

THE LAW OF DISCRIMINATION: CASES AND PERSPECTIVES

2016 Supplement

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Chapter 2

The Right to Equal Educational Opportunity

Part II Constitutional Remedies

E. The Scope of “Desegregative” Relief

[Page 107. Add to the end of Note 1:]

On the other hand, some courts have used *Dowell* as the predicate to maintain desegregation orders. For example, in *Thomas ex rel. D.M.T. v. School Board St. Martin Parish*, 756 F.3d 380 (5th Cir. 2014), the court of appeals affirmed the denial of the school board’s motion to dismiss, and it effectively maintained a 40-year-old permanent injunction notwithstanding a 1974 order of the district court finding that the “defendants have previously achieved a unitary school system.” *Id.* at 386. It reasoned: “The [*Dowell*] Court . . . explained that, because courts in the 1970s had been inconsistent in their use of the term ‘unitary,’ it could not take the order’s reference to the board’s achievement of a ‘unitary system’ to mean that the school board had met its constitutional obligations. Some courts ‘used [the term] to identify a school district that has completely remedied all vestiges of past discrimination,’ which would mean that the district had met the mandate of *Brown v. Board of Education* and its progeny. Other courts, however, used the term ‘to describe any school district that has currently desegregated student assignments, whether or not that status is solely the result of a court-imposed desegregation plan.’ Under the latter usage, ‘a school district could be called unitary and nevertheless still contain vestiges of past discrimination.’” *Id.* at 385-86 (quoting *Dowell*, 498 U.S. at 245; footnotes omitted).

[Page 111. Replace first full paragraph with the following:]

Another example of a lower court’s implementation of *Dowell* and *Freeman* is *Fisher v. Tucson Unified School District*, 652 F.3d 1131 (9th Cir. 2011), where the Ninth Circuit determined that the school district had not yet achieved unitary status. The court assessed whether the school district had eliminated racial discrimination to the maximum extent practicable and whether it had demonstrated a good faith effort to maintain the non-discriminatory system. Although the district court, in *Fisher v. United States*, 549 F. Supp. 2d 1132 (D. Ariz. 2008), previously determined that the school district “failed to act in good faith in its ongoing operation” and also failed to meet all of the *Green* factors in sufficiently eliminating past discrimination, the district court nonetheless approved its unitary status. On appeal, the Ninth Circuit held that “where good faith lacks and the effects of *de jure* segregation linger, public monitoring and political accountability do not suffice.” The court revoked the school district’s unitary status, ordering the district court to maintain

jurisdiction until good-faith effort and sufficient elimination of past discrimination as to all of the *Green* factors are achieved. For a more detailed examination of *Fisher v. Tucson* and the legal standard for declaring school districts unitary, see *Fourteenth Amendment - School Desegregation - Ninth Circuit Requires Continued Federal Oversight of School District. - Fisher v. Tucson Unified School District*, 652 F.3d 1131 (9th Cir. 2011), 125 Harv. L. Rev. 1530 (2012).

[Page 130. Add to the end of Note 2:]

In *Fisher v. University of Texas at Austin (Fisher I)*, 570 U.S. --, 133 S. Ct. 2411 (2013), Justice Kennedy, in a 7-1 decision (Justice Kagan having recused herself), re-affirmed that race is a permissible factor in higher education admissions decisions. However, rather than applying strict scrutiny solely to the university's use of race, in *Fisher* the Court has extended such scrutiny to the potential of race-neutral alternatives. Courts should "examine with care, and not defer to, a university's 'serious, good faith consideration of workable race-neutral alternatives.'" Upon remand to the U.S. Court of Appeals for proper application of the strict scrutiny standard, the Fifth Circuit again upheld the university's race-conscious admissions program in effect at the time of *Fisher*'s application. The U.S. Supreme Court affirmed the decision of the court of appeals by a vote of 4-4 (Kagan again recusing herself from the case). *Fisher v. University of Texas at Austin (Fisher II)*, No. 14-981 (June 23, 2016). Justice Kennedy, in an opinion joined by Justices Ginsburg, Breyer, and Sotomayor, noted that the university had 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" and "gave a "reasoned, principled explanation" for its decision. Slip op. at 11-13. The university's conclusion that race-neutral programs had not achieved its diversity goals was supported by significant statistical and anecdotal evidence. *Id.*, at 13-15. That race played a role in a small portion of admissions decisions is a hallmark of narrow tailoring, not evidence of unconstitutionality. *Id.*, at 15. The university adhered to its continuing obligation to satisfy the strict scrutiny burden by periodically reassessing the program and by tailoring it to ensure that race played no greater role than necessary to meet its compelling interests. *Id.*, at 8-11. For more extensive discussion of *Fisher*, and its impact on *Grutter*, see Chapter 10 of this supplement.

[Page 130. Add to the end of Note 3:]

The Third Circuit held that where a school district is aware of race as a factor but implements its redistricting plan based on a facially neutral purpose, such as equalizing the number of students attending each school, only rational basis review applies. *Doe ex rel. Doe v. Lower Merion School District*, 665 F.3d 524 (3rd Cir. 2011), *cert. denied*, 132 S. Ct. 2773 (2012). This case is distinguishable from *Parents Involved*, in which the redistricting plan expressly involved race as a determinative factor, requiring the Court to apply strict scrutiny.

[Page 131. Add to the end of Note 7:]

In *Race, Affirmative Action, and Equality of Educational Opportunity in a So-Called "Post-Racial" America*, 20 Kan. J.L. & Pub. Pol'y 413 (2011), Michele Moses examines the United States Supreme Court's seemingly paradoxical views on "race-conscious affirmative

action” in *Regents of the University of California v. Bakke* (438 U.S. 265 (1978)) and *Parents Involved in Community Schools*:

In [*Bakke*], as the United States Supreme Court upheld the constitutionality of race-conscious affirmative action, Justice Harry Blackmun explained, “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.” [However, n]early thirty years later, Supreme Court Chief Justice John Roberts ruled against race-conscious student assignment policies [in *Parents Involved in Community Schools*], saying in his majority opinion: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

Did Chief Justice Roberts mean that race-conscious policy is no longer necessary now that we live in a “post-racial” society? Should we still consider race in developing education policy? *Id.* at 413. For more complete coverage of *Bakke*, and aspects of the re-affirmation of the state’s interest in diversity in *Fisher v. University of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013) (*Fisher I*); after remand, *Fisher II*, No. 14-981 (June 23, 2016). See Chapter 10, *infra*.

[Page 131. Add to the end of Note 8:]

The U.S. Supreme Court, in a fragmented decision, ultimately upheld the amendment to the Michigan Constitution. *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014). Justice Sotomayor wrote a dissenting opinion, which was joined by Justice Ginsburg. Justice Kagan recused herself from consideration of the case. For further discussion of this case, see Chapter 3, section F. of this Supplement.

[Page 203. Replace *Equity in Athletics, Inc. v. Department of Education*, 2011 U.S. App. LEXIS 4493, 29-31 (4th Cir. 2011) in Note 4 with the following citation:]

Equity In Athletics, Inc. v. Department of Education, 639 F.3d 91 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1004, *rehearing denied*, 132 S. Ct. 1653 (2012).

Part III Statutory Rights

G. Title IX

[Page 227. Add the following Notes following *Cannon v. University of Chicago*:]

1. In *Parker v. Franklin County Community School Corporation*, 667 F.3d 910 (7th Cir. 2012), the court addressed the question of whether Title IX provides a private right of action where supplementary regulations have been enacted to ensure equal athletic opportunity for both sexes.

Plaintiffs alleged disparate treatment in scheduling boys' high school basketball games primarily during primetime and girls' basketball games on less popular weeknights. *Amicus curiae* on behalf of the school argued that, although the United States Supreme Court recognizes an implied private right of action against intentional discrimination under Title IX (*Cannon*, 441 U.S. at 717), *Alexander v. Sandoval*, 532 U.S. 275, at 289–90 (2001) controls here. It was argued that *Sandoval* barred plaintiffs from a private right of action, because consideration of the “[s]cheduling of games and practice time” was part of a regulation enacted pursuant to Title IX; thus, plaintiffs were attempting to enforce a disparate-impact regulation.

The Seventh Circuit disagreed with this view, holding that the plaintiffs brought a disparate treatment claim, not a disparate-impact claim, and that the two should not be conflated. The court explained that claims for equal opportunity to participate in athletics (or “lack of effective accommodation,” such as failure to provide a girls’ basketball team), as well as claims for equal treatment in athletics (such as those “alleg[ing] sex-based differences in the schedules, equipment, coaching, and other factors affecting participants in athletics,” *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 965 (9th Cir. 2010)), are both claims for intentional discrimination under Title IX, for which *Cannon* provides a private right of action.

2. *Cannon* was decided on the assumption that the University of Chicago had intentionally discriminated against the petitioner, denying admission to medical school under Title IX. *See* 441 U.S. at 680 (noting that respondents “admitted *arguendo*” that petitioner’s “application for admission to medical school was denied by the respondents because she is a woman”). *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001). Similarly, *Parker* was also decided on the assumption of intentional discrimination. However, in *Parker*, the court was required to take the analysis a step further in determining that a private right of action also exists under Title IX regulations designed to promote enforcement of Title IX to eradicate intentional discrimination. *Cf. Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), excerpted at p. 252 of text.

[Page 251. Add at the end of Note 4:]

7. Does Title IX also protect against student-on-student harassment based on sexual orientation? What if the victim is not actually perceived as homosexual? The Eighth Circuit addressed this issue in *Wolfe v. Fayetteville, AR School District*, 648 F.3d 860 (2011). A high school student alleged that the school violated Title IX in failing to protect him from verbal and physical harassment by his peers due to being falsely labeled a homosexual. Classmates and teachers claimed that no one actually perceived the plaintiff as homosexual, but that he was only labeled as such because he was disliked. In addition to requiring proof that a school was deliberately indifferent to the known acts of discrimination occurring under its control to be held liable, the court added that the harasser must be motivated by the victim’s failure to conform to gender stereotypes.

Was sex-based motivation a requirement in *Davis as Next Friend of LaShonda D*? Why would the *Wolfe* court require proof of motivation for Title IX claims alleging harassment based on sexual orientation? Is it required for all Title IX sexual harassment claims?

[Page 262. Add new Note 3:]

3. Support for single-sex classrooms in public education has greatly increased in recent years. However, the movement has been met with some criticism. In *Doe ex rel. Doe v. Vermilion Parish School Board*, 421 F. Appx. 366 (5th Cir. 2011), the petitioner claimed that the single-sex classroom option offered by her daughter's middle school violated Title IX and the Equal Protection Clause. Although Vermilion argued that the petitioner lacked standing to challenge the single-sex classroom option because she was enrolled in a co-ed class, the Fifth Circuit found that the petitioner did have standing. Specifically, the petitioner presented evidence that a disproportionate number of students with learning disabilities were in co-ed classes, and that single-sex classes implemented different subject-matter and teaching styles than the co-ed classes. The court considered the evidence sufficient to prove that the single-sex program was harmful to the school's educational environment as a whole, which gave rise to injury even to students who did not participate in the single-sex classes.

Since *Brown*, *de jure* racial segregation in education has been considered discriminatory as a matter of law. Why do the courts view sex segregation differently? For critical examination of the extent to which society and the courts are more tolerant of sex-based segregation, see David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 Colum. J. Gender & L. 51 (2011); see also Juliet A. Williams, *Learning Differences: Sex-Role Stereotyping in Single-Sex Public Education*, 33 Harv. J.L. & Gender 35 (2010).

Chapter 3

Public Accommodations and Housing

B. Public Accommodations

2. The Civil Rights Act of 1866

[Page 297: Add the following commentary as new Note 3:]

The key question when determining individual standing to bring a claim under Section 1981 is “whether or not plaintiff had or would have had enforceable rights under the existing or proposed contract.” *Shumate v. Twin Tier Hospitality, LLC*, 655 F. Supp. 2d 521, 533 (M.D. Pa. 2009). Section 1981 provides relief to a principal when racial discrimination prevents the creation of a contractual relationship by its agent, “so long as the plaintiff has or would have rights under the existing or proposed contractual relationship.” *Id.* at 531. In *Shumate*, an African-American family was denied rooms at a hotel, although rooms were available and provided for three white males on the same night. *Id.* at 526-527. When plaintiff asked if his family was told there were no rooms available because he was black, defendant replied in the affirmative. *Id.* at 527. The Pennsylvania District Court found that the plaintiff had entered the hotel in an attempt to enter into a contract for himself, his fiancée, and his minor child. *Id.* at 532. Thus, the court allowed the claims of the fiancée and minor child to survive a motion for summary judgment because plaintiff was acting on their behalf when attempting to enter a contractual relationship with the hotel. *Id.*

3. Title II of the Civil Rights Act of 1964

[Page 299: Add the following commentary at the end of Note 1:]

For an in-depth analysis of the Civil Rights Act of 1964 and the lasting impact of the Supreme Court decision in *Heart of Atlanta Motel, Inc. v. United States* on today’s federal public accommodations laws, see Linda C. McClain, *Symposium: The Maryland Constitutional Law Schmooze: Involuntary Servitude, Public Accommodations Laws, and the Legacy of Heart of Atlanta Motel, Inc. v. United States*, 71 Md. L. Rev. 83 (2011).

C. Fair Housing

2. Fair Housing Act of 1968

a. Scope of Coverage

[Page 316: Add the following to the end of 1) Standing to Sue:]

Numerous courts have addressed the standing of individuals associated with those who are discriminated due to their disabilities. In *A.B. v. Hous. Auth. of S. Bend*, 498 Fed. Appx. 620 (N.D. Ind. 2012), the court determined the standing of a minor to sue for injuries associated with discrimination against his mother, an individual who qualified as disabled due to drug addiction. Plaintiff's mother was arrested for cocaine possession, and three weeks later the Housing Authority sent a notice to terminate the lease. *Id.* at 621. Plaintiff alleged that the Housing Authority failed to give his mother a second chance due to his mother's drug addiction disability, which was a failure to accommodate in violation of the ADA. *Id.* at 623. The court stated that a plaintiff who suffers injury that is associated with the disabled individual has standing to bring a claim under the ADA and Rehabilitation Act. See *Hale v. Pace*, 2011 U.S. Dist. LEXIS 35281 (N.D. Ill. 2011) (noting that the ADA allows non-disabled individuals to bring claims of discrimination "based on their association with disabled individuals"). However, the mother's admission that she used cocaine on one particular occasion proved fatal because the court characterized her as a current drug user and thus not entitled to protection under the ADA, Rehabilitation Act, or the FHA. See 42 U.S.C. § 12210(a) (ADA); 29 U.S.C. § 705(20)(C)(I) (Rehabilitation Act); 42 U.S.C. § 3602(h) (FHA). It was, therefore, permissible for the public Housing Authority to terminate her lease because she was caught using drugs. *A.B.*, 498 Fed. Appx. at 623.

Courts have taken a broad view of constitutional standing in disability access cases. See *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011). Disabled persons who encounter barriers impeding full access to a place of public accommodation have standing to pursue injunctive relief if they prove either deterrence from returning to the premises or an injury-in-fact coupled with an intent to return. *Moore v. Robinson Oil Corp.*, 2012 U.S. Dist. LEXIS 80780 (N.D. Cal. 2012), *aff'd*, No. 12-16536 (9th Cir. 2014) (unpublished decision). However, the only remedy a private plaintiff can obtain for an ADA violation is injunctive relief. *Id.* at *26. Furthermore, a disabled person who experiences at least one barrier at a place of public accommodation may challenge all barriers related to his disability, even if he does not personally encounter them. *Chapman*, 631 F.3d at 950-51.

To determine whether an individual ADA Title III plaintiff has demonstrated a "real and immediate threat of future harm" to satisfy the requirement for Article III standing, courts consider four factors: "(1) the proximity of the plaintiff's residence to the alleged offending establishment; (2) the plaintiff's past patronage of the establishment; (3) the definitiveness of the plaintiff's plan to return to the establishment; and (4) whether the plaintiff frequently travels nearby." *Payne v. Sears, Roebuck & Co.*, 2012 U.S. Dist. LEXIS 75486 (E.D.N.C. 2012). Where a plaintiff fails to show an injury in fact, the court need not consider plaintiff's status as a tester. *Id.* at *28-29.

d. Proving Discrimination under Title VIII

(2) Disparate Impact

[Page 339: Replace pages 339 – 346, including Note 1, with the following:

The long-awaited decision of the Supreme Court on whether disparate impact can properly be used as an alternative standard under the Fair Housing Act finally came in the form of a 5-4 vote at the end of the October Term of 2014, an excerpt of which follows.

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

v.

INCLUSIVE COMMUNITIES PROJECT, INC.

135 S. Ct. 2507
Decided June 25, 2015

[2513] KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which ROBERTS, C.J., and SCALIA and THOMAS, JJ., joined.

Justice KENNEDY delivered the opinion of the Court.

The underlying dispute in this case concerns where housing for low-income persons should be constructed in Dallas, Texas — that is, whether the housing should be built in the inner city or in the suburbs. This dispute comes to the Court on a disparate-impact theory of liability. In contrast to a disparate-treatment case, where a “plaintiff must establish that the defendant had a discriminatory intent or motive,” a plaintiff bringing a disparate-impact claim challenges practices that have a “disproportionately adverse effect on minorities” and are otherwise unjustified by a legitimate rationale. *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (internal quotation marks omitted). The question presented for the Court’s determination is whether disparate-impact claims are cognizable under the Fair Housing Act (or FHA), 82 Stat. 81, as amended, 42 U.S.C. § 3601 *et seq.*

A

Before turning to the question presented, it is necessary to discuss a different federal statute that gives rise to this dispute. The Federal Government provides low-income housing tax credits that are distributed to developers through designated state agencies. 26 U.S.C. § 42. Congress has directed States to develop plans identifying selection criteria for distributing the credits. § 42(m)(1). Those plans must include certain criteria, such as public housing waiting lists, § 42(m)(1)(C), as well as certain preferences, including that low-income housing units “contribut[e]

to a concerted community revitalization plan” and be built in census tracts populated predominantly by low-income residents. §§ 42(m)(1)(B)(ii)(III), 42(d)(5)(ii)(I). Federal law thus favors the distribution of these tax credits for the development of housing units in low-income areas.

In the State of Texas these federal credits are distributed by the Texas Department of Housing and Community Affairs (Department). Under Texas law, a developer’s application for the tax credits is scored under a point system that gives priority to statutory criteria, such as the financial feasibility of the development project and the income level of tenants. [2514] Tex. Govt.Code Ann. §§ 2306.6710(a)-(b) (West 2008). The Texas Attorney General has interpreted state law to permit the consideration of additional criteria, such as whether the housing units will be built in a neighborhood with good schools. Those criteria cannot be awarded more points than statutorily mandated criteria. . . .

The Inclusive Communities Project, Inc. (ICP), is a Texas-based nonprofit corporation that assists low-income families in obtaining affordable housing. In 2008, the ICP brought this suit against the Department and its officers in the United States District Court for the Northern District of Texas. As relevant here, it brought a disparate-impact claim under §§ 804(a) and 805(a) of the FHA. The ICP alleged the Department has caused continued segregated housing patterns by its disproportionate allocation of the tax credits, granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods. The ICP contended that the Department must modify its selection criteria in order to encourage the construction of low-income housing in suburban communities.

The District Court concluded that the ICP had established a prima facie case of disparate impact. It relied on two pieces of statistical evidence. First, it found “from 1999–2008, [the Department] approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas.” 749 F.Supp.2d 486, 499 (N.D.Tex.2010) (footnote omitted). Second, it found “92.29% of [low-income housing tax credit] units in the city of Dallas were located in census tracts with less than 50% Caucasian residents.” *Ibid.*

The District Court then placed the burden on the Department to rebut the ICP’s prima facie showing of disparate impact. 860 F.Supp.2d 312, 322–323 (2012). After assuming the Department’s proffered interests were legitimate, *id.*, at 326, the District Court held that a defendant—here the Department—must prove “that there are no other less discriminatory alternatives to advancing their proffered interests,” *ibid.* Because, in its view, the Department “failed to meet [its] burden of proving that there are no less discriminatory alternatives,” the District Court ruled for the ICP. *Id.*, at 331.

The District Court’s remedial order required the addition of new selection criteria for the tax credits. For instance, it awarded points for units built in neighborhoods with good schools and disqualified sites that are located adjacent to or near hazardous conditions, such as high crime areas or landfills. . . . The remedial order contained no explicit racial targets or quotas.

While the Department’s appeal was pending, the Secretary of Housing and Urban Development (HUD) issued a regulation interpreting the FHA to encompass disparate-impact liability. See Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed .Reg. 11460 (2013). The regulation also established a burden-shifting framework for adjudicating disparate-impact claims. Under the regulation, a plaintiff first must make a prima facie showing of disparate impact. That is, the plaintiff “has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.” 24 CFR § 100.500(c)(1) (2014). If a statistical

discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case, and there is no liability. After a plaintiff does establish a prima facie showing [2515] of disparate impact, the burden shifts to the defendant to "prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." § 100.500(c)(2). HUD has clarified that this step of the analysis "is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related." 78 Fed.Reg. 11470. Once a defendant has satisfied its burden at step two, a plaintiff may "prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." § 100.500(c)(3).

The Court of Appeals for the Fifth Circuit held, consistent with its precedent, that disparate-impact claims are cognizable under the FHA. 747 F.3d 275, 280 (2014). On the merits, however, the Court of Appeals reversed and remanded. Relying on HUD's regulation, the Court of Appeals held that it was improper for the District Court to have placed the burden on the Department to prove there were no less discriminatory alternatives for allocating low-income housing tax credits. *Id.*, at 282–283. In a concurring opinion, Judge Jones stated that on remand the District Court should reexamine whether the ICP had made out a prima facie case of disparate impact. She suggested the District Court incorrectly relied on bare statistical evidence without engaging in any analysis about causation. She further observed that, if the federal law providing for the distribution of low-income housing tax credits ties the Department's hands to such an extent that it lacks a meaningful choice, then there is no disparate-impact liability. See *id.*, at 283–284 (specially concurring opinion).

The Department filed a petition for a writ of certiorari on the question whether disparate-impact claims are cognizable under the FHA. The question was one of first impression, see *Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (per curiam), and certiorari followed, 573 U.S. —, 135 S.Ct. 46 (2014). . .

B

The mid-1960's was a period of considerable social unrest; and, in response, President Lyndon Johnson established the National Advisory Commission on Civil Disorders, commonly known as the Kerner Commission. Exec. Order No. 11365, 3 CFR 674 (1966–1970 Comp.). After extensive factfinding the Commission identified residential segregation and unequal housing and economic conditions in the inner cities as significant, underlying causes of the social unrest. See Report of the National Advisory Commission on Civil Disorders 91 (1968) (Kerner Commission Report). . . . The Commission concluded that "[o]ur Nation is moving toward two societies, one black, one white — separate and unequal." *Id.*, at 1. To reverse "[t]his deepening racial division," *ibid.*, it recommended enactment of "a comprehensive and enforceable open-occupancy law making it an offense to discriminate in the sale or rental of any housing ... on the basis of race, creed, color, or national origin." *Id.*, at 263.

In April 1968, Dr. Martin Luther King, Jr., was assassinated in Memphis, Tennessee, and the Nation faced a new urgency to resolve the social unrest in the inner cities. Congress responded by adopting the Kerner Commission's recommendation and passing the Fair Housing Act. The statute addressed the denial of housing opportunities on the basis of "race, color, religion, or national origin." Civil Rights Act of 1968, § 804, 82 Stat. 83. Then, in 1988, Congress amended the FHA. Among other provisions, it created certain exemptions from liability and added "familial status" as a protected characteristic. See Fair Housing Amendments Act of 1988, 102 Stat. 1619.

II

The issue here is whether, under a proper interpretation of the FHA, housing decisions with a disparate impact are prohibited. Before turning to the FHA, however, it is necessary to consider two other antidiscrimination statutes that preceded it.

The first relevant statute is § 703(a) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255. The Court addressed the concept of disparate impact under this statute in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). There, the employer had a policy requiring its manual laborers to possess a high school diploma and to obtain satisfactory scores on two intelligence tests. The Court of Appeals held the employer had not adopted these job requirements for a racially discriminatory purpose, and the plaintiffs did not challenge that holding in this Court. Instead, the plaintiffs argued § 703(a)(2) covers the discriminatory effect of a practice as well as the motivation behind the practice. Section 703(a), as amended, provides as follows:

“It shall be an unlawful employer practice for an employer—

“(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

“(2) to limit, segregate, or classify his employees or applicants for employment [2517] in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e–2(a).

The Court did not quote or cite the full statute, but rather relied solely on § 703(a)(2). *Griggs*, 401 U.S., at 426, n. 1.

In interpreting § 703(a)(2), the Court reasoned that disparate-impact liability furthered the purpose and design of the statute. The Court explained that, in § 703(a)(2), Congress “proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” *Id.*, at 431. For that reason, as the Court noted, “Congress directed the thrust of [§ 703(a)(2)] to the consequences of employment practices, not simply the motivation.” *Id.*, at 432. In light of the statute’s goal of achieving “equality of employment opportunities and remov[ing] barriers that have operated in the past” to favor some races over others, the Court held § 703(a)(2) of Title VII must be interpreted to allow disparate-impact claims. *Id.*, at 429–430.

The Court put important limits on its holding: namely, not all employment practices causing a disparate impact impose liability under § 703(a)(2). In this respect, the Court held that “business necessity” constitutes a defense to disparate-impact claims. *Id.*, at 431. This rule provides, for example, that in a disparate-impact case, § 703(a)(2) does not prohibit hiring criteria with a “manifest relationship” to job performance. *Id.*, at 432; see also *Ricci*, 557 U.S., at 587–589 (emphasizing the importance of the business necessity defense to disparate-impact liability). On the facts before it, the Court in *Griggs* found a violation of Title VII because the employer could not establish that high school diplomas and general intelligence tests were related to the job.

The second relevant statute that bears on the proper interpretation of the FHA is the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602 et seq., as amended. Section 4(a) of the ADEA provides:

“It shall be unlawful for an employer—

“(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate

against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

“(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

“(3) to reduce the wage rate of any employee in order to comply with this chapter.”

29 U.S.C. § 623(a).

The Court first addressed whether this provision allows disparate-impact claims in *Smith v. City of Jackson*, 544 U.S. 228 (2005). There, a group of older employees challenged their employer's decision to give proportionately greater raises to employees with less than five years of experience.

Explaining that *Griggs* “represented the better reading of [Title VII's] statutory text,” 544 U.S., at 235, a plurality of the Court concluded that the same reasoning pertained to § 4(a)(2) of the ADEA. The *Smith* plurality emphasized that both § 703(a)(2) of Title VII and § 4(a)(2) of the ADEA contain language [2518] “prohibit[ing] such actions that ‘deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's’ race or age.” 544 U.S., at 235. As the plurality observed, the text of these provisions “focuses on the effects of the action on the employee rather than the motivation for the action of the employer” and therefore compels recognition of disparate-impact liability. *Id.*, at 236. In a separate opinion, Justice SCALIA found the ADEA's text ambiguous and thus deferred under *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to an Equal Employment Opportunity Commission regulation interpreting the ADEA to impose disparate-impact liability, see 544 U.S., at 243–247 (opinion concurring in part and concurring in judgment).

Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose. These cases also teach that disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system. And before rejecting a business justification—or, in the case of a governmental entity, an analogous public interest—a court must determine that a plaintiff has shown that there is “an available alternative ... practice that has less disparate impact and serves the [entity's] legitimate needs.” *Ricci*, *supra*, at 578. The cases interpreting Title VII and the ADEA provide essential background and instruction in the case now before the Court.

Turning to the FHA, the ICP relies on two provisions. Section 804(a) provides that it shall be unlawful:

“To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” 42 U.S.C. § 3604(a).

Here, the phrase “otherwise make unavailable” is of central importance to the analysis that follows.

Section 805(a), in turn, provides:

“It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction,

because of race, color, religion, sex, handicap, familial status, or national origin.” § 3605(a).

Applied here, the logic of Griggs and Smith provides strong support for the conclusion that the FHA encompasses disparate-impact claims. Congress’ use of the phrase “otherwise make unavailable” refers to the consequences of an action rather than the actor’s intent. . . . This results-oriented language counsels in favor of recognizing disparate-impact liability. . . . The Court has construed statutory language similar to § 805(a) to include disparate-impact liability. See, e.g., *Board of Ed. of City School Dist. of New York v. [2519] Harris*, 444 U.S. 130, 140–141 (1979) (holding the term “discriminat[e]” encompassed disparate-impact liability in the context of a statute’s text, history, purpose, and structure).

. . . Title VII’s and the ADEA’s “otherwise adversely affect” language is equivalent in function and purpose to the FHA’s “otherwise make unavailable” language. In these three statutes the operative text looks to results. The relevant statutory phrases, moreover, play an identical role in the structure common to all three statutes: Located at the end of lengthy sentences that begin with prohibitions on disparate treatment, they serve as catchall phrases looking to consequences, not intent. And all three statutes use the word “otherwise” to introduce the results-oriented phrase. “Otherwise” means “in a different way or manner,” thus signaling a shift in emphasis from an actor’s intent to the consequences of his actions. Webster’s Third New International Dictionary 1598 (1971). This similarity in text and structure is all the more compelling given that Congress passed the FHA in 1968 — only four years after passing Title VII and only four months after enacting the ADEA.

It is true that Congress did not reiterate Title VII’s exact language in the FHA, but that is because to do so would have made the relevant sentence awkward and unclear. A provision making it unlawful to “refuse to sell [,] ... or otherwise [adversely affect], a dwelling to any person” because of a protected trait would be grammatically obtuse, difficult to interpret, and far more expansive in scope than Congress likely intended. . . .

Emphasizing that the FHA uses the phrase “because of race,” the Department argues this language forecloses disparate-impact liability since “[a]n action is not taken ‘because of race’ unless race is a reason for the action.” Brief for Petitioners 26. . . . Both Title VII and the ADEA contain identical “because of” language, see 42 U.S.C. § 2000e–2(a)(2); 29 U.S.C. § 623(a)(2), and the Court nonetheless held those statutes impose disparate-impact liability.

In addition, it is of crucial importance that the existence of disparate-impact liability is supported by amendments to the FHA that Congress enacted in 1988. By that time, all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims. See *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926, 935–936 (C.A.2 1988); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146 (C.A.3 1977). . . .

When it amended the FHA, Congress was aware of this unanimous precedent. And with that understanding, it made a considered judgment to retain the relevant statutory text. See H.R.Rep. No. 100–711, p. 21, n. 52 (1988), 1988 U.S.C.C.A.N. 2173 (H.R. Rep.) (discussing suits premised on [2520] disparate-impact claims and related judicial precedent); 134 Cong. Rec. 23711 (1988) (statement of Sen. Kennedy) (noting unanimity of Federal Courts of Appeals concerning disparate impact); Fair Housing Amendments Act of 1987: Hearings on S. 558 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 100th Cong., 1st Sess., 529 (1987) (testimony of Professor Robert Schwemm) (describing consensus judicial view that the FHA imposed disparate-impact liability). Indeed, Congress rejected a proposed amendment that would have eliminated disparate-impact liability for certain zoning decisions. See

H.R. Rep., at 89–93.

Against this background understanding in the legal and regulatory system, Congress' decision in 1988 to amend the FHA while still adhering to the operative language in §§ 804(a) and 805(a) is convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability. "If a word or phrase has been ... given a uniform interpretation by inferior courts ..., a later version of that act perpetuating the wording is presumed to carry forward that interpretation." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012) . . .

Further and convincing confirmation of Congress' understanding that disparate-impact liability exists under the FHA is revealed by the substance of the 1988 amendments. The amendments included three exemptions from liability that assume the existence of disparate-impact claims. The most logical conclusion is that the three amendments were deemed necessary because Congress presupposed disparate impact under the FHA as it had been enacted in 1968.

The relevant 1988 amendments were as follows. First, Congress added a clarifying provision: "Nothing in [the FHA] prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." 42 U.S.C. § 3605(c). Second, Congress provided: "Nothing in [the FHA] prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance." § 3607(b)(4). And finally, Congress specified: "Nothing in [the FHA] limits the applicability of any reasonable ... restrictions regarding the maximum number of occupants permitted to occupy a dwelling." § 3607(b)(1). . . .

Indeed, none of these amendments would make sense if the FHA encompassed only disparate-treatment [2521] claims liability. . . . For instance, certain criminal convictions are correlated with sex and race. See, e.g., *Kimbrough v. United States*, 552 U.S. 85, 98 (2007) (discussing the racial disparity in convictions for crack cocaine offenses). By adding an exemption from liability for exclusionary practices aimed at individuals with drug convictions, Congress ensured disparate-impact liability would not lie if a landlord excluded tenants with such convictions. The same is true of the provision allowing for reasonable restrictions on occupancy. And the exemption from liability for real-estate appraisers is in the same section as § 805(a)'s prohibition of discriminatory practices in real-estate transactions, thus indicating Congress' recognition that disparate-impact liability arose under § 805(a). In short, the 1988 amendments signal that Congress ratified disparate-impact liability.

A comparison to Smith's discussion of the ADEA further demonstrates why the Department's interpretation would render the 1988 amendments superfluous. Under the ADEA's reasonable-factor-other-than-age (RFOA) provision, an employer is permitted to take an otherwise prohibited action where "the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). In other words, if an employer makes a decision based on a reasonable factor other than age, it cannot be said to have made a decision on the basis of an employee's age. According to the Smith plurality, the RFOA provision "plays its principal role" "in cases involving disparate-impact claims" "by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'" 544 U.S., at 239. The plurality thus reasoned that the RFOA provision would be "simply unnecessary to avoid liability under the ADEA" if liability were limited to disparate-treatment claims. *Id.*, at 238.

A similar logic applies here. If a real-estate appraiser took into account a neighborhood's

schools, one could not say the appraiser acted because of race. And by embedding 42 U.S.C. § 3605(c)'s exemption in the statutory text, Congress ensured that disparate-impact liability would not be allowed either. Indeed, the inference of disparate-impact liability is even stronger here than it was in *Smith*.

* * *

These unlawful practices include zoning laws and other housing restrictions [2522] that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability. See, e.g., *Huntington*, 488 U.S., at 16–18 (invalidating zoning law preventing construction of multifamily rental units); *Black Jack*, 508 F.2d, at 1182–1188 (invalidating ordinance prohibiting construction of new multifamily dwellings); *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish*, 641 F.Supp.2d 563, 569, 577–578 (E.D.La.2009) (invalidating post-Hurricane Katrina ordinance restricting the rental of housing units to only “ ‘blood relative[s]’ ” in an area of the city that was 88.3% white and 7.6% black); see also *Tr. of Oral Arg.* 52–53 (discussing these cases). The availability of disparate-impact liability, furthermore, has allowed private developers to vindicate the FHA's objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units. See, e.g., *Huntington*, *supra*, at 18. Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.

* * *

An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies. This step of the analysis is analogous to the business necessity standard under Title VII and provides a defense against disparate-impact liability. See 78 Fed.Reg. 11470 (explaining that HUD did not use the phrase “business necessity” because that “phrase may not be easily understood to cover the full scope of practices covered by the Fair Housing Act, which applies to individuals, businesses, nonprofit organizations, and public entities”). As the Court explained in *Ricci*, an entity “could be liable for disparate-impact discrimination only if the [challenged practices] were not job related and consistent with business necessity.” [2523] 557 U.S., at 587. Just as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a “reasonable measure[ment] of job performance,” *Griggs*, *supra*, at 436, so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest. . .

As HUD itself recognized in its recent rulemaking, disparate-impact liability “does not mandate that affordable housing be located in neighborhoods with any particular characteristic.” 78 Fed.Reg. 11476.

In a similar vein, a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that “[r]acial imbalance ... does not, without more, establish a prima facie case of disparate impact” and thus protects defendants from being held liable for racial disparities they did not create. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989), superseded by statute on other grounds, 42 U.S.C. § 2000e–2(k). Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a

pervasive way and “would almost inexorably lead” governmental or private entities to use “numerical quotas,” and serious constitutional questions then could arise. 490 U.S., at 653.

* * *

Courts must therefore examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important. A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact. [2524]

* * *

The Department’s amici, in addition to the well-stated principal dissenting opinion in this case, see post, at 2532 – 2533, 2548 – 2549 (opinion of ALITO, J.), call attention to the decision by the Court of Appeals for the Eighth Circuit in *Gallagher v. Wagner*, 619 F.3d 823 (2010). Although the Court is reluctant to approve or disapprove a case that is not pending, it should be noted that *Wagner* was decided without the cautionary standards announced in this opinion and, in all events, the case was settled by the parties before an ultimate determination of disparate-impact liability.

* * *

[2525] While the automatic or pervasive injection of race into public and private transactions covered by the FHA has special dangers, it is also true that race may be considered in certain circumstances and in a proper fashion. Cf. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 789 (2007) (KENNEDY, J., concurring in part and concurring in judgment) (“School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; [and] drawing attendance zones with general recognition of the demographics of neighborhoods”). Just as this Court has not “question[ed] an employer’s affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the [promotion] process,” *Ricci*, 557 U.S., at 585, it likewise does not impugn housing authorities’ race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns. When setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.

The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court’s interpretation of similar language in Title VII and the ADEA, Congress’ ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.

III

... Indeed, many of our Nation’s largest cities — entities that are potential defendants in disparate-impact suits — have submitted an amicus brief in this case supporting disparate-impact liability under the FHA. See Brief for City of San Francisco et al. as Amici Curiae 3–6. The existence of disparate-impact liability in the substantial majority of the Courts of Appeals for the last several decades “has not given rise to ... dire consequences.” *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. —, —, 132 S.Ct. 694, 710 (2012).

Much progress remains to be made in our Nation’s continuing struggle against racial isolation. In striving to achieve our “historic commitment to creating an integrated society,” *Parents Involved*, supra, at 797 (KENNEDY, J., concurring in part and concurring in judgment), we must remain wary of policies that reduce homeowners to nothing more than their race. But since the passage of the Fair Housing Act in 1968 and against the backdrop of disparate-impact

liability in nearly every jurisdiction, many cities have become more diverse. The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that "[o]ur Nation is moving toward two societies, one black, one white — separate and unequal." Kerner Commission Report 1. The Court acknowledges the Fair [2526] Housing Act's continuing role in moving the Nation toward a more integrated society.

The judgment of the Court of Appeals for the Fifth Circuit is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, dissenting [omitted].

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

No one wants to live in a rat's nest. Yet in *Gallagher v. Magner*, 619 F.3d 823 (2010), a case that we agreed to review several Terms ago, the Eighth Circuit held that the Fair Housing Act (or FHA), 42 U.S.C. § 3601 et seq., could be used to attack St. Paul, Minnesota's efforts to combat "rodent infestation" and other violations of the city's housing code. 619 F.3d, at 830. The court agreed that there was no basis to "infer discriminatory intent" on the part of St. Paul. *Id.*, at 833. Even so, it concluded that the city's "aggressive enforcement of the Housing Code" was actionable because making landlords respond to "rodent infestation, missing dead-bolt locks, inadequate sanitation facilities, inadequate heat, inoperable smoke detectors, broken or missing doors," and the like increased the price of rent. *Id.*, at 830, 835. Since minorities were statistically more likely to fall into "the bottom bracket for household adjusted median family income," they were disproportionately affected by those rent increases, i.e., there was a "disparate impact." *Id.*, at 834. The upshot was that even St. Paul's good-faith attempt to ensure minimally acceptable housing for its poorest residents could not ward off a disparate-impact lawsuit.

Today, the Court embraces the same theory that drove the decision in *Magner* [footnote omitted]. This is a serious mistake. The Fair Housing Act does not create disparate-impact liability, nor do this Court's precedents. And today's decision will have unfortunate consequences for local government, private enterprise, and those living in poverty. Something has gone badly awry when a city can't even make slumlords kill rats without fear of a lawsuit. Because Congress did not authorize any of this, I respectfully dissent. . . .

[2533] It is obvious that Congress intended the FHA to cover disparate treatment. The question presented here, however, is whether the FHA also punishes "practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities." *Ricci*, *supra*, at 577. The answer is equally clear. The FHA does not authorize disparate-impact claims. No such liability was created when the law was enacted in 1968. And nothing has happened since then to change the law's meaning.

* * *

[2548] Disparate impact puts housing authorities in a very difficult position because programs that are designed and implemented to help the poor can provide the grounds for a disparate-impact claim. As *Magner* shows, when disparate impact is on the table, even a city's good-faith attempt to remedy deplorable housing conditions can be branded "discriminatory." 619 F.3d, at 834. Disparate-impact claims thus threaten "a whole range of tax, welfare, public service, regulatory, and licensing statutes." *Washington v. Davis*, 426 U.S. 229, 248 (1976).

This case illustrates the point. The Texas Department of Housing and Community Affairs

(the Department) has only so many tax credits to distribute. If it gives credits for housing in lower income areas, many families — including many minority families — will obtain better housing. That is a good thing. But if the Department gives credits for housing in higher income areas, some of those families will be able to afford to move into more desirable neighborhoods. That is also a good thing. Either path, however, might trigger a disparate-impact suit [footnote omitted].

This is not mere speculation. Here, one respondent has sued the Department for not allocating enough credits to higher income areas. See Brief for Respondent Inclusive Communities Project, Inc., 23. But another respondent argues that giving credits to wealthy neighborhoods violates “the moral imperative to improve the substandard and inadequate affordable housing in many of our inner cities.” Reply Brief for Respondent Frazier Revitalization Inc. 1. This latter argument has special force because a city can build more housing where property is least expensive, thus benefiting more people. In fact, federal [2549] law often favors projects that revitalize low-income communities. See ante, at 2513.

Notes

1. The Court’s decision partially relied on the universal interpretation of the Courts of Appeals that had upheld the adoption of the disparate impact standard in cases under Title VIII. Before the Supreme Court decided *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, some Republican Administrations instructed attorneys in the Civil Rights Division of the U.S. Department of Justice to argue that the proper standard in all Title VIII cases required proof of intent to discriminate, even in the face of this overwhelming precedent in the Courts of Appeals. What do you think is an appropriate and ethical response to such a mandate? Many attorneys in the Reagan Administration responded with resignations.

e. Disability Discrimination under Title VIII

[Page 349: Add the following sentences to the end of the second full paragraph:]

In *Reyes-Garay v. Integrant Assur. Co.*, 818 F. Supp. 2d 414, 437 (D.P.R. 2011), the court stated that, “[t]o establish a prima facie case for failure to accommodate under the Fair Housing Act of 1968, a plaintiff must establish the following: (1) claimant is handicapped within the meaning of 42 U.S.C.S. § 3602(a) and the defendant knew or should have known of this fact; (2) an accommodation may be necessary and reasonable to afford the handicapped person an equal opportunity to use and enjoy the dwelling; and (3) the defendant refused to make the requested accommodation. . . . ‘But before a district court can assess whether a plaintiff met his or her burden of establishing each of the elements of a prima facie case, however, the plaintiff must show that a special accommodation of a disability was, in fact, requested.’ *Colon-Jimenez v. GR Mgmt. Corp.*, 218 Fed. Appx. 2, 3 (1st Cir. 2007) (unpublished). Moreover, plaintiff’s request for a reasonable accommodation must specifically explain ‘how the accommodation requested is linked to some disability.’ *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 261 (1st Cir. 2001).”

A housing authority may not require an applicant to demonstrate an ability to live independently, as such a requirement has the effect of discriminating against handicapped individuals and is in violation of federal statutes and regulations concerning discrimination in housing. *Maziarz v. Hous. Authority of the Town of Vernon*, 281 F.R.D. 71 (D. Conn. 2012).

g. Affordable Housing and Title VIII

[Page 360: Add the following case after Note 1:]

MOUNT HOLLY GARDENS CITIZENS IN ACTION, INC. v. TWP. of MT. HOLLY
658 F.3d 375 (3^d Cir. 2011), *cert. granted*, 133 S. Ct. 569, *dismissed*, 134 S. Ct. 636 (2013)

Before: SLOVITER, FUENTES, and FISHER, Circuit Judges.

[377] OPINION OF THE COURT

FUENTES, *Circuit Judge*.

Mount Holly Township (the "Township") has proposed a redevelopment plan that would eliminate the existing homes in its Gardens neighborhood, occupied predominantly by low-income residents, and replace them with significantly more expensive housing units. Appellants, an association of Gardens residents organized under the name Mt. Holly Gardens Citizens in Action, and 23 current and former residents of the neighborhood (collectively the "Residents") filed suit against the Township alleging violations of various anti-discrimination laws.

Before the Township filed an Answer or discovery on these allegations had taken place, the District Court granted summary judgment to the Township. Because the District Court misapplied the standard for deciding whether the Residents could establish a *prima facie* case under Title VIII and because it did not draw all reasonable inferences in the Residents' favor, we will reverse.

I.[footnote omitted]

The homes in this dispute are located in a 30-acre neighborhood called the Gardens in the Township of Mount Holly in Burlington County, New Jersey. The Gardens is the only neighborhood in the Township comprised predominantly of African-American and Hispanic residents. [378] It is poor—almost all of its residents earn less than 80% of the area's median income; with most earning much less.

The 329 [footnote omitted] homes in the Gardens are predominantly two-story buildings made out of solid brick. Built in the 1950s, the homes are attached in rows of 8 to 10 and are set back from the curving streets to allow for front and back yards, with alleys running behind each housing block. Two major commercial districts abut opposite sides of the neighborhood, which is only a mile away from the major downtown business district. Until 2004, the neighborhood was also home to a playground and a community center.

The 2000 census provides a snapshot of the neighborhood [footnote omitted]. According to that [sic] data, the Gardens neighborhood was split evenly between rental properties (with a median rental price of \$705 per month) and homeowners (the median cost of homeownership was \$969 per month). Eighty-one percent of the homeowners had lived in their homes for at least 9

years; 72% of renters had lived there for at least five years. Of the 1,031 [footnote omitted] residents living in the neighborhood, 203, or 19.7%, were non-Hispanic Whites; 475, or 46.1% were African-Americans; and 297, or 28.8% were Hispanic, the highest concentration of minority residents within Mt. Holly. Almost all of these residents were classified as "low income"; indeed, most were classified as having "very low" or "extremely low" incomes.

The neighborhood was not perfect. For one, it was crowded. This created a parking shortage, which led residents to pave their backyards for use as driveways, which, in turn, led to drainage problems. In addition, the fact that the homes were owned in fee simple meant there was no one with a vested interest in maintaining common spaces, such as the alleys. Some of the owners were nothing more than absentee landlords, renting to individuals with little interest in maintaining the properties. Over the years, many of the properties fell into disrepair. Vacant properties were boarded up, some yards filled with rubbish, and parts of the area became blighted. Because the houses were connected to one another, the dilapidation of one house could and sometimes did lead to the decay of the adjoining houses. Finally, the dense population, narrow streets, and vacant properties facilitated crime. In 1999, 28% of crimes in the Township occurred in the Gardens, even though that neighborhood covers only 1.5% of the Township's land area.

These many problems were not ignored. Local community activists and business leaders worked to revitalize the Gardens through a private initiative that eventually came to be known as "Mt. Holly 2000." This community endeavor sought to reverse the neighborhood's decline by rehabilitating properties and increasing social services. Despite sporadic achievements—ten homes were renovated and a [379] community policing center was established—the neighborhood's problems continued.

In the year 2000, the Township commissioned a study to determine whether the Gardens should be designated as an "area in need of redevelopment" under New Jersey's redevelopment laws. The resulting report, issued on November 8, 2000 concluded that the area offered a "significant opportunity for redevelopment" because of blight, excess land coverage, poor land use, and excess crime. . . . That same year, the Township began to acquire properties in the Gardens. Those properties were left vacant.

A series of redevelopment plans followed. In 2003, the Township issued the Gardens Area Redevelopment Plan ("GARP"). This plan called for the demolition of all of the homes in the neighborhood and the permanent or temporary relocation of all of its residents. In their place, the plan provided for the construction of 180 new market-rate housing units, thirty of which would be available only to senior citizens. The plan was changed in 2005 to include a parcel of land immediately north of the Gardens. This plan, the West Rancocas Redevelopment Plan, also called for the destruction of most of the original Gardens homes, to be replaced with 228 new residential units composed of two-family dwellings and townhouses. Unlike the GARP, the West Rancocas plan provided for the optional rehabilitation of some of the original Gardens homes and allowed for the residents of those rehabilitated units to be temporarily relocated in phases so that they could remain in the neighborhood. The West Rancocas plan also contemplated that 10% of the 228 units would be designated as affordable housing. Finally, in 2008, the plan was changed again. This time, the Revised West Rancocas Redevelopment Plan called for construction of up to 520 houses, 75% of which could be townhouses and 50% of which could be apartments. The revised plan called for only 56 deed-restricted affordable housing units, 11 of which would be offered on a priority basis to existing Gardens residents. This revised plan did not include any rehabilitation of existing units.

At each stage of the process, many Gardens residents objected to the redevelopment, complaining about the destruction of their neighborhood and expressing fear that they would not be able to afford to live anywhere else in the Township. One resident complained that the house next to hers was torn down and that a bulldozer had hit her home, tearing the wall, cracking the ceiling, and shifting her roof. Another resident, a 70-year-old disabled homeowner, told the Township's Planning Board that, were he displaced, he would be unable to work and unable to afford a new home. At one meeting in 2005, a planning expert testified that the West Rancocas plan was deficient because it only allowed rehabilitation as an option, without requiring or even encouraging it. He also said that 90% of the Gardens' existing residents would not be able to afford the newly-constructed homes and complained that the plan did not provide an estimate of affordable housing in the existing market for displaced residents. . . .

Despite these complaints, work on the development continued. In February 2006 Keating Urban Partners, LLC, was chosen as the plan developer. Keating, in turn, hired Triad to develop a relocation plan. That plan, the Workable Relocation Assistance Plan ("WRAP"), was submitted to the New Jersey Department of Community Affairs on September 28, 2006 and provided that all residents living in the Gardens on August 1, 2006 would receive [380] relocation assistance. Qualified homeowners would receive \$15,000 and a \$20,000 no-interest loan to assist in the purchase of a replacement home. The Township offered to buy homes for between \$32,000 and \$49,000 [footnote omitted]. The estimated cost of a new home in the development was between \$200,000 and \$275,000, well outside the range of affordability for a significant portion of the African-American and Hispanic residents of the Township.

Renters were authorized to receive up to \$7,500 of relocation assistance, but were not eligible for relocation funds to return to the Gardens. In any case, the vast majority of those renters would be unable to afford the proposed market-rate rent of \$1,230 per month. Eventually, the Township paid to relocate 62 families, 42 of which moved outside of Mt. Holly Township. Renters who moved often had to pay more in rent at their new homes.

Although the redevelopment plan called for building in phases, the Township began to acquire and demolish all of the homes in the Gardens, thereby displacing many residents and creating conditions that encouraged the remaining residents to leave. By August 2008, 75 homes had been destroyed and 148 homes had been acquired and left vacant. Later that fall, the Township demolished 60 more homes. And, in the summer of 2009, 50 more homes were knocked down. Residents living amongst the destruction were forced to cope with noise, vibration, dust, and debris. Worse, the interconnected nature of the houses triggered a cascading array of problems. Uninsulated interior walls were exposed to the outside and covered with unsightly stucco or tar.

But these coatings did not extend below grade, allowing moisture to seep into subterranean crawl spaces, creating an environment for mold problems. Above, the demolitions opened the roofs of adjoining homes. Those openings were patched with plywood, which was insufficient to stop water leaks. Around the neighborhood, homes bore the scars of demolition: hanging wires and telephone boxes, ragged brick corners, open masonry joints, rough surfaces, irregular plywood patches, and damaged porches, floors and railings. Destruction of the sidewalks outside demolished homes further contributed to the disarray by making it difficult to navigate through the neighborhood. By June 2011, only 70 homes remained under private ownership and the Township was in the process of demolishing 52 properties that it had acquired. These conditions discouraged any attempt at rehabilitating the neighborhood and encouraged existing residents to sell their homes for less than they otherwise might have been worth.

In October 2003, Citizens in Action filed a suit in state court alleging violations of New Jersey's redevelopment laws and procedures, and various anti-discrimination laws. Ultimately, the New Jersey Superior Court dismissed some counts and granted summary judgment to the Township on the others, concluding that there was no violation of New Jersey law, that the area was blighted, and that the antidiscrimination claims were not ripe because the plan had not yet been implemented. The Appellate Division affirmed, and the New Jersey Supreme Court denied a petition for certiorari.

The Residents filed suit in the District Court on May 27, 2008, raising the anti-discrimination claims that had not been ripe in their state suit. The federal complaint alleged, among other things, violations of the Fair Housing Act (the "FHA"), Title VIII of the Civil Rights Act of 1968; the Civil Rights Act of 1866, as codified at [381] 42 U.S.C. § 1982⁶ and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.⁷ The

Residents asked for declaratory and injunctive relief to stop the redevelopment plan, as well as damages or compensation that would allow Gardens residents to obtain housing in the Township. The Residents' motion for a preliminary injunction was denied. After they filed an Amended Complaint, the Township, along with the other named defendants, filed motions to dismiss. The District Court converted these into motions for summary judgment and, after allowing the parties time to brief the motions, granted summary judgment to the Township defendants. The District Court ruled that there was no *prima facie* case of discrimination under the FHA and that, even if there was, the Residents had not shown how an alternative course of action would have had a lesser impact.

The Residents filed a timely appeal and we granted the Residents' motion to stay redevelopment pending this appeal. We have jurisdiction under 28 U.S.C. § 1291.

II.

* * *

The FHA makes it unlawful to "refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). A dwelling can be made otherwise unavailable by, among other things, action that limits the availability of affordable housing. *See, e.g., Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 928-29, 938-39 (2d Cir. 1988); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1059, 1062-64 (4th Cir. 1982); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 130 (3d Cir. 1977). The FHA can be violated by either intentional discrimination or if a practice has a disparate impact on a protected class. *Cnty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 176 (3d Cir. 2005).

Disparate impact claims, which do not require proof of discriminatory intent, *see Rizzo*, 564 F.2d at 147-48, permit federal law to reach "[c]onduct that has the necessary and foreseeable consequence of perpetuating segregation[, which] can be as deleterious as purposefully

⁶42 U.S.C. § 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

⁷Section 1 of the Fourteenth Amendment provides in pertinent part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

discriminatory conduct in frustrating the national commitment to replace the ghettos by truly integrated and balanced living patterns." *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1289-90 (7th Cir. 1977). In order to determine whether action of this sort was "because of race" we look to see if it had a "racially discriminatory effect," i.e., whether it disproportionately burdened a particular racial group so as to cause a disparate impact. *Rizzo*, 564 F.2d at 146-48; see also *Lapid-Laurel, LLC v. Zoning Bd. of Adjustment [382] of Twp. of South Plains*, 284 F.3d 442, 466-67 (3d Cir. 2002) (featuring claims of a disparate impact on handicapped persons in violation of 42 U.S.C. § 3604(f)). This is called a *prima facie* case of discrimination. *Rizzo*, 564 F.2d at 148 & n.31. If such a case is established, then we look to see whether the defendant has a legitimate, non-discriminatory reason for its actions. *Id.* at 148. If it does, the defendant must then also establish that "no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." *Id.* at 149. Finally, if the defendant makes this showing, the burden once again shifts to those challenging the action, who must demonstrate that there is a less discriminatory way to advance the defendant's legitimate interest. *Id.* at 149 n.37.

A.

When viewed in the light most favorable to the Residents, the evidence submitted by the Residents was sufficient to establish a *prima facie* case. No single test controls in measuring disparate impact," but the Residents must offer proof of disproportionate impact, measured in a plausible way. *Hallmark Developers, Inc. v. Fulton Cnty.*, 466 F.3d 1276, 1286 (11th Cir. 2006). Typically, "a disparate impact is demonstrated by statistics," *id.* at 1286, and a *prima facie* case may be established where "gross statistical disparities can be shown." *Hazleton Sch. Dist. v. United States*, 433 U.S. 299, 307-08, 97 S. Ct. 2736, 53 L. Ed. 2d 768 (1977). According to the data in the 2000 census conducted before the redevelopment plan began, 22.54% of African-American households and 32.31% of Hispanic households in Mount Holly will be affected by the demolition of the Gardens. The same is true for only 2.73% of White households. In short, the Residents' statistical expert has calculated that African-Americans would be 8 times more likely to be affected by the project than Whites, and Hispanics would be 11 times more likely to be affected. Furthermore, the 2000 data showed that only 21% of African-American and Hispanic households in Burlington County would be able to afford new market-rate housing in the Gardens, compared to 79% of White households.

The District Court's first error was in rejecting the Residents' statistical submissions, which should have been taken in the light most favorable to them at this stage in the proceedings. These statistics, like those presented in *Rizzo* and other prominent housing discrimination cases, show a disparate impact. In *Rizzo*, the plaintiffs presented evidence that, of the 14,000-15,000 people on a waiting list for public housing, 85% were black and 95% were of a minority background. 564 F.2d at 142. Under these circumstances, we concluded that the cancellation of a public housing project had a "racially disproportionate effect, adverse to Blacks and other minorities in Philadelphia." *Id.* Similarly, the plaintiffs in the Second Circuit case of *Huntington Branch* used statistics showing that while only 7% of the residents in a town required subsidized affordable housing, 24% of that town's Black residents required such housing, which meant that Black residents were three times more likely to be affected by a shortage of affordable housing. 844 F.2d at 929. And in *Keith v. Volpe*, the Ninth Circuit concluded that the FHA was violated where a blocked housing project had twice the adverse impact on minorities. 858 F.2d 467, 484 (9th Cir. 1988). The disparate impact here, while not as extreme as the impact in *Rizzo*, is similar to or greater than the disparate impact

found sufficient to establish a *prima facie* case elsewhere. Under these circumstances, the District Court [383] erred in granting summary judgment to the Township.

Further, the District Court's challenge to these statistics in a footnote did not make the appropriate inferences . . . Instead, the District Court challenged the statistical analysis underlying the 21% figure of Burlington County minority residents who could afford units the redeveloped Gardens as both too broad, because it took account of the entire population of Burlington County, and too narrow because it failed to consider minorities *outside* the county who might move in.

In addition, the District Court said the 21% figure did not take into account the fact that 56 of the units in the Revised West Rancocas Plan would be designated as affordable housing. But the District Court's analysis failed to take into account the Residents' evidence that these units, although labeled "affordable," would be out of reach for almost all of the Gardens residents.

The District Court also said that the statistics failed to take into account non-minority purchasers who might rent to minorities. But, unless those purchasers offered below-market rents, this would not affect the inference that the project had a disproportionate effect on Blacks and Hispanics who would be unable to afford market-rate units.

As to the District Court's concern that the statistics did not take into account minorities who might move elsewhere in Mount Holly, the Residents' expert opined that affordable housing in the Township was scarce, and that most Gardens residents would not be able to afford market-rate units elsewhere in the Township.

Lastly, the District Court erred when it rejected a reasonable inference in favor of the Residents by looking at the *absolute* number of African-American and Hispanic households in Burlington County that could afford homes. Instead, the District Court should have looked to see whether the African-American and Hispanic residents were disproportionately *affected* by the redevelopment plan. *See Huntington*, 844 F.2d at 938 ("By relying on absolute numbers rather than on proportional statistics, the district court significantly underestimated the disproportionate impact of the Town's policy."); *Hallmark Developers*, 466 F.3d at 1286 (quoting *Huntington*, 844 F.3d at 928.).⁸

There is another problem. The District Court's most troubling error is its conflation of the concept of disparate treatment with disparate impact. The District Court essentially agreed with the Township that because 100% of minorities in the Gardens will be treated the same as 100% of non-minorities in the Gardens, the Residents failed to prove there is a greater adverse impact on minorities. This was in error. We need not simply ask whether the White residents at the Gardens are *treated* the same as the minority residents at the Gardens. The logic behind the FHA is more perceptive than that. It looks beyond such specious concepts of equality to determine whether a person is being deprived of his lawful rights because of his race. Rather, a disparate impact inquiry requires us to ask whether minorities are disproportionately *affected* by the redevelopment plan. Thus the Residents can establish a *prima facie* case of disparate impact by showing that minorities are disproportionately burdened by the redevelopment plan or that the redevelopment plan "[falls] more harshly" on minorities. [384] *Doe v. City of Butler*, 892 F.2d 315, 323 (3d Cir. 1989).

⁸ The Department of Justice filed an *amicus curiae* brief agreeing that the District Court erred in its disparate impact *prima facie* case analysis.

The Township asserts that a disparate impact approach would result in the unintended consequence of halting the redevelopment of minority neighborhoods and that it is foreclosed by the Supreme Court's decision in *City of Memphis v. Greene*, which states that

[b]ecause urban neighborhoods are so frequently characterized by a common ethnic or racial heritage, a regulation's adverse impact on a particular neighborhood will often have a disparate effect on an identifiable ethnic or racial group. To regard an inevitable consequence of that kind as a form of stigma so severe as to violate the Thirteenth Amendment would trivialize the great purpose of that charter of freedom.

451 U.S. 100, 128, 101 S. Ct. 1584, 67 L. Ed. 2d 769 (1981).

There are three problems with the Township's position. First, *City of Memphis* was concerned with the standard for establishing a violation of the Thirteenth Amendment's ban on the "badges and incidents of slavery in the United States." *Id.* at 125-26. Whatever that standard might be—a question left open by the Supreme Court's ruling in that case, *see id.* at 130 (White, J., concurring)—*City of Memphis* did not consider the FHA.

All of the courts of appeals that have considered the matter, including this one, have concluded that plaintiffs can show the FHA has been violated through policies that have a disparate impact on a minority group. *See Greater New Orleans Fair Housing Action Center v. HUD*, 639 F.3d 1078, 1085 (D.C. Cir. 2011) (acknowledging the majority view but declining to take a position on the matters); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996); *Mountain Side Mobile Estates P'ship v. HUD*, 56 F.3d 1243, 1250-51 (10th Cir. 1995); *Jackson v. Okaloosa County*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252, 269 n.20 (1st Cir. 1993); *Keith*, 858 F.2d at 482-84; *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1100 (2d Cir. 1988); *Arthur v. City of Toledo*, 782 F.2d 565, 574-75 (6th Cir. 1986); *Smith*, 682 F.2d at 1065; *United States v. Mitchell*, 580 F.2d 789, 791-92 (5th Cir. 1978); *Rizzo*, 564 F.2d at 147-48; *Metro. Hous. Dev. Corp.*, 558 F.2d at 1290; *United States v. City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1974).

Second, the Township's approach urges us to conclude that the FHA is violated only when a policy treats each individual minority resident differently from each individual White resident. Under our precedent, a plaintiff may establish a *prima facie* case of discrimination by demonstrating that the policy disproportionately affects or impacts one *group* more than another—facially disparate treatment need not be shown. For instance, in *Rizzo*, the waiting list for public housing comprised 85% African-Americans and 95% minorities, meaning that 5% were White. 564 F.2d at 142. The White residents on the list were treated the same as the minority residents on the list—each was hurt by Philadelphia's decision to block a public housing project—but we nevertheless found a violation of the FHA because cancelling the project had a "racially disproportionate effect" on African-Americans. *Id.* at 149 ("Nor can there be any doubt that the impact of the governmental defendants' termination of the project was felt primarily by blacks, who make up a substantial *proportion* of those who would be eligible to reside there.") (emphasis added).

The Township may be correct that a disparate impact analysis will often allow [385] plaintiffs to make out a *prima facie* case when a segregated neighborhood is redeveloped in circumstances where there is a shortage of alternative affordable housing. But this is a feature of the FHA's programming, not a bug. The FHA is a broadly remedial statute

designed to prevent and remedy invidious discrimination on the basis of race, *see Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982), that facilitates its antidiscrimination agenda by encouraging a searching inquiry into the motives behind a contested policy to ensure that it is not improper. *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 Harv. L. Rev. 642, 652 (2001) (remarking that a "leading gloss" on the Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971), is that "disparate impact functions as a means of smoking out subtle or underlying forms of intentional discrimination on the basis of group membership."). We need not be concerned that this approach is too expansive because the establishment of a *prima facie* case, by itself, is not enough to establish liability under the FHA. It simply results in a more searching inquiry into the defendant's motivations — precisely the sort of inquiry required to ensure that the government does not deprive people of housing "because of race."

Finally, the Township seems to argue that its redevelopment plan does not violate Title VIII unless the statistics show that it increases segregation in the Township. . . . Showing that a policy has a segregative effect is one way to establish a violation of Title VIII, but it is not the only way. *See Huntington Branch*, 844 F.2d at 937 (observing that a policy often discriminates in one of two ways: having a disparate impact or perpetuating segregation). The Township is free to argue that its plan is less discriminatory than all of the available alternatives because it does the best job of integrating the neighborhood. However, those arguments are properly considered in the context of the last steps of the Title VIII analysis, not as a requirement of the *prima facie* case.

In reality, the District Court's decision was based on a valid and practical concern, which appears to drive its reasoning throughout the opinion. It feared that finding a disparate impact here would render the Township powerless to rehabilitate its blighted neighborhoods. This underlying rationale distorts the focus and analysis of disparate impact cases under the FHA. In disparate impact cases, "[e]ffect, not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme." *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1977). Once the Residents established a *prima facie* case of disparate impact, the District Court's inquiry must continue to determine whether a person is being deprived of his lawful rights because of his race. It must ask whether that Township's legitimate objectives could have been achieved in a less discriminatory way.

B.

Once the plaintiffs establish a *prima facie* case, the defendants must offer a legitimate reason for their actions. In this case, everyone agrees that alleviating blight is a legitimate interest. The core of the dispute between the parties is over the next step of the FHA's burden-shifting analysis: whether the defendants have shown that there is no less discriminatory alternative. *Rizzo*, 564 F.2d at 149. Only when the defendants make this showing does the burden shift back to the plaintiffs — where it ultimately remains — to provide evidence of such an alternative. *Id.* [386] at 149 n.37. The test for whether there is no alternative is "similar to the test of whether the defendant has demonstrated that the requested accommodation is 'unreasonable' for the purposes of rebutting a claim under § 3604(f)(3)(B)." *Lapid-Laurel*, 284 F.3d at 468. Section 2604(f)(3)(B) of the FHA requires that reasonable housing accommodations be made for individuals with disabilities. In other words, the defendant must show that the alternatives impose an undue hardship under the circumstances of this specific case. *See US Airways v. Barnett*, 535 U.S. 391, 401-02, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002) (discussing the term "unreasonable accommodation" under the Americans with Disabilities Act).

The District Court characterized the Residents' proposed alternative as follows:

[E]ffectively, plaintiffs are seeking to remain living in the blighted and unsafe conditions until they are awarded money damages for their claims and sufficient compensation to secure housing in the local housing market. Although couched at times like an effort to have the development go up around them, like a highway built around a protected tree, or to have their units rehabilitated, this makes little if no practical sense after years of litigation, approved redevelopment plans, and the expenditure of significant public resources. At this late stage, the only real practical remedy is for plaintiffs to receive the fair value for their home as well as proper and non-discriminatory relocation procedures and benefits The relief they are seeking is inconsistent with proving the fourth element of their FHA claim—namely, that an alternative course of action to eminent domain and relocation is viable. . . .

The Residents' evidence is susceptible to more favorable inferences. The Residents are not asking for permission to continue to live in "blighted and unsafe" conditions. Instead, they argue that there is a feasible plan that meets the Township's goals and entails more substantial rehabilitation. Taking the evidence in the light most favorable to the Residents, one could credit the report of the Residents' planning expert, which stated that the "blighted and unsafe" conditions could be remedied in a far less heavy-handed manner that would not entail the wholesale destruction and rebuilding of the neighborhood.

The Residents' expert pointed out that, although the Revised West Rancocas Plan called for development in stages, the Township began the development by aggressively acquiring houses, which it left vacant and then destroyed. He opined that a more gradual redevelopment plan would have allowed existing residents to move elsewhere in the neighborhood during one part of the redevelopment, and then move back once the redevelopment was completed. The Residents' expert further noted that the Township had not performed a comparative cost analysis showing that total demolition, relocation, and new construction was less feasible than an alternative focused on rehabilitation. Indeed, the expert went on to propose an alternative redevelopment plan that would rely on the targeted acquisition and rehabilitation of some of the existing Gardens homes, the combination of some houses to make larger homes, an initiative to make the houses more attractive through the use of landscaping and added amenities such as decks and porches, and selective demolition and new construction, including the construction of more affordable units. The Residents' expert also provided examples of previous alternatives—including one developed as early as 1989 — to show that the complete demolition of [387] the neighborhood was not the only possible solution to blight in the Gardens [footnote omitted]. Finally, he provided a non-exhaustive list of state and federal funding programs that would support such a redevelopment plan and observed that the Township had failed to make an active effort to locate a developer with experience in neighborhood rehabilitation.

The Township provided the contrasting statements of its Township manager, who argued that a rehabilitation program was not economically feasible. In support, she cited the fact that one alternative, the Mt. Holly 2000 program, demonstrated that rehabilitation of each unit would be extremely costly. She also challenged the availability of sources of funding for a rehabilitation. Lastly, she emphasized the many problems that led the Township to declare the Gardens an area in need of redevelopment and asserted the belief of the Township Council and its planning board that demolition and replacement is the most effective and efficient approach to solving the neighborhood's problems.

These contrasting statements, as well as the parties' continued arguments on appeal as to the cost and feasibility of an alternative relying on rehabilitation, create genuine issues of material fact that require further investigation. Once the record on alternatives has been more fully developed, the District Court may entertain renewed motions for summary judgment, taking into account the Township's initial burden of showing that there are no less discriminatory alternatives, as well as the standard advanced in *Lapid-Laurel* for ultimately determining whether an alternative is unreasonable [footnote omitted].

III.

The Residents are also seeking to recover under the theory that the Township intentionally discriminated against its minority residents when it adopted the redevelopment plan. The District Court saw no evidence of intentional discrimination and granted the Township's motion for summary judgment. After carefully considering the matter, we discern no error in the District Court's decision and will thus affirm that ruling.

IV.

The Township has broad discretion to implement the policies it believes will improve its residents' quality of life. But that discretion is bounded by laws like the FHA and by the Constitution, which prevent policies that discriminate on the basis of race. For this reason, "the federal courts must stand prepared to provide 'such remedies as are necessary to make effective the congressional purpose.'" *Rizzo*, 564 F.2d at 149 (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433, 84 S. Ct. 1555, 12 L. Ed. 2d 423 (1964)). A more developed factual record will assist the District Court in crafting appropriate remedies, if necessary. For all of the foregoing reasons, the [388] District Court's order granting summary judgment is vacated and the case is remanded for further proceedings.

The Supreme Court of the United States granted *certiorari* in *Mt. Holly* in 2013, limited to Question 1 presented by the petition:

Issue: Whether disparate impact claims are cognizable under the Fair Housing Act?

QUESTION PRESENTED:

The Fair Housing Act makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. §3604(a). Reversing the District Court's decision, the Third Circuit found that the Respondents presented a prima facie case under the Fair Housing Act because Petitioners sought to redevelop a blighted housing development that was disproportionately occupied by low and moderate income minorities and because the redevelopment sought to replace the blighted housing with new market rate housing which was unaffordable to the current residents within the blighted area. The Third Circuit found that a prima facie case had been made despite the fact that there was no evidence of discriminatory intent and no segregative effect.

The following are the questions presented, which include subparts:

1. Are disparate impact claims cognizable under the Fair Housing Act?
2. If such claims are cognizable, should they be analyzed under the burden shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or by some other test?
 - (a) What is the correct test for determining whether a prima facie case of disparate impact has been made?
 - (b) How should statistical evidence be evaluated?
 - (c) What is the correct test for determining when a Defendant has satisfied its burden in a disparate impact case?

In November 2013, three weeks before oral argument in the Supreme Court, the case settled and was dismissed. The settlement allows plaintiffs to remain in Mt. Holly in new homes in exchange for allowing redevelopment of their existing homes or for them to be relocated with compensation.

In 2011, the Supreme Court had granted certiorari in *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010) to address the same question, but the parties to the *Magner* litigation also settled their dispute before it was argued to the Supreme Court, resulting in the dismissal of the petition. *Magner v. Gallagher*, 565 U.S. --, 132 S. Ct. 548 (2011), *cert. dismissed*, 565 U.S. --, 132 S. Ct. 1306 (2012). This case was discussed in the Supreme Court's decision in *Texas Department of Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), which finally decided definitively that the effects standard applies to Title VIII (excerpted, *supra*, in subsection C.2.d. (2) of this Supplement).

In *Inclusive Communities Project*, the Court also discussed the regulation adopted by the U.S. Department of Housing and Urban Development, which construes the Fair Housing Act to incorporate the "effects test." Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,461 & nn.12–16 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100); 60 Fed. Reg. 61,846, 61,866–68 (Dec. 1, 1995) (codified at 24 C.F.R. pt. 81). For a practical analysis of the regulation, see Michael G. Allen, Jamie L. Crook, & John P. Relman, *Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective*, 49 Harv. C.R.-C.L. L. Rev 155 (2014).

[Page 360. Add the following commentary at the end of note 2:]

See also Lisa T. Alexander, *Hip-Hop and Housing: Revisiting Culture, Urban Space, Power, and Law*, 63 Hastings L.J. 803 (2012) (arguing that place-based lawmaking can be analyzed through a prism of cultural collective efficacy and calling for a reinterpretation of the Fair Housing Act's "affirmatively furthering" fair housing mandate to advance distributive justice in U.S. housing law).

h. Title VIII Remedies

[Page 369. Add the following commentary at the end of note 3:]

The courts in the Eleventh Circuit have followed the standard for determining punitive damages as set forth in *Lincoln. U.S. v. Gumbaytay*, 757 F. Supp. 2d 1142 (M.D. Ala. 2010). That court also held that an employer is vicariously liable for punitive damages if he discriminated in the face of a perceived risk that his actions will violate federal law. *Id.* at 1152; in the employment context, *Kolstad v. Am. Dental Health Ass’n*, held that punitive damages may only be awarded against a defendant exhibiting a reckless or malicious state of mind.

3. Discrimination in Financing

b. Discrimination in Mortgage Lending

[Page 371. Add the following commentary to the end of Subsection b:]

The District Court of Kansas held that the Fair Housing Act did not apply to the sale of residential property to a person who was buying the property as a commercial venture, had no intention of residing in the property, and was not suing on behalf of protected class members who would reside there. *Home Quest Mortg. LLC v. Am. Family Mut. Ins. Co.*, 340 F. Supp. 2d 1177 (D. Kan. 2004). The court reasoned that, because defendants were not providing plaintiffs with “financial assistance” as to the particular type of transaction, their actions could not be deemed to fall within the meaning of “residential real estate-related transaction.”

For an analysis of the civil rights implications of discretionary pricing on homeownership rates of minorities, see Robert G. Schwemm and Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 Harv. C.R.-C.L. L. Rev. 375 (2010). For many people of color, home ownership and retention continues to be a problem. In his excellent book, *Tierra y Libertad: Land, Liberty, and Latino Housing*, at 47-49 (2010), Professor Steven W. Bender contextualizes the crisis as it applies particularly to Latinos:

[B]y 1980 Latino/as (43.3 percent) remained well behind non/Latino/a Whites (68.5 percent) in homeownership rates. Over the next twenty-five years, and particularly during the Clinton presidency and George W. Bush’s first term, Latino/a homeownership rates grew to a peak of 50 percent in late 2005. This period saw the real estate recession in the early 1990s, which deflated home prices to more affordable levels, as well as a modest increase in Latino/a incomes. But Anglo homeownership rates also rose during this period at a near equal pace, peaking at 76 percent in 2004, thus sustaining the huge ownership gap between Latino/as and Anglos. . . . But the underbelly of these gains in Latino/a homeownership was soon exposed, as subprime mortgage lenders helped write another chapter of loss in the history of the Latino/a housing landscape.

* * *

“Subprime” describes loans made on less favorable terms than prime mortgage loans -- in theory, to borrowers with less-than-stellar credit ratings. In practice, subprime loans control for this greater perceived risk of default by their often onerous terms, which include steep interest rates -- typically 3.5 percent higher than prime loans -- as well as higher fees. The impact on monthly payments is substantial. . . . Subprime loans cheated many borrowers out of wealth acquisition, since payments went toward high interest and loan costs rather than principal. Worse, many subprime borrowers lost possession of their homes in widespread foreclosures prompted by unfair or unanticipated loan terms. . . .

Many subprime loans to Latino/as and other borrowers were specifically designed or arranged to abuse the borrower. . . .

Latino/as and African Americans were a natural demographic target. Researchers have demonstrated that where minorities are more geographically concentrated, the incidence of high-cost subprime lending rises, thereby linking subprime lending and neighborhood segregation.

3. Discrimination in Financing

[Page 373: Add the following to the end of subsection c]

In the first 4-4 affirmance during the vacancy following Justice Scalia’s death, the Court *per curiam* upheld the Eighth Circuit’s ruling that a loan guarantor’s marital status is not covered under the ECOA. *Hawkins v. Community Bank of Raymore*, No. 14-520, 577 U.S. ___, 84 U.S.L.W. (March 22, 2016). The court of appeals affirmed the dismissal of the plaintiff spouses’ marital status discrimination complaint because they were loan guarantors, not applicants. The Eighth Circuit refused to give any deference to the contrary interpretation of the Federal Reserve Board. 761 F. 3d 967 (2014). The United States filed a brief as *amicus curiae* supporting the petitioners.

E. A Right to Shelter for the Homeless

[Page 397. Add the following sentence after the first full paragraph:]

For a critical commentary on whether the right to housing is needed, see Kristen David Adams, *Do We Need a Right to Housing?*, 9 Nev. L.J. 275 (2009) (advocating for low-income housing as a valuable contribution to society).

[Page 401. After the first paragraph in subsection 5, replace the case and discussion of Jones v. City of Los Angeles, and Notes 1 and 2 following it with the following case:]

CHEYENNE DESERTRAIN v. CITY OF LOS ANGELES
754 F. 3d 1147 (9th Cir. 2014)

[1148] Before: Harry Pregerson, Marsha S. Berzon, and Morgan Christen, Circuit Judges.

[1149] PREGERSON, Circuit Judge:

This [42 U.S.C. § 1983](#) case concerns the constitutionality of Los Angeles Municipal Code Section 85.02, which prohibits use of a vehicle "as living quarters either overnight, day-by-day, or otherwise." Plaintiffs include four homeless individuals who parked their vehicles in the Venice area of Los Angeles and were cited and arrested for violating Section 85.02. Defendants are the City of Los Angeles and individual LAPD officers. Plaintiffs argue that Section 85.02 is unconstitutionally vague on its face because it provides insufficient notice of the conduct it penalizes and promotes arbitrary and discriminatory enforcement. We agree.

FACTUAL BACKGROUND

I. Section 85.02 and the Venice Homelessness Task Force

In 1983, the City of Los Angeles enacted Municipal Code Section 85.02:

USE OF STREETS AND PUBLIC PARKING LOTS FOR HABITATION.

No person shall use a vehicle parked or standing upon any City street, or upon any parking lot owned by the City of Los Angeles and under the control of the City of Los Angeles or under control of the Los Angeles County Department of Beaches and Harbors, as living quarters either overnight, day-by-day, or otherwise.

On September 23, 2010, Los Angeles officials held a "Town Hall on Homelessness" to address complaints of homeless individuals with vehicles living on local streets in Venice. Present at the meeting were a member of the City Council, the Chief of the LAPD, the Chief Deputy to the City Attorney, and the Assistant Director of the Los Angeles Bureau of Sanitation. City officials repeated throughout the meeting that their concern was not homelessness generally, but the illegal dumping of trash and human waste on city streets that was endangering public health. To address this concern, officials announced a renewed commitment to enforcing Section 85.02.

Within the week, the LAPD created the Venice Homelessness Task Force (the "Task Force"). The Task Force's twenty-one officers were to use Section 85.02 to cite and arrest homeless people using their automobiles as "living quarters," and were also to distribute to such people information concerning providers of shelter and other social services.

Defendant Captain Jon Peters ran the Task Force, which included Defendant Officers Randy Yoshioka, Jason Prince, and Brianna Gonzales. Task Force officers received informal, verbal training, as well as internal policy memoranda, on how to enforce Section 85.02. Supervisors instructed officers to look for vehicles containing possessions normally found in a home, such as food, bedding, clothing, medicine, and basic necessities. According to those instructions, an individual need not be sleeping or have slept in the vehicle to violate Section 85.02. Supervisors directed officers to issue a warning and to provide information concerning local

shelters on the first instance of a violation, to issue a citation on the second instance, and to make an arrest on the third.

II. Enforcement of Section 85.02

Beginning in late 2010, the Task Force began enforcing Section 85.02 against homeless individuals. Four such homeless individuals are Plaintiffs in this case [footnote omitted].

[1150] Plaintiff Steve Jacobs-Elstein ran his own legal temp company for almost ten years before losing his business and his home in the economic downturn of 2007. He subsequently suffered severe anxiety and depression. He was able to keep his car, a small SUV, and pay for insurance, maintenance, and gas with the \$200 he collects each month from General Relief. He kept his few possessions — mainly two computers and some clothes — in his car because he could not afford storage fees.

When Jacobs-Elstein first became homeless, he slept in his car. In mid-2009, an LAPD officer approached Jacobs-Elstein while parked on a city street, warning him that if he slept in his vehicle at night on public streets he would be arrested. At the time, Jacobs-Elstein was unaware that such conduct was unlawful. He then looked up Section 85.02 on the Internet and, based on what he read and what the officer told him, understood Section 85.02 to mean that he could not sleep in his car on a public street in Los Angeles. He began sleeping at motels and on other private property, and soon obtained permission from a Methodist Church in Venice to sleep in his car while it was parked in the church parking lot, provided he leave the lot by 8:00 a.m. each day. He also registered with the People Assisting The Homeless's "Venice Vehicles to Homes" program, secured a spot on the housing wait lists maintained by the Department of Mental Health and the Los Angeles Housing Authority, and was approved for a Section 8 housing voucher through the Department of Housing and Urban Development. On the morning of September 13, 2010, Jacobs-Elstein was waiting in his car on a public street for the First Baptist Church of Venice to open so that he could volunteer to serve at the food distribution program, and also receive a meal. That morning, Defendant Officer Gonzales and her partner ordered Jacobs-Elstein out of his car, searched his car, and cited him for violating Section 85.02. The officers provided him no shelter or social services information. A few weeks later, Jacobs-Elstein was again waiting in his car on a public street for First Baptist to open when Officer Gonzales banged on the driver's side window and told Jacobs-Elstein it was illegal to live in his vehicle. Two weeks later, Gonzales and her partner again spotted Jacobs-Elstein, this time when he was parked legally in the First Baptist parking lot, and yelled at him from across the street that the next time they saw him they would take him to jail. On the morning of October 31, 2010, Jacobs-Elstein was exiting his car when Officer Gonzales and her partner detained, handcuffed, and arrested Jacobs-Elstein for violating Section 85.02. The car contained personal belongings, such as boxes and computer equipment, as well as plastic bottles of urine. Jacobs-Elstein was in custody for about seven hours before being released, after which he borrowed money to get his car out of impoundment. He had no criminal record before this arrest.

[1151] On January 30, 2011, Defendant Officer Yoshioka and his partner cited Jacobs-Elstein again for violating Section 85.02, this time while Jacobs-Elstein was sitting in his car, talking on his cell phone. Jacobs-Elstein had dog food in the car. He told Officer Yoshioka the dog food was from a friend whose dog he would later take to the park. The car also contained salad boxes, water bottles, a portable radio, and bags of clothes. Jacobs-Elstein showed Officer Yoshioka proof that he resided on private property, and thus was not sleeping in his vehicle.

Officer Yoshioka informed him that he need not sleep in his car to violate Section 85.02. During this last incident, Officer Yoshioka's partner gave Jacobs-Elstein a "Local Resources Information" pamphlet. This was the first time he was offered any such information. The flyer claimed to provide guidance on how to comply with Section 85.02. Yet Jacobs-Elstein soon discovered that this information was not helpful to him. It provided information only on RV parks, where Jacobs-Elstein could not park his car, and shelters, where he could not keep his belongings during the day. Plaintiff Chris Taylor sells his artwork at a booth on Venice Beach, where he works every day. In October 2010, Officer Yoshioka issued a warning to Taylor for sleeping in his small two-door car through the night, in violation of Section 85.02. He then began sleeping on the sidewalk, which is legal. Starting December 1, 2010, Taylor began sleeping at Winter Shelter in Culver City. He rented a storage facility to get his excess property out of the car, though he kept his sleeping bag with him in case he missed the bus to the shelter and had to sleep on the streets.

On the morning of December 18, 2010, Officer Yoshioka and his partner arrested Taylor for violating Section 85.02 and had his car impounded. At the time he was arrested, Taylor was sitting in his car to get out of the rain. The vehicle contained one tin of food, clothing, and a bottle of urine. Taylor informed the officers that he slept at Winter Shelter and not in his car, and that he had an identification card issued by Winter Shelter to prove it. He was arrested nonetheless. Plaintiff Patricia Warivonchik has lived in Venice for thirty-four years. She is epileptic, and after suffering a significant head injury, is unable to work full time. Because she could no longer afford to pay rent in Venice, but did not want to leave the area, she began living in her RV. Since becoming homeless, Warivonchik has supported herself with part-time jobs and by selling ceramic artwork. She is also a member of a church in Santa Monica where she legally parks her RV at night. On November 13, 2010, Warivonchik was driving her RV through Venice — taking her artwork to a local fair — when she was pulled over by Officer Yoshioka and his partner for failing to turn off her left blinker. She was not cited for the blinker, but was given a written warning for violating Section 85.02 and told that she would be arrested if ever seen again in Venice with her RV.

Plaintiff William Cagle has been a resident of Venice since 1979. He suffers from congestive heart failure, which causes fluid to build up in his legs, preventing him from walking even short distances. His sole source of income is Social Security, which is not enough to pay both for rent and for the medicine he needs that is not covered by his insurance. Cagle became homeless in 1993, but was able to keep his small van.

In the early mornings of October 17, 2010, and November 22, 2010, Officer Yoshioka and his partner cited and arrested Cagle for violating Section 85.02. Among the items found in Cagle's van were clothing, bedding, boxed food, bottles of medicine,[1152] and a portable radio. Cagle explained to the officers that he was not sleeping in his vehicle. Officer Yoshioka's partner responded that sleeping is not the only criteria for violating Section 85.02.

PROCEDURAL HISTORY

I. The Complaint

In their First Amended Complaint, Plaintiffs challenged Section 85.02 under the Fourth, Fifth, and Fourteenth Amendments, various sections of the California Constitution, and several state and federal statutes. Although Plaintiffs alleged that enforcement of Section 85.02 "violates due process," they did not specifically allege that the statute is unconstitutionally vague.

II. Discovery

The parties proceeded to discovery. Plaintiffs filed a discovery request for "[a]ny and all documents regarding the incident(s) described in the Complaint." On August 22, 2011 — eight days before the discovery cut-off date — Defendants filed their tenth response to Plaintiffs' discovery request. In their response, Defendants for the first time produced copies of internal memoranda instructing officers on how to enforce Section 85.02.

In one memo from 2008, officers were told that any arrest "report must describe in detail observations . . . that establish one of the following — (i) overnight occupancy for more than one night or (ii) day-by-day occupancy of three or more days." The arrest reports for Plaintiffs Jacobs-Elstein, Taylor, and Cagle, however, contained no such observations. In another memo, from 2010, officers were told to "adhere to the 'Four C's' philosophy: Commander's Intent, Constitutional Policing, Community Perspective, and Compassion," with no further details.

On August 26, 2011, Plaintiffs' attorney deposed the Task Force's lead officer, Defendant Captain Jon Peters. Plaintiffs' attorney questioned Captain Peters extensively on whether the Task Force had been given any limiting instructions on how to enforce Section 85.02. Specifically, Plaintiffs' attorney asked about the 2008 memo directing officers to make an arrest only after observing a suspect occupying a vehicle for more than one night or for three consecutive days, an instruction Defendant Officers had ignored. Captain Peters then stated that he disapproved of this memo because he felt it did not offer Task Force officers enough discretion, and had instead instructed officers to follow the broadly-worded "Four C's" policy. Plaintiffs' attorney asked Captain Peters if he believed a person who slept at a shelter but was found in her vehicle during the day would be in violation of Section 85.02. Captain Peters responded, "I don't believe that they would be violating the law, in my opinion." On August 30, 2011, Plaintiffs' attorney deposed Defendant Officer Jason Prince. Again, Plaintiffs' attorney repeatedly asked whether Task Force officers had been given any specific training or guidance on how to enforce Section 85.02, particularly if a suspect did not sleep in the vehicle at night. Officer Prince responded, "The totality of the circumstances is what brings us to the conclusion that they're in violation of [Section] 85.02, not where they're sleeping at nighttime." After those two depositions revealed conflicting views among the enforcing officers as to what Section 85.02 means, Plaintiffs' attorney told Defense counsel that Plaintiffs would now be challenging the constitutionality of Section 85.02 on vagueness grounds. On September 13, 2013, Plaintiffs' attorney emailed Defense counsel confirming that one of Plaintiffs' "primary arguments [is] vagueness," then mentioned three Supreme Court cases discussing [1153] the void[-]for-vagueness doctrine: *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972), *Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983), and *City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999).

III. Motions for Summary Judgment

On September 14, 2011, the parties filed cross-motions for summary judgment. In their motion, Plaintiffs argued that "§ 85.02 is unconstitutionally vague and criminalizes otherwise innocent behavior with insufficient notice as to what constitutes a violation of the law. . . . Section 85.02 is totally devoid of any standards or guidelines to limit police discretion in enforcing a vague law." . . . Plaintiffs also informed the court that Plaintiffs' attorney had told Defense counsel on August 30, 2011, that Plaintiffs would now be raising a vagueness challenge, and sent an email

confirming this on September 13, 2011.

On October 28, 2011, the district court denied Plaintiffs' motion for summary judgment and granted Defendants' motion for summary judgment as to all claims. In a footnote, the district court held that because Plaintiffs failed to raise a vagueness challenge in their First Amended Complaint, "Defendants were not on notice that Plaintiffs would challenge the constitutionality of § 85.02 [on vagueness grounds] and such arguments are inappropriate." Plaintiffs timely appeal [footnote omitted]. We have jurisdiction under 28 U.S.C. § 1291.

Plaintiffs also appeal their claims under the Fourteenth Amendment's right to travel, the Fourth Amendment's protection against unreasonable searches and seizures, and various California statutes. Because Plaintiffs seek only injunctive and declaratory relief, and because we find that Section 85.02 is unconstitutionally vague on its face — a dispositive holding — we need not address Plaintiffs' other claims.

STANDARD OF REVIEW

We review de novo a grant or denial of summary judgment "to determine whether, viewing the evidence in a light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court applied the relevant substantive law." *Tzung v. State Farm Fire & Cas. Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989) (internal citation omitted).

[1154] DISCUSSION

I. The district court abused its discretion by not addressing Plaintiffs' vagueness claim on the merits.

* * *

The district court should have construed Plaintiffs' vagueness argument at summary judgment as a motion to amend their First Amended Complaint. And given Defendants' late disclosures and inability to make a credible claim of surprise or prejudice, the district court abused its discretion by not amending the First Amended Complaint to conform to the evidence and argument, and by not considering the vagueness claim on the merits. [1155]

II. Section 85.02 is unconstitutionally vague.

A statute fails under the Due Process Clause of the Fourteenth Amendment "if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits" *Giaccio v. Pennsylvania*, 382 U.S. 399, 402, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966). A statute is vague on its face when "no standard of conduct is specified at all. As a result, men of common intelligence must necessarily guess at its meaning." *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971) (internal quotation marks omitted).

"Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56 (citation omitted). Section 85.02 fails under both standards.

A. Section 85.02 fails to provide adequate notice of the conduct it criminalizes.

"[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law." *Id.* at 58. A penal statute cannot require the public to speculate as to its meaning while risking life, liberty, and property in the process. See *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888 (1939).

Section 85.02 offers no guidance as to what conduct it prohibits, inducing precisely this type of impermissible speculation and uncertainty. It states that no person shall use a vehicle "as living quarters either overnight, day-by-day, or otherwise." Yet the statute does not define "living quarters," or specify how long — or when — is "otherwise." We know that under Defendants' enforcement practices sleeping in a vehicle is not required to violate Section 85.02, as *Jacobs-Elstein* learned, nor is keeping a plethora of belongings required, as *Taylor* learned. But there is no way to know what *is* required to violate Section 85.02. Instead, Plaintiffs are left guessing as to what behavior would subject them to citation and arrest by an officer. Is it impermissible to eat food in a vehicle? Is it [1156] illegal to keep a sleeping bag? Canned food? Books? What about speaking on a cell phone? Or staying in the car to get out of the rain? These are all actions Plaintiffs were taking when arrested for violation of the ordinance, all of which are otherwise perfectly legal. And despite Plaintiffs' repeated attempts to comply with Section 85.02, there appears to be nothing they can do to avoid violating the statute short of discarding all of their possessions or their vehicles, or leaving Los Angeles entirely. All in all, this broad and cryptic statute criminalizes innocent behavior, making it impossible for citizens to know how to keep their conduct within the pale. In this respect, Section 85.02 presents the same vagueness concerns as the anti-loitering ordinance held unconstitutional in *Morales*, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67. There, the Supreme Court found that a Chicago law prohibiting "loitering," which it defined as "remain[ing] in any one place with no apparent purpose," lacked fair notice, as it was "difficult to imagine how any citizen . . . standing in a public place with a group of people would know if he or she had an 'apparent purpose.'" *Id.* at 56-57.

So too here. It is difficult to imagine how anyone loading up his or her car with personal belongings, perhaps to go on a camping trip or to donate household wares to the Salvation Army, and parking briefly on a Los Angeles street, would know if he or she was violating the statute. What's worse, even avoiding parking does not seem to be sufficient; Plaintiff Warivonchik was not even parked — she was driving her RV through Venice when she was pulled over and issued a warning. So, under the Task Force's expansive reading of this already amorphous statute, any vacationer who drives through Los Angeles in an RV may be violating Section 85.02. As "the [C]ity cannot conceivably have meant to criminalize each instance a citizen" uses a vehicle to store personal property, vagueness about what is covered and what is not "dooms this ordinance." *Id.* at 57. Because Section 85.02 fails to draw a clear line between innocent and criminal conduct, it is void for vagueness.

B. Section 85.02 promotes arbitrary enforcement that targets the homeless.

A statute is also unconstitutionally vague if it encourages arbitrary or discriminatory enforcement. See *Papachristou*, 405 U.S. at 162. If a statute provides "no standards governing the exercise of . . . discretion," it becomes "a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Id.* at 170 (internal quotation marks omitted).

Arbitrary and discriminatory enforcement is exactly what has occurred here. As noted, Section 85.02 is broad enough to cover any driver in Los Angeles who eats food or transports personal belongings in his or her vehicle. Yet it appears to be applied only to the homeless. The vagueness doctrine is designed specifically to prevent this type of selective enforcement, in which a "net [can] be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of the police and prosecution, although not chargeable in any particular offense." *Id.* at 166 (quoting *Winters v. New York*, 333 U.S. 507, 540, 68 S. Ct. 665, 92 L. Ed. 840 (1948) (Frankfurter, J., dissenting)). Section 85.02 raises the same concerns of discriminatory enforcement as the ordinance in *Papachristou*, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110. There, the Supreme Court held that a city ordinance prohibiting "vagrancy" — which [1157] was applied to "loitering," "prowling," and "nightwalking," among other conduct — was unconstitutionally vague. *Id.* at 158, 163. The Court viewed the ordinance in its historical context as the descendant of English feudal poor laws designed to prevent the physical movement and economic ascension of the lower class. *Id.* at 161-62. In America, such laws had been used to "roundup . . . so-called undesireables,"[sic] and resulted "in a regime in which the poor and the unpopular [we]re permitted to stand on a public sidewalk . . . only at the whim of any police officer." *Id.* at 170, 171 (internal quotation mark omitted). The Court concluded that "the rule of law implies equality and justice in its application. Vagrancy laws . . . teach that the scales of justice are so tipped that even-handed administration of the law is not possible. The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together." *Id.* at 171.

The City argues that its enforcement goals were motivated by legitimate health and safety concerns. It notes that some of the plaintiffs were arrested while in cars with garbage, pets, and their personal belongings, and that it was unsafe for plaintiffs to occupy their cars under these circumstances. We do not question the legitimacy of these public health and safety issues, but the record plainly shows that some of the conduct plaintiffs were engaged in when arrested — eating, talking on the phone, or escaping the rain in their vehicles — mimics the everyday conduct of many Los Angeles residents. The health and safety concerns cited by the City do not excuse the basic infirmity of the ordinance: It is so vague that it fails to give notice of the conduct it actually prohibits. As shown by the City's own documents, the different ways the ordinance was interpreted by members of the police department make it incompatible with the concept of an even-handed administration of the law to the poor and to the rich that is fundamental to a democratic society.

Defendants correctly note that they can bring clarity to an otherwise vague statute "through limiting constructions given . . . by the . . . enforcement agency." *Hess v. Bd. of Parole & Post-Prison Supervision*, 514 F.3d 909, 914 (9th Cir. 2008). Defendants point to their 2008 internal memorandum instructing officers making an arrest to first "establish one of the following — (i) overnight occupancy for more than one night or (ii) day-by-day occupancy of three or more days." This memo is irrelevant. First, Defendant Captain Peters, who heads the Task Force, admitted that he disfavored these instructions, and instead advised his officers to adhere to the "Four C's" philosophy, which gave Task Force officers no more guidance than the statute itself. Second, even if Task Force officers had been given the 2008 memo, they did not follow it. Officers did not observe Plaintiffs in their vehicles overnight or for three consecutive days before arresting them.

In sum, Section 85.02 has paved the way for law enforcement to target the homeless and is therefore unconstitutionally vague.

CONCLUSION

Section 85.02 provides inadequate notice of the unlawful conduct it proscribes, and opens the door to discriminatory enforcement against the homeless and the poor. Accordingly, Section 85.02 violates the Due Process Clause of the Fourteenth Amendment as an unconstitutionally vague statute. For many homeless persons, their automobile may be their last major possession — the means by which they can look for work and seek social services. The [1158] City of Los Angeles has many options at its disposal to alleviate the plight and suffering of its homeless citizens. Selectively preventing the homeless and the poor from using their vehicles for activities many other citizens also conduct in their cars should not be one of those options.

REVERSED.

[Page 412: New Note 4:]

The controversy around anti-begging ordinances has been fueled by a fragmented decision of the U.S. Supreme Court. *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). In *Reed*, the Court addressed the constitutionality of an ordinance enacted by a municipality in Arizona that ostensibly was directed at panhandlers but which nominally placed strict limitations on signs providing directions. The law hindered a “cash-strapped church” from directing people to its Sunday services. Although all Members of the Court agreed that the ordinance was unconstitutional, the majority opinion of Justice Thomas was joined by only five other Justices. Applying the strict scrutiny standard because the majority viewed the law as content-based, the result has led some to the conclusion that this rationale should also result in the invalidation of more specific anti-begging laws. Three concurring opinions -- by Justice Alito, joined by Justices Kennedy and Sotomayor, by Justice Breyer, and by Justice Kagan, joined by Justices Ginsburg and Breyer – had less rigid views. Justice Alito defended “reasonable sign regulations.” *Id.*, at 2233. Justice Breyer suggested that “content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny.” *Id.*, at 2234. Justice Kagan’s concurrence concluded by observing that “I see no reason why such an easy case calls for us to cast a constitutional pall on reasonable regulations quite unlike the one before us.” *Id.*, at 2238.

For commentary on *Cheyenne Desertrain*, see Lorelei Laird, *Cities get mired in civil rights disputes in trying to deal with growing homeless populations*, ABA Journal, November 14, 2014.

F. Circumvention by Referendum

[Page 418: Add before last paragraph:]

Reitman v. Mulkey, *Hunter v. Erickson*, and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) (discussed in chapter 2, Equal Educational Opportunity, text at p. 87) and the political process doctrine that they reflect, were all called into question by the Supreme Court’s decision in *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary*, 134 S.Ct. 1623 (2014). Although this decision is analyzed further in Chapter 10, Affirmative Action, it raises the central circumvention question addressed in this section of this chapter on Public Accommodations and Housing, that is, whether the tyranny of the majority can prevail over the equality of law that the Fourteenth Amendment commands.

In *Schuette* an equal protection challenge was raised regarding Michigan’s voter-approved constitutional amendment that prevents the state from using “race, sex, color, or national origin” to “grant preferential treatment” to any individual seeking “public employment, public education, or public contracting,” a measure adopted in response to the affirmative action programs validated in *Grutter v. Bollinger*, 539 U.S. 306 (2003). The political process, or political structure doctrine, as it is sometimes called, holds that, if a minority believes that a government policy benefits it, state action that burdens that policy is subject to strict scrutiny.

In a plurality opinion, Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, stated:

Though it has not been prominent in the arguments of the parties, this Court’s decision in *Reitman v. Mulkey*, 387 U. S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967), is a proper beginning point for discussing the controlling decisions. . . . The next precedent of relevance, *Hunter v. Erickson*, 393 U. S. 385, 89 S. Ct. 557, 21 L. Ed. 2d 616 (1969), is central to the arguments the respondents make in the instant case. . . . Thus, in *Mulkey* and *Hunter*, there was a demonstrated injury on the basis of race that, by reasons of state encouragement or participation, became more aggravated.

Seattle is the third case of principal relevance here. . . . *Seattle* is best understood as a case in which the state action in question (the bar on busing enacted by the State’s voters) had the serious risk, if not purpose, of causing specific injuries on account of race, just as had been the case in *Mulkey* and *Hunter*. . . . The instant case presents the question involved in *Coral [Constr., Inc. v. City and County of San Francisco]*, 50 Cal. 4th 315, 113 Cal. Rptr. 3d 279, 235 P. 3d 947 (2010)] and [*Coalition for Economic Equity v. Wilson*], 122 F. 3d 692 (CA9 1997)] but not involved in *Mulkey*, *Hunter*, and *Seattle*. That question is not how to address or prevent injury caused on account of race but whether voters may determine whether a policy of race-based preferences should be continued.

For reasons already discussed, *Mulkey*, *Hunter*, and *Seattle* are not precedents that stand for the conclusion that Michigan's voters must be disempowered from acting. Those cases were ones in which the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race. What is at stake here is not whether injury will be inflicted but whether government can be instructed not to follow a course that entails, first, the definition of racial categories and, second, the grant of favored status to persons in some racial categories and not others. The electorate's instruction to governmental entities not to embark upon the course of race-defined and race-based preferences was adopted, we must assume, because the voters deemed a preference system to be unwise, on account of what voters may deem its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it. Whether those adverse results would follow is, and should be, the subject of debate. Voters might likewise consider, after debate and reflection, that programs designed to increase diversity — consistent with the Constitution — are a necessary part of progress to transcend the stigma of past racism.

This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters.

Schuette, 134 S.Ct. at 1631-39.

Justice Sotomayor, joined by Justice Ginsburg, wrote a powerful dissent:

We are fortunate to live in a democratic society. But without checks, democratically approved legislation can oppress minority groups. For that reason, our Constitution places limits on what a majority of the people may do.

Hunter and *Seattle* vindicated a principle that is as elementary to our equal protection jurisprudence as it is essential: The majority may not suppress the minority's right to participate on equal terms in the political process. Under this doctrine, governmental action deprives minority groups of equal protection when it (1) has a racial focus, targeting a policy or program that "inures primarily to the benefit of the minority," *Seattle*, 458 U. S., at 472, 102 S. Ct. 3187, 73 L. Ed. 2d 896; and (2) alters the political process in a manner that uniquely burdens racial minorities' ability to achieve their goals through that process. A faithful application of the doctrine resoundingly resolves this case in respondents' favor.

This right was hardly novel at the time of *Hunter* and *Seattle*. For example, this Court focused on the vital importance of safeguarding minority groups' access to the political process in *United States v. Carolene Products Co.*, 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938), a case that predated *Hunter* by 30 years. In a now-famous footnote, the Court explained that while ordinary social and economic legislation carries a presumption of constitutionality, the same may not be true of legislation that offends fundamental rights or targets minority groups. . . . The Court also noted that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation

of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” *Carolene Products*, 304 U. S., at 153, n. 4, 58 S. Ct. 778, 82 L. Ed. 1234 . . . The values identified in *Carolene Products* lie at the heart of the political-process doctrine.

The Constitution does not protect racial minorities from political defeat. But neither does it give the majority free rein to erect selective barriers against racial minorities. The political-process doctrine polices the channels of change to ensure that the majority, when it wins, does so without rigging the rules of the game to ensure its success. Today, the Court discards that doctrine without good reason.

In doing so, it permits the decision of a majority of the voters in Michigan to strip Michigan’s elected university boards of their authority to make decisions with respect to constitutionally permissible race-sensitive admissions policies, while preserving the boards’ plenary authority to make all other educational decisions. “In a most direct sense, this implicates the judiciary’s special role in safeguarding the interests of those groups that are relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” *Seattle*, 458 U. S., at 486, 102 S. Ct. 3187, 73 L. Ed. 2d 896 (internal quotation marks omitted). The Court abdicates that role, permitting the majority to use its numerical advantage to change the rules mid-contest and forever stack the deck against racial minorities in Michigan. The result is that Michigan’s public colleges and universities are less equipped to do their part in ensuring that students of all races are “better prepare[d] . . . for an increasingly diverse workforce and society . . .” *Grutter*, 539 U. S., at 330, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (internal quotation marks omitted).

Today’s decision eviscerates an important strand of our equal protection jurisprudence. For members of historically marginalized groups, which rely on the federal courts to protect their constitutional rights, the decision can hardly bolster hope for a vision of democracy that preserves for all the right to participate meaningfully and equally in self-government.

I respectfully dissent.

Schuetz, 134 S.Ct. at 1651-83.

Chapter 4

Employment Discrimination

C. Title VII Claims, Procedure, Remedies, and Coverage

2. Title VII Procedure

c. Federal Employees (§717)

[Page 454: Replace subsection c with the following new subsection c:]

In 1972, Congress expanded Title VII's coverage not only to state and local government employees, but also to federal employees in the executive agencies and departments. Section 717, 42 U. S. C. §2000e-16(c). Section 117 of the 1991 Civil Rights Acts applies Title VII to employees in the House of Representatives. 2 U.S.C. §601. The Congressional Accountability Act of 1995 extends not only Title VII, but also the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, and title I of Americans with Disabilities Act of 1990 to the legislative branch. 2 U.S.C. §§ 1302, 1311. Sections 302 and 320 of the 1991 Civil Rights Act (which form the Government Employee Rights Act of 1991, or GERA) provide similar protection for Senate employees and presidential appointees. The enforcement procedure for congressional employees and presidential appointees is internal. Title VII's procedure only applies to federal employees in the executive agencies and departments.

The procedures for enforcing Title VII provisions by federal employees in the executive branch are set forth in §717, 42 U.S.C. §2000e-16. In addition, the EEOC regulations, 29 C.F.R. §1614, set forth a unique set of procedural rules applicable only to such federal employees. These rules are patterned after rules adopted by the Civil Service Commission. EEOC regulations require that, “An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.” 29 C.F.R. 1614.105(a)(2). In the event that the employee resigns in the face of adverse conditions –a “constructive discharge”–the “matter alleged to be discriminatory” includes the resignation itself. Thus, the 45-day period begins only after the employee resigns. *Green v. Brennan*, Postmaster General, 2016 U.S. LEXIS 3484. The Counselor has 30 days to seek an informal resolution of the matter. However, the aggrieved person can agree to a 60-day extension. If the matter has not been resolved within the prescribed time, the Counselor must inform the aggrieved person that she has 15 days from the receipt of such notice to file a discrimination complaint against the appropriate official, with or without counsel or other representation. Where the aggrieved person chooses to participate in an

alternative dispute resolution procedure, the pre-complaint processing period extends from 30 to 90 days. If the claim has not been resolved before the 90th day, the aggrieved person has 15 days to file a discrimination complaint. 29 C.F.R. 1614.105(c)-(g).

3. Title VII Remedies

[Page 456: Replace discussion of attorneys in third paragraph with following paragraph.]

Additionally, Title VII allows for an award of attorney's fees to a prevailing party other than the EEOC or the United States. 42 U.S.C. §2000e-5(k). The Supreme Court has interpreted Title VII to allow fee shifting by the prevailing defendant when the plaintiff's "claim was frivolous, unreasonable, or groundless." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). Importantly, the claim need not have been decided on the merits for the prevailing defendant to recover attorney's fees. "Congress must have intended that a defendant could recover fees expended in frivolous, unreasonable, or groundless litigation when the case is resolved in the defendants' favor, whether on the merits or not." *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642 (2016) (dismissal of claims on the ground that the EEOC "wholly abandoned its statutory duties" to investigate and conciliate makes the defendant a "prevailing party" under the statute).

4. Title VII Coverage

c. Religion

[Page 460: Replace subsection c with the following new subsection c.]

EEOC v. Abercrombie & Fitch Stores Inc.

135 S. Ct. 2028 (2015)

[2031] Scalia, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Alito, J., filed an opinion concurring in the judgment. Thomas, J., filed an opinion concurring in part and dissenting in part.

Justice Scalia delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964 prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship. The question presented is whether this prohibition applies only where an applicant has informed the employer of his need for an accommodation.

I

We summarize the facts in the light most favorable to the Equal Employment Opportunity Commission (EEOC), against whom the Tenth Circuit granted summary judgment. Respondent Abercrombie & Fitch Stores, Inc., operates several lines of clothing stores, each with its own “style.” Consistent with the image Abercrombie seeks to project for each store, the company imposes a Look Policy that governs its employees’ dress. The Look Policy prohibits “caps”—a term the Policy does not define—as too informal for Abercrombie’s desired image.

Samantha Elauf is a practicing Muslim who, consistent with her understanding of her religion’s requirements, wears a headscarf. She applied for a position in an Abercrombie store, and was interviewed by Heather Cooke, the store’s assistant manager. Using Abercrombie’s ordinary system for evaluating applicants, Cooke gave Elauf a rating that qualified her to be hired; Cooke was concerned, however, that Elauf’s headscarf would conflict with the store’s Look Policy.

Cooke sought the store manager’s guidance to clarify whether the headscarf was a forbidden “cap.” When this yielded no answer, Cooke turned to Randall Johnson, the district manager. Cooke informed Johnson that she believed Elauf wore her headscarf because of her faith. Johnson told Cooke that Elauf’s headscarf would violate the Look Policy, as would all other headwear, religious or otherwise, and directed Cooke not to hire Elauf.

The EEOC sued Abercrombie on Elauf’s behalf, claiming that its refusal to hire Elauf violated Title VII. The District Court granted the EEOC summary judgment on the issue of liability, 798 F. Supp. 2d 1272 (ND Okla. 2011), held a trial on damages, and awarded \$20,000. The Tenth Circuit reversed and awarded Abercrombie summary judgment. 731 F. 3d 1106 (2013). It concluded that ordinarily an employer cannot be liable under Title VII for failing to accommodate a religious practice until the applicant (or employee) provides the employer with actual knowledge of his need for an accommodation. *Id.*, at 1131. We granted certiorari.

II

Title VII of the Civil Rights Act of 1964 78 Stat. 253, as amended, prohibits two categories of employment practices. It is unlawful 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 [2032] 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).

These two proscriptions, often referred to as the "disparate treatment" (or "intentional discrimination") provision and the "disparate impact" provision, are the only causes of action under Title VII. The word "religion" is defined to "includ[e] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to" a "religious observance or practice without undue hardship on the conduct of the employer's business." §2000e(j).

Abercrombie's primary argument is that an applicant cannot show disparate treatment without first showing that an employer has "actual knowledge" of the applicant's need for an accommodation. We disagree. Instead, an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision.¹

The disparate-treatment provision forbids employers to: (1) "fail . . . to hire" an applicant (2) "because of" (3) "such individual's . . . religion" (which includes his religious practice). Here, of course, Abercrombie (1) failed to hire Elauf. The parties concede that (if Elauf sincerely believes that her religion so requires) Elauf's wearing of a headscarf is (3) a "religious practice." All that remains is whether she was not hired (2) "because of" her religious practice.

The term "because of" appears frequently in antidiscrimination laws. It typically imports, at a minimum, the traditional standard of but-for causation. *University of Tex. Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013). Title VII relaxes this standard, however, to prohibit even making a protected characteristic a "motivating factor" in an employment decision. 42 U.S.C. §2000e-2(m). "Because of" in §2000e-2(a)(1) links the forbidden consideration to each of the verbs preceding it; an individual's actual religious practice may not be a motivating factor in failing to hire, in refusing to hire, and so on.

It is significant that §2000e-2(a)(1) does not impose a knowledge requirement. As Abercrombie acknowledges, some antidiscrimination statutes do. For example, [2033] the Americans with Disabilities Act of 1990 defines discrimination to include an employer's failure to make "reasonable accommodations to the known physical or mental limitations" of an applicant.

1. The concurrence mysteriously concludes that it is not the plaintiff's burden to prove failure to accommodate. But of course that is the plaintiff's burden, if failure to hire "because of" the plaintiff's "religious practice" is the gravamen of the complaint. Failing to hire for that reason is synonymous with refusing to accommodate the religious practice. To accuse the employer of the one is to accuse him of the other. If he is willing to "accommodate"—which means nothing more than allowing the plaintiff to engage in her religious practice despite the employer's normal rules to the contrary—adverse action "because of" the religious practice is not shown. "The clause that begins with the word 'unless,'" as the concurrence describes it, *ibid.*, has no function except to place upon the employer the burden of establishing an "undue hardship" defense. The concurrence provides no example, not even an unrealistic hypothetical one, of a claim of failure to hire because of religious practice that does not say the employer refused to permit ("failed to accommodate") the religious practice. In the nature of things, there cannot be one.

§12112(b)(5)(A) (emphasis added). Title VII contains no such limitation.

Instead, the intentional discrimination provision prohibits certain motives, regardless of the state of the actor's knowledge. Motive and knowledge are separate concepts. An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his motive. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.

Thus, the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. For example, suppose that an employer thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays. If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII.

. . . Title VII's . . . disparate-treatment provision prohibits actions taken with the motive of avoiding the need for accommodating a religious practice. A request for accommodation, or the employer's certainty that the practice exists, may make it easier to infer motive, but is not a necessary condition of liability.

Abercrombie argues in the alternative that a claim based on a failure to accommodate an applicant's religious practice must be raised as a disparate-impact claim, not a disparate-treatment claim. We think not. That might have been true if Congress had limited the meaning of "religion" in Title VII to religious belief—so that discriminating against a particular religious practice would not be disparate treatment though it might have disparate impact. In fact, however, Congress defined "religion," for Title VII's purposes, as "includ[ing] all aspects of religious observance and practice, as well as belief." 42 U.S.C. §2000e(j). Thus, religious practice is one of the protected characteristics [2034] that cannot be accorded disparate treatment and must be accommodated.

Nor does the statute limit disparate-treatment claims to only those employer policies that treat religious practices less favorably than similar secular practices. Abercrombie's argument that a neutral policy cannot constitute "intentional discrimination" may make sense in other contexts. But Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not "to fail or refuse to hire or discharge any individual . . . because of such individual's" "religious observance and practice." An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an "aspec[t] of religious . . . practice," it is no response that the subsequent "fail[ure] . . . to hire" was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation.

The Tenth Circuit misinterpreted Title VII's requirements in granting summary judgment. We reverse its judgment and remand the case for further consideration consistent with this opinion.

It is so ordered.

Alito, J., concurring in the judgment. [omitted]

Thomas, J., concurring in part and dissenting in part. [omitted]

Notes

1. Though, as the Court indicates, a knowledge requirement cannot be added to the motive requirement to establish a claim of disparate treatment discrimination, does the employer have to have some level of knowledge of the religious practice in question to establish such discrimination? Justice Scalia addresses this issue in footnote 3 omitted from the edited case: “It would seem that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice—i.e., that he cannot discriminate “because of” a “religious practice” unless he knows or suspects it to be a religious practice. That issue is not presented in this case, since Abercrombie knew—or at least suspected—that the scarf was worn for religious reasons. The question has therefore not been discussed by either side, in brief or oral argument. It seems to us inappropriate to resolve this unargued point by way of dictum, as the concurrence would do.”

2. This case intersects with the grooming and dress cases discussed in subsection g *infra*. It demonstrates how religious rights can influence an employer's right to determine its corporate image by regulating the manner in which its employees present themselves to the public. Abercrombie & Fitch imposed a Look Policy that governed its employees' dress. The Court indicates, however, that “Title VII requires otherwise-neutral policies to give way to the need for an accommodation. . . . An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an ‘aspec[t] of religious . . . practice,’ it is no response that the subsequent ‘fail[ure] . . . to hire’ was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation.” Title VII, in other words, gives religious dress “favored treatment,” or to borrow from the Court in another case, “most-favored-nation status.” *Young v. United Parcel Serv. Inc.*, 135 S. Ct. 1338, 1349 (2015).

3. In *EEOC v. Geo Group, Inc.*, 616 F.3d 265 (3d Cir. 2010), the circuit court affirmed the grant of summary judgment against female Muslim employees of a privately run prison who filed a Title VII action claiming religious discrimination based on their employer's refusal to deviate from its dress code and allow them to wear religious head coverings (called “khimars”). In a 2-1 decision, the appellate court concluded that the employer's accommodation of the plaintiffs'

religious practices would constitute an undue hardship by compromising institutional interests in security and safety, which interests outweighed the plaintiff's sincere religious beliefs. The head coverings could be used to smuggle contraband into the prison, to conceal the identity of the wearer, and as a weapon against the wearer in the event of a physical attack by a prisoner. While recognizing that institutional security interests trumped religious freedom, the dissenting judge argued that genuine issues of material fact existed as to whether the head coverings posed a safety risk and as to whether accommodation of the employees' request to wear the head coverings (such as, removing them at checkpoints throughout the prison) would constitute an undue hardship or reasonable accommodation.

4. Would Samantha Elauf have a discrimination claim if, wearing a headscarf, she were denied admission to a night club? See public accommodations discrimination discussed in Chapter 3.

5. In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012), an ADA case, the Supreme Court unanimously ruled that the First Amendment's Establishment and Free Exercise clauses create a "ministerial exception" that bars discrimination lawsuits brought against a religious organization by a former elementary school teacher who was a Lutheran "commissioned minister." Although an ADA case, the Court's reasoning, which refers back to the Founding Fathers and their reaction to religious practices in England, makes it clear that the employment relationship between a religious institution and its ministers is beyond the reach of antidiscrimination legislation.

6. The EEOC has issued guidelines on religious discrimination in the workplace. 29 C.F.R. § 1605.1. The guidelines reassert that Title VII protects all aspects of religious observances, practices, and beliefs. For purposes of Title VII, "religion" includes (1) traditional organized religions, such as Christianity, Judaism, Islam, Hinduism, and Buddhism, (2) spiritual beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or (3) spiritual beliefs that seem illogical or unreasonable to others. An employee's belief or practice can be "religious" under Title VI even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief or practice, or if few (or no) other people adhere to it. Title VII prohibits employers from (1) treating applicants or employees differently based on their religious beliefs or practices (or lack thereof), (2) subjecting employees to harassment because of their religious beliefs or practices, (3) denying a requested reasonable accommodation of an applicant's or employee's sincerely held religious beliefs or practices, and (4) retaliating against an applicant or employee who has engaged in protected activity. 2 EEOC Compliance Manual (BNA) No. 358, at 628:0003 (§ 12 Religious Accommodation).

7. Title VII's ban on religious discrimination includes the employer's affirmative duty to accommodate certain religious practices. However, in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the Supreme Court held that the employer's duty to accommodate religious practices does not include requiring an employer to "discriminate against some employees in order

to enable others to observe their Sabbath." *Id.* at 85. In addition, the employer is not required to endure an undue hardship to accommodate religious practices. The Court stated, "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id.* at 84. See *Balint v. Carson City, Nevada*, 180 F.3d 1047 (9th Cir. 1999) (same); see also *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986) (Title VII does not require the employer to adopt the most reasonable accommodation).

8. Various provisions in Title VII, other than §703(a), make expressed references to religious discrimination. See §701(j), 42 U.S.C. §2000e ("religion" includes observance, practice and belief, unless employer can demonstrate undue hardship caused by reasonable accommodation); §702(a), 42 U.S.C. §2000e-1(a) (exemption for religious corporations, associations, educational institutions or societies); 703(j), 42 U.S.C. §2000e-2(j) (an employer is not required to grant preferential treatment to any group or individual because of their religion); §703(e), 42 U.S.C. §2000e-2(e) (an employer may employ individuals on basis of religion if religion is a bona fide occupational qualification (BFOQ) necessary to the particular business). See generally Joanne C. Brant, *"Our Shield Belongs to the Lord": Religious Employers and the Right to Discriminate*, 21 Hastings Const. L.Q. 275 (1994); Laura S. Underkuffler, *"Discrimination" on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment*, 30 Wm. & Mary L. Rev. 581 (1989). See *Mandell v. County of Suffolk*, 316 F.3d 368 (2d Cir. 2002) (discussing direct evidence of religious discrimination). What happens when an employer's desire to promote a secular workplace collides with an employee's religious beliefs? What happens when an employer's desire to promote a faith-friendly workplace (perhaps as a way to increase employee productivity and satisfaction) collides with an employee's secular stance so much so that the latter feels excluded or forced to join in?

d. Sex

[Page 461. Replace subsection d with the following new subsection d:]

The prohibition against sex discrimination was added as a floor amendment in an attempt to defeat the initial passage of Title VII in 1964. Consequently, there is little legislative history defining the scope of the term "sex." Basically, the courts have interpreted sex to refer to gender and not to sexual orientation. See *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (term "sex" in the Act refers to its traditional meaning of "gender" and not sexual orientation). Thus, there is no per se prohibition against denying a homosexual or transsexual a job, although there may be local laws protecting these groups. See *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69 (8th Cir.), *cert. denied*, 493 U.S. 1089 (1989) (Title VII does not prohibit discrimination against homosexuals). Some scholars argue that discrimination on the basis of sexual orientation is (or should be) a form of sex discrimination. See, e.g., Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 U.C.L.A. L.Rev. 471 (2001). Federal law is, however, moving toward banning sexual-orientation discrimination. On April 20, 2012, the EEOC issued a ruling banning gender-identity discrimination under Title VII.

The opinion came in a decision delivered to lawyers for Mia Macy, a transgender woman, who alleged that the Department of Alcohol, Tobacco, Firearms and Explosives (ATF) denied her employment after the agency learned that she had changed her gender from male to female. The ruling, which means that the EEOC will process gender-identity complaints, follows a line of federal appellate and trial court rulings that gender-identity discrimination constitutes sex discrimination under Title VII or the Equal Protection Clause. In *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), for example, the court ruled that a government agent violates the Equal Protection Clause's prohibition against sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.

In 1978, Congress added '701(k), 42 U.S.C. '2000e, to the definitions section of Title VII. The provision, called the Pregnancy Discrimination Act of 1978 (PDA), was intended to include pregnancy and childbirth under the prohibition against sex discrimination. The Act overruled the Supreme Court's decision in *General Electric Corp. v. Gilbert*, 429 U.S. 125 (1976), which held that an employee benefits plan that provided for non-occupational disability leave but that specifically excluded disability due to pregnancy was not violative of Title VII's prohibition against sex discrimination. See also *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983). In addition to including pregnancy and childbirth in the definition of "sex," the PDA requires that these conditions be treated the same as other disabilities for purposes of employee benefit plans. So if a company provides short-term disability coverage for its employees, pregnancy and childbirth are automatically included in such coverage. This antidiscrimination provision does not, however, preclude employers from providing special leave for pregnant female employees. See *California Federal S & L Assn. v. Guerra*, 479 U.S. 272 (1987) (Title VII does not preempt California's pregnancy disability leave statute because the California statute does not require an employer to treat pregnant workers more favorably than other disabled employees). What about employer health plans exempting abortion coverage? Section 701(k), supra, does not require an employer to pay for health insurance benefits for abortion, unless it is dangerous for the mother to carry the fetus to term or complications arise from abortion. Nor does the section preclude an employer from providing abortion coverage.

In *Young v. United Parcel Serv. Inc.*, 135 S. Ct. 1338, 1354 (2015), petitioner Young was a part-time driver for respondent United Parcel Service (UPS). When she became pregnant, her doctor advised her that she should not lift more than 20 pounds. UPS, however, required drivers like Young to be able to lift up to 70 pounds. UPS told Young that she could not work while under a lifting restriction. Young subsequently sued, claiming that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction. She brought only a disparate-treatment claim of discrimination under Title VII of the 1964 Civil Rights Act, as amended by the Pregnancy Discrimination Act (PDA), which specifies that Title VII's prohibition against sex discrimination applies to discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U. S. C §2000e(k). The Act's second clause states that employers must treat "women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." *Id.* UPS policies accommodate workers who were injured on the job, had disabilities covered by the Americans with Disabilities Act of 1990 (ADA), or had lost Department of Transportation (DOT) certifications. Pursuant to these policies, Young contended, UPS had accommodated several individuals whose disabilities created work restrictions similar

to hers. She argued that these policies showed that UPS discriminated against its pregnant employees because it had a light-duty-for-injury policy for numerous “other persons,” but not for pregnant workers. UPS responded that, since Young did not fall within the on-the-job injury, ADA, or DOT categories, it had not discriminated against Young on the basis of pregnancy, but had treated her just as it treated all “other” relevant “persons.” The District Court granted UPS summary judgment, concluding, inter alia, that Young could not make out a prima facie case of discrimination under the McDonnell Douglas evidentiary scheme, which is based on an employer’s comparative treatment of employees within and without a protected class. The court found that those with whom Young had compared herself—those falling within the on-the-job, DOT, or ADA categories—were too different to qualify as “similarly situated comparator[s].” The Fourth Circuit affirmed. On appeal, the Supreme Court framed the issue as follows: “We must decide how this latter provision [the second clause of the PDA] applies in the context of an employer’s policy that accommodates many, but not all, workers with nonpregnancy-related disabilities.” In a 6-3 decision the Court held that a pregnant employee can establish a prima facie case of disparate treatment by showing, under the familiar McDonnell Douglas burden-shifting framework, that: (1) she belongs to a protected class; (2) she sought an accommodation; (3) the employer did not accommodate her; and (4) the employer accommodated others “similar in their ability or inability to work.” If these elements are established, an employer has the burden of production to proffer a legitimate, nondiscriminatory reason for denying the accommodation. The Court noted, however, that this reason must be more than an employer’s claim that it is more expensive or less convenient to add pregnant women to the categories of those whom the employer accommodates. Once the employer proffers a legitimate, nondiscriminatory reason, the employee must establish that the employer’s reason is pretextual. The Court provided examples of how this could be done in the PDA context. Because an employer might have a legitimate, nondiscriminatory reason for treating a pregnant worker less-favorably than an accommodated non-pregnant worker, the refused to require an employer to provide the same work accommodations to an employee with pregnancy-related work limitations as to employees with similar, but non-pregnancy related, work limitations. To do otherwise, the Court noted, would be tantamount to granting pregnant employees “most-favored-nation-status.” But if an employer gives light-lifting assignments to non-pregnant employees (e.g., those injured on the job), should it not automatically make a similar accommodation to its pregnant employees, especially, as the Court indicates, neither expense nor convenience is a relevant considerations? The Family and Medical Leave Act of 1993, gives certain employees the right to take a leave of absence for birth, adoption or the care of their own or a family member’s serious health problems. See 29 CFR ‘825. Sex discrimination is further proscribed by the Equal Pay Act, mentioned in the historical overview in Section A2 supra. See Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 Hastings L. Rev. 305 (1968). The prohibition against sex discrimination includes claims of sexual harassment, discussed in Section D, infra. Finally, as

discussed in Section D4, *infra*, sex discrimination that is a bona fide occupational qualification (BFOQ) is permissible under Title VII. '703(e), 42 U.S.C. '2000e-2(e).

f. Retaliation

[Page 463. Replace Subsection f. with New Subsection f.]

Title VII protects against discrimination based on retaliation. Section 704(a) prohibits discrimination against an employee or applicant “because he has opposed any practice made an unlawful employment practice [under Title VII]. . . . or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under [Title VII].” Section 704(a), 42 U.S.C. § 2000e-3(a). *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), extended antiretaliation protection to former employees (e.g., where a former employer writes a bad letter of recommendation). Under the direct method of proof (see Section D, *infra*), the plaintiff must “present evidence of (1) a statutorily protected activity; (2) a materially adverse action taken by the employer; and (3) a causal connection between the two.” *Turner v. Saloon*, 2010 U.S. App. LEXIS 2564 (7th Cir.) (citations omitted).

Other employment discrimination laws also explicitly or implicitly contain an antiretaliation component. This includes 42 U.S.C. § 1981 by implication, see *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008); 42 U.S.C. § 1982 by implication, see *Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167 (2005); Age Discrimination in Employment Act of 1967 (ADEA), explicitly in 29 U.S.C. § 623(d) (private-sector provision), and by implication, *Gomez-Perez v. Potter*, 2008 WL 2167189 (U.S.) (construing public-sector provision § 633(a)(a)); Americans with Disability Act of 1990, explicitly in 42 U.S.C. 12203(a) - (b); Family and Medical Leave Act of 1993, explicitly in 29 U.S.C. 215(a)(3); National Labor Relations Act, explicitly in 29 U.S.C. 158(a)(4); Fair Labor Standards Act of 1938, explicitly in 29 U.S.C. 215(a)(3); and, Title IX of the Education Amendments of 1972, by implication, see *Jackson*, 544 U.S. at 173-74 (construing 20 U.S.C. § 1681(a)).

In recognizing or constructing this regime of antiretaliation discrimination law, the Supreme Court has had to face three large questions: (1) what does it mean to say that a person was “discriminated against” in the context of antiretaliation statutes; (2) do general antidiscrimination provisions necessarily imply or otherwise encompass an antiretaliation component; and (3) what is the standard of causation for an antiretaliation action?

The Court addressed the first question in *Burlington N. & S.F.R. Co. v. White*, 548 U.S. 53 (2007), a Title VII case. Section 704(a) prohibits discrimination against an employee, former employee or applicant who has “made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this Title.” Justice Alito’s concurring opinion framed the Court’s discussion of the issue. Justice Alito argued in his concurrence that if § 704(a) were read by itself, the phrase “discriminate against” would mean that any difference in treatment would be deemed to be actionable thereunder, because the word “discriminate” literally means “to treat differently.” However, if § 704(a) is read in *pari materia* with § 703(a), the general antidiscrimination provision, then the phrase “discriminate against” would mean that only

employer actions related to the terms, conditions, and privileges of employment would be subject to a charge of retaliation discrimination under § 704(a). Justice Alito opted for the latter interpretation. See 548 U.S. at 74-75. The majority, however, opted for a third interpretation: the § 704(a) plaintiff must show that a reasonable employee, former employee or applicant would be adversely affected by the challenged action in a material way. Looking at the congressional intent behind the general antidiscrimination provision, § 703(a), and the antiretaliation provision, § 704(a), the Court concluded that Congress intended for the antiretaliation provision to extend beyond the scope of adverse actions relating to employment. In other words, the objective of the antiretaliation provision is to prevent employers from interfering with efforts to enforce Title VII. Given the fact that employers could take retaliatory action not related to the job, Congress's purpose in enacting the antiretaliation law can only be fully realized if that law reached employer actions outside the employment context. The Court believed that, unlike a literal reading of § 704(a) (Justice Alito's first reading), its reasonableness test (which requires the plaintiff to show that a reasonable employee, former employee or applicant, as the case may be, would find the retaliation to be "materially adverse") was an appropriate means of separating "significant" from "trivial" harms to the plaintiff. See 548 U.S. at 68-69. Note also that the assumption underlying Justice Alito's first interpretation (to wit: the word "discriminate" literally means "to treat differently") does not comport with the Supreme Court's own definition of disparate treatment discrimination; namely, "less favorable treatment." See discussion of cases at beginning of Section D, *infra*. The Court's requirement that the retaliation must be "materially adverse" is more consistent with the Court's notion of "less favorable treatment," or "adverse employment action," under § 703(a).

The second large question that has arisen in the construction of antiretaliation law is whether an antiretaliation rule can be implied from a statute's general antidiscrimination provision. In *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008), the Court held 7-2 (with Justices Thomas and Scalia dissenting) that § 1981's general antidiscrimination provision encompasses retaliation claims, including employment-related claims, and that such claims could be brought by individuals who suffer retaliation for trying to help others. In a companion case, *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008), the Court held 6-3 (with Chief Justice Roberts joining Justices Thomas and Scalia in dissent) that federal employees who are retaliated against for filing age-discrimination complaints may assert a claim therefor under the federal-sector provision of the ADEA. The Court in both cases rested its holdings "in significant part upon the principles of *stare decisis*." Retaliation claims had been recognized in many other civil rights statutes, plus the Court had always read § 1981 in light of its sister statute § 1982, in which an antiretaliation provision had been implied.

The third large question concerns the standard of causation. This was the main issue presented in the next case.

Univ. of Tex. Southwestern Med. Ctr. v. Nassar
133 S. Ct. 2517 (2013)

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

JUSTICE KENNEDY delivered the opinion of the Court.

When the law grants persons the right to compensation for injury from wrongful conduct, there must be some demonstrated connection, some link, between the injury sustained and the wrong alleged. The requisite relation between prohibited conduct and compensable injury is governed by the principles of causation, a subject most often arising in elaborating the law of torts. This case requires the Court to define those rules in the context of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e *et seq.*, which provides remedies to employees for injuries related to discriminatory conduct and associated wrongs by employers.

Title VII is central to the federal policy of prohibiting wrongful discrimination in the Nation’s workplaces and in all sectors of economic endeavor. This opinion discusses the causation rules for two categories of wrongful employer conduct prohibited by Title VII. The first type is called, for purposes of this opinion, status-based discrimination. The term is used here to refer to basic workplace protection such as prohibitions against employer discrimination on the basis of race, color, religion, sex, or national origin, in hiring, firing, salary structure, promotion and the like. See §2000e-2(a). The second type of conduct is employer retaliation on account of an employee’s having opposed, complained of, or sought remedies for, unlawful workplace discrimination. See §2000e-3(a).

An employee who alleges status-based discrimination under Title VII need not show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act. So-called but-for causation is not the test. It suffices instead to show that the motive to discriminate was one of the employer’s motives, even if the employer also had other, lawful motives that were causative in the employer’s decision. This principle is the result of an earlier case from this Court, *Price Waterhouse v. Hopkins*, 490 U. S. 228 (1989), and an ensuing statutory amendment by Congress that codified in part and abrogated in part the holding in *Price Waterhouse*, see §§2000e-2(m), 2000e-5(g)(2)(B). The question the Court must answer here is whether that lessened causation standard is applicable to claims of unlawful employer retaliation under §2000e-3(a).

Although the Court has not addressed the question of the causation showing required to establish liability for a Title VII retaliation claim, it has addressed the issue of causation in general in a case involving employer discrimination under a separate but related statute, the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §623. See *Gross v. FBL Financial Services, Inc.*, 557 U. S. 167 (2009). In *Gross*, the Court concluded that the ADEA requires proof that the prohibited criterion was the but-for cause of the prohibited conduct. The holding and analysis of that decision are instructive here.

I

Petitioner, the University of Texas Southwestern Medical Center (University), is an academic institution within the University of Texas system. The University specializes in medical education for aspiring physicians, health professionals, and scientists. Over the years, the University has affiliated itself with a number of healthcare facilities including, as relevant in this case, Parkland Memorial Hospital (Hospital). As provided in its affiliation agreement with the University, the Hospital permits the University's students to gain clinical experience working in its facilities. The agreement also requires the Hospital to offer empty staff physician posts to the University's faculty members, see App. 361-362, 366, and, accordingly, most of the staff physician positions at the Hospital are filled by those faculty members.

Respondent is a medical doctor of Middle Eastern descent who specializes in internal medicine and infectious diseases. In 1995, he was hired to work both as a member of the University's faculty and a staff physician at the Hospital. He left both positions in 1998 for additional medical education and then returned in 2001 as an assistant professor at the University and, once again, as a physician at the Hospital.

In 2004, Dr. Beth Levine was hired as the University's Chief of Infectious Disease Medicine. In that position Levine became respondent's ultimate (though not direct) superior. Respondent alleged that Levine was biased against him on account of his religion and ethnic heritage, a bias manifested by undeserved scrutiny of his billing practices and productivity, as well as comments that "Middle Easterners are lazy." 674 F. 3d 448, 450 (CA5 2012). On different occasions during his employment, respondent met with Dr. Gregory Fitz, the University's Chair of Internal Medicine and Levine's supervisor, to complain about Levine's alleged harassment. Despite obtaining a promotion with Levine's assistance in 2006, respondent continued to believe that she was biased against him. So he tried to arrange to continue working at the Hospital without also being on the University's faculty. After preliminary negotiations with the Hospital suggested this might be possible, respondent resigned his teaching post in July 2006 and sent a letter to Dr. Fitz (among others), in which he stated that the reason for his departure was harassment by Levine. That harassment, he asserted, "stems from . . . religious, racial and cultural bias against Arabs and Muslims." *Id.*, at 451. After reading that letter, Dr. Fitz expressed consternation at respondent's accusations, saying that Levine had been "publicly humiliated by th[e] letter" and that it was "very important that she be publicly exonerated." Meanwhile, the Hospital had offered respondent a job as a staff physician, as it had indicated it would. On learning of that offer, Dr. Fitz protested to the Hospital, asserting that the offer was inconsistent with the affiliation agreement's requirement that all staff physicians also be members of the University faculty. The Hospital then withdrew its offer.

After exhausting his administrative remedies, respondent filed this Title VII suit in the United States District Court for the Northern District of Texas. He alleged two discrete violations of Title VII. The first was a status-based discrimination claim under §2000e-2(a). Respondent alleged that Dr. Levine's racially and religiously motivated harassment had resulted in his constructive discharge from the University. Respondent's second claim was that Dr. Fitz's efforts to prevent the Hospital from hiring him were in retaliation for complaining about Dr. Levine's harassment, in violation of §2000e-3(a). 674 F. 3d, at 452. The jury found for respondent on both claims. It awarded him over \$400,000 in backpay and more than \$3 million in compensatory damages. The District Court later reduced the compensatory damages award to \$300,000.

On appeal, the Court of Appeals for the Fifth Circuit affirmed in part and vacated in part.

The court first concluded that respondent had submitted insufficient evidence in support of his constructive-discharge claim, so it vacated that portion of the jury's verdict. The court affirmed as to the retaliation finding, however, on the theory that retaliation claims brought under §2000e-3(a)—like claims of status-based discrimination under §2000e-2(a)—require only a showing that retaliation was a motivating factor for the adverse employment action, rather than its but-for cause. See *id.*, at 454, n. 16 It further held that the evidence supported a finding that Dr. Fitz was motivated, at least in part, to retaliate against respondent for his complaints against Levine. The Court of Appeals then remanded for a redetermination of damages in light of its decision to vacate the constructive-discharge verdict.

Four judges dissented from the court's decision not to rehear the case en banc, arguing that the Circuit's application of the motivating-factor standard to retaliation cases was "an erroneous interpretation of [Title VII] and controlling case law" and should be overruled en banc. 688 F. 3d 211, 213-214 (CA5 2012) (Smith, J., dissenting from denial of rehearing en banc).

Certiorari was granted.

II A

This case requires the Court to define the proper standard of causation for Title VII retaliation claims. Causation in fact—*i.e.*, proof that the defendant's conduct did in fact cause the plaintiff's injury—is a standard requirement of any tort claim, see Restatement of Torts §9(1934) (definition of "legal cause"); §431, Comment *a* (same); §279, and Comment *c* (intentional infliction of physical harm); §280 (other intentional torts); §281(c) (negligence). This includes federal statutory claims of workplace discrimination. *Hazen Paper Co. v. Biggins*, 507 U. S. 604, 610 (1993) (In intentional-discrimination cases, "liability depends on whether the protected trait" "actually motivated the employer's decision" and "had a determinative influence on the outcome"); *Los Angeles Dept. of Water and Power v. Manhart*, 435 U. S. 702, 711 (1978) (explaining that the "simple test" for determining a discriminatory employment practice is "whether the evidence shows treatment of a person in a manner which but for that person's sex would be different" (internal quotation marks omitted)).

In the usual course, this standard requires the plaintiff to show "that the harm would not have occurred" in the absence of—that is, but for—the defendant's conduct. Restatement of Torts §431, Comment *a* (negligence); §432(1), and Comment *a* (same); see §279, and Comment *c* (intentional infliction of bodily harm); §280 (other intentional torts); Restatement (Third) of Torts: Liability for Physical and Emotional Harm §27, and Comment *b* (2010) (noting the existence of an exception for cases where an injured party can prove the existence of multiple, independently sufficient factual causes, but observing that "cases invoking the concept are rare"). See also Restatement (Second) of Torts §432(1) (1963 and 1964) (negligence claims); §870, Comment *l* (intentional injury to another); cf. §435A, and Comment *a* (legal cause for intentional harm). It is thus textbook tort law that an action "is not regarded as a cause of an event if the particular event would have occurred without it." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 265 (5th ed. 1984). This, then, is the background against which Congress legislated in enacting Title VII, and these are the default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself. . . .

B

Since the statute's passage in 1964, it has prohibited employers from discriminating

against their employees on any of seven specified criteria. Five of them—race, color, religion, sex, and national origin—are personal characteristics and are set forth in §2000e-2. (As noted at the outset, discrimination based on these five characteristics is called status-based discrimination in this opinion.) And then there is a point of great import for this case: The two remaining categories of wrongful employer conduct—the employee’s opposition to employment discrimination, and the employee’s submission of or support for a complaint that alleges employment discrimination—are not wrongs based on personal traits but rather types of protected employee conduct. These latter two categories are covered by a separate, subsequent section of Title VII, §2000e-3(a).

Under the status-based discrimination provision, it is an “unlawful employment practice” for an employer “to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.” §2000e-2(a). In its 1989 decision in *Price Waterhouse*, the Court sought to explain the causation standard imposed by this language. It addressed in particular what it means for an action to be taken “because of” an individual’s race, religion, or nationality. Although no opinion in that case commanded a majority, six Justices did agree that a plaintiff could prevail on a claim of status-based discrimination if he or she could show that one of the prohibited traits was a “motivating” or “substantial” factor in the employer’s decision. 490 U. S., at 258 (plurality opinion); *id.*, at 259 (White, J., concurring in judgment); *id.*, at 276 (O’Connor, J., concurring in judgment). If the plaintiff made that showing, the burden of persuasion would shift to the employer, which could escape liability if it could prove that it would have taken the same employment action in the absence of all discriminatory animus. *Id.*, at 258 (plurality opinion); *id.*, at 259-260 (opinion of White, J.); *id.*, at 276-277 (opinion of O’Connor, J.). In other words, the employer had to show that a discriminatory motive was not the but-for cause of the adverse employment action.

Two years later, Congress passed the Civil Rights Act of 1991 (1991 Act), 105 Stat. 1071. This statute (which had many other provisions) codified the burden-shifting and lessened-causation framework of *Price Waterhouse* in part but also rejected it to a substantial degree. The legislation first added a new subsection to the end of §2000e-2, *i.e.*, Title VII’s principal ban on status-based discrimination. See §107(a), 105 Stat. 1075. The new provision, §2000e-2(m), states:

“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”

This, of course, is a lessened causation standard.

The 1991 Act also abrogated a portion of *Price Waterhouse*’s framework by removing the employer’s ability to defeat liability once a plaintiff proved the existence of an impermissible motivating factor. See *Gross*, 557 U. S., at 178, n. 5. In its place, Congress enacted §2000e-5(g)(2), which provides:

“(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and [the employer] demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor, the court—

“(i) may grant declaratory relief, injunctive relief . . . and [limited] attorney’s fees and costs . . . ; and

“(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment”

So, in short, the 1991 Act substituted a new burden-shifting framework for the one endorsed by *Price Waterhouse*. Under that new regime, a plaintiff could obtain declaratory relief, attorney’s fees and costs, and some forms of injunctive relief based solely on proof that race, color, religion, sex, or nationality was a motivating factor in the employment action; but the employer’s proof that it would still have taken the same employment action would save it from monetary damages and a reinstatement order. See *Gross*, 557 U. S., at 178, n. 5. . . .

After *Price Waterhouse* and the 1991 Act, considerable time elapsed before the Court returned again to the meaning of “because” and the problem of causation. This time it arose in the context of a different, yet similar statute, the ADEA, 29 U. S. C. §623(a). See *Gross*, *supra*. Much like the Title VII statute in *Price Waterhouse*, the relevant portion of the ADEA provided that “[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s age.” 557 U. S., at 176 (quoting §623(a)(1); emphasis and ellipsis in original).

Concentrating first and foremost on the meaning of the phrase “*because of* . . . age,” the Court in *Gross* explained that the ordinary meaning of “because of” is “by reason of” or “on account of.” *Id.*, at 176 (citing 1 Webster’s Third New International Dictionary 194 (1966); 1 Oxford English Dictionary 746 (1933); The Random House Dictionary of the English Language 132 (1966); emphasis in original). Thus, the “requirement that an employer took adverse action ‘because of’ age [meant] that age was the ‘reason’ that the employer decided to act,” or, in other words, that “age was the ‘but-for’ cause of the employer’s adverse decision.” 557 U. S., at 176 . . . “but for’ cause”).

In the course of approving this construction, *Gross* declined to adopt the interpretation endorsed by the plurality and concurring opinions in *Price Waterhouse*. Noting that “the ADEA must be ‘read . . . the way Congress wrote it,’” 557 U. S., at 179 . . . , the Court concluded that “the textual differences between Title VII and the ADEA” “prevent[ed] us from applying *Price Waterhouse* . . . to federal age discrimination claims,” 557 U. S., at 175, n. 2. In particular, the Court stressed the congressional choice not to add a provision like §2000e-2(m) to the ADEA despite making numerous other changes to the latter statute in the 1991 Act. *Id.*, at 174-175

Finally, the Court in *Gross* held that it would not be proper to read *Price Waterhouse* as announcing a rule that applied to both statutes, despite their similar wording and near-contemporaneous enactment. 557 U. S., at 178, n. 5. This different reading was necessary, the Court concluded, because Congress’ 1991 amendments to Title VII, including its “careful tailoring of the ‘motivating factor’ claim” and the substitution of §2000e-5(g)(2)(B) for *Price Waterhouse*’s full affirmative defense, indicated that the motivating-factor standard was not an organic part of Title VII and thus could not be read into the ADEA. See 557 U. S., at 178, n. 5.

. . . [Although an ADEA case,] *Gross* . . . holds two insights for the present case. The first is textual and concerns the proper interpretation of the term “because” as it relates to the principles of causation underlying both §623(a) and §2000e-3(a). The second is the significance of Congress’

structural choices in both Title VII itself and the law’s 1991 amendments. These principles do not decide the present case but do inform its analysis, for the issues possess significant parallels.

III

A

As noted, Title VII’s antiretaliation provision, which is set forth in §2000e-3(a), appears in a different section from Title VII’s ban on status-based discrimination. The antiretaliation provision states, in relevant part:

“It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”

This enactment, like the statute at issue in *Gross*, makes it unlawful for an employer to take adverse employment action against an employee “because” of certain criteria. Cf. 29 U. S. C. §623(a)(1). Given the lack of any meaningful textual difference between the text in this statute and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action. See *Gross, supra*, at 176.

The principal counterargument offered by respondent and the United States . . . [is] in substance . . . that: (1) retaliation is defined by the statute to be an unlawful employment practice; (2) §2000e-2(m) allows unlawful employment practices to be proved based on a showing that race, color, religion, sex, or national origin was a motivating factor for—and not necessarily the but-for factor in—the challenged employment action; and (3) the Court has, as a matter of course, held that “retaliation for complaining about race discrimination is ‘discrimination based on race.’”

. . .

There are three main flaws in this reading of §2000e-2(m). The first is that it is inconsistent with the provision’s plain language. It must be acknowledged that because Title VII defines “unlawful employment practice” to include retaliation, the question presented by this case would be different if §2000e-2(m) extended its coverage to all unlawful employment practices. As actually written, however, the text of the motivating-factor provision, while it begins by referring to “unlawful employment practices,” then proceeds to address only five of the seven prohibited discriminatory actions—actions based on the employee’s status, *i.e.*, race, color, religion, sex, and national origin. This indicates Congress’ intent to confine that provision’s coverage to only those types of employment practices. The text of §2000e-2(m) says nothing about retaliation claims. Given this clear language, it would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope. . . .

The second problem with this reading is its inconsistency with the design and structure of the statute as a whole. See *Gross*, 557 U. S., at 175, n. 2, 178, n. 5. . . . When Congress wrote the motivating-factor provision in 1991, it chose to insert it as a subsection within §2000e-2, which contains Title VII’s ban on status-based discrimination, §§2000e-2(a) to (d), (l), and says nothing about retaliation. See 1991 Act, §107(a), 105 Stat. 1075 (directing that “§2000e-2 . . . [be] further amended by adding at the end the following new subsection . . . (m)”). The title of the section of the 1991 Act that created §2000e-2(m)—“Clarifying prohibition against impermissible consideration of race, color, religion, sex, or national origin in employment practices”—also indicates that

Congress determined to [address only claims of status-based discrimination, not retaliation. See §107(a), *id.*, at 1075.

What is more, a different portion of the 1991 Act contains an express reference to all unlawful employment actions, thereby reinforcing the conclusion that Congress acted deliberately when it omitted retaliation claims from §2000e-2(m). . . .

If Congress had desired to make the motivating-factor standard applicable to all Title VII claims, it could have used language similar to that which it invoked in §109. See *Arabian American Oil Co.*, *supra*, at 256. Or, it could have inserted the motivating-factor provision as part of a section that applies to all such claims, such as §2000e-5, which establishes the rules and remedies for all Title VII enforcement actions. . . .

The third problem with respondent's and the Government's reading of the motivating-factor standard is in its submission that this Court's decisions interpreting federal antidiscrimination law have, as a general matter, treated bans on status-based discrimination as also prohibiting retaliation. In support of this proposition, both respondent and the United States rely upon decisions in which this Court has "read [a] broadly worded civil rights statute . . . as including an antiretaliation remedy." *CBOCS West, Inc. v. Humphries*, 553 U. S. 442, 452-453 (2008). In *CBOCS*, for example, the Court held that 42 U. S. C. §1981—which declares that all persons "shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens"—prohibits not only racial discrimination but also retaliation against those who oppose it. 553 U. S., at 445. And in *Gómez-Pérez v. Potter*, 553 U. S. 474 (2008), the Court likewise read a bar on retaliation into the broad wording of the federal-employee provisions of the ADEA. *Id.*, at 479, 487 ("All personnel actions affecting [federal] employees . . . who are at least 40 years of age . . . shall be made free from any discrimination based on age," 29 U. S. C. §633a(a)); see also *Jackson v. Birmingham Bd. of Ed.*, 544 U. S. 167, 173, 179 (2005) (20 U. S. C. §1681(a)(Title IX)); *Sullivan v. Little Hunting Park, Inc.*, 396 U. S. 229, 235, n. 3, 237 (1969) (42 U. S. C. §1982).

These decisions are not controlling here. It is true these cases do state the general proposition that Congress' enactment of a broadly phrased antidiscrimination statute may signal a concomitant intent to ban retaliation against individuals who oppose that discrimination, even where the statute does not refer to retaliation in so many words. What those cases do not support, however, is the quite different rule that every reference to race, color, creed, sex, or nationality in an antidiscrimination statute is to be treated as a synonym for "retaliation." For one thing, §2000e-2(m) is not itself a substantive bar on discrimination. Rather, it is a rule that establishes the causation standard for proving a violation defined elsewhere in Title VII. The cases cited by respondent and the Government do not address rules of this sort, and those precedents are of limited relevance here.

The approach respondent and the Government suggest is inappropriate in the context of a statute as precise, complex, and exhaustive as Title VII. As noted, the laws at issue in *CBOCS*, *Jackson*, and *Gómez-Pérez* were broad, general bars on discrimination. In interpreting them the Court concluded that by using capacious language Congress expressed the intent to bar retaliation in addition to status-based discrimination. See *Gómez-Pérez*, *supra*, at 486-488. In other words, when Congress' treatment of the subject of prohibited discrimination was both broad and brief, its omission of any specific discussion of retaliation was unremarkable.

If Title VII had likewise been phrased in broad and general terms, respondent's argument

might have more force. But that is not how Title VII was written, which makes it incorrect to infer that Congress meant anything other than what the text does say on the subject of retaliation. Unlike Title IX, §1981, §1982, and the federal-sector provisions of the ADEA, Title VII is a detailed statutory scheme. This statute enumerates specific unlawful employment practices. See §§2000e-2(a)(1), (b), (c)(1), (d) (status-based discrimination by employers, employment agencies, labor organizations, and training programs, respectively); §2000e-2(f) (status-based discrimination in employment-related testing); §2000e-3(a) (retaliation for opposing, or making or supporting a complaint about, unlawful employment actions); §2000e-3(b) (advertising a preference for applicants of a particular race, color, religion, sex, or national origin). It defines key terms, see §2000e, and exempts certain types of employers, see §2000e-1. And it creates an administrative agency with both rulemaking and enforcement authority. See §§2000e-5, 2000e-12.

This fundamental difference in statutory structure renders inapposite decisions which treated retaliation as an implicit corollary of status-based discrimination. Text may not be divorced from context. In light of Congress’ special care in drawing so precise a statutory scheme, it would be improper to indulge respondent’s suggestion that Congress meant to incorporate the default rules that apply only when Congress writes a broad and undifferentiated statute. . . . [citing *Gómez-Pérez, supra*; *Jackson, supra*,].

Further confirmation of the inapplicability of §2000e-2(m) to retaliation claims may be found in Congress’ approach to the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327. . . . [M]ost pertinent for present purposes, it included an express antiretaliation provision, see §503(a), 104 Stat. 370 (codified at 42 U. S. C. §12203). That law, which Congress passed only a year before enacting §2000e-2(m) and which speaks in clear and direct terms to the question of retaliation, rebuts the claim that Congress must have intended to use the phrase “race, color, religion, sex, or national origin” as the textual equivalent of “retaliation.” To the contrary, the ADA shows that when Congress elected to address retaliation as part of a detailed statutory scheme, it did so in clear textual terms.

* * *

B

The proper interpretation and implementation of §2000e-3(a) and its causation standard have central importance to the fair and responsible allocation of resources in the judicial and litigation systems. This is of particular significance because claims of retaliation are being made with ever-increasing frequency. The number of these claims filed with the Equal Employment Opportunity Commission (EEOC) has nearly doubled in the past 15 years—from just over 16,000 in 1997 to over 31,000 in 2012. . . .

In addition, lessening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment. Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation. . . . [T]he lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage. . . .

The facts of this case also demonstrate the legal and factual distinctions between status-based and retaliation claims, as well as the importance of the correct standard of proof. Respondent raised both claims in the District Court. The alleged wrongdoer differed in each: In respondent's status-based discrimination claim, it was his indirect supervisor, Dr. Levine. In his retaliation claim, it was the Chair of Internal Medicine, Dr. Fitz. The proof required for each claim differed, too. For the status-based claim, respondent was required to show instances of racial slurs, disparate treatment, and other indications of nationality-driven animus by Dr. Levine. Respondent's retaliation claim, by contrast, relied on the theory that Dr. Fitz was committed to exonerating Dr. Levine and wished to punish respondent for besmirching her reputation. Separately instructed on each type of claim, the jury returned a separate verdict for each, albeit with a single damages award. And the Court of Appeals treated each claim separately, too, finding insufficient evidence on the claim of status-based discrimination.

If it were proper to apply the motivating-factor standard to respondent's retaliation claim, the University might well be subject to liability on account of Dr. Fitz's alleged desire to exonerate Dr. Levine, even if it could also be shown that the terms of the affiliation agreement precluded the Hospital's hiring of respondent and that the University would have sought to prevent respondent's hiring in order to honor that agreement in any event. That result would be inconsistent with both the text and purpose of Title VII.

* * *

IV

Respondent and the Government also argue that applying the motivating-factor provision's lessened causation standard to retaliation claims would be consistent with longstanding agency views, contained in a guidance manual published by the EEOC. It urges that those views are entitled to deference under this Court's decision in *Skidmore v. Swift & Co.*, 323 U. S. 134 (1944). The weight of deference afforded to agency interpretations under *Skidmore* depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." 323 U. S., at 140. . . .

... [T]he manual offers two rationales in support of adopting the former standard. The first is that "[c]ourts have long held that the evidentiary framework for proving [status-based] discrimination . . . also applies to claims of discrimination based on retaliation." . . . Second, the manual states that "an interpretation . . . that permits proven retaliation to go unpunished undermines the purpose of the anti-retaliation provisions of maintaining unfettered access to the statutory remedial mechanism." . . .

These explanations lack the persuasive force that is a necessary precondition to deference under *Skidmore*. . . . As to the first rationale, while the settled judicial construction of a particular statute is of course relevant in ascertaining statutory meaning, . . . the manual's discussion fails to address the particular interplay among the status-based discrimination provision (§2000e-2(a)), the antiretaliation provision (§2000e-3(a)), and the motivating-factor provision (§2000e-2(m)). Other federal antidiscrimination statutes do not have the structure of statutory subsections that control the outcome at issue here. The manual's failure to address the specific provisions of this statutory scheme, coupled with the generic nature of its discussion of the causation standards for status-based discrimination and retaliation claims, call the manual's conclusions into serious question. . . .

The manual's second argument is unpersuasive, too; for its reasoning is circular. It asserts the lessened causation standard is necessary in order to prevent "proven retaliation" from "go[ing] unpunished." 2 EEOC Compliance Manual §8-II(E)(1), at 614:0008, n. 45. Yet this assumes the answer to the central question at issue here, which is what causal relationship must be shown in order to prove retaliation.

Respondent's final argument, in which he is not joined by the United States, is that even if §2000e-2(m) does not control the outcome in this case, the standard applied by *Price Waterhouse* should control instead. That assertion is incorrect. First, this position is foreclosed by the 1991 Act's amendments to Title VII. As noted above, *Price Waterhouse* adopted a complex burden-shifting framework. Congress displaced this framework by enacting §2000e-2(m) (which adopts the motivating-factor standard for status-based discrimination claims) and §2000e-5(g)(2)(B) (which replaces employers' total defense with a remedial limitation). See *Gross*, 557 U. S., at 175, n. 2, 177, n. 3, 178, n. 5. Given the careful balance of lessened causation and reduced remedies Congress struck in the 1991 Act, there is no reason to think that the different balance articulated by *Price Waterhouse* somehow survived that legislation's passage. Second, even if this argument were still available, it would be inconsistent with the *Gross* Court's reading (and the plain textual meaning) of the word "because" as it appears in both §623(a) and §2000e-3(a). See *Gross*, *supra*, at 176-177. For these reasons, the rule of *Price Waterhouse* is not controlling here.

V

The text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under §2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer. The University claims that a fair application of this standard, which is more demanding than the motivating-factor standard adopted by the Court of Appeals, entitles it to judgment as a matter of law. It asks the Court to so hold. That question, however, is better suited to resolution by courts closer to the facts of this case. The judgment of the Court of Appeals for the Fifth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

* * *

. . . [T]he Court misapprehends what our decisions teach: Retaliation for complaining about discrimination is tightly bonded to the core prohibition and cannot be disassociated from it. Indeed, this Court has explained again and again that "retaliation in response to a complaint about [proscribed] discrimination *is* discrimination" on the basis of the characteristic Congress sought to immunize against adverse [45] employment action. *Jackson v. Birmingham Bd. of Ed.*, 544 U. S. 167, 179, n. 3 (2005)(emphasis added; internal quotation marks omitted).

The Court shows little regard for the trial judges who will be obliged to charge discrete causation standards when a claim of discrimination "because of," e.g., race is coupled with a claim of discrimination "because" the individual has complained of race discrimination. And jurors will puzzle over the rhyme or reason for the dual standards. Of graver concern, the Court has seized on

a provision, §2000e-2(m), adopted by Congress as part of an endeavor to strengthen Title VII, and turned it into a measure reducing the force of the ban on retaliation.

I

* * *

II

* * *

Adverting to the close connection between discrimination and retaliation for complaining about discrimination, this Court has held, in a line of decisions unbroken until today, that a ban on discrimination encompasses retaliation. In *Sullivan v. Little Hunting Park, Inc.*, 396 U. S. 229, 237 (1969), the Court determined that 42 U. S. C. §1982, which provides that “[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property,” protected a white man who suffered retaliation after complaining of discrimination against his black tenant. *Jackson v. Birmingham Board of Education* elaborated on that holding in the context of sex discrimination. “Retaliation against a person because [he] has complained of sex discrimination,” the Court found it inescapably evident, “is another form of intentional sex discrimination.” 544 U. S., at 173. As the Court explained:

“Retaliation is, by definition, an intentional act. It is a form of ‘discrimination’ because the complainant is being subject to differential treatment. Moreover, retaliation is discrimination ‘on the basis of sex’ because it is an intentional response to the nature of the complaint: an allegation of sex discrimination.” *Id.*, at 173-174 (citations omitted).

Jackson interpreted Title IX of the Educational Amendments of 1972, 20 U. S. C. §1681(a). Noting that the legislation followed three years after *Sullivan*, the Court found it “not only appropriate but also realistic to presume that Congress was thoroughly familiar with *Sullivan* and . . . expected its enactment of Title IX to be interpreted in conformity with it.” 544 U. S., at 176 (internal quotation marks and alterations omitted).

Gómez-Pérez v. Potter, 553 U. S. 474 (2008), was similarly reasoned. The Court there held that the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §633a(a), barring discrimination “based on age,” also proscribes retaliation. 553 U. S., at 479-491. “What *Jackson* said about the relationship between *Sullivan* and the enactment of Title IX,” the Court observed, “can be said as [53] well about the relationship between *Sullivan* and the enactment of the ADEA’s federal-sector provision.” *Id.*, at 485. See also *CBOCS West, Inc. v. Humphries*, 553 U. S. 442, 447-457 (2008) (retaliation for race discrimination constitutes discrimination based on race under 42 U. S. C. §1981). There is no sound reason in this case to stray from the decisions in *Sullivan*, *Jackson*, *Gómez-Pérez*, and *CBOCS West*.

II

A

* * *

Superseding *Price Waterhouse* in part, Congress sought to “restore” the rule of decision followed by several Circuits that any discrimination “actually shown to play a role in a contested employment decision may be the subject of liability.” House Report Part II, at 18. See also House Report Part I, at 48. To that end, Congress enacted §2000e-2(m) and §2000e-5(g)(2)(B). The latter

provides that an employer's proof that an adverse employment action would have been taken in any event does not shield the employer from liability; such proof, however, limits the plaintiff's remedies to declaratory or injunctive relief, attorney's fees, and costs.

Critically, the rule Congress intended to "restore" was not limited to substantive discrimination. As the House Report explained, "the Committee endorses[ed] . . . the decisional law" in *Bibbs v. Block*, 778 F. 2d 1318 (CA8 1985) (en banc), which held that a violation of Title VII is established when the trier of fact determines that "an unlawful motive played some part in the employment decision or decisional process." *Id.*, at 1323; see House Report Part I, at 48. Prior to the 1991 Civil Rights Act, *Bibbs* had been applied to retaliation claims. See e.g. *Johnson v. Legal Servs. of Arkansas, Inc.*, 813 F. 2d 893, 900 (CA8 1987) ("Should the court find that retaliation played some invidious part in the [plaintiff's] termination, a violation of Title VII will be established under *Bibbs*."). See also *EEOC v. General Lines, Inc.*, 865 F. 2d 1555, 1560 (CA10 1989).

B

There is scant reason to think that, despite Congress' aim to "restore and strengthen . . . laws that ban discrimination in employment," House Report Part II, at 2, Congress meant to exclude retaliation claims from the newly enacted "motivating factor" provision. Section 2000e-2(m) provides that an "unlawful employment practice is established" when the plaintiff shows that a protected characteristic was a factor driving "any employment practice." Title VII, in §2000e-3(a), explicitly denominates retaliation, like status-based discrimination, an "unlawful employment practice." Because "any employment practice" necessarily encompasses practices prohibited under §2000e-3(a), §2000e-2(m), by its plain terms, covers retaliation.

Notably, when it enacted §2000e-2(m), Congress did not tie the new provision specifically to §§2000e-2(a)-(d), which proscribe discrimination "because of" race, color, religion, gender, or national origin. Rather, Congress added an entirely new provision to codify the causation standard, one encompassing "any employment practice." §2000e-2(m).

Also telling, §2000e-2(m) is not limited to situations in which *the complainant's* race, color, religion, sex, or national origin motivates the employer's action. In contrast, Title VII's substantive antidiscrimination provisions refer to the protected characteristics of the complaining party. See §§2000e-2(a)(1)-(2), (c)(2) (referring to "such individual's" protected characteristics); §§2000e-2(b), (c)(1), (d) (referring to "his race, color, religion, sex, or national origin"). Congress thus knew how to limit Title VII's coverage to victims of status-based discrimination when it was so minded. It chose, instead, to bring within §2000e-2(m) "any employment practice." To cut out retaliation from §2000e-2(m)'s scope, one must be blind to that choice. . . .

C

From the inception of §2000e-2(m), the agency entrusted with interpretation of Title VII and superintendence of the Act's administration, the EEOC . . . , has understood the provision to cover retaliation claims. . . .

In its compliance manual, the EEOC elaborated on its conclusion that "[§2000e-2(m)] applies to retaliation." 2 EEOC Compliance Manual §8-II(E)(1), p. 614:0008, n. 45 (May 20, 1998) (hereinafter EEOC Compliance Manual). That reading, the agency observed, tracked the view, widely held by courts, "that the evidentiary framework for proving employment discrimination based on race, sex, or other protected class status also applies to claims of

discrimination based on retaliation.” *Ibid.* . . .

The position set out in the EEOC’s guidance and compliance manual merits respect. . . .

IV

The Court draws the opposite conclusion, ruling that retaliation falls outside the scope of §2000e-2(m). In so holding, the Court ascribes to Congress the unlikely purpose of separating retaliation claims from discrimination claims, thereby undermining the Legislature’s effort to fortify the protections of Title VII. None of the reasons the Court offers in support of its restrictive interpretation of §2000e-2(m) survives inspection.

A

The Court first asserts that reading §2000e-2(m) to encompass claims for retaliation “is inconsistent with the provision’s plain language.” *Ante*, at 12. The Court acknowledges, however, that “the text of the motivating-factor provision . . . begins by referring to unlawful employment practices,” a term that undeniably includes retaliation. *Ibid.* (internal quotation marks omitted). Nevermind that, the Court continues, for §2000e-2(m) goes on to reference as “motivating factor[s]” only “race, color, religion, sex, or national origin.” The Court thus sees retaliation as a protected activity entirely discrete from status-based discrimination. *Ibid.*

This vision of retaliation as a separate concept runs up against precedent. See *supra*, at 6-7. Until today, the Court has been clear eyed on just what retaliation is: a manifestation of status-based discrimination. As *Jackson* explained in the context of sex discrimination, “retaliation is discrimination ‘on the basis of sex’ because it is an intentional response to the nature of the complaint: an allegation of sex discrimination.” 544 U. S., at 174.

The Court does not take issue with *Jackson*’s insight. Instead, it distinguishes *Jackson* and like cases on the ground that they concerned laws in which “Congress’ treatment of the subject of prohibited discrimination was both broad and brief.” *Ante*, at 15. Title VII, by contrast, “is a detailed statutory scheme,” that “enumerates specific unlawful employment practices,” “defines key terms,” and “exempts certain types of employers.” *Ante*, at 16. Accordingly, the Court says, “it would be improper to indulge [the] suggestion that Congress meant to incorporate [in Title VII] the default rules that apply only when Congress writes a broad and undifferentiated statute.” *Ibid.*

It is strange logic indeed to conclude that when Congress homed in on retaliation and codified the proscription, as it did in Title VII, Congress meant protection against that unlawful employment practice to have *less* force than the protection available when the statute does not mention retaliation. It is hardly surprising, then, that our jurisprudence does not support the Court’s conclusion. In *Gómez-Pérez*, the Court construed the federal-sector provision of the ADEA, which proscribes “discrimination based on age,” 29 U. S. C. §633a(a), to bar retaliation. The Court did so mindful that another part of the Act, the provision applicable to private-sector employees, explicitly proscribes retaliation and, moreover, “set[s] out a specific list of forbidden employer practices.” *Gómez-Pérez*, 553 U. S., at 486-487 (citing 29 U. S. C. §§623(a) and (d)).

The Court suggests that “the la[w] at issue in . . . *Gómez-Pérez* [was a] broad, general ba[r] on discrimination.” *Ante*, at 15. But, as our opinion in that case observes, some of the ADEA’s provisions are brief, broad, and general, while others are extensive, specific, and detailed. 553 U. S., at 487. So too of Title VII. . . . It makes little sense to apply a different mode of analysis to Title VII’s §2000e-2(m) and the ADEA’s §633a(a), both brief statements on discrimination in the context of larger statutory schemes.

The Court’s reliance on §109(b) of the Civil Rights Act of 1991, 105 Stat. 1077 and the

Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, is similarly unavailing. According to the Court, Congress' explicit reference to §2000e-3(a) in §109(b) "reinforc[es] the conclusion that Congress acted deliberately when it omitted retaliation claims from §2000e-2(m)." *Ante*, at 13. The same is true of the ADA, the Court says, as "Congress provided not just a general prohibition on discrimination 'because of [an individual's] disability,' but also seven paragraphs of detailed description of the practices that would constitute the prohibited discrimination . . . [a]nd . . . an express antiretaliation provision." *Ante*, at 17.

This argument is underwhelming. Yes, Congress has sometimes addressed retaliation explicitly in antidiscrimination statutes. When it does so, there is no occasion for interpretation. But when Congress simply targets discrimination "because of" protected characteristics, or, as in §2000e-2(m), refers to employment practices motivated by race, color, religion, sex, or national origin, how should courts comprehend those phrases? They should read them informed by this Court's consistent holdings that such phrases draw in retaliation, for, in truth, retaliation is a "form of intentional [status-based] discrimination." . . . That is why the Court can point to no prior instance in which an antidiscrimination law was found *not* to cover retaliation. The Court's *volte-face* is particularly imprudent in the context of §2000e-2(m), a provision added as part of Congress' effort to toughen protections against workplace discrimination.

B

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C

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V

A

Having narrowed §2000e-2(m) to exclude retaliation claims, the Court turns to *Gross v. FBL Financial Services, Inc.*, 557 U. S. 167 (2009), to answer the question presented: Whether a plaintiff must demonstrate but-for causation to establish liability under §2000e-3(a).

The Court held in *Gross* that, in contrast to Title VII, §623(a) of the ADEA does not authorize any age discrimination claim asserting mixed motives. Explaining that uniform interpretation of the two statutes is sometimes unwarranted, the Court noted in *Gross* that the phrase "because of . . . age" in §623(a) has not been read "to bar discrimination against people of all ages, even though the Court had previously interpreted 'because of . . . race [or] sex' in Title VII to bar discrimination against people of all races and both sexes." 557 U. S., at 175, n. 2. Yet *Gross*, which took pains to distinguish ADEA [73] claims from Title VII claims, is invoked by the Court today as pathmarking. See *ante*, at 2 ("The holding and analysis of [*Gross*] are instructive here.").

The word "because" in Title VII's retaliation provision, §2000e-3(a), the Court tells us, should be interpreted not to accord with the interpretation of that same word in the companion status-based discrimination provision of Title VII, §2000e-2(a). Instead, statutory lines should be crossed: The meaning of "because" in Title VII's retaliation provision should be read to mean just what the Court held "because" means for ADEA-liability purposes. But see *Gross*, 557 U. S., at 174 ("When conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'") (quoting *Holowecki*, 552 U. S., at 393). In other words, the employer prevailed in *Gross* because, according to the Court, the ADEA's antidiscrimination prescription is not like Title VII's. But the employer prevails again in *Nassar's* case, for there is no "meaningful textual

difference,” *ante*, at 11, between the ADEA’s use of “because” and the use of the same word in Title VII’s retaliation provision. What sense can one make of this other than “heads the employer wins, tails the employee loses”?

It is a standard principle of statutory interpretation that identical phrases appearing in the same statute—here, Title VII—ordinarily bear a consistent meaning. See *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U. S. 224, 232 (2007). Following that principle, Title VII’s retaliation provision, like its status-based discrimination provision, would permit mixed-motive claims, and the same causation standard would apply to both provisions.

B

The Court’s decision to construe §2000e-3(a) to require but-for causation in line with *Gross* is even more confounding in light of *Price Waterhouse*. Recall that *Price Waterhouse* interpreted “because of” in §2000e-2(a) to permit mixed-motive claims. See *supra*, at 8. The Court today rejects the proposition that, if §2000e-2(m) does not cover retaliation, such claims are governed by *Price Waterhouse*’s burden-shifting framework, *i.e.*, if the plaintiff shows that discrimination was *a* motivating factor in an adverse employment action, the defendant may escape liability only by showing it would have taken the same action had there been no illegitimate motive. It is wrong to revert to *Price Waterhouse*, the Court says, because the 1991 Civil Rights Act’s amendments to Title VII abrogated that decision.

This conclusion defies logic. Before the 1991 amendments, several courts had applied *Price Waterhouse*’s burden-shifting framework to retaliation claims. In the Court’s view, Congress designed §2000e-2(m)’s motivating-factor standard not only to exclude retaliation claims, but also to override, *sub silentio*, Circuit precedent applying the *Price Waterhouse* framework to such claims. And with what did the 1991 Congress replace the *Price Waterhouse* burden-shifting framework? With a but-for causation requirement *Gross* applied to the ADEA 17 years after the 1991 amendments to Title VII. Shut from the Court’s sight is a legislative record replete with statements evincing Congress’ intent to strengthen antidiscrimination laws and thereby hold employers accountable for prohibited discrimination. See Civil Rights Act of 1991, §2, 105 Stat. 1071; House Report Part II, at 18. It is an odd mode of statutory interpretation that divines Congress’ aim in 1991 by looking to a decision of this Court, *Gross*, made under a different statute in 2008, while ignoring the overarching purpose of the Congress that enacted the 1991 Civil Rights Act, see *supra*, at 8-10.

C

The Court shows little regard for trial judges who must instruct juries in Title VII cases in which plaintiffs allege both status-based discrimination and retaliation. Nor is the Court concerned about the capacity of jurors to follow instructions conforming to today’s decision. Causation is a complicated concept to convey to juries in the best of circumstances. Asking jurors to determine liability based on different standards in a single case is virtually certain to sow confusion. That would be tolerable if the governing statute required double standards, but here, for the reasons already stated, it does not.

VI

A

The Court’s assertion that the but-for cause requirement it adopts necessarily follows from §2000e-3(a)’s use of the word “because” fails to convince. Contrary to the Court’s

suggestion, see *ante*, at 5-6, the word “because” does not inevitably demand but-for causation to the exclusion of all other causation formulations. When more than one factor contributes to a plaintiff’s injury, but-for causation is problematic. See, e.g., 1 Restatement (Third) of Torts §27, Comment *a*, p. 385 (2005) (noting near universal agreement that the but-for standard is inappropriate when multiple sufficient causes exist) (hereinafter Restatement Third); Restatement of Torts §9, Comment *b*, p. 18 (1934) (legal cause is a cause that is a “substantial factor in bringing about the harm”).

When an event is “overdetermined,” *i.e.*, when two forces create an injury each alone would be sufficient to cause, modern tort law permits the plaintiff to prevail upon showing that either sufficient condition created the harm. Restatement Third §27, at 376-377. In contrast, under the Court’s approach (which it erroneously calls “textbook tort law,” *ante*, at 6), a Title VII plaintiff alleging retaliation *cannot* establish liability if her firing was prompted by both legitimate and illegitimate factors. *Ante*, at 18-19.

* * *

B

As the plurality and concurring opinions in *Price Waterhouse* indicate, a strict but-for test is particularly ill suited to employment discrimination cases. Even if the test is appropriate in some tort contexts, “it is an entirely different matter to determine a ‘but-for’ relation when . . . consider[ing], not physical forces, but the mind-related characteristics that constitute motive.” *Gross*, 557 U. S., at 190 (BREYER, J., dissenting). When assessing an employer’s multiple motives, “to apply ‘but-for’ causation is to engage in a hypothetical inquiry about what would have happened if the employer’s thoughts and other circumstances had been different.” *Id.*, at 191. See also *Price Waterhouse*, 490 U. S., at 264 (opinion of O’Connor, J.) (“[A]t . . . times the [but-for] test demands the impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs.” (quoting Malone, *Ruminations on Cause-In-Fact*, 9 Stan. L. Rev. 60, 67 (1956))).

This point, lost on the Court, was not lost on Congress. When Title VII was enacted, Congress considered and rejected an amendment that would have placed the word “solely” before “because of [the complainant’s] race, color, religion, sex, or national origin.” See 110 Cong. Rec. 2728, 13837-13838 (1964). Senator Case, a prime sponsor of Title VII, commented that a “sole cause” standard would render the Act “totally nugatory.” *Id.*, at 13837. Life does not shape up that way, the Senator suggested, commenting “[i]f anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of.” *Ibid.*

* * *

The Court holds, at odds with a solid line of decisions recognizing that retaliation is inextricably bound up with status-based discrimination, that §2000e-2(m) excludes retaliation claims. It then reaches outside of Title VII to arrive at an interpretation of “because” that lacks sensitivity to the realities of life at work. In this endeavor, the Court is guided neither by precedent, nor by the aims of legislators who formulated and amended Title VII. Indeed, the Court appears driven by a zeal to reduce the number of retaliation claims filed against employers. See *ante*, at 18-19. Congress had no such goal in mind when it added §2000e-2(m) to Title VII. See House Report Part II, at 2. Today’s misguided judgment, along with the judgment in *Vance v. Ball State Univ.*, *post*, p. 1, should prompt yet another Civil Rights Restoration Act.

For the reasons stated, I would affirm the judgment of the Fifth Circuit.

Notes

1. This is a mixed-motive case, in which both permissible and impermissible factors are behind the discriminatory act. The Court holds that Title VII retaliation claims must be proven under traditional tort principles of but-for causation rather than under §2000e-2(m), which establishes the plaintiff-friendly motivating-factor causation standard. Thus, in a retaliation lawsuit, the plaintiff must prove that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer. Justice Ginsburg in dissent argues that, “When an event is ‘overdetermined,’ *i.e.*, when two forces create an injury each alone would be sufficient to cause, modern tort law permits the plaintiff to prevail upon showing that either sufficient condition created the harm. Restatement Third §27, at 376-377. In contrast, under the Court’s approach (which it erroneously calls “textbook tort law,”), a Title VII plaintiff alleging retaliation *cannot* establish liability if her firing was prompted by both legitimate and illegitimate factors.

2. The majority and dissent not only disagree about what constitutes traditional tort law but also about “the textual and structural indications”; *i.e.*, the interplay among the status-based discrimination provision (§2000e-2(a)), the antiretaliation provision (§2000e-3(a)), and the motivating-factor provision (§2000e-2(m)), or what these justices refer to as “textual and structural indications.” Who has the stronger position: the majority or the dissent?

3. Justice Ginsburg suggests that the textual and structural indications, the resolution of which may be indeterminate, mask the real reason behind the majority’s holding—to wit, public policy considerations. What are the competing policy considerations that underpin the majority and dissenting opinions?

4. Third-Party Retaliation Claims. In *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863 (2011), the plaintiff, Eric Thompson, alleged that he was fired by the defendant, NAS, three weeks after plaintiff’s fiancée, who worked for the defendant, filed an EEOC sex discrimination charge against the defendant. Sitting *en banc*, the Court of Appeals for the Sixth Circuit affirmed a grant of summary judgment to the employer on the ground that third-party retaliation claims were not permitted by Title VII. The court of appeals reasoned that *because* the employee did not engage in any statutorily protected activity, either on his own behalf or on behalf of his fiancée, he was not included in the class of persons for whom Congress created a retaliation cause of action. *@* Reversing the court of appeals, the Supreme Court addressed two questions: *A* First, did NAS’s firing of Thompson constitute unlawful retaliation? And second, if it did, does Title VII grant Thompson a cause of action? *@* As to the first issue, the Court held that if the facts alleged by the plaintiff are true, then the defendant’s firing of him violated Title VII because *Burlington* held that Title VII’s antiretaliation provision had to be construed to cover a broad range of employer conduct. *Burlington*, the Court noted, reached that conclusion by contrasting the text of Title VII’s antiretaliation provision with its substantive antidiscrimination provision. The former, unlike the latter, *A* is not limited to discriminatory actions that affect the terms and conditions of employment. . . . Rather, Title VII’s antiretaliation provision prohibits any employer action that *>well might have dissuaded a reasonable worker from making or supporting a charge of discrimination=*” (emphasis added). The Court thought it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancée would be fired. The Court noted that

allowing third-party retaliation claims will lead to line-drawing problems concerning the types of relationships entitled to protection. Nonetheless, it declined to identify a fixed class of relationships for which third-party reprisals are unlawful, other than noting that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so. [B]ut beyond that we are reluctant to generalize. The second issue, the Court noted, was the more difficult issue. Did Title VII grant Thompson a cause of action against NAS for its alleged violation of the Act? The statute provides that "a civil action may be brought by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1). Being a person aggrieved does not equate with Article III standing, the Court held. Rather it equates with a smaller subset; namely, with being within the "zone of interests" sought to be protected by the statutory provision whose violation forms the basis for his complaint. To be within the statute's zone of interest, the plaintiff's interests must be so related to or consistent with "the purposes implicit in the statute that it can reasonably be assumed that Congress intended to permit the suit." The Court held that "Thompson fell within the zone of interests protected by Title VII. Thompson was an employee of NAS, and the purpose of Title VII is to protect employees from their employers' unlawful actions. Moreover, accepting the facts as alleged, Thompson is not an accidental victim of the retaliation collateral damage, so to speak, of the employer's unlawful act. To the contrary, injuring him was the employer's intended means of harming Regalado. Hurting him was the unlawful act by which the employer punished her. In those circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII. He is a person aggrieved with standing to sue."

g. Demise of the Sex-Plus Doctrine

[Page 478. Add to end of Note 2]

Is it legal to fire an employee for being too attractive? Compare *Craft*. In *Nelson v. James H. Knight DDS*, 116 Fair Empl. Prac. Cas. (BNA) 1493(2012), the Iowa Supreme Court unanimously ruled that a woman who was fired because she was an "irresistible attraction" to her married boss was not the subject of sex discrimination. The plaintiff, Ms. Nelson, worked in Dr. Knight's dental office for more than ten years, and considered him a person of high integrity. Dr. Knight was satisfied with the quality of Ms. Nelson's work, but began to complain that her clothing was too tight, revealing, and "distracting." During the last six months of Ms. Nelson's employment, she and Dr. Knight began to send each other text messages outside of work. Most of these texts were innocuous. Ms. Nelson denies flirting with Dr. Knight or attempting to start up a romantic relationship with him. For his part, Dr. Knight did in fact send a number of flirtatious messages that, inter alia, mentioned Ms. Nelson's tight clothing and good looks. At most, Ms. Nelson considered Dr. Knight to be a friend and "father figure." Although she did not respond to some of his more flirtatious messages, she did not ask Dr. Knight to stop texting her or tone down his messages. Dr. Knight's wife, Jeanne, who was also an employee in the dental office, discovered these texts and asked that Dr. Knight terminate Ms. Nelson because she was "a big threat" to their marriage. Dr. Knight called Ms. Nelson into his office, with his church pastor present as a witness, and fired her, reading from a prepared statement which said in part that it would be in the best

interests of both of their families that they no longer work together. He also offered her a month's severance pay. Later, Dr. Knight met with Ms. Nelson's husband, assuring him that nothing inappropriate had happened between them and that she was "the best dental assistant he ever had," but that he was afraid he might try to have an affair with Ms. Nelson later if they continued to work together. He replaced Ms. Nelson with another female assistant. In upholding the summary dismissal of Ms. Nelson's sex discrimination lawsuit, the Iowa Supreme Court ruled that Ms. Nelson was fired not because of her gender but because she was a threat to Dr. Knight's marriage. She was fired not because she was a woman, but because of the relationship that Dr. Knight initiated. The court relied, inter alia, upon a federal case, *Tenge v. Phillips Modern Ag Co.*, 446 F. 3d 903 (8th Cir. 2006), that involved a consensual relationship between the owner of a small business and one of his valued employees who was terminated when the owner's wife perceived their relationship as a threat. The *Tenge* court upheld summary judgment in favor of the defendants, stating that treating an employee more favorably than members of the opposite sex because of a consensual relationship with the boss did not violate Title VII. "[A]ny benefits of the relationship are due to the sexual conduct, rather than the gender, of the employee." Id. at 909. The *Nelson* court reasoned that if treating an employee favorably because of a relationship with the boss is not gender discrimination, then neither is treating an employee *unfavorably* because of a relationship with the boss. See *Platner v. Cash & Thomas Contractors, Inc.*, 908 F. 2d. 902 (11th Cir. 1990) (firing was based on favoritism, not gender).

D. Forms of Discrimination

1. Individual Disparate Treatment Discrimination

a. The Concept

[Page 483. Replace Note 1 with the following new Note 1:]

1. Slack is a relatively simple case of disparate treatment discrimination. The employer committed an "unlawful employment practice," which is one of the elements of a Title VII cause of action, see notes following Hishon, supra, Section C1, by engaging in disparate treatment discrimination; in other words, by "simply treat[ing] some people less favorably than others because of their race, color, religion, sex, or [other impermissible factor]." *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003). In *EEOC v. Abercrombie & Fitch Stores Inc.*, 135 S. Ct. 2028, 2032 (2015), a religious discrimination case discussed in Section 4c, supra, Justice Scalia, writing for the Court, observed: "The disparate-treatment provision forbids employers to: (1) "fail . . . to hire" an applicant (2) "because of" (3) "such individual's . . . religion" (which includes his religious practice)." Accordingly, a disparate treatment claim of employment discrimination contains three components, slightly rearranged:

- (1) Less Favorable Treatment (or Adverse Employment Action)
- (2) Impermissible Motivation
- (3) Causation ("because of")

An adverse employment action is defined as a serious and material change in the terms, conditions or privileges of employment. This includes "termination of employment or a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices...unique to a particular situation," *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000), as well as the refusal to promote, *Terry v. Ashcroft*, 336 F. 3d 128, 138 (2d Cir. 2003). However, differences in the allocation of office equipment or scheduling, transfers to a different location without altering responsibilities, salary, benefits, seniority, title, and criticisms or unfavorable evaluations not acted upon are not deemed to constitute adverse employment actions. See, e.g., *Tademe v. St. Cloud State Univ.*, 328 F. 3d 982 (8th Cir. 2003); *Markel v. Board of Regents, Univ. of Wisconsin*, 276 F. 3d 906 (7th Cir. 2002); *Spears v. Missouri Dept. Of Corrections & Human Resources*, 210 F. 3d 850 (8th Cir. 2000).

Impermissible motivation is the intent to subject the plaintiff to an adverse employment action because of race, sex or other impermissible factor. These factors were discussed in Section C, *supra*. The term "because of" is the causal link between an employee's unfavorable treatment and the employer's impermissible motivation. "The term . . . appears frequently in antidiscrimination laws. It typically imports, at a minimum, the traditional standard of but-for causation. *University of Tex. Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013). Title VII relaxes this standard, however, to prohibit even making a protected characteristic a 'motivating factor' in an employment decision. 42 U.S.C. §2000e-2(m)." *EEOC v. Abercrombie & Fitch Stores Inc.*, 135 S. Ct. 2028, 2032 (2015).

b. Forms of Proof

[Page 485. Replace the paragraph, "(1) Direct Evidence Approach," with the following:]

(1) Direct Evidence Approach. Direct evidence is "evidence that, if believed, proves the fact of discriminatory animus without inference or presumption." *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002). But see, *Hatcher v. Board of Trustees of Southern Illinois University and Kempf-Leonard*, No. 15-1599 (7th Cir 7/14/16) at 13 ("Under the direct method, a plaintiff can provide a convincing mosaic of circumstantial evidence that allows a jury to infer intentional discrimination by a decision-maker."). For the plaintiff to prevail, he or she must prove by a preponderance of such evidence that "race, color, religion, sex, or national origin was a motivating factor." § 703(m), 42 U.S.C. §2000e-2(m). The motivating-factor test applies to all Title VII actions. *EEOC v. Abercrombie & Fitch Stores Inc.*, 135 S. Ct. 2028, 2032 (2015).

[Page 488. Add new Notes 3 and 4 after Note 2]

3. "Cat's Paw" Discrimination Claim. The normal employment discrimination claim alleges that the adverse employment action is committed by the person who harbors the impermissible motivation. Sometimes it is alleged that one person's discriminatory motive causes *another* person to execute the adverse employment action. Thus, the animus and adverse employment action are split between two or more persons. This is called a *Cat's paw* discrimination claim. The term *Cat's paw* derives from an Aesop fable introduced into employment discrimination law by Judge Richard Posner in *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990). As explained by the Supreme Court: *In the fable, a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing. A coda to the fable (relevant only marginally, if at all, to employment law) observes that the cat is similar to princes who, flattered by the king, perform services on the king's behalf and receive no reward.* *Staub v. Proctor Hospital*, 131 S.Ct. 1186, 1190 n. 1 (2011). In *Staub*, Vincent Staub sued his former employer, Proctor Hospital, alleging that his discharge violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. ' 4301 et seq. Section 4311(a) provides: "A person who is a member of Y or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, Y or obligation." Section 4311(c) provides: "An employer shall be considered to have engaged in actions prohibited Y under subsection (a), if the person's membership Y is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership." As the Court noted: *The statute is very similar to Title VII, which prohibits employment discrimination >because of Y race, color, religion, sex, or national origin" and states that such discrimination is established when one of those factors "was a motivating factor for any employment practice, even though other factors also motivated the practice.* 42 U.S.C. " 2000e-2(a), (m).@ Hence, the application to Title VII is clear. The facts of the case are as follows. While employed by Proctor, Staub was a member of the United States Army Reserve. Both his immediate supervisor, Janice Mulally, and her supervisor, Michael Korenchuk, were hostile to his military obligations. Mulally issued Staub a corrective action disciplinary warning for purportedly violating a company rule. Mulally's supervisor, Korenchuk, accused Staub, an employee, of violating the corrective action. A human resources vice president, Linda Buck, relied on Korenchuk's accusation as a reason for firing Staub. After he was fired, Staub brought a *Cat's paw* claim against his former employer, Proctor Hospital, *A*meaning that he sought to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision.@ Reversing the Seventh Circuit Court of Appeals, the Court determined that the employer was not entitled to judgment as a matter of law regarding the former employee's "cat's paw" discrimination claim under the USERRA because *A*(1) both supervisors were acting within the scope of their employment when they took the actions that allegedly caused the vice president to fire the employee, (2) there was evidence that the supervisors' actions were motivated by hostility toward [Staub's] military obligations, (3) there was evidence that the supervisors' actions were causal factors underlying the vice president's decision to fire [Staub], and (4) there was evidence that both supervisors had the specific intent to cause [Staub] to be terminated.@ The following facts were crucial to the Court's decision:

ABuck's termination notice expressly stated that Staub was terminated because he had >ignored= the directive in the Corrective Action. . . . [T]here was evidence that both Mulally and Korenchuk had the specific intent to cause Staub to be terminated. Mulally stated she was trying to >get rid of= Staub, and Korenchuk was aware that Mulally was 'out to get' Staub. Moreover, Korenchuk informed Buck, Proctor's personnel officer responsible for terminating employees, of Staub's alleged noncompliance with Mulally's Corrective Action, and Buck fired Staub immediately thereafter; [hence,] a reasonable jury could infer that Korenchuk intended that Staub be fired. The Seventh Circuit therefore erred in holding that Proctor was entitled to judgment as a matter of law.@

4. “Me Too” Evidence. “Me too” evidence is often used by plaintiffs in discrimination cases to show that the defendant has mistreated individuals outside the litigation in a way similar to the defendant’s treatment of the plaintiff. See, e.g., *Pantoja v. Anton*, 129 Cal. Rptr. 3d 384, 389, 395 (Cal. Ct. App. 2011). Such evidence is probative of an employer’s bias. Thus, in *Anton*, the defendant and all of his witnesses testified that, while he did use gender profanity in the workplace, he always directed it at situations, not people. He also testified that his office had a system in place for employees to report harassment and that he and the office did not tolerate such behavior. In an attempt to rebut this evidence, the plaintiff filed a supplemental trial brief and moved to admit “me too evidence” trial judge denied the motion but was reversed on appeal. The Court of Appeals held that because the defendant rooted his theory of the case in the fact that he only directed his profanity at situations and not at individuals, evidence that contradicted this could have assisted the jury in determining his discriminatory intent. See also, *Obrey v. Johnson*, 440 F.3d 691, 695, 697-98 (9th Cir. 2005).(relying of Fed. R. Evid. 401, 401, and 403 which allow the admissibility of evidence that tends to make a fact more of less probable).

3) Mixed-Motive Evidence

[Page 510. Replace Note 2 with the following new Note 2:]

2. At its most basic level, the Court holds that the word "demonstrate" in §107 of the 1991 Civil Rights Act incorporates both direct and indirect evidence, that either form of evidence can be used to satisfy the burdens of production and persuasion. Consequently, Title VII plaintiffs and defendants in mixed-motive cases can carry their respective burdens of proof (plaintiffs in proving impermissible motivation under §703(m) and defendants in taking advantage of the partial affirmative defense under §706(g)(2)(B)) with direct or circumstantial evidence. The Court makes this point near the end of its opinion.

c. The Doctrine of Sexual Harassment

3) Employer Liability

[Page 523. Replace the paragraph above Faragher with following paragraph]

524 U.S., at 755–60. Thus, *Burlington Industries* identifies at least three levels of employer liability: (a) “direct liability, where the employer acts with tortious intent”; (b) “indirect liability, where the agent's high rank in the company makes him or her the employer's alter ego” and (c) *supervisory harassment*, where “[the supervisor's] rank imputes liability” to the employer. Direct liability would likely arise in the context of a sole proprietor (assuming he or she has 15 or more employees) or a corporation with a stated policy of sexual harassment (unlikely). Indirect liability is more common. It arises where the employer's president or other high-ranking officer commits the transgression. Supervisory harassment is by far the employer's greatest area of exposure. An employee is a “supervisor” for purposes of vicarious liability under Title VII “if he or she is empowered by the employer to take tangible employment actions against the victim,” such as the power to hire, fire, demote, promote, transfer, or discipline an employee. Supervisory status does not arise from the mere “ability to exercise significant direction over another's daily work.” *Vance v. Ball State University*, 570 U.S. ____ (2013). *Burlington Industries* establishes principles of employer liability for supervisory harassment based upon an application of the aided-in-the-agency-relationship standard. *Faragher* clarifies these principles, so we begin with that case.

F. Class Actions in Employment Discrimination Cases

[Page 644. Replace Section F with the following new Section F]

Employment discrimination lawsuits are frequently brought as class actions. This is particularly so with respect to systemic theories of discrimination—systemic disparate treatment and systemic disparate impact. Title VII, ‘1981, and ADA class actions are governed by Fed. R. Civ. P. 23. ADEA class actions are explicitly governed by the enforcement provisions of the Fair Labor Standards Act, which differ from Rule 23 in several important ways. For example, Rule 23 expressly gives certain types of classes (namely, (b)(3) classes) the right to opt-out of the class action, while 29 U.S.C. ‘216(b) gives just the opposite right (an opt-in right) to ADEA class members, requiring that each member provide written consent to the action. See *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 169 (1989) (the Supreme Court sustained the district court's order to give notice to the class members). See, e.g., Douglas D. Scherer & Robert Belton, *Handling Class Actions Under the ADEA*, 10 Empl. Rts. & Empl. Pol’y J. 553 (2006); Michael Ashley Stein & Michael Evan Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 Duke L.J. 861 (2006); Susan Strum, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458 (2001).

As in all class action lawsuits, the critical question concerns whether the lawsuit can be certified as a class action. Rule 23(a) sets forth four prerequisites for class certification: (1) the class must be as numerous that joinder of all members is impracticable; (2) there must be at least some questions of law or fact common to the class; (3) the claims of the class representative must be typical of the claims of the class; and (4) the class representative must adequately protect the interests of the class. Once these four prerequisites are satisfied, then the lawsuit must fit into (i.e., be maintainable as) one of the three categories of class actions under Rule 23(b): (b)(1) wherein the person opposing the class is subject to inconsistent or varying adjudications from individual lawsuits or wherein individual lawsuits would as a

practical matter . . . substantially impair or impede@ the ability of class members to protect their interests; (b)(2) which is for lawsuits that seek injunctive or declaratory relief; and (b)(3) wherein common questions of law or fact Apredominate@ over individual questions and class treatment is Asuperior@ (i.e., fair and efficient) to other available forms of litigation. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

Class actions involving large retailers have generated a great deal of controversy in recent years. Aside from questions of manageability and fairness that usually beset class actions, especially settlement class actions, see, e.g., Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 Chap. L. Rev. 201 (2004); Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Actions and Other Large Scale Litigation*, 11 Duke J. Comp. & Intl. L. 179 (2001), class actions against such retail giants as Wal-Mart, see *Wal-Mart Stores, Inc. v. Dukes*, supra, Costco, see *Ellis v. Costco Wholesale Corp.*, 372 F.Supp. 2d 530 (N.D. Cal. 2005), and Home Depot, see *Butler v. Home Depot, Inc.*, 1996 WL 421435 (N.D. Cal. Jan. 25, 1996), typically involve evaluations and policy decisions made by scores of local supervisors or managers on such disparate matters as salary levels, merit pay, promotions, and work assignments. The plaintiff class can consist of millions of employees, as in *Wal-Mart Stores, Inc. v. Dukes*, supra. Some scholars are skeptical of the effects of class actions in employment discrimination litigation, see Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Efforts*, 81 Tex. L. Rev. 1299 (2003), while others see such litigation as an important tool in challenging subtle but persuasive discrimination that continues to limit employment opportunities. See Melissa Hart, *The Possibility of Avoiding Discrimination: Considering Compliance and Liability*, 39 Conn. L. Rev. 1621 (2007).

Wal-Mart Stores, Inc. v. Dukes, supra, joins many of these issues in Title VII litigation. In this case, the Supreme Court denied certification to a class of potentially 1.5 million members consisting of Wal-Mart's female employees. Wal-Mart, which operates retail stores nationwide and is the nation's largest private employer, was sued for disparate impact and disparate treatment discrimination under Title VII. The class claimed that the discretion Wal-Mart gave to local managers over pay and promotions was exercised disproportionately in favor of men. The Supreme Court held that the employees' class could not be certified because the action did not satisfy the commonality requirement of Fed. R. Civ. P. 23(a)(2). This prerequisite is satisfied by showing that all plaintiffs suffered the same injury, so that their claims can be productively litigated at the same time. The employees have only shown that they all suffered a violation of Title VII, which can be violated in different ways. Thus, the employees failed to offer significant proof that the employer operated under a general policy of discrimination. For example, although an expert testified that the employer had a strong corporate culture that made it vulnerable to gender bias, he could not determine how often stereotypes played a meaningful role in employment decisions (i.e., employment injuries). Moreover, the employees' statistical and anecdotal evidence did not show that a common mode of exercising managerial discretion pervaded the entire company. In fact, the employees' claim that the employer's policy of allowing local supervisors to exercise discretionary and subjective decision making over employment matters on its face is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices. It is also a very common and presumptively reasonable way of doing business. One that we have said >should itself raise not inference of discriminatory conduct=@

(quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988)). Although *Watson* did hold that giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory, that holding was conditioned on the plaintiff's ability to identify a specific employment practice that produces the racial or sexual disparity of which the plaintiff complains. That is all the more necessary when a class of plaintiffs is sought to be certified. The requirement that the plaintiff must identify a particular employment practice that creates a statistical disparity comes directly from the Civil Rights Act of 1991, 42 U.S.C. 2000e-2(k)(1)(A)(i), (B)(i). In addition to the commonality ruling, the Court held that the employees' backpay claims were improperly certified under Fed. R. Civ. P. 23(b)(2) in that this provision does not allow class certification of monetary relief claims that are not incidental to injunctive or declaratory relief. The employees' backpay claims are central to the relief sought and, therefore, can only be brought under Fed. R. Civ. P. 23(b)(3).

Chapter 5

The Right to Vote

C. Statutory Rights

2. Voting Rights After the 1965 Act

e. Future Directions in Voting Rights Law

1) The Constitutionality of the Voting Rights Extension Act

[Page 714: Replace Northwest Austin case with the following case:]

SHELBY COUNTY v. HOLDER
133 S. Ct. 2612 (2013)

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

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 of the Act required States to obtain federal permission before enacting any law related to voting--a drastic departure from basic principles of federalism. And §4 of the Act applied that requirement only to some States--an equally dramatic departure from the principle that all States enjoy equal sovereignty. This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach*, 383 U. S. 301, 309 (1966). As we explained in upholding the law, "exceptional conditions can justify legislative measures not otherwise appropriate." *Id.*, at 334. Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years. See Voting Rights Act of 1965, §4(a), 79 Stat. 438.

Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031. There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions. By 2009, "the racial gap in voter registration and turnout [was] lower in the States originally covered by §5 than it [was] nationwide." *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U. S. 193, 203-204 (2009). Since that time, Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by §5, with a gap in the sixth State of less than one half of one percent. See Dept. of Commerce, Census

Bureau, Re-reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2012) (Table 4b).

At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. . .

I
A

The Fifteenth Amendment was ratified in 1870, in the wake of the Civil War. It provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," and it gives Congress the "power to enforce this article by appropriate legislation."

"The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure." *Northwest Austin*, at 197. In the 1890s, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia began to enact literacy tests for voter registration and to employ other methods designed to prevent African-Americans from voting. *Katzenbach*, 383 U. S., at 310. Congress passed statutes outlawing some of these practices and facilitating litigation against them, but litigation remained slow and expensive, and the States came up with new ways to discriminate as soon as existing ones were struck down. Voter registration of African-Americans barely improved. *Id.*, at 313-314.

Inspired to action by the civil rights movement, Congress responded in 1965 with the Voting Rights Act. Section 2 was enacted to forbid, in all 50 States, any "standard, practice, or procedure . . . imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color." 79 Stat. 437. The current version forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U. S. C. §1973(a). Both the Federal Government and individuals have sued to enforce §2, and injunctive relief is available in appropriate cases to block voting laws from going into effect, see 42 U. S. C. §1973j(d). Section 2 is permanent, applies nationwide, and is not at issue in this case.

Other sections targeted only some parts of the country. At the time of the Act's passage, these "covered" jurisdictions were those States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election. §4(b), 79 Stat. 438. Such tests or devices included literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters, and the like. §4(c), *id.*, at 438-439. A covered jurisdiction could "bail out" of coverage if it had not used a test or device in the preceding five years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." §4(a), *id.*, at 438. In 1965, the covered States included Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. The additional covered subdivisions included 39 counties in North Carolina and one in Arizona. See 28 CFR pt. 51, App. (2012).

In those jurisdictions, §4 of the Act banned all such tests or devices. §4(a), 79 Stat. 438. Section 5 provided that no change in voting procedures could take effect until it was approved by federal authorities in Washington, D. C.--either the Attorney General or a court of three judges. *Id.*, at 439. A jurisdiction could obtain such "preclearance" only by proving that the change had neither

"the purpose [nor] the effect of denying or abridging the right to vote on account of race or color." *Ibid.*

Sections 4 and 5 were intended to be temporary; they were set to expire after five years. See §4(a), *id.*, at 438. In *South Carolina v. Katzenbach*, we upheld the 1965 Act against constitutional challenge, explaining that it was justified to address "voting discrimination where it persists on a pervasive scale." 383 U. S., at 308.

In 1970, Congress reauthorized the Act for another five years, and extended the coverage formula in §4(b) to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1968. Voting Rights Act Amendments of 1970, §§3-4, 84 Stat. 314. That swept in several counties in California, New Hampshire, and New York. See 28 CFR pt. 51, App. Congress also extended the ban in §4(a) on tests and devices nationwide. §6, 84 Stat. 314.

In 1975, Congress reauthorized the Act for seven more years, and extended its coverage to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1972. Voting Rights Act Amendments of 1975, §§101, 202, 89 Stat. 400, 401. Congress also amended the definition of "test or device" to include the practice of providing English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English. §203, *id.*, at 401-402. As a result of these amendments, the States of Alaska, Arizona, and Texas, as well as several counties in California, Florida, Michigan, New York, North Carolina, and South Dakota, became covered jurisdictions. See 28 CFR pt. 51, App. Congress correspondingly amended sections 2 and 5 to forbid voting discrimination on the basis of membership in a language minority group, in addition to discrimination on the basis of race or color. §§203, 206, 89 Stat. 400, 402. Finally, Congress made the nationwide ban on tests and devices permanent. §102, *id.*, at 400.

In 1982, Congress reauthorized the Act for 25 years, but did not alter its coverage formula. See Voting Rights Act Amendments, 96 Stat. 131. Congress did, however, amend the bailout provisions, allowing political subdivisions of covered jurisdictions to bail out. Among other prerequisites for bailout, jurisdictions and their subdivisions must not have used a forbidden test or device, failed to receive preclearance, or lost a §2 suit, in the ten years prior to seeking bailout. §2, *id.*, at 131-133.

We upheld each of these reauthorizations against constitutional challenge. See *Georgia v. United States*, 411 U. S. 526 (1973); *City of Rome v. United States*, 446 U. S. 156 (1980); *Lopez v. Monterey County*, 525 U. S. 266 (1999).

In 2006, Congress again reauthorized the Voting Rights Act for 25 years, again without change to its coverage formula. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, 120 Stat. 577. Congress also amended §5 to prohibit more conduct than before. §5, *id.*, at 580581. Section 5 now forbids voting changes with "any discriminatory purpose" as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, "to elect their preferred candidates of choice." 42 U. S. C. §§1973c(b)-(d). . . .

B

Shelby County is located in Alabama, a covered jurisdiction. It has not sought bailout, as the Attorney General has recently objected to voting changes proposed from within the county. See App. 87a-92a. Instead, in 2010, the county sued the Attorney General in Federal District Court in

Washington, D. C., seeking a declaratory judgment that sections 4(b) and 5 of the Voting Rights Act are facially unconstitutional, as well as a permanent injunction against their enforcement. The District Court ruled against the county and upheld the Act. 811 F. Supp. 2d 424, 508 (2011). The court found that the evidence before Congress in 2006 was sufficient to justify reauthorizing §5 and continuing the §4(b) coverage formula. . . . See 679 F. 3d 848, 862-863 (2012). After extensive analysis of the record, the court accepted Congress's conclusion that §2 litigation remained inadequate in the covered jurisdictions to protect the rights of minority voters, and that §5 was therefore still necessary. *Id.*, at 873. Turning to §4, the D. C. Circuit . . . looked to data comparing the number of successful §2 suits in the different parts of the country. Coupling that evidence with the deterrent effect of §5, the court concluded that the statute continued "to single out the jurisdictions in which discrimination is concentrated," and thus held that the coverage formula passed constitutional muster. *Id.*, at 883. Judge Williams dissented. We granted certiorari.

II

In *Northwest Austin*, we stated that "the Act imposes current burdens and must be justified by current needs." 557 U. S., at 203. And we concluded that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Ibid.* These basic principles guide our review of the question before us.

A

The Constitution and laws of the United States are "the supreme Law of the Land." U. S. Const., Art. VI, cl. 2. State legislation may not contravene federal law. The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect. . . .

Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. Amdt. 10. This "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 564 U. S. ___, ___, (2011). But the federal balance "is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Ibid.* (internal quotation marks omitted).

More specifically, "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Gregory v. Ashcroft*, 501 U. S. 452, 461-462 (1991). Of course, the Federal Government retains significant control over federal elections. For instance, the Constitution authorizes Congress to establish the time and manner for electing Senators and Representatives. Art. I, §4, cl. 1. But States have "broad powers to determine the conditions under which the right of suffrage may be exercised." *Carrington v. Rash*, 380 U. S. 89, 91 (1965). . . . Not only do States retain sovereignty under the Constitution, there is also a "fundamental principle of *equal* sovereignty" among the States. *Northwest Austin*, *supra*, at 203. . . .

The Voting Rights Act sharply departs from these basic principles. It suspends "all changes to state election law--however innocuous--until they have been precleared by federal authorities in Washington, D. C." *Id.*, at 202. States must beseech the Federal Government for permission to

implement laws that they would otherwise have the right to enact and execute on their own The Attorney General has 60 days to object to a preclearance request, longer if he requests more information. See 28 CFR §§51.9, 51.37. If a State seeks preclearance from a three-judge court, the process can take years.

And despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). . . . Even if a noncovered jurisdiction is sued, there are important differences between those proceedings and preclearance proceedings; the preclearance proceeding "not only switches the burden of proof to the supplicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation." 679 F. 3d, at 884 (Williams, J., dissenting) (case below). . . .

B

In 1966, we found these departures from the basic features of our system of government justified. The "blight of racial discrimination in voting" had "infected the electoral process in parts of our country for nearly a century." *Katzenbach*, 383 U. S., at 308. . . . Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting, in part because States "merely switched to discriminatory devices not covered by the federal decrees," "enacted difficult new tests," or simply "defied and evaded court orders." *Id.*, at 314. Shortly before enactment of the Voting Rights Act, only 19.4 percent of African-Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi. *Id.*, at 313. Those figures were roughly 50 percentage points or more below the figures for whites. *Ibid.* . . .

At the time, the coverage formula--the means of linking the exercise of the unprecedented authority with the problem that warranted it--made sense. We found that "Congress chose to limit its attention to the geographic areas where immediate action seemed necessary." *Katzenbach*, 383 U. S., at 328. The areas where Congress found "evidence of actual voting discrimination" shared two characteristics: "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average." *Id.*, at 330. . . . We therefore concluded that "the coverage formula [was] rational in both practice and theory," (*ibid.*), [and] ensured that the "stringent remedies [were] aimed at areas where voting discrimination ha[d] been most flagrant." *Id.*, at 315.

C

Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force. In the covered jurisdictions, "[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Northwest Austin*, 557 U. S., at 202. The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years. See §6, 84 Stat. 314; §102, 89 Stat. 400.

Those conclusions are not ours alone. Congress said the same when it reauthorized the Act in 2006, writing that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices." §2(b)(1), 120 Stat. 577. The House Report elaborated that "the number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982," and noted that "[i]n some circumstances, minorities

register to vote and cast ballots at levels that surpass those of white voters." H. R. Rep. No. 109-478, p. 12 (2006). That Report also explained that there have been "significant increases in the number of African-Americans serving in elected offices"; more specifically, there has been approximately a 1,000 percent increase since 1965 in the number of African-American elected officials in the six States originally covered by the Voting Rights Act. *Id.*, at 18.

The following chart, compiled from the Senate and House Reports, compares voter registration numbers from 1965 to those from 2004 in the six originally covered States. These are the numbers that were before Congress when it reauthorized the Act in 2006:

	1965			2004		
	White	Black	Gap	White	Black	Gap
Alabama	69.2	19.3	49.9	73.8	72.9	0.9
Georgia	62.[6]	27.4	35.2	63.5	64.2	-0.7
Louisiana	80.5	31.6	48.9	75.1	71.1	4.0
Mississippi	69.9	6.7	63.2	72.3	76.1	-3.8
South Carolina	75.7	37.3	38.4	74.4	71.1	3.3
Virginia	61.1	38.3	22.8	68.2	57.4	10.8

See S. Rep. No. 109-295, p. 11 (2006); H. R. Rep. No. 109-478, at 12. Census Bureau data from the most recent election indicate that African-American voter turnout exceeded white voter turnout in five of the six States originally covered by §5, with a gap in the sixth State of less than one half of one percent. See Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Table 4b). The preclearance statistics are also illuminating. In the first decade after enactment of §5, the Attorney General objected to 14.2 percent of proposed voting changes. H. R. Rep. No. 109-478, at 22. In the last decade before reenactment, the Attorney General objected to a mere 0.16 percent. S. Rep. No. 109-295, at 13.

There is no doubt that these improvements are in large part because of the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process. See §2(b)(1), 120 Stat. 577. During the "Freedom Summer" of 1964, in Philadelphia, Mississippi, three men were murdered while working in the area to register African-American voters. See *United States v. Price*, 383 U. S. 787, 790 (1966). On "Bloody Sunday" in 1965, in Selma, Alabama, police beat and used tear gas against hundreds marching in support of African-American enfranchisement. See *Northwest Austin, supra*, at 220, n. 3 (THOMAS, J., concurring in judgment in part and dissenting in part). Today both of those towns are governed by African-American mayors. Problems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides.

Yet the Act has not eased the restrictions in §5 or narrowed the scope of the coverage formula in §4(b) along the way. Those extraordinary and unprecedented features were reauthorized--as if nothing had changed. In fact, the Act's unusual remedies have grown even stronger. When Congress reauthorized the Act in 2006, it did so for another 25 years on top of the previous 40--a far cry from the initial five-year period. See 42 U. S. C. §1973b(a)(8). Congress also expanded the prohibitions in §5. We had previously interpreted §5 to prohibit only those redistricting plans that

would have the purpose or effect of worsening the position of minority groups. See *Bossier II*, 528 U. S., at 324, 335-336. In 2006, Congress amended §5 to prohibit laws that could have favored such groups but did not do so because of a discriminatory purpose, see 42 U. S. C. §1973c(c). In addition, Congress expanded §5 to prohibit any voting law "that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States," on account of race, color, or language minority status, "to elect their preferred candidates of choice." §1973c(b). In light of those two amendments, the bar that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved. . . .

Respondents do not deny that there have been improvements on the ground, but argue that much of this can be attributed to the deterrent effect of §5, which dissuades covered jurisdictions from engaging in discrimination that they would resume should §5 be struck down. Under this theory, however, §5 would be effectively immune from scrutiny; no matter how "clean" the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior.

The provisions of §5 apply only to those jurisdictions singled out by §4. We now consider whether that coverage formula is constitutional in light of current conditions.

III

A

[In] 2009 . . . we concluded that the "coverage formula raise[d] serious constitutional questions." *Northwest Austin*, 557 U. S., at 204. As we explained, a statute's "current burdens" must be justified by "current needs," and any "disparate geographic coverage" must be "sufficiently related to the problem that it targets." *Id.*, at 203. The coverage formula met that test in 1965, but no longer does so.

Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years, and voter registration and turnout numbers in the covered States have risen dramatically in the years since. H. R. Rep. No. 109-478, at 12. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. See, e.g., *Katzenbach*, *supra*, at 313, 329-330. There is no longer such a disparity.

In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.

B

The Government's defense of the formula is limited. First, the Government contends that the formula is "reverse-engineered": Congress identified the jurisdictions to be covered and *then* came up with criteria to describe them. Brief for Federal Respondent 48-49. Under that reasoning, there need not be any logical relationship between the criteria in the formula and the reason for coverage; all that is necessary is that the formula happen to capture the jurisdictions Congress wanted to single out. . . .

The Government falls back to the argument that because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States Congress identified back then--regardless of how that discrimination compares to discrimination in States unburdened by coverage. Brief for Federal Respondent 49-50. . . . But history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the "current need[]" for a preclearance system that treats States differently from one another today, that history cannot be ignored. . . . The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. *The Amendment* is not designed to punish for the past; its purpose is to ensure a better future. See *Rice v. Cayetano*, 528 U. S. 495, 512 (2000). To serve that purpose, Congress--if it is to divide the States--must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past. We made that clear in *Northwest Austin*, and we make it clear again today.

C

In defending the coverage formula, the Government, the intervenors, and the dissent also rely heavily on data from the record that they claim justify disparate coverage. Congress compiled thousands of pages of evidence before reauthorizing the Voting Rights Act. The court below and the parties have debated what that record shows--they have gone back and forth about whether to compare covered to noncovered jurisdictions as blocks, how to disaggregate the data State by State, how to weigh §2 cases as evidence of ongoing discrimination, and whether to consider evidence not before Congress, among other issues. Compare, *e.g.*, 679 F. 3d, at 873-883 (case below), with *id.*, at 889-902 (Williams, J., dissenting). Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the "pervasive," "flagrant," "widespread," and "rampant" discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time. *Katzenbach, supra*, at 308, 315; *Northwest Austin*, 557 U. S., at 201 .

But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day. . . . We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record compiled by Congress. Contrary to the dissent's contention, we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.

The dissent also turns to the record to argue that, in light of voting discrimination in Shelby County, the county cannot complain about the provisions that subject it to preclearance. But that is like saying that a driver pulled over pursuant to a policy of stopping all redheads cannot complain about that policy, if it turns out his license has expired. Shelby County's claim is that the coverage formula here is unconstitutional in all its applications, because of how it selects the jurisdictions subjected to preclearance. The county was selected based on that formula, and may challenge it in court.

Striking down an Act of Congress "is the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U. S. 142, 148 (1927) (Holmes, J., concurring). We do not do so lightly. That is why, in 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so, and instead resolved the case then before us on

statutory grounds. But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare §4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.

Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in §2. We issue no holding on §5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an "extraordinary departure from the traditional course of relations between the States and the Federal Government." *Presley*, 502 U. S., at 500-501. Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE THOMAS, concurring. [omitted.]

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

In the Court's view, the very success of §5 of the Voting Rights Act demands its dormancy. Congress was of another mind. Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, §5 remains justifiable, this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments "by appropriate legislation." With overwhelming support in both Houses, Congress concluded that, for two prime reasons, §5 should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard against backsliding. Those assessments were well within Congress' province to make and should elicit this Court's unstinting approbation.

I

* * *

Although the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens. Jurisdictions covered by the preclearance requirement continued to submit, in large numbers, proposed changes to voting laws that the Attorney General declined to approve, auguring that barriers to minority voting would quickly resurface were the preclearance remedy eliminated. *City of Rome v. United States*, 446 U. S. 156, 18 (1980). Congress also found that as "registration and voting of minority citizens increas[ed], other measures may be resorted to which would dilute increasing minority voting strength." *Ibid.* (quoting H. R. Rep. No. 94-196, p. 10 (1975)). Efforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot, are aptly described as "second-generation barriers" to minority voting.

Second-generation barriers come in various forms. One of the blockages is racial gerrymandering, the redrawing of legislative districts in an "effort to segregate the races for purposes of voting." *Shaw*, 509 U. S. 630, 642 (1993). Another is adoption of a system of at-large voting in lieu of district-by-district voting in a city with a sizable black minority. By switching to at-large voting, the overall majority could control the election of each city council member, effectively eliminating the potency of the minority's votes. Grofman & Davidson, *The Effect of Municipal Election Structure on Black Representation in Eight Southern States*, in *Quiet Revolution in the South* 301, 319 (C. Davidson & B. Grofman eds. 1994) (hereinafter *Quiet Revolution*). A similar effect could be achieved if the city engaged in discriminatory annexation by incorporating majority-white areas into city limits, thereby decreasing the effect of VRA-occasioned increases in black voting. Whatever the device employed, this Court has long recognized that vote dilution, when adopted with a discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot. *Allen v. State Bd. of Elections*, 393 U. S. 544, 569. See also H. R. Rep. No. 109-478, p. 6 (2006) (although "[d]iscrimination today is more subtle than the visible methods used in 1965," "the effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates").

In response to evidence of these substituted barriers, Congress reauthorized the VRA for five years in 1970, for seven years in 1975, and for 25 years in 1982. Each time, this Court upheld the reauthorization as a valid exercise of congressional power. As the 1982 reauthorization approached its 2007 expiration date, Congress again considered whether the VRA's preclearance mechanism remained an appropriate response to the problem of voting discrimination in covered jurisdictions.

Congress did not take this task lightly. Quite the opposite. The 109th Congress that took responsibility for the renewal started early and conscientiously. In October 2005, the House began extensive hearings, which continued into November and resumed in March 2006. S. Rep. No. 109-295, p. 2 (2006). In April 2006, the Senate followed suit, with hearings of its own. *Ibid.* In May 2006, the bills that became the VRA's reauthorization were introduced in both Houses. *Ibid.* The House held further hearings of considerable length, as did the Senate. H. R. Rep. 109-478, at 5; S. Rep. 109-295, at 3-4. In mid-July, the House considered and rejected four amendments, then passed the reauthorization by a vote of 390 yeas to 33 nays. 152 Cong. Rec. H5207 (July 13, 2006); Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L. J. 174, 182-183 (2007) (hereinafter Persily). The bill was read and debated in the Senate, where it passed by a vote of 98 to 0. 152 Cong. Rec. S8012 (July 20, 2006). President Bush signed it a week later, on July 27, 2006, recognizing the need for "further work . . . in the fight against injustice," and calling the reauthorization "an example of our continued commitment to a united America where every person is valued and treated with dignity and respect." 152 Cong. Rec. S8781 (Aug. 3, 2006).

In the long course of the legislative process, Congress "amassed a sizable record." *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U. S. 193, 205 (2009). In all, the legislative record Congress compiled filled more than 15,000 pages. H. R. Rep. 109-478, at 5, 11-12; S. Rep. 109-295, at 2-4, 15. The compilation presents countless "examples of flagrant racial discrimination" since the last reauthorization; Congress also brought to light systematic evidence that "intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed." 679 F. 3d, at 866.

After considering the full legislative record, Congress made the following findings: The VRA has directly caused significant progress in eliminating first-generation barriers to ballot access, leading to a marked increase in minority voter registration and turnout and the number of minority elected officials. 2006 Reauthorization §2(b)(1). But despite this progress, "second generation barriers constructed to prevent minority voters from fully participating in the electoral process" continued to exist, as well as racially polarized voting in the covered jurisdictions, which increased the political vulnerability of racial and language minorities in those jurisdictions. §2(b)(2)-(3), 120 Stat. 577. Extensive "[e]vidence of continued discrimination," Congress concluded, "clearly show[ed] the continued need for Federal oversight" in covered jurisdictions. §§2(b)(4)-(5), *id.*, at 577-578. The overall record demonstrated to the federal lawmakers that, "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." §2(b)(9), *id.*, at 578.

Based on these findings, Congress reauthorized preclearance for another 25 years, while also undertaking to reconsider the extension after 15 years to ensure that the provision was still necessary and effective. 42 U. S. C. §1973b(a)(7), (8) (2006 ed., Supp. V). The question before the Court is whether Congress had the authority under the Constitution to act as it did.

II

In answering this question, the Court does not write on a clean slate. It is well established that Congress' judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference. . . . The basis for this deference is firmly rooted in both constitutional text and precedent. The Fifteenth Amendment, which targets precisely and only racial discrimination in voting rights, states that, in this domain, "Congress shall have power to enforce this article by appropriate legislation." . . .

The stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States. In exercising that power, then, Congress may use "all means which are appropriate, which are plainly adapted" to the constitutional ends declared by these Amendments. *McCulloch*, 17 U.S. 316, 4 Wheat., at 421, 4 L. Ed. 579. So when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end. . . .

[L]egislation *reauthorizing* an existing statute is especially likely to satisfy the minimal requirements of the rational-basis test. First, when reauthorization is at issue, Congress has already assembled a legislative record justifying the initial legislation. Congress is entitled to consider that preexisting record as well as the record before it at the time of the vote on reauthorization. This is especially true where, as here, the Court has repeatedly affirmed the statute's constitutionality . . . A reviewing court should expect the record supporting reauthorization to be less stark than the record originally made. Demand for a record of violations equivalent to the one earlier made would expose Congress to a catch-22. If the statute was working, there would be less evidence of discrimination, so opponents might argue that Congress should not be allowed to renew the statute. In contrast, if the statute was not working, there would be plenty of evidence of discrimination, but scant reason to renew a failed regulatory regime. See *Persily* 193-194.

In summary, the Constitution vests broad power in Congress to protect the right to vote, and in particular to combat racial discrimination in voting. This Court has repeatedly reaffirmed Congress' prerogative to use any rational means in exercise of its power in this area. And both precedent and logic dictate that the rational-means test should be easier to satisfy, and the burden on the statute's challenger should be higher, when what is at issue is the reauthorization of a remedy that the Court has previously affirmed, and that Congress found, from contemporary evidence, to be working to advance the legislature's legitimate objective.

III

The 2006 reauthorization of the Voting Rights Act fully satisfies th[is]e standard . . .

I begin with the evidence on which Congress based its decision to continue the preclearance remedy. The surest way to evaluate whether that remedy remains in order is to see if preclearance is still effectively preventing discriminatory changes to voting laws. On that score, the record before Congress was huge. In fact, Congress found there were *more* DOJ objections between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490). 1 Voting Rights Act: Evidence of Continued Need, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 2d Sess., p. 172 (2006) (hereinafter Evidence of Continued Need).

All told, between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a determination that the changes were discriminatory. H. R. Rep. No. 109-478, at 21. Congress found that the majority of DOJ objections included findings of discriminatory intent, see 679 F. 3d, at 867, and that the changes blocked by preclearance were "calculated decisions to keep minority voters from fully participating in the political process." H. R. Rep. 109-478, at 21. On top of that, over the same time period the DOJ and private plaintiffs succeeded in more than 100 actions to enforce the §5 preclearance requirements. 1 Evidence of Continued Need 186, 250.

In addition to blocking proposed voting changes through preclearance, DOJ may request more information from a jurisdiction proposing a change. In turn, the jurisdiction may modify or withdraw the proposed change. The number of such modifications or withdrawals provides an indication of how many discriminatory proposals are deterred without need for formal objection. Congress received evidence that more than 800 proposed changes were altered or withdrawn since the last reauthorization in 1982. H. R. Rep. No. 109-478, at 40-41. . . .

Congress also received evidence that litigation under §2 of the VRA was an inadequate substitute for preclearance in the covered jurisdictions. Litigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency. 1 Evidence of Continued Need 97. An illegal scheme might be in place for several election cycles before a §2 plaintiff can gather sufficient evidence to challenge it. 1 Voting Rights Act: Section 5 of the Act--History, Scope, and Purpose: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., p. 92 (2005) (hereinafter Section 5 Hearing). And litigation places a heavy financial burden on minority voters. See *id.*, at 84. Congress also received evidence that preclearance lessened the litigation burden on covered jurisdictions themselves, because the preclearance process is far less costly than defending against a §2 claim, and clearance by DOJ substantially reduces the likelihood that a §2 claim will be mounted. Reauthorizing the Voting

Rights Act's Temporary Provisions: Policy Perspectives and Views From the Field: Hearing before the Subcommittee on the Constitution, Civil Rights and Property Rights of the Senate Committee on the Judiciary, 109th Cong., 2d Sess., pp. 13, 120-121 (2006).

* * *

B

I turn next to the evidence on which Congress based its decision to reauthorize the coverage formula in §4(b). Because Congress did not alter the coverage formula, the same jurisdictions previously subject to preclearance continue to be covered by this remedy. The evidence just described, of preclearance's continuing efficacy in blocking constitutional violations in the covered jurisdictions, itself grounded Congress' conclusion that the remedy should be retained for those jurisdictions.

There is no question, moreover, that the covered jurisdictions have a unique history of problems with racial discrimination in voting. Consideration of this long history, still in living memory, was altogether appropriate. The Court criticizes Congress for failing to recognize that "history did not end in 1965." *Ante*, at 20. But the Court ignores that "what's past is prologue." W. Shakespeare, *The Tempest*, act 2, sc. 1. And "[t]hose who cannot remember the past are condemned to repeat it." 1 G. Santayana, *The Life of Reason* 284 (1905). Congress was especially mindful of the need to reinforce the gains already made and to prevent backsliding. 2006 Reauthorization §2(b)(9).

Of particular importance, even after 40 years and thousands of discriminatory changes blocked by preclearance, conditions in the covered jurisdictions demonstrated that the formula was still justified by "current needs." *Northwest Austin*, 557 U. S., at 203. Congress learned of these conditions through a report, known as the Katz study, that looked at §2 suits between 1982 and 2004. To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., pp. 964-1124 (2005) (hereinafter *Impact and Effectiveness*). Because the private right of action authorized by §2 of the VRA applies nationwide, a comparison of §2 lawsuits in covered and noncovered jurisdictions provides an appropriate yardstick for measuring differences between covered and noncovered jurisdictions. If differences in the risk of voting discrimination between covered and noncovered jurisdictions had disappeared, one would expect that the rate of successful §2 lawsuits would be roughly the same in both areas. The study's findings, however, indicated that racial discrimination in voting remains "concentrated in the jurisdictions singled out for preclearance." *Northwest Austin*, 557 U. S., at 203.

Although covered jurisdictions account for less than 25 percent of the country's population, the Katz study revealed that they accounted for 56 percent of successful §2 litigation since 1982. *Impact and Effectiveness* 974. Controlling for population, there were nearly *four* times as many successful §2 cases in covered jurisdictions as there were in noncovered jurisdictions. 679 F. 3d, at 874. . . .

The evidence before Congress, furthermore, indicated that voting in the covered jurisdictions was more racially polarized than elsewhere in the country. H. R. Rep. No. 109-478, at 34-35. While racially polarized voting alone does not signal a constitutional violation, it is a factor that increases the vulnerability of racial minorities to discriminatory changes in voting law. The reason is twofold. First, racial polarization means that racial minorities are at risk of being systematically

outvoted and having their interests underrepresented in legislatures. Second, "when political preferences fall along racial lines, the natural inclinations of incumbents and ruling parties to entrench themselves have predictable racial effects. Under circumstances of severe racial polarization, efforts to gain political advantage translate into race-specific disadvantages." Ansolabehere, Persily, & Stewart, *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 Harv. L. Rev. Forum 205, 209 (2013). . . . Just as buildings in California have a greater need to be earthquake-proofed, places where there is greater racial polarization in voting have a greater need for prophylactic measures to prevent purposeful race discrimination. . . .

The case for retaining a coverage formula that met needs on the ground was therefore solid. Congress might have been charged with rigidity had it afforded covered jurisdictions no way out or ignored jurisdictions that needed superintendence. Congress, however, responded to this concern. The VRA permits a jurisdiction to bail out by showing that it has complied with the Act for ten years, and has engaged in efforts to eliminate intimidation and harassment of voters. 42 U. S. C. §1973b(a) (2006 ed. and Supp. V). It also authorizes a court to subject a noncovered jurisdiction to federal preclearance upon finding that violations of the Fourteenth and Fifteenth Amendments have occurred there. §1973a(c) (2006 ed.).

. . . Nearly 200 jurisdictions have successfully bailed out of the preclearance requirement, and DOJ has consented to every bailout application filed by an eligible jurisdiction since the current bailout procedure became effective in 1984. Brief for Federal Respondent 54. The bail-in mechanism has also worked. Several jurisdictions have been subject to federal preclearance by court orders, including the States of New Mexico and Arkansas. App. to Brief for Federal Respondent 1a-3a.

This experience exposes the inaccuracy of the Court's portrayal of the Act as static, unchanged since 1965. Congress designed the VRA to be a dynamic statute, capable of adjusting to changing conditions. True, many covered jurisdictions have not been able to bail out due to recent acts of noncompliance with the VRA, but that truth reinforces the congressional judgment that these jurisdictions were rightfully subject to preclearance, and ought to remain under that regime.

IV

Congress approached the 2006 reauthorization of the VRA with great care and seriousness. The same cannot be said of the Court's opinion today. The Court makes no genuine attempt to engage with the massive legislative record that Congress assembled. Instead, it relies on increases in voter registration and turnout as if that were the whole story. Without even identifying a standard of review, the Court dismissively brushes off arguments based on "data from the record," and declines to enter the "debat[e about] what [the] record shows." *Ante*, at 20-21. One would expect more from an opinion striking at the heart of the Nation's signal piece of civil-rights legislation.

I note the most disturbing lapses. First, by what right, given its usual restraint, does the Court even address Shelby County's facial challenge to the VRA? Second, the Court veers away from controlling precedent regarding the "equal sovereignty" doctrine without even acknowledging that it is doing so. Third, hardly showing the respect ordinarily paid when Congress acts to implement the Civil War Amendments, and as just stressed, the Court does not even deign to grapple with the

legislative record.

A

Shelby County launched a purely facial challenge to the VRA's 2006 reauthorization. "A facial challenge to a legislative Act," the Court has other times said, "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U. S. 739, 745 (1987). "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick*, 413 U. S., at 610. Yet the Court's opinion in this case contains not a word explaining why Congress lacks the power to subject to preclearance the particular plaintiff that initiated this lawsuit--Shelby County, Alabama. The reason for the Court's silence is apparent, for as applied to Shelby County, the VRA's preclearance requirement is hardly contestable.

Alabama is home to Selma, site of the "Bloody Sunday" beatings of civil-rights demonstrators that served as the catalyst for the VRA's enactment. Following those events, Martin Luther King, Jr., led a march from Selma to Montgomery, Alabama's capital, where he called for passage of the VRA. If the Act passed, he foresaw, progress could be made even in Alabama, but there had to be a steadfast national commitment to see the task through to completion. In King's words, "the arc of the moral universe is long, but it bends toward justice." G. May, *Bending Toward Justice: The Voting Rights Act and the Transformation of American Democracy* 144 (2013).

History has proved King right. Although circumstances in Alabama have changed, serious concerns remain. Between 1982 and 2005, Alabama had one of the highest rates of successful §2 suits, second only to its VRA-covered neighbor Mississippi. 679 F. 3d, at 897 (Williams, J., dissenting). . . . This fact prompted the dissenting judge below to concede that "a more narrowly tailored coverage formula" capturing Alabama and a handful of other jurisdictions . . . "might be defensible." 679 F. 3d, at 897 (opinion of Williams, J.). That is an understatement. Alabama's sorry history of §2 violations alone provides sufficient justification for Congress' determination in 2006 that the State should remain subject to §5's preclearance requirement.

A few examples suffice to demonstrate that, at least in Alabama, the "current burdens" imposed by §5's preclearance requirement are "justified by current needs." *Northwest Austin*, 557 U. S., at 203. In the interim between the VRA's 1982 and 2006 reauthorizations, this Court twice confronted purposeful racial discrimination in Alabama. In *Pleasant Grove v. United States*, 479 U. S. 462 (1987), the Court held that Pleasant Grove--a city in Jefferson County, Shelby County's neighbor--engaged in purposeful discrimination by annexing all-white areas while rejecting the annexation request of an adjacent black neighborhood. The city had "shown unambiguous opposition to racial integration, both before and after the passage of the federal civil rights laws," and its strategic annexations appeared to be an attempt "to provide for the growth of a monolithic white voting block" for "the impermissible purpose of minimizing future black voting strength." *Id.*, at 465, 471-472.

Two years before *Pleasant Grove*, the Court in *Hunter v. Underwood*, 471 U.S. 222 (1985), struck down a provision of the Alabama Constitution that prohibited individuals convicted of misdemeanor offenses "involving moral turpitude" from voting. *Id.*, at 223. The provision violated the Fourteenth Amendment's Equal Protection Clause, the Court unanimously concluded, because

"its original enactment was motivated by a desire to discriminate against blacks on account of race[,] and the [provision] continues to this day to have that effect." *Id.*, at 233.

Pleasant Grove and *Hunter* were not anomalies. In 1986, a Federal District Judge concluded that the at-large election systems in several Alabama counties violated §2. *Dillard v. Crenshaw Cty.*, 640 F. Supp. 1347, 1354-1363 (MD Ala. 1986). Summarizing its findings, the court stated that "[f]rom the late 1800's through the present, [Alabama] has consistently erected barriers to keep black persons from full and equal participation in the social, economic, and political life of the state." *Id.*, at 1360. The *Dillard* litigation ultimately expanded to include 183 cities, counties, and school boards employing discriminatory at-large election systems. *Dillard v. Baldwin Cty. Bd. of Ed.*, 686 F. Supp. 1459, 1461 (MD Ala. 1988). One of those defendants was Shelby County, which eventually signed a consent decree to resolve the claims against it. See *Dillard v. Crenshaw Cty.*, 748 F. Supp. 819 (MD Ala. 1990).

* * *

A recent FBI investigation provides a further window into the persistence of racial discrimination in state politics. See *United States v. McGregor*, 824 F. Supp. 2d 1339, 1344-1348 (MD Ala. 2011). Recording devices worn by state legislators cooperating with the FBI's investigation captured conversations between members of the state legislature and their political allies. The recorded conversations are shocking. Members of the state Senate derisively refer to African-Americans as "Aborigines" and talk openly of their aim to quash a particular gambling-related referendum because the referendum, if placed on the ballot, might increase African-American voter turnout. *Id.*, at 1345-1346. See also *id.*, at 13 45 (legislators and their allies expressed concern that if the referendum were placed on the ballot, "[e]very black, every illiterate' would be 'bused [to the polls] on HUD financed buses"). These conversations occurred not in the 1870's, or even in the 1960's, they took place in 2010. *Id.*, at 1344-1345. . . .

These recent episodes forcefully demonstrate that §5's preclearance requirement is constitutional as applied to Alabama and its political subdivisions [including Shelby County]. . . . This Court has consistently rejected constitutional challenges to legislation enacted pursuant to Congress' enforcement powers under the Civil War Amendments upon finding that the legislation was constitutional as applied to the particular set of circumstances before the Court. . . . A similar approach is warranted here.

The VRA's exceptionally broad severability provision makes it particularly inappropriate for the Court to allow Shelby County to mount a facial challenge to §§4(b) and 5 of the VRA, even though application of those provisions to the county falls well within the bounds of Congress' legislative authority. . . . In other words, even if the VRA could not constitutionally be applied to certain States--e.g., Arizona and Alaska, see *ante*, at 8--§1973p calls for those unconstitutional applications to be severed, leaving the Act in place for jurisdictions as to which its application does not transgress constitutional limits.

. . . Leaping to resolve Shelby County's facial challenge without considering whether application of the VRA to Shelby County is constitutional, or even addressing the VRA's severability provision, the Court's opinion can hardly be described as an exemplar of restrained and moderate decisionmaking. Quite the opposite. Hubris is a fit word for today's demolition of the VRA.

B

The Court stops any application of §5 by holding that §4(b)'s coverage formula is unconstitutional. It pins this result, in large measure, to "the fundamental principle of equal sovereignty." *Ante*, at 10-11, 23.

* * *

In the Court's conception, it appears, defenders of the VRA could not prevail upon showing what the record overwhelmingly bears out, *i.e.*, that there is a need for continuing the preclearance regime in covered States. In addition, the defenders would have to disprove the existence of a comparable need elsewhere. . . . I am aware of no precedent for imposing such a double burden on defenders of legislation.

C

The Court has time and again declined to upset legislation of this genre unless there was no or almost no evidence of unconstitutional action by States. See, *e.g.*, *City of Boerne v. Flores*, 521 U. S. 507, 530 2d 624 (1997) (legislative record "mention[ed] no episodes [of the kind the legislation aimed to check] occurring in the past 40 years"). No such claim can be made about the congressional record for the 2006 VRA reauthorization. Given a record replete with examples of denial or abridgment of a paramount federal right, the Court should have left the matter where it belongs: in Congress' bailiwick.

Instead, the Court strikes §4(b)'s coverage provision because, in its view, the provision is not based on "current conditions." *Ante*, at 17. It discounts, however, that one such condition was the preclearance remedy in place in the covered jurisdictions, a remedy Congress designed both to catch discrimination before it causes harm, and to guard against return to old ways. 2006 Reauthorization §2(b)(3), (9). Volumes of evidence supported Congress' determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.

* * *

Beyond question, the VRA is no ordinary legislation. It is extraordinary because Congress embarked on a mission long delayed and of extraordinary importance: to realize the purpose and promise of the Fifteenth Amendment. For a half century, a concerted effort has been made to end racial discrimination in voting. Thanks to the Voting Rights Act, progress once the subject of a dream has been achieved and continues to be made.

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

Notes

1. What do you think separates the majority from the dissenting opinion? The opinions clearly focus on different issues, why do you think that is? What role do you think the history of discrimination, emphasized in the dissent, should play in determining whether the coverage formula remains pertinent? What about the success of the Voting Rights Act and the possibility that eliminating section 5 might eventually cause some jurisdictions to return to their past practices?

2. One of the issues that separates the majority and dissenting opinions is the proper deference to be afforded Congress' decision to renew the Voting Rights Act. The dissent accuses the majority of not providing any deference, and not even providing a standard of review, do these accusations seem accurate to you? If so, why do you think that is? Should Congress be afforded deference with its 2006 renewal? Congress obviously amassed an extensive record, a record that failed to persuade the majority. What was the basis for the majority rejecting that record?

3. The Court's decision only invalidated section 4 of the Voting Rights Act, the coverage formula. Congress could now seek to redo that formula. If it did so, what kind of evidence do you think the Supreme Court would require or accept in order to uphold the new formula? Following the Court's decision, there was considerable speculation on whether Congress might seek to redraw the coverage formula with a general consensus that it would be highly unlikely that it would do so. For example on National Public Radio, law professor Richard Hasen noted, "Politically it would be impossible to single out new jurisdictions which have a greater risk of discriminating against minority voters." See www.npr.org/2013/06/25/195557564/what-changes-after-supreme-court-ruling-on-voting-rights-act. Indeed, one reason Congress failed to alter the coverage formula is that to do so would have opened up the proverbial can of worms and it would have been very difficult for Congress to make distinctions among states or jurisdictions with respect to their discriminatory voting practices. It was, in many respects, simply easier to reaffirm the existing coverage formula while encouraging entities to use the bail out provision if they wanted to be free from federal supervision. In his concurring opinion, Justice Thomas, writing only for himself, would have also deemed Section Five's preclearance requirement unconstitutional.

2) ***Voter Qualification Statutes***

[Page 739: Add the following at the end of Note 3:]

As the 2012 election approached, voter identification legislation became the center of controversy and generated considerable litigation. For example, under its Section Five authority the Department of Justice refused to preclear the voter identification laws from South Carolina and Texas. Both states then sought judicial approval but the courts upheld the Justice Department's decisions, and both laws were prevented from having effect for the 2012 elections. See *Texas v. Holder*, 888 F. Supp.2d 113 (D.D.C. 2012) and *South Carolina v. United States*, 2012 U.S. Dist. Lexis 146187 (D.D.C. Oct. 10, 2012). A controversial Pennsylvania law was also enjoined over concern regarding the availability of the identification cards, though the Department of Justice was not involved in the case. See Ethan Bronner, *Voter ID Rules Fail Court Test Across the Country*, N.Y. Times, 10/3/2012, at A1. The Supreme Court also invalidated an Arizona law that required voters to provide proof of citizenship holding that the state law was preempted by the National Voter Registration Act. See *Arizona v. Inter Tribal Council of Arizona*, 133 S. Ct. 2247 (2013). Although only citizens can vote in federal elections, the federal registration form only requires the person registering to affirm, under the penalty of perjury, that he or she is a citizen. Following the Supreme Court decision in *Shelby v. Holder*, a number of states, including Texas, began to prepare to implement their laws that had been held up for the 2012 election. See Jullian Rayfield, *States Jump to Implement Voter ID Laws After Ruling*, Salon.com, June 25, 2013, available at www.salon.com/2013/06/25/states_jump_at_pushing_laws. The Supreme Court subsequently vacated the lower court's ruling in the Texas case in light of its ruling on the Voting Rights Act.

See Orders issued in *Texas v. Holder* No.12-1028 and *Texas v. United States*, No. 12-496 (June 27, 2013). A lively debate has broken out over the effect of the voter identification laws. While it is still too early to determine the effect on the 2012 election, statistical guru Nate Silver sought to predict the effect of the laws and found that the effect would likely be quite small. For example, in Pennsylvania he predicted that the law would have “reduced Mr. Obama’s chances of winning the state to 82.6 percent from 84.2 percent.” See Nate Silver, *Measuring the Effects of Voter Identification Laws*, FiveThirtyEightBlog, July 15, 2012, available at fivethirtyeightblogs.nytimes.com/2012/07/15/measuring-the-effects-of-voter-identification-laws.

The most recent developments combine the demise of Section 5 preclearance with the rise of voter identification laws. In two high profile actions, the Justice Department challenged the recent voter identification laws passed in Texas and North Carolina as violating Section 2 of the Voting Rights Act, which requires the Government to prove a violation of the Act rather than proceeding through the preclearance process. In the Texas litigation, the District Court found that the 2011 voter identification law was, enacted with discriminatory purpose and unconstitutionally burdened the right to vote under the Fourteenth Amendment. See *Veasey v. Perry*, 71 F. Supp.3d 627 (S.D. Tex. 2014). On appeal, the Fifth Circuit affirmed in part and reversed in part. The Court affirmed the lower court’s finding that the law had a disparate effect on Latinos and African Americans in violation of section 2, but it remanded for a determination whether the law was passed with a discriminatory purpose and to fashion an appropriate remedy, which the court suggested might vary depending on whether the law was passed with a discriminatory purpose. See *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015). In light of the section 2 violation, the court vacated the constitutional ruling. *Id.* The Fifth Circuit recently agreed to rehear the case en banc. See *Veasey v. Abbott*, 815 F.3d 858 (5th Cir. 2016). After a twenty-day trial, the North Carolina voter identification law, passed in 2013, was upheld by the district court, as were a number of additional changes to voting regulations, including the elimination of same-day registration, early registration (when someone turns 16) and early voting. See *NAACP v. McCrory*, 2016 U.S. Dist. LEXIS 55712 (M.D. N.C. 2016). That determination is now on appeal.

Wisconsin’s voter identification law, adopted in 2011, has also been the subject of sharply contested litigation that has produced a number of interesting opinions. The district court initially found that the law violated both Section 2 of the Voting Rights Act and the Fourteenth Amendment. See *Frank v. Walker*, 177 F. Supp. 3d 837 (E.D. Wisc. 2014). On appeal, in an opinion written by Judge Easterbrook, the Court of Appeals reversed, finding that the law was similar to the Indiana law upheld by the Supreme Court in *Crawford*. See *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014). When the Court rejected a petition to rehear the case en banc, Judge Posner wrote a lengthy dissenting opinion, on behalf of four other judges, arguing that the law differed substantially from the Indiana law, and noting further that research and evidence had revealed that there was scant evidence of voter fraud but significant evidence that the laws served to deter individuals, generally Democrats, from voting, which he suggested was the intention of the laws. See *Frank v. Walker*, 773 F.3d 783 (7th Cir. 2014). On remand, the case took a bit of an unexpected turn. The District Court rejected challenges to various parts of the law that the plaintiffs alleged were barriers to obtaining the requisite identification, including challenges to exclusions of out-of-state licenses, veteran’s ID cards and technical college IDs. See *Frank v. Walker*, 141 F. Supp. 3d 932 (E.D. Wisc. 2015). The Seventh Circuit, in an opinion again authored by Judge Easterbrook, reversed on the grounds that the lower court had misunderstood the plaintiffs’ claims, which the court characterized as, “Instead of saying that

inconvenience for some voters means that no one needs photo ID, plaintiffs contend that high hurdles for some persons eligible to vote entitle those particular persons to relief.” *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016). The claims were then remanded for a determination whether individuals could prove that the law posed an unreasonable barrier in their particular circumstances. *Id.* Recent research has sought to shed light on the two lurking issues in these challenges, the effect of the laws on voter turnout and whether voter fraud is a substantial issue. There seems to be an emerging consensus that there is little evidence of actual voter fraud, and studies have indicated that strict voter identification laws (the three above would all be classified as strict) tend to depress turnout among African American and Latino voters. The research is summarized in Christopher Ingraham, New Evidence that Voter ID Laws ‘skew democracy’ in Favor of Whites, *Washington Post*, Feb. 4, 2016, available at <https://www.washingtonpost.com/news/wonk/wp/2016/02/04/new-evidence-that-voter-id-laws-skew-democracy-in-favor-of-white-republicans/>.

[Page 740: Add the following to Note 4]

Sitting en banc, the Ninth Circuit reversed course in its consideration of the Washington state felon disenfranchisement law, joining the other Circuits by holding that section 2 of the Voting Rights Act is generally not the proper vehicle to challenge such laws. See *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (per curiam) (en banc). The Court specifically concluded: “[W]e hold that plaintiffs bringing a section 2 [Voting Rights Act] challenge to a felon disenfranchisement law based on the operation of a state’s criminal justice system must at least show that the criminal justice system is infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent.” *Id.* at 994. The Court added, “We . . . leave for another day the question of whether a plaintiff who has made the required showing would necessarily establish that a felon disenfranchisement law violates section 2.” *Id.*

Chapter 6

Administration of Justice

C. Discrimination in Jury Selection

1. Race-Based Peremptory Challenges

[Page 798: Add the following to the end of Note3:]

This past Term, the Supreme Court issued another decision reversing a conviction as a result of a *Batson* violation. In *Foster v. Chatman*, 195 L.Ed.2d 1, 2016 U.S. LEXIS 3486 (2016), in an opinion written by Chief Justice Roberts, the Court found that the state’s explanations for why it had struck all of the African-American jurors from a death penalty case (tried thirty years earlier) were pretextual and not credible. The Court engaged in a close reading of the record focusing on two African-American jurors and concluded that the state’s inconsistent answers along with “shifting explanations, the misrepresentation of the record, and the persistent focus on race in the prosecution file” resulted in race playing a “substantial factor” in the state’s decisions. *Id.* at 20-21.

Chapter 7

Constitutional Torts

B. Rights Enforceable Under Section 1983

1. The Fourth Amendment and Police Misconduct

[Page 860: Add the following new Note 5:]

5. The Supreme Court recently considered whether an inmate could seek DNA testing through a section 1983 claim or whether habeas corpus provided the proper avenue for relief. As a general matter, the Court has held that habeas is the exclusive remedy when a prisoner seeks “immediate or speedier release from confinement.” *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005). However, if a prisoner’s claim would not necessarily lead to such release than suit may be brought pursuant to section 1983. In *Skinner v. Switzer*, 562 U.S. 521(2011), the Supreme Court found that a prisoner’s request for DNA testing fell into the latter category given that “[s]uccess in his suit for DNA testing would not ‘necessarily imply’ the invalidity of his conviction.” *Id.* at 1297.

C. Governmental Defendants and their Immunities

1. Municipal Liability

b. “Custom or Policy”

[Page 908: Add new Note 6:]

6. In a section 1983 claim, the plaintiff alleged that the District Attorney’s office failed to disclose exculpatory evidence, which led to his wrongful conviction (he was released from jail based on the withheld lab report). The premise for his section 1983 claim was that the Office had deliberately failed to train its prosecutors in the constitutional requirements for disclosing exculpatory evidence. The Supreme Court granted certiorari to “decide whether a district attorney’s office may be held liable under § 1983 for failure to train based on a single . . . violation.” *Connick v. Thompson*, 563 U.S. 51, 53 (2011). The Court ultimately held that a single violation could not support liability: “A pattern of similar constitutional violations by untrained employees is ‘ordinarily necessary’ to demonstrate deliberate indifference for purposes of failure to train.” *Id.* at 62 (citation omitted). Part of the rationale for the Court’s decision turned on the fact that attorneys are trained in law school and elsewhere regarding their constitutional requirements, and thus this was not the kind of situation where it was “plainly

obvious” that failing to provide in-house training would lead to constitutional violations. *Id.* Four members of the Court dissented primarily on the basis that the violation was not an isolated incident and that it should have been obvious that the attorneys needed further training on their constitutional obligation. See *id.* at 79 (Ginsburg, J., dissenting).

4. Individual Immunities

a. *Individuals: The Qualified Immunity Defense*

[Page 940: Add new Note 6:]

6. The Supreme Court has recently issued a series of rulings on qualified immunity. In *Ashcroft v. Iqbal*, 556 U.S. 661 (2009), the Court granted qualified immunity to the Attorney General in a case that challenged his motives for using the material witness statute. The Court held that the “motive” was irrelevant so long as the warrant was properly issued. The Court also afforded qualified immunity to two police officers in connection with a warrant that appeared overbroad because the warrant was not so overbroad that “no reasonable officer could have concluded that the warrant was valid,” the standard the Court applies when a neutral magistrate has issued the warrant. See *Messerschmidt v. Millender*, 132 S.Ct. 1235 (2012). Finally, in a more far-reaching case, the Supreme Court held that a private individual temporarily hired to perform a traditional government function is entitled to assert a qualified-immunity defense. In *Filarsky v. Delia*, 132 S.Ct. 1657 (2012), the City of Rialto hired a private attorney to conduct an investigation of one of its workers, and the Court concluded that the rationale for providing qualified immunity was equally applicable to private individuals. As the Court stated, “There is no reason Rialto’s internal affairs investigator should be denied the qualified immunity enjoyed by the ones who work for New York [City].” *Id.* at 1668.

The Court continued in its broad interpretation of the qualified immunity doctrine in two cases decided in the most recent Supreme Court Term. In *Wood v. Moss*, 134 S.Ct. 2056 (2014), the Court held that two Secret Service officers, charged with protecting the President, were entitled to qualified immunity for their actions in moving protestors away from the President who was having an impromptu dinner at a restaurant. In a separate case, the Court also held that police officers were entitled to qualified immunity for their decision to shoot (fifteen times) a driver of a fleeing vehicle in order to end a dangerous car chase. See *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014). The Court’s decision on qualified immunity in the *Plumhoff* case seemed a foregone conclusion since the Court also held that the officers’ actions did not constitute excessive force in violation of the Fourth Amendment. *Id.* at 2022. Finally, in what might be considered a more traditional approach, the Court held that a public official was entitled to qualified immunity even though his decision to fire an employee for his testimony at a trial that involved his public functions violated the First Amendment. See *Lane v. Franks*, 134 S.Ct. 2369 (2014). The Court concluded that public employee testimony in a judicial proceeding (in this case one that involved public corruption) fell within the core protections of the First Amendment but that the issue was not “beyond debate” at the time the decision was made, thus justifying qualified immunity for the public official.

d. The District Attorney

[Page 942: Add new sentence at bottom:]

The Supreme Court recently held that a grand jury witness is entitled to the same absolute immunity as trial witnesses. See *Rehberg v. Paulk*, 132 S.Ct. 1497 (2012).

F. Attorney's Fees

3. How much is reasonable?

[Page 969: Add new Note 3:]

In appropriate circumstances, defendants may recover fees when a plaintiff's claim is deemed frivolous. Recently, the Supreme Court permitted a defendant to recover reasonable attorney's fees in a case that involved "both frivolous and non-frivolous claims," but the defendant was limited to the "costs the defendant would not have incurred but for the frivolous claims." *Fox v. Vice*, 131 S.Ct. 2205 (2011). The question before the Court is whether federal law preempts and renders invalid four separate provisions of the state law.

Chapter 8

The Rights of Language Minorities

B. Language Rights: Bilingual Education and English as the “Official Language”

3. Bilingual Education Statutes That Affect Language Minority Students

b. The No Child Left Behind Act of 2001

[Page 1011: Add after the third paragraph:]

As a response to poor results since the enactment of the NCLBA, in 2010 President Obama and the Department of Education released *A Blueprint for Reform: The Reauthorization of the Elementary and Secondary Education Act*. U.S. Department of Education, Office of Planning, Evaluation and Policy Development, ESEA Blueprint for Reform, Washington, D.C., 2010. *The Blueprint for Reform* is not intended to replace the Act but provides guidelines and recommendations to improve upon the goals that are set out by the NCLBA. One of the goals and promises it provides is equal opportunity for all students. Included within the description, there is a pledge that “[s]chools must support all students, including by providing appropriate instruction and access to a challenging curriculum along with additional supports and attention where needed. From English Learners and students with disabilities to Native American students, homeless students, migrant students, rural students, and neglected or delinquent students, our proposal will continue to support and strengthen programs for these students and ensure that schools are helping them meet college- and career-ready standards.” *Id.* There is no indication, however, as to the way in which the federal government will require schools to meet these standards. For further discussion of the No Child Left Behind Act and proposed changes to improve its effectiveness, see Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 Harv. C.R.-C.L. L.Rev. 47 (2012) (arguing that the implicit statutory basis for a right to comprehensive educational opportunity should be made explicit).

[Page 1011: Add the following at the end of b. The No Child Left Behind Act:]

In 2010, New Mexico passed the Hispanic Education Act (HEA), which focuses on closing the gap between Latino students and their white peers. See N.M. Stat. Ann. § 22-23B (West). The HEA describes as the purpose of the Act to: (A) “provide for the study, development and implementation of educational systems that affect the educational success of Hispanic

students to close the achievement gap and increase graduation rates; (B) encourage parental involvement in their children's education; and (C) provide a mechanism . . . to improve educational opportunities for Hispanic students for the purpose of closing the achievement gap, increasing graduation rates and increasing post-secondary enrollment, retention and completion." See N.M. Stat. Ann. § 22-23B-2 (West).

As the first statute of its kind in the nation, the debates on this in the House and the Senate brought out the controversial nature of the HEA. A state senator who opposed the Act argued that "[i]f a program or service, or if funding, is beneficial for a high risk student who is Latino it should be available to all students, regardless of race or culture." Another legislator accused supporters of "developing a whole new generation of racism" by singling out Latino students. On the side of the proponents, the chairwoman of New Mexico's Senate Education Committee responded that a "[o]ne-size-fits-all [strategy] is not getting the job done, and the achievement gap keeps growing." Other legislators expressed a similar sentiment: policies tailored to address the academic challenges uniquely experienced by Latino children are needed to resolve the achievement gap. See Tiffani N. Darden, *Defining Quality Education As A Government Interest: The U.S. Supreme Court's Refusal to "Play Nice" with the Executive Branch, Congress, State Supreme Courts, and the Community Voice*, 14 U. Pa. J. Const. L. 661, 664-65 (2012). To date, there have been no challenges to the HEA and the Act remains in effect in New Mexico.

4. Post-Secondary Education Rights

c. Higher Education

[Page 1015: Replace the second paragraph of this subsection with the following:]

At least 14 states have extended eligibility for resident tuition to undocumented students who otherwise satisfy state residency requirements. Laura A. Hernández, *Dreams Deferred -- Why in-State College Tuition Rates Are Not A Benefit Under the IIRIRA and How This Interpretation Violates the Spirit of Plyler*, 21 Cornell J.L. & Pub. Pol'y 525, 556 (2012). In 2011 eight of these states introduced bills to repeal these laws; seven of the bills failed to pass. *Id.* In Oregon, tuition equity was enacted into law in 2013. House Bill 2787 grants in-state tuition for undocumented students who have attended school in the country for at least five years; studied at an Oregon high school for at least three years, and graduated; and show intention to become a U.S. citizen or lawful permanent resident.

Proposed federal legislation would allow undocumented students to work or obtain federal financial aid. The Development, Relief and Education for Alien Minors Act of 2010 ("the 2010 DREAM Act" or "the Act") is federal legislation that attempts to provide a path to citizenship to immigrants brought to the United States illegally as children -- either through obtaining a degree from an institution of higher education or through military service. This legislation has failed to pass numerous times. See, e.g., S. 3992, 111th Cong. (2010). President Obama's continues to support the bill, however, and there is justified optimism that it will

eventually be enacted into law. See Elisha Barron, *The Development, Relief, and Education for Alien Minors (Dream) Act*, 48 Harv. J. on Legis. 623, 655 (2011).

The following is a case in which nonresident university students and their parents sued the state of Kansas for allowing undocumented students to pay resident tuition rates to attend Kansas universities.

C. Employment Discrimination against Language Minorities

2. Alienage

d. National Labor Relations Act

[Page 1045: Add to the end of Note 1:]

Undocumented workers are still unlikely to complain before their status is known; and once their status is known, workers are reluctant to speak up for their rights. See Ruben J. Garcia, *Ten Years After Hoffman Plastic Compounds, Inc. v. NLRB: The Power of a Labor Law Symbol*, 21 Cornell J.L. & Pub. Pol'y 659, 669-70 (2012).

The courts have generally not extended *Hoffman* beyond the issue of back pay under the NLRA, but the breadth of the Court's holding can be applied to remedies other than back pay. The Court held that awarding an undocumented immigrant “pay for work not performed” would trench upon the regulation of immigration. Despite this broad language, courts have refused to extend the unfortunate consequences of *Hoffman* to cases involving Title VII of the Civil Rights Act, the Fair Labor Standards Act, and the Occupational Safety and Health Act. *Id.*

3. National Origin and Citizenship Status

a. The Immigration Reform and Control Act of 1986

[Page 1046: Replace the first paragraph of this subsection with the following:]

As noted earlier, immigration laws were amended in 1986, thus making it unlawful for employers to employ undocumented or “unauthorized” persons. See 8 U.S.C. §1324a (2006). The law imposes a series of escalating fines, potentially leading to criminal sanctions, on employers who violate its mandate. Some states impose additional licensing penalties upon employers of undocumented workers. In *Chamber of Commerce of the United States v. Whiting*, 563 U.S. --, 131 S. Ct. 1968 (2011) [excerpted *infra*], the Supreme Court upheld the Legal Arizona Workers Act (LAWA), allowing the revocation or suspension of business licenses if there is sufficient evidence that employers knowingly or intentionally hired unauthorized aliens.

The Court concluded that the law is not preempted by IRCA and that the state merely supplemented federal law in a way that was not contrary to the intent of Congress.

c. The Racketeer Influenced Corrupt Organizations Act (RICO)

[Page 1071: Add to end of subsection c]

In *Varela v. Gonzales*, 773 F. 3d 704 (5th Cir. 2014), the court of appeals affirmed a district court's holding that two U.S. workers who claimed that their employers' hiring of undocumented workers depressed their wages lacked standing to bring a lawsuit under the Racketeer Influenced Corrupt Organizations Act. Citing *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 453-54 (2006), and *Hemi Group LLC v. City of New York*, 559 U.S. 1, 4 (2010), the Fifth Circuit ruled that there was insufficient causation to confer standing to sue. *Varela*, 773 F. 3d, at 708-09.

F. Immigrants' Rights

3. State and Local Enforcement of Immigration Law

a. Preemption of State and Local Laws Regulating Immigration

[Page 1145: Add to the end of note 1]

The city of Farmers Branch appealed the decision of the district court, relying on *Chamber of Commerce v. Whiting*. Upholding the district court, the Court of Appeals stated:

We conclude that the ordinance's sole purpose is *not* to regulate housing but to exclude undocumented aliens, specifically Latinos, from the City of Farmers Branch and that it is an impermissible regulation of immigration. We hold that the ordinance is unconstitutional and presents an obstacle to federal authority on immigration and the conduct of foreign affairs.

Villas at Parkside Partners v. City of Farmers Branch, Tex., 675 F.3d 802, 804 (5th Cir. 2012).

The court did not even address the City's argument that the *Chamber of Commerce* holding should apply and found that this law was specifically designed to discriminate and regulate immigration by preventing undocumented immigrants from living within the city limits.

In the instant case, the City asserts that a presumption against preemption of the Ordinance applies because the Ordinance is a regulation of residential housing and the issuance of licenses to occupy rental units, which it argues is an area historically occupied by the states. According to the City, the Ordinance merely applies federal classifications consistent

with federal law to achieve a purely local result. We disagree.

The text of the Ordinance, and the circumstances surrounding its adoption, show that its purpose and effect are to regulate immigration, an area of federal concern, rather than to regulate housing. The preamble to the Ordinance specifically states that the Ordinance is intended to aid the enforcement of “federal *immigration* law,” not housing law. (Emphasis added [by the court]). In fact, the Ordinance refers to federal immigration law either directly or by implication in seven of its eleven introductory “whereas” clauses. Moreover, the Ordinance ranges beyond landlord-tenant law because it conditions the validity of an occupancy license on the lawfulness of an occupant's immigration status, thereby expressly tying the Ordinance's criminal offenses to immigration rather than to some violation of the housing code. These facts belie the City's argument that the Ordinance is nothing more than a housing regulation.

Villas at Parkside Partners v. City of Farmers Branch, Tex., 675 F.3d 802, 809 (5th Cir. 2012).

[Page 1145: Replace second paragraph of Note 2 with the following:]

In the appeal from the Ninth Circuit decision, the argument was made that the Legal Arizona Workers Act was preëmpted by federal law because it was simply an attempt by the State to regulate immigration. The Supreme Court held that the Legal Arizona Workers Act was not preëmpted by federal law and that the way in which the Arizona law was worded fit into the framework of what Congress had intended to allow states to regulate. The Supreme Court concluded that the state law legitimately coexists with the federal laws regulating immigration, notwithstanding that immigration is an area that traditionally has been exclusively the province of the federal government.

CHAMBER OF COMMERCE OF UNITED STATES v. WHITING

563 U.S. --, 131 S. Ct. 1968 (2011)

[1973] CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to Parts II–B and III–B. Justice Thomas joins Parts I, II–A, and III–A of this opinion and concurs with the judgment.

Federal immigration law expressly preempts “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ ... unauthorized aliens.” 8 U.S.C. § 1324a(h)(2). A recently enacted Arizona statute — the Legal Arizona Workers Act — provides that the licenses of state employers that knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked. The law also requires that all Arizona employers use a federal electronic

verification system to confirm that the workers they employ are legally authorized workers. The question presented is whether federal immigration law preempts those provisions of Arizona law. Because we conclude that the State's licensing provisions fall squarely within the federal statute's savings clause and that the Arizona regulation does not otherwise conflict with federal law, we hold that the Arizona law is not preempted.

I

A

* * *

[1974]We first addressed the interaction of federal immigration law and state laws dealing with the employment of unauthorized aliens in *De Canas* [*v. Bica*], 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 [(1976)]. In that case, we recognized that the “[p]ower to regulate immigration is unquestionably ... a federal power.” *Id.*, at 354, 96 S.Ct. 933. At the same time, however, we noted that the “States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State,” *id.*, at 356 ...

Ten years after *De Canas*, Congress enacted the Immigration Reform and Control Act (IRCA), 100 Stat. 3359. IRCA makes it “unlawful for a person or other entity ... to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.” 8 U.S.C. § 1324a(a)(1)(A). . . .

To facilitate compliance with this prohibition, IRCA requires that employers review documents establishing an employee's eligibility for employment. § 1324a(b). . . . The employer must attest under penalty of perjury on Department of Homeland Security Form I-9 that he “has verified that the individual is not an unauthorized alien” by reviewing these documents. § 1324a(b)(1)(A). . . .

Employers that violate IRCA's strictures may be subjected to both civil and criminal sanctions. . . . Depending on the circumstances of the violation, a civil fine ranging from \$250 to \$16,000 per unauthorized worker may be imposed. See § 1324a(e)(4)(A); [1975] 73 Fed.Reg. 10136 (2008). Employers that engage in a pattern or practice of violating IRCA's requirements can be criminally prosecuted, fined, and imprisoned for up to six months. § 1324a(f)(1). The Act also imposes fines for engaging in “unfair immigration-related employment practice[s]” such as discriminating on the basis of citizenship or national origin. § 1324b(a)(1); see § 1324b(g)(2)(B). Good-faith compliance with IRCA's I-9 document review requirements provides an employer with an affirmative defense if charged with a § 1324a violation. § 1324a(a)(3).

RCA also restricts the ability of States to combat employment of unauthorized workers. The Act expressly preempts “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” § 1324a(h)(2). Under that provision, state laws imposing civil fines for the employment of unauthorized workers like the one we upheld in *De Canas* are now expressly preempted.

In 1996, in an attempt to improve IRCA's employment verification system, Congress created three experimental complements to the I-9 process as part of the Illegal Immigration

Reform and Immigrant Responsibility Act (IIRIRA). . . Only one of those programs — E-Verify — remains in operation today. Originally known as the “Basic Pilot Program,” E-Verify “is an internet-based system that allows an employer to verify an employee’s work-authorization status.” . . . An employer submits a request to the E-Verify system based on information that the employee provides similar to that used in the I-9 process. In response to that request, the employer receives either a confirmation or a tentative nonconfirmation of the employee’s authorization to work. An employee may challenge a nonconfirmation report. If the employee does not do so, or if his challenge is unsuccessful, his employment must be terminated or the Federal Government must be informed. See *ibid.*

In the absence of a prior violation of certain federal laws, IIRIRA prohibits the Secretary of Homeland Security from “requir[ing] any person or ... entity” outside the Federal Government “to participate in” the E-Verify program, § 402(a), (e), 110 Stat. 3009–656 to 3009–658. To promote use of the program, however, the statute provides that any employer that utilizes E-Verify “and obtains confirmation of identity and employment eligibility in compliance with the terms and conditions of the program ... has established a rebuttable presumption” that it has not violated IRCA’s unauthorized alien employment prohibition, § 402(b)(1), *id.*, at 3009–656 to 3009–657.

B

Acting against this statutory and historical background, several States have recently enacted laws attempting to impose sanctions for the employment of unauthorized aliens through, among other things, “licensing and similar laws,” 8 U.S.C. § 1324a(h)(2) (footnote omitted). Arizona is one of them. [1976] The Legal Arizona Workers Act of 2007 allows Arizona courts to suspend or revoke the licenses necessary to do business in the State if an employer knowingly or intentionally employs an unauthorized alien. Ariz.Rev.Stat. Ann. §§ 23–211, 212, 212.01 (West Supp.2010) (citing 8 U.S.C. § 1324a).

Under the Arizona law, if an individual files a complaint alleging that an employer has hired an unauthorized alien, the attorney general or the county attorney first verifies the employee’s work authorization with the Federal Government pursuant to 8 U.S.C. § 1373(c). Ariz. Rev. Stat. Ann. § 23–212(B). . . . The Arizona law expressly prohibits state, county, or local officials from attempting “to independently make a final determination on whether an alien is authorized to work in the United States.” Ariz. Rev. Stat. Ann. § 23–212(B). . . .

When a complaint is brought against an employer under Arizona law, “the court shall consider only the federal government’s determination pursuant to” 8 U.S.C. § 1373(c) in “determining whether an employee is an unauthorized alien.” § 23–212(H). Good-faith compliance with the federal I-9 process provides employers prosecuted by the State with an affirmative defense. § 23–212(J).

* * *

The Arizona law also requires that “every employer, after hiring an employee, shall verify the employment eligibility of the employee” by using E-Verify. § 23–214(A).³ . . . [1977]

C

The Chamber argued that the Arizona law’s provisions allowing the suspension and revocation of business licenses for employing unauthorized aliens were both expressly and impliedly preempted by federal immigration law, and that the mandatory use of E-Verify was impliedly preempted.

The District Court held that Arizona’s law was not preempted. 534 F.Supp.2d 1036. It found that the plain language of IRCA’s preemption clause did not preempt the Arizona law because the state law does no more than impose licensing conditions on businesses operating within the State. *Id.*, at 1045–1046. With respect to E-Verify, the court concluded that although Congress had made the program voluntary at the national level, it had expressed no intent to prevent States from mandating participation. *Id.*, at 1055–1057. The Court of Appeals affirmed the District Court in all respects, holding that Arizona’s law was a “‘licensing and similar law[]’” falling within IRCA’s savings clause and that none of the state law’s challenged provisions was “expressly or impliedly preempted by federal policy.” 558 F.3d, at 860, 861, 866.

We granted certiorari. . .

II

The Chamber of Commerce argues that Arizona’s law is expressly preempted by IRCA’s text and impliedly preempted because it conflicts with federal law. We address each of the Chamber’s arguments in turn.

A

* * *

IRCA expressly preempts States from imposing “civil or criminal sanctions” on those who employ unauthorized aliens, “other than through licensing and similar laws.” 8 U.S.C. § 1324a (h) (2). The Arizona law, on its face, purports to impose sanctions through licensing laws. [1978] . . . That definition largely parrots the definition of “license” that Congress codified in the Administrative Procedure Act. See 5 U.S.C. §551(8). . . .

[1979] The Chamber and the United States as amicus argue that the Arizona law is not a “licensing” law because it operates only to suspend and revoke licenses rather than to grant them. Again, this construction of the term runs contrary to the definition that Congress itself has codified. See 5 U.S.C. § 551(9). . . . It is also contrary to common sense. There is no basis in law, fact, or logic for deeming a law that grants licenses a licensing law, but a law that suspends or revokes those very licenses something else altogether.

3 Several States have passed statutes mandating the use of E-Verify. See, e.g., Miss.Code Ann. § 71–11–3(3)(d), (4)(b)(i) (Supp.2010); S.C. Code Ann. § 41–8–20(B)–(C) (Supp.2010); Utah Code Ann. § 13–47–201(1) (Lexis Supp.2010); Va. Code Ann. § 40.1–11.2 (Lexis Supp.2010).

* * *

The Chamber asserts that IRCA's amendment of [The Migrant and Seasonal Agricultural Worker Protection Act] (AWPA) shows that Congress meant to allow state licensing sanctions only after a federal IRCA adjudication. . . . But the text of IRCA's savings clause says nothing about state licensing sanctions being contingent on prior federal adjudication, or indeed about state licensing processes at all. . . .

In much the same vein, the Chamber argues that Congress's repeal of "AWPA's separate prohibition concerning unauthorized workers belies any suggestions that IRCA meant to authorize each of the 50 states... to impose its own separate prohibition," and that Congress instead wanted uniformity in immigration law enforcement. Brief for Petitioners 36. Justice BREYER also objects to the departure from "one centralized enforcement scheme" under federal law. *Post*, at 1900 (dissenting opinion). Congress expressly preserved the ability of the States to impose their own sanctions through licensing; [1980] that — like our federal system in general — necessarily entails the prospect of some departure from homogeneity. And as for "separate prohibition[s]," it is worth recalling that the Arizona licensing law is based exclusively on the federal prohibition. . . .

The Chamber argues that its textual and structural arguments are bolstered by IRCA's legislative history. We have already concluded that Arizona's law falls within the plain text of IRCA's savings clause. And, as we have said before, Congress's "authoritative statement is the statutory text, not the legislative history." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005). . . .

[1981] IRCA expressly preempts some state powers dealing with the employment of unauthorized aliens and it expressly preserves others. We hold that Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted.

B

As an alternative to its express preemption argument, the Chamber contends that Arizona's law is impliedly preempted because it conflicts with federal law. . . . But Arizona's procedures simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws. Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority.

And here Arizona went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects. . . . Not only that, the Arizona law expressly provides state investigators must verify the work authorization of an allegedly unauthorized alien with the Federal Government, and "shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States." §23-212(B). [1982]

* * *

[1983] Apart from the mechanics of the Arizona law, the Chamber argues more generally that the law is preempted because it upsets the balance that Congress sought to strike when enacting IRCA. . . . According to the Chamber, the harshness of Arizona's law "exert[s] an

extraneous pull on the scheme established by Congress’ ” that impermissibly upsets that balance. Brief for Petitioners 45. . . Regulating in-state businesses through licensing laws has never been considered such an area of dominant federal concern.

* * *

License suspension and revocation are significant sanctions. But they are typical attributes of a licensing regime. . . . [1984] Federal law recognizes that the authority to license includes the authority to suspend, revoke, annul, or withdraw a license. . . .

The Chamber and Justice BREYER assert that employers will err on the side of discrimination rather than risk the “business death penalty” by “hiring unauthorized workers.” Post, at 1989 – 1990 (dissenting opinion); see Brief for Petitioners 3, 35. That is not the choice. License termination is not an available sanction simply for “hiring unauthorized workers.” Only far more egregious violations of the law trigger that consequence. The Arizona law covers only knowing or intentional violations.

* * *

As with any piece of legislation, Congress did indeed seek to strike a balance among a variety of interests when it enacted IRCA. Part of that balance, however, involved allocating authority between the Federal Government and the States. . . .

Of course Arizona hopes that its law will result in more effective enforcement of the prohibition on employing unauthorized aliens. But in preserving to the States the authority to impose sanctions through licensing [1985] laws, Congress did not intend to preserve only those state laws that would have no effect. . . .

Our precedents “establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.” *Gade [v. National Solid Wastes Management Assn.]*, supra,[505 U.S 88] at 110, 112 S. Ct. 2374 [(1992)]. That threshold is not met here.

III

The Chamber also argues that Arizona's requirement that employers use the federal E-Verify system to determine whether an employee is authorized to work is impliedly preempted. In the Chamber's view, “Congress wanted to develop a reliable and non-burdensome system of work-authorization verification” that could serve as an alternative to the I-9 procedures, and the “mandatory use of E-Verify impedes that purpose.” 558 F.3d, at 866. . . .

A

The provision of IIRIRA setting up the program that includes E-Verify contains no language circumscribing state action.

* * *

Arizona's use of E-Verify does not conflict with the federal scheme. The Arizona law requires that “every employer, after hiring an employee, shall verify the employment eligibility of the employee” through E-Verify. Ariz. Rev. Stat. Ann. § 23–214(A) (West Supp.2010). That requirement is entirely consistent with the federal law. And the consequences of not using

E-Verify under the Arizona law are the same as the consequences of not using the system under federal law. In both instances, the only result is that the employer forfeits the otherwise available rebuttable presumption that it complied with [1986] the law.

B

Congress's objective in authorizing the development of E-Verify was to ensure reliability in employment authorization verification, combat counterfeiting of identity documents, and protect employee privacy. 8 U.S.C. § 1324a (d) (2). Arizona's requirement that employers operating within its borders use E-Verify in no way obstructs achieving those aims. . . .

The Chamber contends that “if the 49 other States followed Arizona's lead, the state-mandated drain on federal resources would overwhelm the federal system and render it completely ineffective, thereby defeating Congress's primary objective in establishing E-Verify.” Brief for Petitioners 50–51. . . . According to the Department of Homeland Security, “the E-Verify system can accommodate the increased use that the Arizona statute and existing similar laws would create.” Brief for United States as Amicus Curiae 34. And the United States notes that “[t]he government continues to encourage more employers to participate” in E-Verify. *Id.*, at 31.

[1987] IRCA expressly reserves to the States the authority to impose sanctions on employers hiring unauthorized workers, through licensing and similar laws. In exercising that authority, Arizona has taken the route least likely to cause tension with federal law. It uses the Federal Government's own definition of “unauthorized alien,” it relies solely on the Federal Government's own determination of who is an unauthorized alien, and it requires Arizona employers to use the Federal Government's own system for checking employee status. If even this gives rise to impermissible conflicts with federal law, then there really is no way for the State to implement licensing sanctions, contrary to the express terms of the savings clause.

Because Arizona's unauthorized alien employment law fits within the confines of IRCA's savings clause and does not conflict with federal immigration law, the judgment of the United States Court of Appeals for the Ninth Circuit is affirmed.

It is so ordered.

JUSTICE KAGAN took no part in the consideration or decision of this case.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

The state law before us, the Legal Arizona Workers Act, imposes civil sanctions upon those who employ unauthorized aliens. See Ariz. Rev. Stat. Ann. § 23–211 et seq. (West Supp.2010). Thus the state law falls within the federal Act's general pre-emption rule and is pre-empted — unless it also falls within that rule's exception for “licensing and similar laws.” Unlike the Court, I do not believe the state law falls within this exception, and I consequently would hold it pre-empted.

Arizona calls its state statute a “licensing law,” and the statute uses the word “licensing.” But the statute strays beyond the bounds of the federal licensing exception. . . . Congress did not intend its “licensing” language to create so broad an exemption, for doing so would permit States to eviscerate the federal Act’s pre-emption provision, indeed to subvert the Act itself, by undermining Congress’ efforts (1) to protect lawful workers from national-origin-based discrimination and (2) to protect lawful employers against erroneous prosecution or punishment. [1988] . . .

[N]either dictionary definitions nor the use of the word “license” in an unrelated statute can demonstrate what scope Congress intended the word “licensing” to have *as it used that word in this federal statute*. Instead, statutory context must ultimately determine the word’s coverage.

I

* * *

[1989] [T]he [Arizona] statute seriously threatens the federal Act’s antidiscriminatory objectives by radically skewing the relevant penalties.

* * *

[1992] Either directly or through the uncertainty that it creates, the Arizona statute will impose additional burdens upon lawful employers and consequently lead those employers to erect ever stronger safeguards against the hiring of unauthorized aliens — without counterbalancing protection against unlawful discrimination. And by defining “licensing” so broadly, by bringing nearly all businesses within its scope, Arizona’s statute creates these effects statewide.

II

The federal licensing exception cannot apply to a state statute that, like Arizona’s statute, seeks to bring virtually all articles of incorporation and partnership certificates within its scope. I would find the scope of the exception to federal pre-emption to be far more limited. Context, purpose, and history make clear that the “licensing and similar laws” at issue involve *employment-related* licensing systems. [1993]

* * *

That is why we should read the federal exemption’s “licensing” laws as limited to those that involve the kind of licensing that, in the absence of this general state statute, would nonetheless have some significant relation to employment or hiring practices. Otherwise we read the federal “licensing” exception as authorizing a State to undermine, if not to swallow up, the federal pre-emption rule.

III

I would therefore read the words “licensing and similar laws” as covering state licensing systems applicable primarily to the licensing of firms in the business of recruiting or referring workers for employment, such as the state agricultural labor contractor licensing schemes in existence when the federal Act was created.

* * *

IV

Another section of the Arizona statute requires “every employer, after hiring an employee,” to “verify the employment eligibility of the employee” through the Federal Government's E-Verify program. Ariz. Rev. Stat. Ann. § 23–214. This state provision makes participation in the federal E-Verify system *mandatory* for virtually all Arizona employers. The federal law governing the E-Verify program, however, creates a program that is *voluntary*. By making mandatory that which federal law seeks to make voluntary, the state provision stands as a significant “‘obstacle to the accomplishment and execution of the full purposes and objectives of Congress,”” *Crosby [v. Nat’l Foreign Trade Council]*, 530 U.S. [363], at 373 [(2000)] . . . And it is consequently pre-empted. [1996]

[1998] JUSTICE SOTOMAYOR, dissenting.

Having constructed a federal mechanism for determining whether someone has knowingly employed an unauthorized alien, and having withheld from the States the information necessary to make that determination, Congress could not plausibly have intended for the savings clause to operate in the way the majority reads it to do so. When viewed in context, the saving clause can only be understood to preserve States’ authority to impose licensing sanctions after a final federal determination that a person has violated IRCA by knowingly employing an unauthorized alien. Because the Legal Arizona Workers Act instead creates a separate state mechanism for Arizona state courts to determine whether a person has employed an unauthorized alien, I would hold that it falls outside the saving clause and is pre-empted. I would also hold that federal law preempts the provision of the Arizona Act making mandatory the use of E-Verify, the federal electronic verification system. By requiring Arizona employers to use E-Verify, Arizona has effectively made a decision for Congress regarding use of a federal resource, in contravention of the significant policy objectives motivating Congress’ decision to make participation in the E-Verify program voluntary.

I

* * *

[1999] Because the plain text of the saving clause does not resolve the question, it is necessary to look to the text of IRCA as a whole to illuminate Congress’ intent. See *Dolan [v. Postal Service]*, 546 U.S., at 486, 126 S. Ct. 1252. . .

Congress enacted IRCA amidst [a] patchwork of state laws. . . . [2000]

Congress made explicit its intent that IRCA be enforced uniformly. IRCA declares that “[i]t is the sense of the Congress that ... the immigration laws of the United States should be enforced vigorously *and uniformly*.” § 115, 100 Stat. 3384 (emphasis added). [2001]

* * *

[2002] Focusing primarily on the text of the saving clause, Arizona and the majority read the clause to permit States to determine themselves whether a person has employed an unauthorized alien, so long as they do so in connection with licensing sanctions. See *ante*, at 1979 – 1980. This interpretation overlooks the broader statutory context and renders the statutory

scheme “[in]coherent and [in]consistent.” *Ali [v. Federal Bureau of Prisons]*, 552 U.S. [214], at 222, 128 S. Ct. 831 [(2008)].

* * *

[2004]In sum, the statutory scheme as a whole defeats Arizona's and the majority's reading of the saving clause. Congress would not sensibly have permitted States to determine for themselves whether a person has employed an unauthorized alien, while at the same time creating a specialized federal procedure for making such a determination, withholding from the States the information necessary to make such a determination, and precluding use of the I-9 forms in nonfederal proceedings. . . .

To render IRCA's saving clause consistent with the statutory scheme, I read the saving clause to permit States to impose licensing sanctions following a final federal determination that a person has violated § 1324a(a)(1)(A) by knowingly hiring, recruiting, or referring for a fee an unauthorized alien. [2005]

* * *

Because the Act's sanctions are not premised on a final federal determination that an employer has violated IRCA, I would hold that the Act does not fall within IRCA's saving clause and is therefore pre-empted.

* * *

II

[2006]The majority highlights the Government's statement in its amicus brief that “the E-Verify system can accommodate the increased use that the Arizona statute and existing similar laws would create.” *Ante*, at 1986 (quoting Brief for United States as *Amicus Curiae* 34). But “[t]he [2007] purpose of Congress is the ultimate touchstone in every pre-emption case.” *Medtronic [, Inc. v. Lohr]*, 518 U.S. [470], at 494, 116 S. Ct. 2240 [(1996)] (internal quotation marks omitted). It matters not whether the Executive Branch believes that the Government is now capable of handling the burdens of a mandatory system. Congressional intent controls, and Congress has repeatedly decided to keep the E-Verify program voluntary. Because state laws requiring use of E-Verify frustrate the significant policy objectives underlying this decision, thereby imposing explicitly unwanted burdens on the Federal Government, I would hold that federal law impliedly preempts the Arizona requirement.

Notes

1. This case is an exception to the commonly accepted principle that immigration law is solely a federal domain. Since *Chamber of Commerce v. Whiting* was decided, states have tried to use it to legitimize a variety of state regulations implicating immigration. See *Cent. Alabama Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1169 (M.D. Ala. 2011) (granting a preliminary injunction against an Alabama law that would effectively prohibit individuals who could not prove their citizenship from staying in their manufactured homes).

2. In 2012, eight states enacted legislation related to E-Verify: Alabama, Georgia, Louisiana, Michigan, New Hampshire, Pennsylvania, South Carolina, and West Virginia. Three of these states now mandate E-Verify for at least some employers: Michigan, Pennsylvania, and West Virginia. Other states made technical changes to earlier laws, clarifying definitions,

creating safe harbor provisions or establishing a hotline to report work authorization violations. As of November 30, 2012, a total of 20 states require the use of E-Verify for at least some public and/or private employers: Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and West Virginia. Eighteen of these requirements were through legislation and two, Florida and Idaho, by executive orders. Two states, California and Illinois, limit the use of E-Verify. Other states are exploring alternatives to E-Verify or identifying safe harbor provisions. North Dakota is the only state to mandate a Legislative Management study on the feasibility of mandating the use of E-Verify. See the state chart below and state by state summary for more information. 2012 State Laws Addressing E-Verify, <http://www.ncsl.org/issues-research/immig/everify-faq.aspx> (July 5, 2013). The opponents of the Supreme Court's decision fear that, in response to this case, states will enact laws that have a profound impact on immigrants. See Krystal D. Norton, *Chamber of Commerce v. Whiting: Why the States Are Permitted to Pass a Tidal Wave of New State Laws So Dangerously Intertwined with Federal Immigration Law*, 57 Loy. L. Rev. 673, 697 (2011).

3. The Legal Arizona Workers Act of 2007, at issue in *Chamber of Commerce v. Whiting*, was amended in 2008 by adding a provision that expanded Arizona's general identity theft statute to include employment-related identity theft. "Employment of Unauthorized Aliens," A.R.S. § 13-2008(A). The U.S. Court of Appeals reversed the district court's judgment, which had preliminarily enjoined the enforcement of the statute on the ground that it was likely facially unconstitutional because it was both conflict-preempted and field-preempted. *Arizona v. Arpaio*, No. 15-15211 (9th Cir. 2016) (for publication), 84 U.S.L.W. 1618 (May 3, 2016). The appellate court held that the employment-related identity theft laws were not preempted in all applications and remanded for consideration of plaintiffs' remaining claims, including the as-applied preemption challenge.

[Page 1159: Add the following to the end of Note 1:]

The City of Hazelton appealed the Third Circuit's decision to the Supreme Court. The Supreme Court granted *certiorari*, vacated the judgment, and remanded to the Third Circuit for consideration in light of *Chamber of Commerce v. Whiting*, 563 U.S. ___, 131 S. Ct. 368, 179 L. Ed. 2d 1031 (2011). See *City of Hazleton, Pa. v. Lozano*, 131 S. Ct. 2958, 180 L. Ed. 2d 243 (2011). On remand, the court of appeals once again concluded that both the employment and housing provisions of the ordinance are preempted by federal law. *Lozano v. City of Hazleton*, 724 F. 3d 297 (3d Cir. 2013). The city appealed yet again, but the Court denied *certiorari*. 134 S. Ct. 1491 (2014).

[Page 1165: Add the following before the section on Senate Bill 1070:]

Proposition 187 was never implemented; however, it remains in the California statutes. In June 2014 Senate Bill 396 was introduced by legislative leaders, which would formally repeal this ill-advised law.

b. Local Enforcement of Immigration Laws

[Page 1167: Add before section G. Integrated Litigation:]

ARIZONA v. UNITED STATES

567 U.S. ___, 132 S. Ct. 2492 (2012)

[2497] Kennedy, J. delivered the opinion of the Court, in which Roberts, C.J., and Ginsburg, Breyer, and Sotomayor, JJ., joined. Scalia, J. Thomas, J., and Alito, J., filed opinions concurring in part and dissenting in part. Kagan, J., took no part in the consideration or decision of the case.

To address pressing issues related to the large number of aliens within its borders who do not have a lawful right to be in this country, the State of Arizona in 2010 enacted a statute called the Support Our Law Enforcement and Safe Neighborhoods Act. The law is often referred to as S. B. 1070, the version introduced in the state senate. . . .

I

The United States filed this suit against Arizona, seeking to enjoin S. B. 1070 as preempted. [2498]

* * *

This Court granted certiorari to resolve important questions concerning the interaction of state and federal power with respect to the law of immigration and alien status. 565 U.S. ___ (2011).

II

A

The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. See *Toll v. Moreno*, 458 U. S. 1, 10, 102 S. Ct. 2977, 73 L. Ed. 2d 563 (1982); see generally S. Legomsky & C. Rodriguez, *Immigration and Refugee Law and Policy* 115-132 (5th ed. 2009). This authority rests, in part, on the National Government's constitutional power to "establish an uniform Rule of Naturalization," U. S. Const., Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations, see *Toll, supra*, at 10, 102 S. Ct. 2977, 73 L. Ed. 2d 563 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 318, 57 S. Ct. 216, 81 L. Ed. 255 (1936)).

* * *

This Court has reaffirmed that "[o]ne of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of [2499] a country's own nationals when those nationals are in another country." *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941).

Federal governance of immigration and alien status is extensive and complex. Congress has specified categories of aliens who may not be admitted to the United States. See 8 U.S.C. §1182. Unlawful entry and unlawful reentry into the country are federal offenses. §§1325, 1326. Once here, aliens are required to register with the Federal Government and to carry proof of status on their person. See §§1301-1306. Failure to do so is a federal misdemeanor. §1304(e),

1306(a). Federal law also authorizes States to deny noncitizens a range of public benefits, §1622; and it imposes sanctions on employers who hire unauthorized workers, §1324a.

Congress has specified which aliens may be removed from the United States and the procedures for doing so. Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law. See §1227. Removal is a civil, not criminal, matter. . . .

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. . . .

United States Customs and Border Protection (CBP) is responsible for determining the admissibility of aliens and securing the country's borders. See Dept. of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions*; 2010, p. 1. (2011) Immigration and Customs Enforcement (ICE), a second agency, "conducts criminal investigations involving enforcement of immigration-related statutes." *Id.*, at 2. . . .[2500]

B

* * *

The issue is whether, under preemption principles, federal law permits Arizona to implement the state-law provisions in dispute. . .

III

The Supremacy Clause provides a clear rule that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. Under this principle, Congress has the power to preempt state law. See *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000); *Gibbons v. Ogden*, 9 Wheat. 1, 210-211 (1824). There is no doubt that Congress may withdraw specified powers from the States by enacting a statute [2501] containing an express preemption provision. See, e.g., *Chamber of Commerce of United States of America v. Whiting*, 563 U.S. ___, ___, 131 S. Ct. 1968, 179 L. Ed. 2d 1031 (2011).

State law must also give way to federal law in at least two other circumstances. First, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. . . . The intent to displace state law altogether can be inferred from a framework of regulation "so pervasive. . . that Congress left no room for the State to supplement it" or where there is a "federal interest. . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); see *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990).

Second, state laws are preempted when they conflict with federal law. . . This includes cases where "compliance with both federal and state regulations is a physical impossibility,"

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), and those instances where the challenged state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” *Hines*, 312 U.S., at 67; see also *Crosby, supra*, at 373 (“What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects”). . .

The four challenged provisions of the state law each must be examined under these preemption principles.

IV A

Section 3

Section 3 of S. B. 1070 creates a new state misdemeanor. It forbids the “willful failure to complete or carry an alien registration document . . . in violation of 8 United States Code section 1304(e) or 1306(a).” Ariz. Rev. Stat. Ann. §11-1509(A) (West Supp. 2011). . . .

The Court discussed federal alien-registration requirements in *Hines v. Davidowitz*, 312 U.S. 52. . . . The Court found that Congress intended the federal plan for registration to be a “single integrated and all-embracing system.” *Id.*, at 74 [2502] As a consequence, the Court ruled that Pennsylvania could not enforce its own alien-registration program. See *id.*, at 59, 74. . . .

* * *

Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards. . . .

* * *

[2503]Under federal law, the failure to carry registration papers is a misdemeanor that may be punished by a fine, imprisonment, or a term of probation. See 8 U.S.C. §1304(e) (2006 ed.); 18 U.S.C. §3561. State law, by contrast, rules out probation as a possible sentence (and also eliminates the possibility of a pardon). See Ariz. Rev. Stat. Ann. §13-1509(D) (West Supp. 2011). . . .

As it did in *Hines*, the Court now concludes that, with respect to the subject of alien registration, Congress intended to preclude States from “complement[ing] the federal law, or enforc[ing] additional or auxiliary regulations.” 312 U.S., at 66-67. Section 3 is preempted by federal law.

B

Section 5(C)

Unlike §3, which replicates federal statutory requirements, §5(C) enacts a state criminal prohibition where no federal counterpart exists. The provision makes it a state misdemeanor for “an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor” in Arizona. Ariz. Rev. Stat. Ann. §13-2928(C)

(West Supp. 2011). . . . The United States contends that the provision upsets the balance struck by the Immigration Reform and Control Act of 1986 (IRCA) and must be preempted as an obstacle to the federal plan of regulation and control.

* * *

[2504]The law makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers. See 8 U.S.C. §§1324a (a) (1) (A), (a) (2). . .

This comprehensive framework does not impose federal criminal sanctions on the employee side (*i.e.*, penalties on aliens who seek or engage in unauthorized work). Under federal law some civil penalties are imposed instead. With certain exceptions, aliens who accept unlawful employment are not eligible to have their status adjusted to that of a lawful permanent resident. See 8 U.S.C. §§1255(c)(2), (c)(8). Aliens also may be removed from the country for having engaged in unauthorized work. See §1227(a)(1)(C)(i); 8 CFR §214.1(e). . . .

The Legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment. . . . In the end, IRCA’s framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives. See, *e.g.*, Hearings before the Subcommittee No. 1 of the House Committee on the Judiciary, 92d Cong., 1st Sess., pt. 3, pp. 919-920 (1971) (statement of Rep. Rodino, the eventual sponsor of IRCA in the House of Representatives).

* * *

[2505]The ordinary principles of preemption include the well-settled proposition that a state law is preempted where it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines*, 312 U.S., at 67. . . . Section 5(C) is preempted by federal law.

C

Section 6

Section 6 of S. B. 1070 provides that a state officer, “without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States.” Ariz. Rev. Stat. Ann. §13-3883(A)(5) (West Supp. 2011). . . .

As a general rule, it is not a crime for a removable alien to remain present in the United States. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent. When an alien is suspected of being removable, a federal official issues an administrative document called a Notice to Appear. See 8 U.S.C. §1229(a); 8 CFR §239.1(a) (2012). The form does not authorize an arrest. Instead, it gives the alien information about the proceedings, including the time and date of the removal hearing. See 8 U.S.C. §1229(a)(1). . . .

The federal statutory structure instructs when it is appropriate to arrest an alien during the removal process. For example, the Attorney General can exercise discretion to issue a warrant

for an alien's arrest and detention "pending a decision on whether the alien is to be removed from the United States." 8 U. S. C. §1226(a); see Memorandum from [2506] John Morton, Director, ICE, to All Field Office Directors et al., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) (hereinafter 2011 ICE Memorandum) (describing factors informing this and related decisions). And if an alien is ordered removed after a hearing, the Attorney General will issue a warrant. See 8 CFR §241.2(a)(1). In both instances, the warrants are executed by federal officers who have received training in the enforcement of immigration law. See §§241.2(b), 287.5(e) (3). If no federal warrant has been issued, those officers have more limited authority. See 8 U. S. C. §1357(a). They may arrest an alien for being "in the United States in violation of any [immigration] law or regulation," for example, but only where the alien "is likely to escape before a warrant can be obtained." §1357(a) (2).

Section 6 attempts to provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers. Under state law, officers who believe an alien is removable by reason of some "public offense" would have the power to conduct an arrest on that basis regardless of whether a federal warrant has issued or the alien is likely to escape. . . . This would allow the State to achieve its own immigration policy. The result could be unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed. . . .

There are significant complexities involved in enforcing federal immigration law, including the determination whether a person is removable. . . .

A decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States. . . .

[2507] In defense of §6, Arizona notes a federal statute permitting state officers to "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U. S. C. §1357(g)(10)(B). There may be some ambiguity as to what constitutes cooperation under the federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government. . . .

* * *

By nonetheless authorizing state and local officers to engage in these enforcement activities as a general matter, §6 creates an obstacle to the full purposes and objectives of Congress. See *Hines*, 312 U. S., at 67. Section 6 is preempted by federal law.

D

Section 2(B)

Section 2(B) of S. B. 1070 requires state officers to make a "reasonable attempt . . . to determine the immigration status" of any person they stop, detain, or arrest on some other legitimate basis if "reasonable suspicion exists that the person is an alien and is unlawfully

present in the United States.” Ariz. Rev. Stat. Ann. §11–1051(B) (West 2012). The law also provides that “[a]ny person who is arrested shall have the person’s immigration status determined before the person is released.” *Ibid.* . . .

Three limits are built into the state provision. First, a detainee is presumed not to be an alien unlawfully present in the United States if he or she provides a valid Arizona driver’s license or similar identification. [2508] Second, officers “may not consider race, color or national origin . . . except to the extent permitted by the United States [and] Arizona Constitution[s].” *Ibid.* Third, the provisions must be “implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.” §11–1051(L) (West 2012). . . .

1

Congress has made clear that no formal agreement or special training needs to be in place for state officers to “communicate with the [Federal Government] regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States.” 8 U. S. C. §1357(g)(10)(A). And Congress has obligated ICE to respond to any request made by state officials for verification of a person’s citizenship or immigration status. See §1373(c); see also §1226(d) (1) (A) (requiring a system for determining whether individuals arrested for aggravated felonies are aliens). . . .

* * *

A federal statute regulating the public benefits provided to qualified aliens in fact instructs that “no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from [ICE] information regarding the immigration status, lawful or unlawful, of an alien in the United States.” §1644. . . .

2 [2509]

Detaining individuals solely to verify their immigration status would raise constitutional concerns. . . . And it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision. . . .

But §2(B) could be read to avoid these concerns. . . . The state courts may conclude that, unless the person continues to be suspected of some crime for which he may be detained by state officers, it would not be reasonable to prolong the stop for the immigration inquiry. . . .

Even if the law is read as an instruction to complete a check while the person is in custody, moreover, it is not clear at this stage and on this record that the verification process would result in prolonged detention.

However the law is interpreted, if §2(B) only requires state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision likely would survive preemption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives. . . .

[2510]The Federal Government has brought suit against a sovereign State to challenge the provision even before the law has gone into effect. . . . This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.

V

* * *

The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here.

* * *

The United States has established that §§3, 5(C), and 6 of S. B. 1070 are preempted. It was improper, however, to enjoin §2(B) before the state courts had an opportunity to construe it and without some showing that enforcement of the provision in fact conflicts with federal immigration law and its objectives. [2511]

JUSTICE KAGAN took no part in the consideration or decision of this case.

JUSTICE SCALIA, concurring in part and dissenting in part.

I

* * *

[2512] Two other provisions of the Constitution are an acknowledgment of the States' sovereign interest in protecting their borders. Article I provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, *except what may be absolutely necessary for executing it's inspection Laws.*" Art. I, §10, cl. 2 (emphasis added). . . . A later portion of the same section provides that "[n]o State shall, without the Consent of Congress, . . . engage in War, *unless actually invaded, or in such imminent Danger as will not admit of delay.*" Art. I, §10, cl. 3 (emphasis added).

* * *

[2513] Congress exercised its power "[t]o establish an uniform Rule of Naturalization," Art. I, §8, cl. 4, very early on, see An Act to establish an uniform Rule of Naturalization, 1 Stat. 103. . . . In 1862, Congress passed "An Act to prohibit the 'Coolie Trade' by American Citizens in American Vessels," which prohibited "procuring [Chinese nationals] . . . to be disposed of, or sold, or transferred, for any term of years or for any time what- ever, as servants or apprentices, or to be held to service or labor." 12 Stat. 340. Then, in 1875, Congress amended that act to bar admission to Chinese, Japanese, and other Asian immigrants who had "entered into a contract or agreement for a term of service within the United States, for [2514] lewd and immoral purposes." An act supplementary to the acts in relation to immigration, ch. 141, 18 Stat. 477. . . . Of course, it hardly bears mention that Federal immigration law is now extensive.

I accept that as a valid exercise of federal power—not because of the Naturalization Clause (it has no necessary connection to citizenship) but because it is an inherent attribute of sovereignty no less for the United States than for the States. [2515]

* * *

§2B

[2516]Of course, any investigatory detention, including one under §2(B), may become an “unreasonable . . . seizur[e],” U. S. Const., Amdt. IV, if it lasts too long. See *Illinois v. Caballes*, 543 U. S. 405, 407 (2005). But that has nothing to do with this case, in which the Government claims that §2(B) is pre-empted by federal immigration law, not that anyone’s Fourth Amendment rights have been violated. And I know of no reason why a protracted detention that does not violate the Fourth Amendment would contradict or conflict with any federal immigration law.

§6

* * *

The most important point is that, as we have discussed, Arizona is *entitled* to have “its own immigration policy” — including a more rigorous enforcement policy — so long [2517] as that does not conflict with federal law. * * *

[2518] §3

[2519] It holds no fear for me, as it does for the Court, that “[w]ere §3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.” *Ante*, at 11. . . . What I do fear—and what Arizona and the States that support it fear—is that “federal policies” of nonenforcement will leave the States helpless before those evil effects of illegal immigration that the Court’s opinion dutifully recites in its prologue (*ante*, at 6) but leaves unremedied in its disposition.

§5(C) [2520]

* * *

Common sense, reflected in the canon *expressio unius est exclusio alterius*, suggests that the specification of pre-emption for laws punishing “those who employ” implies the lack of pre-emption for other laws, including laws punishing “those who seek or accept employment.”

* * *

[2522]If securing its territory in this fashion is not within the power of Arizona, we should cease referring to it as a sovereign State. I dissent.

JUSTICE THOMAS, concurring in part and dissenting in part.

I agree with JUSTICE SCALIA that federal immigration law does not pre-empt any of the challenged provisions of S. B. 1070. I reach that conclusion, however, for the simple reason that there is no conflict between the “ordinary meanin[g]” of the relevant federal laws and that of the four provisions of Arizona law at issue here. *Wyeth v. Levine*, 555 U. S. 555, 588 (2009) (THOMAS, J., concurring in judgment) (“Pre-emption analysis should not be a free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives, but an inquiry into whether the ordinary meanings of state and federal law conflict” (brackets; internal quotation marks omitted)). [2523]

* * *

[2524] Thus, even assuming the existence of some tension between Arizona’s law and the supposed “purposes and objectives” of Congress, I would not hold that any of the provisions of the Arizona law at issue here are pre-empted on that basis.

JUSTICE ALITO, concurring in part and dissenting in part.

I agree with the Court that §2(B) is not pre-empted. . . .

I also agree with the Court that §3 is pre-empted by virtue of our decision in *Hines v. Davidowitz*, 312 U. S. 52 (1941). . . .

[2525] While I agree with the Court on §2(B) and §3, I part ways on §5(C) and §6. . . .

Section 2(B)

A

Section 2(B) quite clearly does not expand the authority of Arizona officers to make stops or arrests. . . . [2526] Section 2(B) thus comes into play only when an officer has reasonable suspicion or probable cause to believe that a person has committed a nonimmigration offense. [2527]

* * *

B

It has been suggested that §2(B) will cause some persons who are lawfully stopped to be detained in violation of their constitutional rights while a prolonged investigation of their immigration status is undertaken.

* * *

[2528] If properly implemented, §2(B) should not lead to federal constitutional violations, but there is no denying that enforcement of §2(B) will multiply the occasions on which sensitive Fourth Amendment issues will crop up. These civil-liberty concerns, I take it, are at the heart of most objections to §2(B). Close and difficult questions will inevitably arise as to whether an officer had reasonable suspicion to believe that a person who is stopped for some other reason entered the country illegally, and there is a risk that citizens, lawful permanent residents, and others who are lawfully present in the country will be detained.

* * *

Section 3

[2530] If we credit our holding in *Hines* that Congress has enacted “a single integrated and all-embracing system” of alien registration and that States cannot “complement” that system or “enforce additional or auxiliary regulations,” *id.*, at 66–67, 74, then Arizona’s attempt to impose additional, state-law penalties for violations of federal registration requirements must be invalidated.

Section 5(C)

[2531] While I agree that §3 is pre-empted, I disagree with the Court’s decision to strike down §5(C).

* * *

The one thing that is clear from the federal scheme is that Congress chose not to impose *federal* criminal penalties on aliens who seek or obtain unauthorized work. But that does not

mean that Congress also chose to pre-empt *state* criminal penalties. The inference is plausible, but far from necessary.

* * *

Section 6 [2532]

A [2533]

Despite acknowledging that there is “ambiguity as to what constitutes cooperation,” the Court says that “no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government.” *Ante*, at 18. The Court adopts an unnecessarily stunted view of cooperation.

* * *

We have said that a facial challenge to a statute is “the most difficult challenge to mount successfully” because “the challenger must establish that no set of circumstances exists under which the [statute] would be valid.” *United States v. Salerno*, 481 U. S. 739, 745 (1987); see also *Anderson v. Edwards*, 514 U.S. 143, 155, n.6 (1995) (applying the *Salerno* standard in a pre-emption case). As to §6, I do not believe the United States has carried that heavy burden. [2534]

B

Finally, the Court tells us that §6 conflicts with federal law because it provides state and local officers with “even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers.” *Ante*, at 16–17. The Court points to 8 U. S. C. §1357(a)(2), which empowers “authorized” officers and employees of ICE to make arrests without a federal warrant if “the alien so arrested is in the United States in violation of any [immigration] law or regulation and is likely to escape before a warrant can be obtained for his arrest.” . . . By granting warrantless arrest authority to *federal officers*, Congress has not manifested an unmistakable intent to strip *state and local officers* of their warrantless arrest authority under state law.

Notes

1. Right before this decision came down, on June 15, 2012, the Obama Administration and the Department of Homeland Security announced that there was going to be a policy change regarding those involved in removal proceedings. Specifically, the directive announced that “individuals who demonstrate that they meet the . . . criteria, will be eligible for an exercise of discretion . . . on case by case basis.” Memorandum from Janet Napolitano, Secretary of Homeland Security, to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection; Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services; and John Morton, Director, U.S. Immigration and Customs Enforcement, p. 1 (June 15, 2012), online at <http://www.dhs.gov> (visited July 2, 2012). To be eligible, the individual must: (1) have come to the United States under the age of sixteen; (2) have continually resided in the United States for at least five years prior to June 15, 2012 and must be present in the United States on June 15, 2012; (3) currently be in school, have graduated from high school, have obtained a general education development certificate, or have received an honorable discharge from the Coast Guard or the

Armed Forces; (4) have not been convicted of a felony, significant misdemeanor offense, multiple misdemeanor offenses, or pose a threat to national security; and (5) not be over the age of thirty years old. *Id.* This policy is known as the DACA (Deferred Action for Childhood Arrivals) program.

President Obama explained the reason for the shift in policy. He said “it makes no sense to expel talented young people, who, for all intents and purposes, are Americans — they’ve been raised as Americans; understand themselves to be part of this country — to expel these young people who want to staff our labs, or start new businesses, or defend our country simply because of the actions of their parents — or because of the inaction of politicians. In the absence of any immigration action from Congress to fix our broken immigration system, what we’ve tried to do is focus our immigration enforcement resources in the right places.” President Obama, *Remarks by the President on Immigration*, <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration> (June 25, 2012).

This change in policy was controversial and raised the ire of many, including Justice Scalia. In his dissent, Justice Scalia voiced his opinion of the new policy of the Obama Administration. Justice Scalia wrote:

The husbanding of scarce enforcement resources can hardly be the justification for this, since the considerable administrative cost of conducting as many as 1.4 million background checks, and ruling on the biennial requests for dispensation that the nonenforcement program envisions, will necessarily be *deducted* from immigration enforcement. The President said at a news conference that the new program is “the right thing to do” in light of Congress's failure to pass the Administration's proposed revision of the Immigration Act. Perhaps it is, though Arizona may not think so. But to say, as the Court does, that Arizona *contradicts federal law* by enforcing applications of the Immigration Act that the President declines to enforce boggles the mind.

Arizona v. United States, 567 U.S. --, 132 S. Ct. 2492, at 2521 (2012). Should the change in the President and the Attorney General have discretion to choose how to expend limited resources?

The Supreme Court did not get the opportunity to answer those questions definitively. The Administration’s DACA program was expanded to include the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. This policy was challenged, and the judgment of the court of appeals that the policy likely violated the Administrative Procedure Act (APA) was affirmed by an equally divided court. *United States v. Texas*, 579 U.S. --, No. 15-674 (June 23, 2016) (*per curiam*). The Fifth Circuit denied a stay of the district court’s preliminary injunction, which had ordered a suspension of the implementation of the program. *State of Texas v. United States*, 787 F. 3d 733 (5th Cir. 2015), *revised*, No.15-40238 (November 25, 2015).

The divided panel, in an opinion by Circuit Judge Jerry E. Smith, concluded: “Reviewing the district court’s order for abuse of discretion, we affirm the preliminary injunction because the States have standing; they have established a substantial likelihood of success on the merits of their procedural and substantive APA claims; and they have satisfied the other elements required

for an injunction” [footnote omitted]. *Id.*, slip op., at 2. In dissent, Circuit Judge King observed: “Because federal courts should not inject themselves into such matters of prosecutorial discretion, I would dismiss this case as non-justiciable. ¶ Furthermore, the evidence in the record (the importance of which should not be overlooked) makes clear that the injunction cannot stand. A determination of “pretext” on the part of DHS *must* have a basis in concrete evidence. . . . Based on the record as it currently stands, the district court’s conclusion that DAPA applications will not be reviewed on a discretionary, case-by-case basis cannot withstand even the most deferential scrutiny. Today’s opinion preserves this error and, by reaching the substantive APA claim, propounds its own. I have a firm and definite conviction that a mistake has been made.” *Id.*, slip op., at 123-24.

2. The Court upheld § 2(B) of the Arizona law, which requires state officers to make a reasonable attempt to determine the immigration status of any person stopped, detained, or arrested on some other basis. The oral arguments in the Supreme Court seemingly went to great pains to obviate the suggestion that this provision would lead to racial profiling. The fact that the law had not yet gone into effect and given that it was a facial challenge led the Court to refrain from holding it unconstitutional, at least at this point. As Chief Justice Roberts put it, “The nature and timing of this case counsel caution in evaluating the validity of § 2(B).” *Arizona*, at 2510. Is it predictable that not only will challenges be forthcoming to the law, as applied, but that those challenges are bound to be successful? Might this have been the consolation prize for the Chief Justice, who surprised almost everyone by joining the liberal bloc of the Court to form a majority? Or did the Chief Justice wish to avoid a 4-4 split on the Court, giving no clear direction to inferior courts in future cases? Remember, Justice Kagan recused herself from the case because of her previous involvement in the case while she was Solicitor General prior to her appointment to the Court.

Chapter 9

The Rights of People with Disabilities

B. Constitutional Rights

2. The Modern Regime

[Page 1206: Replace Note 5 with following new Note 5:]

5. Notwithstanding Justice Marshall's criticism of second order rational-basis review, is there a useful place for this type of judicial review in equal protection jurisprudence? Overturning Section 3 of the Defense of Marriage Act (DOMA), which defines the word "marriage" to mean a legal union between one man and one woman, the Supreme Court in *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Court suggested a more searching rational-basis analysis for certain types of discriminations. "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Ibid.*, at 2692 (quoting *Romer v. Evans*, 517 U.S. 620 (1996) (exclusion of homosexuals from state civil rights protections)). The Court continued this line of analysis the following year when it overturned state versions of DOMA; in other words, state statutes that defined marriage as a union between one man and one woman. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Hence, the LGBT community, seems to have heightened scrutiny in the form of second-order rational basis review. See, *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the Court overturned a criminal sodomy statute and, in the process, overruled an earlier decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In her concurring opinion, Justice O' Connor observed: "When a law exhibits...[a] desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring). See also *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993); *Meinhold v. United States Department of Defense*, 808 F. Supp. 1455 (C.D. Cal. 1993); *Pruitt v. Cheney*, 936 F.2d 1160 (9th Cir. 1991) (all involving homosexual status in the military). In *Disability Constitutional Law*, 63 Emory L. J. 530 (2014), Professor Michael Waterstone argues that the Court's decisions on LGBT constitutional rights suggest a path for arguing for heightened scrutiny for equal protection accorded to people with disabilities. Formal adoption of such a contextualized application of rational-basis review would give "legitimacy" to *Cleburne's* standard of review.

[Page 1222: Add the following commentary to the end of Note 1]

The first step under IDEA is to identify and accommodate a student with a specific disability requires a teacher, parent, or school administrator to refer the child in question for a special education evaluation. 20 U.S.C. §1414(a). Generally the parent makes the initial referral, otherwise the child's teacher will usually make the referral. The school then notifies the child's

parent or guardian, who must consent before the student can be evaluated. 20 U.S.C. §1414(a). Once such consent is given, the an evaluation is conducted by the school's Individualized Education Plan (IEP) team, which consists of a general education teacher, a special education teacher, and a representative of the local education agency, and may include the child's parent or guardian and the child. 20 U.S.C. §1414(d)(1)(B). The team uses standardized assessments, information provided by the parent, and other techniques "tailored to address specific areas of educational need." 20 U.S.C. §1414(b)(2); 34 C.F.R. §300.304. IDEA regulations also recommend that assessments "are not selected and administered so as not to be discriminatory on a racial or cultural basis." *Id.* If the IEP team determines that a child has a specific disability, then the team creates a unique IEP for the student. 20 U.S.C. §1414(d)(3). "The IEP is, in brief, a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." *Sch. Comm. of Burlington v. Dep't. of Educ.*, 471 U.S. 359, 368 (1985). It "will guide the child's education as long as he is diagnosed with a disability and qualifies for special education services." Nicole M. Oelrich, *A New "Idea": Ending Racial Disparity in the Identification of Students with Emotional Disturbance*, 57 S. D. L. Rev. 9, 14 (2012). IDEA also mandates various IEP requirements. The two most important are "free appropriate public education (FAPE) and the least restrictive environment (LRE), the latter also known as the mainstream or inclusion preference because it requires schools to integrate disabled and non-disabled students whenever possible. 34 C.F.R. §300.114. Parents and guardians are authorized to use various procedures to protect their disabled children's rights, including state-level administrative hearings, mediation, due process hearings, and lawsuits in federal courts. 20 U.S.C. §1415 (a)-(i). A court may award reasonable attorney's fees to the prevailing party, including a state or local educational agency where the plaintiff brings a frivolous lawsuit. 20 U.S.C. §1415 (i) (3). A prevailing party is one who secures a court judgment rather than one whose lawsuit was merely a "catalyst" for legislative reform. *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001).

[Page 1222: Insert New Note 2 and renumber remaining notes accordingly:]

2. What role does race place in the delivery of special education services? Race plays a dual role. One is positive, the other negative. Race is the former in that it played a role in conceiving the legislation. Senators who drafted the EAHCA were influenced not only by *PARC* and *Mills*, but also by *Brown v. Board of Education*. Vermont Senator Robert Stafford, for example, believed that "handicapped individuals represented a class of citizens similar to other aggrieved classes for whom civil rights laws have been expressly enacted." Robert T. Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 Vt. L. Rev. 71, 74 (1978). Race plays a negative role in that minority students are often resegregated within public schools through their over-placement in special education classes. See, e.g., Robert A Garda Jr., *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 Ala. L. Rev. 1071, 1072 (2005). In 2004, Congress reauthorized IDEA with an eye toward reducing the disproportionate placement of minority students in special education classes. *IDEA – Reauthorized Statute Disproportionality and Overidentification*, OFFICE OF SPECIAL

EDUCATION AND REHABILITATIVE SERVICES,
<http://www2.ed.gov/policy/speced/guid/idea/tb-overident.pdf> (Last visited Apr. 15, 2015). As the discussion in Note 1 indicates, IDEA requires all school districts to follow certain procedures when identifying a student's specific disability and creating the student's IEP. See 20 U.S.C. §1414 (2004). Educators, however, often do not follow these procedures correctly, which leaves the process vulnerable to racial bias. In addition, racial bias can creep into the IEP evaluation because "teachers, social workers, and psychologists often have to make subjective decisions on whether a child should receive special education services." Avi Salzman, *Special Education and Minorities*, N.Y. TIMES (Nov. 20, 2005) http://www.nytimes.com/2005/11/20/nyregion/nyregionspecial2/20octspecial.html?pagewanted=all&_r=0. For example, teachers often misinterpret cultural cues as evidence of an emotional or intellectual disability. See *Blunt v. Lower Merion Sch. Dist.*, 826 F. Supp. 2d 749, 753-55 (E.D. Pa. 2011) *aff'd*, 767 F.3d 247 (3d Cir. 2014) (discussing several students' experiences with specific disability evaluations that did not conform to IDEA standards; yet granting summary judgment against the plaintiffs for failure to show intentional discrimination by defendant school district notwithstanding the statistical evidence showing African Americans were 8% of the school district's enrollment but 16% of special ed students). Proper placement and accommodation are also important because students who graduate with a special-ed diploma, as opposed to a general-ed diploma, have limited access to college. See *Leveling the Special Ed Playing Field*, *Northeastern Law*, Winter 2016, at 13.

[Page 1230 : Delete Note 5]

[Page 1280: Add the following to the end of the first paragraph:]

In *Mayo v. PCC Structural, Inc.*, 795 F.3d 941 (2015), the court articulated the elements of a prima facie case in a similar fashion: "To prevail on an ADA claim of unlawful discharge, the plaintiff must establish a prima facie case by showing that: (1) he is a disabled person within the meaning of the statute; (2) he is a qualified individual with a disability; and (3) he suffered an adverse employment action because of his disability." The court ruled that Mayo was not a *qualified individual* because he could not perform the essential functions of his job, which included handling stress and interacting with others. Critically, the court noted that "he is not qualified when that stress leads him to threaten to kill his co-workers in chilling detail and on multiple occasions." Plaintiff, therefore, failed to establish a prima facie case that could shift the burden under the *McDonnell Douglas* burden-shifting framework.

[Page 1282: Replace Note 7 with following new Note 7:]

7. In *Weaving v. City of Hillsboro* 763 F.3d 1106 (9th Cir. 2014), petitioner Weaving was a police sergeant for the Hillsboro Police Department (HPD). Weaving was diagnosed with ADHD at six years old, but failed to disclose the information when he first joined the Beaverton Police Department in 1995. Weaving did not disclose the information because he did not believe ADHD still affected him, and subsequently passed psychological examinations. In 2001, Weaving became a narcotics detective on interagency team. He was taken off the team less than

a year later because of “‘personality’ conflicts with another officer.” Weaving was put back on the team in 2003, but due to continuing difficulties with colleagues, Weaving left to join an FBI task force. In 2006, Weaving was hired by HPD. Weaving disclosed that he had a childhood history ADHD but he did not believe it continued to affect him. He was promoted to sergeant in 2007. One of his subordinates claimed Weaving’s responses to questions were “‘demeaning.” Weaving insulted other HPD officers, implying that they were weak, and criticized a Latino officer for his English language skills. In March 2009, Weaving issued a disciplinary letter to a subordinate and further criticized the officer over the open radio. The officer had driven a marked police vehicle through a surveillance area. The subordinate filed a grievance against Weaving with the City Human Resources Department because he believed the letter was a disproportionate response to his actions. In April 2009, the City placed Weaving on paid administrative leave pending the investigation of the grievance. While on leave, it occurred to Weaving that some of his issues might have been caused by his ADHD. Dr. Monkarsh, a clinical psychologist, concluded that Weaving suffered from adult ADHD, and testified that people with ADHD “‘have a hard time understanding their emotions, the emotions of others...the ability to empathize with others’... [and that] someone with Weaving’s characteristics ‘could be an excellent police officer.’” Weaving requested “‘all reasonable accommodations’” including reinstatement to his position as sergeant. The grievance investigation included interviews of 28 HPD employees. The interviews showed that Weaving had “‘creat[ed] and foster[ed] a hostile work environment for his subordinates and peers; in particular, he has been described...as tyrannical, unapproachable, non-communicative, belittling, demeaning, threatening, intimidating, arrogant, and vindictive.” The City conducted their own medical evaluation of Weaving’s fitness for duty. “Two doctors found Weaving fit for duty despite his ADHD diagnosis.” In November 2009, the Deputy Chief of Police sent Weaving a sixteen-page letter advising him of the City’s intention to terminate his employment. “After a hearing, the City terminated Weaving’s employment effective December 11, 2009.” Weaving sued the city in federal district court under the ADA, alleging that “(1) the City fired him because he had an impairment that limited his ability to work or interact with others, and (2) the City fired him because it regarded him as disabled.” The City moved for judgment as a matter of law and the district court denied the motion. The City renewed the motion at the close of all evidence, and the district court denied the motion again. The jury was instructed that Weaving was disabled “if he had a mental impairment that substantially limited one or more major life activities, including ‘interacting with others, working and communicating.’” The jury returned a verdict for Weaving, finding him disabled under the ADA, and found that the City had fired him because of his disability. Weaving was awarded \$75,000 in damages, \$232,143 in back pay, \$330,807 in front pay, and \$139,712 in attorney’s fees. The district court “refused Weaving’s request for reinstatement because of ‘hostility and antagonism between’ Weaving and HPD.” The City filed a renewed motion of judgment as a matter of law based on insufficient evidence, as well as a motion for a new trial based on erroneous jury instruction. The district court denied the motions. The City appealed. The Court of Appeals reversed the denial of the motion for judgment as a matter of law, but did not reach the denial of the motion for a new trial. The ADA lists working as a major life activity. The plaintiff must establish a substantial limitation on his ability to work. The 2008 amendments to the ADA relaxed the standard for determining whether a plaintiff is substantially limited, but Weaving cannot even satisfy this lower standard. There is evidence that Weaving was a skilled police officer, his supervisors selected him for high-level assignments, and he did well enough without ADHD treatment to be promoted to sergeant. Weaving’s only evidence that

ADHD limits his ability to work pertains to his interpersonal problems. Because of the strong evidence supporting Weaving's competence as a police officer, "a jury could not reasonably have concluded that Weaving's ADHD substantially limited his ability to work." Weaving argues he is disabled because his ADHD substantially limits his ability to interact with others. The 9th circuit recognizes interacting with others as a major life activity. Compared to precedent where plaintiffs were so severely impaired that they were housebound, Weaving's problems do not amount to a substantial impairment within the meaning of the ADA. Limiting the ability to get along with others is not the same a substantial limitation with the ability to interact with others. Weaving engaged in normal social interactions, his problems existed almost exclusively with his peers and subordinates. Based on the evidence, "no jury could have found Weaving disabled under the ADA. His ADHD did not substantially limit either his ability to work or to interact with others. The district court erred in denying the City's motion for judgment as a matter of law. Reversed and Remanded."

Chapter 10

Affirmative Action

C. Under Constitutional Law

1. Voluntary Affirmative Action

b. The Diversity Rationale

[Page 1386. Add to end of Note 2 after Grutter]

In *Fisher v. University of Texas at Austin*, 579 U. S. ____ (2016) (*Fisher II*), the Supreme Court, in 4-3 decision (opinion written by Justice Kennedy in which Justices Ginsburg, Breyer, and Sotomayor joined with Justices Alito, Roberts, and Thomas dissenting, Kagan having recused herself) reconfirmed the constitutional rules governing voluntary affirmative action in *Grutter v. Bollinger*, 539 U. S. 306 (2003). *Fisher v. University of Texas at Austin*, 132 S. Ct. 1536 (2013) (*Fisher I*) did not rule on the constitutionality of the university's affirmative action program, but, instead, sent the case back to the lower court for a consideration of whether the university could show that no workable race-neutral alternatives would “promote its interest in the educational benefits of diversity.” The lower court looked into the matter extensively, relying primarily on depositions and affidavits from various admissions officers, and found that the university had carried its burden of proof. *Fisher II* agreed with this finding and, upon that basis, held the university’s affirmative action program was constitutional.

The undergraduate admissions program at the University of Texas at Austin has two tracks. Mandated by state law in response to *Hopwood v. Texas*, 78 F. 3d 932 (5th Cir. 1996) (holding that the state did not have a compelling state interest in student body diversity, which holding *Grutter* effectively reversed), the first track, called the “Top Ten Percent Plan,” offers race-neutral admissions to any student who graduates from a Texas high school in the top 10% of his or her class. Seventy-five percent of the incoming freshman class is admitted under this track. The second track, which admits the remaining 25% of the freshman class, combines the applicant’s “Academic Index” (which consists of the SAT score and high school academic record) with the applicant’s “Personal Achievement Index.” The latter is a holistic review containing numerous factors among which race is only one factor along with the applicant’s leadership experience, extracurricular activities, awards/honors, community service, family responsibilities, socioeconomic status of the applicant’s family or school, the language spoken at the applicant’s home, and whether the applicant lives in a single-parent home. The university’s two-track admissions program was *sui generis*.

Petitioner Abigail Fisher applied for admission in the university’s schools of Business Administration and Liberal Arts for 2008 freshman class. She was not in the top 10% of her high school class and, therefore, was considered under the holistic program. Based on her GPA and

SAT score, petitioner's Academic Index score was 3.1 (out of 4.1). No holistic applicants for the fall 2008 Business or Liberal Arts freshman class were admitted unless their AI score exceeded 3.5 regardless of their Personal Achievement Index score. Brief of Respondent Before Supreme Court of the United States, at 12. Petitioner was denied admission. With the aid of a conservative organization, petitioner filed a lawsuit alleging that the university's consideration of race as part of its holistic-review process disadvantaged her and other white applicants in violation of the Equal Protection Clause. The Court disagreed.

Justice Kennedy began by reviewing the three legal principles laid down in *Fisher I* that courts must use when assessing the constitutionality of a voluntary race-based affirmative action program. First, the institution, in this case the university, must satisfy the strict scrutiny test, which is to say it must show that its use of race is narrowly tailored, or "necessary," to accomplish a compelling, constitutionally permissible interest. Second, although the decision to pursue the educational benefits that flow from student body diversity is an academic determination that deserves judicial deference, such deference is not automatic. Third, when determining whether the use of race is narrowly tailored to achieve a compelling interest, the university bears the burden of demonstrating the absence of "available" and "workable" "race-neutral alternatives."

Then Justice Kennedy noted that the holistic-review plan was not the component of the university's admissions process that had the largest impact on Fisher's chances of being admitted to the university. The Top Ten Percent Plan was much more determinative of Fisher's chances because it admitted three-quarters of the entering freshman class. But Fisher did not challenge the Top Ten Percentage Plan, which, because it was mandated by the Texas legislature, the university lacked authority to alter.

Drawing all reasonable inferences in Fisher's favor, the Court ruled that she failed to show by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected. Here, the Court rejected Fisher's claim that the university did not articulated its compelling interest with sufficient clarity because it failed to specify the level of minority enrollment that would constitute a "critical mass." Justice Kennedy ruled that 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." *Grutter* properly articulated those benefits, noting that a diverse student body "promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races, . . . and better prepare students for an increasingly diverse workforce and society." 539 U.S. at 330.

The university cannot merely assert a generalized interest in the educational benefits of diversity—diversity writ large. It must assert goals that are specific and, hence, sufficiently measurable to permit judicial scrutiny of the policies adopted to achieve them. The record here reveals that the university articulated concrete and precise; 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." These goals mirror the compelling interest *Grutter* and its progeny have approved. The university gave a "reasoned, principled explanation" for its decision in a 39-page proposal prepared after a year-long study revealed that its race-neutral policies and programs did not meet its goals. 579 U. S., at ____ (slip op., at 13). Furthermore, because the university is prohibited by law from using

racial quotas, 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.

The Court also rejected Fisher's claim that the university had already "achieved critical mass" by 2003 under the race-neutral Top Ten Percent Plan and that, therefore, race-conscious affirmative action was not needed. The Court found persuasive the university's conclusion, based on many months of study and deliberation and supported by significant statistical and anecdotal evidence, that its race-neutral track had not achieved the desired diversity goals. Minority enrollment had stagnated under the Top Ten Percent Plan, leaving many minority students feeling lonely and isolated. In addition, "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." 579 U. S., at ____ (slip op., at 15). Most of the minority students admitted under *Hopwood's* race-neutral track came from lower-performing, predominantly minority schools with academic abilities, perspectives, and life goals very different from minority student who graduated in, say, the top quarter percent of high-performing, predominantly white schools. "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." *Id.*, at slip op. 18.

Similarly, the Court rejected Fisher's argument that it was unnecessary to consider race in the admissions process because such consideration had only a minor impact on the number of minority students the school admitted. The record showed that black and Hispanic admissions increased by 54 percent and 94 percent, respectively, between 2003 and 2007. These statistics show that consideration of race has had a meaningful, if still limited, effect on diversifying the freshman class. Finally, the Court rejected Fisher's argument that there were numerous other race-neutral means to achieve the university's diversity goals. The university tried many of these means, such as socioeconomic affirmative action, and found none of them to be as effective as race-based affirmative action. The Court declined to consider "the extrarecord materials on which Justice Alito's dissenting opinion relies, many of which are tangential to this case at best and none of which the university has had a full opportunity to respond to." 579 U. S., at ____ (slip op., at 14).

A broad coalition of organizations, including many Fortune 100 companies, retired military leaders, 19 states, and national civil rights organizations, asked the Court to support the university's affirmative action program.

Is it possible to boost minority admissions through race-neutral admissions policies? Justice Ginsburg argued in her dissent in *Fisher I*, which Justice Kennedy picks up in his majority opinion in *Fisher II*, that the Top Ten Percent Plan, though facially neutral, was "adopted with racially segregated neighborhoods and schools front and center stage. . . . It is race consciousness, not blindness to race, that drives such plans. . . . "[O]nly an ostrich could regard the supposedly neutral alternatives as race unconscious." 579 U. S., at ____ (slip op., at 16-17) (internal citations omitted). Consider whether the alternatives to race-conscious affirmative action discussed in Section D, *infra*, are in fact race-neutral and also effective in achieving racial diversity in higher education.

In his dissenting opinion, filed separately, Justice Thomas reaffirmed that "a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause." Justice Thomas would overrule *Grutter*. In his concurring opinion in *Fisher*

I, Justice Thomas challenged the value and effectiveness of race-based affirmative action for black and Latino students, the intended beneficiaries of most affirmative action admissions policies. He argued that these students are in over their heads in prestigious schools and would be better off in less competitive schools. This is called the “mismatch theory.” For an intense debate regarding the mismatch theory in the context of law schools, see, e.g., Richard H. Sander and Stuart Taylor Jr., *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It* (2012); William C. Kidder and Angela Onwuachi-Willig, *Still Hazy After All These Years: The Data and Theory Behind "Mismatch"* (reviewing Richard Sander & Stuart Taylor, Jr. *Mismatch, How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It*), 92 Tex. L. Rev. 895 (2014); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004); David L. Chambers et al., *The Real Impact of Ending Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 Stan. L. Rev. 1855 (2005); Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807 (2005); Richard Sander, *A Reply to Critiques*, 57 Stan. L. Rev. 1963 (2005); Richard O. Lempert et al., *Affirmative Action in American Law Schools: A Critical Response to Richard Sander's "A Reply to Critics,"* University of Michigan, John M. Olin Center for Law & Economics Working Paper 60 (February 24, 2006).

Justice Alito filed a dissenting opinion, joined by Chief Justice Roberts and Justice Thomas, in which he noted that the majority had repudiated the Court's anti-affirmative action stance taken in *Fisher I*. He also criticized the majority for buying into the assumption “that the Top Ten Percent admittees are somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review,” and for allowing the university to meet its burden under the constitutional means test by relying “on a series of unsupported and noxious racial assumptions.”

[Page 1391. Add New Note 13 after *Grutter*]

13. Having been successful in California (see Note 12), Ward Connerly backed a voter-approved constitutional amendment in Michigan banning race-sensitive admissions in state colleges. The ballot proposal was called “Proposal 2,” which became Article I, § 26, of the Michigan Constitution after it passed by a margin of 58 percent to 42 percent of the vote. In *Schuette v. Coalition to Defend Affirmative Action Integration & Immigration Rights & Fight for Equality by Any Means Necessary (BAMN)*, 134 S. Ct. 1633 (2014), the Supreme Court considered the constitutionality of this voter initiative, which specifically prevents the state from using “race, sex, color, ethnicity, or national origin” to “grant preferential treatment” to any individual seeking “public employment, public education, or public contracting.” In a plurality opinion, six justices held that the amendment did not violate the Equal Protection Clause of the U.S. Constitution. The justices were divided 3 (plurality), 2 (concurring), 1 (concurring), excluding an additional concurring opinion by Chief Justice Roberts, who although joining the plurality opinion, wrote separately to answer one aspect of the dissenting opinion. Justice Kennedy wrote the plurality opinion, joined by Chief Justice Roberts and Justice Alito; Justice Scalia wrote a concurring opinion, joined by Justice Thomas; and Justice Breyer wrote a concurring opinion, breaking rank with kindred spirits on the Court, Justices Sotomayor and Ginsburg, who dissented in an opinion written by Justice Sotomayor. Justice Kagan was recused from the case. The plurality and concurring opinions emphasized the belief that this case raises only a process question—“who

may resolve” the debate over the use of race in higher education admissions—and not a substantive issue—the constitutionality of using race in higher education admissions. Hence, the question was not whether the race-based admission policies at Michigan universities were constitutionally permissible, but rather whether it was constitutionally permissible for the state voters to override those policies. The six plurality and concurring justices ruled that State voters can prohibit such preferences, thereby removing from college administrators the authority to even entertain race-based affirmative action questions.

Justice Kennedy based his decision on a belief that the “political process doctrine” was the controlling law of the case. Taken most prominently from *Washington v. Seattle School District*, 459 U. S. 457 (1982), and *Hunter v. Erickson*, 393 U.S. 385 (1969) (these cases are discussed, along with *Reitman v. Mulkey*, 387 U. S. 369 (1967) in Chapter 3, Section F (Circumvention by Referendum)), the doctrine triggers strict scrutiny when a majority reconfigures the political process in a manner that burdens only a racial minority. Hence, if a racial minority believes that a governmental policy benefits it, state action that burdens that policy is subject to strict scrutiny. Justice Kennedy held that doctrine was inapplicable to the present case because the doctrine applies solely to state action that has “the serious risk, if not the purpose, of causing specific injuries on account of race”—in other words, to acts of intentional discrimination. Section 26, Justice Kennedy opined, was facially nonracial. Hence, even if § 26 created a “higher hurdle” for affirmative action proponents, who are mainly minorities, than for affirmative action opponents, who are mainly white, it was inapplicable because the voter-initiative was not motivated by the intent to discriminate on the basis of race. 134 S. Ct. at 1631-1938.

Concurring in the judgment, Justice Scalia disagreed with the plurality and agreed with the dissent that the political-process doctrine applies to reconfigured political processes that unintentionally burden racial minorities. Counting the dissent, there were four justices who disagreed with the plurality’s interpretation of the political process doctrine. Therefore, Justice Scalia’s opinion warrants some consideration. He wrote:

The political-process doctrine has its roots in two of our cases. The first is *Hunter*. In 1964, the Akron City Council passed a fair-housing ordinance ‘assur[ing] equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry or national origin.’ 393 U. S., at 386. Soon after, the city’s voters passed an amendment to the Akron City Charter stating that any ordinance enacted by the council that ‘regulates’ commercial transactions in real property ‘on the basis of race, color, religion, national origin or ancestry’ — including the already enacted 1964 ordinance — ‘must first be approved by a majority of the electors voting on the question’ at a later referendum. *Id.*, at 387. The question was whether the charter amendment denied equal protection. Answering yes, the Court explained that ‘although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law’s impact falls on the minority. The majority needs no protection against discrimination.’ *Id.*, at 391. By placing a ‘special burden on racial minorities within the governmental processes,’ the amendment ‘disadvantage[d]’ a racial minority ‘by making it more difficult to enact legislation in its behalf.’ *Id.*, at 391, 393.

. . . Resolving to ‘eliminate all [racial] imbalance from the Seattle public schools,’ the city school board passed a mandatory busing and pupil-reassignment plan of the sort typically imposed on districts guilty of de jure segregation. 458 U. S., at 460-461. A year later, the citizens of the State of Washington passed Initiative 350, which directed (with exceptions) that ‘no school . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student’s place of residence . . . and which offers the course of study pursued by such student,’ permitting only court-ordered race-based busing. *Id.*, at 462. The lower courts held Initiative 350 unconstitutional, and we affirmed, announcing in the prelude of our analysis — as though it were beyond debate — that the Equal Protection Clause forbade laws that ‘subtly distort governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.’ *Id.*, at 467.

The first question in *Seattle* was whether the subject matter of Initiative 350 was a ‘racial’ issue,’ triggering *Hunter* and its process doctrine. 458 U. S., at 471-472. It was ‘undoubtedly. . . true ‘that whites and blacks were counted among both the supporters and the opponents of Initiative 350.’ *Id.*, at 472. It was ‘equally clear’ that both white and black children benefitted from desegregated schools. *Ibid.* Nonetheless, we concluded that desegregation ‘inures *primarily* to the benefit of the minority, and is designed for that purpose.’ *Ibid.* (emphasis added). In any event, it was ‘enough that minorities may consider busing for integration to be legislation that is in their interest.’ *Id.*, at 474 (quoting *Hunter*, *supra*, at 395 (Harlan, J., concurring)).

So we proceeded to the heart of the political-process analysis. We held Initiative 350 unconstitutional, since it removed ‘the authority to address a racial problem — and only a racial problem — from the existing decisionmaking body, in such a way as to burden minority interests.’ *Seattle*, 458 U. S., at 474. Although school boards in Washington retained authority over other student-assignment issues and over most matters of educational policy generally, under Initiative 350, minorities favoring race-based busing would have to ‘surmount a considerably higher hurdle’ than the mere petitioning of a local assembly: They ‘now must seek relief from the state legislature, or from the statewide electorate,’ a ‘different level of government.’ *Ibid.*

The relentless logic of *Hunter* and *Seattle* would point to a similar conclusion in this case. In those cases, one level of government exercised borrowed authority over an apparently ‘racial issue,’ until a higher level of government called the loan. So too here. In those cases, we deemed the revocation an equal-protection violation regardless of whether it facially classified according to race or reflected an invidious purpose to discriminate. Here, the Court of Appeals did the same.

The plurality sees it differently. Though it, too, disavows the political-process-doctrine basis on which *Hunter* and *Seattle* were decided, ante, at 10-14, it does not take the next step of overruling those cases. Rather, it reinterprets them beyond recognition. *Hunter*, the plurality suggests, was a case in which the challenged act had ‘target[ed] racial minorities.’ Ante, at 8. Maybe, but the *Hunter* Court neither found that to be so nor considered it relevant, bypassing the question of intent entirely, satisfied that its newly minted political-process theory sufficed to invalidate the charter amendment.

As for *Seattle*, what was really going on, according to the plurality, was that Initiative 350 had the consequence (if not the purpose) of preserving the harms effected by prior de jure segregation. Thus, ‘the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race.’ Ante, at 17. That conclusion is derived not from the opinion but from recently discovered evidence that the city of *Seattle* had been a cause of its schools’ racial imbalance all along: ‘Although there had been no judicial finding of de jure segregation with respect to *Seattle*’s school district, it appears as though school segregation in the district in the 1940’s and 1950’s may have been the partial result of school board policies.’ Ante, at 9. That the district’s effort to end racial imbalance had been stymied by Initiative 350 meant that the people, by passing it, somehow had become complicit in *Seattle*’s equal-protection-denying status quo, whether they knew it or not. Hence, there was in *Seattle* a government-furthered ‘infliction of a specific’ — and, presumably, constitutional — ‘injury.’ Ante, at 14.

Once again this describes what our opinion in *Seattle* might have been, but assuredly not what it was. The opinion assumes throughout that *Seattle*’s schools suffered at most from de facto segregation, see, e.g., 458 U. S., at 474, 475 - that is, segregation not the ‘product . . . of state action but of private choices,’ having no ‘constitutional implications,’ *Freeman*, 503 U. S. at 495-496. Nor did it anywhere state that the current racial imbalance was the (judicially remediable) effect of prior de jure segregation. Absence of de jure segregation or the effects of de jure segregation was a necessary premise of the *Seattle* opinion. That is what made the issue of busing and pupil reassignment a matter of political choice rather than judicial mandate. And precisely because it was a question for the political branches to decide, the manner—which is to say, the process—of its resolution implicated the Court’s new process theory. The opinion itself says this: ‘[I]n the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process. For present purposes, it is enough [to hold reallocation of that political decision to a higher level unconstitutional] that minorities may consider busing for integration to be legislation that is in their interest.’ 458 U. S. at 474 (internal quotation marks omitted).

134 S. Ct. at 1640-1643. Justice Scalia would overturn *Hunter* and *Seattle*. *Id.* at 1643. He joined in the judgment because the voter-approved constitutional amendment was consistent with his view that any race-based program violates the Equal Protection Clause.

Also concurring in the judgment, Justice Breyer wrote separately to emphasize that the Constitution permits, but does not require, the use of the kind of race-conscious programs now barred by the Michigan Constitution. He believed that the political process doctrine was inapplicable here because this case did not involve a diminution of the minority's ability to participate in the political process. Rather, it involved an amendment that took decision making authority away from unelected actors (university faculty and administrators) and placed it in the hands of the voters. *Id.* at 1648-1651.

Dissenting, Justice Sotomayor argued that the political process doctrine governed unintentional discrimination and, as such, clearly applied to this case. The Michigan amendment absolutely created a “higher hurdle” for racial minorities. The amendment “stripped Michigan's elected university boards of their authority to make decisions with respect to constitutionally permissible race-sensitive admissions policies, while preserving the boards' plenary authority to make all other educational decisions.” 134 S. Ct. at 1683. She further explained:

“Before the enactment of § 26, Michigan's political structure permitted both supporters and opponents of race-sensitive admissions policies to vote for their candidates of choice and to lobby the elected and politically accountable boards. Section 26 reconfigured that structure. After § 26, the boards retain plenary authority over all admissions criteria except for race-sensitive admissions policies. To change admissions policies on this one issue, a Michigan citizen must instead amend the Michigan Constitution. That is no small task. To place a proposed constitutional amendment on the ballot requires either the support of two-thirds of both Houses of the Michigan Legislature or a vast number of signatures from Michigan voters — 10 percent of the total number of votes cast in the preceding gubernatorial election. . . .

And the costs of qualifying an amendment are significant. . . . Michigan's Constitution has only rarely been amended through the initiative process. Between 1914 and 2000, voters have placed only 60 statewide initiatives on the Michigan ballot, of which only 20 have passed. . . .

This is the onerous task that § 26 forces a Michigan citizen to complete in order to change the admissions policies of Michigan's public colleges and universities with respect to racial sensitivity. While substantially less grueling paths remain open to those advocating for any other admissions policies, a constitutional amendment is the only avenue by which race-sensitive admissions policies may be obtained. The effect of § 26 is that a white graduate of a public Michigan university who wishes to pass his historical privilege on to his children may freely lobby the board of that university in favor of an expanded legacy admissions policy, whereas a black Michigander who was denied the opportunity to attend that very university cannot lobby the board in favor of a

policy that might give his children a chance that he never had and that they might never have absent that policy.”

Id. at 1661-1662. Does *Schuetz* suggest that *Grutter*’s bell may soon toll? For discussions of the case, see, e.g., Mark Walsh, *The Future of Race: The Michigan Ruling May Enliven the Debate Over Affirmative Action*, ABA Journal, June, 2014, at 22; Christopher E. D'Alessio, *A Bridge too Far: The Limits of the Political Process Doctrine in Schuetz v. Coalition to Defend Affirmative Action*, 9 Duke J. Const. L. & Pub. Pol’y Sidebar 103 (2013). On Justice Sotomayor’s powerful dissent, see Adam Liptak, *Sotomayor Finds Her Voice Among Justices*, New York Times, 5/7/2014, at A1.

D. Beyond Affirmative Action

1. Racial Fairness without Racial Preferences

[Page 1404. Replace the first paragraph with the following:]

Before approving a race-based affirmative action program, a court must determine whether the university “could achieve sufficient diversity without using racial classifications.” *Fisher v. University of Texas at Austin*, 132 S. Ct. 1536 (2013) (referring to the constitutional means test). Are there viable alternatives to race-based affirmative action? Consider the following candidates.

d. Percentage Plans

[Page 1406. Replace Subsection d. with the following:]

Another device that attempts to achieve fairness without the use of racial preferences is the “percentage plan.” The first percentage plan was enacted by the Texas legislature, see H.R. 588, 75th Leg. (Tex. 1997), in an attempt to boost minority college admissions in the wake of *Hopwood v. Texas*, 78 F.3d 932, 944–945 (5th Cir. 1996) (banning the use of race-based college admissions at the University of Texas and other state educational institutions), which effectively has been reversed by *Grutter*, *supra*. Under the Texas 10-Percent Plan, students graduating in the top 10 percent of their high school classes receive automatic admission to all of Texas’ 35 state colleges and universities, including the prestigious University of Texas. SAT and ACT scores are not counted for admission, but students must still take either test. Schools are authorized to go deeper into the pool and grant automatic admissions to the top 25 percent. Below the level of automatic admissions, schools can grant admission only on the basis of 18 other non-racial, socioeconomic indicators or factors. Similarly, the University of California at one time used a 4-Percent Plan, which automatically admits the top 4% of every high school graduating class in the state. Florida has adopted a 20-Percent Plan. According to the Department of Education, the rigor of a student’s high-school curriculum is a better predictor of whether a student will graduate from college than either test scores or high-school grades. See U.S. Department of Education, *Answers in the Tool Box: Academic Intensity, Attendance Patterns, and Bachelor’s Degree Attainment* (1999). Percentage plans attempt to create diverse college student bodies from *de facto* segregated

secondary schools. The paradox is painfully obvious. See Michelle Adams, *Isn't it Ironic? The Central Paradox at the Heart of "Percentage Plans,"* 62 Ohio St. L. J. 1729 (2001). Minority-targeted marketing and recruitment—what Professor Michelle Adams calls "race-conscious, non-preferential" or "soft" affirmative action—often accompany percentage plans. Are "soft" affirmative action programs constitutionally sound? See Michelle Adams, *The Last Wave of Affirmative Action*, 1998 Wis. L. Rev. 1395. See also, Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 Georgetown L. J. 2331 (2000); *University of Texas Leaves Hopwood Behind*, The Journal of Blacks in Higher Education (July 15, 2004).

How effective are the percentage plans in increasing minority, particularly black and Latino, college admissions? The results vary from positive to negative, depending on the sources relied upon. For further discussion of percentage plans, see, e.g., William E. Forbath & Gerald Torres, *Merit and Diversity After Hopwood*, 10 Stan. L. & Pol. Rev. 185 (1999); T. Vance McMahan & Don R. Willett, *Hope from Hopwood: Charting a Positive Civil Rights Course for Texas and the Nation*, 10 Stan. L. & Pol. Rev. 163, 175 (1999); Jeffrey Selinger, *U. of California's 4 Percent Plan Helps Hispanic and Rural Applicants Most*, The Chronicle of Higher Education, May 14, 2002; Lani Guinier, *"Texas Plan" is the Right One on Affirmative Action*, Houston Chronicle, Apr. 24, 1998. See generally, Adams, *Isn't it Ironic?*, supra.

At the University of Texas at Austin, the Ten Percent Plan admitted 75 percent of the freshman class in 2008. In 2009, the Texas legislature passed the Senate Bill (SB) 175, which modified the automatic admission process under the Ten Percent Plan for all public colleges and universities in Texas. See *Automatic Admission*, utexas.edu, www.bealongs.utexas.edu/freshmen/after-you-apply/automatic-admission (last visited July 1, 2013). Under this new law, state colleges and universities are not required to admit more than 50 percent of their incoming class under the Ten Percent Plan. This new law comes after community push back and criticism that Texas state institutions are filled with too many ten percent students. S.B. 175, 81st Leg. (Tex. 2009).

e. Socioeconomic Preferences

[Page 1407. Replace Subsection e. with the following:]

A more politically popular alternative to race-based affirmative action is the use of income-based admissions preferences. Socioeconomic affirmative action programs look to such factors as parental income, occupation, and education as well as family structure (traditional versus single parent), neighborhood, concentrations of poverty, and school district. Universities using socioeconomic affirmative action often do so in lieu of race-based affirmative action, but, as the University of Michigan's point system illustrates (see notes following *Grutter*, supra), they can also be used in conjunction with traditional affirmative action or with another affirmative-action alternative, such as the whole-person theorem discussed in subsection a, supra. The University of California, for example, examines applicants using factors such as "low family income" and "disadvantaged social or educational environment" as part of its Comprehensive Review Program (see subsection a, supra), which runs in tandem with its Percentage Plan (see subsection d, supra). Public universities in Florida, Washington, and Texas also have socioeconomic affirmative action plans. See Richard Kahlenberg, *Economic Affirmative Action in College Admissions: A Progressive Alternative to Racial Preferences and Class Rank Admissions Plans*, The Century

Foundation, at [http://www.tcf.org/Publications/ Issue_Briefs/kahlenberg-affaction.pdf](http://www.tcf.org/Publications/Issue_Briefs/kahlenberg-affaction.pdf) (available on July 11, 2003) (Kahlenberg's work relies heavily on the study conducted by Carnevale and Rose, *infra*). Given the fact that students admitted with the assistance of socioeconomic preferences are from low-income families and, hence, require substantial financial aid from the university, it would seem that, on grounds of cost alone, universities would prefer race-based affirmative action. Traditional affirmative action tends to bring in middle- and upper-income African American and Latino students whose parents can assume some of the cost of college.

There is considerable disagreement concerning whether socioeconomic preferences are as effective as affirmative action in admitting underrepresented people of color. Anthony Carnevale and Stephen Rose attempt to answer this question in a much-discussed study conducted for The Century Foundation. The authors collected data from 146 of the nation's top colleges. Not surprisingly, they report that "there is even less socioeconomic diversity than racial and ethnic diversity at the most selective colleges." Anthony P. Carnevale and Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity and Selective College Admissions*, The Century Foundation (March 31, 2003), at http://www.tcf.org/Publications/White_Papers/carnevale_rose.pdf (available on July 11, 2003). For example, 74 percent of the available slots at these 146 schools are filled by students from families in the top 25 percent of the nation's socioeconomic scale, whereas only 3 percent of these highly selective slots are occupied by students with families from the bottom 25 percent of the socioeconomic scale. Carnevale and Rose argue that socioeconomic preferences are slightly less effective than traditional affirmative action in bringing underrepresented minorities to college campuses. The former admits about 2 percent fewer minorities than the latter. Where strictly racial preferences are used, the students of color admitted tend to be from the middle and upper classes. This causes Kahlenberg to assert that "it is difficult, as a matter of fairness, to insist on continuing to use race to benefit advantaged students of color, living in advantaged communities and enjoying the benefits of substantial net worth." For their part, Carnevale and Rose, reflecting the view of most scholars, argue that socioeconomic preferences should only be used as a supplement, rather than a replacement, to race-based preferences in colleges. Combining racial preferences and socioeconomic preferences will enable a university to meet its social obligations as to race and class, thereby achieving the highest levels of diversity possible.

The Carnevale and Rose study makes an important contribution, but it is not problem free. First, the effectiveness of socioeconomic preferences in increasing minority enrollment is just 2 percent less than the effectiveness of racial preferences. See *id.* That is not much to crow about. Second, the unusually large number of colleges and universities included in the study (146) lessens the significance of the information generated by the study. The action is at the top 20 schools. Students are fighting to get into Harvard, Yale, Princeton, Duke, Stanford, Berkeley, Williams College, and the short list of other schools at that level.

Socioeconomically, traditional affirmative action "is less an escalator up than it is a bridge across." Steven A. Holmes and Greg Winter, *Fixing the Race Gap in 25 Years or Less*, New York Times, §4 (Week in Review), 6/29/03, at 14. But from an educational standpoint, traditional affirmative action *is* an escalator up for middle-class African Americans and Latino students with limited educational opportunities. These students need affirmative action to get into the nation's top colleges because they do not do well on the SAT. Indeed, they are outscored by poor and working-class white students. See Roy L. Brooks, *Atonement and Forgiveness: A New Model for Black Reparations* 83–88 (2004). Although there are many theories as to why this is the case, see *id.*, one of the most plausible theories pushed by the Educational Testing Service, the organization that writes the SAT, and others is that middle-class Black and Latino students bring limited

educational opportunities to the table when they sit for the SAT. These students for the most part attend high schools that lack a rigorous curriculum and are taught by inexperienced or poorly trained teachers in oversized, low-tech classes. See *id.* at 84–85. See also *The ETS Thesis on Why Blacks Tend to Have Low Scores on the SAT*, *Journal of Blacks in Higher Education* 66 (Spring 2004). If this analysis is correct, then racial preferences will continue to have an escalator effect even on middle-class African American and Latino students. These students will continue to benefit more from racial preferences than from socioeconomic preferences.

None of this analysis is intended to suggest that minority families have no role to play in helping their children become more competitive for college. "Unfortunately, reading is not the No. 1 priority as a habit [in middle-class black homes]. There is much more emphasis on television watching." Holmes and Winter, *Fixing the Race Gap*, *supra*, at 14. What the studies on socioeconomic preferences have done is to force educators, policymakers, and minority families to focus on their shared responsibilities to make racial preferences obsolete. As Lisa Navarette, vice president of the National Council of La Raza has said in reference to Justice O'Connor's projection in *Grutter*, "We expect that 25 years from now, the use of racial preferences will no longer be necessary:" "If all we do over the 25 years is affirmative action, then we will still need affirmative action." *Id.* (quoting Ms. Navarette).