(Slip Opinion)

Whether the Magnet School Assistance Program Violates the Constitution's Equal-Protection Guarantee

The Magnet School Assistance Program triggers strict scrutiny because it facially classifies by race and is motivated by the racially discriminatory purpose of changing the racial composition of K–12 schools.

As currently implemented, the Magnet School Assistance Program fails strict scrutiny because it is not narrowly tailored to achieve the government's sole compelling interest in remedying specific instances of illegal discrimination.

The Department of Education may implement the Magnet School Assistance Program in a way that satisfies strict scrutiny by ensuring that grants (1) are issued only to schools that will use the funds to remedy specific instances of illegal discrimination, and (2) are narrowly tailored to that end.

November 5, 2026

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
DEPARTMENT OF EDUCATION

Congress has recognized the important role that magnet schools play in public education. Magnet schools offer a wide range of educational programs, provide meaningful opportunities for school choice, and foster academic excellence and innovation within the public school system. *See* 20 U.S.C. § 7231(a)(3), (b)(2)–(6). Congress sought to support magnet schools through the Magnet School Assistance Program ("MSAP" or "program"), which authorizes the Secretary of Education to award local educational agencies with funds to support magnet-school programming. *Id.* § 7231b. The Secretary has awarded hundreds of millions of dollars under this program.

Notwithstanding magnet schools' important contributions to public education, MSAP grants are not primarily focused on promoting academic excellence. Their purpose "is to assist in the desegregation of schools." *Id.* The statutory and regulatory scheme thus requires the Secretary to prioritize race when awarding funds. *See id.* §§ 7231b–7231c. The consequence is that the MSAP scheme does not allow the Secretary to allocate program funds to any public school based on educational need or school quality. Funds instead go to magnet schools based on their racial compositions for the purpose of changing their racial mix. *See* 34 C.F.R. §§ 280.2(b),

280.4(b). You have asked whether program grants violate the Constitution's equal-protection guarantee under recent Supreme Court precedent. *See* Memorandum for T. Elliott Gaiser, Assistant Attorney General, Office of Legal Counsel, from Candice Jackson, Acting General Counsel, Department of Education, *Re: Request for OLC Opinion on the Constitutionality of the Magnet Schools Assistance Program* (July 24, 2026) ("DOE Request"); *Louisiana v. Callais*, 146 S. Ct. 1131 (2026); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) ("*SFFA*").

In many applications, the answer is yes, the program violates equal-protection requirements. Congress reasonably chose to support magnet schools and their important function in the public education ecosystem. But the racialized framework through which Congress chose to fund magnet school programming places MSAP in unconstitutional terrain. As currently structured and administered, the program triggers strict scrutiny and, in most cases, cannot satisfy it. That does not mean the statute is unconstitutional in all applications; some MSAP grants could theoretically satisfy strict scrutiny's exacting standards, although we are not aware of any specific grant that currently does so. The Department of Education must therefore adjust its grantmaking approach to ensure it conforms to the Constitution's equal-protection requirements.

This opinion proceeds in three parts. Part I describes the program's legal and factual background. Part II explains why the program triggers—and largely fails—strict scrutiny. Part III sets forth how the Department must administer the program to conform it to constitutional requirements.

I.

A.

A magnet school is a public K–12 educational institution "that offers a special curriculum capable of attracting substantial numbers of students of different racial backgrounds." 20 U.S.C. § 7231a. Magnet schools originated in the United States to desegregate public schools. *See* Julian R. Betts & Chenzi Cao, *Magnet School Outcomes*, in *Handbook of Research on School Choice* at 273 (Mark Berends et al. eds., 2d ed. 2019) ("*Magnet School Handbook*"). "The idea was to create public schools with a distinct curricular or pedagogical focus and to allow any student in the district to

attend." *Id.* Magnet schools are frequently placed "in lower-income areas of a district to draw higher-income students of different races or ethnicities from other parts of the district." *Id.* But they are sometimes placed "in relatively affluent neighborhoods with the same strategy in mind." *Id.* Today, magnet schools are "one of the most widespread forms of public school choice." Ellen B. Goldring & Walker A. Swain, *Perspectives on Magnet Schools*, in *Magnet School Handbook* at 241 ("Goldring & Swain").

1.

The first magnet school was formed in the 1960s. *Id.* With federal funding, such schools became widespread in the 1970s and 1980s as part of court-ordered or agency-approved desegregation plans. *See* Ryan Pfleger & Gary Orfield, C.R. Project, *Segregated Choices: Magnet and Charter Schools* at 5–9 (2024), https://perma.cc/T44Z-ZY5E; Claire Smrekar, *The Social Context of Magnet School Programs*, in *Magnet School Handbook* at 259. In 1972, Congress enacted the Emergency School Aid Act ("ESAA"), which authorized the Secretary to award grants to educational agencies implementing a court-ordered desegregation plan or a plan "approved by the Secretary as adequate under title VI of the Civil Rights Act of 1964 for the desegregation of minority group segregated children or faculty." Pub. L. No. 92-318, § 706(a)(1)(A), 86 Stat. 235, 356. Congress identified three purposes for providing this financial assistance. *First*, "to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty" in K–12 education. *Id.* § 702(b)(1), 86 Stat. at 354. *Second*, "to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students." *Id.* § 702(b)(2), 86 Stat. at 354. *Third*, "to aid school children in overcoming the educational disadvantages of minority group isolation." *Id.* § 702(b)(3), 86 Stat. at 354.

ESAA eventually lapsed, but in 1984, Congress enacted a magnet-schools assistance program that endured. *See* Education for Economic Security Act, Pub. L. No. 98-377, §§ 701–712, 98 Stat. 1267, 1299–302 ("EESA"). Ever since then, the Department has administered a program that "offer[s] multiple-year grants to school districts through a competi-

tive process." U.S. Dep't of Educ., *Evaluation of the Magnet Schools Assistance Program, 1998 Grantees: Final Report* at 22 (2003), https://perma.cc/DB4J-LCZY. The 1984 law retained two of ESAA's original purposes and added two more: (1) "to enable [educational] agencies to establish and operate magnet schools," and (2) "to encourage the development of courses of instruction within magnet schools that will substantially strengthen the knowledge of academic subjects and the grasp of tangible and marketable vocational skills of students attending such schools." EESA § 703(1), (4), 98 Stat. at 1299. Many of its provisions track the statutory language today, including its definitions, its authorization provision, and certain application requirements. *See infra* Part I.B.

Over the intervening years, the MSAP statute has undergone several amendments and recodifications. We need not summarize them here beyond emphasizing a few points related to the statutory purposes and findings. In 1985, Congress narrowed the program's purposes down to two: the first relating to countering minority-group isolation and the second aimed at strengthening academic achievement in magnet schools. *See* National Science Foundation Authorization Act for Fiscal Year 1986, Pub. L. No. 99-159, sec. 262, § 703, 99 Stat. 887, 901. These two purposes continued to undergird the program after Congress reenacted MSAP in 1988. *See* Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, sec. 1001, § 3003, 102 Stat. 130, 231. Congress later amended and recodified MSAP as part of the Improving America's Schools Act of 1994, Pub. L. No. 103-382, sec. 101, §§ 5101–5113, 108 Stat. 3518, 3690–95. Those revisions included five legislative findings regarding magnet schools' educational and desegregation benefits. *Id.* § 5101, 108 Stat. at 3690–91. Congress also reframed the statutory purpose as "assist[ing] in the desegregation of schools . . . by providing financial assistance" for, among other things, countering "minority group isolation" and developing "innovative educational methods and practices." *Id.* § 5102, 108 Stat. at 3691. This statutory purpose and the enacted findings largely persist today, albeit with some substantive changes. *See, e.g.*, No Child Left Behind Act of 2001, Pub. L. No. 107-110, sec. 501, §§ 5301–5311, 115 Stat. 1425, 1806–11 (2002) (amending and recodifying the program); Every Student Succeeds Act, Pub. L. No. 114-95, sec. 2, § 4401, 129 Stat. 1802, 2014–16 (2015) (amending and reauthorizing the program).

2.

The program's dual focus on racial desegregation and educational quality reflects more than a half-century of history. Magnet schools' original "purpose . . . was reducing racial isolation." Goldring & Swain at 242. But "[o]ver time, magnet schools have evolved, with their original focus on racial integration shifting toward an emphasis on academic achievement, specialized educational offerings, and school choice." Sinclair Nicholas, *Magnet Schools*, EBSCO (2019), https://perma.cc/5XU7-5BUV.

Two changes in the legal landscape contributed to this trend: (1) active judicial desegregation orders decreased, and (2) judicial decisions restricting the use of race-based decisions in education increased. *See* Goldring & Swain at 250–52. Courts have historically imposed desegregation decrees, with judicial supervision to ensure compliance, on school districts that engaged in illegal racial discrimination. "A large number of school district desegregation cases have remained under court supervision for very long periods of time, some for decades." Ronna Greff Schneider, *Education Law: First Amendment, Due Process, & Discrimination* § 5:10 (2026 ed.). But such "a school system must be declared unitary when it no longer discriminates between children on the basis of race." *Belk v. Charlotte-Mecklengburg Bd. of Educ.*, 269 F.3d 305, 318 (4th Cir. 2001). To decide whether a school has achieved unitary status, a court's "ultimate inquiry is whether the constitutional violator has complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination have been eliminated to the extent practicable." *Missouri v. Jenkins*, 515 U.S. 70, 89 (1995) (cleaned up).

Schools are achieving unitary status at "a rapid pace." Goldring & Swain at 250. And once a school achieves unitary status, it can no longer use its past discrimination to justify remedial race-based discrimination going forward. At that point, "[a]ny continued use of race must be justified on some other basis." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 (2007). For example, in *Cavalier ex rel. Cavalier v. Caddo Parish School Board*, a school district sought to justify racial classifications under a 1981 consent decree that required the district to desegregate. 403 F.3d 246, 249–50 (5th Cir. 2005). But the Fifth Circuit rejected that argument, explaining that the decree was "no longer applicable to" the magnet school because it had achieved "unitary status," and thus the decree could not "be used in any sense to justify the racial

quotas and balancing contained in the [school's] admission policy." *Id.* at 255–56 & n.11.

Two years later, the Supreme Court emphasized the limits of race-based decisionmaking in education by concluding that two school districts not subject to desegregation orders violated the Equal Protection Clause by using race to assign individual students to schools with the goal of achieving a predetermined "racial balance." *Parents Involved*, 551 U.S. at 710–11. Although the justices issued fractured opinions on several questions, a majority agreed that the schools' admissions schemes were racial classifications that triggered and failed strict scrutiny because they were not narrowly tailored. *Id.* at 720, 735. The racial classifications were not "necessary to achieve [the school districts'] stated ends" because they had only "minimal effect . . . on student assignments." *Id.* at 733. And the districts "failed to show that they considered methods other than explicit racial classifications to achieve their stated goals." *Id.* at 735.

Chief Justice Roberts—joined by Justices Scalia, Thomas, and Alito—would have also held that "racial balancing" is not a compelling state interest under strict scrutiny. *Id.* at 730 (plurality opinion). Presaging the Court's *SFFA* decision that would come a decade and a half later, the plurality explained that "[a]llowing racial balancing as a compelling end in itself would effectively assure that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved." *Id.* (cleaned up). The plurality further rejected clever wordsmithing to justify racial balancing in different terms: "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it . . . racial diversity, avoidance of racial isolation, [or] racial integration . . . ." *Id.* at 732. Justice Kennedy's concurrence, by contrast, argued that districts may "consider the racial makeup of schools and . . . adopt general policies to encourage a diverse student body" but may not assign students to schools based on racial classification. *Id.* at 788–91 (Kennedy, J., concurring in part and concurring in the judgment) (citing *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

Parents Involved prompted school districts "to rethink the whole notion of how magnet schools can attract students of various ethnic and racial backgrounds under unitary status and voluntary integration without specifically using race." Goldring & Swain at 252. Taking their cue from Justice Kennedy's concurring opinion, many school districts replaced

admissions policies directly keyed to race with more indirect, race-conscious policies to achieve their desired racial balance. For example, one of the school districts in *Parents Involved* shifted to "a residential cluster-based, controlled-choice model, where the parents rank preferred magnet school selections and then the district assigns students to [e]nsure diverse representation of neighborhood socioeconomic characteristics—including racial concentrations." *Id.*

Sixteen years after *Parents Involved*, the *SFFA* Court invalidated two universities' race-based admissions programs. Chief Justice Roberts, this time writing for a full majority, explained that the Court had previously "permitted race-based admissions only within the confines of narrow restrictions," including the requirement that such racial considerations have a definitive endpoint. 143 S. Ct. at 2166. The universities' diversity-based goals were not compelling interests because they were "not sufficiently coherent for purposes of strict scrutiny." *Id.* The admissions programs were not narrowly tailored because they relied upon "opaque racial categories," the use of which "undermine[d]" the universities' goals rather than "promote[d]" them. *Id.* at 2168. The admissions programs also violated the fundamental equal-protection principle that race must "never be used as a 'negative'" or "operate as a stereotype." *Id.* And they lacked "a logical end point." *Id.* at 2165 (citation omitted).

Most recently, the *Callais* Court reiterated *SFFA*'s central thesis in the Voting Rights Act context. The Supreme Court explained that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Callais*, 146 S. Ct. at 1153 (quoting *SFFA*, 143 S. Ct. at 2162). For that reason, the Court "start[s] with the general rule that the Constitution almost never permits the Federal Government or a State to discriminate on the basis of race." *Id.* at 1152.

B.

The Department currently oversees 60 active MSAP grants awarded to school districts in 18 different states. DOE Request at 8. These grants were awarded pursuant to a detailed statutory and regulatory scheme, which we summarize in three parts: Congress's enacted findings and purposes, relevant definitions, and program requirements. *See generally* 20 U.S.C. §§ 7231–7231j; 34 C.F.R. §§ 280.1–280.41.

1.

As explained in Part I.A.1, the program's overarching purpose remains "to assist in the desegregation of schools" by funding local educational agencies to achieve the program's stated objectives. 20 U.S.C. § 7231(b). These objectives include "the elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools with substantial proportions of minority students." *Id.* § 7231(b)(1). They also include "the development, design, and expansion of innovative educational methods and practices that promote diversity." *Id.* § 7231(b)(3).

Several legislative findings reinforce these race-based objectives. The statute explains that magnet schools are "a significant part" of the government's "effort to achieve voluntary desegregation in our Nation's schools." *Id.* § 7231(a)(1). It notes that more than 69 percent of the then-2,500,000 students attending magnet schools were "non-white." *Id.* § 7231(a)(2). And it repeatedly refers to race when describing the federal government's efforts "to foster meaningful interaction among students of different racial and ethnic backgrounds," *id.* § 7231(a)(4)(A); to prepare students to function in an "economy comprised of people from many different racial and ethnic backgrounds," *id.* § 7231(a)(4)(B); and to "continue to desegregate and diversify schools . . . , recognizing that segregation exists between minority and nonminority students as well as among students of different minority groups," *id.* § 7231(a)(4)(C).

2.

Congress defined only a single term in the statutory scheme—magnet school. A magnet school is a K–12 school "that offers a special curriculum capable of attracting substantial numbers of students of different racial backgrounds." *Id.* § 7231a. Congress did not explain what it would mean for a curriculum to be "capable of attracting" different racial groups. But the regulations define "[s]pecial curriculum" as "a course of study embracing subject matter or a teaching methodology that is not generally offered to students of the same age or grade level in the same [educational agency] as the students to whom the special curriculum is offered in the magnet schools." 34 C.F.R. § 280.4(b).

The regulations define several other key terms, too. "Minority group" means one of four racial groups: (1) American Indian or Alaskan Native,

(2) Asian or Pacific Islander, (3) Black (not of Hispanic origin), and (4) Hispanic. *Id.* "Desegregation" refers to "[1] a plan for the reassignment of children or faculty to remedy the illegal separation of minority group children or faculty in the schools of an [education agency] or [2] a plan for the reduction, elimination, or prevention of minority group isolation in one or more of the schools of an [education agency]." *Id.* And "[f]eeder school" means "a school from which students are drawn to attend a magnet school." *Id.*

3.

Five provisions comprise the core program framework: an authorization provision, an eligibility provision, an applications-and-requirements provision, a prioritization provision, and a use-of-funds provision. 20 U.S.C. §§ 7231b–7231f. The authorization and eligibility provisions determine who can receive grants. The others determine how the Secretary awards grants and how recipients can use funds. We describe them each in turn.

First, the authorization and eligibility provisions together demarcate what kinds of educational entities may receive grants—and, by implication, which entities are ineligible. *See id.* §§ 7231b–7231c. Congress authorized the Secretary to award grants to "eligible" educational agencies that are "(1) part of an approved desegregation plan; and (2) designed to bring students from different social, economic, ethnic, and racial backgrounds together." *Id.* § 7231b. Educational agencies are "eligible" to receive grants in only two circumstances: if they are (1) "implementing a [desegregation] plan undertaken pursuant to a final order issued by a court" or other "official," or (2) voluntarily implementing (or intend to implement) "a plan that has been approved by the Secretary as adequate under title VI of the Civil Rights Act of 1964 for the desegregation of minority-group-segregated children or faculty in such schools." *Id.* § 7231c (citation omitted); *see also* 42 U.S.C. § 2000d *et seq.* For her part, "[t]he Secretary approves a voluntary plan . . . only if [s]he determines that for each magnet school for which funding is sought, the magnet school will reduce, eliminate, or prevent minority group isolation within the period of the grant award, either in the magnet school or in a feeder school, as appropriate." 34 C.F.R. § 280.2(b).

Based on available information at the time of your request, we understand that most grant recipients are implementing voluntary, not court-

ordered, desegregation plans. DOE Request at 9. Specifically, at the time of your request, 52 grantees were implementing voluntary plans, while only 8 grantees were implementing court-ordered plans. *Id.* at 8–9. But there are many educational agencies subject to court-ordered desegregation plans that have not applied for, and thus do not currently receive, MSAP grants. *Id.*

Second, the statute requires each application to include "information and assurances." 20 U.S.C. § 7231d(a). The information component includes both race-related and non-race-related information. For example, applicants must explain how the magnet school will achieve the non-race-based goal of "increas[ing] student academic achievement." *Id.* § 7231d(b)(1)(B). But applicants must also describe how grant funds "will be used to promote desegregation, including any available evidence . . . for how the proposed magnet school programs will increase interaction among students of different social, economic, ethnic, and racial backgrounds." *Id.* § 7231d(b)(1)(A).

The regulations require additional information from applicants. For example, a school "that does not have an approved desegregation plan" must submit its application with "[e]vidence that the plan is a desegregation plan as defined in § 280.4(b)," 34 C.F.R. § 280.20(f), which to reiterate, means "a plan for the reassignment of children or faculty" or "for the reduction, elimination, or prevention of minority group isolation," *id.* § 280.4(b). And applications for existing magnet schools must include "[e]nrollment numbers and percentages, for minority and non-minority group students, for each magnet school for which funding is sought and each feeder school." *Id.* § 280.20(f)(4)(i). These applicants must also provide "[d]istrictwide enrollment numbers and percentages for minority group students" in the relevant schools. *Id.* § 280.20(f)(4)(ii).

Applicants must also provide specific assurances. *See* 20 U.S.C. § 7231d(b)(2). As relevant here, the requisite assurances include a commitment to "use grant funds . . . for the [statutorily defined] purposes." *Id.* § 7231d(b)(2)(A). And applicants must commit to "not engage in discrimination based on race, religion, color, national origin, sex, or disability in" three defined areas:

> (i) the hiring, promotion, or assignment of employees of the applicant or other personnel for whom the applicant has any administrative responsibility;

(ii) the assignment of students to schools, or to courses of instruction within the schools, of such applicant, *except to carry out the approved plan*; and

(iii) designing or operating extracurricular activities for students.

Id. § 7231d(b)(2)(C) (emphasis added).

The regulations explain that the Secretary evaluates applications using a point system. *See* 34 C.F.R. § 280.30(e)–(f). The Secretary's selection criteria include "[t]he effectiveness of [the applicant's] plan to recruit students from different social, economic, ethnic, and racial backgrounds into the magnet schools." *Id.* § 280.31(a)(2)(v). The criteria also include the extent to which each magnet school seeking funding will "[i]mprove the racial balance of students in the applicant's schools by reducing, eliminating, or preventing minority group isolation in its schools." *Id.* § 280.31(c)(2)(v). Additionally, the Secretary determines the extent to which an applicant's evaluation plan "[w]ill determine how successful the project is in meeting its intended outcomes, including its goals for desegregating its students." *Id.* § 280.31(e)(2).

Third, the statute imposes prioritization requirements on grant awards. *See* 20 U.S.C. § 7231e. The Secretary must prioritize applicants that satisfy four criteria, including "the greatest need for assistance," alongside various program-specific factors. *Id.* § 7231e(1); *see also* 34 C.F.R. § 280.32 (regulations outlining the prioritization structure). As relevant here, two factors invoke race. One requires the Secretary to favor proposals that "replicate an existing magnet school program that has a demonstrated record of success in . . . reducing isolation of minority groups." 20 U.S.C. § 7231e(2)(C). The other focuses on applicants that "propose to increase racial integration by taking into account socioeconomic diversity in designing and implementing magnet school programs." *Id.* § 7231e(4).

Finally, the use-of-funds provision identifies nine areas in which educational agencies may spend grant funds. *See id.* § 7231f. These include "planning and promotional activities directly related to the development, expansion, continuation, or enhancement of academic programs and services offered at magnet schools," *id.* § 7231f(a)(1); building "capacity to operate magnet school programs once the grant period has ended," *id.* § 7231f(a)(5); giving educational agencies "flexibility in designing magnet schools for students in all grades," *id.* § 7231f(a)(7); and "strengthen[ing] inter-district and regional magnet programs," *id.* § 7231f(a)(8).

C.

Consistent with the framework described in Part I.B, the Department has historically awarded funds to applicants that promise to change their schools' racial balances. *See generally* U.S. Dep't of Educ., *Magnet Schools Assistance Program (MSAP)* (July 1, 2026), https://perma.cc/3JYU-3AQE ("*MSAP Awards*"). The school districts' racial balancing strategies vary, but they do not extend to admitting or denying students admittance into a particular school based upon their race. *See* DOE Request at 9. Strategies instead include placing magnet schools or programs in certain geographic areas based on likely racial effects, marketing and advertising to certain racial groups, using lottery systems designed to achieve a desired racial balance, and establishing "race-based affinity groups" for teachers. *Id.* To illustrate how the plans work, we summarize here two representative awards.

First, in 2017, the Department awarded $10,121,928 to Napa Valley Unified School District ("NVUSD") to address minority-group isolation in two existing schools and to create a new magnet school. *See MSAP Awards*. NVUSD's application defined minority-group isolation as "any minority group of students attending a District elementary school in substantial numbers that represent 58% or more of the District total elementary enrollment." U.S. Dep't of Educ., *Application for Grants: U165A170039* at 1 (2017), https://perma.cc/64WQ-KXWH (emphasis omitted). Based on that definition, "Hispanic/Latino students" were "the only isolated minority group in the District." *Id.* (emphasis omitted).

NVUSD set a goal of reducing supposed Hispanic/Latino isolation by "at least 2 percentage points per year." *Id.* at 21 (emphasis omitted). Its plan emphasized targeted marketing, classroom groupings, and data-driven reporting. For one magnet school, NVUSD would expand the school and then "target recruiting to Hispanic/Latino . . . students" at two feeder schools. *Id.* at 20–21 (emphasis omitted). At the other magnet school, NVUSD would introduce a STEM program and then "market and target recruit non-Hispanic White [students] . . . from all NVUSD feeder elementary schools." *Id.* at 21 (emphasis omitted). It would likewise recruit "non-Hispanic White" students for the new magnet school. *Id.* (emphasis omitted). Within the schools, NVUSD explained that it would group students to "support student population compositions of heterogeneous grouping in every classroom that yield the same school wide student demographics." *Id.* at 38–39 (emphasis omitted). And to ensure

NVUSD achieved its target racial mix, it committed to comparing its "applicant pool and student placement data (all disaggregated by race/ethnicity)" with previous years' data "to determine why performance measures were or were not attained and if previous recommendations were implemented." *Id.* at 131.

Second, in 2023, the Department awarded $14,981,002 to Ypsilanti Community Schools ("YCS") to convert four existing schools into magnet schools. *See MSAP Awards*. YCS's application defined "Black student isolation" as occurring "if Black student enrollment in the school deviates + / - 15% or more from the percent of Black residents living in the YCS school district per U.S. Census data." U.S. Dep't of Educ., *Application for Grants: S165A230031* at 2 (2023), https://perma.cc/MQ45-EQ3V. Using that definition, YCS identified "Black student isolation" in each of the four schools. *Id.* at 1–2. YCS also proposed "[t]argeted marketing and recruitment efforts" to achieve its desired "racial balances" at the magnet schools. *Id.* at 36. And it committed "grant personnel and school administrators" to "offer[ing] ongoing presentations in racially diverse communities []to decrease Black student isolation in racially-identifiable magnet schools." *Id.* at 31.

II.

"[T]he Constitution almost never permits the Federal Government or a State to discriminate on the basis of race." *Callais*, 146 S. Ct. at 1152.[1] For that reason, "the strict scrutiny standard of review applies whenever the federal government voluntarily adopts a racial or ethnic classification as a basis for decisionmaking." *Constitutionality of Race-Based Department of Education Programs*, 49 Op. O.L.C. __, at *3–4 (Dec. 2, 2025) ("*Race-Based Education Programs*") (citation omitted). Strict scrutiny also applies "if race played a role in a decision made by a government actor." *Callais*, 146 S. Ct. at 1146 (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977)).

[1] The Supreme Court has recognized an equal-protection component of the Constitution that binds the federal government. *See Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) (rooting the principle in the Due Process Clause of the Fifth Amendment); *United States v. Vaello Madero*, 142 S. Ct. 1539, 1544 (2022) (Thomas, J., concurring) (finding "[f]irmer ground . . . in the Fourteenth Amendment's Citizenship Clause").

We thus begin by considering whether the program triggers strict scrutiny because it is race-based, and we conclude that it does. The program here is race-based because it (1) facially classifies by race and (2) is designed to change the racial composition of K–12 schools. At bottom, the current program largely functions as a racial-balancing initiative. Then, we consider counterarguments against applying strict scrutiny and find them unpersuasive. Finally, we apply strict scrutiny and consider whether the Department's administration of the program is narrowly tailored to achieve a compelling governmental interest. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995). We conclude that the program, as currently administered, fails strict scrutiny. But we recognize that grants awarded to remedy specific instances of illegal discrimination might satisfy strict scrutiny.

A.

The Supreme Court "reconcile[s] the principle of equal protection with the reality of legislative classification" by distinguishing the mine-run of laws from those that burden a fundamental right or target a suspect class. *United States v. Skrmetti*, 145 S. Ct. 1816, 1828 (2025). Every legislative classification must, at a minimum, "bear[] a rational relation to some legitimate end." *Id.* at 1828 (citation omitted). But some classifications trigger heightened review. *Id.* As relevant here, "laws that classify on the basis of race, alienage, or national origin trigger strict scrutiny and will pass constitutional muster 'only if they are suitably tailored to serve a compelling state interest.'" *Id.* (citation omitted). "Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). That is true regardless of whether it is a "federal, state, or local governmental actor" classifying by race. *Adarand*, 515 U.S. at 227.

Race-based classifications come in many flavors, but strict scrutiny applies to glaring and subtle classifications alike. So the government cannot "circumvent" the equal-protection guarantee "by writing in abstract terms." *Skrmetti*, 145 S. Ct. at 1831. And "[r]acial balancing" does not become something else when it is relabeled as "racial diversity, avoidance of racial isolation, [or] racial integration." *Parents Involved*, 551 U.S. at 732 (plurality opinion). Put another way, race-based classifications find no refuge in artful drafting.

The program facially classifies by race and thus triggers strict scrutiny. On its terms, the MSAP scheme requires the Secretary to distribute funds to school districts because of those schools' racial compositions and with the aim of changing their racial balances. *See supra* Part I.B. In other words, the program is facially designed to reengineer the racial composition of schools, either to remedy past illegal discrimination or to achieve a predetermined racial balance for its own sake. It must accordingly satisfy strict scrutiny.

Start with the regulations. Like their parent statute, the regulations make two types of educational entities eligible for grants: (1) those implementing a court-ordered desegregation plan, and (2) those voluntarily implementing a desegregation plan "that has been approved by the Secretary." 34 C.F.R. § 280.2(a). The Secretary will approve a voluntary plan "only if [s]he determines that for each magnet school for which funding is sought, the magnet school will reduce, eliminate, or prevent minority group isolation within the period of the grant award, either in the magnet school or in a feeder school." *Id.* § 280.2(b). These regulations require the Secretary to allocate funds based upon the racial compositions of recipient schools, which necessarily entails the use of racial classifications that trigger strict scrutiny.

Were there any doubt, the definitions put it to rest. Recall that the regulations define "[d]esegregation" to mean "a plan for the reassignment of children or faculty to remedy the illegal separation of *minority group* children or faculty in the schools of an [education agency]," or "a plan for the reduction, elimination, or prevention of *minority group* isolation in one or more of the schools." *Id.* § 280.4(b) (emphases added). Both types of "desegregation" use the term "minority group," which the regulations define as one of four racial or ethnic groups. *Id.* And those groups are further defined to turn on detailed racial, ethnic, or national-origin characteristics. For example, the regulations define "Black" as someone with "origins in any of the black *racial groups* of Africa." *Id.* (emphasis added). "Asian or Pacific Islander" refers to a person with "origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands." *Id.* "Hispanic" describes "[a] person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race." *Id.* And "American Indian or Alaskan Native" means a person with "origins in any of the original peoples of

North America, and who maintains cultural identification through tribal affiliation or community recognition." *Id.*

At bottom, the regulations facially require the Secretary to award funds based upon schools' racial compositions to affect their racial balances. To be sure, the reason an applicant is seeking to change the racial composition of its student body may vary. The award may be an effort "to remedy the illegal separation of minority" children that occurred in the past, or it may be an attempt to reduce perceived "minority group isolation" in the present. *Id.* But the race-based classification triggers strict scrutiny regardless. And, indeed, other aspects of the regulatory scheme underscore its facially race-based character. For example, applicants must provide extensive racial data on their school districts, such as "[e]nrollment numbers and percentages, for minority and non-minority group students, for each magnet school for which funding is sought and each feeder school." *Id.* § 280.20(f)(4)(i). And the Secretary's selection criteria may include (1) the extent to which funding will "[i]mprove the *racial balance* of students in the applicant's schools by reducing, eliminating, or preventing minority group isolation in its schools," *id.* § 280.31(c)(2)(v) (emphasis added); and (2) the "effectiveness of [the applicant's] plan to recruit students from different social, economic, *ethnic*, *and racial backgrounds* into the magnet schools," *id.* § 280.31(a)(2)(v) (emphasis added). The regulations thus require racial classifications that trigger strict scrutiny.

We have considered the counterargument that the regulations do not facially classify by race because they do not, in the aggregate, require the Department to burden or benefit any given race. In one situation, the Department might fund an initiative that aims to draw white students to a majority-Hispanic school. In another, the Department might do the reverse. Cumulatively, then, the program conceivably awards funds that "benefit" every race. So, the argument might go, MSAP does not facially require the Department to "distribute[] burdens or benefits on the basis of individual racial classifications." *Parents Involved*, 551 U.S. at 720.

But adding many race-based classifications together does not change their character. *See Johnson v. California*, 543 U.S. 499, 506 (2005) (rejecting the argument that segregating prisoners by race did not constitute a facial classification because "all prisoners are 'equally' segregated"). To the contrary, the Supreme Court's "repeated command" is "that 'racial classifications receive close scrutiny even when they may be said

to burden or benefit the races equally.'" *Id.* (quoting *Shaw v. Reno*, 509 U.S. 630, 651 (1993)). Thus, the law of averages cannot circumvent the Constitution's commitment to equal protection for individual people.

Moreover, the MSAP scheme here cannot even be said to treat the races equally. Only educational entities implementing a court-ordered or Secretary-approved desegregation plan are eligible to receive a grant, 34 C.F.R. § 280.2(a), and the Secretary will only approve a voluntary plan that "will reduce, eliminate, or prevent minority group isolation within the period of the grant award," *id.* § 280.2(b). To reiterate, "minority groups" consists of four discrete racial or ethnic groupings. *See id.* § 280.4(b). Schools with an acceptable mix of races (whatever that means) are thus disadvantaged or entirely precluded from accessing grant funds. And schools with isolated *majority* races are likewise disadvantaged. That is so no matter how great a school's need for funds may be, and it remains true no matter how effectively the school could use those funds to serve its students. Certain school districts fall outside MSAP's reach, or are disadvantaged when seeking grants, because of their students' races. The regulations trigger strict scrutiny because they make that race-based classification.

It also bears emphasizing that MSAP-ineligible school districts are not the only entities disadvantaged by the program's racial classifications. Government-funded racial-balancing plans, *see supra* Part I.C, also carry race-based consequences for individual students and their parents. To be sure, children who attend federally funded magnet programs ostensibly benefit from the Department's race-based judgments. But even then, the programs are not strictly designed to maximize academic results and are instead informed by racial-balancing objectives approved by federal bureaucrats. The negative consequences for students who cannot participate are even more pronounced. In those cases, students and their parents may remain unaware of a high-quality school or program nearby because they never received marketing materials from the school district. Or there may be insufficient spots available under a government-approved lottery system. Or families may wonder why their preferred school is inconveniently far away. Or they might move because the school nearby does not align with their pedagogical goals. In each case, the common denominator is the federal government's decision to fund a program based on classifications like "Black," "Hispanic," or "Asian."

For similar reasons, the MSAP statute facially classifies by race and triggers strict scrutiny. Like the regulations, the MSAP statute limits grant

eligibility to schools implementing a plan for "the desegregation of minority-group-segregated children or faculty" in K–12 schools. 20 U.S.C. § 7231c(1)–(2). And Congress repeatedly used words—such as avoiding minority group isolation and promoting diversity—that make clear it was creating a grant program designed to support racial-balancing efforts for the purpose of addressing perceived racial isolation.[2] As in *Parents Involved*, the statute's "various verbal formulations" of "racial diversity, avoidance of racial isolation, [and] racial integration" are simply different ways of saying "racial balance." 551 U.S. at 732 (plurality opinion). And it is difficult to conceive of a racial-balancing initiative that can function without making racial classifications.

To be sure, Congress's failure to define key terms tends to obscure its facial race classifications. Take the eligibility provision's references to desegregating "minority-group-segregated children." 20 U.S.C. § 7231c(1)–(2). One might attempt to craft a race-neutral definition of "minority group" that differs from the regulatory definition—which, to repeat, defines the term as a closed set of four racial groups. *See* 34 C.F.R. § 280.4(b). For example, as an abstract matter, "minority group" might not refer to race at all; it might refer to any group (e.g., children of police officers) that constitutes less than the majority of a school. But the statute's race-based definition of "magnet school" makes that reading untenable. *See* 20 U.S.C. § 7231a (defining magnet school as a public school with a "special curriculum capable of attracting substantial numbers of students of different *racial* backgrounds" (emphasis added)). And that focus makes sense given the racial backdrop against which Congress enacted MSAP.

Alternatively, one might attempt to define "minority group" as *any* racial group that represents less than 50% of a school's student body. But this effort to construct a race-neutral racial-balancing scheme would

[2] *See, e.g.*, 20 U.S.C § 7231(b)(1) ("minority group isolation"); *id.* § 7231c(1)–(2) ("minority-group-segregated"); *id.* § 7231e(2)(C) ("isolation of minority groups"); *id.* § 7231(a)(4)(C) ("segregation . . . between minority and nonminority students as well as . . . different minority groups" and "desegregate and diversify schools"); *id.* § 7231(a)(4)(A) ("students of different racial and ethnic backgrounds"); *id.* § 7231a ("attracting . . . students of different racial backgrounds"); *id.* § 7231b(2) ("bring students from different . . . ethnic[] and racial backgrounds together"); *id.* § 7231d(b)(1)(A) (similar); *id.* § 7231e(4) ("increase racial integration"); *id.* § 7231(b)(3) ("promote diversity"); *id.* § 7231(a)–(b) ("desegregation"); *id.* § 7231e(1) (same).

conflict with other parts of the statute. Recall that Congress's enacted purpose for MSAP includes eliminating "minority group isolation" in "schools with *substantial proportions* of minority students." *Id.* § 7231(b)(1) (emphasis added). Consistent with that statutory objective, the Department awards grants to schools that define "racial isolation" as a minority group that comprises a large *majority* of a school. *See supra* Part I.C. This understanding of isolation, too, tracks MSAP's historical backdrop as a response to the unconstitutional practice of racially segregating students into separate schools. Moreover, it is doubtful whether an ostensibly race-neutral racial-balancing scheme could ever truly avoid classifying by race. At an operational level, the very act of identifying, and then attempting to correct, any given racial "imbalance" would require a school district to classify individuals by racial groupings to solve the perceived imbalance.

On top of all that, the statute's antidiscrimination provisions explicitly address racial discrimination and then go on to expressly bless some forms of it. The statute requires voluntary desegregation applicants to provide assurances that they will not "engage in discrimination based on *race*, religion, *color*, *national origin*, sex, or disability in" employment, school assignments, or extracurricular activities. 20 U.S.C. § 7231d(b)(2)(C) (emphases added). But it then carves out an exception for such discrimination "to carry out the approved plan." *Id.* § 7231d(b)(2)(C)(ii). This caveat alone shows—on the face of the statute—that the program makes a concession to race-based discrimination and triggers strict scrutiny. *See Adarand*, 515 U.S. at 228.

B.

MSAP would be subject to strict scrutiny even if the scheme were facially race-neutral. That is because strict scrutiny applies even to facially race-neutral statutes—*i.e.*, laws that do not draw race-based distinctions—if they "are motivated by a racially discriminatory purpose." *Id.* at 213 (first citing *Arlington Heights*, 429 U.S. 252; and then citing *Washington v. Davis*, 426 U.S. 229 (1976)); *see Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 45 (1st Cir. 2021) (explaining that strict scrutiny applies to race-neutral admissions criteria motivated by a discriminatory purpose). "[W]ell-intentioned or not, express or neutral on its face, a law or policy that purposefully dis-

criminates on account of race is presumptively invalid and can survive only if it withstands strict scrutiny review." *Pryor v. NCAA*, 288 F.3d 548, 566 (3d Cir. 2002). In other words, "if race played a role in a decision made by a government actor," then "strict scrutiny applie[s]." *Callais*, 146 S. Ct. at 1146 (citing *Arlington Heights*, 429 U.S. at 265–66). After all, "facially race-neutral actions" that are "motivated by the purpose of altering racial balance[] constitute intentional discrimination against the members of the racial group who are balanced down." *Constitutionality of Disparate-Impact Liability Under Title VII*, 50 Op. O.L.C. __, at *8 (June 9, 2026) ("*Disparate-Impact Liability*"). A challenging party can show purposeful discrimination through "a combination of direct and circumstantial evidence." *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 146 S. Ct. 541, 544 (2024) (Alito, J., dissenting from the denial of certiorari).

Under the *Arlington Heights* framework, relevant factors include: "(1) the law's historical background, (2) the sequence of events leading to the law's enactment, including any departures from the normal legislative process, (3) the law's legislative history, and (4) whether the law 'bears more heavily on one race than another.'" *Id.* (quoting *Arlington Heights*, 429 U.S. at 266). The "touchstone" of the analysis is "whether the challenged law can 'ultimately be traced to a racially discriminatory purpose.'" *Disparate-Impact Liability* at *4 (emphasis omitted) (quoting *Davis*, 426 U.S. at 240). MSAP fits the bill under three *Arlington Heights* considerations: its historical background, legislative history, and focus on one race over another.

Begin with the historical background, which strongly favors applying strict scrutiny to MSAP. As explained in Part I.A, magnet-school grants began in the 1970s as part of an effort to use race-based measures to remedy past illegal segregation. As government-imposed segregation withered away, schools increasingly achieved unitary status, and courts began rejecting racial quotas in schools, magnet schools turned to less overt racial-balancing strategies. Notably, the Department amended its MSAP regulations in response to *Parents Involved* and deleted several significant provisions. *See* Magnet Schools Assistance Program, 75 Fed. Reg. 9777, 9777 (Mar. 4, 2010). The previous regulations defined "minority group isolation" as "a condition in which minority group children constitute more than 50 percent of the enrollment of the school." *Id.* at 9778 (emphasis omitted) (quoting 34 C.F.R. § 280.4(b) (2009)). And the

prior regulations used "a district-wide percentage of minority students as an absolute limitation on student enrollment in magnet or feeder schools." *Id.* The Department removed those provisions, explaining that *Parents Involved* (1) found using "only two categories in defining race problematic," and (2) "rejected the achievement of racial balance . . . as a basis for the use of race in a voluntary desegregation plan." *Id.* Instead of replacing the provisions, the Department explained that it would "determine on a case-by-case basis whether a district's voluntary plan meets the statutory purpose of reducing, eliminating, or preventing minority group isolation." *Id.*

The result is a change in labels but not in substance. MSAP still incents grant applicants to achieve racial balance, and applicants still bucket racial groups into blunt categories. *See supra* Part I.C. It is just less obvious now how the applicants intend to do so unless one reviews their grant applications. To be sure, the regulations no longer limit enrollment in magnet schools through racial quotas. But the applicants themselves set target racial compositions for their student bodies and articulate a plan to achieve their desired racial balance. The Department then reviews those applications and decides how to allocate funds based on criteria that require, or at least prioritize, racial balancing. Although the Department no longer imposes a single, uniform racial balance, *see supra* Part I.C, the new and indirect method of achieving racial balance fares no better than the Department's pre-*Parents Involved* approach. "'The Constitution deals with substance, not shadows,' and the prohibition against racial discrimination is 'levelled at the thing, not the name.'" *SFFA*, 143 S. Ct. at 2176 (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)).

At a minimum, this history supports applying strict scrutiny. Such "context" is important when determining "whether a 'discriminatory purpose was a motivating factor in the [government's] decision.'" *Mullin v. Doe*, 146 S. Ct 2121, 2138 (2026) (alteration accepted) (quoting *Arlington Heights*, 429 U.S. at 265–66). MSAP arose fifty years ago as a racial desegregation effort. As government-imposed segregation ended and school districts achieved unitary status such that the government's remedial consideration of race was no longer necessary, MSAP's structure became sufficiently suspect that the Department removed several provisions and opted to proceed on a case-by-case basis. Given that context, MSAP must be scrutinized to ensure it does not violate equal-protection principles in less obvious ways.

Next, consider Congress's enacted legislative findings and purposes, which embody its collective considerations and aims. As already explained, the relevant findings and purposes can be summed up with two words: racial balancing. *See supra* Part I.B. That focus is confirmed by the central role that "minority group isolation" plays in the statutory scheme, the extensive racial data that grant applicants must provide, and the overt racial-balancing objectives that grant applicants propose in their applications. As the *Parents Involved* plurality put it, "avoidance of racial isolation" is just another way of saying "racial balance." 551 U.S. at 732 (plurality opinion).

Some might argue that certain race-based motives are benign and should therefore be subjected to less stringent review. But the Supreme Court has "insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation." *Johnson*, 543 U.S. at 505 (citations omitted). That means "all governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." *Adarand*, 515 U.S. at 227 (emphasis omitted). This admonition is both longstanding and recently reaffirmed. Just this year, the Supreme Court reiterated that our Constitution is "colorblind." *Allen v. Milligan*, 146 S. Ct. 1377, 1380 (2026) (per curiam). And *SFFA* and *Callais* each underscore the Court's continued commitment to rooting out all forms of governmental discrimination that are based on race.

Finally, MSAP "bears more heavily on one race than another." *Coalition for TJ*, 146 S. Ct. at 544 (Alito, J., dissenting from the denial of certiorari) (quoting *Arlington Heights*, 429 U.S. at 266). As already explained, MSAP channels funds to K–12 schools "with substantial proportions of minority students" to change their racial makeup. 20 U.S.C. § 7231(b)(1). This disproportionately impacts specific races in at least two ways. *First*, it disadvantages schools primarily comprised of non-minority races, as well as schools with purportedly "balanced" racial mixes. *Second*, it funds school initiatives directed towards specific racial groups. *See supra* Part I.C. That translates into targeted marketing and recruitment programs directed towards some races—and thus *not* directed towards others. And it translates into locating schools near target races—and thus

not near non-preferred races. It is no answer that magnet schools do not always perfectly achieve their racial targets, because the Secretary will only approve a plan that "will reduce, eliminate, or prevent minority group isolation within the period of the grant award." 34 C.F.R. § 280.2(b). And applicants measure program effectiveness to ensure they achieve desired racial targets. *See, e.g.*, *supra* Part I.C.

* * *

MSAP triggers strict scrutiny because it facially classifies by race and because Congress, however well intentioned, enacted it with a discriminatory purpose. For those who resist this conclusion, consider a hypothetical MSAP scheme motivated by opposite purposes and designed to achieve opposite aims. In this hypothetical, Congress finds that racial isolation in K–12 education is in the best interests of the United States. So Congress designs MSAP to award grants to school districts that achieve racial homogeneity in race-conscious ways. A grant recipient cannot set race-based admissions quotas. But to receive funds, they must engage in race-conscious strategies—such as selective marketing and strategic school placements—to maximize racial isolation. Few would argue that a program like that should be subjected to anything less than strict scrutiny: Racial balancing is its explicit aim and plain design. It follows that the real MSAP program should be strictly scrutinized too. If MSAP furthers a compelling interest and is narrowly tailored to achieve that end, then it can satisfy strict scrutiny. But sympathy for Congress's intentions cannot be an end-run around applying strict scrutiny.

C.

Some contend that K–12 schools may engage in race-based activities without satisfying strict scrutiny, and that *SFFA* does not dictate a different result. *See generally* Sonja Starr, *The Magnet School Wars and the Future of Colorblindness*, 76 Stan. L. Rev. 161 (2024). They find support in Justice Kennedy's *Parents Involved* concurrence and argue that it controls. *See id.* at 185. We disagree.

As a threshold matter, this memorandum considers the Department's implementation of MSAP grants and not whether any specific magnet school policy violates the Constitution's equal-protection guarantee. That focus simplifies the equal-protection analysis by providing a clear target:

the MSAP statute and regulations. Because the statute and regulations make racial classifications and because race plays a role in the grantmaking decisions made by government actors, strict scrutiny must apply to the Department's implementation of the MSAP scheme. *See supra* Part II.A. And because Congress left no doubt that racial balancing was among its intended purposes for MSAP, strict scrutiny would apply even if the statute and regulations were worded in a facially race-neutral way. *See id.* So we need not decide—and were not asked to consider—whether any specific magnet-school plan is itself race-classifying or motivated by a discriminatory purpose.

That is not to say our analysis is irrelevant to the constitutionality of race-conscious magnet-school programs. It is only to say that applying the strict-scrutiny framework to the statutory and regulatory schemes simplifies the analysis. MSAP is arguably worse in degree and kind than any single race-conscious magnet-school initiative because it makes the federal government a central planner for racial-balancing in K–12 education for thousands of students across the country. Although magnet schools "voluntarily" propose many of the racial-balancing initiatives, they are required to do so to qualify for MSAP grants. And it is ultimately the federal government that reviews detailed racial data and decides what schools to fund.

Setting aside the differences between MSAP grants and race-conscious school programming, we reject the argument that a school's facially neutral efforts to counteract "racial isolation" do not trigger strict scrutiny, as suggested in Justice Kennedy's *Parents Involved* concurrence. *See* Starr, 76 Stan. L. Rev. at 185–86. According to this argument, the concurrence was the narrowest opinion that determined *Parents Involved*'s outcome and thus serves as the controlling opinion under *Marks v. United States*, 430 U.S. 188 (1977). *See* Starr, 76 Stan. L. Rev. at 185–86. Even if the concurrence did not control under the *Marks* rule, the argument goes, the Court subsequently adopted it in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015). *See* Starr, 76 Stan. L. Rev. at 185–86.

This argument did not work before *SFFA*, and it undoubtedly fails after *SFFA*. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. at 193 (citation and quotation marks omitted). Applying the *Marks* rule

requires identifying the concurring justices' "narrowest and controlling" position. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1403 (2020). Sometimes that task is so difficult that the Supreme Court resolves the matter without reaching the *Marks* issue. *See, e.g.*, *Hughes v. United States*, 584 U.S. 675, 679–80 (2018). But *Marks* does not apply here at all because *Parents Involved* did not turn on the overlapping reasoning of concurring justices. It instead featured a majority opinion that resolved the case by concluding that the schools' racial classifications (1) triggered strict scrutiny and (2) failed the narrow-tailoring requirement. *See supra* Part I.A.2. The plurality opinion would have also concluded that the schools' racial-diversity interest was not compelling, but Justice Kennedy disagreed with that additional rationale and did not supply the fifth vote. To treat the concurrence's view on that point as controlling would be to import dicta from a single concurring justice into the opinion of the Court and to set a precedent with which the other four justices necessary to the judgment disagreed. That makes no sense. *Accord Learning Res., Inc. v. Trump*, 146 S. Ct. 628, 720 n.24 (2026) (Kavanaugh, J., dissenting) (observing that, under the *Marks* rule, *Learning Resources* did not decide how the major-questions doctrine applied in the foreign-affairs context because only three justices had applied that doctrine to the case).[3]

Additionally, the relevant portions of the concurrence are incompatible with the Supreme Court's subsequent equal-protection decisions. According to the concurrence, a school "district may consider it a compelling interest to achieve a diverse student population." *Parents Involved*, 551 U.S. at 797–98 (Kennedy, J., concurring in part and concurring in judgment). But according to *SFFA*, diversity is "not [a] sufficiently coherent [goal] for purposes of strict scrutiny." 143 S. Ct. at 2166. And *Callais* explained that the Court's precedents "have identified 'only two compelling interests' that can satisfy" strict scrutiny—neither of which involve a generalized interest in racial diversity. 146 S. Ct. at 1152 (quoting *SFFA*, 143 S. Ct. at 2162); *see also Milligan*, 146 S. Ct. at 1380 (per curiam). That the *Parents Involved* concurrence relied on *Grutter* underscores that

[3] *Inclusive Communities* is not to the contrary. There, the Supreme Court cited Justice Kennedy's concurrence in passing—with a *cf.* signal no less—for the proposition "that race may be considered in certain circumstances and in a proper fashion." 576 U.S. at 545. But the "question presented" was "whether disparate-impact claims are cognizable under the Fair Housing Act," *id.* at 525, and the Court's citation to the concurrence was dicta.

it is now out-of-step with the Court's more recent and controlling decisions. *Compare Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring in part and concurring in the judgment) (explaining that a school's racial considerations "would be informed by *Grutter*"), *with SFFA*, 143 S. Ct. at 2207 (Thomas, J., concurring) (explaining that "[t]he Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled").

SFFA likewise forecloses the *Parents Involved* concurrence's effort to sidestep strict scrutiny for "race-conscious measures" that increase racial diversity "in a general way and without . . . individual typing by race." *Parents Involved*, 551 U.S. at 788–89 (Kennedy, J., concurring in part and concurring in judgment). The concurrence reasoned that "the dangers presented by individual [racial] classifications . . . are not as pressing when the same ends are achieved by more indirect means." *Id.* at 797. But the lead dissent in *SFFA* made a similar argument that the Court rejected. According to the *SFFA* dissent, the Court left "intact holistic . . . admissions and recruitment efforts that seek to enroll diverse classes without using racial classifications." 143 S. Ct. at 2252 (Sotomayor, J., dissenting). But the Court rejoined, "What cannot be done directly cannot be done indirectly." *Id.* at 2176 (citation omitted). The Court agreed that its decision should not "be construed as prohibiting universities from considering an application's discussion of how race affected his or her life." *Id.* But it hastened to add that schools cannot end-run around the Constitution's equal-protection guarantee by engaging in covert racial balancing. *Id.* The reason a university can consider a student essay discussing race is because overcoming racial discrimination can "be tied to *that student's* courage and determination." *Id.* That is not racial balancing at all; it is focusing on "the touchstone of an individual's identity," rather than on their race—on their "challenges bested, skills built, or lessons learned," and thus on their individual merit. *Id.* As the Court observed, "[a] dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion." *Id.* The same can be said for a single-justice concurrence that predates important intervening precedent.

D.

Having concluded that MSAP triggers strict scrutiny, we must now evaluate whether the government's use of race (1) furthers a compelling governmental interest, and (2) is narrowly tailored—that is, "necessary"—

to achieve the government's compelling interest. *Id.* at 2162. We first explain why the program lacks a compelling governmental interest to the extent it is unmoored from the goal of remedying specific instances of illegal discrimination. We then explain how the Department's current implementation of the program is not narrowly tailored to redress such instances of discrimination.

In short, the current program is premised upon governmental interests, such as racial diversity, that the Supreme Court has repeatedly found non-compelling. The current program also suffers tailoring defects like those the Court identified in *SFFA* and fails strict scrutiny for that independent reason. A constitutional MSAP award would be narrowly tailored to remediate a specific instance of illegal discrimination, but the current program is not designed to operate in that constitutionally permissible way. The Department must accordingly reform its administration of the program. *See infra* Part III.

1.

The Court has recognized only two race-based compelling interests that satisfy strict scrutiny: "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" and "avoiding imminent and serious risks to human safety in prisons, such as a race riot." *SFFA*, 143 S. Ct. at 2162. These categories are narrow precisely because equal protection's "central mandate is racial neutrality in governmental decisionmaking." *Miller v. Johnson*, 515 U.S. 900, 904 (1995).

Here, MSAP furthers a compelling governmental interest only to the extent that it remedies specific instances of illegal discrimination. *Cf. N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971) ("Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."). To be sure, the statute does not identify that compelling governmental interest with those exact words. But it is a logical subset of the statutory references to "desegregation," "diversi[t]y," and "minority group isolation." 20 U.S.C. § 7231 (enacted findings and purpose). It is also reflected in the scheme's eligibility provision, which allows grants only for educational agencies implementing desegregation plans. *See id.* § 7231c. Read in view of the long history of illegal discrimination in K–12 education—which gave rise to numerous judicial desegregation orders

and the original enactments involving magnet-school grants, *see supra* Part I.A.1—the statute in part reflects Congress's compelling goal of remediating specific instances of illegal discrimination in K–12 education.

But outside that narrow focus, Congress's stated interests for MSAP grants are not compelling. *See, e.g.*, 20 U.S.C. § 7231(a)(4)(C) (aiming to "diversify schools"); *id.* § 7231(a)(4)(A) (supporting schools that "foster meaningful interaction among students" of different races); *id.* § 7231(b)(1) (directing financial assistance for "the elimination, reduction, or prevention of minority group isolation"). They instead resemble the justifications that *SFFA* rejected as not "coherent for purposes of strict scrutiny." 143 S. Ct. at 2166. At bottom, Congress's race-based goals amount to racial balancing for its own sake when they are untethered from remediating a specific instance of illegal discrimination. But "[r]acial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation." *Freeman v. Pitts*, 503 U.S. 467, 494 (1992). Within those confines, the government "can determine whether any race-based remedial action produces a distribution of students comparable to what it would have been in the absence of [the] constitutional violation[]." *SFFA*, 143 S. Ct. at 2167 (cleaned up). Otherwise, "'racial balancing' is 'patently unconstitutional.'" *Id.* at 2172 (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311 (2013)); *see also Fisher*, 570 U.S. at 319 (Thomas, J., concurring) (explaining that "the pursuit of diversity as an end is nothing more than impermissible 'racial balancing'" (citation omitted)).

2.

Even when the Secretary determines that an MSAP application would further the government's lone compelling interest in remediating a specifically identified instance of racial discrimination, the applicant must still show that its use of race is "necessary" to achieving that remedial purpose. *Race-Based Education Programs* at *7 (quoting *SFFA*, 143 S. Ct. at 2162). Relevant tailoring considerations include whether the program: (1) operates flexibly rather than as "a per se unconstitutional quota"; (2) reflects genuine consideration of "workable race-neutral alternatives"; (3) has "a definite duration" and "undergoes 'periodic review'"; (4) employs "'arbitrary or undefined' racial categories"; and (5) "minimize[s] the burden on other racial groups." *Id.* at *7–8 (citations

omitted). Racial classifications that are used "to allocate zero-sum benefits" are subject to additional skepticism, and "race may never be used as a 'negative.'" *Id.* at *8 (quoting *SFFA*, 143 S. Ct. at 2168). In all but "the most extraordinary case," *SFFA*, 143 S. Ct. at 2163, strict scrutiny of racial classifications is "automatically fatal," *Race-Based Education Programs* at *47 (citation omitted).

The Department's existing implementation of the program fails narrow tailoring because it does not require "a meaningful connection between the means [MSAP plans] employ and the goals they pursue," much less the Department's lone cognizable goal of remedying specific acts of illegal discrimination. *SFFA*, 143 S. Ct. at 2167.

First, the Department uses "'arbitrary or undefined' racial categories" in its regulations. *Race-Based Education Programs* at *8 (quoting *SFFA*, 143 S. Ct. at 2167). MSAP aims to reduce minority-group isolation by changing the racial mix of schools with large numbers of students from four racial categories: (1) American Indian or Alaskan Native, (2) Asian or Pacific Islander, (3) Black (not of Hispanic origin), and (4) Hispanic. 34 C.F.R. § 280.4(b). But this grouping is strikingly similar to the six racial classes at issue in *SFFA*: "(1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American." *SFFA*, 143 S. Ct. at 2167. As was true in *SFFA*, MSAP's categories are "imprecise" and "plainly overbroad." *Id.* By grouping large swaths of distinct racial and cultural groups together, MSAP is "apparently uninterested" in the unique diversity that these subgroups—say, "*South* Asian or *East* Asian students"—bring to a school. *Id.*

For example, its "Black" category includes any person with "origins in *any* of the black racial groups of Africa." 34 C.F.R. § 280.4(b) (emphasis added). It does not distinguish between black individuals born in the United States to citizen parents and African immigrants. And it ignores the fact that "[m]ore than 2000 ethnolinguistic groups have been identified in Africa, consisting of around one third of the world's languages." Shaohua Fan et al., *African Evolutionary History Inferred from Whole Genome Sequence Data of 44 Indigenous African Populations*, Genome Biology, Apr. 2019, at 1. MSAP bundles this diversity into a single racial label and thus deems "isolated" even schools with otherwise measurably diverse racial and cultural groups. And it is underinclusive by excluding Africans of white descent, thereby addressing only minority-group isola-

tion for favored African racial groups. *See, e.g.*, Josephine Campbell, *White South Africans*, EBSCO (2022), https://perma.cc/8QD4-MBQE (explaining that white South Africans "maintain distinct identities with roots in European traditions and languages").

A similar point applies to MSAP's "Asian or Pacific Islander" and "Hispanic" categories. Recall that the regulations define an Asian or Pacific Islander as anyone with "origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands"—which includes "China, India, Japan, Korea, the Philippine Islands, and Samoa." 34 C.F.R. § 280.4(b). This category encompasses a large percentage of the world's population, and MSAP completely misses the rich diversity among people from these parts of the world. The definition may also be underinclusive to the extent it omits parts of the global East. *See SFFA*, 143 S. Ct. at 2168 (discussing the classification for people from the Middle East). For its part, MSAP's Hispanic category—"[a] person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race," 34 C.F.R. § 280.4(b)—is similarly "arbitrary," *Race-Based Education Programs* at *20 (quoting *SFFA*, 143 S. Ct. at 2167). It inexplicably bundles together people from hundreds of distinct cultural, racial, and linguistic backgrounds. And it leaves undefined what it means for someone to be of "Spanish culture or origin, regardless of race." 34 C.F.R. § 280.4(b).

At bottom, the Department's broad and arbitrary racial buckets are not narrowly tailored to achieve even the non-cognizable goal of avoiding racial isolation, *see SFFA*, 143 S. Ct. at 2167–68, much less the Department's sole compelling interest in remedying specific acts of illegal discrimination. To state the obvious: A program focused on remedying past illegal discrimination should, at a bare minimum, identify a specific instance of illegal discrimination and direct its cure to that injury. *See infra* Part III.A.

Second, the program's requirement that an MSAP applicant use race lacks a clear endpoint and "a definite duration." *Race-Based Education Programs* at *8. *SFFA* explained that the Court's previous accommodation of certain race-based admissions programs had been premised upon the idea that "they must end." 143 S. Ct. at 2165 (discussing *Grutter*, 539 U.S. at 342). That conclusion applies with equal force to the race-based grant program here, which operates in perpetuity. True, MSAP grants are

awarded for a maximum five-year period, *see* 20 U.S.C. § 7231h(a), but grant applicants can apply for consecutive grants, *see id.* § 7231c (eligibility requirements); *MSAP Awards* (awarded grants). And although "periodic review" might help mitigate narrow-tailoring concerns, it cannot "make unconstitutional conduct constitutional." *SFFA*, 143 S. Ct. at 2173. Race-based "programs eventually ha[ve] to end—despite whatever periodic review" the Secretary may conduct. *Id.* Yet MSAP is designed to encourage racial balancing even after the funding it has provided expires. *See* 20 U.S.C. § 7231d(b)(1)(C) (requiring applicants to explain how they "will continue the magnet school program after assistance under this part is no longer available"); *id.* § 7231f(a)(5) (allowing recipients to use funds "for activities . . . that will build the recipient's capacity to operate magnet school programs once the grant period has ended"). In other words, MSAP is designed in a way that ensures "race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved." *Parents Involved*, 551 U.S. at 730 (plurality opinion) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion)).

Finally, MSAP's existing implementation "fail[s] to comply with the twin commands of the Equal Protection Clause that race may never be used as a 'negative' and that it may not operate as a stereotype." *SFFA*, 143 S. Ct. at 2168. That is because a school's racial composition can operate as a negative factor. To repeat again: MSAP grants go to schools with substantial numbers of "minority" students. So those grants *do not* go to schools comprised primarily of non-minority students or schools with broad racial mixtures. "A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." *Id.* at 2169. In this sense, MSAP grants—like college admissions—"are zero-sum." *Id.* Race thus operates as a "negative" for schools that cannot obtain MSAP grants because of the schools' existing racial compositions. *Id.* at 2175.

MSAP's current implementation also reflects unconstitutional racial stereotyping. The Supreme Court has "long held that universities may not operate their admissions programs on the 'belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.'" *Id.* at 2169 (citation omitted). When an admissions

program "admits students on the basis of race, it engages in the offensive and demeaning assumption that students of a particular race, because of their race, think alike—at the very least alike in the sense of being different from nonminority students." *Id.* at 2070 (cleaned up).

The program here is premised upon the same stereotyping rejected in *SFFA*. When MSAP is unmoored from the concrete objective of remediating prior unlawful discrimination, it amounts to racial balancing for its own sake—a value infected by stereotypes about individuals that are based upon their race. And indeed, Congress emphasized the number of "non-white" students attending magnet schools, 20 U.S.C. § 7231(a)(2), found it to be in the best interests of the United States for schools to "foster meaningful interaction among students of different racial and ethnic backgrounds," *id.* § 7231(a)(4)(A), and deemed support for magnet schools a way to "diversify schools," *id.* § 7231(a)(4)(C). Congress even defined a magnet school as a school with a "special curriculum capable of attracting substantial numbers of students of different racial backgrounds," *id.* § 7231a—as if to suggest that some domains of knowledge are more appealing to some races than others. But "[t]he entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well." *SFFA*, 143 S. Ct. at 2170 (emphasis added). In other words, schools can legitimately seek to have a diverse student body in many respects. But they cannot use skin color as the measure of diversity, because doing so amounts to unlawful stereotyping. Such racial stereotyping is forbidden because it "treat[s] individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id.* (citation omitted).

III.

Because the Constitution allows racial classifications that are narrowly drawn to remediate specific instances of past racial discrimination, we cannot conclude that "no set of circumstances exists under which [an MSAP award] would be valid." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024) (citation omitted). Recall that the statute authorizes the Secretary to award grants for "approved desegregation plan[s]," 20 U.S.C.

§ 7231b(1), and makes grant-eligible any educational agency that is implementing a court-ordered or Secretary-approved desegregation plan, *id.* § 7231c. These provisions empower the Secretary to fund magnet schools that are remediating prior illegal discrimination, and they do not restrict the Secretary's ability to tailor awards to that compelling end.

The upshot is that the Secretary can constitutionally apply the program in some situations. But because the program is not designed to identify applicants that satisfy strict scrutiny, it fails to ask applicants the right questions and cannot reliably yield a constitutionally permissible answer. We thus find the scheme invalid as currently structured and to the extent the Secretary funds magnet schools that do not satisfy strict scrutiny. The Secretary must ensure that only applicants that satisfy strict scrutiny receive MSAP awards.

A.

We conclude that the Secretary must apply strict scrutiny to MSAP applications even though the MSAP statute does not expressly impose that requirement. Even without an express requirement, the statutory "text is reasonably susceptible to [that] saving construction" as a matter of constitutional avoidance. *Disparate-Impact Liability* at *14. Put another way, a constitutional interpretation of the MSAP scheme is "fairly possible," *id.*, because each type of eligible educational entity—those subject to court desegregation orders and those with Secretary-approved desegregation plans—can in theory satisfy strict scrutiny.

Start with judicial desegregation orders. When a court issues a judicial desegregation order, it does so based on the government's compelling interest in correcting a "specific, identified instance[] of [illegal] past discrimination" that occurred in the relevant school district. *SFFA*, 143 S. Ct. at 2162. Using the same reasoning, the Department might likewise conclude that it has a compelling interest in awarding funds to support the school district's efforts to remedy the specific instance of illegal discrimination that occurred in the district. Of course, even then, the Department must ensure that the award is narrowly tailored to remediate the illegal discrimination—including by focusing solely on the particular racial group or groups that were victims of the illegal discrimination and by ensuring that there is "a logical end point" to any remedial discrimination. *Id.* at 2165 (citation omitted). But for present purposes, the point is that an

MSAP award premised on a judicial desegregation order could potentially satisfy both the statutory requirements and the Constitution's equal-protection guarantee.

Grants for applicants implementing a voluntary desegregation plan follow the same logic. An applicant could theoretically satisfy strict scrutiny by demonstrating that it is remediating a specific instance of illegal discrimination and that the funds would be used in ways narrowly tailored to achieve the remedial objective. Although section 7231c(2) does not expressly require the Secretary to apply strict scrutiny in so many words, we may infer such a requirement as a permissible interpretation of the text. Specifically, section 7231c(2) focuses the Secretary's approval upon whether a desegregation plan is "adequate under title VI of the Civil Rights Act of 1964." 20 U.S.C. § 7231c(2). Title VI, in turn, provides that "no person in the United States" shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" based upon that person's race. 42 U.S.C. § 2000d. This suggests that Congress intended grants for voluntary desegregation plans to comply with equal-protection principles. Limiting the program to applications that satisfy strict scrutiny also arguably harmonizes section 7231c(2) and section 7231d(b)(2)(C)(ii). Because the Supreme Court recognizes that the Constitution allows racial discrimination that is narrowly tailored to remedy specific instances of illegal discrimination, it follows that racial discrimination "to carry out [an] approved plan" that satisfies strict scrutiny, 20 U.S.C. § 7231d(b)(2)(C)(ii), would offend neither the Constitution nor section 7231c(2).

For both court-ordered and Secretary-approved plans, then, the Constitution requires the Department to ensure that grant awards go only to schools that can satisfy strict scrutiny. That analysis is necessarily fact dependent. For example, some court orders may remain in effect from sheer inertia and thus not reflect a governmental interest that remains compelling. Indeed, one might imagine a school district leaving a court order undisturbed and not seeking unitary status to remain eligible for grants, which would cast into doubt whether the government retained a compelling interest in funding that district's desegregation plan. Or the relevant court order might take the form of a consent decree that reflects only limited judicial scrutiny. *See* 18A *Wright & Miller's Federal Prac-*

tice and Procedure § 4443 (3d ed. 2026) (explaining that "the central characteristic of a consent judgment is that the court has not actually resolved the substance of the issues presented"); *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (explaining that a "court's duty when passing upon a settlement agreement is fundamentally different from its duty in trying a case on the merits"). For voluntary plans, the need for a case-by-case review is even more imperative because such plans lack a court's threshold finding that specific instances of illegal discrimination occurred in the relevant school district.

B.

We have considered the counterargument that the MSAP statute cannot be given a saving construction because certain statutory provisions are incompatible with strict scrutiny. For example, the priority provision requires the Secretary to favor applicants with the "greatest need," and to prioritize applicants that propose programs with defined characteristics. 20 U.S.C. § 7231e. The applications provision requires applicants to provide detailed information about magnet-school initiatives that is arguably unrelated to remediating prior illegal racism. *See id.* § 7231d. And the use-of-funds provision delineates broad categories that define how government funds can be used, some of which do not obviously relate to remediating past discrimination. *See id.* § 7231f. Some might argue that the Department cannot both comply with these requirements and honor strict scrutiny's narrow-tailoring requirement.

In our view, these statutory requirements are not inherently inconsistent with administering grants consistent with strict scrutiny. The Department might, for instance, follow the statutory prioritization requirements for grants that clear the strict-scrutiny hurdle. It might find the information requirements relevant to determining whether strict scrutiny has been satisfied. And the use-of-funds provisions might be relevant under the specific circumstances of a desegregation plan aimed at remediating a previous instance of illegal discrimination. Of course, if a statutory provision were inconsistent with strict scrutiny (or any other constitutional requirement), then the offending provision—and only that provision—should be severed from the scheme. *See id.* § 7916 ("If any provision of this chapter is held invalid, the remainder of this chapter shall be unaffect-

ed thereby."). That is consistent with longstanding severability principles that require interpreters to use "a scalpel rather than a bulldozer in curing [a] constitutional defect." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2210–11 (2020) (opinion of Roberts, C.J.). The result of severing unconstitutional provisions would be similar to applying constitutional avoidance: It would stop any unconstitutional application of the program. In either event, the answer would not be to invalidate the program in its entirety.

We have also considered whether the statute's race-based distinctions could be severed from the scheme, leaving the Secretary with an open-ended power to award grants to any magnet school without considering race. The Supreme Court has recognized that cases like this one, which involve unequal treatment, can theoretically be cured "either by extending the benefits or burdens to the exempted class, or by nullifying the benefits or burdens for all." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2354 (2020) (opinion of Kavanaugh, J.). And "[t]he Court's precedents reflect [a] preference for extension rather than nullification." *Id.* (collecting cases).

Here, though, the Secretary can constitutionally apply the statute's race-based provisions to schools that are remediating specific instances of illegal discrimination—without extending those provisions to groups that Congress declined to include. Because the statute can be read as applying in this limited and constitutional way, it would be inappropriate to sever the race-based provisions from the scheme entirely as if they were facially unconstitutional. Furthermore, the statute's race-based provisions form a critical part of the statutory structure. Congress authorized grants only for "eligible" educational agencies with "an approved desegregation plan." 20 U.S.C § 7231b. And Congress made eligibility contingent upon "desegregation" plans. *Id.* § 7231c. Severing the concept of "desegregation" from the authorization and eligibility provisions would leave unrecognizable the statute that Congress enacted.

The better approach, which we take here, is to read the statutory scheme as permitting grants only for applicants whose plans satisfy strict scrutiny. That means, again, that the Department must ensure there is a compelling governmental interest in funding an MSAP applicant and that the award is narrowly tailored to that compelling interest.

IV.

Strict scrutiny is "automatically fatal" for most programs that involve racial classifications. *Race-Based Education Programs* at *47 (quoting *Parents Involved*, 551 U.S. at 752 (Thomas, J., concurring)). Because certain narrow applications of MSAP may satisfy that demanding standard, the program is not facially unconstitutional. But the program may not continue as currently constituted. At present, the Department's administration of MSAP does not require applicants to make the requisite showing. To the contrary, MSAP is broadly structured to provide funds for schools that seek to implement a "racial balance." As a result, we understand the Department awards grants based on race that do not purport to satisfy strict scrutiny and thus violate the Constitution's equal-protection guarantee. This defect is especially pronounced for voluntary desegregation plans, which lack a judicial finding of illegal discrimination to be remedied. The Department must therefore implement the MSAP scheme in a way that ensures grants are awarded within constitutional limits.

The Constitution imposes a high bar before the Secretary can award funds to magnet schools based on racial considerations. And given the progress that the United States has made toward remediating illegal discrimination in K–12 education, it may prove difficult for a voluntary desegregation plan today to establish the factual predicates needed to survive strict scrutiny. "[T]hat is cause for celebration." *Callais*, 146 S. Ct. at 1160.

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