SUPREME COURT OF THE UNITED STATES

Nos. 94–631, 94–797 AND 94–929

ZELL MILLER, ET AL., APPELLANTS
94–631 *v.*
DAVIDA JOHNSON ET AL.

LUCIOUS ABRAMS, JR., ET AL., APPELLANTS
94–797 *v.*
DAVIDA JOHNSON ET AL.

UNITED STATES, APPELLANT
94–929 *v.*
DAVIDA JOHNSON ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

[June 29, 1995]

JUSTICE STEVENS, dissenting.

JUSTICE GINSBURG has explained why the District Court's opinion on the merits was erroneous and why this Court's law-changing decision will breed unproductive litigation. I join her excellent opinion without reservation. I add these comments because I believe the respondents in these cases, like the respondents in *United States* v. *Hays*, *ante*, p. ___, have not suffered any legally cognizable injury.

In *Shaw* v. *Reno*, 509 U. S. ___ (1993), the Court crafted a new cause of action with two novel, troubling features. First, the Court misapplied the term "gerrymander," previously used to describe grotesque line-drawing by a dominant group to maintain or enhance its political power at a minority's expense, to condemn the efforts of a majority (whites) to share its power with a minority (African Americans). Second, the Court dispensed with its previous insistence in vote dilution cases on a showing of injury to an identifiable group of voters, but it failed to explain adequately what showing a

plaintiff must make to establish standing to litigate the newly minted *Shaw* claim. Neither in *Shaw* itself nor in the cases decided today has the Court coherently articulated what injury this cause of action is designed to redress. Because respondents have alleged no legally cognizable injury, they lack standing, and these cases should be dismissed. See *Hays*, *ante*, at ___ (STEVENS, J., concurring in judgment) (slip op., at ___).

Even assuming the validity of *Shaw*, I cannot see how respondents in these cases could assert the injury the Court attributes to them. Respondents, plaintiffs below, are white voters in Georgia's Eleventh Congressional District. The Court's conclusion that they have standing to maintain a *Shaw* claim appears to rest on a theory that their placement in the Eleventh District caused them "`representational harms.'" *Hays*, *ante*, at ___ (slip op., at 8), cited *ante*, at 7. The *Shaw* Court explained the concept of "representational harms" as follows: "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Shaw*, 509 U. S., at ___ (slip op., at 16). Although the *Shaw* Court attributed representational harms solely to a message sent by the legislature's action, those harms can only come about if the message is received—that is, first, if all or most black voters support the same candidate, and, second, if the successful candidate ignores the interests of her white constituents. Respondents' standing, in other words, ultimately depends on the very premise the Court purports to abhor: that voters of a particular race "`think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Ante*, at 10 (quoting *Shaw*, ___ U. S., at ___ (slip op., at 16)). This generalization, as the Court recognizes, is "offensive and demeaning." *Ante*, at 10.

In particular instances, of course, members of one race may vote by an overwhelming margin for one candidate, and in some cases that candidate will be of the same race. "Racially polarized voting" is one of the circumstances plaintiffs must prove to advance a vote dilution claim. *Thornburg* v. *Gingles*, 478 U. S. 30, 56–58 (1986). Such a claim allows voters to

allege that gerrymandered district lines have impaired their ability to elect a candidate of their own race. The Court emphasizes, however, that a so-called *Shaw* claim is "`analytically distinct' from a vote dilution claim," *ante*, at 9 (quoting *Shaw*, 509 U. S., at ___ (slip op., at 21)). Neither in *Shaw*, nor in *Hays*, nor in the instant cases has the Court answered the question its analytic distinction raises: If the *Shaw* injury does not flow from an increased probability that white candidates will lose, then how can the increased probability that black candidates will win cause white voters, such as respondents, cognizable harm?[1]

The Court attempts an explanation in these cases by equating the injury it imagines respondents have suffered with the injuries African Americans suffered under segregation. The heart of respondents' claim, by the Court's account, is that "a State's assignment of voters on the basis of race," *ante*, at 13, violates the Equal Protection Clause for the same reason a State may not "segregate citizens on the basis of race in its public parks, *New Orleans City Park Improvement Assn.* v. *Detiege*, 358 U. S. 54 (1958) *(per curiam)*, buses, *Gayle* v. *Browder*, 352 U. S. 903 (1956) *(per curiam)*, golf courses, *Holmes* v. *Atlanta*, 350 U. S. 879 (1955) *(per curiam)*, beaches, *Mayor and City Council of Baltimore* v. *Dawson*, 350 U. S. 877 (1955) *(per curiam)*, and schools, *Brown, supra*." *Ante*, at 9. This equation, however, fails to elucidate the elusive *Shaw* injury. Our desegregation cases redressed the *exclusion* of black citizens from public facilities reserved for whites. In this case, in contrast,

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[1]White voters obviously lack standing to complain of the other injury the Court has recognized under *Shaw*: the stigma blacks supposedly suffer when assigned to a District because of their race. See *Hays*, *ante*, at ___ (slip op., at 7); cf. *Adarand Constructors, Inc.* v. *Pena*, *ante*, at ___, n. 5 (slip op., at 7, n. 5) (STEVENS, J., dissenting).

any voter, black or white, may live in the Eleventh District. What respondents contest is the *inclusion* of too many black voters in the District as drawn. In my view, if respondents allege no vote dilution, that inclusion can cause them no conceivable injury.

The Court's equation of *Shaw* claims with our desegregation decisions is inappropriate for another reason. In each of those cases, legal segregation frustrated the public interest in diversity and tolerance by barring African Americans from joining whites in the activities at issue. The districting plan here, in contrast, serves the interest in diversity and tolerance by increasing the likelihood that a meaningful number of black representatives will add their voices to legislative debates. See *post*, at 16–17 (GINSBURG, J., dissenting). "There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination." *Adarand Constructors, Inc.* v. *Pena*, *ante*, at ___ (slip op., at 2) (STEVENS, J., dissenting); see also *id.*, at ___, n. 5. That racial integration of the sort attempted by Georgia now appears more vulnerable to judicial challenge than some policies alleged to perpetuate racial bias, cf. *Allen* v. *Wright*, 468 U. S. 737 (1984), is anomalous, to say the least.

Equally distressing is the Court's equation of traditional gerrymanders, designed to maintain or enhance a dominant group's power, with a dominant group's decision to share its power with a previously underrepresented group. In my view, districting plans violate the Equal Protection Clause when they "serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community." *Karcher* v. *Daggett*, 462 U. S. 725, 748 (1983) (STEVENS, J., concurring). In contrast, I do not see how a districting

plan that favors a politically weak group can violate equal protection. The Constitution does not mandate any form of proportional representation, but it certainly permits a State to adopt a policy that promotes fair representation of different groups. Indeed, this Court squarely so held in *Gaffney* v. *Cummings*, 412 U. S. 735 (1973):

> "[N]either we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." *Id.*, at 754.

The Court's refusal to distinguish an enactment that helps a minority group from enactments that cause it harm is especially unfortunate at the intersection of race and voting, given that African Americans and other disadvantaged groups have struggled so long and so hard for inclusion in that most central exercise of our democracy. See *post*, at 4–6 (GINSBURG, J., dissenting). I have long believed that treating racial groups differently from other identifiable groups of voters, as the Court does today, is itself an invidious racial classification. Racial minorities should receive neither more nor less protection than other groups against gerrymanders.[2] *A fortiori,* racial minorities

[2]"In my opinion an interpretation of the Constitution which afforded one kind of political protection to blacks and another kind to members of other identifiable groups would itself be invidious. Respect for the citizenry in the black community compels acceptance of the fact that in the long run there is no more certainty that these individuals will vote alike than will individual members of any other ethnic, economic, or social group. The probability of parallel voting fluctuates as the blend of

should not be less eligible than other groups to benefit from districting plans the majority designs to aid them.

I respectfully dissent.

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political issues affecting the outcome of an election changes from time to time to emphasize one issue, or a few, rather than others, as dominant. The facts that a political group has its own history, has suffered its own special injustices, and has its own congeries of special political interests, do not make one such group different from any other in the eyes of the law. The members of each go to the polls with equal dignity and with an equal right to be protected from invidious discrimination." *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 852 (CA7 1972) (Stevens, J., dissenting).