

SCHEDULED FOR ORAL ARGUMENT ON MARCH 14, 2025

Nos. 24-7050 & 24-7065

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STACIA HALL, *et al.*,
APPELLANTS & CROSS-APPELLEES,

V.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS,
APPELLEE & CROSS-APPELLANT

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

**REPLY BRIEF OF CROSS-APPELLANT
THE DISTRICT OF COLUMBIA BOARD OF ELECTIONS**

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GLOSSARY

Board Br.	Principal Brief of Cross-Appellant District of Columbia Board of Elections in No. 24-7065
JA	Joint Appendix
Plaintiffs	Appellants, Cross-Appellees
Resp. Br.	Response Brief of Cross-Appellees in No. 24-7065
The Board	Appellee, Cross-Appellant, the District of Columbia Board of Elections
The Voting Act	Local Resident Voting Rights Amendment Act of 2022, D.C. Law 24-242

INTRODUCTION AND SUMMARY OF ARGUMENT

The Local Resident Voting Rights Amendment Act of 2022 (“Voting Act”) is a constitutionally valid expansion of voting rights that the Council of the District of Columbia enacted to improve access to democracy for the benefit of all District residents. In relevant part, the Act eliminates the citizenship requirement for District elections so that all qualified residents—without regard to race, sex, national origin, or citizenship—can vote in local elections and run for local office. D.C. Code § 1-1001.02(2)(B). That policy choice is consistent with this Nation’s history of noncitizen voting, it is nondiscriminatory in all relevant respects, and it is rationally related to the Council’s legitimate interest in improving access to democracy for all qualified District residents. The Constitution requires nothing more.

Plaintiffs nevertheless urge this Court to override the Council’s policy decision because, in their view, the Constitution so requires. Resp. Br. 10-20. But it does not, and plaintiffs pay the Constitution only lip-service in arguing otherwise. At bottom, they ask this Court to break new ground by declaring new unenumerated rights and new equal-protection precepts based on ahistorical policy theories and novel extensions of settled jurisprudence. The Court should decline that invitation, especially given plaintiffs’ inability support their theories with historical evidence and apposite caselaw. Assuming Article III standing exists, *see* Board Br. 18-34, the Court should affirm the dismissal of plaintiffs’ suit on the merits.

ARGUMENT

I. Plaintiffs' unenumerated-rights claims lack merit.

As the Board's principal brief explained (at 35-48), plaintiffs have not alleged facts plausibly establishing that the Voting Act violates any constitutional right, let alone an unenumerated "right to citizen self-government." Plaintiffs' contrary arguments find no support in history, the Constitution, or precedent.

A. History and precedent foreclose plaintiffs' claims.

1. Plaintiffs' asserted right is not deeply rooted in history.

The unenumerated-rights claims fail at the threshold because plaintiffs have marshalled no historical evidence—none—to suggest that legislatures are constitutionally barred from allowing noncitizens to participate in local elections, or that every citizen has an individual right to compel the disenfranchisement of otherwise-qualified noncitizens. Unenumerated rights trigger strict scrutiny only when they are "fundamental"—that is, only when plaintiffs establish that they are "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721-22 (1997) (cleaned up). Otherwise, rational-basis review applies. *Abigail All. for Better Access to Dev. Drugs v. von Eschenbach*, 495 F.3d 695, 702-07 (D.C. Cir. 2007) (en banc).

Here, plaintiffs have not shown that their asserted right is fundamental. And they cannot. As the Board has demonstrated, the history of noncitizen voting and local officeholding is extensive and indisputable. Board Br. 3-6, 38-45. Noncitizens

voted and held office in the colonies. Board Br. 3. They continued to do so in certain states and federal territories after the Constitution's ratification, including in the District. Board Br. 3-6, 39-41. And many jurisdictions permitted noncitizen voting throughout the nineteenth and early twentieth centuries with the tacit approval of the Supreme Court. Board Br. 40-44. Moreover, although noncitizen voting at the state level has waned over time as a policy matter, the practice has begun to reemerge in various localities over the last few decades. Board Br. 6, 43-45.

Plaintiffs do not meaningfully dispute this history. To the contrary, they acknowledge that “noncitizen voting in the United States” dates back to “the founding generation.” Resp. Br. 12. Yet plaintiffs nonetheless assert that they have an unenumerated right to monopolize local voting and to exclude noncitizens from the franchise, even where the locally elected Council has legislated otherwise. *See* Resp. 10-14. Their arguments lack merit.

First, plaintiffs theorize that history reveals “a gradually greater adherence to” their “theory of democratic liberty,” which “gradually eliminated any noncitizen voting” in the twentieth century. Resp. Br. 13. But even accepting that revisionist account, it simply means noncitizen voting has historically been a policy choice on which preferences have changed over time. Board Br. 43-44. It does not mean the Constitution always “presupposed” a “theory of democratic self-government” that “confines voting to citizens,” Resp. Br. 13-14. If anything, just the opposite is true,

as plaintiffs cite nothing to support the idea that fundamental rights can arise “gradually” “over time” in response to political developments, Resp. Br. 13. *See, e.g., Dep’t of State v. Munoz*, 602 U.S. 899, 911-14 (2024) (finding no fundamental right to bring noncitizen spouses to the United States despite the Nation’s “relatively open borders until the late 19th century”).

Second, unable to rewrite history, plaintiffs urge the Court to ignore it on the theory that a “right” cannot be “negated by a history of its violation.” Resp. Br. 10-11. But the Board need not “negate[]” anything because the burden is on plaintiffs to establish the historical pedigree of their asserted right, and they cannot carry this burden by circularly assuming that a fundamental right exists and then shrugging away inconvenient history as a “violation.” *See Abigail*, 495 F.3d at 702-11. Holding otherwise would flout countless decisions of this Court and the Supreme Court, *see* Board Br. 36-46—all of which plaintiffs ignore. *See, e.g., Glucksberg*, 521 U.S. at 723, 728 (finding no fundamental right to physician-assisted suicide given the “centuries” of contrary “legal doctrine and practice”); *Hutchins v. District of Columbia*, 188 F.3d 531, 536-39 (D.C. Cir. 1999) (en banc) (plurality op.) (finding no fundamental right for juveniles to roam the streets without supervision given that “juvenile curfews were not uncommon early in our history”).

Third, plaintiffs liken noncitizen voting to the most invidious “relics of the past, such as excluding nonwhites and women from voting.” Resp. Br. 2, 10-11.

The comparison is inapt to say the least. Discriminatory practices *excluding* people from the franchise based on racial hatred and misogyny cannot, as a matter of law or common sense, be equated with a practice that *includes* people in the franchise regardless of citizenship or national origin. *Accord Schuette v. BAMN*, 572 U.S. 291, 300-10 (2014) (plurality op.) (recognizing that eliminating “racial preferences in governmental decisions” is not the same as imposing “race-based preferences”); *id.* at 331 (Scalia, J., concurring in the judgment) (“A law that prohibits the State from classifying individuals by race *a fortiori* does not classify individuals by race.” (cleaned up)). Plaintiffs’ contrary suggestions are at odds with their own cited cases. *See Brown v. Bd. of Comm’rs*, 722 F. Supp. 380, 398 (E.D. Tenn. 1989) (“*Over* inclusiveness is a lesser constitutional evil than *under* inclusiveness.”).

Fourth, plaintiffs try to side-step history altogether by claiming that their right “is not derived solely” from “the Due Process Clause” but also from a “theory of democratic self-government.” Resp. Br. 11, 13. That makes no difference. Challengers must show that “history and tradition” affirmatively establish an unenumerated right even if it is not framed “in terms of substantive due process.” *In re OPM Data Sec. Breach Litig.*, 928 F.3d 42, 71-74 (D.C. Cir. 2019) (rejecting “a freestanding constitutional right to informational privacy” that was “untethered to specific constitutional provisions”). So whether plaintiffs invoke the Due Process Clause or some undefined constitutional penumbra, the history of noncitizen voting

forecloses their claims either way. *Id.* (emphasizing that “history and tradition” are “integral” to “identifying *unenumerated* rights” of any kind).

Fifth, plaintiffs appear to suggest (Br. 12-13) that their claims would fail only under the “Privileges [or] Immunities Clause of the Fourteenth Amendment,” because that was the context in which the Supreme Court noted that “citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage,” *Minor v. Happersett*, 88 U.S. 162, 177 (1874). But the historical reality of noncitizen voting is not confined to the facts of *Happersett* or any other case, and plaintiffs’ argument is self-defeating anyways. For if their claims fail under the Privileges or Immunities Clause, then they also fail here because the test is the same: claimants must establish that their “unenumerated rights” are “rooted in the Nation’s history and tradition” even under “the Privileges or Immunities Clause.” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 240 & n.22 (2022). Plaintiffs’ inability to carry that burden thus confirms that their asserted rights are not fundamental under any constitutional provision. *See id.*

Finally, plaintiffs can draw no coherent support from the Constitution itself. Even if the Preamble and Supremacy Clause provide “proof of popular sovereignty,” it does not follow that “sovereignty implies the *exclusive* right” for citizens—and only citizens—to vote. Resp. Br. 2, 11-12 (emphasis added). The structure of the Constitution embodies a far more flexible concept of popular sovereignty because,

despite expressly requiring citizenship for the President, Senators, and Representatives, it imposes no such requirement for any other federal office, let alone for state and local voting and officeholding. Board Br. 39-40; *see* Federalist No. 52 (1788) (Madison) (declining to “reduce[] the different qualifications in the different States to one uniform rule”). Contrary to plaintiffs’ assertions, then, the Constitution itself presupposes almost nothing about who should participate in state or local elections, and at the very least, plaintiffs have identified nothing that conclusively “confines voting to citizens” in such elections, Resp. Br. 13-14.

2. Plaintiffs’ reliance on the *Foley* line of cases is misplaced.

Finding no support in history, plaintiffs next assert that the Supreme Court has “clearly held” that “only citizens may vote.” Resp. Br. 11. That is inaccurate and plaintiffs cite no direct authority for their claim. They instead point to language in three cases that did not involve voting and that plaintiffs admit (Br. 14-16) did not declare citizenship “constitutionally mandatory” even in their narrow circumstances. *Foley v. Connelie*, 435 U.S. 291 (1978); *Ambach v. Norwick*, 441 U.S. 68 (1979); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982). The Court should reject plaintiffs’ strained reading of those cases. *See Brown v. Davenport*, 596 U.S. 118, 141 (2022) (“[R]espect for past judgments also means respecting their limits.”).

For starters, plaintiffs’ argument fails on its own terms. The question in this case is not whether an asserted right is “consistent with” a “line of cases”—it is

whether the right is among those few “fundamental” rights that are deeply rooted in “this Nation’s history and practice.” *Glucksberg*, 521 U.S. at 720-21, 723-74; *see Kerry v. Din*, 576 U.S. 86, 95 (2015) (plurality op.) (same). This is why, as the Board has explained (Br. 38-39), dicta are not a sound basis for creating new unenumerated rights. *See Hutchins*, 188 F.3d at 536-37. So, even if the *Foley* line of cases obliquely supported plaintiffs’ theory, their claims would still fail because plaintiffs have not shown that their asserted right is *fundamental*. Board Br. 38-45.

In any event, plaintiffs vastly overread *Foley* and its progeny. As the Board has explained (Br. 47-48), *Foley*, *Ambach*, and *Cabell* held that states may require citizenship for police officers, schoolteachers, and probation officers without triggering strict scrutiny in the equal-protection context. *Cabell*, 454 U.S. at 445; *Ambach*, 441 U.S. at 69; *Foley*, 435 U.S. at 292. The rationale for those decisions was that, because noncitizens have no constitutional right to participate in self-government, states have “wider latitude” to enact laws “limiting the participation of noncitizens” in “the functions of government.” *Ambach*, 441 U.S. at 75; *see Cabell*, 454 U.S. at 438-39; *Foley*, 435 U.S. at 295. Nothing more was needed to resolve those cases, and nothing more was squarely decided by them.

Plaintiffs thus cannot plausibly say that those decisions “clearly held” that “only citizens may vote,” just as they cannot characterize the language they recite as “necessary to the judgment in those cases.” Resp. Br. 2, 11, 14-15. In *Foley* and

Cabell, for instance, the Court had no need to (and did not) decide whether noncitizens are constitutionally excluded from the “political community” for all purposes in holding that states *may* require citizenship for law-enforcement officers. *Cabell*, 454 U.S. at 438-39, 447; *Foley*, 435 U.S. at 297. *Ambach* is even clearer on this point, because the regime there would, on plaintiffs’ theory, be riddled with unconstitutional loopholes, including “exemptions” for “aliens who are not yet eligible for citizenship” and allowances “for situations where a particular alien’s special qualifications as a teacher outweigh” the citizenship requirement. 441 U.S. at 70, 81 n.14. The language in these cases, therefore, cannot sensibly be construed as creating a fundamental unenumerated right to confine voting exclusively to citizens. *See, e.g., Kerry*, 576 U.S. at 93-95 (declining to fashion a new right out of “borrow[ed] language” from “inapposite cases” that “indulged a propensity for grandiloquence when reviewing the sweep of implied rights”).

B. The Voting Act passes rational-basis review.

In its principal brief (at 48-49), the Board explained why the Voting Act satisfies the deferential standard of rational-basis review. Plaintiffs make no effort to dispute that point, despite having the burden to do so. Resp. Br. 10-16; *see Sanchez v. Off. of State Superint. of Educ.*, 45 F.4th 388, 396 (D.C. Cir. 2022). This Court should therefore treat the matter as conceded and hold that the Voting Act passes rational-basis review. *See, e.g., Verizon v. FCC*, 740 F.3d 623, 656 (D.C. Cir.

2014) (holding that appellee “forfeited” an “argument by failing to raise it in its briefs” (citing *Roth v. U.S. DOJ*, 642 F.3d 1161, 1181 (D.C. Cir. 2011))).

II. Plaintiffs’ equal-protection claims lack merit.

The Court should also reject plaintiffs’ equal-protection claims. As the Board has explained (Br. 49-60), the Voting Act is a facially neutral law that plaintiffs have not shown lacks any rational basis. Nor have plaintiffs adequately alleged that the Act was enacted specifically because of an allegedly discriminatory, vote-dilutive effect. Finally, plaintiffs’ quest to label U.S. citizens and American-born persons as “protected classes” is beside the point and not persuasively justified in any event.

A. The Voting Act’s facially neutral voter qualifications easily satisfy rational-basis review.

The Voting Act is facially neutral as to citizenship and national origin because it draws no distinction among voters based on those criteria for local elections. Board Br. 50-52. The Act states that a “qualified elector” must be, among other things, “a citizen of the United States; except, that this subparagraph shall not apply in a local election.” D.C. Code § 1-1001.02(2)(B). Because nothing in that provision differentiates between voters based on citizenship or national origin in local elections, it is facially neutral even under the cases plaintiffs cite, *see Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 212-13 (1995) (noting that awarding contracts solely “based on *disadvantage*” would be “race neutral” and “subject only to the most relaxed judicial scrutiny” (internal quotation marks omitted)).

Plaintiffs offer little response, and they ignore the statutory text altogether. The most that can be gleaned from their brief is one fleeting assertion that the Voting Act “dilutes” the votes of citizens and American-born persons “by logical implication from its terms,” and “thus does so on its face.” Resp. Br. 19. But even assuming that sort of unreasoned assertion counts as a developed argument, it fails all the same. *See Roth*, 642 F.3d at 1181 (“Even appellees waive arguments by failing to brief them.” (internal quotation marks omitted)).

Most fundamentally, plaintiffs ask the wrong question and reach the wrong answer by confusing the Act’s *text* (which is neutral) with the Act’s alleged *effect* (which is purportedly dilutive). *See, e.g., Kirkhuff v. Nimmo*, 683 F.2d 544, 553 (D.C. Cir. 1982) (recognizing that a law does not discriminate “on its face” by impacting only certain people). In contrast to the Voting Act, a facially vote-dilutive statute would be one that by its terms assigns different weight to different votes in the same election, or that gives certain individuals a greater number of votes than others. *See Day v. Robinwood W. Cmty. Improvement Dist.*, 693 F. Supp. 2d 996, 1000-07 (E.D. Mo. 2010) (invalidating provision giving certain voters multiple votes, while upholding provision allowing noncitizen, nonresident property owners to vote in certain local elections). But when, as here, the text of a law treats all votes in an election equally, and does not differentiate among voters, the law is neutral and non-dilutive on its face, because the “crux of a vote dilution claim is *inequality* of

voting power—not diminishment of voting power *per se*,” *Election Integrity Project Cal., Inc. v. Weber*, 113 F.4th 1072, 1087-88 (9th Cir. 2024) (rejecting vote-dilution challenge to “generally applicable” and “even handed” vote-by-mail system).

Moreover, the Voting Act satisfies even plaintiffs’ flawed test because the Act’s “logical implication” is *equality*: it allows each qualified citizen resident to cast one vote in District elections, and it allows each qualified noncitizen resident to cast one vote in District elections. *See* JA 56 (acknowledging that the Act “treats citizens and noncitizens ‘the same’ by letting both groups vote”). That citizens were previously the only residents who voted does not turn equality into inequality either, because the “mere expansion of the class of persons eligible to vote does not, *per se*, imply unconstitutional vote dilution,” *Duncan v. Coffee County*, 69 F.3d 88, 94 n.3 (6th Cir. 1995); *see Collins v. Town of Goshen*, 635 F.2d 954, 957-59 (2d Cir. 1980) (Friendly, J.). Rather, “[v]ote dilution in the *legal* sense occurs only when disproportionate weight is given to some votes over others within the same electoral unit.” *Weber*, 113 F.4th at 1087. Were it otherwise, litigants could stonewall legislative efforts to extend voting rights to previously excluded persons, thus rendering “the scope of the franchise static and virtually unchangeable.” *Duncan*, 69 F.3d at 95. Nothing in the Constitution’s guarantee of equal protection requires that anomalous and counterintuitive result. *See* Board Br. 50-56.

Nor have plaintiffs cited any precedent compelling a different conclusion. Nearly every case they cite involved “explicitly race-based measures,” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 213-18, 226 (2023) (invalidating “race-based admissions systems”), and they only passingly mention one decision addressing discriminatory actions against a minority group for “no reason” besides “hostility to” their “race and nationality,” *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 373-74 (1886) (holding that laundry-permit ordinance was enforced “with an evil eye and an unequal hand” against Chinese persons).¹ But otherwise, plaintiffs’ authorities reaffirm that “the traditional ‘rational basis’ test” applies to laws like the Voting Act that “*expand* rather than curtail the franchise.” *Brown*, 722 F. Supp. at 398; *see* Board Br. 55-56.

Because the Voting Act is facially neutral, plaintiffs must show that extending the franchise to noncitizen residents is wholly irrational. Board Br. 52-56. But

¹ See also *Gratz v. Bollinger*, 539 U.S. 244, 268-70 (2003) (invalidating college-admissions policy that “automatically” distributed “points” to “every single ‘underrepresented minority’ applicant solely because of race”); *Rice v. Cayetano*, 528 U.S. 495, 498-499, 516-17, 522 (2000) (invalidating “an explicit, race-based voting qualification” with an “express racial purpose” under the Fifteenth Amendment); *Adarand*, 515 U.S. at 204-06, 237-39 (remanding for lower court to apply strict scrutiny to “race-based presumptions” in federal-contracting program); *Regents of Univ. Cal. v. Bakke*, 438 U.S. 265, 269-72, 289 & n.27, 313-18 (1978) (opinion of Powell, J.) (invalidating medical-school policy of admitting “a specified number of students from certain minority groups”); *Hirabayashi v. United States*, 320 U.S. 81, 89, 100-02 (1943) (upholding military curfew that expressly discriminated against “citizens of Japanese descent”).

instead of addressing that issue, plaintiffs assert that the Act cannot “be justified here, whatever the level of scrutiny,” because it purportedly lacks a “compelling governmental interest” and is not “narrowly tailored.” Resp. Br. 20. That argument sounds in strict scrutiny, however, not rational basis, and this Court should treat plaintiffs’ refusal to address the proper standard of review as tacitly conceding the Voting Act’s constitutionality. *See, e.g., In re Navy Chaplaincy*, 738 F.3d 425, 430 (D.C. Cir. 2013) (rejecting equal-protection claim where plaintiffs failed to argue that facially neutral policies “lack a rational basis”).

B. Plaintiffs have not plausibly alleged that the Voting Act’s legitimate, democracy-expanding purposes are a pretext for invidious discrimination.

Plaintiffs’ claims fail for the independent reason that they have not adequately alleged that the Voting Act has an invidious purpose. Claimants asserting unconstitutional vote dilution must show that the legislature intended to dilute their votes. *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 38-39 (2024); *Abbott v. Perez*, 585 U.S. 579, 603-05 (2018). It is not enough that dilution was a foreseeable consequence. *Mobile v. Bolden*, 446 U.S. 55, 70-71 & n.17 (1980) (plurality op.), *superseded on other grounds by statute*, *Thornburg v. Gingles*, 478 U.S. 30 (1986). Here, as the Board explained (Br. 58-59), the Voting Act’s purpose is to expand democracy for the benefit of all District residents, citizens and noncitizens alike, and the potential foreseeability of vote dilution does not by itself

prove a different purpose. *See Bolden*, 446 U.S. at 70-71 & n.17 (declining to infer intentional vote dilution “simply because that was a foreseeable consequence”).

Plaintiffs’ counterarguments are too little, too late. Their complaint insists that “no inquiry into legislative purpose is needed” here at all, JA 13, and on appeal, they point to no well-pleaded factual allegations addressing that issue, Resp. Br. 16-20. *See* Board Br. 57-58. Plaintiffs have thus not even alleged facts “consistent with” a “discriminatory motive,” much less facts establishing such a motive. *See Frederick Douglass Found., Inc. v. District of Columbia*, 82 F.4th 1122, 1147-48 (D.C. Cir. 2023) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (dismissing equal-protection selective enforcement claim where allegations were at most “consistent with” an intention to suppress” certain viewpoints).

But regardless, plaintiffs’ newly raised arguments founder. Rather than point to persuasive evidence of the Voting Act’s purposes, plaintiffs instead focus on the Act’s alleged consequences. *See* Resp. 3-4, 18-20. From the assumption that “it is impossible not to intend the necessary consequences of one’s actions,” plaintiffs assert that, by allowing noncitizens to vote, the Act “implies the intent to reduce the voting share of citizens and those of American national origin, because it is impossible to do the former without doing the latter.” Resp. Br. 3-4, 19.

That is wrong. Courts do not ascribe invidious purposes to facially neutral laws that are explainable on nondiscriminatory grounds simply because “a person

intends the natural and foreseeable consequences of his voluntary actions.” *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 276-79 & n.25 (1979) (finding no discriminatory intent behind veterans-preference law despite its “inevitable” and “disproportionately adverse” impact on women). Such a rule would undermine the “presumption of legislative good faith” and ignore the judiciary’s customary reluctance to accuse legislatures of the “offensive and demeaning” practice of acting with unconstitutional motives. *Alexander*, 602 U.S. at 10-11; *see Abbott*, 585 U.S. at 605 (requiring vote-dilution claimants to “overcome the presumption of legislative good faith” by showing “invidious intent”). Accordingly, while disparate impact is not irrelevant, challengers must still show that a facially neutral law was enacted “‘because of,’ not merely ‘in spite of,’ its adverse effects,” even if those effects seem “inevitable.” *Feeney*, 442 U.S. at 278-79 & n.25; *accord DHS v. Univ. of Cal.*, 591 U.S. 1, 34-35 (2020) (plurality op.) (holding that the “disparate impact” of DACA’s recission on “Latinos from Mexico” did not show “discriminatory purpose”).

These principles foreclose plaintiffs’ claims. The most generous reading of their new argument is that it would have been “impossible” not to *foresee* potential vote dilution. Resp. Br. 18-19. But that by itself cannot show that dilution was the Voting Act’s *purpose*, let alone rebut the presumption of legislative good faith. Board. Br. 56-59. Indeed, contrary to plaintiffs’ unsupported assertion (Br. 3), the Board has not “admit[ted]” that the Act’s “purpose” was “to benefit noncitizens.”

Rather, the Board has relayed (Br. 58-59) the Council's determination that the Act was intended to benefit *all* District residents by expanding access to democracy in local elections. *See* D.C. Council, Comm. on the Jud. & Pub. Safety, Report on Bill 24-0300, the "Local Resident Voting Rights Amendment Act of 2022," at 2 (Sept. 27, 2022) (explaining that the Voting Act was "the next step in the expansion of the franchise" to "improve[] access to democracy for all District residents"). Nothing in the record, therefore, plausibly suggests that, in enacting the Voting Act, the Council as a whole was institutionally driven by the invidious intent to single out and dilute the votes of U.S. citizens and American-born persons.

Plaintiffs offer no reason or authority to conclude otherwise. Resp. Br. 18-20. *Students for Fair Admissions* sheds no light on the validity of a facially neutral law like the Voting Act because that case involved explicit "racial preferences," which (unlike facially neutral laws) are subject to strict scrutiny even if "well intentioned and implemented in good faith." 600 U.S. at 213-19; *see Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 89 F.4th 46, 61-62 (1st Cir. 2023) (finding "no reason to conclude that *Students for Fair Admissions* changed the law governing the constitutionality of facially neutral" policies), *cert. denied*, 145 S. Ct. 15 (2024). Nor do plaintiffs pinpoint anything in *Students for Fair Admissions* that clearly abrogates the Court's precedents barring inferences of discriminatory intent solely from the effects of a facially neutral law. *See Herron v. Fannie Mae*, 861

F.3d 160, 168 (D.C. Cir. 2017) (“[T]he Court does not overturn or limit its prior holdings through silence or implication.”).

Also misplaced is plaintiffs’ reliance (Br. 19-20) on two cases under Section 5 of the Voting Rights Act, which would be inapposite even had that statute survived *Shelby County v. Holder*, 570 U.S. 529 (2013). Those cases merely note that “dilutive impact” may be “probative” under Section 5 but that it “does not, without more, suffice to establish” a “discriminatory purpose.” *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 487-88 (1997); *Florida v. United States*, 885 F. Supp. 2d 299, 349-57 (D.D.C. 2012). That rule of course does not help plaintiffs here for the reasons explained, *see supra* pp. 14-17, all of which are reinforced by the stark differences between Section 5’s “statutory preclearance test” and the “traditional presumption” of constitutionality that applies to facially neutral laws like the Voting Act. *Florida*, 885 F. Supp. 2d at 350 (explaining that Section 5 “reversed” the “relevant constitutional standard” by requiring states to show that their actions “do not have a discriminatory purpose”); *see Bossier*, 520 U.S. at 477-82 (same).

C. Plaintiffs’ efforts to create new “protected classes” are immaterial and inadequately justified.

In the district court, plaintiffs tied their equal-protection claims to the notion that U.S. citizens and American-born persons are “protected classes.” JA 56-61. The Board responded by explaining that this Court and the Supreme Court have limited such classes to historically disadvantaged and politically powerless groups,

and that plaintiffs flunk that test by their own admission. Board Br. 56, 59-60 (citing *Graham v. Richardson*, 403 U.S. 365 (1971); *United States v. Cohen*, 733 F.2d 128 (D.C. Cir. 1984) (en banc) (Scalia, J.); *Hedgepeth ex rel. Hedgepeth v. WMATA*, 386 F.3d 1148 (D.C. Cir. 2004) (Roberts, J.)). Now, without even mentioning those precedents or their own statements, plaintiffs say that analyzing their claims through the lens of “protected classes” would “enshrine a caste system,” and alternatively, that they are “protected classes” in this case because they “were not all-powerful in DC when the [Voting Act] was passed.” Resp. Br. 3, 18.

Plaintiffs’ new contentions are unsound, but the Court need not address this issue at all because their equal-protection claims fail for the independent reasons noted above. Specifically, the Voting Act is facially neutral and plaintiffs have not shown that it lacks any rational basis or that it was enacted for an improper purpose. *See supra* pp. 10-18. Plaintiffs thus cannot prevail even if they belong to a protected class because the Voting Act is not discriminatory class-based legislation. *See, e.g., David K. v. Lane*, 839 F.2d 1265, 1271 (7th Cir. 1988) (declining to decide whether “white inmates in protective custody” were a “suspect class” where policies were “facially neutral” and “plaintiffs failed to show” a “discriminatory motive”).

But if the Court does reach this issue, it should reject plaintiffs’ theories, which they admit present “a question of first impression in this Court,” Resp. Br. 16. Plaintiffs in fact cite no decision of *any* court treating U.S. citizens and

American-born persons as constitutionally protected classes, or otherwise holding that laws affecting such persons receive the same constitutional scrutiny as laws discriminating against noncitizens and foreign-born persons. Resp. Br. 16-18. Worse yet, plaintiffs neglect to mention that the only court to consider their central thesis has squarely rejected it. *See Lacy v. San Francisco*, 312 Cal. Rptr. 3d 391, 412-13 (Cal. Ct. App. 2023) (upholding noncitizen voting for schoolboard elections since “citizens” are not a “protected class” just “because noncitizens are”).

Instead, plaintiffs once again invoke the racial-discrimination cases distinguished above to assert that strict scrutiny should apply to laws affecting citizens and the American-born because “citizenship” and “national origin” have been deemed “suspect *characteristics*.” Resp. Br. 16-18. The Court should decline plaintiffs’ invitation to embark on that uncharted venture. *See, e.g., SECSYS, LLC v. Vigil*, 666 F.3d 678, 687-88 (10th Cir. 2012) (opinion of Gorsuch, J.) (recognizing that “heightened review” is reserved for “historically ostracized groups”).

The Supreme Court has deemed “citizenship” and “national origin” suspect characteristics only in certain cases involving discrimination against *noncitizens* or persons of *foreign* ancestry, and only because of the historical discrimination and political powerlessness that such persons have faced. *See, e.g., Graham*, 403 U.S. at 371-76. Yet plaintiffs do not explain why those cases cover U.S. citizens and American-born persons, whom they admit have not historically been “burdened

based on these characteristics,” JA 61. Nor do plaintiffs reconcile their theory with the Supreme Court’s suggestion that laws may “treat certain aliens more favorably than citizens,” since aspects of the Constitution itself “rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other.” *Mathews v. Diaz*, 426 U.S. 67, 78 & n.12 (1976) (discussing federal law). These unanswered questions simply underscore plaintiffs’ failure to persuasively justify their novel position. See *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 557 (2012) (rejecting “heightened scrutiny” for persons who had not been shown to “share the characteristics that prompted” the Court’s “skepticism of classifications disadvantaging” other individuals).

As a fallback, plaintiffs appear to suggest (Br. 18) that they are a protected class “in the circumstances” here because they feel “harmed” by the Voting Act and “were not all-powerful in DC when [it] was passed.” That approach has no principled limit, however, and cannot be squared with this Court’s caselaw. Under plaintiffs’ test, the child-arrestees in *Hedgepeth v. WMATA* should have been a protected class because they were obviously harmed by policies treating them more harshly than adults and were not all-powerful there. 386 F.3d at 1150-55. And the protected class label also should have applied to the defendants in *United States v. Cohen*, who were automatically institutionalized solely because they were acquitted by reason of insanity in the District rather than a state, since they, too, were harmed

and not all-powerful. 733 F.2d at 129-36. Yet in both cases, this Court reached the opposite conclusion. The same determination is warranted here.

CONCLUSION

This Court, if it does not affirm the dismissal of plaintiffs' suit for lack of standing, should affirm the judgment of dismissal on the merits and remand with instructions to dismiss with prejudice.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 28.1(e)(2)(C) for a cross-appellant's reply brief because the brief contains 5,242 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14-point font.

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