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Orchestrating Equity: What Antidiscrimination Law Can Learn from Blind Hiring in American Orchestras

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Major American orchestras are unique in their hiring practices. Employment decisions for orchestra musicians are based almost solely on an audition, which is typically conducted "blindly," meaning a curtain visually separates the candidate from the judges. This practice was originally implemented as a means to limit gender bias in orchestra hiring—so that the hiring committee would not be able to tell whether a candidate was male or female. With regard to increasing gender diversity in orchestras, implementing blind auditions is largely seen as having contributed to a significant rise in the number of women hired as orchestral musicians. But, while gender diversity has significantly increased, racial demographics in orchestras remain largely static, and largely nondiverse.

In a widely-discussed and widely-criticized July 2020 editorial, Anthony Tommasini, Chief Classical Music Critic of the New York Times, called for an end to the practice of blind auditions, arguing that if racial diversity is ever to increase in the American orchestra, blind auditions must be eliminated. Tommasini does not provide a clear alternative to the blind audition, but implies that some sort of affirmative action may be necessary, and/or that for some reason, whether a lack of qualifications as defined in the traditional sense or structural biases and barriers to accessing the hiring process, minority candidates are not winning orchestra auditions. And although neither Tommasini nor the broader industry seems to have a well-settled or uniform solution, the proposal provides an interesting angle from which to analyze the diversity problem in orchestral music, and how potential solutions interact with antidiscrimination law.

This comment seeks to address the various factors that may contribute to this lack of diversity: the practice of blind auditions, a lack of training for minority candidates, cost and time

barriers to pursuing professional auditions, and biases built in to the typical assessment criteria. Each of these implicate distinct facets of antidiscrimination law and present different challenges both with respect to furthering diversity initiatives and complying with the law. Additionally, this comment analyzes the potential merits of a Title VII disparate impact suit that could be brought by an orchestra candidate.

Analyzing the difficulties in bringing such a suit—particularly in overcoming business necessity and First Amendment defenses—illustrates how in a highly skilled, highly competitive field, Title VII does little to further its original goal of increasing equal employment opportunities. These issues are not unique to the orchestral world. While the unique hiring structure in this field provides an interesting and isolated perspective from which to analyze unintentional discrimination in the audition process, it also illustrates broader issues with many antidiscrimination law ideas including debiasing, the antisubordination vs. anticlassification distinction, and the legal viability of affirmative action. These lessons can be applied to virtually any hiring context. And in analyzing the viability of a disparate impact suit, this comment also seeks to highlight the shortcomings in Title VII, one of the most important pieces of legislation in U.S. history. Today, it is much rarer for racial minority candidates to face overt hiring discrimination, as compared to 1964. But, statistics are clear that unintentional discrimination is still prevalent in many fields, including orchestras. This comment will explore how despite the clear disparate impact in orchestral hiring, Title VII may lack the ability to combat discrimination where it is most needed today: where discrimination is hard to detect or where the discriminator either lacks intent to discriminate or does so in subtle or structural ways.

Finally, this comment seeks to explore how the same First Amendment principles that could undermine a potential Title VII suit can also potentially give orchestras much greater

leeway in implementing affirmative action should they choose to do so. While classifying orchestras' hiring processes and decisions as expression means that any disparities the hiring process creates are likely shielded by the First Amendment, that same First Amendment protection may protect potential voluntary affirmative action plans from an otherwise challenging legal landscape shaped by cases like Johnson *and* Weber.

I. Background

American orchestras are struggling to diversify the orchestral musician workforce.[1] Historically, candidates hired as full-time musicians in major American orchestras were almost entirely white and male.[2] With the implementation of a practice known as the "blind audition" beginning in the 1970s, orchestras began to gradually rectify gender disparities among their musicians.[3] Today, women are hired as orchestra musicians at an equal, if not greater, rate compared to men.[4] However, racial disparities persist in orchestras' hiring processes.[5] As one classical music critic notes, "[the orchestral] world is blindingly white, both in its history and its present."[6] As this issue draws increasing public attention, various programs, initiatives, and

[1] Aaron Flagg, *Anti-Black Discrimination in American Orchestras*, SYMPHONY, Summer 2020, at 30-37 ("the orchestra field has [historically] been branded as being by and for white men[, but] the field by and large wants to dismantle the impact of systematic discrimination …."); Michael Cooper, *Seeking Orchestras in Tune With Their Diverse Communities*, N.Y. TIMES (Apr. 18, 2018) (describing that "[o]rchestras are among America's least racially diverse institutions. African-American musicians accounted for only 1.8 percent of the nation's orchestra players in 2014"); Anthony Tommasini, *To Make Orchestras More Diverse, End Blind Auditions*, N.Y. TIMES (July 16, 2020) ("Hanging on to a system that has impeded diversity is particularly conspicuous at a moment when the country has been galvanized by revulsion to police brutality against Black Americans — and when orchestras, largely shuttered by the coronavirus pandemic, are brainstorming both how to be more relevant to their communities and how to redress racial inequities among their personnel when they re-emerge.").
[2] Flagg, *supra* note 1, at 31; Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV., no. 4, Sept. 2000, at 715.
[3] Goldin & Rouse, *supra* note 2.
[4] *Id.*
[5] *See, e.g.,* Flagg, *supra* note 1; Tommasini, *Blind Auditions*, supra note 1; Alex Ross, *Black Scholars Confront White Supremacy in Classical Music*, THE NEW YORKER (Sept. 14, 2020).
[6] Ross, *supra* note 5.

proposals aimed at addressing these disparities have been attempted or considered. They include forms of affirmative action, changing audition and hiring procedures, legal proceedings alleging racial discrimination, and educational initiatives to foster minority talent. This comment will explore the distinct legal and practical challenges associated with each.

A. The Race Problem in American Orchestras

Today, there is an extreme racial imbalance in American orchestras. According to a 2014 study "only 1.8 percent of the players in top [orchestras] were Black; just 2.5 percent were Latino."[7] As a point of comparison, Black and Latino persons comprised 11.4% and 7.4% of the total U.S. workforce in 2014, respectively.[8] While many highly skilled or specialized professions are criticized for a lack of diversity, the disparity is particularly stark among professional orchestra musicians. Diversity among professional orchestra musicians lags drastically behind other professional groups, even many groups similarly criticized for having nondiverse workforces like medical doctors,[9] attorneys,[10] and actors.[11]

American orchestras have increasingly drawn criticism for this lack of diversity, and for not reflecting the communities they seek to serve.[12] Relevance to the surrounding community is a

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[7] Tommasini, supra note 1; Flagg, *supra* note 1, at 31. *See also* Cooper, *supra* note 1 (noting that at the time of the 2014 study, the percentage of Black musicians had been static for almost a decade). *See also* Sameer Rao, *Inside the Battle to Diversify Orchestras, One Costly Audition at a Time*, COLORLINES (Dec. 27, 2018, 2:56 PM) ("Black musicians made up just under 2 percent of orchestra musicians but were 12 percent of the U.S. population. Latinx people comprised 17 percent of the overall populace but only 2.5 percent of orchestra players. … [A]t 9 percent, Asian orchestra musicians exceeded their U.S. population of 1 percent.")

[8] U.S. BUREAU OF LABOR STATISTICS, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2014 (Nov. 2015).

[9] *Diversity in Medicine: Facts and Figures 2019*, ASS'N AM. MED. COLLS. (Black and Latino medical doctors made up 5% and 5.8% of the total US workforce in 2018).

[10] Debra Cassens Weiss, *Lawyer Population 15% Higher Than 10 Years Ago, New ABA Data Shows*, ABA JOURNAL (May 3, 2018, 2:31 PM) (Black and Latino attorneys each made up 5% of the total US workforce in 2018).

[11] Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CAL. L. REV. 1, 11 (2007).

[12] Tommasini, *supra* note 1 (noting that "American orchestras remain among the nation's least racially diverse institutions" and "[i]f ensembles are to reflect the communities they serve, the audition process should take into account race, gender and other factors.").

particularly important business concern for modern orchestras as they struggle to stay solvent while "largely shuttered" by the pandemic. Accordingly, Tommasini argues that "[h]anging on to a system that has impeded diversity" may no longer be part of a viable business model.[13]

Orchestras have also failed to make progress on racial diversity where other professions have, illustrated by the fact that the New York Philharmonic, the oldest and arguably finest American orchestra, has the same number of Black musicians in its 106-musician complement as it had in 1969: one.[14] Prominent musicians have additionally noted the importance of representation in the field for the industry's long-term diversity and viability.[15]

Although a lack of racial diversity still plagues American orchestras, many have, to varying degrees, recognized the issue and considered remedial action. For example, in 2018, the League of American Orchestras launched an "equity, diversity, and inclusion" (EDI) initiative, recognizing EDI's importance to long-term viability and relevance of orchestral institutions.[16]

B. Historical Issues

While diversity problems in American orchestras have lately drawn renewed attention, the issue has long been discussed. In July 1969, during the Civil Rights Movement, two Black musicians, Arthur Davis and Earl Madison, challenged the New York Philharmonic's hiring practices as discriminatory before the New York City Commission on Human Rights.[17] In response to the allegations, groups including the National Urban League "called on the orchestra

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[13] *Id.*
[14] *Id.*
[15] *See id.* (profiling Anthony McGill, the sole Black member of the New York Philharmonic, and noting his perspective on representation in the field).
[16] LEAGUE OF AM. ORCHESTRAS, EQUITY, DIVERSITY, AND INCLUSION: AN EVOLVING STRATEGIC FRAMEWORK (January 18, 2019)
[17] Daniel J. Wakin, *Mahler Said What to Whom?*, N.Y. TIMES (Feb. 3, 2011); Tommasini, supra note 1.

to put affirmative action in place."[18] Ultimately, the Commission concluded that the Philharmonic had not discriminated against Madison and Davis because they were simply unqualified for the positions they sought, but nonetheless determined that the orchestra "had 'engaged in a pattern and practice of discrimination' regarding the hiring of substitute and extra musicians: an old-boy system that usually relied on the students of players."[19] In its defense, the Philharmonic denied that it had discriminated, and emphasized the purely meritocratic character of its hiring processes.[20]

Despite being found not to have discriminated against Davis and Madison, the racial disparity in the Philharmonic was stark. The Philharmonic, and orchestras more broadly, recognized that their public image needed some help.[21] At the time, like many of its peer institutions, the Philharmonic had only one Black musician.[22] In seeking to diversify, the Philharmonic conducted "an almost frantic search for black candidates," compiling a seven-page list of candidates and inviting many for special auditions.[23] The Philharmonic's management also received correspondence urging it to "refute charges of discrimination" by hiring a "young black violinist."[24]

Against the backdrop of the Civil Rights Movement, the movement to diversify orchestras had support from some of the era's leading musical figures.[25] The Philharmonic's

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[18] Wakin, *supra* note 17.
[19] *Id.*; Tommasini, *Blind Auditions*, *supra* note 1 (hiring extra or substitute musicians was considered discriminatory, and "old boys' network").
[20] AMYAS AMES, REPORT TO SUBSCRIBERS, *Special Files: Racial Discrimination Charges, Nov 5, 1969 - Nov 5, 1969 (ID: 009-01-05)*, N.Y. Philharmonic Leon Levy Digital Archives, https://archives.nyphil.org/index.php/artifact/e488c5d9-8f55-4178-a783-dbc05ef9441c-0.1/fullview#page/1/mode/2up.
[21] Tommasini, *supra* note 1 ("The ruling helped prod American orchestras, finally, to try and deal with the biases that had kept them overwhelmingly white and male.").
[22] Wakin, *supra* note 17 (at the time of the article in, there were no black musicians in the New York Philharmonic).
[23] *Id.*
[24] *Id.*
[25] *Id.*

then-Music Director and globally esteemed conductor, composer, and performer, Leonard Bernstein, was a vocal supporter of both the Civil Rights Movement and increasing diversity in the music industry.[26] Other prominent musicians also supported this movement.[27] More broadly, Congress intended to diversify workforces through Title VII of the Civil Rights Act, and much of the Court's contemporaneous jurisprudence recognized the legitimacy of those goals.[28]

C. The Blind Audition

Racial imbalances are not the only diversity problem orchestras have historically faced. Gender imbalances were prevalent until the last couple of decades.[29] In an effort to diversify their workforces and hire more women, orchestras began to institute a new hiring system in the 1970s: so-called "blind" auditions.[30] Gender diversity has since increased significantly.[31] Racial diversity still lags far behind.[32]

The key feature of the blind audition is a screen or curtain, which is used to visually conceal the candidate from the hiring committee.[33] The candidates thus become anonymized and de-identified, and are referred to simply by a gender-nonspecific number.[34] Candidate anonymity is taken so seriously that the personnel manager often rolls out a small carpet to conceal the

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[26] *See, e.g., id.*; Transcript of Record at 53, Madison v. Philharmonic Symphony Soc'y of N.Y., *Volume VI: Human Rights Commission Hearings, Testimony of Bernstein, Sep 29, 1969–Sep 29, 1969*, N.Y. Philharmonic Leon Levy Digital Archives, https://archives.nyphil.org/index.php/artifact/b9dcfa41-0472-4839-8357-07255dbc0a5e-0.1/fullview#page/53/mode/1up; Leonard Bernstein, *The Negro in Music, Problems He Has to Face In Getting a Start*, N.Y. TIMES, Nov. 2, 1947, at 253.
[27] Flagg, *supra* note 1, at 37.
[28] *See, e.g.,* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).
[29] *E.g.,* Goldin & Rouse, *supra* note 2, at 715-20.
[30] *See* Goldin & Rouse, *supra* note 2.; Tommasini, *Blind Auditions*, *supra* note 1 (explaining that the New York Philharmonic and other large orchestras began to hold blind auditions to minimize racial and gender biases).
[31] *E.g.,* Goldin & Rouse, *supra* note 2 (50% increase); Tommasini, *supra* note 1 ("Blind auditions, as they became known, proved transformative. … Today, women make up a third of the Boston Symphony Orchestra, and they are half the New York Philharmonic.").
[32] *See supra* Part I.A.
[33] *See* Goldin & Rouse, *supra* note 2, at 720-24.
[34] *Id.*

sounds of a candidate's footsteps and corresponding inferences about the candidate's sex, or alternatively asking a female candidate to take off her shoes while he or she provides "compensating footsteps" that are identical for each candidate.[35]

Orchestra auditions typically feature multiple rounds, with the candidate pool narrowed at each stage.[36] The preliminary and semifinal rounds are typically blind.[37] The final round is sometimes, but not universally, blind.[38] These auditions are very important with regard to the overall makeup of the orchestra as well as individual musicians' careers because once a candidate wins the audition, they are awarded tenure for life in the orchestra, after a brief probationary period.[39]

Not only do the results of each individual audition have a high degree of permanence, but the audition procedures themselves reinforce this permanence as they are generally written into union contracts.[40] Musicians' unions could pose a barrier to eliminating blind auditions. Unions were segregated until 1974 and have largely supported the practice as the fairest way to administer hiring. Given the recent push for diversity, union members may be willing to reconsider structural barriers that impede diversity. However, the elimination of blind auditions is far from a sure proposal. Other considerations, too, are often used to justify blind auditions.[41]

The traditional argument in favor of blind auditions is that they are a pure meritocracy: because no candidate can be personally identified, there can be no bias against any candidate's

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[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id. See also* Desmond Charles Sergeant & Evangelos Himonides, *Orchestrated Sex: The Representation of Male and Female Musicians in World-Class Symphony Orchestras*, 10 FRONTIERS IN PSYCHOLOGY 1, 4 (2019) ("It is common … for the successful candidate to be hired solely on the evidence of the audition: the player judged to be the best performer gets the post.").
[40] Goldin & Rouse, *supra* note 2, at 9; Tommasini, supra note 1 ("Musicians' unions[] … have long been tenacious defenders of blind auditions").
[41] Goldin & Rouse, *supra* note 2.

personal characteristics, and accordingly any judgements the audition committee makes are purely on the merits of a candidate's performance because "[t]he screen permits us to focus on the pure trait of musicianship …." [42] This "blind audition meritocracy" reinforces the idea that "[a]n orchestra should be built from the very best players, period."[43] Significant empirical support exists for this position, as "[r]esearch shows that female musicians are scored higher when judges cannot tell they are female."[44]

D. Proposed Reforms

Amidst rapidly growing social movements, the classical music community has recognized a need to change and diversify.[45] This push comes both from orchestra boardrooms as well as musicians, press, and nonprofits.[46]

One criticism and possible area for improvement is the talent pool from which orchestras draw their players. This argument posits that there simply are not enough qualified players of color in the labor market for them to be significantly represented on stage. This view implicates the question of how to define the relevant labor market, what standards candidates should be judged upon, and whether there are unreasonable barriers for racially diverse candidates to be competitive for these jobs in ways unrelated to their qualifications.

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[42] Tommasini, *supra* note 1 (noting among other things that they were first implemented to address discriminatory biases and that defenders of blind auditions "assert[] that they are the best way to ensure fairness."). *See also* Nancy Leong, *The Race-Neutral Workplace of the Future*, 51 U.C. DAVIS L. REV. 719, 720 (2017); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 15-16 (2000) (describing the meritocracy argument in terms of functional rationality and explaining that while "[t]he screen permits us to focus on the pure trait of musicianship," this "instrumentalization of persons" has both distinct benefits and limitations).

[43] Tommasini, *supra* note 1.

[44] Leong, *supra* note 43, at 722.

[45] *See, e.g.,* LEAGUE OF AMERICAN ORCHESTRAS, EQUITY, DIVERSITY, AND INCLUSION: AN EVOLVING STRATEGIC FRAMEWORK (Jan. 18, 2019).

[46] *See, e.g.,* Flagg, *supra* note 1; Tommasini, supra note 1.

Another proposal is to critically reassess the actual hiring processes for the orchestra musicians themselves, as this will have a more direct and immediate effect. This could come in the form of broadening the candidate pool to include qualified individuals from more diverse backgrounds, redefining the standards upon which candidates are judged, or instituting some form of affirmative action.

One of the more controversial recent proposals is a call to end blind auditions.[47] Tommasini recognizes the reality that the blind audition system has done little to further racial diversity, and asserts that "[i]f things are to change, ensembles must be able to take proactive steps to address the appalling racial imbalance that remains in their ranks[]." "Blind auditions are no longer tenable," Tommasini writes, but does not suggest a specific alternative practice.[48] Tommasini implies that affirmative action of some kind is necessary, and also seems to suggest, perhaps problematically, that minority musicians cannot win on the merits, at least as we currently define them.[49] Regardless, a proposal to eliminate blind auditions presents interesting legal questions because it would strip away the practice's primary benefit of de-identification, potentially reintroducing biases (though not necessarily harmful biases) into the selection process. Such proposals may also run afoul of the Court's complicated affirmative action doctrine.[50]

II. Challenging Hiring Processes under Title VII

[47] *How to Diversify Orchestras*, Opinion, N.Y. TIMES (Aug. 8, 2020) (letters from readers in reaction to Tommasini's *Blind Auditions*); Tommasini, *supra* note 1.

[49] *Diversify Orchestras*, *supra* note 47.

[50] Another common initiative is "facial" or top-down casting and hiring. It has become commonplace for orchestras to advertise programs that feature prominent composers, soloists, and conductors of color. While such approaches lend visibility to racially diverse musicians, they do very little (at least in the short term) to address the particular problem discussed in this comment: the actual makeup of the orchestra. Thus, these initiatives will not be analyzed in this comment.

Scholars, commentators, and musicians alike have long lauded the blind audition for its meritocratic value. Legal scholars, in particular, have touted the blind audition as a valuable form of debiasing technology for its effects on gender diversity in orchestras, and applied those lessons to arguments about antidiscrimination law in other contexts. And while scholars and observers have acknowledged the downsides associated with the blind audition, it has often been used to bolster arguments in favor of other debiasing mechanisms, such as blind resume review, without due weight to the adverse effects associated with stripping away elements of an individual's identity.

This comment will walk through a hypothetical Title VII disparate impact suit brought by a candidate for a performing role in an orchestra, as well as potential employer- or community-initiated solutions to combat this diversity problem including educational initiatives, changes in recruitment, and various forms of affirmative action. The comment will analyze the various defenses available in these types of Title VII suits, chiefly the business necessity defense and a First Amendment defense. In so doing, we will undertake an analysis of the qualities—musical, professional, and identity-based—that orchestra-employers can, and possibly should, consider in hiring musicians, and the legal implications and theoretical justifications for considering each of those aspects.

In structuring this argument through the lens of a potential Title VII suit challenging current audition practices or future affirmative action plans, this comment also seeks to illustrate where current Title VII jurisprudence falls short of Congress's goal of creating equal employment opportunity.

A. The Title VII Disparate Impact Claim

Adversely affected minority job candidates can challenge a potentially discriminatory hiring system through a Title VII lawsuit. Title VII allows plaintiffs to bring "disparate impact" challenges to employment practices that are facially neutral but fall more harshly on one group than another, as long as those practices cannot be justified by business necessity. Unlike many other antidiscrimination laws, Title VII's disparate impact provision does not require plaintiffs to show an employer's discriminatory intent to impose liability.[51]

In the orchestral field, where hiring musicians is done blindly, a cause of action without an intent element is essentially a necessary prerequisite to bringing a discrimination claim, as it is nearly impossible for a plaintiff to prove an employer's discriminatory intent, and similarly difficult for employers to discriminate against candidates on the basis of race when they do not know candidates' identities.[52]

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[51] Nonetheless, "[t]he distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis [which requires a showing of intent] is used." *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 987 (1988). It would be improper to "hold a defendant liable for unintentional discrimination . …Rather, the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be *functionally equivalent to intentional discrimination*." *Id.* (emphasis added). Although it may seem counterintuitive to allow a cause of action against employers that does not include an explicit intent element, it is helpful to consider the national debate over civil rights and equal employment opportunity at the time Title VII was passed. Civil rights leaders did not focus on intentional, "blatantly exclusionary bars" as the primary barrier to equal employment opportunity, rather were adamant about "eliminat[ing] other exclusionary impediments" that impede the development of racially diverse workforces to "reverse a long legacy of *structural* exclusion."[51] Courts have carefully specified that Title VII does not "guarantee a job to every person regardless of qualifications[,]" nor does it "command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." But, Title VII does require "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." The Title VII disparate impact action was codified in the Civil Rights Act of 1991 "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *See* Pub. L. No. 102-166.

[52] In some cases, a candidate may be deductively identifiable. *Consider* LEONARD SLATKIN, CLASSICAL CROSSROADS: THE PATH FORWARD FOR MUSIC IN THE 21ST CENTURY, ch. "On Diversity" (forthcoming Sept. 2021) (on file with author) ("[T]he people on the audition committee typically include those who are in the section in question. So if you have a vacancy for first flute, and the second flute of the orchestra tries out for the position, the committee automatically knows that this colleague is auditioning. … [T]hat person is supposed to be in the hall listening and is not there, so logically the panel assumes that this musician is one of the candidates playing. Add to that the members of the orchestra who are usually advanced straight to the finals, and chances are that most jury personnel can figure out when that particular musician is playing. As trained professionals who have rehearsed and performed together over a number of seasons, they know how their musical colleagues sound.").

In a Title VII disparate impact claim, plaintiffs must first show that a specific practice has a significant, adverse effect on a protected class. If plaintiffs make this prima facie case, the employer must then satisfy the burden of persuasion that the challenged practice is related to job performance and consistent with business necessity.[53] Should the employer successfully make a business necessity defense, plaintiffs have an opportunity to show that an alternative practice would meet the business objectives without adverse impact.[54] In orchestral hiring, the adverse effect requirement is readily satisfied by statistics that show minority musicians are grossly underrepresented in the workforce. However, it may be harder to identify the *specific* practice causing or contributing to this disparity. A few specific practices could form the basis for a disparate impact claim, either collectively or standing alone.

One possibility is that the entire audition process is the specific discriminatory practice, either broadly or because auditions are typically conducted blindly. It may be impossible for a plaintiff to show how, specifically, these practices contribute to the disparity as required by Title VII, because of the opacity of the decisionmaking process. But *Griggs v. Duke Power Co.* provides helpful guidance on Title VII's goals, noting that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[55] Even if a specific practice cannot be linked to existing disparities, courts recognize a "bottom line exception" which allows statistical evidence to prove that employment practices, collectively, lead to impermissible discrimination.[56]

[53] *See* Civil Rights Act of 1991, Pub. L. No. 102-166.
[54] *See, e.g.,* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)
[55] 401 U.S. 424 (1971).
[56] *See* Civil Rights Act of 1991, Pub. L. No. 102-166.

In a world where the New York Philharmonic has the same number of Black musicians in 2021 that it had in 1969,[57] statistics illustrate that the "status quo" has been effectively frozen. Importantly, the status quo need not be *intentionally* discriminatory for the disparities it sustains to violate Title VII. A more complex question is whether the hiring practices preceding the implementation of blind auditions were actually discriminatory. On those same statistics, one might assume that the disparities that existed prior to the gradual implementation of blind auditions in the 1970s were discriminatory because, just like the disparities that exist today, racial minorities were dramatically underrepresented earlier in the 20th century as compared to the broader population. Alternatively, it may be productive to analogize to the statistical change in gender diversity following the introduction of blind auditions. The dramatic shift toward gender equality after orchestras adopted blind auditions suggests that prior hiring and audition and hiring procedures were in fact biased and discriminatory against women. Gender discrimination is distinct from racial discrimination, and because blind auditions helped one group and not the other, it may be inaccurate to claim that the practices in place prior to 1970 were also *racially* discriminatory on those grounds alone. However, the backdrop of the Civil Rights Movement, the 1970 New York City Commission on Human Rights ruling that then-existing orchestral hiring policies constituted a "pattern and practice of discrimination[,]" and the stark statistical disparities that exist today create at least a plausible suggestion that racial animus has traditionally been a factor in orchestral hiring. Still, in a disparate impact claim, racial discrimination can be proven without any showing of racial animus—the two concepts are not inseparably linked.

[57] Tommasini, *supra* note 1.

Even so, potential plaintiffs must grapple with the reality that blind auditions helped remedy gender discrimination, but not racial discrimination. Thus, employers can argue that the blind audition system creates a pure meritocracy: a system that selects the best musician without regard to race, gender, or any other protected characteristic; in which candidates are judged completely and exclusively on their ability to perform the job they seek. Employers may then conclude that this bias-free hiring scheme can only indicate that there are simply not enough qualified, minority musicians for these racial disparities not to exist. If these points are true, orchestras may have a powerful "business necessity defense."

B. The Business Necessity Defense

"Business necessity" is the principal defense available to employers in Title VII disparate impact cases. To prevail on a business necessity defense, the employer must show that the challenged practice is related to job performance and consistent with business necessity. Business necessity requires that the practice actually be—as the term implies—*necessary* to a job's function.[58]

In the context of orchestra auditions, job-relatedness should be easily satisfied: an orchestra seeks to hire a skilled musician, hears a slate of candidates audition, and chooses the player it deems the best fit for the ensemble. But, whether the practice is actually necessary for the job is a harder question. *Necessity* raises more interesting questions. To determine whether a practice meets the business necessity requirement, we must analyze the skills and qualifications

[58] Previous scholarship has suggested that in the realm of casting and auditions, true necessity is not required, but Title VII was amended in 1991 to explicitly require actual necessity. *See* Civil Rights Act of 1964, § 701, as amended, 42 U.S.C.A. § 2000e; Jennifer L. Sheppard, *Theatrical Casting - Discrimination or Artistic Freedom?*, 15 COLUM.-VLA J.L. & ARTS 267 (1991).

that orchestra auditions assess, and whether that assessment is necessary to the orchestra's mission.

Those who ascribe to the "meritocracy" view of blind auditions typically argue that blind auditions allow the hiring committee to choose the best candidate from the audition pool, solely based on certain aural assessment criteria. But making a judgment about which candidate is the *best* musician raises several distinct questions.

1. What skills are "necessary?"

First, what are the skills and qualities that make a musician the *best* candidate in an audition pool? The blind audition purports to exclusively test a candidate's musical abilities, and choose the best candidate based on those criteria. And it is not hard to intuit that just like any employer, orchestras seek to hire the best available applicant for an open position. To accomplish this goal, orchestras have traditionally asked candidates to play a few excerpts, alone and in isolation from musical context, to judge their musical abilities. Setting aside, for a moment, the fact that performing orchestral passages in context can be vastly different from performing excerpts in isolation, there is another, related question of whether a candidate's ability to succeed in this type of audition is predictive or representative of their ability to succeed on the job.

The excerpt list often draws from the standard canon and represents some of the most commonly performed or most notorious passages on a given instrument. In analyzing a potential business necessity defense and properly determining who is the "best" musician of a particular group of candidates, organizations must consider whether a performance of these particular excerpts, in this particular context accurately predicts who is the best candidate for the job.

Orchestral auditions, as they exist today, test one narrow subset of skills required to succeed as a member of the orchestra. Because these auditions are such an isolated, narrowly-

informative process, they arguably do not test how well a musician will interact with colleagues on stage—whether they will be a team player and be a good "fit" for the ensemble, nor do they (generally) test how well and how quickly a candidate responds to instruction or feedback—a crucial aspect of modern musicianship. Professional qualities include the same things important in any other job candidate: reliability, professionalism, collegiality, adaptability, creativity, leadership ability (especially in principal chairs), and more. In many, if not most, other industries, even those featuring qualification-based hiring tests, an interview is also a critical component of hiring decisions, and in that setting, a decisionmaker is able to assess some of these "soft" but important skills that differentiate candidates.

Further, the orchestral field is increasingly competitive. Tommasini analogizes some aspects of instrumental performance to athletics:

> There is an athletic component to playing an instrument, and as with sprinters, gymnasts and tennis pros, the basic level of technical skill among American instrumentalists has steadily risen. A typical orchestral audition might end up attracting dozens of people who are essentially indistinguishable in their musicianship and technique.
>
> It's like an elite college facing a sea of applicants with straight A's and perfect test scores. Such a school can move past those marks, embrace diversity as a social virtue and assemble a freshman class that advances other values along with academic achievement. For orchestras, the qualities of an ideal player might well include talent as an educator, interest in unusual repertoire or willingness to program innovative chamber events as well as pure musicianship. American orchestras should be able to foster these

values, and a diverse complement of musicians, rather than passively waiting for representation to emerge from behind the audition screen.[59]

If we take Tommasini at his word, we can draw two conclusions relevant to business necessity. One conclusion is that if extramusical characteristics like pedagogical ability, passion for innovation, and diversity are part of the broader modern American orchestra business model, an isolated, dispositive test assessing only one small slice of an orchestral musician's job requirements cannot reasonably determine which candidate best fits a particular position. The second, related conclusion is that where such extramusical qualifications should properly be taken into account, and the best musician as defined by the current process may not be the same candidate best fit for the day-to-day job requirements, such a narrow test may not be consistent with business *necessity*.

2. Who defines the necessary skills, and how stringently?

But to assess whether these conditions remove blind auditions from the shield provided by the business necessity defense, we must consider the how broadly or narrowly courts define "necessity" in this context. Defining necessity raises interesting questions. First, who decides what qualifications or skills are necessary for orchestra candidates to possess? Additionally, can necessity be satisfied by a test that assesses only a small slice of how well a candidate will perform their job responsibilities? Relatedly, is a hiring decision based almost exclusively on which candidate performs best on such a narrowly tailored test *necessary*?

The Third Circuit helpfully articulated in *Lanning v. Se. Pennsylvania Transp. Auth.* that courts should examine that first question critically, noting that "a business necessity standard that

[59] Tommasini, *supra* note 1.

wholly defers to an employer's judgment as to what is desirable in an employee therefore is completely inadequate in combating covert discrimination based upon societal prejudices."[60] In *Lanning*, the Third Circuit considered whether a relatively stringent aerobic fitness test was *necessary* in evaluating candidates for SEPTA's police force. The test established a cutoff score which disparately and adversely affected women, and the court ruled that under *Griggs*, such a discriminatory test only complies with Title VII in a disparate impact claim if it measures the "minimum qualifications necessary" for successful job performance.[61] In *Albemarle Paper Co. v. Moody*, the Court ruled that "discriminatory tests must be validated to show that they are 'predictive of ... important elements of work behavior which comprise ... the job ... for which candidates are being evaluated' and that the scores of the higher-level employees do not necessarily validate a cutoff score for the minimum qualifications to perform the job at an entry level."[62] In *Dothard v. Rawlinson*, the Court decided that "'a discriminatory employment practice,' such as a discriminatory cutoff score on an entry level exam, 'must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge.'" Judge Mansmann reasoned in *Lanning* that these two cases read in conjunction with *Griggs* show that "the business necessity of a discriminatory cutoff score…must…measure[] the minimum qualifications necessary" for successful job performance.[63]

An orchestral audition is certainly distinguishable from a law enforcement fitness test in a variety of ways. Nonetheless, the "minimum qualifications necessary" standard can be instructive. Indeed, as Tommasini notes, instrumental performance has elements of athleticism.

[60] Lanning v. Se. Pennsylvania Transp. Auth. (SEPTA), 181 F.3d 478, 490 (3d Cir. 1999).
[61] *Id.* at 489 (3d Cir. 1999), citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 431, 434 (1975) and Dothard v. Rawlinson, 433 U.S. 321, 332, n.14 (1977).
[62] *Id.*
[63] *Id.*

That more physical side of music performance can be readily analogized to fitness tests like that in *Lanning*. In the context of orchestral auditions, where orchestras generally have the luxury of considering a "sea of [highly qualified] applicants," and where the ultimate decision is made by determining which candidate played the best audition, that candidate's "score," in effect, becomes the "cutoff." Not only does defining a cutoff this way create a moving target for candidates, but where all of the top job candidates "are essentially indistinguishable in their musicianship and technique[,]" an argument that a test that solely assesses musicianship and technique, and perhaps not even completely, can hardly be said to measure the minimum qualifications necessary for the position. Under this standard, a more tenable function for the blind audition might be to assess the baseline standards—the "minimum" level of musicianship the orchestra is willing to accept in a performer—and employ a "cutoff" at that point rather than at the point of decision. Regardless, since the court rejected a "more is better" approach, prohibiting employers from simply selecting the candidates who perform best on employment tests, blind auditions as currently implemented may not comport with business necessity.[64] The reasons for prohibiting such an approach to hiring is amplified where the differences between the top candidates' performance on this "test" are at most marginally distinguishable,

3. What makes a skill "necessary" for orchestra musicians?

An employer may claim that it is a business necessity for them to hire the very best candidate. And for many orchestras that historically feature a certain degree of prestige as part of their allure, they may, understandably, wish to hire the single player who performs best at an audition. However, there is a distinction between hiring the single "best" candidate based on

[64] *Id.*

factors consistent with an employer's goals and determining whether a *particular practice* for selecting the best candidate is consistent with the business necessity defense. This comment in no way argues that orchestras, or any employers, should not have the freedom to select the best candidate for a given job considering market pressures and consumer preferences.

The traditional orchestral business model was rooted in selecting the very finest candidates for a job based on the narrow criteria an audition assesses. But, especially as orchestras face more regular and severe financial difficulties, they have also recently sought to broaden their programming to appeal to a broader audience base. As orchestras no longer adhere to traditional classical programming and instead seek to present more modern and innovative programs, it may be both preferable and more practical to assess candidates on how well they perform a range of different styles, or on other factors like those discussed above, such as how adaptable they may be.

Even if it is desirable for orchestras to hire based on pure musical skill, blind auditions as they exist today may be a poor indicator of musicians' relative abilities. Once the screen is gone, and once the process is over, candidates will be assessed on a range of criteria that the current system fails to address, which may include whether a candidate is a good team player, as well as adaptability, professional responsibility, physical endurance, and creativity.[65]

All of those other qualities aside, assessing pure musicality in context is much different in the audition and performance contexts. A blind audition assesses how well a candidate can perform certain excerpts, in a very isolated way. The experience of playing in the orchestra, and in a particular section is vastly different. It requires an awareness that performing an excerpt on one's own cannot replicate. It requires listening to the rest of the musicians on stage, and paying

[65] *See, e.g.,* Jack M. Balkin, *Verdi's High C*, 91 TEX. L. REV. 1687 (2013); Flagg, *supra* note 1; Tommasini, *supra* note 1; Goldin & Rouse, *supra* note 2.

close attention to the conductor's instructions, while maintaining focus on individual execution. A blind audition merely tests how well a candidate performs the excerpt list, in a focused and isolated manner—an experience that hardly replicates performing with the whole orchestra. And even if a player has significant orchestra experience, each ensemble has its own unique sound, feel, and style, and an isolated test is arguably a poor indicator of whether a candidate will be a good fit for that *particular* orchestra. In sum, this process artificially isolates the individual in a way that is not reflective of the job they seek.

Analyzing these various interactive pieces, Professor Balkin explains that "[t]he performing arts … normally involve a *triangle of performance*."[66] This triangle consists of the composer, the audience, and the performer; and it is the interaction between all three that give a performance legitimacy.[67] So, by isolating the candidate in an audition, the process diminishes the influence of at least two points on the triangle.

In the orchestral audition, the composer is the most well-represented point on the triangle. She has written her intentions on paper, and perhaps given guidance on how her work should be interpreted. But, in orchestral music, the arbiter responsible for realizing the (often-deceased) composer's intentions is the conductor. He may or may not be present for the audition, but in a normal setting he would inform players of his artistic interpretation and require them to adapt. Blind auditions thus do not sufficiently capture the influence of the conductor and composer.

Illustrating the influential role of the composer, Antonín Dvořák wrote in 1893 in conjunction with the premiere of his "New World" Symphony that "Black musical idioms should

[66] Balkin, *supra* note 65, at 1691 (discussing similarities between musical and legal interpretation, noting that both are informed by many factors—including performers and audiences—other than simply written text or musical notation).
[67] Balkin, *supra* note 65, at 1691-92.

form the basis of an American classical style."[68] Around that same time, the American canon of classical music began to take shape and orchestras began to form. Partially because of views like Dvořák's, and partially because of the relative youth of American music, many diverse cultures exercised influence over the genre. Yet, early American audiences viewed composers from the European tradition continued to as artistically superior and thus more popular.[69] Yet, more recently, audience tastes have begun to shift, and even in a largely-cancelled 2020-21 season, orchestras' "drastically reduced programs … contain a noticeable uptick in Black names."[70]

Despite the audience's importance, it is absent from the audition hall. The candidate cannot react to or interact with audience members, and although historical accounts can provide an indication of audience preferences, the role of the audience is also diminished in an orchestral audition. Like the musicians on stage, orchestra audiences have been traditionally white.[71] But as preferences change, and as orchestras seek to serve audiences more representative of their broader communities, they must recognize any consumer preference shifts that come with marketing toward a different and more diverse subset of the population.[72]

The role of the performer is also limited. This point may seem counterintuitive, unless we consider the relative context of the orchestral audition compared to performing *in* the orchestra. Orchestras are often viewed as a unit or team—a singular entity working cohesively to present a unified interpretation of a piece of music. If we invoke this collective definition of the term "performer," blind auditions strip away the influence of *most* members of the performing body.[73]

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[68] Douglas W. Shadle, *Let's Make the Future That the 'New World' Symphony Predicted*, N.Y. TIMES (Mar. 17, 2021).
[69] Ross, *supra* note 5.
[70] *Id.*
[71] Flagg, *supra* note 1; Tommasini, *supra* note 1.
[72] Anthony Tommasini, *Notes Toward Reinventing the American Orchestra*, N.Y. TIMES (Feb. 12, 2021).
[73] *See, e.g.,* Jack M. Balkin, *Verdi's High C*, 91 TEX. L. REV. 1687 (2013); Flagg, *supra* note 1; Tommasini, *Blind Auditions*, supra note 1; Goldin & Rouse, *supra* note 2.

All of this may seem like a criticism of the current audition process that is based on ideals not practicable in the real world. After all, almost all hiring processes will to some degree lack the ability to assess every aspect of the job at issue. And certainly, employers cannot be expected to address every single possible facet of a particular job at the hiring stage, nor should they be expected to go to painstaking lengths to do so. In many cases, an artificial approximation of job requirements is the best an employer can do. However, when business necessity of a discriminatory practice is at stake, Justice Burger warns in *Griggs* that "tests are useful servants, but … they are not to become masters of reality."[74] Perhaps, then, a hiring process using blind auditions as essentially dispositive, as a "master of reality," is precisely the type of discriminatory practice *Griggs* condemns.

C. Alternative Title VII Actions

Blind auditions are not the only hiring practice that bear upon diversity in the industry. One other practice that might be challenged in a disparate impact action is the selection of the labor pool from which candidates are drawn. A potential plaintiff could argue that inviting candidates to audition from all over the globe with relatively little prescreening[75] to determine which of those candidates are truly competitive for the position, and requiring candidates to attend the audition at their own (often significant) expense, only to participate in a highly nontransparent process with very little odds of winning, is per se the type of structural discrimination that Title VII is meant to prohibit through its disparate impact proof structure. If such a case can be made, the business necessity defense is again implicated. And such an indiscriminate invitation process could well be considered job-related, as orchestras wish to hear

[74] Griggs v. Duke Power Co., 401 U.S. 424, 433 (1971).
[75] *See, e.g.,* SLATKIN, *supra* note 52.

the maximum number of candidates from the broadest number of educational lineages and traditions. But once again, the question of true "necessity" comes into play. Do orchestras truly *need* to hear such a broad cross-section of available musicians? And considering the rest of the processes involved with the blind audition system, do orchestras truly end up considering a diverse slate of candidates by the final round?

The first question implicates some tricky realities surrounding pedagogical lineage in the classical music sphere. As a preliminary matter, one must consider that orchestras are growing to prefer an "increasingly homogenous sound concept."[76] This necessarily leads to a contraction in orchestras' stylistic preferences as they seek to recruit players who are steeped in musical traditions that closely adhere to those players already in the section,[77] and this contraction is only catalyzed by wider availability of popular recordings on the internet and the increasing ease of long-distance travel. It is also worth considering how the nature and relative competitiveness of major orchestral auditions has changed over time.

Consider the perspective of Vincent Cichowicz, arguably the most influential modern trumpet pedagogue:

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[76] Laura L. Bloss, A Comparative Examination of Six American Master Trumpet Teachers and the Regional Schools of Playing That They Represent (Aug. 2014) (D.M.A. dissertation, University of North Texas) (on file with author).

[77] The New York Philharmonic again provides a helpful illustration of such a contraction and the factors behind it. Consider their current trumpet section and those players' educational lineage. Of the four section members, the three most recently hired earned degrees at Northwestern University and studied with the same professors, husband-and-wife duo and former Cichowicz students, Barbara Butler and Charles Geyer. *See, e.g., Meet the Orchestra*, New York Philharmonic (2020), https://nyphil.org/about-us/meet/musicians-of-the-orchestra. Butler and Geyer are responsible for placing an unprecedented number of young orchestral trumpet players in top positions compared to any other teachers today. Their "students fill many of the world's top orchestras, including the Chicago Symphony, New York Philharmonic, Philadelphia Orchestra, Los Angeles Philharmonic, St. Louis Symphony, Montreal Symphony, Rochester Philharmonic, Atlanta Symphony, Toronto Symphony, Vancouver Symphony, Houston Symphony, San Francisco Symphony and the "President's Own" Marine [B]and." *See* Amy McCaig, *Acclaimed Trumpet Pedagogues to Join Shepherd School in 2013*, RICE UNIVERSITY (July 18, 2012), https://news.rice.edu/2012/07/18/acclaimed-trumpet-pedagogues-to-join-shepherd-school-in-2013-2/. This type of pedagogical exclusivity is by no means confined to orchestral trumpet sections, and grows more prominent as more players from the same heritages win orchestral positions. The resulting sonic homogeneity reinforces the already narrow and increasingly objective standards upon which candidates are judged.

> When I was growing up there were more players with an individual character.… If you listen to orchestras now they all play wonderful[sic] but I miss the individuality. Somebody like [former Boston Symphony Orchestra Principal Trumpet] Mager who had this individual sound, didn't sound like [New York Philharmonic Principal Trumpet] Vacchiano or [subsequent Boston Symphony Orchestra Principal Trumpet] Ghitalla. Today it seems like there is a general bureau of standards.[78]

Even these iconic musicians have noticed how the numerical realities have made these auditions more competitive. Ghitalla noted that "[t]here were 25 players when I auditioned for the BSO job in 1951. Ten years ago[,] there were 600 inquiries for a fourth trumpet job in the St. Louis Symphony. They accepted about 175 tapes, and at least 60 players came…. No one was chosen."[79] And Cichowicz has described how "[t]he audition process has become very mechanistic because of the sheer numbers[,]" noting that a "lack of time to listen [leads to] not getting the right player for the position.…There are real dangers in this practice. I am also upset by occasional decisions not to accept any player…."[80]

A highly competitive process cannot automatically be labeled discriminatory and exclusionary. Even if it were possible to eliminate all implicit and explicit bias from this process, the field would still be left with the same number of qualified musicians in fierce competition for the same number of roles. But the competitive nature of the process illustrates the importance of nondiscriminatory decisionmaking practices that comply with Title VII where the barriers are so high, the competition so intense, and where many of these positions will be occupied by an audition winner for the rest of her career.

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[78] Laura L. Bloss, A Comparative Examination of Six American Master Trumpet Teachers and the Regional Schools of Playing That They Represent 130 (Aug. 2014) (D.M.A. dissertation, University of North Texas).
[79] *Id.* at 131.
[80] Bloss, *supra* note 76, at 131.

Employers may, therefore, benefit by arguing the relevant labor market and qualified applicant pool should be defined relatively narrowly, so that statistics may not show any disparate impact on racial minorities because there are simply not *enough* qualified minority candidates. This assumption requires analyzing how the qualified applicant pool should be defined, a task which raises several questions.

First, what makes a candidate "qualified" for the job? Proponents of the system as it exists today invoke the "meritocracy" argument discussed previously: that pure musical ability is the sole characteristic upon which candidates are evaluated, and that other aspects of their professional and personal identities should not and do not come into consideration. But, a broader view may be more appropriate. As addressed above, there are other professional and musical qualities that blind auditions, or perhaps auditions generally, do not address. The system as it exists today is additionally vulnerable to criticism on the grounds that framing blind auditions as a system that addresses pure musical ability is a flawed characterization.

A plausible argument exists that the (largely) historically static standards on which orchestral musicians are judged are no longer appropriate for the 21st century. Audiences want orchestras to modernize, and orchestra management has noticed. Orchestras are realizing that a viable modern business model necessarily includes more diversified programming—arguably both in terms of the musicians on stage and the types of music performed.

In considering how to best diversify their ensemble members and musical programming, orchestras should evaluate the types of candidates they attract, compared to the relevant labor market. For the purposes of this comment, it is impossible to examine the actual candidate pool since orchestras do not collect racial data. Alternatively, we can consider racial demographics of top music school graduates in the United States. Here, there may be an imbalance, as most top

music schools seem to have more reasonably diverse student bodies.[81] Additionally, those in the field argue that there are plenty of qualified minority candidates prepared for orchestral jobs.[82] The question then becomes: why are the ultimate audition winners so nondiverse?

Perhaps one issue is the cost and time barriers associated with traveling to and performing even one audition. As noted above, a player must bear the cost of traveling to an audition on his or her own, a cost which is often magnified for those who play physically large instruments having to find a way to safely transport that instrument to an audition. But the cost of taking an individual audition is far from the only structural barrier involved with reaching this stage in one's career. From a young age, a musician must take lessons from a professional on their instrument. While private music lessons are expensive from any teacher, an aspiring orchestral musician must find the *right* teachers—one well-versed in the orchestral tradition and preferably from the predominant school of playing on that individual's instrument, like the Cichowicz-Butler-Geyer school of trumpet pedagogy. Finding such a teacher may come with increased cost, but a knowledge barrier may also be present—a young musician must know which teachers to study with and where to find them. Additionally, there can be significant cost associated with actually acquiring professional-level instruments suitable for taking professional auditions. Some instruments, like string instruments, French horns, harps, and reed instruments require an investment of tens of thousands of dollars. Others, like the trumpet or flute are often

[81] *E.g.,* CURTIS INSTITUTE OF MUSIC, DATAUSA (database updated 2019) ("The enrolled student population … is 34.7% White, 17.9% Asian, 4.05% Black or African American, 2.31% Hispanic or Latino"); THE JUILLIARD SCHOOL, DATAUSA (database updated 2019) ("34.5% White, 11.9% Asian, 6.25% Black or African American, 5.63% Hispanic or Latino, 5.31% Two or More Races"); CLEVELAND INSTITUTE OF MUSIC, DATAUSA (database updated 2019) ("35.1% White, 9.92% Asian, 7.51% Hispanic or Latino, 6.17% Two or More Races, 1.88% Black or African American"). Each of these distributions include between 25% and 40% nonresidents, whose race is not reported, and about 10% of students who did not report their race.

[82] Flagg, *supra* note 1.

more affordable, but require an investment in multiple instruments in different keys. None of this may be obvious to a young student starting out in the field.

Another potential issue is that the audition process has not kept up with the increasing diversification in orchestral programming. Auditions, as they exist today, largely test the same collection of excerpts from the established canon—the "greatest hits" of the last 300 years. While orchestras have obvious incentives to hire the best musician possible, we return to the point that are the blind audition system falls short of distinguishing the "best" candidate. A traditionally white, Eurocentric industry may have to adapt its definitions of what is actually musically desirable if its goal is to increase diversity or to create orchestras that reflect the communities around them. If orchestras truly seek to modernize, they must not only diversify the musicians on stage but diversify the product they offer.

Evidence of this intent to modernize is reflected in, among other things, the many "fusion" concerts we have seen cropping up over the last decade or programs geared toward a younger crowd. Other forms of diversification could look like more interactive performances; programs featuring more diverse soloists, conductors, and composers; concerts featuring new, avant-garde compositions; or mixed-media performances.

Nonetheless, hiring in the same way as before, if the goal is to create new or more diverse kinds of music, may not be consistent hiring the best-fitting musician for the modern orchestra. The modern orchestra should seek out musicians who are adaptable and have experience in a breadth of styles or musical traditions. In other words, orchestras must ask: is the musician who

can best perform excerpts from Strauss's *Eine Alpensinfonie* the same musician who is best suited for a Drake fusion[83] concert? If not, why do orchestras only test the former?

D. Alternative Practices

Even if an employer can prove business necessity, plaintiffs have one more opportunity to defeat the challenged practice: by showing there is an alternative practice that can meet the business objectives without adverse, discriminatory impact.[84] In the realm of orchestral auditions, a variety of alternative practices could potentially prove less discriminatory, and in practice should not impose a significant burden on orchestras in administering auditions. This section will explore some of the alternatives orchestras have to their current practices. Such alternatives include various forms of affirmative action, a reconceptualization of the assessment standards for orchestra candidates, initiatives to recruit more diverse candidates into the fold, and educational programs to foster minority talent aimed at combatting these disparate statistics in the long run.

1. Affirmative Action

Voluntary affirmative action policies that employers institute with the aim of remedying racial imbalances in their workforces occupy a perennially controversial political space, and additionally are subject to exacting legal scrutiny under Title VII. Despite this controversy, prominent leaders in the music industry have voiced support for certain, limited affirmative action initiatives. Esteemed conductor Leonard Slatkin argues that he is "not a fan of affirmative

[83] *Tchaikovsky Meets Drake at FUSE@PSO March 22 at Heinz Hall*, PITTSBURGH SYMPHONY ORCHESTRA (Mar. 18, 2017).
[84] *See, e.g.,* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

action," but that it can be beneficial to, all else being equal, hire "the person who brings the potential to inspire other minorities to the stage" because "[t]he candidate of color contributes added value by bringing the orchestra a step closer to reflecting the diverse community it serves, which will ultimately lead to a stronger and more sustainable organization."[85]

Justice Brennan's opinion in *United Steelworkers v. Weber* upheld the implementation of voluntary affirmative action plans, as long as such programs meet three requirements: that the plan remedies traditional patterns of discrimination, that the plan does not unduly trammel the interests of applicants or employees who are not its intended beneficiaries, and that the plan is will only be active temporarily until the pattern of discrimination has been eliminated.[86] A few years later, the Court upheld an affirmative action plan which authorized consideration of ethnicity or sex.[87] Brennan clarified that under *Weber*, Title VII did not prohibit an employer considering sex for purposes of promotion.[88]

Conductor Leonard Slatkin has proposed a potential form of affirmative action labeled the "Slatkin Audition Process."[89] In the Slatkin Audition Process, first, "[a]ll applicants submit their CVs for consideration as has been the usual method."[90] A blind preliminary round then takes place, either virtually or live, followed by "a round of in-person semi-finals … without the presence of the music director[,]" and *without* a screen.[91] After this semifinal round, Slatkin proposes that orchestras hold "no finals in the traditional sense[,]" but instead invite each remaining candidate "to play with the orchestra for four weeks.…so that [musicians can] express

[85] SLATKIN, *supra* note 52.
[86] United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979).
[87] Johnson v. Transportation Agency, Santa Clara Cty., 480 U.S. 616 (1987).
[88] *Id.*
[89] SLATKIN, *supra* note 52.
[90] *Id.*
[91] *Id.*

an opinion ….”[92] Then, after each candidate has a trial period, a “final decision is reached between the leader of the section in question and the music director[] ….”[93] Slatkin argues this practice can help diversity as “a decision can be made in favor of a candidate who represents an underserved community if … that the player’s musicianship is on par with the others being considered.”[94] Slatkin notes that his proposal is imperfect, but believes it could “encourag[e] more persons of color not to give up because of the process.”[95]

It is certainly true that Slatkin’s process remedies traditional patterns of discrimination as the *Weber* test requires, and if it is only instituted on a temporary basis—perhaps until those “underserved” communities are no longer underserved, the remaining issue is whether the plan would “unduly trammel” opportunities for white candidates. As an illustration, if the orchestra chooses a Black candidate *because of* his race, as Slatkin suggests, a reviewing court would have to consider whether race was the dispositive factor in the decisionmaking process, that necessarily excluded from consideration the other, non-Black candidates. If an orchestra is considered to have made this decision *because of* race, it may impermissibly and “unduly trammel” opportunities for other candidates, especially since open orchestra roles are so rare. But this issue can also be framed differently. Justice Brennan clarified his position in *Weber* in *Johnson v. Transportation Agency, Santa Clara County, Cal.* a few years later, ruling that where “[s]even … applicants were classified as qualified and eligible, and the [decisionmaker] was authorized to promote any of the seven[,]” it was appropriate for the employer to take the sex of candidates into account as *one* factor among many in the hiring process without unsettling any

[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*

"legitimate, firmly rooted expectation on the part of" other candidates.[96] Still, we note that Justice Brennan did not hold that sex, race, or any other protected characteristic can be the *dispositive* factor in a hiring decision.

In evaluating whether Slatkin's plan would be permissible under current U.S. affirmative action doctrine,[97] it is helpful to import the reasoning from two 2003 Supreme Court decisions, *Gratz v. Bollinger* and *Grutter v. Bollinger*. In *Grutter*, Justice O'Connor affirmed *Regents of University of California v. Bakke*, ruling that affirmative action plans which consider race as a "plus factor" in higher education admissions processes are permissible.[98] In *Gratz*, the Court held that a point-based evaluation which prefers certain minority candidates is impermissible if functions as "guaranteeing" admission to all minimally-qualified minority applicants.[99] O'Connor clarified in concurrence that the policy should be eliminated because it mechanically selected minority applicants without meaningful individualized review.[100]

On which side of this distinction would a plan like Slatkin's fall? On one hand, Slatkin's process seems to thoroughly evaluate candidates at a number of stages before making an ultimate decision between a handful of highly qualified candidates, and accordingly could be viewed as using race as a potential "plus factor" at the discretion of the ultimate decisionmaker. Alternatively, one could view the process as an impartial process *up until* the point of the ultimate decision, which is made—just like the effect of the point system in *Gratz*—using race as a dispositive factor. However, this system is not entirely mechanistic and quantitative like that in

[96] Johnson v. Transportation Agency, Santa Clara Cty., Cal., 480 U.S. 616, 638 (1987).
[97] It is worth noting that affirmative action jurisprudence under Title VII could well end up on the chopping block with the Court's current composition.
[98] Grutter v. Bollinger, 539 U.S. 306 (2003).
[99] Gratz v. Bollinger, 539 U.S. 244, 274 (2003) ("[I]ndividualized review is only provided *after* admissions counselors automatically distribute [a point-based bump,] the University's version of a 'plus' that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant.").
[100] *See id.* at 276-80 (O'Connor, J., concurring).

Gratz. There is a certain degree of discretion granted to the decisionmaker in this proposed audition process, and perhaps the crux of the process's potential legality would turn on how much of that discretion a decisionmaker chose to exercise—whether she used race as a dispositive factor in choosing between finalists, or went through a thorough and holistic review of each candidate's qualifications, fit, and abilities. In other words, legality could hinge not on the ultimate *result* of the decision but in the *factors* relied upon to reach it.

Justice Kennedy's opinion in *Ricci v. DeStefano* complicates the analysis further. At issue in *Ricci* was a test used by the New Haven Fire Department to determine which candidates should be promoted. The Department "threw out" the test results because they disparately and adversely affected Black candidates, but the Court ruled that the Department's decision to cast these results aside violated Title VII, because despite the test's disparate impact, the action constituted intentional discrimination against white candidates. The Court explained that race-based actions are impermissible under Title VII unless employer can "demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."

A shift from the blind audition to processes flexible enough to allow race-conscious hiring could be considered the type of race-based action that *Ricci* prohibits, and orchestras instituting such plans would therefore have to provide a "strong basis in evidence" that not instituting some form of race-conscious affirmative action would leave them liable to a Title VII disparate impact suit. As discussed above, many complexities arise in bringing a disparate impact suit. Potential plaintiffs would have to defeat a showing of business necessity, and as we will discuss *infra*, a disparate impact suit could likely be defeated on First Amendment grounds. Accordingly, an explicitly race-based affirmative action plan may not survive a Title VII

challenge alleging *intentional* discrimination. Nonetheless, this comment will explore below how the employer's same First Amendment defenses in a disparate impact suit could shield affirmative action plans from being struck down.

Slatkin's process is certainly not the only possible path for orchestras who wish to implement some form of affirmative action. Perhaps taking affirmative steps earlier in the audition process could provide a middle ground between a mechanism that arguably allows race-based decisionmaking, and the nominal and ineffectual steps the industry has taken thus far toward creating a less discriminatory process.

2. Recruiting Diverse Candidates

Another potential solution is to affirmatively select a certain number of presumptively qualified, racially diverse candidates at the preliminary stage and automatically advance them to the semifinal round of the audition—whether blind or not—where they would compete with the rest of the candidates advanced through the typical process. This could ensure that more minority candidates are heard, and do not face the initial challenge of trying to distinguish themselves from a sea of candidates, many of whom are nearly identical to a blind adjudicator. At the same time, such a procedure would not be vulnerable to a challenge for "guaranteeing" a particular spot to a minority candidate as the *Gratz* Court prohibited.[101]

Another idea is to screen more candidates at the pre-audition stage through increased use of recorded prescreening tapes, with the aim of inviting fewer candidates to the live audition. Although this would limit the number of candidates considered in live auditions, it is not an opportunity-limiting device. The point of this proposal is to more scrupulously choose which

[101] Gratz v. Bollinger, 539 U.S. 244, 274 (2003).

candidates to invite, focusing on those who would genuinely be a good fit for the position. The candidates who audition live would thus have a statistically improved chance of winning the audition—which is important if, as we have considered above, the cost and time barriers associated with taking a live, blind audition can be prohibitively expensive in many cases, and in ways that disproportionately impact qualified minority candidates. And, because auditions in their current form are often considered a "numbers game" by candidates (a musician will rarely, if ever, win their first audition, and will have to gain experience auditioning to find success), minimizing the unlikelihood of success in live auditions can help *all* candidates efficiently maximize their preparation.

3. Implementing Nondiscriminatory Standards

Both of the aforementioned proposals allow orchestras to preserve the same criteria on which they make their final decision—the purportedly objective assessment of each finalist's musical and technical prowess. Whether such assessments are consistent with nondiscriminatory goals is an open question. There is certainly an argument that they allow orchestras to preserve artistic integrity and shape their stylistic visions. But there is also an argument that such a solution does not address underlying biases—that effectively requiring minority candidates to conform to these traditional and increasingly uniform artistic standards erases the benefit of cross-cultural exchange that should come hand-in-hand with an institution's workforce diversification.

Addressing this issue requires discussing whether antidiscrimination law *should* confront those underlying biases. At the heart of this debate are two differing theories of antidiscrimination law. The anticlassification approach ascribes to a "colorblind" view of equality, aptly articulated by Justice Roberts in *Parents Involved in Community Schools v.*

Seattle School District No. 1: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[102] Proponents of this view believe that individuals should not be differentiated based on their race—often even in the context of affirmative action programs—and believe, like the proponents of the "meritocracy" justification for blind auditions, that the most qualified candidate should always prevail, regardless of his or her identity. This view has been a useful sword for combatting *intentional* discrimination, but often declines to recognize structural harms to minority groups as a whole, and more subtle, structural forms of discrimination.

Alternatively, the antisubordination approach focuses on discriminatory *effects* of actions or policies on minority groups, and is more consistent with recognizing group-level, structural harms regardless of discriminatory intent.[103] This view is more consistent with recognizing the underlying biases that traditional affirmative action may not address. An antisubordination approach allows us to explore how an employer's evaluative standards can contribute to a cyclical lack of diversity and continue to "subordinate" minority candidates who may not have access to the "elite" educational institutions an orchestral career often requires. It also allows us to explore how divergent educational paths lead to these disparities, and consider potential solutions at the formative stages of a musician's training.

Discussing first the bias associated with the standards used to evaluate orchestra candidates, the audition system may be vulnerable in part because an audition does not predict nor closely approximate the skills and capabilities necessary for successful job performance. Additionally, however, these standards themselves may have inherent discriminatory biases. Orchestras may wish, for artistic reasons, to preserve the European tradition on which they were

[102] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).
[103] *See, e.g.,* Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

founded (though even this is a questionable premise as orchestral composers have historically borrowed from other musical and artistic traditions). But in the face of globalization and recent calls for social change, orchestras have begun to recognize the need to diversify the musicians they place on stage, and have begun to reconcile this aim with realizing a sustainable business model. Increasingly, orchestras present fusion concerts which meld together the classical tradition with popular musical genres, invite diverse composers and soloists to headline their concert programming, and present performances in innovative new styles that are a marked departure from their standard canon. Considering these seismic artistic shifts, such a narrowly constrained hiring process may no longer be appropriate. Especially in light of the increasing stylistic homogeneity discussed previously, orchestras should consider reversing course, diversifying not just the musicians they hire but the *styles* and *capabilities* they emphasize in the audition process. In 2021, the demands on a full-time orchestra musician are broader than ever before in terms of style, technique, and creativity. It no longer seems prudent to maintain the narrow standards of the past half-century, and broadening audition criteria could help orchestras find the most talented musician in light of *all* of their programming. That musician might just happen to be diverse.

4. Education

Another proposed method that has been put forth as a means to increase diversity is addressing the educational system that trains musicians. Some in the industry argue that the talent pipeline is the true issue—that minority candidates simply are not qualified enough. As we have touched on above, there may very well be a problem with the minority candidate pipeline

and its accessibility in classical music. The premise that there are not enough *qualified* minority musicians, however, is well-rebutted by leaders in music education.[104]

Nonetheless, orchestras and music education organizations have implemented programs to increase access to quality music education. Over the past forty years, many of the top major orchestras have created "fellowships" for Black and Latino musicians to give those players training in a top orchestra and to diversify the ranks of the ensemble.[105] And over that same period of time, groups such as the Sphinx Organization and the New World Symphony have created assistance funds to increase equity in accessing auditions. Despite this relatively long arc of professional assistance initiatives, racial diversity in orchestras remains static.

There are also initiatives that seek to address disparities earlier in a musician's training. It is generally true that musical training should begin relatively early in one's life if they are to reach a professional competency level. Therefore, the available training in a musician's precollegiate years can be critical to long-term success. But, access to these types of programs, perhaps unsurprisingly, is unequal. "[O]rchestral training is offered in approximately only 20 percent of American public schools, with the large majority of these programs being located in suburban schools."[106] Often, too, such inequalities begin even earlier in a student's life. Musicologist Anne Shreffler describes the typical collegiate music curriculum, noting that "[w]e relied on students showing up on our doorstep having had piano lessons since the age of six."[107] And, "[g]iven the systemic inequality into which many people of color are born, this 'class-based implicit requirement' … becomes a covert form of racial exclusion."[108]

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[104] Flagg, *supra* note 1.
[105] Flagg, *supra* note 1, at 36, Fig. 1.
[106] Melissa Lesniak, *El Sistema and American Music Education*, 99 MUSIC EDUCATORS J. 63, 63-66 (2012).
[107] Ross, *supra* note 5.
[108] *Id.*

Nonetheless, extracurricular programs, often based on the success of El Sistema[109] in Venezuela, have been relatively successful in filling this opportunity gap where such programs are available. Perhaps expanding programs like these is the sustainable solution to complement any necessarily temporary affirmative action plan. The Supreme Court has noted that over time, nondiscriminatory hiring practices "will in time result in a work force more or less representative of the population in the community from which employees are hired."[110] Affirmative action may be one way to accomplish that goal now, but to achieve long-term diversity, the classical music field should seek to improve educational equity. And while both of these efforts represent worthy goals, industry leaders should not ignore the lesson taken from antisubordination theory: that hiring more diverse musicians is an incomplete means to serve a diverse community if such efforts do not come alongside a cultural and artistic diversification of the final product an orchestra offers.

E. The First Amendment Defense

Regardless of any alternative, less-discriminatory practices, employers may have a strong First Amendment defense to a disparate impact claim. Setting aside potentially viable business necessity and "qualifications" defenses, employers whose products constitute a form of "expression" often have a right to make casting decisions as they see fit, and are granted significant discretion in doing so. As Professor Robinson has noted, "the First Amendment requires treating casting decisions with a degree of deference that Title VII would not ordinarily

[109] El Sistema is a highly successful Venezuelan music education program. El Sistema comprises 60 children's orchestras, about 200 youth orchestras, 30 professional orchestras, and many choirs. It features a great deal of individual and group instruction, a significant time commitment, and financial assistance for both instruments and instruction. *See* Lesniak, *supra* note 106.
[110] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40, n. 20 (1977).

afford employers[.]"[111] The First Amendment does not exempt employers from antidiscrimination regulations if the action at issue is commercial speech that encourages discrimination, such as a "Female Help Wanted" sign[112] or a "White Applicants Only" advertisement,[113] as those are considered *conduct*, not *content*, regulations.[114] However, where the regulated discriminatory "speech" is something less explicit, the analysis is more complicated.

First, it is necessary to determine whether Title VII's effects on speech are content-based, either facially or as-applied, or content-neutral, as that will dictate the level of scrutiny the statute and its application would have to overcome.[115] Generally, content-based regulations must pass strict scrutiny while content-neutral restrictions are subjected to the more lenient intermediate scrutiny standard.[116] In a landmark decision, *Reed v. Town of Gilbert*, the Supreme Court ruled that laws that are "facially content neutral[] will be considered content-based regulations of speech: laws that cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys,'" must overcome strict scrutiny.[117]

What, if anything, does an orchestra "say" by blindly hiring a new musician? By hiring blindly, the orchestra necessarily chooses a candidate without considering race as an explicit factor.

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[111] Robinson, *supra* note 11, at 4.
[112] *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376 (1973).
[113] *See* Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47.
[114] Robinson, *supra* note 11, at 43-46.
[115] *See, e.g.,* Reed v. Town of Gilbert, Ariz., 576 U.S. 155 (2015).
[116] *See, e.g., Reed*, 576 U.S. at 163 (2015) (citing R.A.V. v. St. Paul, 505 U.S. 377, 395 (1992); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115, 118 (1991)) ("[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").
[117] *Reed*, 576 U.S. at 164 (2015) (citing Ward v. Rock Against Racism, 491 U.S. 781 (1989)).

On this view, it is difficult to call any application of Title VII content-based, as it is difficult to implicate the content of the regulated speech in the restriction's justification. Where the regulation prohibits racial and other types of discrimination, and the regulated content is, depending on whose theory of the First Amendment we invoke, either hiring the single "best" musician or hiring the musician who best fits with the overall artistic goal of the ensemble, there is virtually no definition upon which the Title VII's justification, the government interest in eradicating racial discrimination, bears upon the content of the speech it regulates in this case.[118] Thus, even as-applied, Title VII would here be considered a content-neutral regulation warranting intermediate scrutiny, and likely passing that scrutiny.

To survive intermediate scrutiny, a restriction must simply be "justified without reference to the content of the regulated speech," which we have determined it likely is, and be "narrowly tailored to serve a significant governmental interest, … leav[ing] open ample alternative channels for communication of the information."[119] Title VII, by its own virtue, represents a significant governmental interest, as indicated by its various amendments and judicial affirmances, and as we have discussed, the protections, exceptions, and defenses both written into the statute and granted by the courts create at least a plausible suggestion that the statute is narrowly tailored. In sum, the fact that auditions are conducted blindly may allow the orchestra to assert the "meritocracy" argument in support of the claim that, unlike an employment decision that is made because of and with full knowledge of a candidate's race, no discriminatory conduct occurs in the typical blind audition.[120]

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[118] *See Reed*, 576 U.S. at 164 (2015) ("justified without reference to the content of the regulated speech") (citing Ward v. Rock Against Racism, 491 U.S. 781 (1989)).
[119] Clark v. Community for Creative Non–Violence, 468 U.S. 288, 293 (1984).
[120] *Cf.* Robinson, *supra* note 11.

Yet, an alternative understanding of the blind audition process may implicate strict scrutiny. Considering the disparities that this process creates or perpetuates in the musician workforce, it seems possible that as applied, Title VII's requirements regulate *content*. Because the industry's lack of diversity is well-known and widely discussed,[121] perhaps a more practical understanding of blind auditions and Title VII is that the regulation, which prohibits racial discrimination, does in fact regulate the content of the speech at issue, because American orchestras are well aware of the racial disparities, yet continually elect to hire in a way that perpetuates these disparities.

One might wonder if Justices of the current Supreme Court would be amenable to this framing of the issue. In *Bostock v. Clayton County*, Justice Gorsuch wrote that "[b]y intentionally setting out a rule that makes hiring turn on race or religion, the employer violates the law, *whatever he might know or not know* about individual applicants."[122] Along similar lines, if an orchestra knows their blind hiring practices have discriminatory effects, and "studiously avoids"[123] learning the race or any other identifying factor of the candidate they are hiring until late in the process, could they similarly violate Title VII's prohibitions on those grounds?

Where this is the case, it is then perhaps possible to characterize the current blind hiring process as not only aimed at hiring the best musician, but doing so with knowing disregard for the racial disparities that process either creates or preserves. This implicates the characterization of the "speech" an orchestra promulgates through its hiring practices. Justifying a particular application of a racial discrimination law, in that case, may well be impossible without

[121] *See, e.g.,* Flagg, *supra* note 1; Goldin & Rouse, *supra* note 2; Leong, *supra* note 43; Post, *supra* note 65; Ross, *supra* note 5.
[122] *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731 (2020) (emphasis added).
[123] *E.g.,* Flagg, *supra* note 1.

mentioning the racially discriminatory hiring practice. Under *Reed*, such an understanding would trigger a much tougher strict scrutiny analysis.

The practical difference between the strict and intermediate scrutiny standards is far more than semantics.[124] Recent Supreme Court decisions have almost always invalidated content-based regulations under strict scrutiny, and rarely invalidated content-neutral regulations.[125]

In our hypothetical disparate impact case, two possible outcomes may lead to divergent tiers of scrutiny. On one hand, orchestras could argue that unlike a film casting decision that is typically made because of and with full knowledge of an actor's race, no discriminatory conduct occurs in blind auditions. Under this view, race is not implicated in decisionmaking, and the regulations receives intermediate scrutiny. On the other hand, the argument could be framed around the fact that American orchestras are well aware of existing racial disparities, yet continually hire in a way that perpetuates these disparities, perhaps because they have assessed artistic integrity to be more valuable than a diverse workforce. Under this view, any justification of a Title VII application is necessarily content-referential, triggering strict scrutiny under *Reed*.

If indeed true that framing this same issue in two different lights can trigger different tiers of scrutiny, it is also worth examining the justifications behind the various forms of "speech" the First Amendment protects.

A. What content is protected?

Any analysis must start with defining the protected "speech" interest at issue, and which components of an artistic product fall within the First Amendment's sphere. In *Hurley*, the Court

[124] *See, e.g., Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VANDERBILT L. REV. 793 (2006).
[125] *See e.g.,* Lee Mason, Comment, *Content Neutrality and Commercial Speech Doctrine after* Reed v. Town of Gilbert, 84 U. CHI. L. REV. 955, 960 (2017).

focused on a decisionmaker's discretion to choose which messages are associated with its name, refusing to grant "any contingent of protected individuals with a message [] the right to participate in petitioners' speech."[126] Similarly, in *Dale*, the Court was concerned that accommodating a gay Boy Scout leader would unduly burden the Scouts' "ability to advocate public or private viewpoints."[127] Neither of these two rationales are helpful here—it would be strange to argue that blindly hiring a musician based purely on "merits" and irrespective of identity would hamper an orchestra's particular *viewpoint*, if they have an articulable viewpoint at all. And, as discussed, choosing a musician in an orchestra is not so much granting them a platform for their own *message* as much as choosing an employee who best fits the orchestra's expressive goals.[128]

Although possible that an orchestra selects a candidate based on that candidate's particular *artistic viewpoint*, this argument leads to two issues. First, under *Reed*'s content-referencing justification framework, defining the protected speech as something other than identity-based likely removes the application of Title VII from strict scrutiny. Second, as we will discuss below, current First Amendment precedent does not provide a satisfactory premise from which to assess an artistic viewpoint.

B. Art & First Amendment Theory

Art, construed broadly to include performance arts, has long been considered as being within the First Amendment's coverage of speech and expression.[129] While the Supreme Court's jurisprudence has been clear that "art is within the First Amendment's coverage," Professor

[126] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572–73 (1995).
[127] Boy Scouts of America v. Dale, 530 U.S. 640, 649-50 (2000).
[128] *See supra* pp. 26-27 (increasing homogeneity) & 14-15 (defining "performer").
[129] U.S. CONST. amend. I; *Hurley*, 515 U.S. at 572–73 (1995); Redgrave v. Bos. Symphony Orchestra, Inc., 855 F.2d 888 (1st Cir. 1988); Robinson, *supra* note 11; Alan K. Chen, *Instrumental Music and the First Amendment*, 66 HASTINGS L.J. 381 (2015).

Adler notes that "it is difficult to find a satisfactory rationale to justify that assumption within existing First Amendment theory."[130] "[T]he predominant rationale for protecting speech under the First Amendment is the fabled metaphor of 'the marketplace of ideas[,]'" which values speech for its "rationally comprehensible ideas," making it challenging to characterize art as protected under the First Amendment's umbrella.[131] Adler argues, "[i]t would be a reductive and cramped reading of … art to suggest that the point of [a piece] is to express an idea."[132]

The Court's First Amendment cases, broadly, have granted protection to forms of expression including art, parades, music, drama, movies, and television[133] Professor Chen argues that instrumental music is no exception.[134] However, to understand why the Court so unquestionably protects art, particularly its nonverbal subcategories including visual art and instrumental music, under the First Amendment despite maintaining the "marketplace of ideas" approach as its primary justification for protecting speech, it is helpful to consider what little relevant justification the Court has given. In *Hurley*, the Court determined that Jackson Pollack's art and Arnold Schöenberg's (purely instrumental) music were both "unquestionably shielded" by the First Amendment, reasoning that trying to find a "succinctly articulable" message was not required, because such a requirement would make it difficult to reconcile the "marketplace of ideas" approach with artistic protections.[135]

Like Adler, Chen notes that "[r]ather than engaging in a careful or thoughtful consideration of music as speech, the Court has instead made superficial assumptions and

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[130] Amy Adler, *Art's First Amendment Status: A Cultural History of* The Masses, 50 ARIZ. ST. L.J. 687, 711 (2018).
[131] *Id.* at 711-12.
[132] *Id.*
[133] *Cf. Hurley*, 515 U.S. 557 (1995); *Redgrave*, 855 F.2d 888 (1st Cir. 1988); Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990); Claybrooks v. Am. Broad. Companies, Inc., 898 F. Supp. 2d 986, 996 (M.D. Tenn. 2012). *See also* Adler, *supra* note 130; Chen, *supra* note 129; Robinson, *supra* note 11.
[134] *Redgrave*, 855 F.2d 888 (1st Cir. 1988); Chen, *supra* note 129.
[135] *Hurley*, 515 U.S. 557 (1995); Adler, *supra* note 130, at 713.

conveyed lofty, unquestioning platitudes."[136] Chen notes the three cases in which the Court has concluded that music is expressive, protected speech, but in all of those cases the Court omitted any analysis of whether the musical components of those performances were themselves protected and which particular components of a musical performance, if any, received First Amendment coverage.[137] One of the most thorough judicial justifications for classifying music as speech worthy of First Amendment protection is found in *Miller v. Civil City of South Bend*, where the Seventh Circuit, sitting en banc, decided that music need not have a particular intellectual message or appeal to warrant First Amendment coverage.[138] Judge Posner wrote in concurrence that music need not be propositional to be considered speech, otherwise instrumental music would generally receive less protection than nude dancing, explaining that under such an approach, "Beethoven's string quartets are entitled to less protection than *Peter and the Wolf*."[139] Judge Easterbrook dissented, arguing that nude dancing was distinguishable from instrumental music.[140] Easterbrook wrote:

> "People may fairly dispute whether absolute music,[141] such as LaMonte Young's *Well-Tuned Piano*, communicates thoughts, but surely it embodies them (the right place for the major third, etc.); all that we call music is the product of rational human thought and appeals at least in part to the same faculties in others. It has the "capacity to appeal to the intellect," … is not "conduct," and is closer to speech (even an emotional harangue is

[136] Chen, *supra* note 129, at 390.
[137] *Id.* at 391-2.
[138] *See Miller*, 904 F.2d 1081 (7th Cir. 1990).
[139] *Id.* (Posner, J., concurring).
[140] *Id.* (Easterbrook, J., dissenting).
[141] "Absolute music" refers to pieces expressing no "agreed idea" or without "external purpose," instead meant to derive value from their "musical purity" or structure without "being subordinated to words (as in song), to drama (as in opera), to some representational meaning (as in programme music), or even to the vague requirements of emotional expression." *E.g.,* ROGER SCRUTON, *Absolute Music*, *in* GROVE MUSIC ONLINE (Jan. 20, 2001).

speech) than to smashing a Ming vase or kicking a cat, two other ways to express emotion."[142]

Though they disagreed on the case's merits, the two judges helped rationalize instrumental music as a form of expression covered under the First Amendment.

C. The First Amendment and Affirmative Action

While the First Amendment may prove fatal to a potential plaintiff's Title VII disparate impact suit challenging orchestral audition processes, so too might it defeat the threats posed by potential disparate treatment suits to voluntary remedial affirmative action plans. It is thus possible that protected artistic freedom allows an employer significant discretion over hiring processes absent a showing that the speech at issue encourages discrimination. Because affirmative action generally constitutes a race-based, race-justified action, any affirmative action challenge under Title VII would likely implicate strict scrutiny under *Reed*, granting orchestra-employers significant discretion to tailor appropriate affirmative action policies should they so choose.

Professor Robinson argues that in the film context, the First Amendment should not be a blanket defense against Title VII liability, but illustrates that in certain cases, like period pieces, "filmmakers … should not have to cast actors whose racial identity might be unrealistic given the historical setting."[143] Robinson applies that argument to depictions of well-known figures like Malcolm X, but also to general populations to ensure accurate historical depictions.[144] Just like a film's decision to cast in a racially-accurate way, the First Amendment should protect an

[142] Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990) (Easterbrook, J., dissenting).
[143] Robinson, *supra* note 11, at 68.
[144] *Id.*

orchestra's reasonable initiatives to hire in a manner that diversifies its membership to reflect the community it serves. If an orchestra has an interest in "depicting" or "representing" the diversity of the surrounding community, and if the First Amendment can, in some cases, permit the orchestra to continue discriminatory hiring practices, it should allow the employer similar deference with an appropriately-tailored affirmative action plan.[145]

III. Implications

This exploration of antidiscrimination law's applicability to the orchestral hiring process leaves several open questions for further analysis. First, the application of debiasing technology in the form of blind auditions raises normative questions about the proper aims of antidiscrimination law and policy, and whether "debiased" hiring should be a goal in itself, or like the Court has required of traditional affirmative action, a crutch employers temporarily rely on to catalyze the creation of a more diverse workforce. Second, the analysis of a potential Title VII disparate impact suit challenging the status quo in orchestral audition procedures illustrates some of the civil rights statute's potential shortcomings. Considering Title VII's goals and the state of employment discrimination today, legislative or jurisprudential shifts may be necessary to more fully recognize structural discrimination and realize an appropriately diverse workforce.

A. Debiasing Technologies

The blind audition occupies a curious space in combatting discrimination. The data show that blind auditions have proven a useful tool to remedy gender inequality in orchestral hiring. But while the gender imbalance has stabilized at the hiring stage, is it really fair to say that the

[145] Any voluntary affirmative action plan must still pass Title VII muster. *See supra* Part II.D.1.

implementation removed bias from the process? Perhaps the blind audition simply shifts existing biases—conscious or unconscious—to other phases of education, recruitment, hiring, and eventually, employment itself.

One way to view the blind audition is as a tool that does not remove *bias* from the process, but merely removes a candidate's *identity*, the foundation of that bias, from consideration. Even confining this analysis to gender disparities, while blind auditions arguably eliminated gender imbalances in orchestral hiring, examining other phases in the pre- and post-hiring timeline prove that certain gender disparities persist. At the education and training phase of a musician's career, statistics show that certain instruments are considered stereotypically "male" or "female" in ways that affect imbalances from the "pre-conservatoire" to professional stages.[146] We additionally observe that on the job, women's tenure is, on average, about 14% less than their male counterparts.[147] Men occupy 83.2% of principal, and 64.82% of assistant or associate principal chairs.[148] And, women face the same pay equity issues in orchestras as in so many other industries.[149]

In light of these realities, perhaps the blind audition is not so much a *de*-biasing tool, rather a bias-*shifting* mechanism. The gender shift facilitated by blind auditions is a significant step toward equity, but it is also an incomplete remedial measure. Scholars like Professor Leong have noted that in implementing debiasing technologies in other industries, "while the face-to-face interaction that sometimes triggers bias does still occur with [debiased hiring technology], it occurs at a much later stage."[150] Leong explains that, for example, "[p]ast the hiring stage,

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[146] Sergeant, *supra* note 39, at 3-6, tbls. 1 & 3.
[147] *Id.*at 7, fig. 4.
[148] *Id.*at 6, tbl. 3.
[149] *See, e.g.,* Geoff Edgers, *Elizabeth Rowe has sued the BSO. Her case could change how orchestras pay men and women.*, WASH. POST. (Dec. 11, 2018); Boston Symphony Orchestra, Return of Organization Exempt From Income Tax (Form 990) 21 (July 1, 2020) (listing BSO's highest-paid musicians).
[150] Leong, *supra* note 43, at 724.

technological interventions can also affect the evaluation of people who hold a particular job."[151] So, debiasing at the early stages risks simply pushing discrimination issues further down the employment timeline to the point when the candidate joins the workforce.[152] Studies of "ban-the-box" laws—essentially "debiasing" laws which prohibit employers from asking about criminal history in initial job applications—illustrate the reality that employers "would rather call back a white applicant with a known criminal record than a black applicant whose criminal record was unknown."[153] Accordingly, where debiasing in multiple contexts failed to facilitate diverse hiring, perhaps the utility of these seemingly meritocratic systems should be reassessed.

Still, debiasing the early hiring process bolsters the argument that a blind audition system is a pure meritocracy—a system that strips away a candidate's identity to focus purely on their musical capabilities.[154] This approach is consistent with an anticlassification view of antidiscrimination law's goals.[155]

Nonetheless, as Leong suggests, debiasing through blind auditions may simply push the point of discrimination later in the employment timeline. But beyond that, blind auditions may shift bias from overt, discriminatory acts (whether intentional or not), to subtler, more impersonal decisions built into the hiring process, easily defended as artistic preferences, and thus better shielded from the reach of antidiscrimination law.

While such technologies are not necessarily incompatible with longer-term goals, a real worry exists that screening technologies may be viewed as sufficient, rather than simply helpful, in rooting out discrimination.[156] "[O]ne problem with [debiasing] technology that makes us blind

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[151] *Id.*
[152] *Id.* at 720.
[153] Dallan Flake, *Do Ban-the-Box-Laws Really Work?*, 104 IOWA L. REV. 1079 (2019).
[154] *Cf.* Leong, *supra* note 43, Post (discussing antidiscrimination principles as defined by the theory of functional rationality).
[155] Leong, *supra* note 43, at 720; Parents Involved.
[156] *Id.* at 729.

to race is that it also potentially makes us blind to racial bias and how much racial bias is out there."[157]

Considering the other gender equity issues that persist in the orchestra, and the racial imbalances this comment has discussed thoroughly above, Leong's conclusion, more consistent with antisubordination theory, is persuasive that in this context, "the overarching priority [should be] simply that we do think about the decisions we make, and that we do not simply head blindly into a misinformed attempt at race-blindness."[158] Even outside the legal realm, recruitment professionals have begun to notice the potential shortcomings with debiasing methods. As one professional recruiter argues, "[t]hose who can set biases aside while hiring based on qualifications and experience, as well as some element of uniqueness or diversity the candidate brings to the workplace, will achieve or exceed the benefits of blind hiring."[159]

If orchestras are to truly eradicate impermissible biases in a lawful and meaningful way, they should consider the other subtle, structural, and implicit biases previously discussed, whether or not the blind audition is here to stay.

B. Title VII's Shortcomings

These issues illustrate significant shortcomings in Title VII's goal of promoting equal employment opportunities. Title VII jurisprudence recognizes that over time, nondiscriminatory hiring practices "will in time result in a work force more or less representative of the population in the community from which employees are hired."[160] But this is not yet the reality in many

[157] *Id.*
[158] *Id.*
[159] John Feldman, The Benefits And Shortcomings Of Blind Hiring In The Recruitment Process, Forbes (Apr. 3, 2018).
[160] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40, n. 20 (1977).

fields, and the peculiarities of the American orchestra's hiring practices illustrate some of the many barriers to workforce diversity that Title VII does not adequately address.

As discussed, the First Amendment may pose a bar to disparate impact suits against orchestra-employers in many, if not all cases. While it may also be true that employers may invoke that same First Amendment freedom of speech and artistic discretion to shield voluntary affirmative action from judicial intervention, voluntary affirmative action is just that—*voluntary*. It must be an affirmative step that the employer takes to remedy traditional patterns of discrimination in its workforce, and cannot be a step compelled by candidates who allege they were treated unfairly in the hiring process. Instituting such a policy could spark significant backlash and debate, so orchestras may be discouraged from doing so, instead opting to continue the largely harmless yet unproductive "diversity" initiatives they have experimented with over the past forty years. This legal landscape grants employers too much discretion and job-seekers insufficient protection. If an orchestra is free to continue structural forms of discrimination, and for the same reason cannot be compelled to institute affirmative remedial hiring procedures, Title VII is left toothless in combating arguably the most prevalent form of discrimination today—discrimination that comes in the form of unintentional, structural, or subtle ways; that cannot be directly attributed to discriminatory animus; and that disproportionately affects disadvantaged minority populations United States law should address this problem by more appropriately reconciling First Amendment and Title VII protections in a way that does not so heavily favor employers. Perhaps this is best achieved by, as Robinson suggests in the film context, stringently limiting the applicability of First Amendment defenses to those cases where artistic integrity is truly at stake.[161]

[161] Robinson, *supra* note 11.

Existing law has its tradeoffs of—it may essentially act as a shield for both employers who continue historical discriminatory trends and those who attempt to remedy them. If hiring decisions are deemed to content-affecting, the First Amendment could undercut the viability of voluntary affirmative action in orchestral hiring. Yet, if hiring decisions are categorized as non-content-altering acts—acts that do not interfere with artistic integrity—the First Amendment may not bar voluntary affirmative action plans. Perhaps, then, existing law is a better—even if less concrete and immediate—method for combating discrimination in orchestral hiring, as opposed to codifying certain employers' discretion to discriminate based on race.

IV. Conclusion

The intersection of antidiscrimination law and the First Amendment with the current and proposed states of orchestral musician hiring present interesting and complex normative and legal questions. The current legal landscape affords no clear solution to the diversity problem in American orchestras, but the blind audition status quo as well as proposed reforms each offer distinct benefits and challenges. This comment does not advocate a single path forward, rather seeks to provide an overview of the various factors weighing for and against each approach, with an eye toward helping American orchestras achieve greater racial diversity in a manner consistent with a sustainable business model. This comment also seeks to analyze these issues under current antidiscrimination law to provide both insight that is applicable across a range of industries, and to illustrate the discrepancies between the goals of Title VII and the scope of the legal force it actually wields in practice. While this complex area of law leaves no clear answers, it should encourage employers to think critically about the goals their employment policies actually accomplish, and encourage courts to consider the full effect of policies challenged

before them in a way not only consistent with current antidiscrimination jurisprudence, but also respectful of the goals Title VII originally sought to accomplish.