

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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STUDENTS FOR FAIR ADMISSIONS, INC.,)
) Petitioner,)
) v.) No. 20-1199
PRESIDENT AND FELLOWS OF)
HARVARD COLLEGE,)
) Respondent.)
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Pages: 1 through 121
Place: Washington, D.C.
Date: October 31, 2022

HERITAGE REPORTING CORPORATION
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6 PRESIDENT AND FELLOWS OF)
7 HARVARD COLLEGE,)
8 Respondent.)
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10 Washington, D.C.
11 Monday, October 31, 2022

12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 12:58 p.m.

16
17 APPEARANCES:
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19 behalf of the Petitioner.
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21 of the Respondent.
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24 United States, as amicus curiae, supporting the
25 Respondent.

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P R O C E E D I N G S

(12:58 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 20-1199, Students for Fair Admissions versus the President and Fellows of Harvard College.

Mr. Norris.

ORAL ARGUMENT OF CAMERON T. NORRIS
ON BEHALF OF THE PETITIONER

MR. NORRIS: Mr. Chief Justice, and may it please the Court:

Grutter assumed that universities could use race in a narrowly tailored way if they just did it like Harvard. But this Court never had any evidence about Harvard. Now you do, and that evidence proves that none of Grutter's core assumptions were ever true.

First, Grutter assumed that race would only be a plus. But race is a minus for Asians, a group that continues to face immense racial discrimination in this country. Asians should be getting into Harvard more than whites, but they don't because Harvard gives them significantly lower personal ratings.

Harvard ranks Asians less likable,

1 confident, and kind, even though the alumni who
2 actually meet them disagree. What Harvard is
3 doing to Asians, like what it was doing to Jews
4 in the 1920s, is shameful, but it's a
5 predictable result of letting universities use
6 race in highly subjective processes.

7 Second, Grutter assumed that
8 applicants would be treated as individuals, not
9 as members of racial groups, but Harvard gives
10 racial preferences based on the box that
11 applicants check, even if they never write about
12 race or explain how it influences their views.

13 And for competitive applicants,
14 checking the right racial box is an anvil on the
15 admissions scale, worth the same as ultra rare
16 achievements like winning a national
17 championship.

18 Third, Grutter assumed that
19 universities would seriously consider
20 race-neutral alternatives, but Harvard never
21 once did so until 2017, three years after we
22 sued it. Harvard now refuses to eliminate its
23 legacy preferences or boost its socioeconomic
24 preferences, even though both changes would make
25 Harvard far less white, wealthy, and privileged.

1 That's how Harvard uses race, and Harvard is
2 supposed to be the model.

3 This Court should admit that it was
4 wrong about Harvard, wrong about Grutter, and
5 wrong about letting the poison of racial
6 classifications seep back into education.
7 Grutter should be overruled both for public
8 schools and for private schools that accept
9 federal funds.

10 JUSTICE THOMAS: Mr. Norris, would you
11 spend a few minutes -- some time on the
12 originalism argument that was made at the
13 last -- the end of the last case?

14 MR. NORRIS: Absolutely. So, in terms
15 of the original meaning of the Fourteenth
16 Amendment, the best source on this I've ever
17 read is the United States' brief on reargument
18 in Brown. It painstakingly details the
19 legislative history and how the framers of the
20 Fourteenth Amendment saw it as a ban on all
21 racial classifications.

22 Also, the -- everyone knows that the
23 impetus for the Fourteenth Amendment was to
24 constitutionalize the Civil Rights Act of 1866.
25 The Civil Rights Act of 1866 is a series of bans

1 on racial discrimination. It's a series of
2 color-blind measures and requirements.

3 And then the -- one of the earliest
4 cases this Court had before it went off the
5 rails in Plessy was a case called Strauder,
6 where the Court immediately recognized that the
7 purpose of this amendment was to eliminate
8 racial classifications, no matter whether they
9 benefited whites or blacks, because racial
10 classifications themselves impose harms.

11 That's the affirmative evidence. Now
12 I know that the -- the -- the evidence -- the
13 pushback is the post-ratification history, but
14 the post-ratification of the history of the
15 Fourteenth Amendment is not the best evidence
16 because we know there was massive resistance to
17 the original meaning of the text of the
18 Fourteenth Amendment.

19 But it also doesn't prove anything.
20 Every measure that's cited in Harvard's brief
21 was a remedial measure. It was in response to
22 the end of slavery and the position that black
23 Americans found themselves in.

24 Harvard does not cite a remedial
25 measure for what it's doing today. Those same

1 measures that it cites would not be
2 constitutional today because they would no
3 longer serve a remedial purpose and not a shred
4 of evidence that anyone back then used race to
5 achieve the educational benefits of diversity.

6 CHIEF JUSTICE ROBERTS: Would you have
7 any objection if you do not ask candidates for
8 admission to -- to check a box, what their race
9 is, but you are allowed to take into
10 consideration what an applicant would say in an
11 -- in an essay about having to confront
12 discrimination growing up and how he or she did
13 that.

14 You are allowed to take in
15 consideration what a faculty recommender said.
16 You know, one of the things that, you know, this
17 applicant would bring is how to deal with racial
18 discrimination in an area or in a school where
19 he's part of a very small minority.

20 Is there any -- do you have any
21 objection to that sort of introduction of -- of
22 race on behalf of a particular applicant?

23 MR. NORRIS: Absolutely not, Mr. Chief
24 Justice. And, in fact, at the end of this case,
25 at the end of the trial, it was -- it was -- we

1 were -- we discovered that Harvard had amended
2 its reading procedures for applications, and
3 there had been an amendment that said you only
4 should take into account race if someone talks
5 about it on their essay or in their -- in their
6 recommendation letters. Harvard deleted that
7 instruction and said that is not how we use race
8 and that should have never been put in there.
9 So we really are, in this case, talking about
10 the check box.

11 JUSTICE KAGAN: So you agree that,
12 with respect to the essays -- I mean, the Chief
13 Justice suggested that one aspect of racial
14 experience is confronting discrimination. But
15 there are also other aspects of racial
16 experience. Justice Alito gave an example
17 earlier. But you agree that, with respect to
18 the essays, whether it's guidance counselors or
19 whether it's students -- can -- can express
20 whatever views they choose to express about
21 their own racial experiences and the relevance
22 of that for admissions officers?

23 MR. NORRIS: Yes, the -- the -- what
24 the -- what Title VI bans is race itself as a
25 consideration. And so, if a university gives

1 credit to a black student who writes an essay
2 about overcoming discrimination and equal credit
3 to an Asian student who writes an essay about
4 overcoming discrimination, then that is not race
5 itself.

6 JUSTICE BARRETT: But --

7 MR. NORRIS: That is over --

8 JUSTICE BARRETT: Oh, sorry. Finish.

9 MR. NORRIS: I would just say that
10 that's overcoming discrimination, which Justice
11 Scalia wrote in Croson is not a racial
12 classification.

13 JUSTICE BARRETT: But I guess, you
14 know, in our earlier argument, Justice Kagan
15 pointed out that this gets to be slicing the
16 salami pretty finely. I mean, it's one thing to
17 say, yes, that shows resilience because you've
18 written about overcoming discrimination, and a
19 student could write about any number of
20 obstacles that they've overcome, from physical
21 disabilities on down the line.

22 But what if -- you know, Justice
23 Jackson had asked in the last argument, you
24 know, about pride. What if a -- what if an
25 applicant wrote an essay about how integral

1 their racial identity was to them as a source of
2 pride and the cultural attributes of the racial
3 heritage were very important? Would that be
4 okay even if it were all intimately tied up,
5 say, with, you know, the traditions of a Mexican
6 family? And -- and if the answer is no, that
7 can't be extricated from race, why would that be
8 different than someone writing about how
9 important it was to them to have this passion
10 for music in their life, that they loved music?

11 MR. NORRIS: I think culture,
12 tradition, heritage are all not off limits for
13 students to talk about and for universities to
14 consider. They can't consider that -- they
15 can't read that and say, "oh, this person is
16 Hispanic or black or Asian, and, therefore, I'm
17 going to credit that." They need to credit
18 something unique and individual in what they
19 actually wrote, not race itself.

20 JUSTICE SOTOMAYOR: I -- I'm -- I'm a
21 little confused because this almost sounds like
22 a different kind of viewpoint discrimination.
23 And under our strict scrutiny standards, we're
24 not supposed to discriminate on the basis of
25 viewpoint or discriminate on the basis of

1 religion. They're considered as sacrosanct, I
2 believe, as race.

3 And yet what you're suggesting is that
4 the viewpoint that somehow being a minority that
5 overcomes discrimination in the way you define
6 it as important as overcoming obstacles, that
7 that's okay, but if you're a black person who's
8 from an affluent family who may be the only
9 class president ever in a white school's
10 history, that that fact shouldn't feature.

11 That's a form of viewpoint
12 discrimination, isn't it?

13 MR. NORRIS: I don't think we're
14 saying --

15 JUSTICE SOTOMAYOR: That that's not
16 overcoming any kind of obstacle?

17 MR. NORRIS: We're not saying that
18 universities have to consider anything or
19 nothing. Universities just cannot consider race
20 itself.

21 JUSTICE KAGAN: But I thought you were
22 saying that both of those essays might be
23 entirely appropriate for the university to
24 consider, is that correct?

25 MR. NORRIS: Correct.

1 JUSTICE KAGAN: Or did I misunderstand
2 what you were saying?

3 MR. NORRIS: No, there is no federal
4 statute about what essays universities consider.
5 There's a federal ban on consideration of race
6 itself.

7 JUSTICE SOTOMAYOR: So -- so why is it
8 -- are you just objecting to touching a box that
9 admissions officers can look at?

10 MR. NORRIS: We're objecting to the
11 use of race as either a plus or a minus in
12 making admissions decisions.

13 JUSTICE SOTOMAYOR: But I don't think
14 you -- I think the district court made very
15 clear findings that checking the box alone is
16 not what got anybody in --

17 MR. NORRIS: That there's a --

18 JUSTICE SOTOMAYOR: -- that it was a
19 holistic enterprise that looked at everything
20 that that candidate did, and race might have
21 been one among many factors, because there's a
22 lot of Hispanics and blacks who have higher --
23 higher GPAs than many whites who don't get
24 admitted.

25 So they're not looking at just being

1 black and white. They're rejecting a lot of the
2 10 percent applicants who have higher numbers
3 than, I guess, whites and Asian Americans.

4 MR. NORRIS: Your Honor, there's a
5 finding from the district court in our favor at
6 page 116 of the Petition Appendix that Harvard
7 can award a racial preference based on the check
8 box alone, whether or not an applicant writes
9 about it or otherwise indicates that it's
10 important to them. And that is important.
11 That's race itself.

12 JUSTICE SOTOMAYOR: Well, that --
13 that -- that finding was made in a -- in an
14 undisputed finding by the district court that
15 race alone did not account for any one
16 admissions package, that it was race among many
17 factors.

18 MR. NORRIS: Well, the district court
19 found that race is determinative for 45 percent
20 of blacks and Hispanics who get into Harvard.
21 So, yes, there's 55 percent who would not get
22 in --

23 JUSTICE SOTOMAYOR: I'll let Mr.
24 Waxman debate that because that's not the way I
25 saw that record. It was very clear that the

1 district court found, for example, that being
2 Asian or not being Asian wasn't involved
3 statistically in any -- in any of the
4 admissions, whether for ADLCs or for non-ADLCs.

5 MR. NORRIS: Well, I -- I just want to
6 be clear, the 45 percent number is when race is
7 determinative for blacks and Hispanics. That's
8 the number of applicants who it's determinative
9 for.

10 Our number was much higher. That's
11 not my number. That's Harvard's number in their
12 race-neutral alternatives report.

13 JUSTICE GORSUCH: Counsel, if I could
14 return a moment to the drafting of the
15 Fourteenth Amendment, you said we should ignore
16 the post-ratification history, but let's just
17 pay a little attention to it for a moment.

18 In the briefs, we have discussion
19 about the Freedmen's Bureau that -- that -- that
20 Congress set up. How is that consistent or
21 inconsistent with your position?

22 MR. NORRIS: I think it's entirely
23 consistent, Your Honor. The Freedmen's Bureau
24 for the most part did not draw any racial
25 classifications. It was classifications on the

1 basis of being a former slave or a refugee. And
2 the refugees at the time from the Civil War were
3 mostly white.

4 In fact, when -- when objections were
5 made in Congress that this is a racial-based
6 law, the -- the people who supported the
7 Freedmen's Bureau denied the charge. They
8 didn't say yes, but so what. They said no, it
9 is not, it is not race-based at all.

10 JUSTICE KAVANAUGH: So today a -- a
11 benefit to descendants of slaves would not be
12 race-based, correct?

13 MR. NORRIS: I -- I think that's
14 incorrect, Justice Kavanaugh.

15 JUSTICE KAVANAUGH: Well, how does
16 that -- you just said a benefit to former slaves
17 was not race-based in the Freedmen's Bureau.
18 How is that different now?

19 MR. NORRIS: Well, the remedial
20 exception that this Court has recognized is --
21 is fairly narrow. It has to be prior --

22 JUSTICE KAVANAUGH: The question is
23 whether it's race-based.

24 MR. NORRIS: Right. Okay.

25 JUSTICE KAVANAUGH: You -- you said --

1 you said, I think, to Justice Gorsuch, and I'm
2 sorry to interrupt his question, but you said to
3 Justice Gorsuch, I think, that the benefit for
4 former slaves was not race-based. If that's
5 correct, then the benefit for descendants of
6 former slaves is also not race-based. There --
7 you can make other arguments if you want about
8 that, but it does not seem to be race-based
9 under what you said to Justice Gorsuch, correct?

10 MR. NORRIS: Well, not correct. I
11 think there's a difference between the former
12 slaves themselves getting a benefit versus
13 generations later. I think that's the
14 classification on the basis of ancestry, which
15 is still problematic under this Court's
16 precedents.

17 And even if it's not directly
18 race-based, I would assume that universities
19 are -- are -- and depending on the record, but
20 universities are drawing that classification as
21 a proxy for race in ways that the Reconstruction
22 Congress was not.

23 JUSTICE GORSUCH: Okay. If I might
24 just finish up. The Freedmen's Bureau is on the
25 federal side. We have some briefs before us

1 that also talk about practice on the state side.

2 Now we know that shortly after the
3 Civil War there were a lot of race-based
4 statutes passed by states, and most of them were
5 Jim Crow laws that invidiously discriminated on
6 the basis of race, but your friend on the other
7 side cites two that he says are not, one from
8 Kentucky and one from South Carolina.

9 Could you address those?

10 MR. NORRIS: Yes. So we -- we cite a
11 book full of statutes from the same era from
12 states that were purely color blind, but they do
13 cite two examples, one from South Carolina which
14 I believe banned racial discrimination by
15 government-licensed entities, and there was a
16 finding by that legislature that our
17 government-licensed entities were continuing to
18 discriminate on the basis of race.

19 I think it was a directly -- a
20 remedial measure and it made sense in light of,
21 you know, the end of the war and the massive
22 racial discrimination that was still ongoing.

23 Now the Kentucky statute is even
24 clearer. It gave benefits -- it -- it was a
25 racial classification, but it gave benefits to a

1 group of people in Mercer County, Kentucky, who
2 had no property, were so injured they could no
3 longer work, had no income. I mean -- I mean, I
4 think that what the statute was talking about
5 were the people -- the -- the recently freed
6 slaves in Mercer County to which there were
7 many.

8 JUSTICE GORSUCH: And then I have one
9 final question about this. There's also a
10 question of whether we should pay attention to
11 state practices given the language of the
12 Fourteenth Amendment, which doesn't pertain to
13 -- whether we should pay attention to federal
14 side, sorry, given that the language of the
15 Fourteenth Amendment doesn't purport to bar
16 remedial measures or classifications by
17 Congress, which at that time was in full
18 Reconstruction efforts, but that the drafters of
19 the Fourteenth Amendment were especially
20 concerned about racial classifications at the
21 state level because so many of them, everyone
22 knew, would be used, as Jim Crow laws were, to
23 discriminate against African Americans.

24 MR. NORRIS: I think there's something
25 to that, Justice Gorsuch. Justice Scalia

1 recounted some of that history I think in Croson
2 and maybe Adarand, where he said there's no
3 reason to think that the same distrust of the
4 federal government would have been there at the
5 time.

6 But I -- I -- I don't think any of
7 these federal statutes are even particularly
8 hard if you assume the equal protection
9 principle binds the federal government because
10 they are all plainly remedial. None have
11 anything to do with diversity. And Harvard has
12 not pressed the remedial interests that
13 justified those statutes.

14 JUSTICE SOTOMAYOR: I'm sorry, but
15 many of the civil rights statutes and some of
16 the laws pertaining thereto were directed to --
17 and directed to being equal to whites, so there
18 was consciousness of race in those statutes.

19 MR. NORRIS: I -- I -- I -- I think
20 not in a relevant sense. Those statutes, this
21 Court said in the Jam case in 2019 that that
22 exact language is color blind, that whites --
23 you have to have the same rights as whites,
24 which means everyone is equal. Now they used
25 race-based language, but the race -- well, what

1 they did was they banned racial discrimination.

2 JUSTICE SOTOMAYOR: So what do we --

3 MR. NORRIS: That's not race
4 consciousness.

5 JUSTICE SOTOMAYOR: -- do about all
6 the legislation that was passed that gave
7 benefits not just to former slaves but to free
8 blacks? That was still remedial in your mind
9 because there was inequality, correct?

10 MR. NORRIS: I -- I believe it was.
11 And it was in response to a -- an entire system
12 that had been built up of de jure
13 discrimination. I think those were remedial
14 statutes as well. And even the --

15 JUSTICE SOTOMAYOR: So, even if we
16 have de jure discrimination now or segregation
17 now, Congress can't look at that? Because we
18 certainly have de jure segregation. Races are
19 treated very differently in our society in terms
20 of their access to opportunity.

21 MR. NORRIS: I -- I believe that the
22 remedial exception is still good law. It was
23 one of the two things that justifies the use of
24 race in education that this Court identified in
25 Parents Involved.

1 However, Harvard has not made that
2 argument and has no factual record that you
3 would need to support that argument. It does
4 not justify its use of race based on its own
5 prior discrimination against blacks and
6 Hispanics.

7 JUSTICE ALITO: Are you aware of de
8 jure segregation today?

9 MR. NORRIS: I am not. I am aware
10 that -- that racial preferences on college
11 campuses in our belief -- in our view have
12 increased racial consciousness, and so there's
13 some of this that's happening on campus, but
14 it's not -- it's not de jure.

15 JUSTICE SOTOMAYOR: It's not clear
16 that there's segregation between -- there are
17 large swaths of the country with residential
18 segregation, there are large numbers of -- of
19 schools in our country that have people of just
20 one race, there are schools -- districts that
21 have only kids of one race and not multiple race
22 or not white people.

23 De jure to me means places are
24 segregated. The causes may be different, but
25 places are segregated in our country.

1 MR. NORRIS: Absolutely. And I -- I
2 think the top 10 percent program in Fisher,
3 which really got a -- a bad rap in Fisher II but
4 was meant -- solutions like that are meant to
5 account for residential segregation in a
6 race-neutral way.

7 JUSTICE SOTOMAYOR: Yeah. The problem
8 is that they don't. That's what the district
9 court found.

10 MR. NORRIS: My memory of Fisher II
11 was that the top 10 percent program was
12 extremely successful at increasing the
13 enrollment of underrepresented minorities at
14 Texas. There were other solutions. We -- we
15 have a very sophisticated race-neutral
16 alternative in this case that takes into account
17 socioeconomic status and forces Harvard to
18 eliminate its preferences for the largely white
19 legacies.

20 And that is another way -- I mean, our
21 numbers -- the number of -- of Asians would
22 increase on campus; the number of Hispanics
23 would increase on campus; the overall number of
24 underrepresented minorities would increase on
25 campus.

1 JUSTICE SOTOMAYOR: Blacks wouldn't
2 increase.

3 MR. NORRIS: Black representation
4 would be 10 percent, which is higher than it is
5 in the State of Massachusetts. And that number
6 is -- is quite low. Our expert testified that
7 if Harvard was only willing to consider wealth
8 instead of income, then that number would be
9 quite a bit better because the main disparities
10 we see on the basis of race today is not on
11 parental income but on generational wealth.

12 JUSTICE GORSUCH: Harvard -- Harvard
13 argues, though, that we have a compelling
14 interest in diversity writ large and that this
15 Court has deferred to that interest, and among
16 the diverse things that we need to have in our
17 class are children of large donors -- there's
18 evidence about that museum we talked about
19 earlier -- children of legacies, and -- and the
20 squash team. I'm not making it up. It's in the
21 record.

22 And to what extent should this Court
23 be deferring to those interests as part of its
24 compelling interest analysis?

25 MR. NORRIS: Not at all, Your Honor.

1 I don't -- I think strict scrutiny means you
2 need to -- you need to be able to reject
3 race-neutral alternatives because they don't
4 satisfy the compelling interest, and the
5 compelling interest is overall broad-based
6 diversity, not declines in our -- our fencing
7 status, not drops in five points on the U.S.
8 News and World Report, but it's diversity.

9 And Harvard -- it's a little ironic in
10 this case, Harvard is not diverse at all.
11 Besides its -- its racial statistics, 9 percent
12 of incoming freshman at Harvard are
13 conservatives. Harvard is 82 percent wealthy.
14 There's 23 rich students for every one
15 low-income student on campus. It is not diverse
16 in hardly any other way. And so I think that
17 the -- the compelling interest that you
18 recognized in Grutter is not what's actually
19 being pursued on Harvard's campus.

20 JUSTICE KAVANAUGH: You heard the --

21 JUSTICE KAGAN: But, Mister --

22 JUSTICE KAVANAUGH: Go ahead.

23 JUSTICE KAGAN: I'm sorry. Go ahead.

24 JUSTICE KAVANAUGH: Uh-uh.

25 JUSTICE KAGAN: I mean, are -- are you

1 saying now that there is an interest and a
2 compelling interest in racial diversity among
3 other kinds of diversity? I mean, putting
4 Harvard's -- you know, whether Harvard should be
5 more socioeconomically diverse, probably should
6 be. But putting that -- I mean, is there an
7 interest in racial diversity?

8 MR. NORRIS: I agree with my
9 colleague, not a compelling interest that could
10 justify a racial classification, but racial
11 diversity is not a bad thing. It is a great
12 thing. It is something --

13 JUSTICE KAGAN: Well, but -- but the
14 whole premise of this, right -- and, you know,
15 we can talk about whether these programs are
16 narrowly tailored, whether the universities have
17 done enough to -- in -- in the -- with the use
18 of race-neutral criteria, but the premise of
19 your argument is that even if race-neutral
20 criteria could not achieve the object, Harvard
21 can't use race-conscious criteria.

22 And that must be because you think
23 it's just not important enough, isn't that
24 right?

25 MR. NORRIS: I don't think that's

1 right. So we have very detailed record evidence
2 here that if Harvard just turned off race on its
3 admissions process, it would still have
4 6 percent African Americans, I believe it's
5 9 percent Hispanics, so 15 percent
6 underrepresented minority --

7 JUSTICE KAGAN: So you think, like,
8 good enough? But how about if it were
9 2 percent? I mean, the nature of your argument
10 is that it doesn't matter. That's what the
11 nature of your argument is.

12 MR. NORRIS: I -- I disagree, Justice
13 Kagan. It does matter because, if you're below
14 those numbers, then Harvard's probably
15 discriminating in some sense and it should stop.
16 Or it's not reaching underrepresented minorities
17 in the way that it should. Perhaps it should
18 not have been --

19 JUSTICE KAGAN: Well, that's just
20 fighting the -- the -- the question. I mean,
21 the question is, you know, is there a limit
22 beyond which you would say, oh, yes, if -- if
23 you can't achieve that level of diversity with
24 race-neutral criteria, then you're allowed to
25 use race-conscious criteria?

1 MR. NORRIS: I -- I don't think
2 there's any level that justifies explicit racial
3 classifications. But I -- I'm going to fight
4 the hypothetical one more time if you'll let me
5 because race-neutral alternatives --

6 JUSTICE KAGAN: Yeah, no, I don't
7 think I will. So let me just go on and ask you
8 a couple of other things, I mean -- I mean,
9 because this is -- you know, to me, this is -- a
10 lot of the argument here is about a university
11 has a -- a -- a compelling interest in
12 collecting a diverse class, including along
13 racial dimensions and maybe especially along
14 racial -- racial dimensions given the kinds of
15 challenges that our society faces, in the exact
16 same way that all the other institutions of our
17 society does.

18 So I'm just going to ask you some
19 questions about that. If -- if -- if -- if
20 you're a hospital and you serve a diverse group
21 of patients, is it super-important to you to
22 have a diverse set of doctors?

23 MR. NORRIS: I -- I don't know that
24 the -- that the evidence about the diversity of
25 doctors and patients or anything about the

1 medical field in that sense --

2 JUSTICE KAGAN: It wouldn't matter?
3 Yeah, okay, or maybe it would. You don't know.
4 If you're a police department and you serve a
5 diverse community, is it super-important to you
6 to have a diverse set of police officers?

7 MR. NORRIS: I mean, I -- I believe
8 that's important if there's good evidence that
9 that -- that a racial classification was needed.
10 That has nothing to do with the educational
11 benefits of diversity in universities. That's
12 the interest that Grutter upheld.

13 JUSTICE KAGAN: Do you think that if
14 you're a law firm or if you're a judge, if
15 you're a judge and you want to have a diverse
16 set of clerks, do you think a judge can't think
17 about that in making clerkship decisions?

18 MR. NORRIS: Absolutely can think
19 about it. This Court's decision in Feeney says
20 knowledge of race is not the violation. It is
21 using it as a factor to distinguish --

22 JUSTICE KAGAN: I'm using -- let's --
23 let's say a judge says "I want a diverse set of
24 clerks." That's -- you know, I want clerks who
25 would -- you know, great on any number of

1 criteria, but I also want a diverse set of
2 clerks. So, over the years, people will look at
3 that and they'll say: There are Asian Americans
4 there, there are Hispanics there, there are
5 African Americans there, as well as there are
6 whites there.

7 Can a judge not do that?

8 MR. NORRIS: I mean, I think that's a
9 -- that's a -- that is a admirable goal. I
10 don't think a judge could implement that goal by
11 putting a thumb on the scale against Asian
12 applicants or giving a big preference to black
13 and Hispanic applicants. I think you need to
14 treat people -- treat equally based on race just
15 as you're not going to hold my race against me
16 in judging the quality of my arguments.

17 I think race -- racial diversity is
18 important because it's a good metric to make
19 sure our -- our -- our institutions are equally
20 open. You can certainly be concerned about
21 that. But the question is using racial
22 classification, telling people that you didn't
23 get the clerkship because of your race.

24 JUSTICE KAGAN: Yeah, but the -- the
25 -- the -- the point here is, look, everybody

1 would rather achieve all our racial diversity
2 goals through race-neutral means. Everybody
3 would rather that. And that's certainly what
4 our cases say you have to do.

5 The question is, when the race-neutral
6 means don't get you there, are you prevented
7 from taking race into account in all those ways
8 that I said? And I could add a dozen more.
9 Businesses who find it necessary, you know, in
10 order to achieve their economic objectives to
11 have racially diverse workforces. I mean, I
12 could go on and on and on.

13 And the question is, when race-neutral
14 means can't get you there, don't get you there,
15 when you've tried and tried and they still won't
16 get you there, can you go race-conscious?

17 MR. NORRIS: I don't believe so,
18 Justice Kagan. And I think your -- this Court
19 has already said in Parents Involved that racial
20 diversity is not a compelling interest. It is
21 the overall diversity of all kinds on college
22 campuses.

23 And I don't -- I mean, this is not --
24 this doesn't have to be hypothetical. We
25 presented an alternative to Harvard that would

1 achieve socioeconomic diversity for the first
2 time, that would boost underrepresented minority
3 representation, that would lower the number of
4 white students on campus. And so we're talking
5 not about no diversity and diversity. We're
6 talking about 10 percent black representation or
7 14 percent black representation.

8 JUSTICE KAVANAUGH: That's -- that's
9 your, I would say, narrower argument. I think
10 Justice Kagan's right that you have a broader
11 argument that it wouldn't -- it wouldn't matter.
12 Then you have a narrower argument, as I read the
13 submission and hear you, that even under the
14 Bakke-Grutter framework, race-neutral
15 alternatives suffice to achieve the -- the kind
16 of diverse -- sufficient diversity.

17 And I'm going to ask you the same
18 question I asked the Solicitor General, which
19 is, how do you -- how do you measure that on
20 your narrower, as I see it, argument? Maybe you
21 don't want to accept my characterization, but on
22 what I see as your narrower argument, what --
23 what is sufficient, what's meaningful, to use
24 the Solicitor General's words, in your view?

25 MR. NORRIS: Well, I think you need to

1 be measuring -- well, I mean, if you just take
2 Grutter's interest as a given, you need to be
3 measuring whether your student body is diverse
4 on all dimensions. I don't think Harvard is
5 very --

6 JUSTICE KAVANAUGH: No, let me ask it
7 specifically. How do you know whether a
8 race-neutral alternative proposed would be
9 sufficient, adequate to achieve sufficient
10 levels of otherwise underrepresented minorities,
11 that you would satisfy what Bakke and Grutter,
12 which I know you disagree with, but would
13 satisfy what those achieve? And you heard the
14 Solicitor General's answer, and I'd be curious,
15 your responses to her or your alternative
16 submission on that.

17 MR. NORRIS: Well, I think the burden
18 is on Harvard. And so Harvard would need to
19 come forward with evidence about race-neutral
20 alternatives that have been presented or that
21 it's considered itself and show how, under that
22 alternative, it's not getting the educational
23 benefits of diversity.

24 Now, in this case -- the only
25 testimony we have is that Harvard doesn't know

1 what number it needs to get the educational
2 benefits of diversity. Doesn't know what
3 evidence to consult to know whether it has that.
4 Doesn't know what the evidence would even look
5 like, as Dean Fitzsimmons testified, and the
6 only evidence is Harvard's report on -- on the
7 importance of diversity, which made --

8 JUSTICE KAVANAUGH: But -- but, in
9 looking -- I'm sorry. Looking at your proposals
10 or looking at California or Michigan or
11 Washington, one of the big themes, I think, of
12 the briefs is, hey, we have these states that
13 have done race-neutral alternatives and that's
14 been -- that's been effective in achieving
15 diversity, I think. You can dispute that
16 characterization, but that's a theme I -- I
17 gleaned from the briefs.

18 And as I look at that, I want to know,
19 what does that mean, effective or adequate?
20 What -- what's the measurement? Really, the
21 same question I had for the Solicitor General.
22 It's asking us to say, yes, that's adequate, but
23 what does that -- got to say more than that, I
24 think.

25 MR. NORRIS: Part of the problem, I

1 think, is the fuzziness of the interest in
2 Grutter itself, but --

3 JUSTICE KAVANAUGH: No, no, no. No.
4 Accept the interest.

5 MR. NORRIS: Okay.

6 JUSTICE KAVANAUGH: Sorry to
7 interrupt. Accepting that the interest,
8 race-neutral, this is the back half of your --
9 back part of your brief, race-neutral
10 alternatives are adequate.

11 And I -- I just want to know, okay,
12 well, California, Florida, great. That's
13 adequate because?

14 MR. NORRIS: The --

15 JUSTICE KAVANAUGH: And that could be
16 translated to Harvard because?

17 MR. NORRIS: The -- the University of
18 California system is the most racially diverse
19 elite institution in the world. Whites are the
20 third most represented group on campus. So, if
21 racial diversity has these educational benefits,
22 then they've achieved them.

23 I think they've -- they studied their
24 undergraduates on your racial consciousness and
25 your cross-racial understanding. They get

1 really high scores at Berkeley. Berkeley and
2 all the UC system tells prospective students
3 that we have a very diverse student body and
4 that -- that the educational benefits were --
5 that you would expect to get from that are
6 present. It's the top ranked public university
7 in the country. It's great.

8 JUSTICE KAVANAUGH: And your point
9 then, the -- the necessary add-on point is, and
10 that could be translated to Harvard in essence
11 or something sufficient could be translated to
12 Harvard, and I just want you to fill in the
13 blank there. Why?

14 MR. NORRIS: I -- I think it can. Our
15 -- our race-neutral alternative that we've
16 focused on, Simulation D is what we called it,
17 would make Harvard go -- it -- it would go from
18 82 percent economically advantaged to
19 51 percent. You would actually have pure
20 socioeconomic diversity where it's about 50/50.

21 The number of white students would
22 decrease. The number of Asian students would
23 increase. The number of Hispanic students would
24 increase. I think you'd see lots of benefits in
25 that.

1 JUSTICE KAVANAUGH: The number of
2 black students would decrease from what to what?

3 MR. NORRIS: Would decrease from
4 14 percent to 10 percent was the number. And
5 our expert testified that that number --
6 10 percent is an absolute floor because he
7 only -- the number couldn't be higher because
8 his socioeconomic preference didn't have the
9 sophisticated data that Harvard has.

10 I think that's successful on -- on any
11 metric. And I -- I've never heard Harvard prove
12 the -- the -- the delta there as being necessary
13 for educational benefits of diversity.

14 JUSTICE SOTOMAYOR: Counsel, I don't
15 know what to do in a situation like this one.
16 If you have perfect scores on every metric,
17 you're not guaranteed a spot at Harvard because
18 they have enough people with perfect scores of
19 every background that exceeds their class limit.

20 At some point, something has to break
21 the tie. And as we know, top 10 percent
22 students of Asian and of black and Hispanic
23 backgrounds in academic and extracurricular
24 activities are not being admitted to Harvard.

25 So it's not as if once we say take

1 race out of this that all of the people who are
2 -- that you consider super-qualified are going
3 to get in. But, on every matrix, there's going
4 to be competing applicants.

5 And you're saying a school can't look
6 at its general diversity figures and say, among
7 equal applicants, I might make race a
8 tie-breaker if the numbers that I have on that
9 matrix seem fairly low otherwise. You're
10 saying, no, you can't do that.

11 MR. NORRIS: No, you cannot do that.
12 That's what Title VI forbids. It doesn't forbid
13 --

14 JUSTICE SOTOMAYOR: And that basically
15 what you're saying is really race diversity is
16 not important?

17 MR. NORRIS: Race --

18 JUSTICE SOTOMAYOR: So I don't
19 actually see why all the race-based -- because
20 all of the alternatives, whether it's the
21 10 percent plan, whether it's socioeconomic,
22 they're all subterfuges to reaching some sort of
23 diversity in race.

24 You're touting them as race-neutral,
25 but none of them are race-neutral. You're doing

1 them because you believe in racial diversity. I
2 just don't understand why considering race as
3 one factor but not the sole factor is any
4 different than using any of those other metrics.

5 MR. NORRIS: Well, I don't think those
6 are -- those are racial classifications in
7 disguise. Harvard's never criticized Simulation
8 D that we presented as a racial classification
9 disguise. It criticizes it because it doesn't
10 hit Harvard's precise racial numbers.

11 It's based on socioeconomic status.
12 And I don't think anyone thinks eliminating the
13 legacy --

14 JUSTICE SOTOMAYOR: No. It -- it
15 reduces SAT score averages. It reduces lots of
16 other factors to get to your numbers.

17 MR. NORRIS: I mean, I think that's
18 our point, that -- that SAT scores would go from
19 the 99th percentile to the 98th percentile.
20 That's not sacrificing academic excellence.
21 That's moving Harvard from Harvard to Dartmouth.
22 Dartmouth is still a great school. That's --
23 that they get 98th percentile SAT scores. We've
24 got to make some sacrifices.

25 JUSTICE SOTOMAYOR: I -- I -- I don't

1 -- I -- I actually --

2 JUSTICE KAGAN: There are those who
3 love it.

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 JUSTICE THOMAS: No.

9 CHIEF JUSTICE ROBERTS: Justice Alito?

10 JUSTICE ALITO: No.

11 CHIEF JUSTICE ROBERTS: Anything
12 further, Justice Kagan?

13 Justice Kavanaugh?

14 JUSTICE KAVANAUGH: Just have one --
15 one question about the -- how to think about the
16 25-year sentence in Grutter and the surrounding
17 discussion.

18 MR. NORRIS: Yeah, absolutely. I
19 think that what people forget about the 25-year
20 mark or the four paragraphs you mentioned before
21 it where they explain that racial preferences,
22 they will fail their own acid test unless they
23 make themselves unnecessary.

24 So I think what Justice O'Connor was
25 saying is that in 25 years, if we still need

1 race, it's not that you get another 25 years.
2 It's that we then declare racial preferences to
3 be a failure and call it off and go to race --
4 race neutrality and try that instead.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 JUSTICE BARRETT: But we're not to
8 that 25-year point yet, right? So, if -- if it
9 has its own self-destruct mechanism where it
10 says like, hey, Grutter says we've got to call
11 it quits because they're just not working, are
12 we obligated to give more time?

13 MR. NORRIS: Well, Harvard has
14 certainly never indicated that in five years it
15 will stop using race. Harvard over the 20-year
16 span has not decreased its use of race at all.

17 And I think the only legal standard
18 this Court has ever recognized for when do you
19 stop using race in education is in Brown with --
20 with all deliberate speed.

21 The 25-year mark, we don't -- you
22 know, we don't support it from the get-go. But
23 we do think it was a prediction from Justice
24 O'Connor that has not borne out, and so Grutter
25 on its own terms, I think 20 years is enough to

1 call it.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Waxman.

5

6

7 ORAL ARGUMENT OF SETH P. WAXMAN

8 ON BEHALF OF THE RESPONDENT

9 MR. WAXMAN: Mr. Chief Justice, and
10 may it please the Court:

11 The evidence and findings in this case
12 confirm what this Court has long recognized,
13 that a university student body comprising a
14 multiplicity of backgrounds, experiences, and
15 interests vitally benefits our nation,
16 stereotypes are broken down, prejudice is
17 reduced, and critical thinking and
18 problem-solving skills are improve.

19 Student body diversity makes our
20 businesses more innovative and globally
21 competitive, our scientists more creative, our
22 medical professionals more effective, and our
23 military more cohesive.

24 Experience has more than borne out
25 Justice Powell's observation that our future as

1 a country depends on having leaders who have
2 enjoyed wide exposure to students as diverse as
3 the nation itself.

4 And so, as this Court has consistently
5 held, if necessary to achieve genuine diversity,
6 a university need not blind itself to race,
7 which like the type of high school an applicant
8 attended, their socioeconomic and family
9 background or the part of the country they live
10 in, forms a part of who they are.

11 Now SFFA attempts to use Harvard's
12 admissions program as some sort of proof that
13 settled constitutional precedent is egregiously
14 wrong, but while SFFA is fully entitled to its
15 own legal arguments, it is not entitled to its
16 own facts.

17 Following exhaustive discovery in this
18 case, the trial court considered the testimony
19 of 30 witnesses and detailed expert analysis and
20 made extensive meticulous findings which the
21 court of appeal robustly affirmed, and those
22 findings, applying strict scrutiny, are that
23 Harvard does not improperly emphasize race in
24 its admissions decisions, it does not engage in
25 racial balancing, it most certainly does not

1 discriminate against Asian American applicants,
2 and it does not yet have a current workable
3 race-neutral alternative.

4 The false narrative to which SFFA
5 clings is no basis to dismantle decades of
6 precedent confirming the constitutionality of
7 limited race consciousness in admissions.

8 And I very much welcome the Court's
9 questions.

10 JUSTICE THOMAS: Mr. Waxman, the
11 Petitioner argues that over 80 percent -- that,
12 actually, you could -- you do have available a
13 not -- a race-neutral approach that would yield
14 different but excellent results.

15 And the argument includes the fact
16 that, at least as they argue, that you're over
17 80 percent wealthy students, that that's not
18 diverse, and that over 30 percent -- or
19 30 percent or so of a class is made up of ALDC
20 students and that if you were to lower those
21 numbers, you could achieve far more diverse
22 results without -- along socioeconomic lines. I
23 don't think it's arguable that Harvard is
24 socioeconomically diverse. But -- at least it
25 doesn't appear that way. But it seems that --

1 and that would not have a constitutional problem
2 if you did it socioeconomically.

3 And I'd like you simply to address
4 their argument.

5 MR. WAXMAN: Yes. Thank you.

6 First of all, the numbers that my
7 friend is throwing around are not, in fact, the
8 numbers that actually reflect, for example,
9 socioeconomic diversity at Harvard, where, as it
10 stands now, 20 percent of all matriculants pay
11 nothing, 70 percent of underrepresented
12 minorities pay nothing, and well over half of
13 all applicants get substantial financial aid.

14 But, as to your point about
15 race-neutral alternatives -- and I -- correct me
16 if I'm wrong, Justice Thomas, but I think this
17 is what you're asking me about -- we have
18 exquisitely detailed metrics in this case with
19 respect to race-neutral alternatives and
20 findings and testimony with respect to the
21 so-called ALDCs, which is an acronym that I
22 think I was present -- I was actually literally
23 present at the birth of, which is a preference
24 for children of alumni, children of faculty, and
25 staff, athletes, and other people who have found

1 themselves on the dean's interest list.

2 This -- the data in this case shows
3 that if that -- if race were eliminated, you
4 couldn't consider race, and you also could give
5 none of those preferences, the racial diversity
6 of the matriculating class would go down. The
7 -- the -- the representation of African
8 Americans, if you just stopped considering race,
9 would go from 14 to 6 percent, but if you also
10 stopped considering ALDCs, it would go to
11 5 percent.

12 With respect to --

13 JUSTICE GORSUCH: Let's just say
14 hypothetically, though, hypothetically, and I --
15 I know I'm going to get --

16 MR. WAXMAN: I -- I know all the usual
17 caveats --

18 JUSTICE GORSUCH: All right. All
19 right.

20 MR. WAXMAN: -- and I accept them.

21 JUSTICE GORSUCH: Thank you,
22 Mr. Waxman.

23 (Laughter.)

24 MR. WAXMAN: Yes.

25 JUSTICE GORSUCH: Thank you.

1 MR. WAXMAN: I'm pretty sure, since
2 you're asking me, I'm not going to like the
3 hypothetical.

4 JUSTICE GORSUCH: You're not going to
5 like it. But let's assume that a very wealthy
6 university could pay for everybody to go and
7 still increase its endowment. It's a "perpetual
8 motion machine," Malcolm Gladwell called them.

9 Let's say, if it just gave up
10 preferences for donors' children, legacies, and
11 squash athletes, okay, or maybe those who row
12 crew, all of which tend to favor predominantly
13 white children, and it could achieve whatever it
14 deemed racial diversity, would it then be
15 permitted to engage in race consciousness, or in
16 that circumstance, would you agree that that
17 would not be narrowly tailored?

18 MR. WAXMAN: So I'm not claiming --
19 I'm accepting your hypothetical as hard as it is
20 for me in light of what the evidence in this
21 case shows.

22 JUSTICE GORSUCH: I understand that.
23 There we go.

24 MR. WAXMAN: I -- I am not claiming
25 that there is a compelling interest in having

1 donors per se, there is a compelling interest in
2 your proverbial art museum, there is a
3 compelling --

4 JUSTICE GORSUCH: There is a
5 compelling interest in the art museum?

6 MR. WAXMAN: No, no.

7 JUSTICE GORSUCH: No.

8 MR. WAXMAN: These are the things that
9 I'm not claiming.

10 JUSTICE GORSUCH: Okay. Okay. I'm
11 sorry.

12 MR. WAXMAN: Okay? I'm disclaiming
13 all of those things.

14 JUSTICE GORSUCH: All right.

15 MR. WAXMAN: When you look at a
16 so-called race-neutral alternative, the question
17 that this Court -- that Justice Powell
18 articulated in Bakke and this Court underscored
19 and amplified in Grutter and then in Fisher is,
20 how does -- is -- does that race-neutral
21 alternative actually substantially impact the
22 character of the institution and the education
23 that's being provided? And here --

24 JUSTICE GORSUCH: Oh. Now let me stop
25 you there because -- and I'm sorry to

1 interrupt -- but, surely, getting rid of those
2 preferences would substantially impact the
3 university.

4 MR. WAXMAN: And -- and --

5 JUSTICE GORSUCH: But you -- you're --
6 you're saying they are not a compelling interest
7 for constitutional purposes --

8 MR. WAXMAN: No, what I -- what I'm
9 saying --

10 JUSTICE GORSUCH: -- for the
11 Fourteenth Amendment? Or does the Fourteenth
12 Amendment make -- make legacy children and donor
13 --

14 MR. WAXMAN: Of course --

15 JUSTICE GORSUCH: Okay. So we agree?

16 MR. WAXMAN: Of course not. And the
17 truth of the matter is that if this were a case
18 in which the evidence showed that eliminating a
19 legacy preference made a substantial difference,
20 the district judge who -- to say that the
21 district judge was applying strict skeptical
22 scrutiny on the narrow tailoring principles is
23 quite an understatement --

24 JUSTICE GORSUCH: Okay.

25 MR. WAXMAN: -- might have decided

1 otherwise. What the district court found --

2 JUSTICE GORSUCH: Okay. Okay.

3 MR. WAXMAN: And, Justice Gorsuch, if
4 I can just --

5 JUSTICE GORSUCH: Sure.

6 MR. WAXMAN: -- make one comment about
7 the record which I think responds to the -- at
8 least the gist and spirit of your hypothetical.
9 With respect to race-neutral alternatives, the
10 -- the simulation, what has come to be called
11 "Simulation D" in this Court, the district court
12 found that "the Simulation D would require
13 'sacrifices on almost every' -- "'every
14 dimension important to Harvard's admissions
15 process.'"

16 Among other things -- and these are
17 all recited in the Smith Committee report, they
18 are recited in the -- the extensive discussion
19 of race-neutral alternatives in both the
20 district court opinion and the court of appeals
21 opinion -- are that, for example, with respect
22 to academic excellence, the academic factor, the
23 number of -- of matriculants with -- who score 1
24 or 2 on the five-point scale would go down
25 17 percent.

1 JUSTICE GORSUCH: I'm familiar.

2 Mr. Waxman --

3 MR. WAXMAN: Yeah.

4 JUSTICE GORSUCH: -- I am familiar with
5 all of that along with --

6 MR. WAXMAN: So, in other words, it's
7 not --

8 JUSTICE GORSUCH: -- we go down from
9 99 to 98th percentile. I've got it. If I might
10 --

11 MR. WAXMAN: No, no.

12 JUSTICE GORSUCH: -- if I might shift
13 gears. Okay. I -- I -- I -- I am familiar with
14 all those, and I appreciate that, and I
15 understand your point. It was a hypothetical.

16 What do we do about history here?
17 Because one -- one of -- one -- one thing we --
18 we know or we think we know or we're told in the
19 briefs at least is that Harvard's move to a
20 holistic application approach happened in the
21 1920s because it wanted to impose a quota on
22 Jewish applicants, but it didn't want to do
23 through front door, so it used diversity as a --
24 as a subterfuge for racial quotas.

25 MR. WAXMAN: What the record in this

1 case shows, and it's -- it's discussed in some
2 detail in the -- I'm going to blank on the names
3 of the reports, but the various reports that
4 Harvard has done over the years on diversity and
5 diverse admissions in the case, one is the
6 so-called Rudenstine Report and the other is the
7 Khurana Report, both of which are in the Joint
8 Appendix, is that Harvard actually even before
9 the Civil War has as an admissions policy an
10 effort to, in fact, diversify on both viewpoint
11 and geography the class.

12 Now it is no -- there's no doubt, and
13 Harvard acknowledges and is ashamed, that in
14 1920, one of its presidents, President Lowell,
15 decided that there were too many Jews and that
16 they were then going to start asking questions
17 on the application that would allow them to take
18 into effect character.

19 The notion that that bears at all on
20 the way that Harvard's current admissions
21 process, which uses a 40-person admissions
22 committee that meets and decides each
23 application en banc, in discussion, has any
24 resemblance whatsoever to the racist,
25 anti-Semitic policy of a single Harvard

1 president is insubstantial, as the courts found.

2 JUSTICE GORSUCH: Okay. How do you
3 respond then to -- again, we have many briefs on
4 this point from Asian American applicants who
5 have -- and -- and they say there's an entire
6 industry to help them appear less Asian on their
7 college applications and that they consider
8 elite colleges to have Asian quotas effectively,
9 if not in name.

10 MR. WAXMAN: I'll say two things, one,
11 generally about the amicus briefs, and, two,
12 specifically about Harvard, and I -- I certainly
13 want to get to number two.

14 But there are multiple amicus briefs
15 filed by Asian American organizations and one
16 that is particularly, I think, powerful, filed
17 by 1,240 scholars of Asian American experience
18 and Asian ethnicity, all of whom not only opine
19 but cite studies showing that Asian Americans as
20 a group -- and Asia, of course, represents
21 61 percent of the world's population and a
22 multiplicity of ethnicities -- that Asian
23 Americans demonstrably benefit from a holistic
24 admissions policy that considers race as one
25 factor among many.

1 Now, with respect to Harvard, there
2 was -- to say that there was evidence in this
3 case is quite an understatement. The district
4 court found -- I'm citing -- I'm quoting page
5 261 of the Joint Appendix, and it's reiterated
6 by the court of appeals on page 80 of the Joint
7 Appendix -- that there was "no evidence of
8 discrimination against Asian Americans
9 whatsoever."

10 Again, now on page 264, there was
11 consistent, unambiguous, and convincing
12 testimony that there was no discrimination in
13 the administration -- administrative --
14 admissions process in general and the personal
15 rating in particular.

16 The -- the plaintiffs in this case
17 could not, after four years of discovery in
18 which they hand-picked applications to view in
19 total, they could not produce a single witness
20 to testify that he or she had been --

21 JUSTICE ALITO: Well, Mr. --

22 MR. WAXMAN: -- discriminated against.

23 JUSTICE ALITO: -- Mr. Waxman, let me
24 stop you there because you referred to the
25 personal score, and that's a score that Harvard

1 gives based on character traits such as
2 integrity, courage, kindness, and empathy. But
3 the record shows that Asian student applicants
4 get the lowest personal scores of any other
5 group.

6 What accounts for that? Is it -- it
7 -- has to be one of two things. It has to be
8 that they really do lack integrity, courage,
9 kindness, and empathy to the same degree as
10 students of other races, or there has to be
11 something wrong with this personal score.

12 MR. WAXMAN: That's -- that is -- I
13 mean, I -- I want to get to what the evidence
14 was there, but that -- that syllogism, with all
15 due respect, is wrong. There was, for example,
16 a study that was done in 1983 that looked at why
17 it was that female applicants to graduate school
18 at the University of --

19 JUSTICE ALITO: No, just address this.

20 MR. WAXMAN: Okay. Here's --

21 JUSTICE ALITO: The personal score
22 that's given to Asian applicants to Harvard, why
23 do they -- why are they given a lower score than
24 any other group?

25 MR. WAXMAN: Okay. So the answer to

1 why they -- as a group, why there is a slight
2 numerical disparity with respect to the personal
3 rating of Asian Americans, but -- and also a
4 slight numerical disparity to the advantage of
5 Asian Americans with respect to the
6 extracurricular rating and the academic rating
7 was the answer that their expert gave with
8 respect to the latter two, which is that the
9 only way that you can -- the only model that can
10 be created to figure out what was going into the
11 personal rating couldn't look at almost anything
12 that admissions officers look at in those
13 ratings.

14 It can't -- there's no way that it
15 could model what the guidance counselor letters
16 said, what the teacher letters said, what the
17 essays said, what the interviewers' letters
18 said. In other words, what they --

19 JUSTICE ALITO: Well, I thought the
20 interviewers did not rate the applicants lower
21 than other -- than other applicants based on
22 race.

23 MR. WAXMAN: There --

24 JUSTICE ALITO: There was not the
25 disparity in what was done by -- what was said

1 by the interviewers.

2 MR. WAXMAN: The -- with respect to
3 the alumni interviewers --

4 JUSTICE ALITO: The alumni
5 interviewers.

6 MR. WAXMAN: -- based on -- based on
7 the subset that was included here, that their
8 subset, by the way, excluded all ALDC
9 applicants, that is, even though they
10 acknowledged that there was not only no evidence
11 of discrimination against Asian American ALDCs,
12 but they did better, they eliminated from their
13 -- their model applicants that represent on
14 average 30 percent of the admitted class --

15 JUSTICE ALITO: I -- I -- I still --
16 putting aside the -- the teacher recommendations
17 or guidance counselor recommendations, which
18 I'll come to, I still haven't heard any
19 explanation for the disparity between the
20 personal scores that are given to Asians. They
21 rank below whites. They rank way below
22 Hispanics and really way below African
23 Americans.

24 What -- you're talking about hundreds
25 and hundreds of applicants, maybe thousands.

1 What is the explanation for that?

2 MR. WAXMAN: So the explanation that
3 was -- I -- I can't do better than the findings
4 of fact in the trial court as affirmed. And I
5 -- and I -- but I want to make two points very
6 clear with respect to your question.

7 We -- all of this evidence was -- all
8 of this was on display and in front of the trial
9 court for, this Asian American part of it, for
10 well more than a week, maybe two weeks.

11 The district court found, considering
12 all of the evidence, that there is "no credible
13 evidence that corroborates the improper
14 discrimination suggested by SFFA's
15 interpretation of the personal rating," page
16 264.

17 JUSTICE ALITO: Well, all right. I'll
18 try one more time. The district court found "a
19 statistically significant and negative
20 relationship between Asian American identity and
21 the personal rating assigned by Harvard
22 admissions officers."

23 MR. WAXMAN: That's correct. And what
24 she said is the record will not allow a full
25 explanation of that because, it -- the -- the --

1 this -- this -- there is -- there was no
2 evidence with respect to what teachers said,
3 what guidance counselors said, what these
4 students wrote -- wrote about.

5 But what we can say with respect to
6 the allegation of discrimination in this case,
7 which was the -- the -- the definition of
8 discrimination that was at issue in Bakke and
9 Grutter and Fisher and which their expert, which
10 their lawyer got up at opening statement and
11 said: "When we talk about discrimination in
12 this case, we're talking about discrimination in
13 admissions outcomes."

14 And here again, the district court
15 found and the court of appeals also concluded
16 that there was no evidence of discrimination in
17 admissions outcomes against Asian Americans --

18 JUSTICE ALITO: If you -- if you --

19 MR. WAXMAN: -- whatever you think
20 about the personal rating, which is, after all,
21 simply a number that --

22 CHIEF JUSTICE ROBERTS: Justice --
23 Justice Alito would like to ask a question.

24 MR. WAXMAN: I'm sorry.

25 JUSTICE ALITO: Go ahead.

1 MR. WAXMAN: I'm not trying to
2 filibuster you.

3 JUSTICE ALITO: Finish your -- finish
4 your sentence.

5 MR. WAXMAN: Okay.

6 JUSTICE ALITO: Then I will ask one
7 more question on this.

8 MR. WAXMAN: I just -- I -- I want to
9 make one other thing clear to the extent that
10 it's not clear from the record. The personal
11 rating, like the academic rating and the
12 extracurricular rating and the athletic rating,
13 is a number that is put down by a "first
14 reader." That is, the file comes in, it's not
15 usually complete, and just as a matter of
16 triage, one of the 40 admissions officers goes
17 through and gives these numerical numbers.

18 It is -- the testimony was it is not
19 considered in any way once the subcommittees and
20 committees meet. It "fades into the
21 background." It is not the basis of admissions
22 decisions.

23 And so not only did the court find as
24 fact that those -- that that slight disparity
25 was not evidence of discrimination even in the

1 personal rating, it had no effect with respect
2 to outcomes.

3 JUSTICE ALITO: It makes no difference
4 whatsoever?

5 MR. WAXMAN: It's --

6 JUSTICE ALITO: It doesn't affect --

7 MR. WAXMAN: -- it's not that it makes
8 no difference whatsoever. Look at what the
9 expert testimony was, and I -- I realize we're
10 --

11 JUSTICE ALITO: Does it make a
12 difference or doesn't it make a difference?

13 MR. WAXMAN: It doesn't make a
14 statistical difference in admissions outcomes --

15 JUSTICE ALITO: Then -- then why do
16 you do it?

17 MR. WAXMAN: -- as both courts found.

18 JUSTICE ALITO: Then why do you do it?

19 MR. WAXMAN: We -- I said, I mean, as
20 --

21 JUSTICE ALITO: If it doesn't matter,
22 why do you do it?

23 MR. WAXMAN: We do it as a matter of
24 triage. Right now, Harvard is getting -- last
25 year got 61,000 applications for 1600 slots.

1 And it is an entirely rational way of figuring
2 out where -- how you're going to allocate your
3 attention to ask an admissions officer, as the
4 file is being developed, just go through in a
5 very rough way and rate a particular application
6 based on what you can see on these four metrics.

7 The fact that Asian Americans got a
8 marginally -- on average, a marginally lower
9 personal rating score is no more evidence of
10 discrimination against them than the fact that
11 they got a marginally higher rating than any
12 data can show on academics and extracurriculars.
13 It doesn't mean that they're either smarter or
14 people think they're smarter.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 JUSTICE SOTOMAYOR: Counsel --

18 CHIEF JUSTICE ROBERTS: We'll get to
19 you in a moment.

20 There's been a lot of talk about
21 African American applicants to Harvard in sort
22 of a general indistinguishable way when, in
23 fact, they cover a very broad swath of -- of
24 applicants.

25 MR. WAXMAN: Of course.

1 CHIEF JUSTICE ROBERTS: What do you do
2 with respect to an African American applicant?
3 I mean, you're concerned about diversity of
4 viewpoint. Let's say his viewpoints tend to be
5 very close to, you know, the white applicants,
6 he grew up in Grosse Point, you know, had a
7 great upbringing, comfortable, his parents went
8 to Harvard, he's a legacy, and yet, under your
9 system, when he checks African American, he gets
10 a -- a tip. He gets a benefit from that.

11 Isn't that --

12 MR. WAXMAN: So --

13 CHIEF JUSTICE ROBERTS: -- isn't that
14 very stereotypical on -- under the Harvard
15 program?

16 MR. WAXMAN: -- I -- I think it's --
17 it's -- well, first of all, it is simply not the
18 case that every -- every black applicant gets a
19 "tip." In fact, I'll direct the Court's
20 attention to page 1,811 of the Joint Appendix,
21 which includes this beautiful chart which
22 represents an undisputed model of the relative
23 importance of race on application outcomes.

24 And the one that you cannot actually
25 even see to your far right is race. Race

1 explains --

2 CHIEF JUSTICE ROBERTS: I can't see it
3 because it's far away. But, I mean --

4 (Laughter.)

5 MR. WAXMAN: Nonetheless, you have the
6 page reference.

7 CHIEF JUSTICE ROBERTS: -- it is not
8 zero.

9 MR. WAXMAN: It is very close to zero.
10 That is, the testimony in the case was --

11 CHIEF JUSTICE ROBERTS: Well, so
12 there's only a little racial discrimination in
13 the case.

14 MR. WAXMAN: No -- are you asking me
15 whether Harvard is -- you're asking me to answer
16 a question that assumes that Harvard is
17 discriminating on the basis of race? No. I
18 can't accept that.

19 CHIEF JUSTICE ROBERTS: Well, isn't
20 that --

21 MR. WAXMAN: What Harvard says is --

22 CHIEF JUSTICE ROBERTS: -- isn't that
23 what is -- Mr. Waxman, isn't that what the case
24 is about, the discrimination against Asian
25 Americans?

1 MR. WAXMAN: There was a -- Count I of
2 the complaint was that Harvard was intentionally
3 discriminating against Asian Americans. The --
4 the entire evidence of that case, all of the
5 plaintiff's proof, was that Asian Americans are
6 treated worse than white applicants; that is,
7 that there was prejudice, intentional
8 discrimination. That could not -- the evidence
9 could not --

10 CHIEF JUSTICE ROBERTS: What do you do
11 with the -- what do you do with the charts --

12 MR. WAXMAN: -- more soundly have
13 refuted that.

14 CHIEF JUSTICE ROBERTS: -- what do you
15 do with the charts in their brief, I think
16 they're on page 24 --

17 MR. WAXMAN: Twenty-four.

18 CHIEF JUSTICE ROBERTS: -- or 43, the
19 academic decile and the comparative treatment of
20 African Americans, Hispanics, and Asian
21 Americans? You don't see a surprising disparity
22 in that?

23 MR. WAXMAN: So there's a lot to be
24 said about that, but I guess the first thing I
25 would say about that chart is that their own

1 expert agreed that because that chart is simply
2 a descriptive statistic, it is "not equal to
3 evidence of discrimination." It reflects a
4 pattern which might or might not be real.

5 Now understand that that chart that
6 they've displayed for you, they have eliminated
7 all ALDC applicants. So one-third of the
8 admitted class, over six years, they're not even
9 in that chart. They have all -- they're -- that
10 chart is predicated on something called an
11 academic index. An academic index is a formula
12 that looks at two things, high school grades and
13 test scores. The academic --

14 CHIEF JUSTICE ROBERTS: And so people
15 in the different racial categories, they have a
16 different result based on other factors, which
17 includes race?

18 MR. WAXMAN: They -- they have a
19 different result because, among the many, many,
20 many characteristics of any particular
21 individual applicant that Harvard considers, one
22 that it does not consider is the academic
23 INDREX. That is, the very metric that they're
24 displaying for you Harvard doesn't even use.

25 The only -- the testimony in the case

1 was the only reason that the academic INDREX is
2 even calculated is because the Ivy League
3 athletic rules require that your recruited
4 athlete class, the -- the AA for your -- AI for
5 your recruited athlete class not be more than
6 two standard deviations below --

7 CHIEF JUSTICE ROBERTS: Okay, Mr.
8 Waxman, put aside --

9 MR. WAXMAN: -- the matriculating
10 class last year.

11 CHIEF JUSTICE ROBERTS: -- put aside
12 the hypothetical about the African American
13 applicant who's a legacy. Take two African
14 American applicants in the same category,
15 however you want to take it. They both get or
16 both can get a tip, right, based on their race.

17 And yet they may have entirely
18 different views. Some of their views may
19 contribute to diversity from the perspective of
20 Asians or whites. Some of them may not. And
21 yet it's true that they're eligible for the same
22 increase in the opportunities for admission
23 based solely on their skin color?

24 MR. WAXMAN: So the -- the point is --

25 CHIEF JUSTICE ROBERTS: That was a

1 question.

2 MR. WAXMAN: No, I know. I'm -- I'm
3 -- I'm attempting to answer your question.

4 There is no doubt that for -- as the
5 testimony showed, that for applicants who are
6 essentially so strong on multiple dimensions, so
7 extraordinarily strong on multiple dimensions
8 that they are sort of on the bubble, that they
9 might -- they have a real candidate for
10 admission, African American -- being African
11 American or being Hispanic or in some instances
12 being Asian American can provide one of many,
13 many tips that will put you in.

14 CHIEF JUSTICE ROBERTS: Well, people
15 say that, yes, but you will have to concede,
16 that if it provides one of many, that in some
17 cases it will be determinative.

18 MR. WAXMAN: I do. I do concede that.

19 CHIEF JUSTICE ROBERTS: Okay. So
20 we're talking about race as a determining factor
21 in admission to Harvard.

22 MR. WAXMAN: Race in some -- for some
23 highly qualified applicants can be the
24 determinative factor, just as being the -- you
25 know, an oboe player in a year in which the

1 Harvard-Radcliffe orchestra needs an oboe player
2 will be the tip.

3 CHIEF JUSTICE ROBERTS: Yeah. We did
4 not fight a Civil War about oboe players.

5 MR. WAXMAN: I --

6 CHIEF JUSTICE ROBERTS: We did fight a
7 Civil War to eliminate racial discrimination,
8 and that's why it's a matter of -- of -- of
9 considerable concern.

10 And I think it's important to -- for
11 you to establish whether or not granting a
12 credit based solely on skin color is based on a
13 stereotype when you say this brings diversity of
14 viewpoint. It may not bring diversity of
15 viewpoint -- viewpoint in a particular case at
16 all.

17 MR. WAXMAN: Well, number one,
18 viewpoint diversity, while Harvard values it and
19 seeks it, is not the only -- is by far the only
20 reason for wanting a genuinely diverse class.
21 We want a diverse class for backgrounds and
22 interests and lots of things other than just
23 viewpoint.

24 If we were to use, for example, the --
25 the -- the example that has been discussed, I

1 believe, for every other advocate that has stood
2 up this morning, you know, and ask what about
3 taking race into account if the student writes
4 about it, the fact of the matter is Harvard is
5 attempting not to have among it -- among a class
6 of -- that is diverse among many generations, a
7 class that is racially diverse only for people
8 for whom their racial identity and their racial
9 experiences is of such compelling importance
10 that they write about it, right?

11 The -- the -- your hypothetical about
12 the black student who may have very different
13 views than the stereotypical -- the stereotype
14 of what a black student will have was, in fact
15 -- is, in fact, the subject of the -- that's
16 discussed in the Khurana Report.

17 The Khurana Report gave in its
18 analysis of the importance and dimensions of
19 diversity an actual example that came from
20 Richard Light's book, published book, which had
21 a particular class. It happened to have three
22 African American students in it. An African
23 American student gave an answer in a discussion,
24 which another African American student said:
25 That is not my view. My view is quite the

1 opposite. And a third one said: I wasn't
2 actually going to say anything, but I have a
3 completely different view.

4 That was an incredible learning
5 experience not only for the non-African
6 Americans in the discussion but for them. And
7 that's what Harvard is trying to get at.

8 CHIEF JUSTICE ROBERTS: Thank you, Mr.
9 Waxman.

10 MR. WAXMAN: I'm sorry for taking so
11 long to get that.

12 CHIEF JUSTICE ROBERTS: No, no. I
13 appreciate your answers.

14 Justice Thomas?

15 Justice Alito?

16 JUSTICE ALITO: In -- in Bakke,
17 Justice Powell chose Harvard's admission program
18 as a model, and that selection has had an
19 enormous effect for the last 50 years. Harvard
20 submitted a brief in Bakke, along with a number
21 of other colleges. I went back and I looked at
22 it and noticed that the brief talked about
23 Harvard's program going back 30 years, but it
24 didn't say anything about President Lowell or
25 what Harvard had done back in the 1920s.

1 So my question is, did Harvard sell
2 Justice Powell a bill of goods? Do you think
3 Justice Powell would have championed, would have
4 held up the Harvard program as a model, as an
5 exemplar for the whole country if he knew about
6 the origins of the holistic program?

7 MR. WAXMAN: Justice Powell used the
8 -- used Harvard's description about its
9 admissions process and the limited extent to
10 which it was then and for the past 30 years had
11 been using race as one factor among many to
12 achieve genuine diversity in its student body.

13 Harvard -- the Harvard brief --
14 Justice Powell didn't take it or not take it
15 because, prior to the Civil War, Harvard College
16 was a leader in encouraging diversity in its
17 undergraduate applications, any more than the
18 fact that it had a terrible stain on its history
19 a hundred years ago.

20 It was taken for what it was presented
21 as, and it was -- what it was -- and it fairly
22 presented how the Harvard admissions process
23 worked then and works now.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor?

1 JUSTICE SOTOMAYOR: Counsel, there are
2 two questions that I want to get to that were
3 asked of you. The first was Justice Alito's
4 about the poor personal rating. It seems to me
5 that Petitioner claims that Harvard's
6 discriminating against Asian Americans because
7 it uses subjective criteria that's affecting the
8 personnel ratings. That's how I think I read
9 his question, correct?

10 So it's not that it's using race in
11 admitting people. It's that it's using a
12 corrupted personnel rating, correct?

13 MR. WAXMAN: Well, I -- I don't want
14 to speak for Justice -- I don't want to presume
15 to speak for Justice Alito.

16 JUSTICE SOTOMAYOR: I agree.

17 MR. WAXMAN: I think it is -- it is
18 fair to say that the criticism of the -- this --
19 the personal rating --

20 JUSTICE SOTOMAYOR: Right.

21 MR. WAXMAN: -- relates to the
22 "subjectivity" that is involved really in all of
23 the ratings but particularly in the personal
24 rating.

25 JUSTICE SOTOMAYOR: Well, it goes --

1 the evaluations that use words like "not a" --
2 "non-leader," "not caring," "not" whatever --

3 MR. WAXMAN: Yes. Yeah.

4 JUSTICE SOTOMAYOR: -- it applies to
5 all races, correct?

6 MR. WAXMAN: Of course.

7 JUSTICE SOTOMAYOR: All races --
8 applicants receive those ratings as well,
9 correct?

10 MR. WAXMAN: Correct.

11 JUSTICE SOTOMAYOR: And I think what
12 the expert was saying, the fact that you have
13 these numbers, standing alone don't tell you
14 anything, correct, you have to look at all the
15 input that goes into why --

16 MR. WAXMAN: Correct. Correct.

17 JUSTICE SOTOMAYOR: -- whether there
18 was discrimination or not, correct?

19 MR. WAXMAN: Correct.

20 JUSTICE SOTOMAYOR: All right. So the
21 numbers alone tell you nothing.

22 MR. WAXMAN: That's -- that's right.
23 The numbers can tell you -- you could -- you
24 could tote up 100,000 applications and look at
25 what the first reader says -- scored and measure

1 it against declared race and come up with a
2 feature that says, gee, across these 150,000 or,
3 in this case, 150,000 minus all the ALDCs, it
4 looks like, you know, on average, Asian --
5 self-declared Asian Americans have this number
6 and self-declared whites have this number.

7 It tells you nothing about why that
8 number was given, any more than why --

9 JUSTICE SOTOMAYOR: And -- and -- and
10 I don't want to cut you off, but I want to
11 get to --

12 MR. WAXMAN: No, I -- I -- I need to
13 be cut off.

14 JUSTICE SOTOMAYOR: And so it doesn't
15 tell you why, and there was no proof to show
16 why. District court found that that number did
17 not prove discrimination, correct?

18 MR. WAXMAN: There was actual proof
19 that it did not reflect discrimination. There
20 was a multi -- there was expert analysis on --
21 on -- on multi-dimensionality and that looked at
22 the non-academic index that showed that, for
23 example, white applicants who got a 1 or a 2 on
24 academics and Asian Americans who got 1 or 2 on
25 academics, for whatever reason, the latter group

1 got lower teacher ratings than the former.

2 And same with guidance counselor
3 ratings. It doesn't tell you why. It doesn't
4 permit -- and it certainly doesn't permit an
5 inference that Harvard is discriminating. The
6 -- the district court could not have been more
7 definitive about the absence of any racial
8 discrimination or discrimination against Asian
9 Americans than it was.

10 A finding that the Office of Civil
11 Rights in the early 19 -- in -- in -- in 1990
12 also found.

13 JUSTICE SOTOMAYOR: All right. Could
14 you deal with Simulation D? I think that you
15 were trying to explain why the district court
16 rejected that stimulation -- simulation.

17 MR. WAXMAN: Simulation.

18 JUSTICE SOTOMAYOR: Simulation, I'm
19 sorry, simulation numbers as meaningful. Could
20 you finish your answer?

21 MR. WAXMAN: Yes. And, you know, in
22 particular, I'll -- you know, I'll -- I'll point
23 the Court to -- because I'm not going to be able
24 to do it as well as the district court -- to
25 pages 208 to 220 of the Joint Appendix, which is

1 the district court's findings on this, and 73 to
2 79, which is the court of appeals, and 1307 to
3 1325, which is the Smith Committee's analysis of
4 this.

5 But, basically, what the district
6 court found was, as I said, that Simulation D
7 would require significant sacrifices -- I don't
8 have the quote right in front of me now -- on
9 almost every dimension that Harvard values,
10 including a substantial decline -- we're not
11 talking about a decline in SAT scores or going
12 from the 99th percentile to the 98th percentile.
13 We're talking about the following things that
14 the court found.

15 The -- the percentage of the
16 matriculating class that would be academic 1s or
17 2s would go down by 17 percent. Every other
18 factor would go down by at least 10 percent,
19 between 10 and 22 percent.

20 The number of -- of matriculants
21 interested in majoring in the humanities, which
22 is a major tip that Harvard gives because of
23 Harvard's recent inability to matriculate
24 excellent students who want to major in the
25 humanities, would go down by 14 percent.

1 The number of African Americans
2 admitted would go down from 14 to 10 percent.
3 It was the whole confluence of all of those
4 consequences that led the district court to
5 confirm that it was not a workable, effective
6 race-neutral alternative.

7 JUSTICE SOTOMAYOR: Well, it seems
8 that for Justice Gorsuch, none of those other
9 things are compelling interests. And how do --

10 MR. WAXMAN: Well --

11 JUSTICE SOTOMAYOR: -- you respond to
12 that? He would say --

13 MR. WAXMAN: Well, I -- I'm not sure
14 I'm ascribing that to Justice Gorsuch, but --

15 JUSTICE SOTOMAYOR: Well, I -- I --
16 but he seemed to say an art museum is not
17 important. So, if the matrix shows that those
18 interested in the arts falls to -- falls
19 dramatically, that might be of concern to
20 Harvard. I think it was valuable, but --

21 MR. WAXMAN: It might very well be a
22 concern. Would it -- would it lead -- would it
23 lead a judge skeptically applying strict
24 scrutiny to say: Oh, it just doesn't work,
25 you're not going to have an art museum, or

1 you're not going to have a squash team, or
2 you're not going to have, you know, alumni
3 contributions.

4 It wasn't any of those things. It's a
5 caricature to say that those were the reasons
6 why this particular thing wasn't a race-neutral
7 alternative.

8 Now I just want to say, if you think,
9 notwithstanding the findings, that the district
10 court and the court of appeals didn't properly
11 apply the kind of strict scrutiny and narrow
12 tailoring analysis that it should have, okay,
13 that's a remand.

14 I don't think the record will bear
15 that out. It is not a reason to dispense with
16 decades of constitutional precedent that has
17 allowed all of these, what this Court has
18 properly considered to be a compelling national
19 interest in having this kind of learning
20 environment.

21 CHIEF JUSTICE ROBERTS: Thank you.

22 Justice Kagan?

23 JUSTICE KAGAN: Mr. Waxman, there have
24 been a lot of questions today, and I take these
25 to be important questions, about what is the end

1 point. If -- if we can achieve racial diversity
2 through neutral mechanisms rather than through
3 race-conscious mechanisms, we should. We've
4 said that many times.

5 So the question is, when can we say
6 that we can achieve our racial diversity goals
7 in that way? And I guess I have a two-part
8 question and -- and then an assumption that I
9 want you to bake into the two parts.

10 The first is, what is Harvard doing in
11 an ongoing way to test whether that is true?
12 And the second is, does Harvard see any progress
13 along that dimension? In other words, I think
14 it was said by Petitioner's counsel, oh, Harvard
15 is doing -- you know, is putting this -- is --
16 is -- is -- is using as great a preference as it
17 ever did. And the question is, over time, has
18 Harvard found that it has become less necessary
19 to use race-conscious means or not?

20 Here's the assumption that I want to
21 have you bake into this, which is I take
22 Petitioners to be saying, and I think that this
23 is an important thing, that it doesn't matter if
24 some part of the reason for adopting
25 race-neutral approaches is to achieve racial

1 diversity. I think that they very clearly said
2 that. I'm not sure I understand why given their
3 legal arguments, but I think that they very
4 clearly said that.

5 So assume that you can, you know, sit
6 down and say we're -- we're -- we're -- we're --
7 we're trying to figure out what race-neutral
8 mechanisms to use, and part of the goal is to
9 achieve racial diversity. What is Harvard doing
10 to answer that question and is it any closer?

11 MR. WAXMAN: I have firmly in mind the
12 second part of your question. If I don't also
13 answer the first, please remind me.

14 The evidence in the case is that for
15 decades Harvard has been taking steps other than
16 the conscious -- other than race-consciousness
17 to increase the level of diversity, including
18 ethnic and racial diversity.

19 And these are discussed, actually, in
20 the Smith Committee report and the -- and Dean
21 Smith's testimony and in the findings. It, for
22 example, in the wake of Grutter and actually
23 before substantially increased the amount of
24 resources that it put in outreach, in partnering
25 with organizations that -- that assist and, you

1 know, advance the educational potential of
2 minority and low socioeconomic students.

3 It has -- it has achieved some success
4 in -- in -- in getting additional applications
5 not just from minorities but from minority
6 applicants who are actually really qualified to
7 attend Harvard.

8 It thought about, well, maybe a way to
9 increase this is to substantially increase our
10 financial aid, and the -- there's evidence in
11 the case, there's actually a beautiful chart
12 that shows how the level of financial aid went
13 up at various points over two decades and what
14 happened with respect to the racial diversity of
15 the applicant class and the matriculating class.

16 And what the testimony showed and the
17 findings was it made a difference to a point.
18 After a certain point, it no longer made any
19 difference. Harvard tested the proposition that
20 its early action program, it's -- it's not early
21 decision in the way that most schools are
22 because you're not committed to it, but that by
23 admitting a significant percentage, I don't
24 know, 20 or 25 percent of its class for people
25 who applied, you know, early, early on in the

1 academic year, it was disadvantaging minority
2 applicants and applicants from low socioeconomic
3 circumstances because they didn't have the kind
4 of resources, guidance counselors and test prep
5 and all that sort of stuff, to be able to take
6 advantage of it.

7 They -- they -- they ended it and
8 asked other universities to do the same thing.
9 With two exceptions, no one else did. And what
10 they found at the end of five years was that it
11 had the opposite result; that is, it made it
12 more difficult for them to recruit and
13 matriculate underrepresented minorities.

14 And there were -- there were a bunch
15 of other things in the record about things that
16 Harvard has done, some of which have had
17 substantial success. And so the notion that
18 Harvard is doing things the same way and is
19 always going to do the same things the same way
20 is just wrong.

21 Harvard is -- Harvard completely
22 recognizes and endorses this Court's statement
23 in Grutter that "there are serious problems of
24 justice connected with the idea of preference
25 itself." That's why it holds itself -- why it

1 is attempting to achieve all of the compelling
2 benefits of -- of a genuinely diverse student
3 body in the most race-neutral way that it can.

4 And in terms of -- I don't know if
5 this is the first part of your question, but
6 Harvard is actually attempting -- is measuring
7 how it is doing in terms of diversity and the
8 benefits of diversity and what needs to be done
9 and what other things can be done in a
10 race-neutral way on a very regular basis.

11 And I -- I can give you the data on --
12 you know, with respect to either, but, for
13 example, Harvard -- there is a -- Harvard said
14 -- committed itself in 2018 that it would, you
15 know, continue to look for race-neutral
16 alternatives and have another systematic review,
17 you know, systematic, statistically, you know,
18 rigorous review about how it is doing.

19 That committee has been formed and has
20 already met for the five years that will -- you
21 know, that will transpire next year. Yes, we
22 are trying. Yes, we have tried other things
23 that have helped. Are we there yet? No. And
24 that's the reason why the 45 percent -- the
25 district court's finding of 45 percent. That's

1 what it shows. It shows --

2 JUSTICE KAGAN: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, Mr.
4 Waxman.

5 Justice Gorsuch?

6 JUSTICE GORSUCH: Yeah. I -- I -- I
7 just was hoping to get an answer to the second
8 half of the question --

9 MR. WAXMAN: Oh, okay.

10 JUSTICE GORSUCH: -- which was when --
11 when does Harvard anticipate this will end?

12 MR. WAXMAN: Yeah.

13 JUSTICE GORSUCH: Grutter spoke of it
14 being a 25-year window, as you're well aware.
15 Harvard could tomorrow do without federal funds
16 and continue to discriminate on the basis of
17 race however it pleased. I'm sure that would be
18 a hardship. But what -- what is -- what is
19 Harvard's view on how long this will take?

20 MR. WAXMAN: So Harvard, like the
21 Solicitor General and like UNC, understood all
22 four paragraphs of what Justice O'Connor wrote
23 in her opinion and takes it to heart. What
24 Justice O'Connor said was it's been 25 years
25 since Grutter, there's evidence that our society

1 is changing, it is -- we expect that 25 years
2 from now the use of racial preferences will no
3 longer be necessary.

4 JUSTICE GORSUCH: So Harvard agrees
5 with that?

6 MR. WAXMAN: And --

7 JUSTICE GORSUCH: Does Harvard agree
8 with that?

9 MR. WAXMAN: I don't -- I -- Harvard
10 does not currently, based on its data, expect
11 that in 2028 it will have -- been able to use a
12 -- only race-neutral alternatives.

13 JUSTICE GORSUCH: So --

14 MR. WAXMAN: So what this --

15 JUSTICE GORSUCH: -- so -- so --

16 MR. WAXMAN: -- but what I do agree
17 with --

18 JUSTICE GORSUCH: -- what -- what are
19 -- what are Harvard's --

20 MR. WAXMAN: -- if I -- if I may --

21 JUSTICE GORSUCH: I'm -- I'm --
22 just -- I'm just -- just -- it's a real simple
23 question. If Harvard doesn't have an answer,
24 that's fine, but does Harvard have some view
25 about when?

1 MR. WAXMAN: Harvard -- yes, Harvard's
2 view about when doesn't have a date on it.
3 Harvard takes to heart Justice O'Connor's
4 opinion that "in the context of higher
5 education, the durational requirement can be met
6 by periodic reviews to determine whether racial
7 preferences are still necessary" --

8 JUSTICE GORSUCH: Okay.

9 MR. WAXMAN: -- "to achieve student
10 body diversity."

11 JUSTICE GORSUCH: Thank you.

12 MR. WAXMAN: And we want to be put to
13 that strict scrutiny test.

14 JUSTICE GORSUCH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Kavanaugh?

17 JUSTICE KAVANAUGH: I do have two or
18 three questions.

19 First, you're seeking educational
20 diversity, as I understand it, at Harvard, but
21 my understanding, correct me if I'm wrong, is
22 that you don't ask about religion.

23 And why the disparate treatment of
24 religion and race when -- when evangelical
25 Christians, Catholics, Muslims add to the

1 educational diversity at Harvard and other
2 religious groups add to the diversity and why --
3 why not ask about that?

4 MR. WAXMAN: So Harvard greatly values
5 religious diversity. It is extraordinarily
6 proud of the religious --

7 JUSTICE KAVANAUGH: How can it track
8 it if it doesn't ask about it?

9 MR. WAXMAN: Oh, how can it track it?

10 JUSTICE KAVANAUGH: How can it track
11 it in the admissions process? It may happen by
12 happenstance. I'll let you finish.

13 MR. WAXMAN: Okay. Harvard is not
14 tracking it in the admissions process other than
15 to the extent that and many, many students
16 indicate what their religion is. Harvard --
17 Harvard has not provided, thought it necessary,
18 and so far as I know, nobody has suggested that
19 Harvard has any need to provide a tip for
20 religious diversity because the Harvard
21 undergraduate population is so religiously
22 diverse.

23 There are currently 47 --

24 JUSTICE KAVANAUGH: That answers my --

25 MR. WAXMAN: -- chaplains --

1 JUSTICE KAVANAUGH: -- that answers my
2 question.

3 MR. WAXMAN: Yeah.

4 JUSTICE KAVANAUGH: I understand.
5 Okay. That answers --

6 MR. WAXMAN: I just -- I just want to
7 say that our ministry minister -- ministers to
8 27 different religious denominations.

9 JUSTICE KAVANAUGH: All right. It was
10 a factual question.

11 Second, I think you agree that the
12 baseline in our precedents, operating within the
13 confines of our precedents, as you want us to
14 do, is race neutrality. And we've allowed,
15 though, limited consideration of race in
16 educational -- in higher educational admissions.
17 As you've heard, two limits on that, as I
18 understand it, one, the adequate race-neutral
19 alternatives; two, the durational limits, the 25
20 years or whatever durational limit you think
21 works there.

22 I just want to make -- make sure you
23 agree with how I set that up. In other words,
24 race neutrality is the baseline. There are two
25 limits on the consideration of race-conscious

1 educational admissions at colleges and
2 universities. Adequate race-neutral
3 alternatives would be one. A durational limit,
4 25 or something else, would be the other. Is
5 that how you read our precedents or not?

6 MR. WAXMAN: I read your precedent in
7 that -- I think you have other requirements too,
8 which is it has to be flexible, it has to be one
9 factor among many, you know, et cetera, et
10 cetera.

11 JUSTICE KAVANAUGH: Right.

12 MR. WAXMAN: But, with -- the only --
13 I agree with your two categorizations, except
14 that with respect to the durational
15 requirements, we understand it to be the -- the
16 -- the -- inconsistent with the language from
17 Justice O'Connor's opinion that I quoted the
18 Court --

19 JUSTICE KAVANAUGH: Okay.

20 MR. WAXMAN: -- which is that the
21 narrow tailoring requirement and the
22 race-neutral alternative requirement, strictly,
23 scrupulously, and skeptically applied, will tell
24 us when race-neutral alternative --

25 JUSTICE KAVANAUGH: Okay. And one

1 last one. This picks up on Justice Kagan's and
2 Justice Gorsuch's questions, I believe.

3 But, on the adequate race-neutral
4 alternatives question, it seems that Harvard
5 would have to sacrifice potentially something
6 else to achieve what you think would be
7 meaningful, sufficient racial diversity. And I
8 think the questions, Justice Gorsuch, were,
9 well, why don't you have to then sacrifice those
10 something elses to achieve the -- if you're
11 going to otherwise use race-conscious means?

12 MR. WAXMAN: There's no question
13 that our --

14 JUSTICE KAVANAUGH: In other words, we
15 -- I think that's a legal question we're going
16 to have to ultimately figure out. Does a
17 university have to sacrifice those other things
18 or not?

19 MR. WAXMAN: And so what this Court's
20 precedents say, you know, Bakke, Grutter, and
21 Fisher, are, of course, race -- you know, there
22 are race-neutral alternatives that may require
23 some sacrifices. A university is not required
24 to sacrifice, you know, so much that it changes
25 the essential character. I -- I -- I wish I had

1 the -- this Court's own words, but I think
2 that's the test, and that was certainly the test
3 the district court applied.

4 JUSTICE KAVANAUGH: That -- that
5 suffices and you answered it. Thank you.

6 MR. WAXMAN: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 JUSTICE BARRETT: Mr. Waxman, this is
10 not a question about Harvard's history of
11 anti-Semitism, but I do want to go back to the
12 opinion in Bakke and Justice Powell's holding up
13 Harvard's application process as a model and
14 then Justice O'Connor in Grutter again referred
15 back to Harvard's admissions process.

16 And I want to know whether Harvard's
17 admissions process has meaningfully changed from
18 the time that Justice Powell held it up? I
19 mean, what Justice Powell found attractive about
20 it, what Justice O'Connor endorsed, was the
21 holistic aspect of it and that race can be used
22 as a tip. In its essence, is it the same?

23 MR. WAXMAN: Yes, race can be used as
24 a tip, as one of many, many, many tips in an
25 effort to achieve diversity that is across many,

1 many dimensions beyond ethnic.

2 JUSTICE BARRETT: And so, in the way
3 that Harvard thinks about its admissions
4 process, it is the same now as it was in Bakke?

5 MR. WAXMAN: Yes. Harvard is -- can I
6 just give a -- a one-sentence --

7 JUSTICE BARRETT: Yeah. Sure.

8 MR. WAXMAN: -- explication of that?
9 What the Harvard admissions committee
10 is attempting to do, with the benefit -- the
11 luxury of a pool of applicants that is supremely
12 qualified, is to bring together a class of 1600
13 matriculants who are best in the judgment of the
14 admissions committee and the faculty that
15 oversees it, are best able to learn from and
16 teach each other as an organic whole.

17 JUSTICE BARRETT: So my question is --
18 we've been talking a lot about end point, and my
19 question is: So Bakke was, you know, almost 50
20 years ago now. If Harvard's admissions process
21 is essentially the same in the way that it
22 accounts for race and thinking about end points,
23 and I -- I recognize and you described some of
24 the things that Harvard is doing to try to
25 recruit more minority applicants, but why are we

1 to think that there will be an end point?

2 And Grutter's pretty insistent. I
3 mean, Grutter says the requirement that all
4 race-conscious admissions programs have a
5 termination point, so there has to be one, and
6 if it really hasn't changed much since Bakke --

7 MR. WAXMAN: So the system that is
8 we're taking race into account as one factor
9 among many, obviously, the extent to which race
10 is race qua race is a factor, is dependent on
11 the extent to which so-called race-neutral
12 alternatives have already helped Harvard to
13 matriculate a class that is diverse along this
14 dimension and others.

15 And Harvard does track its progress in
16 this regard and accommodate the admissions
17 process. For example, in terms of where we are,
18 when will we get there, you know, the -- the
19 record contains, you know, any number -- the --
20 a faculty committee study, a working group, a
21 task force, all of which made reports about
22 this, but it also annually does a comprehensive
23 survey of its graduating seniors and asks them
24 questions that go to this.

25 And the -- the survey in the record on

1 the benefits side to -- I think to Harvard's
2 great satisfaction showed that two-thirds of all
3 of the seniors said that their Harvard
4 experience strengthened their ability to relate
5 to people of different races, nations, and
6 religions, and 70 percent said that Harvard's
7 experience had led them to seriously question or
8 rethink their beliefs about a race or ethnic
9 group different than their own. That is --

10 JUSTICE BARRETT: But that's showing
11 the educational benefits of diversity, right?

12 MR. WAXMAN: And it shows that -- it
13 shows that in terms of are we there yet, you
14 know, we're not going to achieve a
15 hundred percent. Honestly, 70 percent is pretty
16 darn good.

17 And it would not have been -- at the
18 time that Harvard wrote its brief in the Bakke
19 case and at the time that Grutter was decided,
20 those were not the statistics.

21 JUSTICE BARRETT: So you think you're
22 getting closer to a termination point?

23 MR. WAXMAN: I -- we are very
24 definitely getting closer to a termination point
25 both in terms of engineering race-neutral

1 alternatives but also achieving a class that is
2 diverse across religious viewpoint, racial,
3 ethnic, you know, academic, political -- you
4 know, yes, we are -- we -- we are proud of the
5 progress we've made.

6 As Dean Smith said, we still have work
7 to do, including with respect to the way in
8 which we treat students and allow students to
9 interact with each other once they get here.

10 JUSTICE BARRETT: Okay. Thank you.

11 MR. WAXMAN: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 MR. WAXMAN: Thank you.

15 CHIEF JUSTICE ROBERTS: General
16 Prelogar. Welcome back.

17 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
18 FOR THE UNITED STATES, AS AMICUS CURIAE,
19 SUPPORTING THE RESPONDENT

20 GENERAL PRELOGAR: Thank you, Mr.
21 Chief Justice, and may it please the Court:

22 The Court has heard hours of argument
23 on the constitutional issues in this case, and
24 so I would like to take a step back and focus on
25 the profound consequences of the Court's

1 decision here for the nation that we are and the
2 nation that we aspire to be.

3 Petitioner seeks a sweeping ruling
4 that would harm students at schools and colleges
5 throughout the nation. A blanket ban on
6 race-conscious admissions would cause racial
7 diversity to plummet at many of our nation's
8 leading educational institutions.

9 Race-neutral alternatives right now
10 can't make up the difference, so all students at
11 those schools would be denied the benefits of
12 learning in a diverse educational environment,
13 and because college is the training ground for
14 America's future leaders, the negative
15 consequences would have reverberations
16 throughout just about every important
17 institution in America.

18 For the United States military, as
19 I've explained, having a diverse officer corps
20 is a critical national security imperative. For
21 corporate America, diversity is essential to
22 business solutions. For the medical community
23 and scientific researchers, diversity is an
24 essential element of innovation and delivering
25 better health outcomes.

1 Overruling Grutter would have
2 devastating effects on our nation's efforts to
3 move ever closer to a more perfect union where
4 our nation's diversity is a source of its
5 greatest strength. And I think the Court should
6 not take the destabilizing step of overruling
7 precedent here.

8 Justice Gorsuch, you asked a series of
9 questions about race-neutral alternatives, and I
10 want to offer the position of the United States.
11 I think, Justice Barrett, you also asked these
12 questions about things like legacy, donors,
13 children of faculty and staff.

14 And I want to be very clear on behalf
15 of the United States that if it could be shown
16 that eliminating those kinds of preferences
17 would actually enable a university to meet its
18 -- its diversity goals and to be able to offer
19 the educational benefits of a diverse student
20 body, then, yes, we think absolutely that can
21 function as a race-neutral alternative. And
22 it's incumbent on universities to consider those
23 kinds of options as they chart a path forward.

24 And so I think, to -- to the extent
25 that the Court has any concerns about that or

1 thinks that the lower court in this case did not
2 apply that kind of standard, that would be wrong
3 because the Court has made clear that strict
4 scrutiny in this context is strict and that
5 universities have to undertake continual
6 obligations to search for those types of
7 alternatives in order to be able to achieve
8 diverse student enrollment without taking race
9 into account.

10 JUSTICE ALITO: Grutter was about
11 college admissions, but in your opening
12 statement, it seemed to me you want to extend it
13 to employment. Is that right?

14 GENERAL PRELOGAR: No, Justice Alito,
15 I was trying to make the observation that the
16 experience of students in those four years of
17 college have effects on the course of their
18 life.

19 JUSTICE ALITO: Then why were you
20 talking about corporate America?

21 GENERAL PRELOGAR: Because corporate
22 America, like the United States military, relies
23 on having a diverse pipeline of individuals who
24 had the experience of learning in a diverse
25 educational environment and who themselves

1 reflect the diversity of the American
2 population.

3 We're not asking the Court to extend
4 Grutter in any way here. We're only asking the
5 Court to reject Petitioner's request for the
6 Court to overrule that precedent because I think
7 it would have these destabilizing ramifications
8 in just about every important industry in
9 America.

10 JUSTICE BARRETT: General, if we were
11 talking about the 25-year mark, so let's imagine
12 we fast-forward and it's, you know, five years
13 from now and we're considering whether to --
14 same question, would it be overruling Grutter at
15 that point to say this is the end point, we're
16 at 25 years, no more race-consciousness in
17 admissions?

18 GENERAL PRELOGAR: I think it would if
19 this Court based that decision on the nature of
20 the compelling interest here. I just don't
21 think it's a tenable way to read Grutter to say
22 that the Court was suggesting that 25 years from
23 now, poof, the interest in diversity in higher
24 education is no longer compelling.

25 That is and will remain a compelling

1 interest. And Grutter observed that over time,
2 it would be possible for schools and
3 universities to achieve that interest without
4 having to take race into account.

5 And I understand the concerns, Justice
6 Barrett, that you've raised, Justice Kavanaugh,
7 that you've raised about the fact that the arc
8 of progress in society has perhaps been slower
9 than the Grutter Court imagined.

10 I think, if this Court has those
11 concerns, it could emphasize that the narrow
12 tailoring requirement remains very strict in
13 this case. Universities should be held to a
14 high standard and a heavy burden to explore
15 those alternatives, to put into practice the
16 race-neutral alternatives that currently exist
17 and to try to get to the point that the Grutter
18 Court imagined and that we will eventually reach
19 as a nation where it is no longer necessary to
20 take race into account.

21 JUSTICE BARRETT: But what if the
22 structural barriers -- I mean -- there's not a
23 remedial justification on the table here. Our
24 precedents rule that out.

25 What if the structural barriers just

1 make it impossible 25 years from now to sit here
2 and say that without race-conscious admissions,
3 you know, especially if Harvard wants to keep
4 everything exactly the same with respect to its
5 other metrics like SAT scores not dropping at
6 all and -- and the museum and the squash team
7 and all of that stuff, what if it's just
8 impossible?

9 And so what if Grutter was grossly
10 optimistic in what it thought was achievable and
11 perhaps, you know, Grutter, as we've talked
12 about earlier in the argument, emphasized the
13 risky and potentially poisonous nature of race
14 classifications, what if there's no end point?

15 I mean, could we still say that
16 there's a compelling interest in the educational
17 benefit of a diverse classroom if it comes at
18 the cost of something that Grutter itself
19 recognized was very dangerous and corrosive to
20 society?

21 GENERAL PRELOGAR: I do think that,
22 yes, the compelling interest would still exist
23 there. I recognize the force of the point that
24 there are structural barriers that can impede
25 progress, but I think it would be wrong to

1 suggest that those barriers are going to exist
2 in perpetuity in all places and with respect to
3 all schools.

4 The states are not similarly situated
5 in this regard. There are nine states, as
6 Petitioner has emphasized, that have barred the
7 use of race in college admissions, and many of
8 the universities and colleges in those states
9 have been able still to achieve enrollment of
10 diverse student bodies.

11 And I think that it's incumbent on --
12 on every college and university around the
13 nation to study from and learn from those
14 examples, and it's not accurate to say that if
15 we look forward into the future in 25 years,
16 still, all places throughout the nation, it will
17 be necessary to have race-conscious admissions.

18 But I do want to be responsive as well
19 to the point that -- that you made about
20 resisting any changes whatsoever and be clear,
21 again, on behalf of the United States that we do
22 not think that a university could reject a
23 race-neutral alternative because it would have
24 those kinds of modest impacts on things like SAT
25 scores.

1 I think that that can clearly be the
2 kind of thing that would qualify as a viable or
3 workable race-neutral alternative. And if the
4 Court has any concerns that lower courts are not
5 applying that stringent standard, then I would
6 urge the Court to make that clear in a decision
7 and -- and provide guidance going forward.

8 JUSTICE KAVANAUGH: I think that's
9 very important, what you just said. So you're
10 saying an adequate race-neutral alternative, it
11 would be permissible for the Court to say that
12 you have to eliminate things like legacy,
13 children of donors, if you could obtain a
14 sufficient -- meet its diversity goals, was your
15 word, by doing so and doing race-neutral
16 admissions. Do I have that correct?

17 GENERAL PRELOGAR: Yes, that's exactly
18 right, Justice Kavanaugh. And I think that that
19 flows directly from this Court's --

20 JUSTICE SOTOMAYOR: But I'm sorry, at
21 what point does that become dramatic? Harvard
22 won't be Harvard if it drops from 2200 to 500.

23 GENERAL PRELOGAR: Yes, and I was
24 speaking --

25 JUSTICE SOTOMAYOR: And -- and -- or

1 there is a point at which a change is
2 significant or insignificant.

3 GENERAL PRELOGAR: I agree, Justice
4 Sotomayor. And I think that the -- the lines
5 that the Court has drawn in this context --
6 context flow from Grutter itself, where the
7 Court made clear that a university doesn't have
8 to sacrifice its reputation for academic
9 excellence. In other words, it doesn't have to
10 accept those kinds of dramatic changes to the
11 academic quality of the incoming student class.

12 I was speaking to --

13 JUSTICE SOTOMAYOR: Well, your
14 adversary on Simulation D says the change was
15 only from -- it was less than a 40-point change,
16 and so he says that's insignificant.

17 Why do you think his point is not
18 valid?

19 GENERAL PRELOGAR: With respect to
20 Simulation D in particular, it wasn't just
21 changes to SAT scores. I think the most
22 substantial reason that the district court
23 rejected that as a workable alternative here is
24 because it would have had a precipitous decline
25 in the number of African American students.

1 They would fall by about 30 percent in the
2 enrollment of the class. And that was coupled
3 with the impact on reductions in the number of
4 students who had the highest academic and
5 extracurricular ratings who could then be
6 admitted in the class. But I -- I don't --

7 JUSTICE SOTOMAYOR: So you're
8 sacrificing the essence of Harvard, academic
9 excellence?

10 GENERAL PRELOGAR: That was what the
11 district court found with respect to Simulation
12 D. But, you know, I -- I guess I would say I
13 think that that was a factual finding in this
14 case. The First Circuit affirmed it. But, as
15 Mr. Waxman said, if you do not think the
16 district court applied the right stringent
17 standard in evaluating that as a race-neutral
18 alternative, then that is a basis to send this
19 case back, because we agree that strict scrutiny
20 is strict in this context.

21 JUSTICE KAVANAUGH: The other side
22 points to the examples, as you've heard
23 throughout, of California and Washington,
24 Michigan and Florida and other states and says,
25 well, if they just put their effort to it, they

1 will be able to use race-neutral alternatives
2 and still be able to achieve its diversity
3 goals -- I'm going to bracket the fact that "its
4 diversity goals" is still pretty vague, but we
5 talked about that in the last case -- but would
6 still be able to do so.

7 Do you want to respond to that?

8 GENERAL PRELOGAR: So, as I was saying
9 to Justice Barrett, I do think it's the case
10 that there are some states and certainly some
11 institutions today that can fully achieve a
12 diverse student body without needing to take
13 race into account.

14 With respect to California and
15 Michigan in particular, since your question
16 referred to them, I would point the Court to the
17 amicus brief filed by those university systems
18 in those states, which have explained that,
19 actually, they have struggled, despite
20 implementing any number of race-neutral
21 alternatives, to actually see true diversity
22 across all of their campuses, including their
23 most selective campuses.

24 And University of California in
25 particular points to Berkeley and UCLA as places

1 where there have been these dramatic declines in
2 diversity, racial diversity, on campus.

3 JUSTICE KAVANAUGH: I -- I guess this
4 will be repetitive, but you've said "true
5 diversity," "meet its diversity goals." You
6 know, I'm not sure exactly what that means, and
7 that's -- I'm going to have to figure that out,
8 I guess, but without any more precise guidance
9 on what exactly "meet its diversity goals" means
10 as to numbers, it's a little hard to assess, I
11 think.

12 GENERAL PRELOGAR: Well, let me try to
13 be more precise. I think that the relevant
14 compelling interest here comes directly from
15 Grutter, where the Court recognized that it is
16 student body diversity in all of its many
17 manifestations. The Court has made clear it's
18 not simple ethnic or racial diversity, and
19 that's what creates a lot of the guardrails in
20 this area in terms of no racial quotas, no
21 automatic awards of points, no separate
22 set-asides or separate admissions tracks.

23 The nature of the interest is not in
24 achieving a precise numerical threshold of
25 minority enrollment at a particular university.

1 Instead, the Court has defined this as the
2 educational goals that derive from having a
3 diverse student body along multiple dimensions.
4 And that is the -- the ultimate aim of these
5 policies.

6 JUSTICE GORSUCH: So -- so a
7 university that -- that did use a -- a -- a
8 numerical goal or did grant a -- a tip based on
9 race alone would be a problem?

10 GENERAL PRELOGAR: Yes, I think, if a
11 university used a numerical goal and that
12 functioned as an inflexible goal for the
13 university or -- or functioned as a quota
14 system, that's plainly unconstitutional. This
15 Court's precedents don't countenance that.

16 JUSTICE GORSUCH: And when we --

17 GENERAL PRELOGAR: With respect --

18 JUSTICE GORSUCH: -- when we look at
19 that -- I'm sorry to interrupt.

20 GENERAL PRELOGAR: Okay.

21 JUSTICE GORSUCH: Go ahead and finish.

22 GENERAL PRELOGAR: I -- I just wanted
23 also to try to be responsive to your point about
24 using race as a -- as a tip or a preference.
25 And to be clear, that there as well, the Court

1 has made clear that that can't be mechanical
2 application, so you can't preference every
3 single person automatically or inflexibly.

4 JUSTICE GORSUCH: Okay. And on -- but
5 -- but what do we -- what is a court, a lower
6 court, all right, faced with, you know,
7 diversity and very hard standards to apply,
8 supposed to do when a university's admissions
9 data with respect to race looks more or less
10 identical every single year?

11 GENERAL PRELOGAR: So I think, at that
12 point, the district court needs to probe whether
13 impermissible racial balancing is happening.
14 The Court has made clear that that is not
15 appropriate, that the relevant compelling
16 interest here is not in trying to achieve a
17 precise percentage of particular racial or
18 ethnic groups in the class year over year. And
19 so, if that kind of evidence existed, then I
20 think it would be incumbent on the university to
21 -- to establish that it is not actually engaging
22 in racial balancing.

23 JUSTICE GORSUCH: Thank you.

24 JUSTICE SOTOMAYOR: I think, in this
25 case, wasn't it clear there were variations

1 among the groups?

2 GENERAL PRELOGAR: Yes, that's exactly
3 right, Justice Sotomayor. And what the district
4 court said with respect to the Harvard facts is
5 that there were greater fluctuations with
6 respect to the number of students in each group
7 who were admitted year over year than there were
8 fluctuations in the applicant pool of
9 individuals of those particular races.

10 And so the -- the district court said
11 that runs completely contrary to a theory of
12 racial balancing in this case.

13 JUSTICE SOTOMAYOR: Now going back to
14 the earlier argument, Petitioner's counsel in
15 rebuttal raised Berkeley's figures, and I don't
16 remember it exactly, but it was like a third
17 white, a third Hispanic, a third this. He -- at
18 the end, he mentioned a black population that
19 seemed tiny.

20 But how do you deal with answering
21 Justice Kavanaugh's question of what constitutes
22 adequacy?

23 GENERAL PRELOGAR: So --

24 JUSTICE SOTOMAYOR: Because he seemed
25 to imply, your opponent, opposing counsel, that

1 -- that Berkeley was already diverse. It had
2 numbers that were close to the population.

3 GENERAL PRELOGAR: Well, Justice
4 Sotomayor, I would point to the brief filed by
5 the University of California system in this
6 case, and they have explained in detail how
7 Berkeley has -- has experienced a substantial
8 decline in the African American student
9 population. I think it's gone down to
10 3 percent. And they further have explained the
11 toll that's taken on their ability to offer the
12 educational benefits of diversity, as well as
13 the glaring sense of racial isolation that those
14 students have on the Berkeley campus.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 General.

17 Justice Thomas?

18 Justice Alito?

19 Justice Kagan?

20 JUSTICE KAGAN: General, one of the
21 through lines of the briefs in this case is -- I
22 -- I think it's -- it's actually the first line
23 of the Petitioner's brief or something like it
24 -- is -- is essentially Brown compels the
25 overruling of Grutter.

1 And the Petitioners actually haven't
2 given a whole lot of attention to that argument,
3 but the idea is, and some of the questioning has
4 reflected this -- this idea, is that, you know,
5 we have this long and horrible history of racial
6 discrimination, and, surely, that functions here
7 to prevent racial classifications or to prevent
8 race consciousness of the kind that Harvard and
9 UNC are using.

10 And I just thought I'd give you an
11 opportunity to discuss what you think of that
12 argument.

13 GENERAL PRELOGAR: I think that
14 argument is wrong in just about every respect.
15 There is a world of difference between the
16 situation this Court confronted in Brown, the
17 separate but equal doctrine that was designed to
18 exclude African Americans based on notions of
19 racial inferiority and subjugate them, which, as
20 this Court recognized, the school children
21 affected their hearts and minds in a way
22 unlikely ever to be undone, a world of
23 difference between that and the university
24 policies at issue in this case, which are not
25 intended to exclude anyone on the basis of race

1 or -- or even to benefit particular racial
2 groups on the basis of race but, rather, are
3 designed to bring individuals of all races
4 together so that they can all learn together and
5 benefit from that diverse educational
6 environment.

7 And I think it is profoundly
8 ahistorical to say, as Petitioners do, that
9 those situations are precisely equivalent, and
10 it also trivializes the grievous moral and legal
11 wrongs of state-sponsored segregation and the
12 enormous harms that millions of Americans
13 suffered under it.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 JUSTICE GORSUCH: Just to return to
17 Justice Sotomayor's question to you, you
18 indicated, I believe, that -- that -- that
19 percentages varied dramatically over the years.
20 I must be missing something.

21 On page 23 of the Petitioner's brief,
22 they have the statistics from Harvard from 2006
23 through 2018, and -- and -- and the share of
24 Asian American students varied three -- three --
25 between 17 and 20 percent every year, 17 percent

1 actually being the outlier. Am I missing
2 something?

3 GENERAL PRELOGAR: No, Justice
4 Gorsuch. I think that the point I was trying to
5 make is that that band is actually a greater
6 amount of fluctuation than was present in the
7 applicant pool with respect to the number of
8 Asian Americans who were applying to Harvard
9 every year.

10 But -- but let me just say this --

11 JUSTICE GORSUCH: Is the same thing
12 true with Hispanics and -- and African
13 Americans, because the numbers are pretty
14 similar -- similarly banded for those?

15 GENERAL PRELOGAR: Yes, that's my
16 understanding, that the district court's factual
17 finding in this regard is that there was
18 relative stability with respect to the number of
19 individuals in those groups who were applying
20 and greater fluctuation with respect to
21 admissions decisions.

22 JUSTICE GORSUCH: No, these -- these
23 -- these are -- these -- these are admitted
24 students I'm talking about here.

25 GENERAL PRELOGAR: Yes. And the

1 district court was drawing a comparison between
2 the -- the bands that you were just describing
3 and the bands that exist to --

4 JUSTICE GORSUCH: The point is
5 whatever the pool is, every year the percentage
6 is the same. And the U.S. Government below said
7 this manifest steadiness speaks for itself.

8 Am I missing something?

9 GENERAL PRELOGAR: Well, let me just
10 say that the district court made a factual
11 finding of no racial balancing. But, if you
12 think the district court was wrong about that
13 and this is clearly erroneous, then that is
14 clearly impermissible and -- and the Court
15 should send it back.

16 That would provide a basis to reverse
17 on clear error, and we are not here to suggest
18 that racial balancing is okay under this Court's
19 precedents. Grutter doesn't countenance it and
20 the Court could make that clear.

21 JUSTICE GORSUCH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh?

24 JUSTICE KAVANAUGH: I appreciate your
25 statement about Brown. I want to ask a

1 question. Justice Thomas's opinion in Grutter
2 said: "I agree with the Court's holding that
3 racial discrimination in higher education
4 admissions will be illegal in 25 years."

5 And taking that statement, it would
6 seem that extending it beyond 25 years would
7 itself be overruling Grutter. And I just want
8 you to have a chance to respond.

9 Is that an -- not an accurate
10 characterization of the Court's holding in your
11 view, or -- or what is your response to that
12 description of what the Court did? A variation
13 on questions you've had before, but I wanted to
14 give you an opportunity to address that in
15 particular.

16 GENERAL PRELOGAR: I do think that
17 that is not how the Court itself understood the
18 language. The Court made clear in the four
19 paragraphs that we've been discussing that the
20 Court expected that universities would no longer
21 be able to justify race-conscious admissions
22 policies over time, but that was because the
23 Court expected that, due to the rate of change
24 in society, they would be able to achieve the
25 benefits of student body diversity without

1 taking race into account.

2 And so I don't think that it's tenable
3 to read the majority opinion in that case as
4 having determined that there was a -- a 25-year
5 clock that would be inflexible. Instead, it was
6 an expectation about how -- what changes we
7 would see in society.

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 Thank you, General.

12 Rebuttal, Mr. Norris?

13 REBUTTAL ARGUMENT OF CAMERON T. NORRIS

14 ON BEHALF OF THE PETITIONER

15 MR. NORRIS: Thank you, Mr. Chief
16 Justice. Just a few points.

17 First, I think what's lost in the
18 United States' argument and Harvard's argument
19 and in Grutter itself is that racial
20 classifications themselves have harms. They
21 stigmatize their intended beneficiaries, they
22 increase racial consciousness, which delays the
23 day in which we can move to true racial
24 neutrality, and they cause resentment by
25 treating people differently based on something

1 they can't change that's cosmetic and that's
2 irrelevant to their ability to get educational
3 opportunities.

4 The Court said that in Adarand. It
5 said it in Shaw. It said it in Croson. Harvard
6 doesn't challenge any of those precedents.

7 Secondly, race-neutral alternatives.
8 There were a few pleas for a remand that I heard
9 from my friends, but it's hard to take those
10 seriously when Harvard thumbed its nose at
11 Grutter for 14 years to not consider
12 race-neutral alternatives one time until three
13 years after we filed a lawsuit against it.

14 I understand Mr. Waxman to say he'll
15 no longer defend his legacy preferences, but now
16 what -- what -- what's at stake in terms of
17 race-neutral alternatives are a decline, a
18 slight decline in profile ratings, which Mr.
19 Waxman said are not that important to the
20 admissions process when he talked about Asian
21 Americans, a 3 percentage point decline in
22 people who want to major in the humanities.

23 Students change majors like they
24 change socks. I mean, speaking from experience,
25 there will be people who think that they're

1 going to major in the hard sciences and then
2 find themselves majoring in the humanities.
3 That's not the stuff of strict scrutiny.

4 Then we have the 4 percentage point
5 decline in black admissions. Our expert
6 testified without contradiction that that is an
7 absolute floor, that Harvard could get that
8 number almost to parity if it considered wealth
9 instead of income.

10 And Harvard already sacrifices on all
11 of these metrics in order to meet its racial
12 goals. It should do the same for racial
13 equality.

14 This Court made schools close to
15 comply with Brown, as it should have. Harvard
16 should have to sacrifice for the same reasons.

17 Lastly, Harvard thankfully does say it
18 is ashamed of its history of Jewish
19 discrimination. I hope someday it says the same
20 about how it's treating Asians.

21 It is undisputed that Harvard --
22 there's a statistically significant relationship
23 between being Asian and getting a low personal
24 rating, which is supposed to measure things like
25 confidence, likability, and kindness.

1 Harvard's witnesses consistently
2 testified that Asians don't deserve lower
3 personal ratings in their experience. Harvard
4 didn't submit a model of the personal rating
5 itself, which means I think they probably did
6 study it and realized they couldn't get rid of
7 the disparity.

8 In the model, when you take the
9 personal rating out of an admissions model, it
10 shows a statistically significant disparity
11 against Asian Americans in admissions decisions.

12 Now the district court said I believe
13 Harvard that it doesn't discriminate, but we
14 don't typically let people satisfy strict
15 scrutiny with just their testimony. Mr. Waxman
16 said it's attributable -- attributable to
17 unobservables in the model, but "unobservables"
18 is code for "Asians really deserve it," and
19 that's simply not true. That was not ever
20 supported by any evidence in the record.

21 And we keep saying Asians. These are
22 not Asians. They're not from Asia. These are
23 people who are Americans. They were born in
24 Texas, California, Ohio, Tennessee. They should
25 not be the victims.

1 They were born in 2005, the people who
2 are applying to college now. They should not be
3 the victims of Harvard's racial experimentation.
4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you to
6 all counsel in both cases. Case is submitted.

7 (Whereupon, at 2:55 p.m., the case was
8 submitted.)

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