Ed 1121*; *96 L Ed 1291*; *98 L Ed 882*; *100 L Ed 488*; *3 L Ed 2d 1556*; *6 L Ed 2d 1302*; *10 L Ed 2d 105*; *15 L Ed 2d 990*; *21 L Ed 2d 915*.

What constitutes reverse or majority discrimination on basis of sex or race violative of Federal Constitution or statute. *26 ALR Fed 13*.

Fair employment statutes designed to eliminate racial, religious, or national origin discrimination in private employment. *44 ALR2d 1138*.

End of Document

Johnson v. Transportation Agency

Supreme Court of the United States

November 12, 1986, Argued ; March 25, 1987, Decided

No. 85-1129

Reporter
480 U.S. 616 *; 107 S. Ct. 1442 **; 94 L. Ed. 2d 615 ***; 1987 U.S. LEXIS 1387 ****; 55 U.S.L.W. 4379; 43 Fair Empl. Prac. Cas. (BNA) 411; 42 Empl. Prac. Dec. (CCH) P36,831

JOHNSON v. TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, ET AL.

Subsequent History: As Amended.

Prior History: **[****1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Disposition: *770 F.2d 752*, affirmed.

Case Summary

Procedural Posture

Respondent agency, pursuant to its affirmative action plan, passed over petitioner male employee and promoted a female employee. The male employee filed suit under Title VII of the Civil Rights Act of 1964 (act), *42 U.S.C.S. § 2000e et seq.* The United States Court of Appeals for the Ninth Circuit reversed the district court, which had held that the promotion violated the act. The male employee appealed.

Overview

The agency noted in its plan that women were represented in numbers far less than their proportion of the county labor force in both the agency as a whole and in five of seven job categories. The male employee argued that he was more qualified than the female employee, and, thus, the promotion violated Title VII. The Court affirmed the judgment of reversal. In so doing, the Court held that (1) the agency appropriately took into account as one factor the sex of the female employee in determining that she should have been promoted to the road dispatcher position; (2) the decision to do so was made pursuant to an affirmative action plan that represented a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the agency's work force; and (4) such a plan was fully consistent with Title VII, for it embodied the contribution that voluntary employer action could make in eliminating the vestiges of discrimination in the workplace.

Outcome

The judgment of reversal by the court of appeals was affirmed.

Syllabus

In 1978, an Affirmative Action Plan (Plan) for hiring and promoting minorities and women was voluntarily adopted by respondent Santa Clara County Transportation Agency (Agency). The Plan provides, *inter alia*, that in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented, the Agency is authorized to consider as one factor the sex of a qualified applicant. The Plan is intended to achieve a statistically measurable yearly improvement in hiring and promoting minorities and women in job classifications where they are underrepresented, and the long-term goal is to attain a work force whose composition reflects the proportion of minorities and women in the area labor force. The Plan sets aside no specific number of positions for minorities or women, but requires that short-range goals be established and annually adjusted to serve as the most realistic guide for actual employment decisions. When the Agency announced a vacancy for the promotional position of road dispatcher, none of the **[****2]** 238 positions in the pertinent Skilled Craft Worker job classification, which included the dispatcher position, was held by a woman. The qualified applicants for the position were interviewed and the Agency, pursuant to the Plan, ultimately passed over petitioner, a male employee, and promoted a female, Diane Joyce, both of whom were rated as well qualified for the job. After receiving a right-to-sue letter from the Equal Employment Opportunity Commission, petitioner filed suit in Federal District Court, which held that the Agency had violated Title VII of the Civil Rights Act of 1964. The court found that Joyce's sex was the determining factor in her selection and that the Agency's Plan was invalid under the criterion announced in *Steelworkers v. Weber, 443 U.S. 193*, that the Plan be temporary. The Court of Appeals reversed.

Held: The Agency appropriately took into account Joyce's sex as one factor in determining that she should be promoted. The Agency's Plan represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force, and is fully consistent with **[****3]** Title VII. Pp. 626-640.

(a) Petitioner bears the burden of proving that the Agency's Plan violates Title VII. Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision, such as the existence of an affirmative action plan. The burden then shifts to the plaintiff to prove that the plan is invalid and that the employer's justification is pretextual. Pp. 626-627.

(b) Assessment of the legality of the Agency's Plan must be guided by the decision in *Weber*. An employer seeking to justify the adoption of an affirmative action plan need not point to its own prior discriminatory practices, but need point only to a conspicuous imbalance in traditionally segregated job categories. Voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and Title VII should not be read to thwart such efforts. Pp. 627-630.

(c) The employment decision here was made pursuant to a plan prompted by concerns similar to those of the employer in *Weber, supra.* **[****4]** Consideration of the sex of applicants for skilled craft jobs was justified by the existence of a "manifest imbalance" that reflected underrepresentation of women in "traditionally segregated job categories." *Id., at 197*. Where a job requires special training, the comparison for determining whether an imbalance exists should be between the employer's work force and those in the area labor force who possess the relevant qualifications. If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would improperly dictate mere blind hiring by the numbers. However, the Agency's Plan did not authorize such blind hiring, but expressly directed that numerous factors be taken into account in making employment decisions, including specifically the number of female applicants qualified for particular jobs. Thus, despite the fact that no precise short-term goal was yet in place for the Skilled Craft Worker job category when Joyce was promoted, the Agency's management had been clearly instructed that they were not to hire solely by reference to statistics. The fact that only the long-term goal had been **[****5]** established for the job category posed no danger that personnel decisions would be made by reflexive adherence to a numerical standard. Pp. 631-637.

(d) The Agency Plan did not unnecessarily trammel male employees' rights or create an absolute bar to their advancement. The Plan sets aside no positions for women, and expressly states that its goals should not be construed as "quotas" that must be met. Denial of the promotion to petitioner unsettled no legitimate, firmly rooted expectation on his part, since the Agency Director was authorized to select any of the seven applicants deemed qualified for the job. Express assurance that a program is only temporary may be necessary if the program actually sets aside positions according to specific numbers. However, substantial evidence shows that the Agency has sought to take a moderate, gradual approach to eliminating the imbalance in its work force, one which establishes realistic guidance for employment decisions, and which visits minimal intrusion on the legitimate expectations of other employees. Given this fact, as well as the Agency's express commitment to "attain" a balanced work force, there is ample assurance that the Agency **[****6]** does not seek to use its Plan to "maintain" a permanent racial and sexual balance. Pp. 637-640.

Counsel: Constance E. Brooks argued the cause for petitioner. With her on the briefs was James L. Dawson.

Steven Woodside argued the cause for respondents. With him on the brief for respondent Transportation Agency, Santa Clara County, California, were Ann Miller Ravel, James Rumble, and Morris J. Baller. David A. Rosenfeld filed a brief for respondent Service Employees International Union Local 715. *

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* Briefs of amici curiae urging reversal were filed for the United States by Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Solicitor General Ayer, Deputy Assistant Attorney General Carvin, Roger Clegg, and David K. Flynn; for the Mid-Atlantic Legal Foundation by Richard B. McGlynn and Douglas Foster; and for the Pacific Legal Foundation et al. by Ronald A. Zumbrun, John H. Findley, and Anthony T. Caso.

Briefs of amici curiae urging affirmance were filed for the State of California et al. by John K. Van de Kamp, Attorney General, Andrea Sheridan Ordin, Chief Assistant Attorney General, Marian M. Johnston, Supervising Deputy Attorney General, Beverly Tucker, Deputy Attorney General, Jim Jones, Attorney General of Idaho, William J. Guste, Jr., Attorney General of Louisiana, Stephen H. Sachs, Attorney General of Maryland, Frank J. Kelley, Attorney General of Michigan, Hubert H. Humphrey III, Attorney General of Minnesota, Robert M. Spire, Attorney General of Nebraska, Robert Abrams, Attorney General of New York, David Frohnmayer, Attorney General of Oregon, Bronson C. La Follette, Attorney General of Wisconsin, and Elisabeth S. Shuster; for the American Federation of Labor and Congress of Industrial Organizations by David Silberman and Laurence Gold; for the American Society for

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Judges: BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, post, p. 642. O'CONNOR, J., filed an opinion concurring in the judgment, post, p. 647. WHITE, J., filed a dissenting opinion, post, p. 657. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, and in Parts I and II of which WHITE, J., joined, post, p. 657.

Opinion by: BRENNAN

Opinion

[*619] **[***623]** **[**1445]** JUSTICE BRENNAN delivered the opinion of the Court.

[1A]Respondent, Transportation Agency of Santa Clara County, California, unilaterally promulgated an Affirmative Action Plan applicable, *inter alia*, to promotions of employees. In selecting applicants for the promotional position of road dispatcher, the Agency, pursuant to the Plan, passed over petitioner Paul Johnson, a male employee, and promoted a female employee applicant, Diane Joyce. The question for decision is whether in making the promotion the Agency impermissibly took into account the sex of the applicants in violation of Title VII of the Civil Rights Act of 1964, *42 U. S. C. § 2000e et seq.* [1] **[****9]** The District Court for the **[*620]** Northern District **[****8]** of California, in an action filed by petitioner following receipt of a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC), held that respondent had violated Title VII. App. to Pet. for Cert. 1a. The Court of Appeals for the Ninth Circuit reversed. *770 F.2d 752 (1985)*. We granted certiorari, *478 U.S. 1019* ***[**1446]*** *(1986)*. We affirm. [2]

I

A

In December 1978, the Santa Clara County Transit District Board of Supervisors adopted an Affirmative Action Plan (Plan) for the County Transportation Agency. The Plan implemented a County Affirmative Action Plan, which had been adopted, declared the County, because "mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable **[***624]** representation of minorities, women and handicapped persons." App. 31. [3] Relevant to this case, the Agency Plan provides that, in making promotions to positions within a traditionally segregated **[****10]** job classification in which women have **[*621]** been significantly underrepresented, the Agency is authorized to consider as one factor the sex of a qualified applicant.

In reviewing the composition of its work force, the Agency noted in its Plan that women were represented in numbers far less than their proportion of the County labor force in both the Agency as a whole and in five of seven job categories. Specifically, while women constituted 36.4% of the area labor market, they composed only 22.4% of Agency employees. Furthermore, women working at the Agency were

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Briefs of amici curiae were filed for the Equal Employment Advisory Council by Robert E. Williams, Douglas S. McDowell, and Thomas R. Bagby; for the city of Detroit et al. by Daniel B. Edelman, James R. Murphy, Charles L. Reischel, Frederick N. Merkin, and Robert Cramer; and for the Lawyers' Committee for Civil Rights Under Law et al. by Harold R. Tyler, Jr., James Robertson, Norman Redlich, William L. Robinson, Richard T. Seymour, James D. Crawford, Antonia Hernandez, Grover G. Hankins, and Kenneth Kimerling.

[1] Section 703(a) of the Act, 78 Stat. 255, as amended, 86 Stat. 109, *42 U. S. C. § 2000e-2(a)*, provides that it "shall be an unlawful employment practice for an employer --

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[2] No constitutional issue was either raised or addressed in the litigation below. See *770 F.2d 752, 754, n. 1 (1985)*. We therefore decide in this case only the issue of the prohibitory scope of Title VII. Of course, where the issue is properly raised, public employers must justify the adoption and implementation of a voluntary affirmative action plan under the *Equal Protection Clause*. See *Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)*.

[3] The Plan reaffirmed earlier County and Agency efforts to address the issue of employment discrimination, dating back to the County's adoption in 1971 of an Equal Employment Opportunity Policy. App. 37-40.

concentrated largely in EEOC job categories traditionally held by women: women made up 76% of Office and Clerical Workers, but only 7.1% of Agency Officials and Administrators, 8.6% of Professionals, 9.7% of Technicians, and 22% of Service and Maintenance **[****11]** Workers. As for the job classification relevant to this case, none of the 238 Skilled Craft Worker positions was held by a woman. *Id.*, at 49. The Plan noted that this underrepresentation of women in part reflected the fact that women had not traditionally been employed in these positions, and that they had not been strongly motivated to seek training or employment in them "because of the limited opportunities that have existed in the past for them to work in such classifications." *Id.*, at 57. The Plan also observed that, while the proportion of ethnic minorities in the Agency as a whole exceeded the proportion of such minorities in the County work force, a smaller percentage of minority employees held management, professional, and technical positions. [4]

The Agency stated that its Plan was intended to **[****12]** achieve "a statistically measurable yearly improvement in hiring, training and promotion of minorities and women throughout the Agency in all major job classifications where they are underrepresented." *Id.*, at 43. As a benchmark by which to evaluate progress, the Agency stated that its long-term goal was to attain a work force whose composition reflected the proportion **[*622]** of minorities and women in the area labor force. *Id.*, at 54. Thus, for the Skilled Craft category in which the road dispatcher position at issue here was classified, the Agency's aspiration was that eventually about 36% of the jobs would be occupied by women.

The Plan acknowledged that a number of factors might make it unrealistic to rely on the Agency's long-term goals in evaluating the Agency's progress in expanding job opportunities for minorities and women. Among the factors identified were low **[**1447]** turnover rates in some classifications, the fact that some jobs involved heavy labor, the small number of positions within some job categories, the limited number of **[***625]** entry positions leading to the Technical and Skilled Craft classifications, and the limited number of minorities **[****13]** and women qualified for positions requiring specialized training and experience. *Id.*, at 56-57. As a result, the Plan counseled that short-range goals be established and annually adjusted to serve as the most realistic guide for actual employment decisions. Among the tasks identified as important in establishing such short-term goals was the acquisition of data "reflecting the ratio of minorities, women and handicapped persons who are working in the local area in major job classifications relating to those utilized by the County Administration," so as to determine the availability of members of such groups who "possess the desired qualifications or potential for placement." *Id.*, at 64. These data on qualified group members, along with predictions of position vacancies, were to serve as the basis for "realistic yearly employment goals for women, minorities and handicapped persons in each EEOC job category and major job classification." *Ibid.*

The Agency's Plan thus set aside no specific number of positions for minorities or women, but authorized the consideration of ethnicity or sex as a factor when evaluating qualified candidates for jobs in which members of such groups **[****14]** were poorly represented. One such job was the road dispatcher position that is the subject of the dispute in this case.

[*623] B

On December 12, 1979, the Agency announced a vacancy for the promotional position of road dispatcher in the Agency's Roads Division. Dispatchers assign road crews, equipment, and materials, and maintain records pertaining to road maintenance jobs. *Id.*, at 23-24. The position requires at minimum four years of dispatch or road maintenance work experience for Santa Clara County. The EEOC job classification scheme designates a road dispatcher as a Skilled Craft Worker.

Twelve County employees applied for the promotion, including Joyce and Johnson. Joyce had worked for the County since 1970, serving as an account clerk until 1975. She had applied for a road dispatcher position in 1974, but was deemed ineligible because she had not served as a road maintenance worker. In 1975, Joyce transferred from a senior account clerk position to a road maintenance worker position, becoming the first woman to fill such a job. Tr. 83-84. During her four years in that position, she occasionally worked out of class as a road dispatcher.

Petitioner Johnson began **[****15]** with the County in 1967 as a road yard clerk, after private employment that included working as a supervisor and dispatcher. He had also unsuccessfully applied for the road dispatcher opening in 1974. In 1977, his clerical position was downgraded, and he sought and received a transfer to the position of road maintenance worker. *Id.*, at 127. He also occasionally worked out of class as a dispatcher while performing that job.

Nine of the applicants, including Joyce and Johnson, were deemed qualified for the job, and were interviewed by a two-person board. Seven of the applicants scored above 70 on this

[4] While minorities constituted 19.7% of the County labor force, they represented 7.1% of the Agency's Officials and Administrators, 19% of its Professionals, and 16.9% of its Technicians. *Id.*, at 48.

interview, which meant that they were certified as eligible for selection by the appointing authority. The scores awarded ranged from **[***626]** 70 to 80. Johnson was tied for second **[*624]** with a score of 75, while Joyce ranked next with a score of 73. A second interview was conducted by three Agency supervisors, who ultimately recommended that Johnson be promoted. Prior to the second interview, Joyce had contacted the County's Affirmative Action Office because she feared that her application might not receive disinterested review. [5] The Office in turn contacted the **[**1448]** **[****16]** Agency's Affirmative Action Coordinator, whom the Agency's Plan makes responsible for, *inter alia*, keeping the Director informed of opportunities for the Agency to accomplish its objectives under the Plan. At the time, the Agency employed no women in any Skilled Craft position, and had never employed a woman as a road dispatcher. The Coordinator recommended to the Director of the Agency, James Graebner, that Joyce be promoted.

[**17]** Graebner, authorized to choose any of the seven persons deemed eligible, thus had the benefit of suggestions by the second interview panel and by the Agency Coordinator in arriving at his decision. After deliberation, Graebner concluded **[*625]** that the promotion should be given to Joyce. As he testified: "I tried to look at the whole picture, the combination of her qualifications and Mr. Johnson's qualifications, their test scores, their expertise, their background, affirmative action matters, things like that. . . . I believe it was a combination of all those." *Id.*, at 68.

The certification for naming Joyce as the person promoted to the dispatcher position stated that both she and Johnson were rated as well qualified for the job. The evaluation of Joyce read: "Well qualified by virtue of 18 years of past clerical experience including 3 1/2 years at West Yard plus almost 5 years as a [road maintenance worker]." App. 27. The evaluation of Johnson was as follows: "Well qualified applicant; two years of [road maintenance worker] experience plus 11 years of Road Yard Clerk. Has had previous outside Dispatch experience but was 13 years ago." *Ibid.* Graebner testified that **[****18]** he did not regard as significant the fact that Johnson scored 75 and Joyce 73 when interviewed by the two-person board. Tr. 57-58.

Petitioner Johnson filed a complaint with the EEOC alleging that he had been denied promotion on the basis of sex in violation of Title VII. He received a right-to-sue letter **[***627]** from the EEOC on March 10, 1981, and on March 20, 1981, filed suit in the United States District Court for the Northern District of California. The District Court found that Johnson was more qualified for the dispatcher position than Joyce, and that the sex of Joyce was the *"determining factor* in her selection." App. to Pet. for Cert. 4a (emphasis in original). The court acknowledged that, since the Agency justified its decision on the basis of its Affirmative Action Plan, the criteria announced in *Steelworkers v. Weber, 443 U.S. 193 (1979)*, should be applied in evaluating the validity of the Plan. App. to Pet. for Cert. 5a. It then found the Agency's Plan invalid on the ground that the evidence did not satisfy *Weber's* criterion that the Plan be temporary. App. to Pet. for Cert. 6a. The Court of Appeals for the Ninth Circuit reversed, **[****19]** **[*626]** holding that the absence of an express termination date in the Plan was not dispositive, since the Plan repeatedly expressed its objective as the attainment, rather than the maintenance, of a work force mirroring the labor force in the County. *770 F.2d, at 756*. The Court of Appeals added that the fact that the Plan **[**1449]** established no fixed percentage of positions for minorities or women made it less essential that the Plan contain a relatively explicit deadline. *770 F.2d, at 757*. The Court held further that the Agency's consideration of Joyce's sex in filling the road dispatcher position was lawful. The Agency Plan had been adopted, the court said, to address a conspicuous imbalance in the Agency's work force, and neither unnecessarily trammeled the rights of other employees, nor created an absolute bar to their advancement. *Id., at 757-759*.

II

[2]As a preliminary matter, we note that petitioner bears the burden of establishing the invalidity of the Agency's Plan. Only last Term, in *Wygant v. Jackson Board of Education, 476 U.S. 267, 277-278 (1986)*, we held that "[the] ultimate

[5] Joyce testified that she had had disagreements with two of the three members of the second interview panel. One had been her first supervisor when she began work as a road maintenance worker. In performing arduous work in this job, she had not been issued coveralls, although her male co-workers had received them. After ruining her pants, she complained to her supervisor, to no avail. After three other similar incidents, ruining clothes on each occasion, she filed a grievance, and was issued four pairs of coveralls the next day. Tr. 89-90. Joyce had dealt with a second member of the panel for a year and a half in her capacity as chair of the Roads Operations Safety Committee, where she and he "had several differences of opinion on how safety should be implemented." *Id.*, at 90-91. In addition, Joyce testified that she had informed the person responsible for arranging her second interview that she had a disaster preparedness class on a certain day the following week. By this time about 10 days had passed since she had notified this person of her availability, and no date had yet been set for the interview. Within a day or two after this conversation, however, she received a notice setting her interview at a time directly in the middle of her disaster preparedness class. *Id.*, at 94-95. This same panel member had earlier described Joyce as a "rebel-rousing, skirt-wearing person," *id.*, at 153.

burden **[****20]** remains with the employees to demonstrate the unconstitutionality of an affirmative-action program," and we see no basis for a different rule regarding a plan's alleged violation of Title VII. This case also fits readily within the analytical framework set forth in *McDonnell Douglas Corp.* v. *Green, 411 U.S. 792 (1973)*. Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid. As a practical matter, of course, an employer will generally seek to avoid a charge of **[*627]** pretext by presenting evidence in support of its plan. That does not mean, however, as petitioner suggests, that reliance on an affirmative action plan is to be treated as an affirmative defense requiring the employer to carry the burden of proving the validity of **[****21]** the plan. The burden of proving its invalidity remains on the plaintiff.

[1B]The assessment of the legality of the Agency Plan must be guided **[***628]** by our decision in *Weber, supra.*[6] In that case, the **[*628]** **[**1450]** Court addressed the question whether the employer violated Title VII by adopting a voluntary affirmative action plan designed to "eliminate manifest racial imbalances in traditionally segregated job categories." *Id., at 197*.The respondent employee in that case challenged the employer's denial of his application for a position in a newly established craft training program, contending that the employer's selection process impermissibly took into account the race of the applicants. The selection process was guided by an affirmative action plan, which provided that 50% of the new trainees were to be black until the percentage of black skilled craftworkers in the employer's plant approximated the percentage of blacks in the local labor force. Adoption of the plan had been prompted by the fact that only 5 of 273, or 1.83%, of skilled craftworkers at the plant were black, even though the work force in the area was approximately **[****22]** 39% black. Because of the historical exclusion of blacks from craft positions, the employer regarded its former policy of hiring trained outsiders as inadequate to redress the imbalance in its work force.

[**23]** We upheld the employer's decision to select less senior black applicants over the white respondent, for we found that taking race into account was consistent with Title VII's objective of "[breaking] down old patterns of racial segregation and hierarchy." **[***629]** *Id., at 208*. As we stated:

"It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' constituted **[*629]** the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." *Id., at 204* (quoting remarks of Sen. Humphrey,

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[6] JUSTICE SCALIA's dissent maintains that the obligations of a public employer under Title VII must be identical to its obligations under the Constitution, and that a public employer's adoption of an affirmative action plan therefore should be governed by *Wygant*. This rests on the following logic: Title VI embodies the same constraints as the Constitution; Title VI and Title VII have the same prohibitory scope; therefore, Title VII and the Constitution are coterminous for purposes of this case. The flaw is with the second step of the analysis, for it advances a proposition that we explicitly considered and rejected in *Weber*. As we noted in that case, Title VI was an exercise of federal power "over a matter in which the Federal Government was already directly involved," since Congress "was legislating to assure federal funds would not be used in an improper manner." *443 U.S., at 206, n. 6*. "Title VII, by contrast, was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the *Fifth* and *Fourteenth Amendments*. Title VII and Title VI, therefore, cannot be read *in pari materia." Ibid*. This point is underscored by Congress' concern that the receipt of any form of financial assistance might render an employer subject to the commands of Title VI rather than Title VII. As a result, Congress added § 604 to Title VI, 78 Stat. 253, as set forth in *42 U. S. C. § 2000d-3*, which provides:

"Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment."

The sponsor of this section, Senator Cooper, stated that it was designed to clarify that "it was not intended that [Title] VI would impinge on [Title] VII." 110 Cong. Rec. 11615 (1964).

While public employers were not added to the definition of "employer" in Title VII until 1972, there is no evidence that this mere addition to the definitional section of the statute was intended to transform the substantive standard governing employer conduct. Indeed, "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Dothard v. Rawlinson, 433 U.S. 321, 332, n. 14 (1977)*. The fact that a public employer must also satisfy the Constitution does not negate the fact that the *statutory* prohibition with which that employer must contend was not intended to extend as far as that of the Constitution.

110 Cong. Rec. 6552 (1964)). [7]

[**24]** **[*630]** **[**1451]** We noted that the plan did not "unnecessarily trammel the interests of the white employees," since it did not require "the discharge of white workers and their replacement with new black hirees." *443 U.S., at 208*. Nor did the plan create "an absolute bar to the advancement of white employees," since half of those trained in the new program were to be white. *Ibid.* Finally, we observed that the plan was a temporary measure, not designed to maintain racial balance, but to "eliminate a manifest racial imbalance." *Ibid.* As JUSTICE BLACKMUN's concurrence made clear, *Weber* held that **[***630]** an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an "arguable violation" on its part. *Id., at 212*. Rather, it need point only to a "conspicuous . . . imbalance in traditionally segregated job categories." *Id., at 209*. Our decision was grounded in the recognition that voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that **[****25]** Title VII should not be read to thwart such efforts. *Id., at 204*. [8]

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[7] JUSTICE SCALIA's dissent maintains that *Weber*'s conclusion that Title VII does not prohibit voluntary affirmative action programs "rewrote the statute it purported to construe." *Post*, at 670. *Weber*'s decisive rejection of the argument that the "plain language" of the statute prohibits affirmative action rested on (1) legislative history indicating Congress' clear intention that employers play a major role in eliminating the vestiges of discrimination, *443 U.S., at 201-204*, and (2) the language and legislative history of § 703(j) of the statute, which reflect a strong desire to preserve managerial prerogatives so that they might be utilized for this purpose. *Id., at 204-207*. As JUSTICE BLACKMUN said in his concurrence in *Weber*, "[If] the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses." *Id., at 216*. Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct.

JUSTICE SCALIA's dissent faults the fact that we take note of the absence of congressional efforts to amend the statute to nullify *Weber*. It suggests that congressional inaction cannot be regarded as acquiescence under all circumstances, but then draws from that unexceptional point the conclusion that *any* reliance on congressional failure to act is necessarily a "canard." *Post*, at 672. The fact that inaction may not always provide crystalline revelation, however, should not obscure the fact that it may be probative to varying degrees. *Weber*, for instance, was a widely publicized decision that addressed a prominent issue of public debate. Legislative inattention thus is not a plausible explanation for congressional inaction. Furthermore, Congress not only passed no contrary legislation in the wake of *Weber*, but not one legislator even proposed a bill to do so. The barriers of the legislative process therefore also seem a poor explanation for failure to act. By contrast, when Congress has been displeased with our interpretation of Title VII, it has not hesitated to amend the statute to tell us so. For instance, when Congress passed the Pregnancy Discrimination Act of 1978, *42 U. S. C. § 2000e(k)*, "it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in [*General Electric Co.* v. *Gilbert, 429 U.S. 125 (1976)*]." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC, 462 U.S. 669, 678 (1983)*. Surely, it is appropriate to find some probative value in such radically different congressional reactions to this Court's interpretations of the same statute.

As one scholar has put it, "When a court says to a legislature: 'You (or your predecessor) meant X,' it almost invites the legislature to answer: 'We did not.'" G. Calabresi, A Common Law for the Age of Statutes 31-32 (1982). Any belief in the notion of a dialogue between the judiciary and the legislature must acknowledge that on occasion an invitation declined is as significant as one accepted.

[8] See also *Firefighters v. Cleveland, 478 U.S. 501, 515 (1986)* ("We have on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII"); *Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974)* ("Cooperation and voluntary compliance were selected as the preferred means for achieving [Title VII's] goal"). JUSTICE SCALIA's suggestion that an affirmative action program may be adopted only to redress an employer's past discrimination, see *post*, at 664-665, was rejected in *Steelworkers v. Weber, 443 U.S. 193 (1979)*, because the prospect of liability created by such an admission would create a significant disincentive for voluntary action. As JUSTICE BLACKMUN's concurrence in that case pointed out, such a standard would "[place] voluntary compliance with Title VII in profound jeopardy. The only way for the employer and the union to keep their footing on the 'tightrope' it creates would be to eschew all forms of voluntary affirmative action." *Id., at 210*. Similarly, JUSTICE O'CONNOR has observed in the constitutional context that "[the] imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations." *Wygant, 476 U.S., at 290* (O'CONNOR, J., concurring in part and concurring in judgment).

Contrary to JUSTICE SCALIA's contention, *post*, at 664-668, our decisions last term in *Firefighters, supra*, and *Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986)*, provide no support for a standard more restrictive than that enunciated in *Weber*. *Firefighters* raised the issue of the conditions under which parties could enter into a consent decree providing for explicit numerical quotas. By contrast, the affirmative action plan in this case sets aside no positions for minorities or women. See *infra*, at 635. In *Sheet Metal Workers*, the issue we addressed was the scope of judicial remedial authority under Title VII, authority that has not been exercised in this case. JUSTICE SCALIA's suggestion that employers should be able to do no more voluntarily than courts can order as remedies, *post*, at 664-

[**26]** **[*631]** In reviewing the employment decision at issue in this case, we must first examine whether that decision was made pursuant to a plan prompted by concerns similar to those of the employer in *Weber*. Next, we must determine whether the effect of the Plan on males and nonminorities is comparable to the effect of the plan in that case.

[3][4]The first issue is therefore whether consideration of the sex of applicants for Skilled Craft jobs was justified by the existence of a "manifest imbalance" that reflected underrepresentation of women in **[**1452]** "traditionally segregated job categories." *Id., at 197*. In determining whether an imbalance exists that would justify taking sex or race into account, a **[*632]** **[***631]** comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise, see *Teamsters v. United States, 431 U.S. 324 (1977)* (comparison between percentage of blacks in employer's work force and in general population proper in determining extent of imbalance in truck driving positions), or training **[****27]** programs designed to provide expertise, see *Steelworkers v. Weber, 443 U.S. 193 (1979)* (comparison between proportion of blacks working at plant and proportion of blacks in area labor force appropriate in calculating imbalance for purpose of establishing preferential admission to craft training program). Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications. See *Hazelwood School District v. United States, 433 U.S. 299 (1977)* (must compare percentage of blacks in employer's work ranks with percentage of qualified black teachers in area labor force in determining underrepresentation in teaching positions). The requirement that the "manifest imbalance" relate to a "traditionally segregated job category" provides assurance both that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination, and that the interests of those employees not benefiting from the plan will not be unduly infringed.

[5A]A manifest imbalance need not be such that it would support a prima facie **[****28]** case against the employer, as suggested in JUSTICE O'CONNOR's concurrence, *post*, at 649, since we do not regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans. [9] Application of the "prima facie" standard in Title VII cases would be inconsistent with *Weber*'s focus on **[*633]** statistical imbalance, [10] and could inappropriately create a significant disincentive for employers to adopt **[***632]** an affirmative action plan. See *Weber, supra, at 204* (Title VII intended as a "catalyst" for employer efforts to eliminate vestiges of discrimination). A corporation concerned with maximizing return on investment, for instance, is hardly likely to adopt a plan if in order to do so it must compile evidence that could be used **[**1453]** to subject it to a colorable Title VII suit. [11]

668, ignores the fundamental difference between volitional private behavior and the exercise of coercion by the State. Plainly, "Congress' concern that federal courts not impose unwanted obligations on employers and unions," *Firefighters, supra, at 524*, reflects a desire to preserve a relatively large domain for voluntary employer action.

[9] See n. 6, *supra*.

[10] The difference between the "manifest imbalance" and "prima facie" standards is illuminated by *Weber*. Had the Court in that case been concerned with past discrimination by the employer, it would have focused on discrimination in hiring skilled, not unskilled, workers, since only the scarcity of the former in Kaiser's work force would have made it vulnerable to a Title VII suit. In order to make out a prima facie case on such a claim, a plaintiff would be required to compare the percentage of black skilled workers in the Kaiser work force with the percentage of black skilled craft workers in the area labor market.

Weber obviously did not make such a comparison. Instead, it focused on the disparity between the percentage of black skilled craft workers in Kaiser's ranks and the percentage of blacks in the area labor force. *443 U.S., at 198-199*. Such an approach reflected a recognition that the proportion of black craft workers in the local labor force was likely as miniscule as the proportion in Kaiser's work force. The Court realized that the lack of imbalance between these figures would mean that employers in precisely those industries in which discrimination has been most effective would be precluded from adopting training programs to increase the percentage of qualified minorities. Thus, in cases such as *Weber*, where the employment decision at issue involves the selection of unskilled persons for a training program, the "manifest imbalance" standard permits comparison with the general labor force. By contrast, the "prima facie" standard would require comparison with the percentage of minorities or women qualified for the job for which the trainees are being trained, a standard that would have invalidated the plan in *Weber* itself.

[11] In some cases, of course, the manifest imbalance may be sufficiently egregious to establish a prima facie case. However, as long as there is a manifest imbalance, an employer may adopt a plan even where the disparity is not so striking, without being required to introduce the nonstatistical evidence of past discrimination that would be demanded by the "prima facie" standard. See, *e. g., Teamsters v. United States, 431 U.S. 324, 339 (1977)* (statistics in pattern and practice case supplemented by testimony regarding employment practices). Of course, when there is sufficient evidence

[**29]** [5B]

[*634] [1C]It is clear that the decision to hire Joyce was made pursuant to an Agency plan that directed that sex or race be taken into account for the purpose of remedying underrepresentation. The Agency Plan acknowledged the "limited opportunities that have existed in the past," App. 57, for women to find employment **[****30]** in certain job classifications "where women have not been traditionally employed in significant numbers." *Id., at 51*. [12] As a result, observed the Plan, women were concentrated in traditionally female jobs in the Agency, and represented a lower percentage in other job classifications than would be expected if such traditional segregation had not occurred. Specifically, 9 of the 10 Para-Professionals and 110 of the 145 Office and Clerical Workers were women. By contrast, women were only 2 of the 28 Officials and Administrators, 5 of the 58 Professionals, 12 of the 124 Technicians, none of the Skilled Craft Workers, and 1 -- who was Joyce -- of the *110 Road Maintenance Workers. Id., at 51-52*. The Plan sought to remedy these imbalances through "hiring, training and promotion of . . . women throughout the Agency in all major job classifications where they are underrepresented." *Id., at 43*.

[**31]** **[*635]** As an initial matter, the Agency adopted as a benchmark for measuring progress in eliminating underrepresentation the long-term goal of a work force that mirrored in its major job classifications the percentage of women in the area labor market. [13] **[***633]** Even as it did so, however, the Agency acknowledged that such a figure could not by itself necessarily justify taking into account the sex of applicants for positions in all job categories. For positions requiring specialized training and experience, the Plan observed that the number of minorities and women "who possess the qualifications required for entry into such job classifications is limited." *Id., at 56*. The Plan therefore directed that annual short-term goals be formulated that would provide a more realistic indication of the degree to which sex should be taken into account in filling particular positions. *Id., at 61-64*. The Plan stressed that such goals "should not be construed as 'quotas' that must be met," but as reasonable aspirations in correcting the imbalance in the Agency's work force. *Id., at 64*. These goals were to take into account factors such as "turnover, layoffs, lateral transfers, **[****32]** new job openings, retirements and availability of minorities, women and handicapped persons in the area work force who possess the desired qualifications or potential **[**1454]** for placement." *Ibid*. The Plan specifically directed that, in establishing such goals, the Agency work with the County Planning Department and other sources in attempting to compile data on the percentage of minorities and women in the local labor force that were actually working in the job classifications constituting the Agency work force. *Id., at 63-64*. From the outset, therefore, the Plan sought annually to develop even more refined measures of the underrepresentation in each job category that required attention.

[*636] As the Agency Plan recognized, women **[****33]** were most egregiously underrepresented in the Skilled Craft job category, since *none* of the 238 positions was occupied by a woman. In mid-1980, when Joyce was selected for the road dispatcher position, the Agency was still in the process of refining its short-term goals for Skilled Craft Workers in accordance with the directive of the Plan. This process did not reach fruition until 1982, when the Agency established a short-term goal for that year of 3 women for the 55 expected openings in that job category -- a modest goal of about 6% for that category.

We reject petitioner's argument that, since only the long-term goal was in place for Skilled Craft positions at the time of Joyce's promotion, it was inappropriate for the Director to take into account affirmative action considerations in filling the road dispatcher position. The Agency's Plan emphasized that the long-term goals were not to be taken as guides for actual hiring decisions, but that supervisors were to consider a host of practical factors in seeking to meet affirmative action objectives, including the fact that in some job categories women were not qualified in numbers comparable to their

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to meet the more stringent "prima facie" standard, be it statistical, nonstatistical, or a combination of the two, the employer is free to adopt an affirmative action plan.

[12] For instance, the description of the Skilled Craft Worker category, in which the road dispatcher position is located, is as follows:

"Occupations in which workers perform jobs which require special manual skill and a thorough and comprehensive knowledge of the process involved in the work which is acquired through on-the-job training and experience or through apprenticeship or other formal training programs. Includes: mechanics and repairmen; electricians, heavy equipment operators, stationary engineers, skilled machining occupations, carpenters, compositors and typesetters and kindred workers." App. 108.

As the Court of Appeals said in its decision below, "A plethora of proof is hardly necessary to show that women are generally underrepresented in such positions and that strong social pressures weigh against their participation." *748 F.2d, at 1313*.

[13] Because of the employment decision at issue in this case, our discussion henceforth refers primarily to the Plan's provisions to remedy the underrepresentation of women. Our analysis could apply as well, however, to the provisions of the plan pertaining to minorities.

representation in the **[****34]** labor force.

By contrast, had the Plan simply calculated imbalances in all categories according to the proportion of women in the area labor pool, and then directed that hiring be governed solely by those figures, its validity fairly could be called into question. This is because analysis of a more specialized labor pool normally is necessary in determining underrepresentation in some positions. If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment **[***634]** decisions, it would dictate mere blind hiring by the numbers, for it would hold supervisors to "achievement of a particular percentage of minority employment or membership . . . regardless of circumstances such as economic conditions or the number of available qualified minority applicants . . . ." *Sheet Metal Workers v. EEOC, 478 U.S. 421, 495 (1986)* **[*637]** (O'CONNOR, J., concurring in part and dissenting in part).

The Agency's Plan emphatically did *not* authorize such blind hiring. It expressly directed that numerous factors be taken into account in making hiring decisions, including specifically the qualifications of female applicants **[****35]** for particular jobs. Thus, despite the fact that no precise short-term goal was yet in place for the Skilled Craft category in mid-1980, the Agency's management nevertheless had been clearly instructed that they were not to hire solely by reference to statistics. The fact that only the long-term goal had been established for this category posed no danger that personnel decisions would be made by reflexive adherence to a numerical standard.

Furthermore, in considering the candidates for the road dispatcher position in 1980, the Agency hardly needed to rely on a refined short-term goal to realize that it had a significant problem of underrepresentation that required attention. Given the obvious imbalance in the Skilled Craft category, and given the Agency's commitment to eliminating such imbalances, it was plainly not unreasonable for the Agency to determine that it was appropriate to consider as one factor the sex of Ms. Joyce in making its decision. [14] The promotion of **[**1455]** Joyce thus satisfies the first requirement enunciated in *Weber*, since it was undertaken to further an affirmative action plan designed to eliminate Agency work force imbalances in traditionally segregated **[****36]** job categories.

[1D]We next consider whether the Agency Plan unnecessarily trammeled the rights of male employees or created an absolute **[*638]** bar to their advancement. In contrast to the plan in *Weber*, which provided that 50% of the positions in the craft training program were exclusively for blacks, and to the consent decree upheld last Term in *Firefighters v. Cleveland, 478 U.S. 501 (1986)*, which required the promotion of specific numbers of minorities, the Plan sets aside no positions for **[****37]** women. The Plan expressly states that "[the] 'goals' established for each Division should not be construed as 'quotas' that must be met." App. 64. Rather, the Plan merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants. As the Agency Director testified, the sex of Joyce was but one of numerous factors he took into account in arriving at his decision. Tr. 68. The Plan thus resembles the "Harvard Plan" approvingly noted by JUSTICE POWELL in *Regents of University of California v. Bakke, 438 U.S. 265, 316-319* **[***635]** *(1978)*, which considers race along with other criteria in determining admission to the college. As JUSTICE POWELL observed: "In such an admissions program, 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." *Id., at 317*. Similarly, the Agency Plan requires women to compete with all other qualified applicants. *No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against **[****38]** those of other applicants.

In addition, petitioner had no absolute entitlement to the road dispatcher position. Seven of the applicants were classified as qualified and eligible, and the Agency Director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate, firmly rooted expectation on the part of petitioner. Furthermore, while petitioner in this case was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions. [15]

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[14] In addition, the Agency was mindful of the importance of finally hiring a woman in a job category that had formerly been all male. The Director testified that, while the promotion of Joyce "made a small dent, for sure, in the numbers," nonetheless "philosophically it made a larger impact in that it probably has encouraged other females and minorities to look at the possibility of so-called 'non-traditional' jobs as areas where they and the agency both have samples of a success story." Tr. 64.

[15] Furthermore, from 1978 to 1982 Skilled Craft jobs in the Agency increased from 238 to 349. The Agency's personnel figures indicate that the Agency fully expected most of these positions to be filled by men. Of the 111 new Skilled Craft jobs during this period, 105, or almost 95%, went to men. As previously noted, the Agency's 1982 Plan set a goal of hiring only 3 women out of the 55 new Skilled Craft positions projected for that year, a figure of about 6%. While this degree of employment expansion by an employer is by no means

[**39]** **[*639]** Finally, the Agency's Plan was intended to *attain* a balanced work force, not to maintain one. The Plan contains 10 references to the Agency's desire to "attain" such a balance, but no reference whatsoever to a goal of maintaining it. The Director testified that, while the "broader goal" of affirmative action, defined as "the desire to hire, to promote, to give opportunity and training on an equitable, non-discriminatory basis," is something that is "a permanent part" of "the Agency's operating philosophy," that broader goal "is divorced, if you will, from specific numbers or percentages." Tr. 48-49.

[1456]** [1E][6]The Agency acknowledged the difficulties that it would confront in remedying the imbalance in its work force, and it anticipated only gradual increases in the representation of minorities and women. [16] It is thus unsurprising that the Plan contains no explicit end date, for the Agency's flexible, case-by-case approach **[***636]** was not expected to yield success in a brief period of time. Express assurance that a program is **[*640]** only temporary may be necessary if the program actually sets aside positions according to specific numbers. See, *e. g.*, *Firefighters, supra, at 510* **[****40]** (4-year duration for consent decree providing for promotion of particular number of minorities); *Weber, 443 U.S., at 199* (plan requiring that blacks constitute 50% of new trainees in effect until percentage of employer work force equal to percentage in local labor force). This is necessary both to minimize the effect of the program on other employees, and to ensure that the plan's goals "[are] not being used simply to achieve and maintain . . . balance, but rather as a benchmark against which" the employer may measure its progress in eliminating the under-represention of minorities and women. *Sheet Metal Workers, 478 U.S., at 477-478*. In this case, however, substantial evidence shows that the Agency has sought to take a moderate, gradual approach to eliminating the imbalance in its work force, one which establishes realistic guidance for employment decisions, and which visits minimal intrusion on the legitimate expectations of other employees. Given this fact, as well as the Agency's express commitment to "attain" a balanced work force, there is ample assurance that the Agency does not seek to use its Plan to maintain a permanent racial **[****41]** and sexual balance.

III

[1F]In evaluating the compliance of an affirmative action plan with Title VII's prohibition on discrimination, we must be mindful of "this **[****42]** Court's and Congress' consistent emphasis on 'the value of voluntary efforts to further the objectives of the law.'" *Wygant, 476 U.S., at 290* (O'CONNOR, J., concurring in part and concurring in judgment) (quoting *Bakke, supra, at 364*). The Agency in the case before us has undertaken such a voluntary effort, and has done so in full recognition of both the difficulties and the potential for intrusion on males and nonminorities. The Agency has identified a conspicuous imbalance in job categories traditionally segregated by race and sex. It has made clear from the outset, however, **[*641]** that employment decisions may not be justified solely by reference to this imbalance, but must rest on a multitude of practical, realistic factors. It has therefore committed itself to annual adjustment of goals so as to provide a reasonable guide for actual hiring and promotion decisions. The Agency earmarks no positions for anyone; sex is but one of several factors that may be taken into account in evaluating qualified applicants for a position. [17] As both the **[***637]** **[**1457]**

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essential to a plan's validity, it underscores the fact that the Plan in this case in no way significantly restricts the employment prospects of such persons. Illustrative of this is the fact that an additional road dispatcher position was created in 1983, and petitioner was awarded the job. Brief for Respondent Transportation Agency 36, n. 35.

[16] As the Agency Plan stated, after noting the limited number of minorities and women qualified in certain categories, as well as other difficulties in remedying underrepresentation:

"As indicated by the above factors, it will be much easier to attain the Agency's employment goals in some job categories than in others. It is particularly evident that it will be extremely difficult to significantly increase the representation of women in technical and skilled craft job classifications where they have traditionally been greatly underrepresented. Similarly, only gradual increases in the representation of women, minorities or handicapped persons in management and professional positions can realistically be expected due to the low turnover that exists in these positions and the small numbers of persons who can be expected to compete for available openings." App. 58.

[17] JUSTICE SCALIA's dissent predicts that today's decision will loose a flood of "less qualified" minorities and women upon the work force, as employers seek to forestall possible Title VII liability. *Post*, at 673-677. The first problem with this projection is that it is by no means certain that employers could in every case necessarily avoid liability for discrimination merely by adopting an affirmative action plan. Indeed, our unwillingness to require an admission of discrimination as the price of adopting a plan has been premised on concern that the potential liability to which such an admission would expose an employer would serve as a disincentive for creating an affirmative action program. See n. 8, *supra*.

A second, and more fundamental, problem with JUSTICE SCALIA's speculation is that he ignores the fact that

Plan's language and its manner of operation attest, the Agency has no intention of establishing **[****43]** a work force whose permanent composition is dictated by rigid numerical standards.

[**44]** We therefore hold that the Agency appropriately took into account as one factor the sex of Diane Joyce in determining **[*642]** that she should be promoted to the road dispatcher position. The decision to do so was made pursuant to an affirmative action plan that represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force. Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Concur by: STEVENS; O'CONNOR

Concur

JUSTICE STEVENS, concurring.

While I join the Court's opinion, I write separately to explain my view of this case's position in our evolving antidiscrimination law and to emphasize that the opinion does not establish the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantaged groups.

I

"[it] is a standard tenet of personnel administration that there is rarely a single, 'best qualified' person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection. Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, final determinations as to which candidate is 'best qualified' are at best subjective." Brief for the American Society for Personnel Administration as *Amicus Curiae* 9.

This case provides an example of precisely this point. Any differences in qualifications between Johnson and Joyce were minimal, to say the least. See *supra*, at 623-625. The selection of Joyce thus belies JUSTICE SCALIA's contention that the beneficiaries of affirmative action programs will be those employees who are merely not "utterly unqualified." *Post*, at 675.

Antidiscrimination measures may benefit protected groups in two distinct ways. As a sword, such measures may confer benefits by specifying that a person's membership in **[****45]** a disadvantaged group must be a neutral, irrelevant factor in governmental or private decisionmaking or, alternatively, by compelling decisionmakers to give favorable consideration to disadvantaged group status. As a shield, an antidiscrimination statute can also help a member of a protected class by assuring decisionmakers in some instances that, when they elect for good reasons of their own to grant a preference of some sort to a minority citizen, they will not violate the law. The Court properly holds that the statutory shield allowed respondent to take Diane Joyce's sex into account in promoting her to the road dispatcher position.

Prior to 1978 the Court construed the Civil Rights Act of 1964 as an **[***638]** absolute blanket prohibition against discrimination which neither required nor permitted discriminatory preferences **[*643]** for any group, minority or majority. The Court unambiguously endorsed the neutral approach, first in the context of gender discrimination [1] and then in the context of racial discrimination against a white person. [2] As I explained **[**1458]** in my separate opinion in

[1] "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." *Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)*.

[2] "Similarly the EEOC, whose interpretations are entitled to great deference, [401 U.S.,] at 433-434, has consistently interpreted Title VII to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites, holding that to proceed otherwise would

"'constitute a derogation of the Commission's Congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including *Caucasians.' EEOC Decision No. 74-31, 7 FEP Cases 1326, 1328*, CCH EEOC Decisions para. 6404, p. 4084 (1973).

"This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to 'cover white men and white women and all Americans,' 110 Cong. Rec. 2578 (1964) (remarks of Rep. Celler), and create an 'obligation not to discriminate against whites,' *id.*, at 7218 (memorandum of Sen. Clark). See also *id.*, at 7213 (memorandum of Sens. Clark and Case); *id.*, at 8912 (remarks of Sen. Williams). We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and Jackson white." *McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 279-280 (1976)*

Regents of University of California v. Bakke, 438 U.S. 265, 412-418 (1978), **[****46]** and as the Court forcefully stated in *McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 280 (1976)*, Congress intended "'to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians'" (citations omitted). If the Court had adhered to that construction of the Act, petitioner would unquestionably prevail in this case. But it has not done so.

[**47]** **[*644]** In the *Bakke* case in 1978 and again in *Steelworkers v. Weber, 443 U.S. 193 (1979)*, a majority of the Court interpreted the antidiscriminatory strategy of the statute in a fundamentally different way. The Court held in the *Weber* case that an employer's program designed to increase the number of black craftworkers in an aluminum plant did not violate Title VII. [3] It remains clear that the Act does not *require* any employer to grant preferential treatment on the basis of race or gender, but since 1978 the Court has unambiguously interpreted the statute to *permit* the voluntary adoption of special programs to benefit members of the minority groups for whose protection the statute was enacted. Neither the "same standards" language used in *McDonald*, nor the "color blind" rhetoric used by the **[***639]** Senators and Congressmen who enacted the bill, is now controlling. Thus, as was true in *Runyon v. McCrary, 427 U.S. 160, 189 (1976)* (STEVENS, J., concurring), the only problem for me is whether to adhere to an authoritative construction of the Act that is at odds with my understanding of the actual intent of the **[****48]** authors of the legislation. I conclude without hesitation that I must answer that question in the affirmative, just as I did in *Runyon*. *Id., at 191-192*.

Bakke and *Weber* have been decided and are now an important part of the fabric of our law. This consideration is sufficiently compelling for me to adhere to the basic construction of this legislation that the Court adopted in *Bakke* and in *Weber*. There is an undoubted public interest in "stability and orderly development of the law." *427 U.S., at 190*. [4]

(footnotes omitted).

[3] Toward the end of its opinion, the Court mentioned certain reasons why the plan did not impose a special hardship on white employees or white applicants for employment. *Steelworkers v. Weber, 443 U.S., at 208*. I have never understood those comments to constitute a set of conditions that every race-conscious plan must satisfy in order to comply with Title VII.

[4] "As Mr. Justice Cardozo remarked, with respect to the routine work of the judiciary: 'The labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.' Turning to the exceptional case, Mr Justice Cardozo noted: '[When] a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. . . . If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.' In this case, those admonitions favor adherence to, rather than departure from, precedent." *427 U.S., at 190-191*. Even while writing in dissent in the *Weber* case, Chief Justice Burger observed that the result reached by the majority was one that he "would be inclined to vote for were I a Member of Congress considering a proposed amendment of Title VII." *443 U.S., at 216*.

[**49]** **[*645]** **[**1459]** The logic of antidiscrimination legislation requires that judicial constructions of Title VII leave "breathing room" for employer initiatives to benefit members of minority groups. If Title VII had never been enacted, a private employer would be free to hire members of minority groups for any reason that might seem sensible from a business or a social point of view. The Court's opinion in *Weber* reflects the same approach; the opinion relied heavily on legislative history indicating that Congress intended that traditional management prerogatives be left undisturbed to the greatest extent possible. See *443 U.S., at 206-207*. As we observed last Term, "'[it] would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long" constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.'" *Firefighters v. Cleveland, 478 U.S. 501, 516 (1986)* (quoting *Weber, 443 U.S., at 204*). **[****50]** In *Firefighters*, we again acknowledged Congress' concern in Title VII to avoid "undue federal interference with managerial discretion." *478 U.S., at 519*. [5]

[*646] As **[***640]** construed in *Weber* and in *Firefighters*, the statute does not absolutely prohibit preferential hiring in **[****51]** favor of minorities; it was merely intended to

[5] As JUSTICE BLACKMUN observed in *Weber, 443 U.S., at 209, 214-215* (concurring opinion):

"Strong considerations of equity support an interpretation of Title VII that would permit private affirmative action to reach where Title VII itself does not. The bargain struck in 1964 with the passage of Title VII guaranteed equal opportunity for white and black alike, but where Title VII provides no remedy for blacks, it should not be construed to foreclose private affirmative action from supplying relief. . . . Absent compelling evidence of legislative intent, I would not interpret Title VII itself as a means of 'locking in' the effects of discrimination for which Title VII provides no remedy."

protect historically disadvantaged groups *against* discrimination and not to hamper managerial efforts to benefit members of disadvantaged groups that are consistent with that paramount purpose. The preference granted by respondent in this case does not violate the statute as so construed; the record amply supports the conclusion that the challenged employment decision served the legitimate purpose of creating diversity in a category of employment that had been almost an exclusive province of males in the past. Respondent's voluntary decision is surely not prohibited by Title VII as construed in *Weber*.

II

Whether a voluntary decision of the kind made by respondent would ever be prohibited by Title VII is a question we need not answer until it is squarely presented. Given the interpretation of the statute the Court adopted in *Weber*, I see no reason why the employer has any duty, prior to granting a preference to a qualified minority employee, to determine whether his past conduct might constitute an arguable violation of Title VII. Indeed, in some instances the employer may find it more helpful to focus on the future. **[****52]** Instead of retroactively scrutinizing his own or society's possible exclusions of minorities in the past to determine the outer limits of a valid affirmative-action program -- or indeed, any particular affirmative-action decision -- in many cases the employer will find it more appropriate to consider other legitimate reasons **[**1460]** to give preferences to members of underrepresented groups. **[*647]** Statutes enacted for the benefit of minority groups should not block these forward-looking considerations.

"Public and private employers might choose to implement affirmative action for many reasons other than to purge their own past sins of discrimination. The Jackson school board, for example, said it had done so in part to improve the quality of education in Jackson -- whether by improving black students' performance or by dispelling for black and white students alike any idea that white supremacy governs our social institutions. Other employers might advance different forward-looking reasons for affirmative action: improving their services to black constituencies, averting racial tension over the allocation of jobs in a community, or increasing the diversity of a work force, **[****53]** to name but a few examples. Or they might adopt affirmative action simply to eliminate from their operations all de facto embodiment of a system of racial caste. All of these reasons aspire to a racially integrated future, but none reduces to 'racial balancing for its own sake.'" Sullivan, The Supreme Court -- Comment, Sins of Discrimination: Last **[***641]** Term's Affirmative Action Cases, *100 Harv. L. Rev. 78, 96 (1986)*.

The Court today does not foreclose other voluntary decisions based in part on a qualified employee's membership in a disadvantaged group. Accordingly, I concur.

JUSTICE O'CONNOR, concurring in the judgment.

In *Steelworkers v. Weber, 443 U.S. 193 (1979)*, this Court held that § 703(d) of Title VII does not prohibit voluntary affirmative action efforts if the employer sought to remedy a "manifest . . . [imbalance] in traditionally segregated job categories." *Id., at 197*. As JUSTICE SCALIA illuminates with excruciating clarity, § 703 has been interpreted by *Weber* and succeeding cases to permit what its language read literally would prohibit. *Post*, at 669-671; see also *ante*, at 642-643 **[*648]** **[****54]** (STEVENS, J., concurring). Section 703(d) prohibits employment discrimination "against *any individual* because of his race, color, religion, sex, or national origin." *42 U. S. C. § 2000e-2(d)* (emphasis added). The *Weber* Court, however, concluded that voluntary affirmative action was permissible in some circumstances because a prohibition of every type of affirmative action would "'bring about an end completely at variance with the purpose of the statute.'" *443 U.S., at 202* (quoting *United States v. Public Utilities Comm'n, 345 U.S. 295, 315 (1953)*). This purpose, according to the Court, was to open employment opportunities for blacks in occupations that had been traditionally closed to them.

None of the parties in this case have suggested that we overrule *Weber* and that question was not raised, briefed, or argued in this Court or in the courts below. If the Court is faithful to its normal prudential restraints and to the principle of *stare decisis* we must address once again the propriety of an affirmative action plan under Title VII in light of our precedents, precedents that have upheld affirmative action in a variety of **[****55]** circumstances. This time the question posed is whether a public employer violates Title VII by promoting a qualified woman rather than a marginally better qualified man when there is a statistical imbalance sufficient to support a claim of a pattern or practice of discrimination against women under Title VII.

I concur in the judgment of the Court in light of our precedents. I write separately, however, because the Court has chosen to follow an expansive and ill-defined approach to voluntary affirmative action by public employers despite the limitations imposed by the Constitution and by the provisions of Title VII, and because JUSTICE SCALIA's dissent rejects the Court's precedents and addresses the question of how Title VII should be interpreted as if the Court were writing on a clean slate. The **[**1461]** former course of action gives insufficient guidance to courts and litigants; the latter course of action serves as a useful point of academic discussion, but

fails **[*649]** to reckon with the reality of the course that the majority of the Court has determined to follow.

In my view, the proper initial inquiry in evaluating the legality of an affirmative action plan by a public **[****56]** employer under Title VII is no different from that required by the **[***642]** *Equal Protection Clause*. In either case, consistent with the congressional intent to provide some measure of protection to the interests of the employer's nonminority employees, the employer must have had a firm basis for believing that remedial action was required. An employer would have such a firm basis if it can point to a statistical disparity sufficient to support a prima facie claim under Title VII by the employee beneficiaries of the affirmative action plan of a pattern or practice claim of discrimination.

In *Weber*, this Court balanced two conflicting concerns in construing § 703(d): Congress' intent to root out invidious discrimination against *any* person on the basis of race or gender, *McDonald v. Santa Fe Transportation Co., 427 U.S. 273 (1976)*, and its goal of eliminating the lasting effects of discrimination against minorities. Given these conflicting concerns, the Court concluded that it would be inconsistent with the background and purpose of Title VII to prohibit affirmative action in all cases. As I read *Weber*, however, the Court also determined that **[****57]** Congress had balanced these two competing concerns by permitting affirmative action only as a remedial device to eliminate actual or apparent discrimination or the lingering effects of this discrimination.

Contrary to the intimations in JUSTICE STEVENS' concurrence, this Court did not approve preferences for minorities "for any reason that might seem sensible from a business or a social point of view." *Ante*, at 645. Indeed, such an approach would have been wholly at odds with this Court's holding in *McDonald* that Congress intended to prohibit practices that operate to discriminate against the employment opportunities of nonminorities as well as minorities. Moreover, in *Weber* the Court was careful to consider the effects of the affirmative **[*650]** action plan for black employees on the employment opportunities of white employees. *443 U.S., at 208*. Instead of a wholly standardless approach to affirmative action, the Court determined in *Weber* that Congress intended to permit affirmative action only if the employer could point to a "manifest . . . [imbalance] in traditionally segregated job categories." *Id., at 197*. This requirement **[****58]** both "provides assurance . . . that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination," *ante*, at 632, and is consistent with this Court's and Congress' consistent emphasis on the value of voluntary efforts to further the antidiscrimination purposes of Title VII. *Wygant v. Jackson Board of Education, 476 U.S. 267, 290 (1986)* (O'CONNOR, J., concurring in part and concurring in judgment).

The *Weber* view of Congress' resolution of the conflicting concerns of minority and nonminority workers in Title VII appears substantially similar to this Court's resolution of these same concerns in *Wygant v. Jackson Board of Education, supra*, which involved the claim that an affirmative action plan by a public employer violated the *Equal Protection Clause*. In *Wygant*, the Court was in agreement that remedying past or present racial discrimination by a state actor is a sufficiently **[***643]** weighty interest to warrant the remedial use of a carefully constructed affirmative action plan. The Court also concluded, however, that "[societal] discrimination, **[****59]** without more, is too amorphous a basis for imposing a racially classified remedy." *Id., at 276*. Instead, we determined that affirmative action was valid if it was crafted to remedy past or **[**1462]** present discrimination by the employer. Although the employer need not point to any contemporaneous findings of actual discrimination, I concluded in *Wygant* that the employer must point to evidence sufficient to establish a firm basis for believing that remedial action is required, and that a statistical imbalance sufficient for a Title VII prima facie **[*651]** case against the employer would satisfy this firm basis requirement:

"Public employers are not without reliable benchmarks in making this determination. For example, demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority such as the School Board to conclude that implementation of a voluntary affirmative action plan is appropriate **[****60]** to remedy apparent prior employment discrimination." *Id., at 292*.

The *Wygant* analysis is entirely consistent with *Weber*. In *Weber*, the affirmative action plan involved a training program for unskilled production workers. There was little doubt that the absence of black craftworkers was the result of the exclusion of blacks from craft unions. *Steelworkers v. Weber, 443 U.S., at 198, n. 1* ("Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice"). The employer in *Weber* had previously hired as craftworkers only

persons with prior craft experience, and craft unions provided the sole avenue for obtaining this experience. Because the discrimination occurred at entry into the craft union, the "manifest racial imbalance" was powerful evidence of prior race discrimination. Under our case law, the relevant comparison for a Title VII prima facie case in those circumstances -- discrimination in admission to entry-level positions such as membership in craft unions -- is to the total percentage of blacks in the labor force. See *Teamsters v. United States, 431 U.S. 324 (1977)*; **[****61]** cf. *Sheet Metal Workers v. EEOC, 478 U.S. 421, 437-439 (1986)* (observing that lower courts had relied on comparison to general labor force in finding Title VII violation by union). Here, however, the evidence of past discrimination is more complex. The number **[*652]** of women with the qualifications for entry into the relevant job classification was quite small. A statistical imbalance between the percentage of women in the work force generally and the percentage of women in the particular specialized job classification, therefore, does not suggest past discrimination for purposes of proving a Title VII prima facie case. See *Hazelwood School District v. United States, 433 U.S. 299, 308, and n. 13 (1977)*.

[*644]** Unfortunately, the Court today gives little guidance for what statistical imbalance is sufficient to support an affirmative action plan. Although the Court denies that the statistical imbalance need be sufficient to make out a prima facie case of discrimination against women, *ante*, at 632, the Court fails to suggest an alternative standard. Because both *Wygant* and *Weber* attempt to reconcile the same competing **[****62]** concerns, I see little justification for the adoption of different standards for affirmative action under Title VII and the *Equal Protection Clause*.

While employers must have a firm basis for concluding that remedial action is necessary, neither *Wygant* nor *Weber* places a burden on employers to prove that they actually discriminated against women or minorities. Employers are "trapped between the competing hazards of liability to minorities if affirmative action is *not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action *is* taken." *Wygant v. Jackson Board of Education, 476 U.S., at 291* (O'CONNOR, J., **[**1463]** concurring in part and concurring in judgment). Moreover, this Court has long emphasized the importance of voluntary efforts to eliminate discrimination. *Id., at 290*. Thus, I concluded in *Wygant* that a contemporaneous finding of discrimination should not be required because it would discourage voluntary efforts to remedy apparent discrimination. A requirement that an employer actually prove that it had discriminated in the past would also unduly discourage **[****63]** voluntary efforts to remedy apparent discrimination. As I emphasized in *Wygant*, a challenge **[*653]** to an affirmative action plan "does not automatically impose upon the public employer the burden of convincing the court of its liability for prior unlawful discrimination; nor does it mean that the court must make an actual finding of prior discrimination based on the employer's proof before the employer's affirmative action plan will be upheld." *Id., at 292*. Evidence sufficient for a prima facie Title VII pattern or practice claim against the employer itself suggests that the absence of women or minorities in a work force cannot be explained by general societal discrimination alone and that remedial action is appropriate.

In applying these principles to this case, it is important to pay close attention to both the affirmative action plan, and the manner in which that plan was applied to the specific promotion decision at issue in this case. In December 1978, the Santa Clara Transit District Board of Supervisors adopted an affirmative action plan for the Santa Clara County Transportation Agency (Agency). At the time the plan was adopted, not one woman **[****64]** was employed in respondents' 238 skilled craft positions, and the plan recognized that women "are not strongly motivated to seek employment in job classifications where they have not been traditionally employed because of the limited opportunities that have existed in the past for them to work in such classifications." App. 57. Additionally, the plan stated that respondents "[recognized] that mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, **[***645]** women and handicapped persons," *id.*, at 31, and that "the selection and appointment processes are areas where hidden discrimination frequently occurs." *Id., at 71*. Thus, respondents had the expectation that the plan "should result in improved personnel practices that will benefit all Agency employees who may have been subjected to discriminatory personnel practices in the past." *Id.*, at 35.

[*654] The long-term goal of the plan was "to attain a work force whose composition in all job levels and major job classifications approximates the distribution of women . . . in the Santa Clara County work force." **[****65]** *Id., at 54*. If this long-term goal had been applied to the hiring decisions made by the Agency, in my view, the affirmative action plan would violate Title VII. "[It] is completely unrealistic to assume that individuals of each [sex] will gravitate with mathematical exactitude to each employer . . . absent unlawful discrimination." *Sheet Metal Workers, 478 U.S., at 494* (O'CONNOR, J., concurring in part and dissenting in part). Thus, a goal that makes such an assumption, and simplistically focuses on the proportion of women and minorities in the work force without more, is not remedial. Only a goal that takes into account the number of women and

minorities qualified for the relevant position could satisfy the requirement that an affirmative action plan be remedial. This long-range goal, however, was never used as a guide for actual hiring decisions. Instead, the goal was merely a statement of aspiration wholly without operational significance. The affirmative action plan itself recognized the host of reasons why this goal was extremely unrealistic, App. 56-57, and as I read the record, the long-term goal was not applied in the promotion decision challenged **[****66]** in this case. Instead, the plan provided for the development of short-term goals, which alone were to guide the respondents, *id., at 61,* **[**1464]** and the plan cautioned that even these goals "should not be construed as 'quotas' that must be met." *Id., at 64*. Instead, these short-term goals were to be focused on remedying past apparent discrimination, and would "[provide] an objective standard for use in determining if the representation of minorities, women and handicapped persons in particular job classifications is at a reasonable level in comparison with estimates of the numbers of persons from these groups in the area work force who can meet the educational and experience requirements for employment." *Id., at 61*.

[*655] At the time of the promotion at issue in this case, the short-term goals had not been fully developed. Nevertheless, the Agency had already recognized that the long-range goal was unrealistic, and had determined that the progress of the Agency should be judged by a comparison to the *qualified* women in the area work force. As I view the record, the promotion decision in this case was entirely consistent with the philosophy underlying the **[****67]** development of the short-term goals.

The Agency announced a vacancy for the position of road dispatcher in the Agency's Roads Division on December 12, 1979. Twelve employees applied for this position, including Diane Joyce and petitioner. Nine of these employees were interviewed for the position by a two-person board. Seven applicants -- including **[***646]** Joyce and petitioner -- scored above 70 on this interview, and were certified as eligible for selection for the promotion. Petitioner scored 75 on the interview, while Joyce scored 73. After a second interview, a committee of three agency employees recommended that petitioner be selected for the promotion to road dispatcher. The County's Affirmative Action Officer, on the other hand, urged that Joyce be selected for the position.

The ultimate decision to promote Joyce rather than petitioner was made by James Graebner, the Director of the Agency. As JUSTICE SCALIA views the record in this case, the Agency Director made the decision to promote Joyce rather than petitioner solely on the basis of sex and with indifference to the relative merits of the two applicants. See *post*, at 662-663. In my view, however, the record **[****68]** simply fails to substantiate the picture painted by JUSTICE SCALIA. The Agency Director testified that he "tried to look at the whole picture, the combination of [Joyce's] qualifications and Mr. Johnson's qualifications, their test scores, their experience, their background, affirmative action matters, things like that." Tr. 68. Contrary to JUSTICE SCALIA's suggestion, *post*, at 663, the Agency Director knew far more than **[*656]** merely the sex of the candidates and that they appeared on a list of candidates eligible for the job. The Director had spoken to individuals familiar with the qualifications of both applicants for the promotion, and was aware that their scores were rather close. Moreover, he testified that over a period of weeks he had spent several hours making the promotion decision, suggesting that Joyce was not selected solely on the basis of her sex. Tr. 63. Additionally, the Director stated that had Joyce's experience been less than that of petitioner by a larger margin, petitioner might have received the promotion. *Id., at 69-70*. As the Director summarized his decision to promote Joyce, the underrepresentation of women in skilled craft positions was **[****69]** only one element of a number of considerations that led to the promotion of Ms. Joyce. *Ibid.* While I agree with JUSTICE SCALIA's dissent that an affirmative action program that automatically and blindly promotes those marginally qualified candidates falling within a preferred race or gender category, or that can be equated with a permanent plan of "proportionate representation by race and sex," would violate Title VII, I cannot agree that this is such a case. Rather, as the Court demonstrates, Joyce's sex was simply used as a "plus" factor. *Ante*, at 636-637.

In this case, I am also satisfied that respondents had a firm basis for adopting an affirmative action program. Although the District Court found no discrimination against women in fact, at the time the affirmative action plan was adopted, there **[**1465]** were *no* women in its skilled craft positions. Petitioner concedes that women constituted approximately 5% of the local labor pool of skilled craft workers in 1970. Reply Brief for Petitioner 9. Thus, when compared to the percentage of women in the qualified work force, the statistical disparity would have been sufficient for a prima facie Title VII case **[****70]** brought by unsuccessful women job applicants. See *Teamsters, 431 U.S., at 342, n. 23* ("[Fine] tuning **[***647]** of the statistics could not have obscured the glaring absence of minority line drivers. . . . [The] company's inability to rebut the inference **[*657]** of discrimination came not from a misuse of statistics but from 'the inexorable zero'").

In sum, I agree that respondents' affirmative action plan as implemented in this instance with respect to skilled craft positions satisfies the requirements of *Weber* and of *Wygant*. Accordingly, I concur in the judgment of the Court.

Dissent by: WHITE; SCALIA

Dissent

JUSTICE WHITE, dissenting.

I agree with Parts I and II of JUSTICE SCALIA's dissenting opinion. Although I do not join Part III, I also would overrule *Weber*. My understanding of *Weber* was, and is, that the employer's plan did not violate Title VII because it was designed to remedy the intentional and systematic exclusion of blacks by the employer and the unions from certain job categories. That is how I understood the phrase "traditionally segregated jobs" that we used in that case. The Court now interprets it to mean nothing more than a manifest imbalance **[****71]** between one identifiable group and another in an employer's labor force. As so interpreted, that case, as well as today's decision, as JUSTICE SCALIA so well demonstrates, is a perversion of Title VII. I would overrule *Weber* and reverse the judgment below.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, and with whom JUSTICE WHITE joins in Parts I and II, dissenting.

With a clarity which, had it not proven so unavailing, one might well recommend as a model of statutory draftsmanship, Title VII of the Civil Rights Act of 1964 declares:

"It shall be an unlawful employment practice for an employer --

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

[*658] "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national **[****72]** origin." *42 U. S. C. § 2000e-2(a)*.

The Court today completes the process of converting this from a guarantee that race or sex will *not* be the basis for employment determinations, to a guarantee that it often *will*. Ever so subtly, without even alluding to the last obstacles preserved by earlier opinions that we now push out of our path, we effectively replace the goal of a discrimination-free society with the quite incompatible goal of proportionate representation by race and by sex in the workplace. Part I of this dissent will describe the nature of the plan that the Court approves, and its effect upon this petitioner. Part II will discuss prior holdings that are tacitly overruled, and prior distinctions that are disregarded. Part III will describe the engine of discrimination we have finally completed.

I

On October 16, 1979, the County of Santa Clara adopted an Affirmative **[***648]** Action Program (County plan) which sought the "attainment of a County work force whose composition . . . includes women, disabled persons and ethnic minorities in a ratio in all job categories that reflects their distribution **[**1466]** in the Santa Clara County area work force." App. 113. **[****73]** In order to comply with the County plan and various requirements imposed by federal and state agencies, the Transportation Agency adopted, effective December 18, 1978, the Equal Employment Opportunity Affirmative Action Plan (Agency plan or plan) at issue here. Its stated long-range goal was the same as the County plan's: "to attain a work force whose composition in all job levels and major job classifications approximates the distribution of women, minority and handicapped persons in the Santa Clara County work force." *Id., at 54.* **[*659]** The plan called for the establishment of a procedure by which Division Directors would review the ethnic and sexual composition of their work forces whenever they sought to fill a vacancy, which procedure was expected to include "a requirement that Division Directors indicate why they did *not* select minorities, women and handicapped persons if such persons were on the list of eligibles considered and if the Division had an underrepresentation of such persons in the job classification being filled." *Id., at 75* (emphasis in original).

Several salient features of the plan should be noted. Most importantly, the plan's purpose was assuredly **[****74]** not to remedy prior sex discrimination by the Agency. It could not have been, because there was no prior sex discrimination to remedy. The majority, in cataloging the Agency's alleged misdeeds, *ante*, at 624, n. 5, neglects to mention the District Court's finding that the Agency "has not discriminated in the past, and does not discriminate in the present against women in regard to employment opportunities in general and promotions in particular." App. to Pet. for Cert. 13a. This finding was not disturbed by the Ninth Circuit.

Not only was the plan not directed at the results of past sex discrimination by the Agency, but its objective was not to achieve the state of affairs that this Court has dubiously assumed would result from an absence of discrimination -- an overall work force "more or less representative of the racial and ethnic composition of the population in the community." *Teamsters v. United States, 431 U.S. 324, 340, n. 20 (1977)*.

Rather, the oft-stated goal was to mirror the racial and sexual composition of the entire county labor force, not merely in the Agency work force as a whole, but in each and every individual job category at the **[****75]** Agency. In a discrimination-free world, it would obviously be a statistical oddity for every job category to match the racial and sexual composition of even that portion of the county work force *qualified* for that job; it would be utterly miraculous for each of them to match, as the plan expected, the composition of the *entire* work force. **[*660]** Quite obviously, the plan did not seek to replicate what a lack of discrimination would produce, but rather imposed racial and sexual tailoring that would, in defiance of normal expectations and laws of probability, give each protected racial and sexual group a governmentally determined "proper" proportion of each job category.

[*649]** That the plan was not directed at remedying or eliminating the effects of past discrimination is most clearly illustrated by its description of what it regarded as the *"Factors Hindering Goal Attainment" -- i. e.*, the existing impediments to the racially and sexually representative work force that it pursued. The plan noted that it would be "difficult," App. 55, to attain its objective of across-the-board statistical parity in at least some job categories, because:

"a. Most of the positions **[****76]** require specialized training and experience. Until recently, relatively few minorities, women and handicapped persons sought entry into these positions. Consequently, the number of persons from these groups in the area labor force who possess the qualifications required for entry into such job classifications is limited.

. . . .

"c. Many of the Agency positions where women are underrepresented involve heavy labor; e. g., Road Maintenance **[**1467]** Worker. Consequently, few women seek entry into these positions.

. . . .

"f. Many women are not strongly motivated to seek employment in job classifications where they have not been traditionally employed because of the limited opportunities that have existed in the past for them to work in such classifications." *Id., at 56-57*.

That is, the qualifications and desires of women may fail to match the Agency's Platonic ideal of a work force. The plan concluded from this, of course, not that the ideal should be reconsidered, but that its attainment could not be immediate. **[*661]** *Id., at 58-60*. It would, in any event, be rigorously pursued, by giving "special consideration to Affirmative Action requirements in every individual **[****77]** hiring action pertaining to positions where minorities, women and handicapped persons continue to be underrepresented." *Id., at 60*. [1]

Finally, the one message that the plan unmistakably communicated was that concrete results were expected, and supervisory personnel would be evaluated on the basis of the affirmative-action numbers they produced. The plan's implementation was expected to "result in a statistically measurable yearly improvement in the hiring, training and promotion of minorities, women and handicapped persons in the major job classifications utilized by the Agency where these groups are underrepresented." *Id.*, at 35. Its Preface declared that "[the] degree to which each Agency Division *attains the Plan's objectives* will provide a direct **[****78]** measure of that Division Director's personal commitment to the EEO Policy," *ibid.* (emphasis added), and the plan itself repeated that "[the] degree to which each Division *attains the Agency Affirmative Action employment goals* will provide a measure of that Director's commitment and effectiveness in carrying out the Division's EEO Affirmative Action requirements." *Id., at 44* (emphasis added). As noted earlier, supervisors **[***650]** were reminded of the need to give attention to affirmative action in every employment decision, and to explain their reasons for *failing* to hire women and minorities whenever there was an opportunity to do so.

The petitioner in the present case, Paul E. Johnson, had been an employee of the Agency since 1967, coming there from a private company where he had been a road dispatcher for 17 years. He had first applied for the position of Road Dispatcher at the Agency in 1974, coming in second. Several **[*662]** years later, after a reorganization resulted in a down-grading of his Road Yard Clerk II position, in which Johnson "could see no future," Tr. 127, he requested and received a voluntary demotion from Road Yard Clerk II to Road Maintenance **[****79]** Worker, to increase his experience and thus improve his chances for future promotion. When the Road Dispatcher job next became vacant, in 1979, he was the leading candidate -- and indeed was assigned to work out of class full time in the vacancy, from September 1979 until June 1980. There is no question why he did not get the job.

The fact of discrimination against Johnson is much clearer, and its degree more shocking, than the majority and JUSTICE O'CONNOR's concurrence would suggest -- largely because neither of them recites a single one of the District Court

[1] This renders utterly incomprehensible the majority's assertion that "the Agency acknowledged that [its long-term goal] could not by itself necessarily justify taking into account the sex of applicants for positions in all job categories." *Ante*, at 635.

findings that govern this appeal, relying instead upon portions of the transcript which those findings implicitly rejected, and even upon a document (favorably comparing Joyce to Johnson), *ante*, at 625, that was prepared *after* Joyce was selected. See App. 27-28; Tr. 223-227. Worth mentioning, for example, is the trier of fact's determination that, if the Affirmative Action Coordinator had not intervened, "the decision as to whom to promote . . . would have been made by [the Road Operations Division Director]," App. to Pet. for Cert. 12a, who had recommended that **[**1468]** Johnson be appointed to the position. **[****80]** *Ibid.* [2] Likewise, the even more extraordinary **[*663]** findings that James Graebner, the Agency Director who made the appointment, "did not inspect the applications and related examination records of either [Paul Johnson] or Diane Joyce before making his decision," *ibid.*, and indeed "did little or nothing to inquire into the results of the interview process and conclusions which [were] described as of critical importance to the selection process." *Id.*, at 3a. In light of these determinations, it is impossible to believe (or to think that the District Court believed) **[***651]** Graebner's self-serving statements relied upon by the majority and JUSTICE O'CONNOR's concurrence, such as the assertion that he "tried to look at the whole picture, the combination of [Joyce's] qualifications and Mr. Johnson's qualifications, their test scores, their expertise, their background, affirmative action matters, things like that," Tr. 68 (quoted *ante*, at 625; *ante*, at 655 (O'CONNOR, J., concurring in judgment)). It was evidently enough for Graebner to know that both candidates (in the words of Johnson's counsel, to which Graebner assented) "met the M. Q.'s, the minimum. Both **[****81]** were minimally qualified." Tr. 25. When asked whether he had "any basis," *ibid.*, for determining whether one of the candidates was more qualified than the other, Graebner candidly answered, "No. . . . As I've said, they both appeared, and my conversations with people tended to corroborate, that they were both capable of performing the work." *Ibid.*

[**82]** After a 2-day trial, the District Court concluded that Diane Joyce's gender was *"the determining factor*," App. to Pet. for Cert. 4a, in her selection for the position. Specifically, it found that "[based] upon the examination results and the departmental interview, [Mr. Johnson] was more qualified for **[*664]** the position of Road Dispatcher than Diane Joyce," *id.*, at 12a; that "[but] for [Mr. Johnson's] sex, male, he would have been promoted to the position of Road Dispatcher," *id.*, at 13a; and that "[but] for Diane Joyce's sex, female, she would not have been appointed to the position. . . ." *Ibid.* The Ninth Circuit did not reject these factual findings as clearly erroneous, nor could it have done so on the record before us. We are bound by those findings under *Federal Rule of Civil Procedure 52(a)*.

II

The most significant proposition of law established by today's decision is that racial or sexual discrimination is permitted under Title VII when it is intended to overcome the effect, not of the employer's own discrimination, but of societal attitudes that have limited the entry of certain races, or of a particular sex, into certain jobs. Even if the societal **[****83]** attitudes in question consisted exclusively of conscious discrimination by other employers, this holding would contradict a decision of this Court rendered only last Term. *Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)*, held that the objective of remedying societal discrimination cannot prevent remedial affirmative action from violating the *Equal Protection Clause*. **[**1469]** See *id., at 276*; *id., at 288* (O'CONNOR, J., concurring in part and concurring in judgment); *id., at 295* (WHITE, J., concurring in judgment). While Mr. Johnson does not advance a constitutional claim here, it is most unlikely that Title VII was intended to place a *lesser* restraint on discrimination by public actors than is established by the Constitution. The Court has already held that the prohibitions on discrimination in Title VI, *42 U. S. C. § 2000d*, are at least as stringent as those in the Constitution. See *Regents of University of California v. Bakke, 438 U.S. 265, 286-287 [***652] (1978)* (opinion of POWELL, J.) (Title VI embodies constitutional restraints on discrimination); **[****84]** *id., at 329-340* (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) (same); *id., at 416* (opinion of **[*665]** STEVENS, J., joined by Burger, C. J., and Stewart and REHNQUIST, JJ.) (Title VI "has independent force, with language and emphasis *in addition to* that found in the Constitution") (emphasis added).

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[2] The character of this intervention, and the reasoning behind it, was described by the Agency Director in his testimony at trial:

"Q. How did you happen to become involved in this particular promotional opportunity?

"A. I . . . became aware that there was a difference of opinion between specifically the Road Operations people [Mr. Shields] and the Affirmative Action Director [Mr. Morton] as to the desirability of certain of the individuals to be promoted.

. . . .

". . . Mr. Shields felt that Mr. Johnson should be appointed to that position.

"Q. Mr. Morton felt that Diane Joyce should be appointed?

"A. Mr. Morton was less interested in the particular individual; he felt that this was an opportunity for us to take a step toward meeting our affirmative action goals, and because there was only one person on the [eligibility] list who was one of the protected groups, he felt that this afforded us an opportunity to meet those goals through the appointment of that member of a protected group." Tr. 16-18.

There is no good reason to think that Title VII, in this regard, is any different from Title VI. [3] **[****85]** Because, therefore, those justifications (*e. g.*, the remedying of past societal wrongs) that are inadequate to insulate discriminatory action from the racial discrimination prohibitions of the Constitution are also inadequate to insulate it from the racial discrimination prohibitions of Title VII; and because the portions of Title VII at issue here treat race and sex equivalently; *Wygant*, which dealt with race discrimination, is fully applicable precedent, and is squarely inconsistent with today's decision. [4]

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[3] To support the proposition that Title VII is more narrow than Title VI, the majority repeats the reasons for the dictum to that effect set forth in *Steelworkers v. Weber, 443 U.S. 193, 206, n. 6 (1979)* -- a case which, as JUSTICE O'CONNOR points out, *ante*, at 651-652, could reasonably be read as consistent with the constitutional standards of *Wygant*. Those reasons are unpersuasive, consisting only of the existence in Title VII of *42 U. S. C. § 2000e-2(j)* (the implausibility of which, as a *restriction* upon the scope of Title VII, was demonstrated by CHIEF JUSTICE REHNQUIST's literally unanswered *Weber* dissent) and the fact that Title VI pertains to recipients of federal funds while Title VII pertains to employers generally. The latter fact, while true and perhaps interesting, is not conceivably a reason for giving to virtually identical categorical language the interpretation, in one case, that intentional discrimination is forbidden, and, in the other case, that it is not. Compare *42 U. S. C. § 2000d* ("No person . . . shall, on the ground of race, color, or national origin, be . . . subjected to discrimination"), with *§ 2000e-2(a)(1)* (no employer shall "discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin").

[4] JUSTICE O'CONNOR's concurrence at least makes an attempt to bring this Term into accord with last. Under her reading of Title VII, an employer may discriminate affirmatively, so to speak, if he has a "firm basis" for believing that he might be guilty of (nonaffirmative) discrimination under the Act, and if his action is designed to remedy that suspected prior discrimination. *Ante*, at 649. This is something of a halfway house between leaving employers scot-free to discriminate against disfavored groups, as the majority opinion does, and prohibiting discrimination, as do the words of Title VII. In the present case, although the District Court found that in fact no sex discrimination existed, JUSTICE O'CONNOR would find a "firm basis" for the agency's *belief* that sex discrimination existed in the "inexorable zero": the complete absence, prior to Diane Joyce, of any women in the Agency's skilled positions. There are two problems with this: First, even positing a "firm basis" for the Agency's belief in prior discrimination, as I have discussed above the plan was patently not *designed to remedy* that prior discrimination, but rather to establish a sexually representative work force. Second, even an absolute zero is not "inexorable." While it may inexorably provide "firm basis" for belief in the mind of an outside observer, it cannot conclusively establish such a belief *on the employer's part*, since he may be aware of the particular reasons that account for the zero. That is quite likely to be the case here, given the nature of the jobs we are talking about, and the list of *"Factors Hindering Goal Attainment"* recited by the Agency plan. See *supra*, at 622. The question is in any event one of fact, which, if it were indeed relevant to the outcome, would require a remand to the District Court rather than an affirmance.

[**86]** **[*666]** Likewise on the assumption that the societal attitudes relied upon by the majority consist of conscious discrimination **[***653]** by **[**1470]** employers, today's decision also disregards the limitations carefully expressed in last Term's opinions in *Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986)*. While those limitations were dicta, it is remarkable to see them so readily (and so silently) swept away. The question in *Sheet Metal Workers* was whether the remedial provision of Title VII, *42 U. S. C. § 2000e-5(g)*, empowers courts to order race-conscious relief for persons who were not identifiable victims of discrimination. Six Members of this Court concluded that it does, *under narrowly confined circumstances*. The plurality opinion for four Justices found that race-conscious relief could be ordered at least when "an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination." *478 U.S., at 445* (opinion of BRENNAN, J., joined by MARSHALL, BLACKMUN, and STEVENS, JJ.). See also *id., at 476*. JUSTICE POWELL **[****87]** concluded that race-conscious relief can be ordered "in cases involving **[*667]** particularly egregious conduct," *id., at 483* (concurring in part and concurring in judgment), and JUSTICE WHITE similarly limited his approval of race-conscious remedies to "unusual cases." *Id., at 499* (dissenting). See also *Firefighters v. Cleveland, 478 U.S. 501, 533 (1986)* (WHITE, J., dissenting) ("I also agree with JUSTICE BRENNAN's opinion in *Sheet Metal Workers* . . . that in Title VII cases enjoining discriminatory practices and granting relief only to victims of past discrimination is the general rule, with relief for nonvictims being reserved for particularly egregious conduct"). There is no sensible basis for construing Title VII to permit employers to engage in race- or sex-conscious employment practices that courts would be forbidden from ordering them to engage in following a judicial finding of discrimination. As JUSTICE WHITE noted last Term:

"There is no statutory authority for concluding that if an employer desires to discriminate against a white applicant or employee on racial grounds he may do so without violating **[****88]** Title VII but may not be ordered to do so if he objects. In either case, the harm to the discriminatee is

the same, and there is no justification for such conduct other than as a permissible remedy for prior racial discrimination practiced by the employer involved." *Id., at 533*.

The Agency here was not seeking to remedy discrimination -- much less "unusual" or "egregious" discrimination. *Firefighters*, like *Wygant*, is given only the most cursory consideration by the majority opinion.

In fact, however, today's decision goes well beyond merely allowing racial or sexual discrimination in order to eliminate the effects of prior societal *discrimination*. The majority opinion often uses the phrase "traditionally segregated job category" to describe the evil against which the plan is legitimately (according to the majority) directed. As originally used in *Steelworkers v. Weber, 443 U.S. 193 (1979)*, that phrase described skilled jobs from which employers and unions **[*668]** had systematically and **[***654]** intentionally excluded black workers -- traditionally segregated jobs, that is, in the sense of conscious, exclusionary discrimination. **[****89]** See *id., at 197-198*. But that is assuredly not the sense in which the phrase is used here. It is absurd to think that the nationwide failure of road maintenance crews, for example, to achieve the Agency's ambition of 36.4% female representation is attributable primarily, if even substantially, to systematic exclusion of women eager to shoulder pick and shovel. It is a "traditionally segregated job category" *not* in the *Weber* sense, but in the sense that, because of longstanding social attitudes, it has not been regarded *by women themselves* as desirable work. Or as the majority opinion puts the point, quoting approvingly the Court of Appeals: "'A plethora of proof is hardly necessary to show that women are generally underrepresented **[**1471]** in such positions and that strong social pressures weigh against their participation.'" *Ante*, at 634, n. 12 (quoting *748 F.2d 1308, 1313 (CA9 1984))*. Given this meaning of the phrase, it is patently false to say that "[the] requirement that the 'manifest imbalance' relate to a "traditionally segregated job category' provides assurance . . . that sex or race will be taken into account in **[****90]** a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination." *Ante*, at 632. There are, of course, those who believe that the social attitudes which cause women themselves to avoid certain jobs and to favor others are as nefarious as conscious, exclusionary discrimination. Whether or not that is so (and there is assuredly no consensus on the point equivalent to our national consensus against intentional discrimination), the two phenomena are certainly distinct. And it is the alteration of social attitudes, rather than the elimination of discrimination, which today's decision approves as justification for state-enforced discrimination. This is an enormous expansion, undertaken without the slightest justification or analysis.

[*669] III

I have omitted from the foregoing discussion the most obvious respect in which today's decision o'erleaps, without analysis, a barrier that was thought still to be overcome. In *Weber*, this Court held that a private-sector, affirmative-action training program that overtly discriminated against white applicants did not violate Title VII. However, although the majority does not advert to the fact, **[****91]** until today the applicability of *Weber* to public employers remained an open question. In *Weber* itself, see *443 U.S., at 200, 204*, and in later decisions, see *Firefighters v. Cleveland, supra, at 517*; *Wygant, 476 U.S., at 282, n. 9* (opinion of POWELL, J.), this Court has repeatedly emphasized that *Weber* involved only a private employer. See *Williams v. New Orleans, 729 F.2d 1554, 1565 (CA5 1984)* (en banc) (Gee, J., concurring) ("Writing for the Court in *Weber*, Justice Brennan went out of his way, on at least eleven different occasions, to point out that what was there before the Court was *private* affirmative action") (footnote omitted). This distinction between public and private employers has several possible justifications. *Weber* rested in part on the assertion that the **[***655]** 88th Congress did not wish to intrude too deeply into private employment decisions. See *443 U.S., at 206-207*. See also *Firefighters v. Cleveland, supra, at 519-521*. Whatever validity that assertion may have with respect to private employers (and I think **[****92]** it negligible), it has none with respect to public employers or to the 92d Congress that brought them within Title VII. See Equal Employment Opportunity Act of 1972, Pub. L. 92-261, § 2, 86 Stat. 103, *42 U. S. C. § 2000e(a)*. Another reason for limiting *Weber* to private employers is that state agencies, unlike private actors, are subject to the *Fourteenth Amendment*. As noted earlier, it would be strange to construe Title VII to permit discrimination by public actors that the Constitution forbids.

In truth, however, the language of *42 U. S. C. § 2000e-2* draws no distinction between private and public employers, **[*670]** and the only good reason for creating such a distinction would be to limit the damage of *Weber*. It would be better, in my view, to acknowledge that case as fully applicable precedent, and to use the *Fourteenth Amendment* ramifications -- which *Weber* did not address and which are implicated for the first time here -- as the occasion for reconsidering and overruling it. It is well to keep in mind just how thoroughly *Weber* rewrote the statute it purported to construe. The language of that statute, as quoted at the outset of this dissent, is unambiguous: **[****93]** it is an unlawful employment practice "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because **[**1472]** of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e-2(a). *Weber* disregarded the text of the statute, invoking instead its "'spirit,'" 443 U.S., at 201 (quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)), and "practical and equitable [considerations] only partially perceived, if perceived at all, by the 88th Congress," 443 U.S., at 209 (BLACKMUN, J., concurring). It concluded, on the basis of these intangible guides, that Title VII's prohibition of intentional discrimination on the basis of race and sex does not prohibit intentional discrimination on the basis of race and sex, so long as it is "designed to break down old patterns of racial [or sexual] segregation and hierarchy," "does not unnecessarily trammel the interests of the white [or male] employees," "does not require the discharge of white [or male] workers **[****94]** and their replacement with new black [or female] hirees," "does [not] create an absolute bar to the advancement of white [or male] employees," and "is a temporary measure . . . not intended to maintain racial [or sexual] balance, but simply to eliminate a manifest racial [or sexual] imbalance." Id., at 208. In effect, *Weber* held that the legality of intentional discrimination by private employers against certain disfavored groups or individuals is to be judged not by Title VII but by a judicially **[*671]** crafted code of conduct, the contours of which are determined by no discernible standard, aside from (as the dissent convincingly demonstrated) **[***656]** the divination of congressional "purposes" belied by the face of the statute and by its legislative history. We have been recasting that self-promulgated code of conduct ever since -- and what it has led us to today adds to the reasons for abandoning it.

The majority's response to this criticism of *Weber, ante*, at 629, n. 7, asserts that, since "Congress has not amended the statute to reject our construction, . . . we . . . may assume that our interpretation was correct." This assumption, which frequently **[****95]** haunts our opinions, should be put to rest. It is based, to begin with, on the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant. To make matters worse, it assays the current Congress' desires *with respect to the particular provision in isolation*, rather than (the way the provision was originally enacted) as part of a total legislative package containing many *quids pro quo*. Whereas the statute as originally proposed may have presented to the enacting Congress a question such as "Should hospitals be required to provide medical care for indigent patients, with federal subsidies to offset the cost?," the question theoretically asked of the later Congress, in order to establish the "correctness" of a judicial interpretation that the statute provides no subsidies, is simply "Should the medical care that hospitals are required to provide for indigent patients be federally subsidized?" Hardly the same question -- and many of those legislators who accepted the subsidy provisions in order to gain the votes necessary for enactment of the care requirement would **[****96]** not vote for the subsidy in isolation, now that an unsubsidized care requirement is, thanks to the judicial opinion, safely on the books. But even accepting the flawed premise that the intent of the current Congress, with respect to the provision in isolation, is determinative, one must ignore rudimentary **[*672]** principles of political science to draw any conclusions regarding that intent from the *failure* to enact legislation. The "complicated check on legislation," The Federalist No. 62, p. 378 (C. Rossiter ed. 1961), erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice. It is interesting to speculate on how **[**1473]** the principle that congressional inaction proves judicial correctness would apply to another issue in the civil rights field, the liability of municipal corporations under § 1983. In 1961, we held that that statute did not reach municipalities. See **[****97]** Monroe v. Pape, 365 U.S. 167, 187 (1961). Congress took no action to overturn our decision, but we ourselves did, in Monell v. New York City Dept. of Social Services, 436 U.S. 658, 663 (1978). On the majority's logic, *Monell* was wrongly decided, since Congress' 17 years of silence established that *Monroe* had not "misperceived the political will," and one could therefore "assume that [*Monroe*'s] interpretation was correct." On the other hand, nine years have now gone by since *Monell*, and Congress **[***657]** *again* has not amended § 1983. Should we now "assume that [*Monell*'s] interpretation was correct"? Rather, I think we should admit that vindication by congressional inaction is a canard.

JUSTICE STEVENS' concurring opinion emphasizes the "undoubted public interest in 'stability and orderly development of the law,'" *ante*, at 644 (citation omitted), that often requires adherence to an erroneous decision. As I have described above, however, today's decision is a demonstration not of stability and order but of the instability and unpredictable expansion which the substitution of judicial improvisation for statutory **[****98]** text has produced. For a number of reasons, *stare decisis* ought not to save *Weber*. First, this Court has applied the doctrine of *stare decisis* to civil rights **[*673]** statutes less rigorously than to other laws. See Maine v. Thiboutot, 448 U.S. 1, 33 (1980) (POWELL, J., dissenting); Monroe v. Pape, supra, at 221-222 (Frankfurter, J., dissenting in part). Second, as JUSTICE STEVENS acknowledges in his concurrence, *ante*, at 644, *Weber* was itself a dramatic departure from the Court's prior Title VII precedents, and can scarcely be said to be "so consistent with

the warp and woof of civil rights law as to be beyond question." *Monell v. New York City Dept. of Social Services, supra, at 696*. Third, *Weber* was decided a mere seven years ago, and has provided little guidance to persons seeking to conform their conduct to the law, beyond the proposition that Title VII does not mean what it says. Finally, "even under the most stringent test for the propriety of overruling a statutory decision . . . -- 'that it appear beyond doubt . . . that [the decision] misapprehended the meaning of the **[****99]** controlling provision,'" *436 U.S., at 700* (quoting *Monroe v. Pape, supra, at 192* (Harlan, J., concurring)), *Weber* should be overruled.

In addition to complying with the commands of the statute, abandoning *Weber* would have the desirable side effect of eliminating the requirement of willing suspension of disbelief that is currently a credential for reading our opinions in the affirmative-action field -- from *Weber* itself, which demanded belief that the corporate employer adopted the affirmative-action program "voluntarily," rather than under practical compulsion from government contracting agencies, see *443 U.S., at 204*; to *Bakke*, a Title VI case cited as authority by the majority here, *ante*, at 638, which demanded belief that the University of California took race into account as merely one of the many diversities to which it felt it was educationally important to expose its medical students, see *438 U.S., at 311-315*; to today's opinion, which -- in the face of a plan obviously designed to force promoting officials to prefer candidates from the favored racial and sexual classes, warning them that their "personal **[****100]** commitment" will be determined by how successfully they "attain" certain numerical goals, **[*674]** and in the face of a particular promotion awarded to the less qualified **[**1474]** applicant by an official who "did little or nothing" to inquire into sources "critical" to determining the final candidates' relative **[***658]** qualifications other than their sex -- in the face of all this, demands belief that we are dealing here with no more than a program that "merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants." *Ante*, at 638. Any line of decisions rooted so firmly in naivete must be wrong.

The majority emphasizes, as though it is meaningful, that "*No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants." *Ibid.* One is reminded of the exchange from Shakespeare's King Henry the Fourth, Part I:

"GLENDOWER: I can call Spirits from the vasty Deep.

"HOTSPUR: Why, so can I, or so can any man. But will they come when you do call for them?" Act III, Scene I, lines 53-55.

Johnson was indeed entitled to have his qualifications **[****101]** weighed against those of other applicants -- but more to the point, he was virtually assured that, after the weighing, if there was any minimally qualified applicant from one of the favored groups, he would be rejected.

Similarly hollow is the Court's assurance that we would strike this plan down if it "failed to take distinctions in qualifications into account," because that "would dictate mere blind hiring by the numbers." *Ante*, at 636. For what the Court means by "taking distinctions in qualifications into account" consists of no more than eliminating from the applicant pool those who are not even *minimally qualified* for the job. Once that has been done, once the promoting officer assures himself that all the candidates before him are "M. Q.'s" (minimally qualifieds), he can then ignore, as the Agency Director did here, how much better than minimally qualified some of the candidates may be, and can proceed to appoint **[*675]** from the pool solely on the basis of race or sex, until the affirmative-action "goals" have been reached. The requirement that the employer "take distinctions in qualifications into account" thus turns out to be an assurance, not that candidates' **[****102]** comparative merits will always be considered, but only that none of the successful candidates selected over the others solely on the basis of their race or sex will be utterly unqualified. That may be of great comfort to those concerned with American productivity; and it is undoubtedly effective in reducing the effect of affirmative-action discrimination upon those in the upper strata of society, who (unlike road maintenance workers, for example) compete for employment in professional and semiprofessional fields where, for many reasons, including most notably the effects of past discrimination, the numbers of "M. Q." applicants from the favored groups are substantially less. But I fail to see how it has any relevance to whether selecting among final candidates solely on the basis of race or sex is permissible under Title VII, which prohibits discrimination on the basis of race or sex. [5]

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[5] In a footnote purporting to respond to this dissent's (nonexistent) "[prediction] that today's decision will loose a flood of 'less qualified' minorities and women upon the work force," *ante*, at 641, n. 17, the majority accepts the contention of the American Society for Personnel Administration that there is no way to determine who is the best qualified candidate for a job such as Road Dispatcher. This effectively constitutes appellate reversal of a finding of fact by the District Court in the present case ("[Plaintiff] was more qualified for the position of Road Dispatcher than Diane Joyce," App. to Pet. for Cert. 12a). More importantly, it has staggering implications for future Title VII litigation, since the most common reason advanced for failing to hire a member of a protected group is the superior qualification of the hired individual. I am confident, however, that

[**103]** **[**1475]** Today's **[***659]** decision does more, however, than merely reaffirm *Weber*, and more than merely extend it to public actors. It is impossible not to be aware that the practical effect of our holding is to accomplish *de facto* what the law -- in language **[*676]** even plainer than that ignored in *Weber*, see *42 U. S. C. § 2000e-2(j)* -- forbids anyone from accomplishing *de jure*: in many contexts it effectively *requires* employers, public as well as private, to engage in intentional discrimination on the basis of race or sex. This Court's prior interpretations of Title VII, especially the decision in *Griggs v. Duke Power Co., 401 U.S. 424 (1971)*, subject employers to a potential Title VII suit whenever there is a noticeable imbalance in the representation of minorities or women in the employer's work force. Even the employer who is confident of ultimately prevailing in such a suit must contemplate the expense and adverse publicity of a trial, because the extent of the imbalance, and the "job relatedness" of his selection criteria, are questions of fact to be explored through rebuttal and counterrebuttal of a "prima facie case" consisting **[****104]** of no more than the showing that the employer's selection process "selects those from the protected class at a 'significantly' lesser rate than their counterparts." B. Schlei & P. Grossman, Employment Discrimination Law 91 (2d ed. 1983). If, however, employers are free to discriminate through affirmative action, without fear of "reverse discrimination" suits by their nonminority or male victims, they are offered a threshold defense against Title VII liability premised on numerical disparities. Thus, after today's decision the *failure* to engage in reverse discrimination is economic folly, and arguably a breach of duty to shareholders or taxpayers, wherever the cost of anticipated Title VII litigation exceeds the cost of hiring less capable (though still minimally capable) workers. (This situation is more likely to obtain, of course, with respect to the least skilled jobs -- perversely creating an incentive to discriminate against precisely those members of the nonfavored groups *least* likely to have profited from societal discrimination in the past.) It is predictable, moreover, that this incentive will be greatly magnified by economic pressures brought to bear by government **[****105]** contracting agencies upon employers who refuse to discriminate in the fashion **[*677]** we have now approved. A statute designed to establish a color-blind and gender-blind workplace has thus been converted into a powerful engine of racism and sexism, not merely *permitting* intentional race- and sex-based discrimination, but often making it, through operation of the legal system, practically compelled.

It is unlikely that today's result will be displeasing to politically elected officials, to whom it provides the means of quickly accommodating the demands of organized groups to **[***660]** achieve concrete, numerical improvement in the economic status of particular constituencies. Nor will it displease the world of corporate and governmental employers (many of whom have filed briefs as *amici* in the present case, all on the side of Santa Clara) for whom the cost of hiring less qualified workers is often substantially less -- and infinitely more predictable -- than the cost of litigating Title VII cases and of seeking to convince federal agencies by nonnumerical means that no discrimination exists. In fact, the only losers in the process are the Johnsons of the country, for **[****106]** whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals -- predominantly unknown, unaffluent, unorganized -- suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent. I dissent.

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the Court considers this argument no more enduring than I do.

References

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12 Federal Procedural Forms, L Ed, Job Discrimination 45:71, 45:84

5 Am Jur Pl & Pr Forms (Rev), Civil Rights, Forms 61.8-61.10, 61.13, 61.15, 65, 67.2

12 Am Jur Proof of Facts 2d 645, Sex Discrimination in Employment--Promotion Practices

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9A RIA Employment Coordinator 38,463, 38,464, 38,619.5, 38,650

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Index to Annotations, Discrimination; Equal Employment Opportunity **[****107]** ;Promotion of Employees; Sex Discrimination

Annotation References:

Affirmative action benefitting particular employees or prospective employees as violating other employees' rights under Federal Constitution or under federal civil rights legislation-- Supreme Court cases. *92 L Ed 2d 849*.

Validity, under *equal protection clause of Fourteenth Amendment*, of gender-based classifications arising by operation of state law--federal cases. *60 L Ed 2d 1188*.

Sex discrimination-- Supreme Court cases. *27 L Ed 2d 935*.

What constitutes reverse or majority discrimination on basis of sex or race violative of Federal Constitution or statutes. *26 ALR Fed 13*.

Construction and application of provisions of Title VII of Civil Rights Act of 1964 (*42 USCS 2000e et seq.*) making sex discrimination in employment unlawful. *12 ALR Fed 15*.

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July 13, 2023

Dear Fortune 100 CEOs:

We, the undersigned Attorneys General of 13 States, write to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race, whether under the label of "diversity, equity, and inclusion" or otherwise. Treating people differently because of the color of their skin, even for benign purposes, is unlawful and wrong. Companies that engage in racial discrimination should and will face serious legal consequences.

Last month, the United States Supreme Court handed down a significant decision in *Students for Fair Admissions v. President & Fellows of Harvard College*, No. 20-1199 (U.S. June 29, 2023) ("*SFFA*"). In that case, the Supreme Court struck down Harvard's and the University of North Carolina's race-based admissions policies and reaffirmed "the absolute equality of all citizens of the United States politically and civilly before their own laws." *SFFA*, slip op., at 10. Notably, the Court also recognized that federal civil-rights statutes prohibiting *private* entities from engaging in race discrimination apply at least as broadly as the prohibition against race discrimination found in the Equal Protection Clause. *See SFFA*, slip op. at 6 n.2. And the Court reiterated that this commitment to racial equality extends to "other areas of life," such as employment and contracting. *Id.* at 13. In sum, the Court powerfully reinforced the principle that *all* racial discrimination, no matter the motivation, is invidious and unlawful: "***Eliminating racial discrimination means eliminating all of it.***" *Id.* at 15 (emphasis added).

We ask that you comply with these race-neutral- principles in your employment and contracting practices.

A. Racial Discrimination Is Commonplace Among Fortune 100 Companies and Others.

Sadly, racial discrimination in employment and contracting is all too common among Fortune 100 companies and other large businesses. In an inversion of the odious discriminatory practices of the distant past, today's major companies adopt explicitly race-based initiatives which are similarly illegal. These discriminatory practices include, among other things, explicit racial quotas and preferences in hiring, recruiting, retention, promotion, and advancement. They also include race-based contracting practices, such as racial preferences and quotas in selecting suppliers, providing overt preferential treatment to customers on the basis of race, and pressuring contractors to adopt the company's racially discriminatory quotas and preferences.

A few cases illustrate the pervasiveness and explicit nature of these racial preferences. In 2020, a group of executives from 27 banks, tech companies, and consulting firms set an explicit racial hiring quota. Matthew Lavietes, *'Watershed Moment': Corporate America Looks to Hire More Black People*, Reuters (Aug. 19, 2020), *available at* https://www.reuters.com/article/us-usa-race-hiring-idUSKCN25F2SY/. Similarly, in 2019, Goldman Sachs set racial quotas for the hiring of new analysts and entry-level associates. Hugh Son, *How JPMorgan Increased the Number of Black Interns in Its Wall Street Program by Nearly Two-Thirds*, CNBC, Apr. 9, 2021, *available at* https://www.cnbc.com/2021/04/09/jpmorgan-increased-the-number-of-black-interns-in-its-wall-street-program-by-nearly-two-thirds.html. Racial quotas and other explicitly race-based practices in recruitment, hiring, promotion, and/or contracting have also been adopted by other major companies, such as Airbnb, Apple, Cisco, Facebook, Google, Intel, Lyft, Microsoft, Netflix, Paypal, Snapchat, TikTok, Uber, and others. Lauren Feiner, *Tech Companies Made Big Pledges to Fight Racism Last Year—Here's How They're Doing So Far*, CNBC (June 6, 2021), *available at* https://www.cnbc.com/2021/06/06/tech-industry-2020-anti-racism-commitments-progress-check.html.

Microsoft announced that it would set a quota for the number of Black-owned approved suppliers over three years and demand annual diversity disclosures from its top 100 suppliers, implying that suppliers that did not adopt their own racially discriminatory policies would suffer consequences. *Id.* Microsoft also announced that over a three-year period, it would set quotas for transaction volumes through Black-owned banks and external managers as well as for the number of Black-owned U.S. partners. *Id.*

B. Race Discrimination Is Illegal Under Federal and State Law.

Such overt and pervasive racial discrimination in the employment and contracting practices of Fortune 100 companies compels us to remind you of the obvious: Racial discrimination is both immoral and illegal. Such race-based employment and contracting violates both state and federal law, and as the chief law enforcement officers of our respective states we intend to enforce the law vigorously.

"It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855, 867 (2017). As the multitude of state and federal statutes prohibiting race discrimination by private parties attests, this "commitment to the equal dignity of persons" extends to the private sector as well as the government.

Title VII of the Civil Rights Act of 1964 prohibits racial discrimination in employment. It provides that "[i]t shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;" or "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a).

Furthermore, 42 U.S.C. § 1981 prohibits race discrimination in contracting. It provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981(a). This extends to "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 1981(b). Further, "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." *Id.* § 1981(c).

The Supreme Court has repeatedly and emphatically condemned racial quotas and preferences. As the Court held in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 746 (2007):

> [Racial] classifications promote "notions of racial inferiority and lead to a politics of racial hostility," "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," and "endorse race-based reasoning and the conception of a Nation

divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."

Id. at 746 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *Shaw*, 509 U.S. at 657; *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (O'Connor, J., dissenting)). "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000).

Well-intentioned racial discrimination is just as illegal as invidious discrimination. The "argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past, and has been repeatedly rejected." *Parents Involved*, 551 U.S. at 742.

Last month, the Supreme Court stated definitively that racial discrimination under the guise of affirmative action must end: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *SFFA*, slip op. at 16 (internal quotes omitted). "[R]acial discrimination is invidious in all contexts." *Id.* at 22 (internal quotes omitted). Racial preferences are a "perilous remedy." *Id.* at 23. The Court previously allowed a narrow exception for race-conscious college admissions to further student body diversity, but we have known for decades that that exception would be expiring soon—as indeed it did on June 29. *See generally Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary . . . .").

And the Court took pains to emphasize that the supposedly benign nature of racial preferences cannot save them. Despite the universities' claims in *SFFA* that they were actually helping people, not hurting them, the Court rightly noted that that argument itself "rest[ed] on [a] pernicious stereotype." Slip op. at 29. Likewise, when an employer makes employment or contracting decisions "on the basis of race, it engages in the offensive and demeaning assumption that [applicants] of a particular race, because of their race, think alike." *Id.* (internal quotes omitted). Further, racial preferences "stamp" the preferred races "with a badge of inferiority" and "taint the accomplishments of all those who are admitted as a result of racial discrimination." *SFFA*, slip op. at 41 (Thomas, J., concurring); *see also id.* ("The question itself is the stigma.").

And, of course, every racial preference necessarily imposes an equivalent harm on individuals outside of the preferred racial groups, solely on the basis of their skin color. "[I]t is not even theoretically possible to 'help' a certain racial group without causing harm to members of other racial groups. It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others." *Id.* at 42 (quotation omitted). Thus, "whether a law relying upon racial taxonomy is 'benign' or 'malign' either turns on 'whose ox is gored' or on distinctions found only in the eye of the beholder." *Id.*

Racial discrimination inevitably "provokes resentment among those who believe they have been wronged by the . . . use of race." *Id.* at 46.

Attempting to defend such racial hiring in the name of seeking racial diversity is unavailing. Regarding Harvard's unlawful admissions program, the Supreme Court noted that it was a quota system in all but name—as all race-conscious practices inevitably are. "For all the talk of holistic and contextual judgments, the racial preferences at issue here in fact operate like clockwork." *Id.* at 32 n.7. Playing this "numbers game" is flagrantly illegal: "[O]utright racial balancing" is "patently unconstitutional." *Id.* at 32.

Let there be no confusion: These principles apply equally to Title VII and other laws restricting race-based discrimination in employment and contracting. Courts routinely interpret Title VI and Title VII in conjunction with each other, adopting the same principles and interpretation for both statutes. *See, e.g., SFFA* slip op. at 4 (J. Gorsuch concurring), *Maisha v. Univ. of N. Carolina*, 641 F. App'x 246, 250 (4th Cir. 2016) (applying "familiar" Title VII standards to "claims of discrimination under Title VI"); *Rashdan v. Geissberger*, 764 F.3d 1179, 1182 (9th Cir. 2014) ("We now join the other circuits in concluding that [the Title VII standard] also applies to Title VI disparate treatment claims.").

Race discrimination in employment and contracting, of course, also violates state law. And State courts frequently look to Title VII to interpret their own prohibitions against race discrimination in employment practices. *See, e.g., Montana State University-Northern v. Bachmeier*, 480 P.3d 233, 246 (Mont. 2021) ("Reference to federal case law is appropriate in employment discrimination cases filed under the [Montana Human Right Act]' because of the MHRA's similarity to Title VII of the Civil Rights Act of 1964."); *Texas Dep't of State Health Servs. v. Kerr*, 643 S.W.3d 719, 729 (Tex. Ct. App. 2022) ("The Texas Legislature modeled the TCHRA after federal law 'for the express purpose of carrying out the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments.'"); *see also McCabe v. Johnson Cty. Bd. of Cty. Comm'rs*, 615 P.2d 780, 783 (Kan. 1980) ("Federal court decisions under [Title VII], although not controlling, are of persuasive precedential value [in construing the Kansas Act Against Discrimination]."). Likewise, refusing to deal with a customer or supplier or otherwise penalizing them on the basis of race is illegal under the laws of many states. *See, e.g., J.T.'s Tire Service, Inc. v. United Rentals of North America, Inc.*, 985 A.2d 211, 240 (N.J. App. 2010) (holding that New Jersey law "prohibits discriminatory refusals to do business" with any person on the basis of race); *Reese v. Wal-Mart Stores, Inc.*, 73 Cal. App. 4th 1225, 1231 (Cal. Ct. App. 1999) (noting that California law prohibits any "business establishment" from "discriminat[ing] against" or "refus[ing] to buy from, sell to, or trade with any person" because of race); *Mehtani v. New York Life Ins. Co.*, 145 A.D.2d 90, 94 (N.Y. 1989) (noting that New York law defines "unlawful discriminatory practice(s)" to include "discriminat[ing] against," "refus[ing] to buy from, sell to or trade with, any person" because of race).

Accordingly, the Supreme Court's recent decision should place every employer and contractor on notice of the illegality of racial quotas and race-based preferences in employment and contracting practices. As Attorneys General, it is incumbent upon us to remind *all* entities operating within our respective jurisdictions of the binding nature of American anti-discrimination laws. If your company previously resorted to racial preferences or naked quotas to offset its bigotry, that discriminatory path is now definitively closed. Your company must overcome its underlying bias and treat *all* employees, *all* applicants, and *all* contractors equally, without regard for race.

***

Social mobility is essential for the long-term viability of a democracy, and our leading institutions should continue to provide opportunities to underprivileged Americans. Race, though, is a poor proxy for what is fundamentally a class distinction. Responsible corporations interested in supporting underprivileged individuals and communities can find many lawful outlets to do so. But drawing crude lines based on skin color is not a lawful outlet, and it hurts more than it helps.

We urge you to immediately cease any unlawful race-based quotas or preferences your company has adopted for its employment and contracting practices. If you choose not to do so, know that you will be held accountable—sooner rather than later—for your decision to continue treating people differently because of the color of their skin.

Sincerely,

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Kansas Attorney General

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Tennessee Attorney General and Reporter

Steve Marshall
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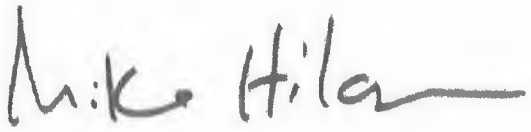

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July 19, 2023

Dear Fortune 100 CEOs,

We recently reviewed a letter sent to you by 13 state attorneys general, purporting to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race. While we agree with our colleagues that "companies that engage in racial discrimination should and will face serious legal consequences," we are focused on actual unlawful discrimination, not the baseless assertion that any attempts to address racial disparity are by their very nature unlawful. We condemn the letter's tone of intimidation, which purposefully seeks to undermine efforts to reduce racial inequities in corporate America. As the chief legal officers of our states, we recognize the many benefits of a diverse population, business community, and workforce, and share a commitment to expanding opportunity for all.

We applaud the Fortune 100 for your collective efforts to address historic inequities, increase workplace diversity, and create inclusive environments.[1] These programs and policies are ethically responsible, good for business, and good for building America's workforce.[2] Importantly, these programs also comply with the spirit and the letter of state and federal law.

The letter you received from the 13 state attorneys general is intended to intimidate you into rolling back the progress many of you have made. We write to reassure you that corporate efforts to recruit diverse workforces and create inclusive work environments are legal and reduce corporate risk for claims of discrimination.[3] In fact, businesses should

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[1] Cision PR Newswire, "New Data From Deloitte and the Alliance for Board Diversity (ABD) Reveals Continued Focus is Necessary for Fortune 500 Boards to be More Representative of the US Population," June 15, 2023, available at https://www.prnewswire.com/news-releases/new-data-from-deloitte-and-the-alliance-for-board-diversity-abd-reveals-continued-focus-is-necessary-for-fortune-500-boards-to-be-more-representative-of-the-us-population-301851560.html.

[2] Forbes, "Harnessing The Power Of Diversity For Profitability," Mach 3, 2022, available at https://www.forbes.com/sites/forbesbusinesscouncil/2022/03/03/harnessing-the-power-of-diversity-for-profitability/

[3] The U.S. Equal Employment Opportunity Commission advises that to reduce the risk of employment discrimination claims, businesses should, "[r]ecruit, hire, and promote with EEO principles in mind, by implementing practices designed to widen and diversify the pool of candidates considered for employment openings, including openings in upper level management." *See* U.S. Equal Employment Opportunity Commission, *"Best practices for employers and human resources/eeo professionals,"* available at https://www.eeoc.gov/initiatives/e-race/best-practices-employers-and-human-resourceseeo-professionals.

double-down on diversity-focused programs because there is still much more work to be done.

I. Corporate Diversity Programs are Lawful and Serve Important Public and Business Purposes.

Many of your companies engage in a wide variety of programs meant to provide opportunities for success for historically underrepresented communities, including women, Black/African Americans, Latinos/Hispanics, Asian Americans and Pacific Islanders, Native Americans, people who identify as LGBTQ+, and others. These programs take on many forms, but all meet important business and workforce needs.

Efforts by private sector employers to foster and support diversity and address racial inequities are even more important in the aftermath of the United States Supreme Court's recent opinion in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, Case Nos. 20-1199, 21-707 (June 29, 2023) ("*SFFA*"). As recognized in *SFFA*, our nation's history is replete with instances of discrimination against disfavored minorities. And racial inequity is not only a problem of our country's distant past. Justice Thomas acknowledges in *SFFA* that he is "painfully aware of the social and economic ravages which have befallen my race and all who suffer discrimination[.]" *SFFA*, slip op. at 58 (Thomas, J., concurring). Justice Kavanaugh underscores that "racial discrimination still occurs and the effects of past racial discrimination still persist." *Id.* at 8 (Kavanaugh, J., concurring). Justice Jackson details historical and current racial disparities, emphasizing that "[g]ulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past but have indisputably been passed down to the present day through the generations." *Id.* at 1 (Jackson, J., dissenting). Racial inequity is sadly both a problem from our nation's distant past and, as the above Justices recognize, a persistent problem today.

To be clear, *SFFA* does not directly address or govern the behavior or the initiatives of private sector businesses. *SFFA* held that two universities' admissions systems, which the Court characterized as "race-based," violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000d et seq. *SFFA*, slip op. at 8, 21. Private sector employers continue to be subject to the requirements of Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000e et seq., and 42 U.S.C. sec. 1981, as they always have been.[4] It is irresponsible and misleading to suggest that *SFFA* imposes additional prohibitions on the diversity, equity, and inclusion initiatives of private employers. In fact, following *SFFA*, the U.S. Equal Employment Opportunity Commission issued a statement clarifying that, "[i]t remains lawful for employers to implement diversity, equity, inclusion,

[4] Congress, in Title VI, 42 U.S.C. § 2000d-3, ensured that merely receiving federal financial assistance would not incidentally render an employer subject to the commands of Title VI rather than Title VII.

and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."[5]

A. Diversity, Equity, and Inclusion Efforts Remain Vital to the Well-being of Our Society, both Socially and Economically.

As state attorneys general, we are responsible for protecting the well-being of our residents, especially those who face inequitable treatment and discrimination. Promoting diversity, equity, and inclusion is thus a top priority in our states. We also recognize that, for private sector employers, diversity is an important, legitimate, and valid business interest, as well established by decades of research.[6] Affirmative efforts by private sector businesses to diversify their workforces remain vital both morally—to address past and present discrimination—and economically—to achieve a healthy economy and productive workforce.

"[S]egregation by race was declared unconstitutional almost a century ago, but its vestiges remain . . . intertwined with the country's economic and social life." *Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 528 (2015). As Justice Jackson explains in her dissent in *SFFA*, "[a]lthough formal race-linked legal barriers are gone, race still matters to the lived experiences of all Americans in innumerable ways." *SFFA*, slip op. at 25 (Jackson, J., dissenting). Indeed, race and racism continue to play a role in exacerbating inequities in health, housing, employment and business, and other areas of life.

Diversity initiatives in the workplace help combat these inequities. As a result of these efforts, corporate America has grown more diverse and more representative of American society. The economies of our states have likewise benefited from diversity and inclusion, as workers share their diverse beliefs, experiences, and ideas, becoming better informed, more creative, and ultimately, more productive. Diversity initiatives raise awareness of the value of collaborating with people of different cultures, backgrounds, perspectives, experiences, races, and ethnicities. They build diverse teams and a workforce that understands its customers—a business imperative. Companies' efforts to foster diversity in the workplace also help to expand markets and attract diverse talent to our states. Now more than ever, private sector employers play a crucial role in establishing and maintaining the societal and economic benefits of diversity. These are critically important business interests that help our economies thrive.

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[5] U.S. Equal Employment Opportunity Commission, "Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs," June 29, 2023, available at https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action.

[6] *See, e.g*, *Global Parity Alliance: Diversity, Equity and Inclusion Lighthouses 2023*, World Economic Forum, https://www3.weforum.org/docs/WEF_Global_Parity_Alliance_2023.pdf.

B. *SFFA* Does Not Prohibit, or Even Impose New Limits on, the Ability of Private Employers to Pursue Diversity, Equity, and Inclusion Initiatives.

Properly read, *SFFA* provides no basis to conclude that a company's efforts to reach and recruit from a broad and diverse applicant pool is now prohibited. Private companies remain free to expand access to employment and contracting opportunities, subject to the same limitations under Title VII and Section 1981 that have applied to them for over half a century.

Leading companies have long set diversity-related goals and operated successful and lawful diversity, equity, and inclusion programs under the guidance of Title VII. Properly formulated and administered programs are not unconstitutional. *See, e.g., Iadimarco v. Runyon*, 190 F.3d 151, 164 (3d Cir. 1999) (finding that a memo outlining diversity goals is not prima facie evidence of discrimination and recognizing that "[a]n employer has every right to be concerned with the diversity of its workforce, and the work environment"); *Reed v. Agilent Techs, Inc.*, 174 F. Supp. 2d 176, 185-86 (D. Del. 2001) (rejecting plaintiff's contention that the defendant company's diversity policy was prima facie evidence of discrimination and stating that "evidence regarding the aspirational purpose of an employer's diversity policy, and its intent to ameliorate any underutilization of certain groups, is not sufficient" to establish a violation of Title VII). Private sector employers should continue to be aware of the demographics of their workforce and their contracting partners, and make efforts to recruit, attract, and retain diverse workforces, consistent with the strictures of Title VII and Section 1981.

C. Private Employers Retain Many Tools to Continue the Important Work of Diversifying Their Workforces.

Irrespective of *SFFA*, hiring decisions made on the basis of race are prohibited under Title VII and have been for decades. Of course, consistent with Title VII, private employers can, should — and in some circumstances, *must* — identify arbitrary and unnecessary barriers to diversity, equity, and inclusion in the workplace and develop solutions to address those issues. Removing barriers does not constitute an act of racial discrimination. Companies remain free to remedy historic inequities by: (a) adjusting recruiting practices, (b) developing better retention and promotion strategies, and/or (c) furthering leadership development and accountability. Companies need not don a veil of ignorance and pretend that racial inequities do not exist.

No organization should hire an employee solely based on the individual's race. Private sector employers can and should, however, identify problems that have created racial and other disparities in the past and develop solutions to address them. Likewise, businesses can, consistent with the law, identify barriers to advancement in the employment and contracting pipelines and adjust recruiting, retention, and leadership accordingly. Such efforts are not only legal but constitute an appropriate moral and ethical response to the ongoing problem of racial inequity in our society. In short, businesses can

improve their own bottom line and the experiences of their employees through mentoring, training, and leadership programs that include diversity, equity, and inclusion as goals. Such race-neutral programs—that improve outcomes for all—do not run afoul of the law.

In pursuing diversity efforts, we encourage businesses not to ignore the specific challenges that Black workers have faced and continue to face as the result of decades of past discrimination in many industries. Given that reality, race-neutral inclusion efforts are not properly characterized as improper "racial quotas" merely because they may lead to some benefit for Black workers. *SFFA* acknowledges that our society has a compelling interest in "remediating specific, identified instances of past discrimination that violated the Constitution or a statute." *SFFA*, slip op. at 15. Decades of discrimination in the labor market, as well as in other areas of society, have led to a massive and persistent racial wealth gap between Black and white Americans, one that remains roughly the same today as it was two years before the Civil Rights Act was passed in 1964. *See* Fed. Reserve Bank of Cleveland, "What is Behind the Persistence of the Racial Wealth Gap?" (Feb. 28, 2019).[7] Given this large and persistent wealth and income gap, race-neutral efforts to address industry barriers are likely to enhance diversity, particularly among those who have been most marginalized in the past.

D. Improving Diversity Makes Good Business Sense.

The diversity efforts of private sector employers remain vital to a healthy economy and productive workforce. *See, e,g*, "The Other Diversity Dividend," Harvard Business Review, July–August 2018; "Why Diverse Teams Are Smarter," Harvard Business Review, November 4, 2016; "Diverse Teams Feel Less Comfortable–and That's Why They Perform Better," Harvard Business Review, September 22, 2016. Diverse teams are not just for appearances; they make bottom-line sense for businesses. In the venture-capital world, for example, research shows that "[d]iversity significantly improves financial performance on measures such as profitable investments at the individual portfolio-company level and overall fund returns." *See id.,* "The Other Diversity Dividend."

Efforts to improve diversity, equity and inclusion have been found to further important business objectives. For instance, JPMorgan Chase found that its intern pool became more diverse after it adopted the race-neutral approach of recruiting from a larger pool of schools. The bank found that diversity was a welcome benefit of focusing recruitment on "skills . . . previous experiences . . . [and] ability to articulate . . . competencies for the role, rather than . . . assuming them based upon the school" intern candidates attended. Hugh Son, "How JPMorgan Increased the Number of Black Interns in Its Wall Street Program by Nearly Two-Thirds", CNBC, (April 9, 2021) (quoting Rob Walke, global head of campus recruiting).[8] In short, JP Morgan Chase found that using race-neutral, relevant

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[7] Available at https://www.clevelandfed.org/newsroom-and-events/publications/economiccommentary/2019-economic-commentaries/ec-201903-what-is-behind-the-persistence-of-the-racialwealth-gap.aspx.

[8] CNBC, "How JPMorgan increased the number of Black interns in its Wall Street program by nearly two-thirds," April 9, 2021, available at https://www.cnbc.com/2021/04/09/jpmorgan-increased-the-number-of-black-interns-in-its-wall-street-program-by-nearly-two-thirds.html.

criteria to recruit interns led to a remarkable increase in the percentage of Black and female interns selected.

II. Hollow Claims of Unlawful Discrimination Against White People at Fortune 100 Companies Do Not Change the Fact that Women and People of Color Continue to Face Barriers in the Workplace.

The July 13th letter claims that the existence of a few scattered articles evidences "commonplace," "overt," and "pervasive" discrimination by Fortune 100 companies against white people. We urge you not to allow these false claims to prevent you from continuing in your lawful efforts to foster diversity. The letter's attempts to equate these permissible diversity efforts with impermissible hiring quotas is a clear effort to block opportunities for women and people of color—especially Black people. Aspirational diversity goals and concerted recruitment efforts to increase the diversity of a company's workforce are not hiring quotas, which were already unlawful under Title VII of the Civil Rights Act of 1964, well before *SFFA*.

Since this nation's inception, racism has been a part of our policies, our institutions, and our communities—and businesses are no exception. Racial preferences are pervasive in both businesses and boardrooms, preferences that unequivocally and overwhelmingly favor white people, particularly white men. A 2021 Washington Post analysis of 50 of the world's most valuable companies revealed that only 8 percent had Black C-suite executives.[9] A 2023 Harvard Law School study analyzing 1,500+ executives at the 100 largest companies in the S&P 500 showed that only 23% of the C-Suite were Asian, Black, Hispanic, or Latino.[10] For too long, employment and leadership opportunities at many of your companies were reserved for white men. White men continue to dominate leadership roles in Fortune 100 companies. A 2022 report on the diversity of CEOs at Fortune 100 Companies found that only 12% were women, despite women representing more than 50% of the population of the United States; and only 14% were not white, despite more than 40% of the U.S. comprising of individuals who are not white.[11] Only 3% were Black, despite representing 14% of the U.S. population.

The impact this disparity has on women and communities of color cannot be overstated. A 2020 survey indicates that about 1 in 4 Black (24%) and Hispanic employees

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[9] The Washington Post, "The striking race gap in corporate America," December 15, 2021, available at, https://www.washingtonpost.com/business/interactive/2021/black-executives-american-companies/.

[10] Harvard Law School Forum on Corporate Governance, "How To Fix The C-suite Diversity Problem," February 23, 2023, available at https://corpgov.law.harvard.edu/2023/02/25/how-to-fix-the-c-suite-diversity-problem/#:~:text=The%20headline%20finding%20is%20that,in%20most%20C%2Dsuite%20positions.

[11] Cision PR Newswire, "Diversity Stagnant Among Fortune 100 Leaders Despite Belief That DE&I Is a Key Contributor to Business Success, Reveals Heidrick & Struggles' Route to the Top 2022," November 17, 2022, available at Reporthttps://www.prnewswire.com/news-releases/diversity-stagnant-among-fortune-100-leaders-despite-belief-that-dei-is-a-key-contributor-to-business-success-reveals-heidrick--struggles-route-to-the-top-2022-report-301681143.html.

(24%) in the U.S. report having been discriminated against at work in the past year.[12] Furthermore, 75% of the Black workers who reported being discriminated against indicated the discrimination they experienced was based on their race or ethnicity.

III. The July 13th Letter Is an Attempt to Intimidate the Businesses and Workers of America—And We Will Fight Back.

The July 13th letter is disguised as providing information regarding anti-discrimination law, but it in fact takes direct aim at efforts to broaden recruitment and address inequities meant to break down historic barriers—efforts that are consistent with controlling law. While the letter asks you to adhere to "race-neutral principles in your employment and contracting practices," the only employment and contracting practices the letter expresses concern about are those that advance opportunity for people of color. The very fact that many of your companies have expressed support for ending historic disparities through providing opportunities for people of color offends the authors of the July 13th letter. And, the 13 attorneys general reserve their greatest offense for the programs that provide opportunities for Black people.[13] We find this alarming, coming from state attorneys general who should be champions of civil rights and racial progress.

Rest assured that we are committed to fighting against discrimination and to expanding opportunities for all. We will vigorously oppose any attempts to intimidate or harass businesses who engage in vital efforts to advance diversity and expand opportunities for the nation's workforce.

Sincerely,

AARON D. FORD
Attorney General
State of Nevada

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[12] Gallup, "One in Four Black Workers Report Discrimination at Work," January 12, 2021, available at https://news.gallup.com/poll/328394/one-four-black-workers-report-discrimination-work.aspx.

[13] The attorneys general cite news reports that raise such alarm for them, which include the titles, "Corporate America Looks to Hire More Black People" and "How JPMorgan Increased the Number of Black Interns in Its Wall Street Program by Nearly Two-Thirds"; additionally, they call out Microsoft's program to increase the number of Black-owned approved suppliers.

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July 17, 2023

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Dear Mr. Patel,

I write regarding your firm's employment law practice. In recent years, many major corporations have adopted race-based hiring quotas and benchmarks as part of their "Diversity, Equity & Inclusion" ("DEI") initiatives.[1] This is often driven by investment firms like BlackRock that pressure companies to implement DEI hiring policies to satisfy their "Environmental, Social, and Governance" mandates. These initiatives are both unpopular and unlawful. Your firm has a duty to fully inform clients of the risks they incur by making employment decisions based on race.

The Supreme Court recently struck down racial discrimination in college admissions. Though that case focused on colleges, the same principles and indeed the plain text of federal law also cover private employers. Title VI of the Civil Rights Act already prohibits federal fund recipients from discriminating based on race. Title VII likewise prohibits private employers from basing hiring decisions on race, prompting a U.S. Equal Employment Opportunity Commissioner to recently warn that "diversity programs pose both legal and practical risks for companies."[2]

Federal law has long prohibited treating employees differently because of their race. Employers should take to heart the Supreme Court's recent declaration that "eliminating racial discrimination means eliminating all of it." Congress will increasingly use its oversight powers—and private individuals and organizations will increasingly use the courts—to scrutinize the proliferation of race-based employment practices. To the extent that your firm continues to advise clients regarding DEI programs or operate one of your own, both you and those clients should take care to preserve relevant documents in anticipation of investigations and litigation.

Sincerely,

Tom Cotton
United States Senator

[1] Marin Wolf & Kim Bhasin, *After decades of unmet diversity goals, some major employers turn to hard racial quotas*, CHICAGO TRIBUNE (Sept. 1, 2020), https://www.chicagotribune.com/business/ct-biz-black-jobs-racial-hiring-quotas-20200901-4c3jlnc5mzb4bflnm7egljvm7e-story.html.
[2] Andrea R. Lucas, *With Supreme Court affirmative action ruling, it's time for companies to take a hard look at their corporate diversity programs*, REUTERS (June 29, 2023), https://www.reuters.com/legal/legalindustry/with-supreme-court-affirmative-action-ruling-its-time-companies-take-hard-look-2023-06-29/.

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