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P R O C E E D I N G S

(11:04 a.m.)

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

CHIEF JUSTICE ROBERTS: Well, I get to say that this is Case Number 11-345, Fisher against the University of Texas at Austin. And you get to say --

ORAL ARGUMENT OF BERT W. REIN

ON BEHALF OF THE PETITIONER

MR. REIN: Mr. -- Mr. -- General Suter trained me too well.

Mr. Chief Justice, and members of the Court, and may it please the Court:

The central issue here is whether the University of Texas at Austin can carry its burden approving that its use of race as an admissions-plus factor in the consequent denial of equal treatment, which is the central mandate of the Equal Protection Clause, to Abigail Fisher met the two tests of strict scrutiny which are applicable.

First --

JUSTICE GINSBURG: Mr. Rein, before we get to that, because the Court is supposed to raise it on its own, the question of -- of standing. The injury -- if the injury is rejection by the University of Texas,

1 and the answer is, no matter what, this person would not
2 have been accepted, then how is the injury caused by the
3 affirmative action program?

4 MR. REIN: Well, Justice Ginsburg, the first
5 injury that was before the Court was the use of a system
6 which denied equal treatment. It was a Constitutional
7 injury, and part of the damage claim was premised
8 directly on the Constitutional issue.

9 JUSTICE SOTOMAYOR: How do you get past
10 Texas v. Lesage with that injury --

11 MR. REIN: Lesage --

12 JUSTICE SOTOMAYOR: -- which says that mere
13 use of race is not cognizable injury sufficient for
14 standing.

15 MR. REIN: Lesage was litigated on its
16 merits, and the question was whether Lesage could carry
17 his case when -- on summary judgment, when it was
18 apparent that his complaint, which was that he was
19 denied access to the graduate program at the University
20 of Texas, was not sustainable.

21 As I said -- and there are several factors
22 in this case that are quite different. First, there is
23 a Constitutional injury as such, and the Court has
24 recognized it.

25 Second, the fact premise, she could not have

1 been allowed in under any circumstance, was never tested
2 below, wasn't raised below. It comes up in a footnote
3 in --

4 JUSTICE SOTOMAYOR: Can I go to another
5 side? She's graduated.

6 MR. REIN: Correct.

7 JUSTICE SOTOMAYOR: She disclaimed the
8 desire, after her application, to go to the school at
9 all. She was permitted to apply for the summer program
10 and get in automatically, and she didn't, correct?

11 MR. REIN: No, that's not correct,
12 Your Honor. She -- she was not automatically admitted.
13 She was considered for the summer program and rejected.

14 You are talking about the CAP program, where
15 she could have attended a different university in the
16 Texas system, and had she been able to achieve --

17 JUSTICE SOTOMAYOR: But she's graduated.

18 MR. REIN: She has graduated.

19 JUSTICE SOTOMAYOR: Injunctive relief, she's
20 not going to get. So what measure of damages will she
21 get or will she be entitled to?

22 MR. REIN: Well, that issue, of course, is
23 bifurcated, and we've reserved the ability to --

24 JUSTICE SOTOMAYOR: But you have to claim an
25 injury. So what's the injury --

1 MR. REIN: Well --

2 JUSTICE SOTOMAYOR: -- that you're claiming
3 that would sustain a claim of damages?

4 MR. REIN: The -- the denial of her right to
5 equal treatment is a Constitutional injury in and of
6 itself, and we had claimed certain damages on that.
7 We -- we started the case before it was clear whether
8 she would or wouldn't be admitted.

9 JUSTICE SOTOMAYOR: You still haven't
10 answered how Lesage gets away from that --

11 MR. REIN: Well, Lesage --

12 JUSTICE SOTOMAYOR: -- but if there's a --
13 give me another --

14 MR. REIN: Well, I think --

15 JUSTICE SOTOMAYOR: -- damages question.

16 MR. REIN: On the -- if we then, on remand,
17 were to assert damages contingent upon the fact that she
18 should have been admitted to UT and was not admitted, we
19 would then have to prove that, but for the use of race,
20 she would be admitted. That's the thrust of Lesage.

21 Whether we can prove it or can't prove it is
22 something you can't tell on this record. It's merely
23 asserted. And I would point out that Texas said below,
24 there was no way to determine that issue without --

25 JUSTICE SOTOMAYOR: What damages --

1 JUSTICE SCALIA: We've had cases involving
2 alleged discrimination in state -- state contracting.
3 And we haven't required the person who was discriminated
4 against because of race to prove that he would have
5 gotten the contract otherwise, have we?

6 MR. REIN: No, sir.

7 JUSTICE SCALIA: It's -- it's been enough
8 that there was a denial of equal protection.

9 MR. REIN: That is our correct, and that is
10 our first premise. And I would say that the same issue
11 was raised in Bakke. And in Bakke, the contention was
12 he couldn't have gotten into the medical school;
13 therefore, he has no case. The Court said, in footnote
14 14 to Justice Powell's opinion, that's a matter of
15 merits; it is not a matter of standing.

16 I think in -- in Parents Involved, the same
17 type of contention was made with respect to the
18 Louisville class plaintiffs, whose son had been admitted
19 to the school of his choice, and the Court said damages
20 are enough to sustain standing. There is a live damages
21 claim here, and I don't think there is a question of
22 standing.

23 JUSTICE SCALIA: Her claim is not
24 necessarily that she would have been -- would have been
25 admitted, but that she was denied a fair chance in the

1 admission lottery. Just as when a person is denied
2 participation in the contracting lottery, he has
3 suffered an injury.

4 MR. REIN: Yes, Justice Scalia, I agree with
5 that.

6 JUSTICE BREYER: If you are going to the --
7 to the merits, I want to know whether you want us to --
8 or are asking us to overrule Grutter. Grutter said it
9 would be good law for at least 25 years. And I know
10 that time flies, but I think only nine of those years
11 have passed.

12 (Laughter.)

13 JUSTICE BREYER: And so, are you? And, if
14 so, why overrule a case into which so much thought and
15 effort went and so many people across the country have
16 depended on?

17 MR. REIN: Justice Breyer, we had said, very
18 carefully, we were not trying to change the Court's
19 disposition of the issue in Grutter. Could there be a
20 legitimate -- a compelling interest in -- in moving --
21 in using race to establish a diverse class.

22 What -- the problem that we've encountered
23 throughout the case is there are varying understandings,
24 not of the legitimacy of the interest, but how you get
25 there; is it necessary to use race to achieve that

1 interest; what does a critical mass --

2 JUSTICE BREYER: So your question is
3 whether -- your point is does your case satisfy Grutter?
4 Is that what you're arguing?

5 MR. REIN: We litigated it on that basis,
6 yes.

7 JUSTICE BREYER: Well, how do you want to
8 argue it right now in the next ten minutes? I'm
9 interested because I have a very short time to get my
10 question out, and I need to know how you are going to
11 argue it.

12 MR. REIN: Well, Justice Breyer, our
13 argument is we can satisfy Grutter if it's properly
14 read. What we've seen --

15 JUSTICE GINSBURG: May I ask you on that
16 specifically, let's take away the 10 percent solution.
17 Suppose the only plan were the one that is before the
18 Court now, no 10 percent. This is the exclusive way
19 that the University is attempting to increase minority
20 enrollment.

21 Then, if we had no 10 percent solution,
22 under Grutter, would this plan be acceptable?

23 MR. REIN: Well, I think that there would be
24 flaws under Grutter, even if you assumed away something
25 that can't be assumed away because it is a matter of

1 Texas law, that is, there is a top 10 percent program,
2 and that --

3 JUSTICE GINSBURG: Well, then the -- the
4 question is can you have both? But it seems to me that
5 this program is certainly no more aggressive than the
6 one in -- in Grutter; it's more -- in fact, more modest.

7 MR. REIN: Well, I don't agree with that,
8 and let me explain why.

9 In order to satisfy Grutter, you first have
10 to say that you are not just using race gratuitously,
11 but it is in the interest of producing a critical mass
12 of otherwise underrepresented students. And so to -- to
13 be within Grutter framework, the first question is,
14 absent the use of race, would we be generating a
15 critical mass?

16 To answer that question, you start -- you've
17 got to examine in context the so-called soft factors
18 that are in Grutter -- you know, are -- is there an
19 isolation on campus? Do members of minority feel that
20 they cannot speak out?

21 JUSTICE SOTOMAYOR: The one social studies
22 that this University did said that minority students,
23 overwhelmingly, even with the numbers they have now, are
24 feeling isolated. So what do -- why isn't that even
25 under your test?

1 We can go back to whether substantial
2 evidence is adequate, is necessary, or not. Why does
3 their test fail?

4 MR. REIN: Well, the survey was -- a random
5 survey. It's not reported in any systematic way. They
6 evidently interviewed students. And it was all about
7 classroom isolation. It wasn't about --

8 JUSTICE SCALIA: Was it -- was it done
9 before or after they announced the decision to
10 reinstitute racial --

11 MR. REIN: It was done after
12 President Faulkner had made the declaration they were
13 going to do it. It was done before --

14 JUSTICE SCALIA: Which came almost
15 immediately after our decision in Grutter.

16 MR. REIN: On the -- I believe, on the same
17 day.

18 JUSTICE SCALIA: And by the way, do you
19 think that Grutter -- this goes to Justice Breyer's
20 question -- do you think that Grutter held that there is
21 no more affirmative action in higher education after
22 2028?

23 MR. REIN: No, I don't.

24 JUSTICE SCALIA: Was that the holding of
25 Grutter?

1 MR. REIN: That was -- that was not --

2 JUSTICE SCALIA: That's a scary -- that's a
3 scary --

4 JUSTICE BREYER: I agree it might, but I
5 want to get to the question, so, what I'm trying to
6 pinpoint, because we have such a limited time, and to
7 me, the one thing I want to pinpoint, since you're
8 arguing on that this satisfies Grutter, if properly
9 understood, as you say that. In looking up, we have a
10 two-court rule.

11 And two courts have found, it seems to me,
12 that here, there is a certain thing -- there is no
13 quota. It is individualized. It is time limited. It
14 was adopted after the consideration of race-neutral
15 means. Each applicant receives individual
16 consideration, and race did not become the predominant
17 factor.

18 So I take those as a given. And then I want
19 to know what precisely it is that Grutter required in
20 your opinion that makes this different from Grutter, in
21 that it was not satisfied here? The ones I listed, two
22 courts say are the same. So maybe there's some others.

23 MR. REIN: I'm not sure we agree with those
24 courts in their method of analysis.

25 JUSTICE BREYER: But we have a rule that if

1 two courts say it, we're very reluctant, on something
2 connected with facts, to overturn it, so -- so that's
3 why I mention that.

4 MR. REIN: Well -- and -- particularly in
5 the case of considering alternatives that have worked
6 about as well, I think that's a legal question this
7 Court is free to act on.

8 JUSTICE BREYER: Okay.

9 JUSTICE SCALIA: There are facts, and there
10 are facts, aren't there?

11 MR. REIN: So if I might try to answer your
12 question, there was no effort in this case to establish
13 a -- even a working target for critical mass. They
14 simply ignored it. They just used words, and they said,
15 we've got to do more. So they never answered the
16 predicate question, which Grutter asks: Absent the use
17 of race, can we generate a critical mass?

18 So -- I mean, that's -- that's a flaw we
19 think is in Grutter. We think it's necessary for this
20 Court to restate that principle. Now, whether that --

21 JUSTICE SCALIA: That -- that's a normal
22 fact that we accede to two-court holdings on, whether
23 there is -- is or is not a critical mass?

24 MR. REIN: No. I --

25 JUSTICE SCALIA: It's a weird kind of a

1 fact.

2 MR. REIN: And I'm -- I'm not saying --

3 JUSTICE SCALIA: It's an estimation, isn't
4 it? A judgment?

5 MR. REIN: Well, Justice Scalia, that is
6 correct. And in addition, the courts didn't find
7 whether a critical mass --

8 JUSTICE SOTOMAYOR: So could you tell me
9 what a critical mass was? I'm looking at the number of
10 blacks in the University of Texas system. Pre-Grutter,
11 when the state was indisputably still segregating, it
12 was 4 percent. Today, under the post-Grutter system,
13 it's 6 percent. The 2 percent increase is enough for
14 you, even though the state population is at 12 percent?
15 Somehow, they've reached a critical mass with just the
16 2 percent increase?

17 MR. REIN: Well, we don't believe that
18 demographics are the key to underrepresentation of
19 critical mass.

20 JUSTICE SOTOMAYOR: No -- putting aside -- I
21 don't -- I'm not going to quarrel with you that, if
22 demographics alone were being used, I would be somewhat
23 concerned. But you can't seriously suggest that
24 demographics aren't a factor to be looked at in
25 combination with how isolated or not isolated your

1 student body is actually reporting itself to feel?

2 MR. REIN: Well, I think, if you start to
3 split out subgroups of minorities, you mistake, I
4 think -- what I think is the proper thrust of Grutter,
5 or at least ought to be.

6 JUSTICE SOTOMAYOR: It might be insulting --
7 it might be insulting to some to be thrown into a pot.

8 JUSTICE SCALIA: Why -- why don't you
9 seriously suggest that? Why don't you seriously suggest
10 that demographic -- that the demographic makeup of the
11 state has nothing to do with whether somebody feels
12 isolated, that if you're in a state that is only
13 1 percent black that doesn't mean that you're not
14 isolated, so long as there's 1 percent in the class?

15 MR. REIN: Certainly -- racial balance --

16 JUSTICE SCALIA: I wish you would take that
17 position because it seems, to me, right.

18 MR. REIN: Well, Justice Scalia, racial
19 balancing is not a permissible interest. And we have
20 constantly -- this Court has constantly held not a
21 permissible interest. And that is something we
22 certainly agree with.

23 Trying to respond to Justice Sotomayor
24 and -- and in the framework of Grutter, what you're
25 looking at is, do you -- does this person, member of a

1 so-called underrepresented minority -- it's a concept we
2 don't necessarily accept, but it's Texas' concept -- are
3 they isolated? Are they unable to speak out?

4 And I think we've always said, if you have a
5 very large number, as Texas did in 2004, when they
6 ostensibly made the decision to reinstitute race, they
7 had a 21 percent admission percentage of what they
8 called the underrepresented minorities.

9 They also had about an 18 percent admission
10 ratio of Asian Americans. So on campus, you're talking
11 about -- about 40 percent of the class being minorities.

12 JUSTICE BREYER: Now, but the test is -- the
13 test is, in your opinion -- I have to write this in the
14 opinion, let's say -- the proper test of critical mass
15 is, is the minority isolated, unable to speak out.
16 That's the test. And that wasn't in Grutter or was in
17 Grutter? And in your opinion, it was in Grutter?

18 MR. REIN: Yes. It said expressly in
19 Grutter --

20 JUSTICE BREYER: Isolated. And the reason
21 it was satisfied there and not here is?

22 MR. REIN: In Grutter, the Court assumed
23 that the very small number of admissions -- minority
24 admissions, looked at as the whole -- and it was looked
25 at as a whole, only as a whole in Grutter -- would have

1 yielded about 3 or 4 percent minority admission in a
2 class of 350, which means about 12 to 15 students --

3 JUSTICE SOTOMAYOR: So what are you telling
4 us is the standard of critical mass? At what point does
5 a district court or a university know that it doesn't
6 have to do any more to equalize the desegregation that
7 has happened in that particular state over decades, that
8 it's now going to be stuck at a fixed number and it has
9 to change its rules. What's that fixed number?

10 MR. REIN: We -- it's not our burden to
11 establish the number. It was the burden of the
12 University of Texas to determine whether --

13 JUSTICE SOTOMAYOR: Well, they told -- they
14 told the district court. They took a study of students.
15 They analyzed the composition of their classes, and they
16 determined in their educational judgment that greater
17 diversity, just as we said in Grutter, is a goal of
18 their educational program and one that includes
19 diversifying classes.

20 So what more proof do you require?

21 MR. REIN: Well, if you are allowed to state
22 all the grounds that need to be proved, you will always
23 prove them, in all fairness, Justice Sotomayor.

24 The question is, they have --

25 JUSTICE SOTOMAYOR: Well, but given it was

1 in the evidence, what more do you think they needed? I
2 think I hear all you saying in your brief is the
3 number's fixed now, they got enough, no more is
4 necessary.

5 MR. REIN: What we're saying in the brief
6 was they were generating, in fact, a very substantial
7 number of minority presence on campus.

8 JUSTICE SOTOMAYOR: That's enough now.

9 MR. REIN: And --

10 JUSTICE SOTOMAYOR: That's what you're
11 saying?

12 MR. REIN: No. And that immediately thrust
13 upon them the responsibility, if they wanted to -- you
14 know, essentially move away from equal treatment, they
15 had to establish, we have a purpose, we are trying to
16 generate a critical mass of minorities that otherwise
17 could not be achieved.

18 JUSTICE SOTOMAYOR: Tell me -- all right.
19 Tell me what about their use of race did not fit the
20 narrow tailoring -- not the necessity prong as you've
21 defined it, but the narrow tailoring that Grutter
22 required? How is race used by them in a way that
23 violated the terms of Grutter?

24 MR. REIN: And for this purpose --

25 JUSTICE SOTOMAYOR: Assuming that the need

1 is there. I know you're challenging the need.

2 MR. REIN: Well, put -- put aside whether
3 this was necessary and whether it was an appropriate
4 last resort in -- in a quest for diversity and critical
5 mass because Grutter's not without limits. But I'll put
6 that aside, and let me come directly to your question.

7 First of all, if you think about narrow
8 tailoring, you can't tailor to the unknown. If you have
9 no range of evaluation, if you have no understanding of
10 what critical mass means, you can't tailor to it.

11 JUSTICE SOTOMAYOR: So you have to set a
12 quota for critical mass?

13 MR. REIN: No. There's -- there's a huge
14 difference, and it's an important one that is not well
15 put out by the University of Texas. Having a range, a
16 view as to what would be an appropriate level of
17 comfort, critical mass, as defined in Grutter, allows
18 you to evaluate where you are --

19 JUSTICE SOTOMAYOR: So we won't call it a
20 quota, we'll call it a goal, something Grutter said you
21 shouldn't have.

22 MR. REIN: Well, Justice Sotomayor, I think
23 it's very important to distinguish between the operative
24 use of that range. In other words, that's where we are,
25 and we're going to use race until we get there, every

1 year, in consideration of each application, which was a
2 problem --

3 JUSTICE SOTOMAYOR: Boy, it sounds awfully
4 like a quota to me, that Grutter said you should not be
5 doing, that you shouldn't be setting goals, that you
6 shouldn't be setting quotas. You should be setting an
7 individualized assessment of the applicants.

8 Tell me how this system doesn't do that.

9 MR. REIN: This system doesn't -- I mean,
10 it's not narrowly tailored because it doesn't fit.
11 There are certain forms of Grutter that it follows.
12 It --

13 JUSTICE ALITO: Mr. Rein, do you understand
14 what the University of Texas thinks is the definition of
15 a critical mass? Because I don't.

16 MR. REIN: I -- well, it simply reiterated
17 the language of Grutter. They have no definition. They
18 can't fit --

19 JUSTICE GINSBURG: Mr. -- Mr. Rein, it seems
20 to me that, in your talking about critical mass, you are
21 relying entirely on the 10 percent is enough. They
22 don't -- they got minorities through the 10 percent, so
23 they don't need any more. And I tried to get you
24 rigidly to focus on -- forget the 10 percent plan. This
25 is the entire plan.

1 MR. REIN: Well, let me tell you that, if
2 you look outside the top 10, at the so-called AI/PAI
3 admits only -- forget the top 10 for a minute, they were
4 generating approximately 15 percent minority admissions
5 outside the top 10, which is in -- above what the target
6 was in Grutter. So this is not Grutter on its facts.
7 It's vastly different. This is a --

8 JUSTICE GINSBURG: Because of the
9 10 percent.

10 MR. REIN: No, it was -- I'm talking about
11 only the non-top 10 percent admissions. 15 percent of
12 those were so-called underrepresented minorities. This
13 is without the top 10. Now, the top 10 is also a major
14 generator of admissions for underrepresented minorities.

15 JUSTICE KENNEDY: And this was -- and this
16 was before the adoption of the plan.

17 MR. REIN: That is correct. Those are the
18 numbers --

19 CHIEF JUSTICE ROBERTS: Well, I'm sorry.
20 Now, I'm confused. I thought the 15 percent figure was
21 the one that was arrived at with the 10 percent plan.

22 MR. REIN: No. With the 10 percent plan,
23 it's much higher. In 2004, it was 21 percent for just
24 Hispanics and African Americans, and these are the
25 categories they used. If you add in Asians, it was over

1 38 percent.

2 But I'm isolating -- in response to Justice
3 Ginsburg, I'm isolating to the non-top 10 admissions.
4 Those are over 15 percent in that year, and they average
5 very close to that over time.

6 So the -- the total generation of minority
7 presence is a combination of the two in fact, but the
8 AI/PAI system -- which was adopted in response to
9 Hopwood, it was -- as Texas says, it was the first thing
10 they tried to accommodate to their loss of the ability
11 to use race directly, which came up in Hopwood.

12 So that was their first response, to look at
13 a more balanced admission program between Academic Index
14 and Personal Achievement Index. So it is not a system
15 which just excludes minorities.

16 JUSTICE KENNEDY: Could you comment on
17 this -- and then I hope we can get back to
18 Justice Alito's question.

19 You argue that the University's
20 race-conscious admission plan is not necessary to
21 achieve a diverse student body because it admits so few
22 people -- so few minorities. And I had trouble with
23 that, reading the brief. I said, well, if it's so few,
24 then what's the problem?

25 MR. REIN: Well, it's a question --

1 JUSTICE KENNEDY: Then -- let's assume --

2 MR. REIN: Excuse me, Justice.

3 JUSTICE KENNEDY: -- that it resulted in the
4 admission of many minorities. Then you'd come back and
5 say, oh, well, this is -- this shows that we -- we were
6 probably wrongly excluded. I --

7 MR. REIN: Well --

8 JUSTICE KENNEDY: I see an inconsistency
9 here.

10 MR. REIN: Well --

11 JUSTICE KENNEDY: Is it -- are you saying
12 that you shouldn't impose this hurt or this injury,
13 generally, for so little benefit; is -- is that the
14 point?

15 MR. REIN: Well, yes, that's part of it.

16 The second is the question of reasonably available
17 alternatives. If we take Texas at its word, and it says
18 they are satisfied, they are happy going on with the way
19 they apply race today, we tried to measure, well, what
20 difference is it making? And could you achieve the same
21 thing with a reasonably available race-neutral
22 alternative?

23 That's a question that was asked in Grutter.
24 They were supposed to analyze that. They didn't look at
25 it. But it --

1 JUSTICE GINSBURG: But is the -- the
2 race-neutral alternative is the 10 percent plan?

3 MR. REIN: The race-neutral alternative
4 includes an extension of the 10 percent plan because
5 it's a major generator of minority admissions. And
6 right now, that ranges at 30.

7 JUSTICE GINSBURG: But you say, and that's
8 okay because it's -- it's race-neutral. But is it
9 really? The -- the only reason that they instituted the
10 10 percent plan was to increase minority enrollment.

11 MR. REIN: Well, we say --

12 JUSTICE GINSBURG: And it -- and that -- the
13 only way it works is if you have heavily separated
14 schools. And worse than that, I mean, if you -- if you
15 want to go to the University of Texas under the
16 10 percent plan, you go to the low-performing school,
17 you don't take challenging courses, because that's how
18 you'll get into the 10 percent.

19 So maybe the University is concerned that
20 that is an inadequate way to deal with it.

21 MR. REIN: But, Justice Ginsburg, let -- let
22 me say that -- that a lot of that is speculative. There
23 is nothing in the record to support it. We don't know.
24 They've never surveyed the top 10 admits, the minority
25 admits, to see, well, did you --

1 JUSTICE SCALIA: Excuse me. The 10 percent
2 plan is not imposed by the University. It's not their
3 option --

4 MR. REIN: Correct.

5 JUSTICE SCALIA: -- to say this -- this is
6 not good for education because people will take easy
7 courses. It's imposed by state law, isn't it?

8 MR. REIN: Correct.

9 JUSTICE SCALIA: Anybody who is in the top
10 10 percent of any school in the state gets into the
11 University of Texas.

12 MR. REIN: Yes. And even the Fifth Circuit
13 said you can't disregard its consequences because it's a
14 matter of law. I'm simply saying they could choose to
15 extend it beyond where it is because it's capped today
16 at 75 percent.

17 But that's not the only option. That's not
18 the only alternative. And -- and certainly, one simple
19 alternative is they could look at the yield, that is,
20 what percentage of the admitted minorities are they
21 actually encouraging and -- and enrolling.

22 JUSTICE BREYER: Or they could -- this is
23 what is underlying my thing here. I want to get you
24 directly to answer it. I did look up the figures. And
25 before Hopwood and the 10 percent plan, it looked on the

1 African American side, that it averaged about 5 --
2 5 percent per year, really, pretty steadily.

3 Then after Hopwood and 10 percent, it went
4 down a little bit, not a lot, but it went down to about
5 3 and a half percent -- 4 percent, maybe. And then they
6 introduced Grutter, and it's back up to 5 percent.

7 MR. REIN: No --

8 JUSTICE BREYER: Okay. Now, is that a lot?
9 Is that a little? There are several thousand admissions
10 officers in the United States, several thousand
11 universities, and what is it we're going to say here
12 that wasn't already said in Grutter, that isn't going to
13 take hundreds or thousands of these people and have
14 Federal judges dictating the policy of admission of all
15 these universities? You see why I'm looking for some
16 certainty?

17 MR. REIN: Well, Justice --

18 JUSTICE BREYER: I saw what happened, you
19 saw the numbers.

20 Sorry. Go ahead.

21 MR. REIN: Justice Breyer, just -- I will
22 answer your question. I'd like to reserve a little
23 time.

24 JUSTICE BREYER: You can answer it later, if
25 you want, or not answer it at all, if you don't.

1 (Laughter.)

2 MR. REIN: No, I am perfectly happy to -- to
3 answer your question.

4 I think that the increase in
5 African American admissions that you're looking at was
6 pre-Grutter. It -- it was generated before 2004.

7 JUSTICE BREYER: Uh-huh.

8 MR. REIN: So I just want to make clear the
9 record doesn't depend -- they don't depend on race to do
10 it. It's minimal change with the use of race. And
11 that's why we say there is an alternative, which would
12 serve it about as well in increasing yield or, indeed,
13 in reweighting the -- the PAI, which is a critical
14 element here, so that you put more emphasis on the
15 socioeconomic factors and less emphasis on the essays,
16 which are an academic measure within the PAI.

17 So there are lots that they could do --

18 JUSTICE SOTOMAYOR: So now, we're going to
19 tell the universities how to run and how to weigh
20 qualifications, too?

21 MR. REIN: It's not the job of the Court to
22 tell them how to do it. It's their job to examine the
23 alternatives available to them and see if they couldn't
24 achieve the same thing.

25 JUSTICE SOTOMAYOR: Could you tell me,

1 again, how race and their use of race overwhelms those
2 other factors in their system as it's created?

3 MR. REIN: I -- the question is not whether
4 it overwhelms them. They're -- but they -- they say --
5 they admit, it is effective. There are admissions that
6 would not have taken place, but for; somebody else would
7 have had that place, but for the use of race.

8 And I think, Justice Kennedy, just to answer
9 your question fully, you have to analyze race-neutral
10 alternatives. And if you look at Parents Involved,
11 that -- that was the critical question. The out -- the
12 outcomes were so small, that there were readily
13 available alternatives.

14 JUSTICE KENNEDY: Well, perhaps you could
15 summarize by saying -- by telling us, from your point of
16 view, this plan fails strict scrutiny on one or two or
17 both levels, A, because the objective is inappropriate
18 or ill-defined, and, B, because of the implementation is
19 defective. Which or both of those are you arguing?

20 MR. REIN: We have argued both, and we
21 continue to argue both. It is not a necessary --

22 JUSTICE KENNEDY: And in what respect does
23 this plan fail strict scrutiny under either of those --
24 under both of those categories?

25 MR. REIN: Okay. Under the category -- the

1 first category, was it a necessary means of pursuing a
2 compelling interest, we don't believe they've shown any
3 necessity for doing what they were doing. And
4 certainly, it -- race should have been a last resort.
5 It was a first resort. That's, in a nutshell, that
6 prong of it. And in order -- and they failed in every
7 respect.

8 If you go to narrow tailoring, what we are
9 saying is they didn't consider alternatives, and their
10 treatment of, as we have pointed out, Asian Americans
11 and Hispanics makes a -- an incomprehensible
12 distinction. They say, we don't worry about Asians,
13 there are a lot of Asians, it's a demographic measure,
14 which is a forbidden measure.

15 They are in excess of their share of the
16 Texas population. But if you are trying to find
17 individual comfort levels, if you are breaking it down
18 between African Americans and -- and Hispanics, the --

19 JUSTICE SOTOMAYOR: Counsel, you are the one
20 who, in your brief, has assumed that they are valuing
21 different races differently. But Asian numbers have
22 gone up, under however they have structured this PAI.
23 And as I understand their position, race is balanced
24 against other issues like socioeconomic, the strength
25 of the classes people took. It's never a standalone.

1 So even a white student, I presume, who goes
2 to an -- an entirely black or an entirely Latino school,
3 who becomes class president, would get some points
4 because he has or she has proven that they foster or can
5 deal in a diverse environment. That's how I understood
6 their plan, that it's not just giving you a plus because
7 of race. It's combining that with other factors.

8 MR. REIN: There is a plus because of race.
9 There are many other factors in the decision. And might
10 I say that this -- the white student president of the
11 class in an ethnically different school is a measure of
12 leadership.

13 Leadership is an independent factor in the
14 PAI. It isn't -- he is not getting that point because
15 he's -- because of his race; he's getting that point
16 because of his leadership. That's a race-neutral
17 criteria could work for anybody.

18 So race is an independent add-on. It -- it
19 is something they can use to boost the PAI score, the
20 PAS element in any way they like, because they say they
21 contextualize it. And we've said it's not necessary,
22 it's not narrowly tailored, it ignores available
23 alternatives, it treats -- gives disparate treatment to
24 Asian Americans because they are minorities as well.

25 And to the extent it depends on the

1 classroom factor, there is simply no way to relate or
2 fit what they are doing to the solution of the problem
3 which they used as a major foundation of their proposal,
4 which is the nondiverse classroom. That -- certainly,
5 there is just no correspondence there.

6 I see my time is up, Mr. Chief Justice.

7 CHIEF JUSTICE ROBERTS: We will afford you
8 rebuttal time, since our questions have prevented you
9 from reserving it.

10 MR. REIN: Thank you.

11 CHIEF JUSTICE ROBERTS: Mr. Garre.

12 ORAL ARGUMENT OF GREGORY G. GARRE

13 ON BEHALF OF THE RESPONDENTS

14 MR. GARRE: Thank you, Mr. Chief Justice,
15 and may it please the Court:

16 For two overriding reasons, the -- the
17 admissions plan before you is Constitutional under this
18 Court's precedents. First, it is indistinguishable in
19 terms of how it operates in taking race into account as
20 only one modest factor among many for the individualized
21 considerations of applicants in their totality from
22 plans that this Court has upheld in Grutter and plans
23 that this Court approved in Bakke and the Harvard
24 plan --

25 JUSTICE SOTOMAYOR: I -- I put that in the

1 narrow tailoring category, that it is narrowly tailored
2 the way Grutter did -- said, not the necessity prong and
3 not the need prong -- not the necessity prong. I think
4 most of his argument has been centered on that, so --

5 MR. GARRE: That's right. And so that's the
6 second point I was going to make, which is that the
7 holistic admissions process at issue here is a necessary
8 counterpart to the state's top 10 percent Law and works
9 to systematic -- to offset the systematic drawbacks of
10 that law in achieving an interest that is indisputably
11 compelling, the university's interest in assembling a
12 broadly diverse student body.

13 In the interest --

14 CHIEF JUSTICE ROBERTS: Counsel, before -- I
15 need to figure out exactly what these numbers mean.
16 Should someone who is one-quarter Hispanic check the
17 Hispanic box or some different box?

18 MR. GARRE: Your Honor, there is a
19 multiracial box. Students check boxes based on their
20 own determination. Now, this is true under the Common
21 Application --

22 CHIEF JUSTICE ROBERTS: Well, I suppose a
23 person who is one-quarter percent Hispanic, his own
24 determination, would be, I'm one-quarter percent
25 Hispanic.

1 MR. GARRE: Then they would check that box,
2 Your Honor, as is true of any --

3 CHIEF JUSTICE ROBERTS: They would check
4 that box. What about one-eighth?

5 MR. GARRE: Your Honor, that was -- they --
6 they would make that self-determination, Your Honor.
7 If -- if anyone, in any part of the application,

8 violated some honor code then that could come out --

9 CHIEF JUSTICE ROBERTS: Would it violate the
10 honor code for someone who is one-eighth Hispanic and
11 says, I identify as Hispanic, to check the Hispanic box?

12 MR. GARRE: I don't think -- I don't think
13 it would, Your Honor. I don't think that that issue
14 would be any different than the plan upheld in Grutter
15 or the Harvard plan or in Bakke --

16 CHIEF JUSTICE ROBERTS: You don't check, in
17 any way, the racial identification?

18 MR. GARRE: We do not, Your Honor, and no
19 college in America, the Ivy Leagues, the Little Ivy
20 Leagues, that I'm aware of.

21 CHIEF JUSTICE ROBERTS: So how do you know
22 you have 15 percent African American -- Hispanic or
23 15 percent minority?

24 MR. GARRE: Your Honor, the same way that
25 that determination is made in any other situation, I'm

1 aware of, where race is taken into account --

2 CHIEF JUSTICE ROBERTS: You say it's "the
3 same way." What is that way?

4 MR. GARRE: Well, the persons self-identify
5 on that form.

6 JUSTICE SCALIA: Do they have to
7 self-identify?

8 MR. GARRE: They do not, Your Honor. Every
9 year people do not, and many of those applicants are
10 admitted.

11 JUSTICE SCALIA: And how do they decide?
12 You know, it's -- they want not just a critical mass in
13 the school at large, but class by class? How do they
14 figure out that particular classes don't have enough?
15 What -- are they -- somebody walks in the room and looks
16 them over to see who looks -- who looks Asian, who looks
17 black, who looks Hispanic? Is that -- is that how it's
18 done?

19 MR. GARRE: No, Your Honor, and let me try
20 to be clear on this. The university has never asserted
21 a compelling interest in any specific diversity in every
22 single classroom. It has simply looked to classroom
23 diversity as one dimension of student body diversity.
24 And after --

25 JUSTICE SCALIA: I don't know what you are

1 talking about. I mean, it is either a factor that is
2 validly in this case or it isn't. Now, do they look to
3 individual classroom diversity or not? And if so, how
4 do they decide when classes are diverse?

5 MR. GARRE: This Court in Grutter, Your
6 Honor -- and maybe the most important thing that was
7 said during the first 30 minutes is, when given an
8 opportunity to challenge Grutter, I understood my friend
9 not to ask this Court to overrule it.

10 This Court in Grutter recognized the obvious
11 fact that the classroom is one of the most important
12 environments where the educational benefits of diversity
13 are realized. And so the University of Texas, in
14 determining whether or not it had reached a critical
15 mass, looked to the classroom, along with --

16 JUSTICE SCALIA: Fine. I'm asking how. How
17 did they look to the classroom?

18 MR. GARRE: Well, Your Honor --

19 JUSTICE SCALIA: On their way in -- did they
20 require everybody to check a box or they have somebody
21 figure out, oh, this person looks 1/32nd Hispanic, and
22 that's enough?

23 MR. GARRE: They did a study, Your Honor,
24 that took into account the same considerations that they
25 did in discussing the enrollment categories --

1 JUSTICE SCALIA: What kind of a study? What
2 kind of a study?

3 MR. GARRE: Well, Your Honor, it's in the
4 Supplemental Joint Appendix.

5 JUSTICE SCALIA: Yes. It doesn't explain to
6 me how they go about, classroom by classroom, deciding
7 how many minorities there are.

8 MR. GARRE: Your Honor, there are student
9 lists in each classroom. The student lists --

10 CHIEF JUSTICE ROBERTS: There are student
11 lists in each classroom that -- that have race
12 identified with the students?

13 MR. GARRE: No, no, Your Honor. Of course,
14 each classroom -- the university knows which students
15 are taking its classes. And one can then, if you want
16 to gauge diversity in the classrooms, go back --

17 CHIEF JUSTICE ROBERTS: Oh, you go back to
18 what they checked on the form?

19 MR. GARRE: Your Honor, this was part of
20 a --

21 CHIEF JUSTICE ROBERTS: That's a yes or no
22 question. You go back to what they checked on their
23 application form in deciding whether Economics 201 has a
24 sufficient number of African Americans or Hispanics?

25 MR. GARRE: That is information that is

1 available to the university, Your Honor, the race of
2 students, if they've checked it on the application. But
3 I do want to be clear on this classroom diversity study.
4 This was only one of many information points that the
5 university looked to.

6 JUSTICE ALITO: Well, on the classroom
7 diversity, how does the non-top 10 percent part of the
8 plan further classroom diversity? My understanding is
9 that the university had over 5,000 classes that
10 qualified as small, and the total number of African
11 Americans and Hispanics who were admitted under the part
12 of the plan that is challenged was just a little over
13 200.

14 So how does that -- how does that -- how can
15 that possibly do more than a tiny, tiny amount to
16 increase classroom diversity?

17 MR. GARRE: Well, Your Honor, first, I think
18 that 200 number is erroneous. There have been many more
19 minority candidates in --

20 JUSTICE ALITO: Per class?

21 MR. GARRE: No, not -- not on a per-class
22 basis.

23 JUSTICE ALITO: In an entering class.

24 MR. GARRE: I think in looking at the
25 classrooms, Your Honor, what the university found was

1 shocking isolation against --

2 JUSTICE ALITO: How many -- how many non-top
3 10 percent members of the two minorities at issue here
4 are admitted in each class?

5 MR. GARRE: Your Honor, we didn't look
6 specifically at that determination. What we did -- in
7 other words, to try to find whether there were holistic
8 admits or percentage admits, we did conclude in 2004 --
9 and, again, this was before -- we did the classroom
10 study before the plan at issue was adopted, and at that
11 time, there were no holistic admits taking race into
12 account.

13 And what we concluded was that we simply --
14 if you looked at African Americans, for example, in
15 90 percent of the classes of the most common
16 participatory size --

17 JUSTICE ALITO: I really don't understand
18 your answer. You know the total number of, let's say,
19 African Americans in an entering class, right? Yes or
20 no?

21 MR. GARRE: Yes, Your Honor.

22 JUSTICE ALITO: And you know the total
23 number who were admitted under the top 10 percent plan?

24 MR. GARRE: We do, Your Honor. But, again,
25 at the time --

1 JUSTICE ALITO: If you subtract A from B,
2 you'll get C, right?

3 MR. GARRE: Your Honor, at the time --

4 JUSTICE ALITO: And what is the value of C
5 per class?

6 MR. GARRE: Your Honor, I don't know the
7 answer to that question, and let me try to explain why
8 the university didn't look specifically at -- to that.
9 Because at the time that the classroom diversity study
10 was conducted, it was before the holistic admissions
11 process at issue here was adopted in 2003-2004.

12 And so that determination wouldn't have been
13 as important as just finding out are African Americans
14 or Hispanics, underrepresented minorities, present at
15 the university in such numbers that we are not
16 experiencing racial -- racial isolation in the
17 classroom.

18 CHIEF JUSTICE ROBERTS: What is that number?
19 What is the critical mass of African Americans and
20 Hispanics at the university that you are working toward?

21 MR. GARRE: Your Honor, we don't have one.
22 And -- and this Court in Grutter --

23 CHIEF JUSTICE ROBERTS: So how are we
24 supposed to tell whether this plan is narrowly tailored
25 to that goal?

1 MR. GARRE: To look to the same criteria of
2 this Court in Grutter. This Court in Grutter
3 specifically rejected the notion that you could come up
4 with a fixed percentage. Now --

5 JUSTICE ALITO: Does critical mass vary from
6 -- from group to group? Does it vary from state to
7 state?

8 MR. GARRE: It certainly is contextual. I
9 think it could vary, Your Honor. I think -- let me
10 first say that my friends have -- throughout this
11 litigation, not in this Court, asserted 20 percent as a
12 critical mass, and that's lumping together different
13 minority groups.

14 JUSTICE ALITO: No. But could you answer my
15 question? What does the University of Texas -- the
16 University of Texas think about those questions?

17 MR. GARRE: We --

18 JUSTICE ALITO: Is the critical mass for the
19 University of Texas dependent on the breakdown of the
20 population of Texas?

21 MR. GARRE: No, it's not at all.

22 JUSTICE ALITO: It's not.

23 MR. GARRE: It's not at all. It's looking
24 to -- to the educational benefits of diversity on
25 campus, and I think we actually agree on what that means

1 and what Grutter said it meant, in terms of --

2 JUSTICE GINSBURG: Mr. Garre, could you
3 explain -- I think you were trying to before -- what
4 seems to me the critical question in this case: Why
5 didn't the 10 percent solution suffice? There were a
6 substantial number of minority members admitted as a
7 result of the 10 percent solution. Why wasn't that
8 enough to achieve diversity?

9 MR. GARRE: Well, let me make a couple of
10 points, Your Honor. First, if you just looked at the
11 numbers -- we don't think it's the numbers, but if you
12 looked at the numbers, after 7 years, racial diversity
13 among these groups at the University of Texas had
14 remained stagnant or worse. 2002, African American
15 enrollment had actually dropped to 3 percent. That's
16 one part of it.

17 The other part of it is, if you look at the
18 admissions under the top 10 percent plan, taking the --
19 the top 10 percent of a racially identifiable high
20 school may get you diversity that looks okay on paper,
21 but it doesn't guarantee you diversity that produces
22 educational benefits on campus. And that's one of the
23 considerations that the university took into account as
24 well.

25 JUSTICE SCALIA: I don't understand that.

1 Why? Why -- why doesn't it?

2 MR. GARRE: Because, Your Honor, as is true
3 for any group -- and the Harvard plan that this Court
4 approved in Bakke specifically recognized this, you
5 would want representatives and different viewpoints from
6 individuals within the same -- the same racial group,
7 just as you would from individuals outside of that.

8 JUSTICE SCALIA: What kind of viewpoints? I
9 mean, are they political viewpoints?

10 MR. GARRE: Well, anyone's experiences,
11 where they grew up, the situations that they -- that
12 they experience in their lives are going to affect their
13 viewpoints.

14 JUSTICE SCALIA: This -- this has nothing to
15 do with, with racial diversity. I mean, you're talking
16 about something else.

17 MR. GARRE: Your Honor, I think it directly
18 impacts the educational benefits of diversity in this
19 sense, that the minority candidate who has shown that --
20 that he or she has succeeded in an integrated
21 environment, has shown leadership, community service,
22 the other factors that we looked at in holistic review,
23 is precisely the kind of candidate that's going to
24 come -- come on campus, help to break down racial
25 barriers, work across racial lines, dispel --

1 stereotypes --

2 JUSTICE SCALIA: Also, the kind that is
3 likely to be included within the 10 percent rule. And,
4 incidentally, when -- when was the 10 percent rule
5 adopted?

6 MR. GARRE: 1998, Your Honor.

7 But, but with respect to your -- your
8 factual point, that's absolutely wrong, Your Honor. If
9 you look at the admissions data that we cite on page 34
10 of our brief, it shows the breakdown of applicants under
11 the holistic plan and the percentage plan.

12 And I don't think it's been seriously
13 disputed in this -- this case to this point that,
14 although the percentage plan certainly helps with
15 minority admissions, by and large, the -- the minorities
16 who are admitted tend to come from segregated,
17 racially-identifiable schools.

18 JUSTICE ALITO: Well, I thought that the
19 whole purpose of affirmative action was to help students
20 who come from underprivileged backgrounds, but you make
21 a very different argument that I don't think I've ever
22 seen before.

23 The top 10 percent plan admits lots of
24 African Americans -- lots of Hispanics and a fair number
25 of African Americans. But you say, well, it's -- it's

1 faulty because it doesn't admit enough African Americans
2 and Hispanics who come from privileged backgrounds. And
3 you specifically have the example of the child of
4 successful professionals in Dallas.

5 Now, that's your -- that's your argument?
6 If you have -- you have an applicant whose parents are
7 -- let's say they're -- one of them is a partner in your
8 law firm in Texas, another one is a part -- is another
9 corporate lawyer. They have income that puts them in
10 the top
11 1 percent of earners in the country, and they have --
12 parents both have graduate degrees.

13 They deserve a leg-up against, let's say, an
14 Asian or a white applicant whose parents are absolutely
15 average in terms of education and income?

16 MR. GARRE: No, Your Honor. And let me --
17 let me answer the question. First of all, the example
18 comes almost word for word from the Harvard plan that
19 this Court approved in Grutter and that Justice Powell
20 held out in Bakke.

21 JUSTICE ALITO: Well, how can the answer to
22 that question be no, because being an African American
23 or being a Hispanic is a plus factor.

24 MR. GARRE: Because, Your Honor, our point
25 is, is that we want minorities from different

1 backgrounds. We go out of our way to recruit minorities
2 from disadvantaged backgrounds.

3 JUSTICE KENNEDY: So what you're saying is
4 that what counts is race above all?

5 MR. GARRE: No, Your Honor, what counts is
6 different experiences --

7 JUSTICE KENNEDY: Well, that's the
8 necessary -- that's the necessary response to
9 Justice Alito's question.

10 MR. GARRE: Well, Your Honor, what we want
11 is different experiences that are going to -- that are
12 going to come on campus --

13 JUSTICE KENNEDY: You want underprivileged
14 of a certain race and privileged of a certain race. So
15 that's race.

16 MR. GARRE: No, Your Honors, it's -- it's
17 not race. It's just the opposite. I mean, in the LUAC
18 decision, for example, this Court said that failing to
19 take into account differences among members of the same
20 race does a disservice --

21 JUSTICE KENNEDY: But the -- but the reason
22 you're reaching for the privileged is so that members of
23 that race who are privileged can be representative, and
24 that's race. I just --

25 MR. GARRE: It's -- it's members of the same

1 racial group, Your Honor, bringing different
2 experiences. And to say that -- if you took any racial
3 group, if you -- if you had an admissions process that
4 only tended to admit from a -- people from a particular
5 background or perspective, you would want people from
6 different perspectives.

7 CHIEF JUSTICE ROBERTS: Counsel --

8 MR. GARRE: And that's -- that's the
9 interests that we're discussing here. It's the
10 interests that -- that the Harvard plan specifically
11 adopts and lays out --

12 CHIEF JUSTICE ROBERTS: I understand my job,
13 under our precedents, to determine if your use of race
14 is narrowly tailored to a compelling interest. The
15 compelling interest you identify is attaining a critical
16 mass of minority students at the University of Texas,
17 but you won't tell me what the critical mass is. How am
18 I supposed to do the job that our precedents say I
19 should do?

20 MR. GARRE: Your Honor, what -- what this
21 Court's precedents say is a critical mass is an
22 environment in which students of underrepresented --

23 CHIEF JUSTICE ROBERTS: I know what you say,
24 but when will we know that you've reached a critical
25 mass?

1 MR. GARRE: Well --

2 CHIEF JUSTICE ROBERTS: Grutter said there
3 has to be a logical end point to your use of race. What
4 is the logical end point? When will I know that you've
5 reached a critical mass?

6 MR. GARRE: Your Honor, this question, of
7 course, implicates Grutter itself. And, again, I
8 understood my friend not to challenge that. They
9 haven't challenged that diversity is a compelling
10 interest at all.

11 What -- what we look to, and we think that
12 courts can review this determination, one, we look to
13 feedback directly from students about racial isolation
14 that they experience. Do they feel like spokespersons
15 for their race.

16 CHIEF JUSTICE ROBERTS: So you, what, you
17 conduct a survey and ask students if they feel racially
18 isolated?

19 MR. GARRE: That's one of the things we
20 looked at.

21 CHIEF JUSTICE ROBERTS: And that's the basis
22 for our Constitutional determination?

23 MR. GARRE: Your Honor, that's one of the
24 things that we looked at.

25 CHIEF JUSTICE ROBERTS: Okay. What are the

1 others?

2 MR. GARRE: Another is that we did look to
3 enrollment data, which showed, for example, among
4 African Americans, that African American enrollment at
5 the University of Texas dropped to 3 percent in 2002
6 under the percentage plan.

7 CHIEF JUSTICE ROBERTS: At what level will
8 it satisfy the critical mass?

9 MR. GARRE: Well, I think we all agree that
10 3 percent is not a critical mass. It's -- it's well
11 beyond that.

12 CHIEF JUSTICE ROBERTS: Yes, but at what
13 level will it satisfy the requirement of critical mass?

14 MR. GARRE: When we have an environment in
15 which African Americans do not --

16 CHIEF JUSTICE ROBERTS: When -- how am I
17 supposed to decide whether you have an environment
18 within particular minorities who don't feel isolated?

19 MR. GARRE: Your Honor, part of this is a --
20 is a judgment that the admin -- the educators are going
21 to make, but you would look to the same criteria --

22 CHIEF JUSTICE ROBERTS: So, I say -- when
23 you tell me, that's good enough.

24 MR. GARRE: No, Your Honor, not at all. You
25 would look to the criteria that we looked at, the -- the

1 enrollment data, the feedback from the students. We
2 also took into account diversity in the classroom. We
3 took into account the racial climate on campus.

4 JUSTICE ALITO: But would 3 percent be
5 enough in New Mexico, your bordering state, where the
6 African American population is around 2 percent?

7 MR. GARRE: Your Honor, I don't think it
8 would. I mean, our concept to critical mass isn't tied
9 to demographic. It's undisputed in this case that we
10 are not pursuing any demographic goal. That's on page
11 138 of the Joint Appendix.

12 All of -- I think many key facts are
13 undisputed here. It's undisputed that race is only a
14 modest factor. It's undisputed that we're taking race
15 into account only to consider individuals in their
16 totality. This is a --

17 JUSTICE SOTOMAYOR: Mr. Garre, I think that
18 the issue that my colleagues are asking is, at what
19 point and when do we stop deferring to the University's
20 judgment that race is still necessary? That's the
21 bottom line of this case. And you're saying, and I
22 think rightly because of our cases, that you can't set a
23 quota, because that's what our cases say you can't do.

24 So if we're not going to set a quota, what
25 do you think is the standard we apply to make a

1 judgment?

2 MR. GARRE: I think the standard you would
3 apply is the one set forth in Grutter, and it comes from
4 Justice Powell's opinion in Bakke, that you would look
5 to whether or not the University reached an environment
6 in which members of underrepresented minorities, African
7 Americans and Hispanics, do not feel like spokespersons
8 for their race, members -- an environment where
9 cross-racial understanding is promoted, an environment
10 where the benefit -- educational benefits of diversity
11 are realized.

12 And the reason why the University of Texas
13 concluded that that environment was not met here, it
14 laid out in several different information points that
15 this Court can review and --

16 JUSTICE SCALIA: But that -- that -- that
17 holds for only -- only another what, 16 years, right?
18 Sixteen more years, and you're going to call it all off.

19 MR. GARRE: Your Honor, we don't read
20 Grutter as establishing that kind of time clock. We are
21 looking at this --

22 JUSTICE SCALIA: But you're appealing to
23 Grutter, and that's what it said.

24 MR. GARRE: Well - well, Your Honor, Grutter
25 is this Court's precedence. We're guided by it here.

1 At least the advocates are. And -- and what we would
2 look to is once -- we're looking at this every year,
3 we're looking at it carefully. And once we reach that
4 point, of course, we're going to stop.

5 But we also take into --

6 JUSTICE GINSBURG: Mr. Garre. Mr. Garre.

7 JUSTICE SCALIA: Some of the stuff that
8 Grutter says -- some of the stuff that Grutter says you
9 agree with, some of the stuff that it says you don't
10 agree with.

11 MR. GARRE: Well, I don't know that I've
12 disagreed with anything it said. It --

13 JUSTICE GINSBURG: Mr. Garre, before your
14 time is -- runs out, the other point that I'd like you
15 to answer is the argument based on Parents Involved,
16 that the gain is just too small to warrant using a
17 racial criteria.

18 MR. GARRE: Your Honor --

19 JUSTICE GINSBURG: Once you have the
20 10 percent, you don't need more. So how do you answer
21 the argument of the gain is too small?

22 MR. GARRE: First I'd point to my friend's
23 own concessions, that the consideration of race has
24 increased racial diversity at Hispanic and helps with
25 minority enrollment. That's on page 138 of the Joint

1 Appendix.

2 Secondly, I'd point to the fact that African
3 American and Hispanics' admissions did increase.
4 African American admissions doubled from the period of
5 2002 and 2004. So this has had a real important impact
6 on diversity at the University of Texas.

7 JUSTICE ALITO: Well, in terms of diversity,
8 how do you justify lumping together all Asian Americans?
9 Do you think -- do you have a critical mass of Filipino
10 Americans?

11 MR. GARRE: Your Honor --

12 JUSTICE ALITO: Cambodian Americans --
13 Cambodian Americans?

14 MR. GARRE: -- the common form that's used
15 has Asian American, but also, next to that, has a form
16 that says country of origin where that can be spelled
17 out.

18 JUSTICE ALITO: And do you have a critical
19 mass as to all the subgroups that fall within this
20 enormous group of Asian Americans?

21 MR. GARRE: Your Honor, we've looked to
22 whether or not we have a critical mass of
23 underrepresented minorities, which is precisely what the
24 Grutter decision asks us to do.

25 I think -- if I can make a quick point on

1 jurisdiction --

2 JUSTICE KENNEDY: If I could, before we get
3 to that.

4 MR. GARRE: I'm sorry.

5 JUSTICE KENNEDY: Suppose we -- that you, in
6 your experience identify a numerical category a
7 numerical standard, a numerical designation for critical
8 mass: It's X percent. During the course of the
9 admissions process, can the admissions officers check to
10 see how close they are coming to this numerical --

11 MR. GARRE: No. No, Your Honor, and we
12 don't. On page 389 of the joint --

13 JUSTICE KENNEDY: You -- you cannot do that?

14 MR. GARRE: We -- we wouldn't be monitoring
15 the class. I think one of the problems --

16 JUSTICE KENNEDY: But isn't that what
17 happened in Grutter; it allowed that.

18 MR. GARRE: It did, Your Honor. It was one
19 of the things --

20 JUSTICE KENNEDY: So are you saying that
21 Grutter is incorrect?

22 MR. GARRE: No, Your Honor. It was one of
23 the things that you pointed out in your dissent. What
24 I'm saying is we don't have that problem, because --

25 JUSTICE KENNEDY: I'm -- I'm asking whether

1 or not you could do that. And if --

2 MR. GARRE: I don't think so, because the
3 Grutter majority didn't understand it to be monitoring
4 for the purposes of reaching a specific demographic.

5 CHIEF JUSTICE ROBERTS: They don't -- they
6 don't monitor, but race is the only one of your holistic
7 factors that appears on the cover of every application,
8 right?

9 MR. GARRE: Well, all the holistic factors
10 are taking into account on the application, and they're
11 listed at various points on the application.

12 CHIEF JUSTICE ROBERTS: I'm sorry. The
13 question was whether race is the only one of your
14 holistic factors that appears on the cover of every
15 application.

16 MR. GARRE: That -- that is true on the
17 cover of the application.

18 If -- could I make one point on jurisdiction?

19 CHIEF JUSTICE ROBERTS: We will give you a
20 little more time since I'm going to give your friend a
21 little more time.

22 MR. GARRE: Thank you.

23 The fundamental problem with jurisdiction is
24 this: First of all, they definitively cannot show that
25 she was injured by any consideration of race. That's at

1 pages 415 and 416 of the Joint Appendix, where it makes
2 clear that Ms. Fisher would not have been admitted to
3 the fall 2008 class at University of Texas no matter
4 what her race, because her --

5 CHIEF JUSTICE ROBERTS: Just to be clear,
6 are you arguing that she doesn't have standing in an
7 Article III sense?

8 MR. GARRE: Yes, Your Honor. And I think --

9 CHIEF JUSTICE ROBERTS: You address that in
10 your brief in one footnote, right? We have an
11 obligation to consider it in every case, and what you
12 gave us is one footnote in which you said it's hard to
13 see how she could establish cognizable jurisdiction.

14 MR. GARRE: And there is another part of
15 that that comes from the brief in opposition, Your
16 Honor, which goes to the relief that she has requested.
17 The declaratory and injunctive release -- relief that
18 this case began with, that request has fallen out, and
19 that's undisputed. So the only thing that is live in
20 this case is a request for monetary damages. That
21 request is on page 79 of the Joint Appendix, and it's
22 focused exclusively on a request for the return of
23 admissions fees. And the reason why that is not enough
24 to confer standing is that she would have paid the
25 admissions fee no matter what policy the university

1 admissions had.

2 CHIEF JUSTICE ROBERTS: What about -- what
3 about our Jacksonville case that said it is an injury to
4 be forced to be part of a process in which there is
5 race-conscious evaluation?

6 MR. GARRE: Texas v. Lesage says that
7 that -- that injury is not sufficient in a
8 backward-looking case like this, where you only have
9 monetary damages. In Jacksonville and all the other
10 cases, they involved forward-looking claims for
11 declaratory injunctive reliefs where people who were
12 going to go out and get contracts again. So Texas --

13 CHIEF JUSTICE ROBERTS: I thought your
14 friend -- your friend told us that these remedial issues
15 and damages issues had been segregated out of the
16 process and are still available for remand.

17 MR. GARRE: Your Honor, that is not an
18 answer to jurisdiction for this reason: It's true that
19 it is bifurcated in the sense that we could go and prove
20 damages, but the complaint makes no doubt that the only
21 request for monetary damages is a request for admissions
22 fees. That -- it says that explicitly. And this Court
23 has said that relief that does not remedy the injury
24 suffered cannot bootstrap a plaintiff into Federal
25 court. That is the very essence of the redressability

1 requirement. That comes from the Seal Co. Case.

2 JUSTICE SCALIA: Well, that's part of the
3 injury she suffered. It's -- it's not the only injury
4 perhaps.

5 MR. GARRE: It's the only --

6 JUSTICE SCALIA: But she -- she had to pay
7 an admissions fee for a process in which she was not
8 treated fairly.

9 MR. GARRE: And the reason why --

10 JUSTICE SCALIA: Why shouldn't she get her
11 money back?

12 MR. GARRE: The reason why the payment of
13 that fee doesn't redress the injury, Your Honor, is that
14 she would have paid it even if Texas didn't consider
15 race at all; and, therefore, the payment of the
16 application fee back doesn't remedy the injury that she
17 is complaining about.

18 JUSTICE BREYER: Can I ask you to get -- if
19 this is easy, do it; if not, don't.

20 I wanted to use accurate numbers, and so I
21 discovered -- I wanted to find out how many universities
22 actually used a Grutter-type process last year or the
23 year before, etcetera. And one of your amici, the
24 admissions officers, according to our library, is the
25 only place that has that information, though it's

1 public, and I didn't want them to do it because they are
2 an amici of yours. And you are both here, both sides,
3 so if you can agree on -- simply, roughly -- what that
4 number is, I would like to know it; otherwise, I will --
5 I can use pre-Grutter numbers which are public and
6 available.

7 MR. GARRE: Your Honor, I don't have
8 specific numbers. Obviously, the Ivy Leagues and Little
9 Ivy Leagues that have filed amicus briefs are using it.
10 And this Court recognized in Grutter that the best
11 universities, many of the best universities in America,
12 have been using these plans for 30 years or more.

13 JUSTICE SCALIA: Since we are asking
14 questions about just curiosity, I am curious to know how
15 many -- this is a very ambitious racial program here at
16 the University of Texas. How many people are there in
17 the affirmative action department of the University of
18 Texas? Do you have any idea? I mean, there must be a
19 lot of people to, you know, to monitor all these classes
20 and do all of this assessment of race throughout the
21 thing. There would be a large number of people be out
22 of a job, wouldn't we, wouldn't they, if we suddenly
23 went to just 10 percent?

24 MR. GARRE: Your Honor, one of the things
25 that the University of Texas does monitor is the racial

1 climate on campus. It does that to improve the
2 experience for all students on campus.

3 JUSTICE SCALIA: How many people?

4 MR. GARRE: I don't --

5 JUSTICE SCALIA: You don't.

6 MR. GARRE: -- have a specific number of
7 people, Your Honor, but it is -- it is an important part
8 of improving the educational experience for all students
9 at the University of Texas no matter what their race.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 MR. GARRE: Thank you, Your Honor.

12 CHIEF JUSTICE ROBERTS: General Verrilli.

13 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

14 FOR UNITED STATES, AS AMICUS CURIAE,

15 SUPPORTING THE RESPONDENTS

16 GENERAL VERRILLI: Mr. Chief Justice, and
17 may it please the Court:

18 In resolving this case, it is important to
19 focus on what is, or more precisely, what is not at
20 issue.

21 Petitioner is not challenging Grutter's
22 reaffirmation of the principle of Justice Powell's
23 opinion in Bakke that student body diversity is a
24 compelling interest that can justify the consideration
25 of race in university admissions. Colleges and

1 universities across the country have relied on that
2 principle in shaping their admissions policies, and it
3 is of vital interest to the United States that they
4 continue to be able to do so.

5 The core of our interest is in ensuring that
6 the Nation's universities produce graduates who are
7 going to be effective citizens and effective leaders in
8 an increasingly diverse society, and effective
9 competitors in diverse global markets.

10 JUSTICE ALITO: Does the United States agree
11 with Mr. Garre that African American and Hispanic
12 applicants from privileged backgrounds deserve a
13 preference?

14 GENERAL VERRILLI: I understand that
15 differently, Justice Alito. Here's how we understand
16 what is going on with respect to the admissions process
17 in the University of Texas, and I am going to address it
18 directly. I just think it needs a bit of context to do
19 so.

20 The top 10 percent plan certainly does
21 produce some ethnic diversity. Significant numbers get
22 in. The problem is the university can't control that
23 diversity in the same way it can with respect to the
24 25 percent of the class that is admitted through the
25 holistic process.

1 So my understanding of what the university
2 here is looking to do, and what universities generally
3 are looking to do in this circumstance, is not to grant
4 a preference for privilege, but to make individualized
5 decisions about applicants who will directly further the
6 educational mission. For example, they will look for
7 individuals who will play against racial stereotypes
8 just by what they bring: The African American fencer;
9 the Hispanic who has -- who has mastered classical
10 Greek. They can also look for people who have a
11 demonstrated track record of --

12 JUSTICE ALITO: If you have two applicants
13 who are absolutely the same in every respect: They both
14 come from affluent backgrounds, well-educated parents.
15 One falls within two of the groups that are given a
16 preference, the other doesn't. It's a marginal case.
17 It's the last -- the last position available in the
18 class. Under the Texas plan, one gets in; one doesn't
19 get in. Now, do you agree with that or not?

20 GENERAL VERRILLI: No. I think the -- in
21 the --

22 JUSTICE ALITO: Do you agree with -- do you
23 agree that that is an incorrect statement of the facts,
24 or do you agree that that's an incorrect understanding
25 of the Equal Protection Clause?

1 GENERAL VERRILLI: I think it's both. I
2 think the -- there is no automatic preference in Texas.
3 And I think this is right in the -- it says at page 398a
4 of the Joint Appendix -- the -- they describe the
5 process as saying, "An applicant's race is considered
6 only to the extent that the applicant, viewed
7 holistically, will contribute to the broader vision of
8 diversity desired by the university."

9 JUSTICE SCALIA: Yes, but -- but the
10 hypothetical is that the two applicants are entirely the
11 same in all other respects.

12 GENERAL VERRILLI: Right. But the point --

13 JUSTICE SCALIA: And if -- if the ability to
14 give a racial preference means anything at all, it
15 certainly has to mean that, in the -- in the
16 hypothetical given -- given by Justice Alito, the
17 minority student gets in and the other one doesn't.

18 GENERAL VERRILLI: I disagree,
19 Justice Scalia. What the -- Texas, I think, has made
20 clear -- and I think this is a common feature of these
21 kinds of holistic approaches -- that not everyone in an
22 underrepresented group gets a preference, gets a plus
23 factor.

24 JUSTICE SCALIA: It's not a matter of not
25 everyone; it's a matter of two who are identical in all

1 other respects.

2 GENERAL VERRILLI: Right.

3 JUSTICE SCALIA: And what does the racial
4 preference mean if it doesn't mean that in that
5 situation the minority applicant wins and the other one
6 loses?

7 GENERAL VERRILLI: There may not be a racial
8 preference in that situation. It's going to depend on a
9 holistic, individualized consideration of the applicant.

10 JUSTICE SCALIA: But, they're already
11 talking --

12 JUSTICE KENNEDY: I just don't understand
13 this argument. I thought that the whole point is that
14 sometimes race has to be a tie-breaker and you are
15 saying that it isn't. Well, then, we should just go
16 away. Then -- then we should just say you can't use
17 race, don't worry about it.

18 GENERAL VERRILLI: I don't think it's a
19 tie-breaker. I think it functions more subtly than
20 that, Justice Kennedy.

21 CHIEF JUSTICE ROBERTS: It doesn't function
22 more subtly in every case. We have findings by both
23 courts below -- and I'm reading from the court of
24 appeals opinion at Petitioner appendix page 33.

25 "The district court found that race is

1 indisputably a meaningful factor that can make a
2 difference in the evaluation of a student's
3 application." If it doesn't make a difference, then we
4 have a clear case; they're using race in a way that
5 doesn't make a difference. The supposition has to be
6 that race is a determining factor.

7 We've heard a lot about holistic and all
8 that. That's fine. But unless it's a determining
9 factor, in some cases they're using race when it doesn't
10 serve the purpose at all. That can't be the situation.

11 GENERAL VERRILLI: It can make a difference.
12 It just doesn't invariably make a difference with
13 respect to every minority applicant, and that's the
14 key here --

15 CHIEF JUSTICE ROBERTS: You have to agree
16 that it makes a difference in some cases.

17 GENERAL VERRILLI: Yes, it does.

18 CHIEF JUSTICE ROBERTS: Okay.

19 GENERAL VERRILLI: But it doesn't
20 necessarily make a difference in the situation that
21 Justice Alito posited in the hypothetical --

22 JUSTICE GINSBURG: But that's the same --
23 the same would be true in -- of the Bakke plan, that in
24 some cases it's going to make a difference. The same
25 would be true under Grutter. The same would be true

1 under the policies now in existence at the military
2 academies.

3 GENERAL VERRILLI: That -- that is exactly
4 right, Justice Ginsburg, but the point is that it's not
5 a mechanical factor.

6 Now, with respect to the implementation
7 of -- and the narrow tailoring inquiry, with respect to
8 the University's implementation of this -- of its
9 compelling interest, I do think it's clear that,
10 although the Petitioner says she's challenging
11 implementation, that this plan meets every requirement
12 of Grutter and addresses the concern of Justice Kennedy
13 that you raised in dissent in Grutter. Whether Texas
14 had to or not, it did address that concern.

15 There's no quota. Everyone competes against
16 everyone else. Race is not a mechanical automatic
17 factor. It's an holistic individualized consideration.
18 And because of the way the process is structured, they
19 do not monitor the racial composition on an ongoing
20 basis.

21 JUSTICE SOTOMAYOR: General, I think, as I
22 take your answer, is that the supposition of
23 Justice Alito's question is truly impossible under this
24 system. There are not two identical candidates because
25 there are not identical mechanical factors that --

1 except the 10 percent plan.

2 Under the PIA, the factors are so varied, so
3 contextually set, that no two applicants ever could be
4 identical in the sense that they hypothesize.

5 GENERAL VERRILLI: That's correct. They
6 make specific individualized judgments about each
7 applicant --

8 JUSTICE SOTOMAYOR: Because no two people
9 can be the same --

10 CHIEF JUSTICE ROBERTS: Just to get back to
11 what we're talking about, you -- as I understand it,
12 race by itself is taken into account, right? That's the
13 only thing on the cover of the application; they take
14 race into account.

15 And the district court found -- and you're
16 not challenging -- that race makes a difference in some
17 cases, right?

18 GENERAL VERRILLI: Yes. But the key,
19 Mr. Chief Justice, is the way it makes a difference.
20 And it makes a difference by casting the accomplishments
21 of the individual applicant in a particular light, or
22 the potential of an individual applicant in a particular
23 light.

24 What -- what universities are looking for
25 principally with respect to this individualized

1 consideration is what is this individual going to
2 contribute to our campus? And race can have a bearing
3 on that because it can have a bearing on evaluating what
4 they've accomplished, and it can have a bearing for the
5 reasons I tried to identify earlier to Justice Alito on
6 what they can bring to the table, what they can bring to
7 that freshman seminar, what they can bring to the
8 student government, what they can bring to the campus
9 environment --

10 JUSTICE BREYER: All right, so. But it is
11 the correct answer to Justice Alito's -- if there are
12 ever two applicants where the GPA, the test -- the
13 grades, the SA1, SA2, leadership, activities, awards,
14 work experience, community service, family's economic
15 status, school's socioeconomic status, family's
16 responsibility, single-parent home, languages other than
17 English spoken at home, and SAT score relative to
18 school's average race, if you had a situation where
19 those -- all those things were absolutely identical,
20 than the person would be admitted on the bounds of race.

21 GENERAL VERRILLI: Not necessarily.

22 (Laughter.)

23 GENERAL VERRILLI: Because -- because -- I'm
24 trying to make a simple point here. Neither --

25 JUSTICE ALITO: General, if you don't

1 like --

2 GENERAL VERRILLI: -- neither -- neither
3 might get in.

4 JUSTICE ALITO: Let me withdraw my prior
5 question if you don't like that.

6 Before your time runs out, let me ask you
7 another question.

8 Your ROTC argument -- you make -- you
9 make -- you devote a lot of attention in your brief to
10 the military. Could you explain your ROTC argument to
11 me?

12 GENERAL VERRILLI: Sure.

13 JUSTICE ALITO: Why is it important for the
14 ROTC program for commissioned officers that Texas have
15 this other plan on top of the top 10 percent plan?

16 GENERAL VERRILLI: Our -- our military
17 effectiveness depends on a pipeline of well-qualified
18 and well-prepared candidates from diverse backgrounds
19 who are comfortable exercising leadership in diverse
20 settings, and --

21 JUSTICE ALITO: Oh, I understand that. And
22 just -- I don't want to cut you off, but --

23 GENERAL VERRILLI: Right.

24 JUSTICE ALITO: -- because the time is about
25 to expire, so you've got a marginal candidate who wants

1 to go to the University of Texas at Austin and is also
2 interested in ROTC. Maybe if race is taken into
3 account, the candidate gets in. Maybe if it isn't, he
4 doesn't get in. How does that impact the military?

5 The candidate will then probably go to Texas
6 A&M or Texas Tech? Is it your position that he will be
7 an inferior military officer if he went to one of those
8 schools?

9 GENERAL VERRILLI: No, Justice Alito.

10 JUSTICE ALITO: Then I don't understand the
11 argument.

12 GENERAL VERRILLI: The point of educational
13 diversity, the point of what the University of Texas is
14 trying to achieve is to create an environment in which
15 everyone develops an appropriate sense of citizenship,
16 everyone develops the capacity to lead in a racially
17 diverse society, and so it will benefit every ROTC
18 applicant from the University of Texas.

19 And 43 percent of the Officer Corps comes
20 from the ROTC. It's a very significant source of our
21 military leadership.

22 CHIEF JUSTICE ROBERTS: General, how -- what
23 is your view on how we tell whether -- when the
24 University has attained critical mass?

25 GENERAL VERRILLI: I don't think critical --

1 I agree with my friend that critical mass is not a
2 number. I think it would be very ill-advised to suggest
3 that it is numerical. So --

4 CHIEF JUSTICE ROBERTS: Okay. I'm hearing a
5 lot about what it's not. I'd like to know what it is
6 because our responsibility is to decide whether this use
7 of race is narrowly tailored to achieving, under this
8 University's view, critical mass.

9 GENERAL VERRILLI: May I answer,
10 Mr. Chief Justice?

11 CHIEF JUSTICE ROBERTS: Oh, yes.

12 GENERAL VERRILLI: Thank you.

13 I think -- I don't think that this is a
14 situation in which the Court simply affords complete
15 deference to the University's judgment that it hasn't
16 yet achieved the level of diversity that it needs to
17 accomplish its educational mission.

18 I think that the Court ought to -- has to
19 make its own independent judgment. I think the way the
20 Court would go about making that independent judgment is
21 to look at the kind of information that the university
22 considered. That could be information about the
23 composition of the class. It could be information about
24 classroom diversity. It could be information about
25 retention and graduation rates. It can be information

1 about -- that's specific to the university's context in
2 history. Is it a university that has had a history of
3 racial incidents and trouble or not? A series of
4 factors.

5 And then what the Court's got to do is
6 satisfy itself that the University has substantiated its
7 conclusion based on that -- based on the information
8 it's considered, that it needs to consider race to
9 further advance the educational goals that Grutter has
10 identified as a compelling interest.

11 And I will say, I do think, as the number of
12 minority enrollees gets higher, the burden on the
13 university to do that is going to get harder to meet.
14 But I don't think -- I don't think there is a number,
15 and I don't think it would be prudent for this Court to
16 suggest that there is a number, because it would raise
17 exactly the kind of problem that I -- that I think
18 Justice Kennedy identified in the Grutter dissent of
19 creating hydraulic pressure towards that number.

20 JUSTICE SCALIA: We should probably stop
21 calling it critical mass then, because mass, you know,
22 assumes numbers, either in size or a certain weight.

23 GENERAL VERRILLI: I agree.

24 JUSTICE SCALIA: So we should stop calling
25 it mass.

1 GENERAL VERRILLI: I agree.

2 JUSTICE SCALIA: Call it a cloud or
3 something like that.

4 (Laughter.)

5 GENERAL VERRILLI: I agree that critical
6 mass -- the idea of critical mass has taken on a life of
7 its own in a way that's not helpful because it doesn't
8 focus the inquiry where it should be.

9 If I may just add one word in conclusion.

10 CHIEF JUSTICE ROBERTS: Sure.

11 GENERAL VERRILLI: Thank you.

12 I think it is important, Your Honors, not
13 just to the government, but to the country, that our
14 universities have the flexibility to shape their
15 environments and their educational experience to make a
16 reality of the principle that Justice Kennedy identified
17 in Parents Involved, that our strength comes from people
18 of different races, different creeds, different
19 cultures, uniting in a commitment to freedom, and to
20 more a perfect union.

21 That's what the University of Texas is
22 trying to do with its admissions policy, and it should
23 be upheld.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, General.

1 Mr. Rein, 10 minutes.

2 REBUTTAL ARGUMENT OF BERT W. REIN

3 ON BEHALF OF THE PETITIONER

4 MR. REIN: Thank you, Mr. Chief Justice.

5 That's more than I expected.

6 CHIEF JUSTICE ROBERTS: Just keeping the
7 playing field level.

8 MR. REIN: Well, that's what we're seeking
9 in this case, Mr. Chief Justice, a level playing field
10 for Abby Fisher. So it's most apt at this point.

11 There's just three things I want to touch
12 on. First, there's been a lot of back and forth on
13 standing, but, as we have pointed out, that really
14 relates to merits. And I just want to make clear that
15 we do not accept the premise of that footnote, that she
16 would not have entered under any circumstances; that
17 they've asserted that, but, in fact, she was considered
18 for the summer program, which is --

19 JUSTICE SOTOMAYOR: Is your complaint
20 limited to injunctive relief and the return of the \$100?
21 As written, is that what it's limited to?

22 MR. REIN: No, because it said, "any and all
23 other damages," at the point when we were writing it,
24 which was --

25 JUSTICE SOTOMAYOR: In Arizonans and Alvarez

1 we said any all -- any and other -- all damages is too
2 speculative. Is what you actually see what I said:
3 Injunctive relief and the return of the \$100.

4 MR. REIN: And what I'm saying is that we
5 never had the opportunity to develop the full damages --

6 JUSTICE SOTOMAYOR: In --

7 MR. REIN: -- because of --

8 JUSTICE SOTOMAYOR: In *Arizonans and Alvarez*
9 we said you can't manufacture standing after the fact.
10 Did you ask only for injunctive relief and the \$100,
11 specifically?

12 MR. REIN: The only specific number in the
13 complaint, because of the point in time when it was
14 filed was the application fee, which we believe --

15 JUSTICE SOTOMAYOR: And you would have paid
16 that no matter what; under any system of admission you
17 would have paid the same \$100.

18 MR. REIN: You would have paid the fee in
19 return for a fair processing of the application, which
20 she did not receive, and we think that is a claim that
21 will be sustained. It is not tested at this point.

22 And the second thing is, because of the way
23 the case was bifurcated, with the agreement of all and
24 the district court as well, we did not develop the
25 additional damages here. We reserved the right to

1 amend, and as things have progressed --

2 JUSTICE SOTOMAYOR: For what, nominal
3 damages?

4 MR. REIN: No --

5 JUSTICE SOTOMAYOR: And then how do you get
6 around Arizonans?

7 MR. REIN: Because as -- as in the BIO, what
8 UT pointed out was there are other kinds of financial
9 injuries which were not ascertainable at the time the
10 complaint was filed because we were trying to put her
11 into the university.

12 JUSTICE SOTOMAYOR: She was going to get a
13 better job because she went to a different university?

14 MR. REIN: That's one of the things they
15 suggested. There are differences in cost between the --
16 what she paid at LSU and what she would have paid at UT.
17 I'm just saying, these are all reserved questions and
18 they don't go to standing. The Court made that clear in
19 Bakke.

20 Let me go to another issue that, you know, I
21 think I never completed my answer to Justice Breyer.
22 Where we stand on what you should do about Grutter is as
23 follows.

24 We recognize, as in the words of -- that the
25 Solicitor General just issued -- that there is an

1 interest which is cognizable in diversity. That is --
2 that was the root question in Grutter, could you
3 recognize it at all. But what we are concerned about,
4 as you are seeing here, is universities like UT and many
5 others have read it to be green light, use race, no end
6 point, no discernible target, no critical mass written,
7 you know, in circumstances reduced to something that can
8 be reviewed.

9 And as long as you don't cross two lines,
10 determinative points and fixed quotas -- "quotas"
11 meaning we will fill this quota exclusively with who we
12 deem to be under-represented -- you are okay. We don't
13 think that's the way Grutter was intended. Grutter was
14 intended to say this is an area of great caution; using
15 race itself raises all kinds of red flags, so before you
16 use race make a determination whether really, your
17 interest in critical mass -- that is, in the dialogue
18 and interchange, the educational interest, is that --

19 JUSTICE SOTOMAYOR: You are not suggesting
20 that if every minority student that got into a
21 university got into only the physical education program;
22 and in this particular university that -- that physical
23 education program includes all the star athletes; so
24 every star athlete in the school happens to be black or
25 Hispanic or Asian or something else, but they have now

1 reached the critical mass of 10, 15, 20 percent -- that
2 the university in that situation couldn't use race?

3 MR. REIN: Well, I think you are talking
4 about --

5 JUSTICE SOTOMAYOR: In the holistic way that
6 Grutter permits?

7 MR. REIN: Well, if you are saying there's a
8 -- a differentiated department of physical education,
9 which is like a separate college, you have changed the
10 nature of the hypothetical.

11 JUSTICE SOTOMAYOR: No, it's just that every
12 one of their students who happens to be a minority is
13 going to end up in that program. You don't think the
14 university could consider that it needs a different
15 diversity in its other departments?

16 MR. REIN: Well, if that were the case,
17 remember the factor that is causing it, and you are
18 assuming, is choice. You have a critical mass of
19 students. They choose to major in different things, and
20 that's one of the base problems with the classroom
21 diversity concept. They never asked the question why,
22 if 40 percent of our students are minorities, are they
23 not in the small classrooms? Why does that happen?
24 Statistically you would say that's an aberration. You
25 might ask the question what's causing it? Because in

1 order to fit --

2 JUSTICE SOTOMAYOR: Aren't they saying the
3 same thing when they say, when we are looking at the
4 holistic measure, we are looking for that student who
5 is a -- that minority student who is a nuclear
6 scientist?

7 MR. REIN: No. Because they don't take into
8 account your interests, they don't ask you, are you
9 going to join ROTC, they don't ask you are you going to
10 major -- major in physics. And when it comes time in
11 the UT system to allocate access to different majors,
12 they do that in a way that is basically premised on
13 academic index.

14 So they have a two-tiered admission system.
15 They are only here focused -- their preference goes to
16 admission as such, it doesn't go to sorting people out
17 by majors.

18 And if I might then say to Justice Breyer, I
19 think our answer is, when we see what UT is doing, what
20 we that -- Grutter's -- you know, it has been perceived
21 as a green light; go ahead and use race, race which is
22 otherwise really a highly questionable, an abominable
23 kind of sorting out. That unchecked use of race, which
24 we think is -- has been spawned by misreading of
25 Grutter, needs to be corralled. So what we --

1 JUSTICE GINSBURG: Is it any more unchecked
2 than the Harvard plan which -- that started all this off
3 in 1978, decided by Justice Powell? Is it any different
4 from how race is used in our military academies?

5 MR. REIN: Well, I mean, they are two
6 different questions. The Harvard plan is a very
7 different world. It's a plan of wholly individualized
8 admission comparing individuals one on one, to establish
9 the platonic ideal of the class as the educational
10 mission. This is not what is going on at UT.

11 This is not an individualized, I will look
12 at you. I will score you. I will score you
13 individually. But as they keep saying, at the point of
14 admission, I am not admitting people; I am admitting
15 categories, boxes; and that relates to Justice Alito's
16 question.

17 I thought your hypothetical, Justice Alito,
18 was entirely fair, because in the way they do their
19 system, in the PAI scoring, you can figure out that two
20 people would have had the same PAI score but for race.
21 It's an add-on. It allows them to boost the PAS
22 component of the PAI score. So -- it is not infrequent.
23 There are many, many candidates who will score the same
24 PAI, may even have the same AI, and then you boost some
25 of them.

1 Now, what UT says is, well, we don't boost
2 all the minorities. And that -- as they've stood here
3 today, and they said in their briefs, we want to boost
4 the ones we like. We want those affluent minorities who
5 we think will improve, in our view, dialogue. That is
6 contrary indeed to the fact that they give points in the
7 same system for socioeconomic disadvantage. It's at
8 odds with itself.

9 But it's purely race, and it comes to the
10 ultimate question then, which, Chief Justice, you were
11 asking: Where is the end point? If you have nothing to
12 gauge the success of the program, if you can't even say
13 at the beginning we don't have critical mass because we
14 don't know what it is and we refuse to say what it is,
15 there is no judicial supervision, there is no strict
16 scrutiny and there is no end point to what they are
17 doing.

18 So what we have said, and it comes right
19 back to Justice Breyer, how would you write it, you can
20 clarify it, you can say Grutter properly applies,
21 requires you to do A, B, C, and -- and we've said in our
22 brief that would be satisfactory. But to the extent
23 that you then have it surviving side by side, there
24 could be enormous confusion.

25 JUSTICE BREYER: So what you want me to do

1 is go read back what we wrote in Grutter, go look what
2 the underlying determinations of critical mass were
3 there, go look exactly how it is being done in Texas --
4 which I have charts that help me see that -- and I will
5 then find enough of a difference that I can write some
6 words that can be administered by 2,000 or 3,000 -- a
7 thousand Federal judges as they try to deal with
8 programs like this, in -- that's the point, is that
9 right?

10 MR. REIN: Well, I'm saying if you clarify
11 the needs and the necessity point, if you then look at
12 some of the other deficiencies and clarify the -- the
13 consideration of reasonably available alternatives as a
14 necessity, if you then attribute that -- you attribute
15 the weaknesses of the Texas program to the absence of
16 those factors, I think you can fashion a result in this
17 case which may or may not have to, quote, "overrule"
18 Grutter.

19 It's really a matter, what do you -- do you
20 want to clearly restate what it is that allows the use
21 of this odious classification? That's what we are
22 talking about, it's a narrow window; and it should be
23 stated as a narrow window.

24 JUSTICE SOTOMAYOR: So you don't want to
25 overrule Grutter, you just want to gut it.

1 MR. REIN: Excuse me?

2 JUSTICE SOTOMAYOR: You just want to gut it.
3 You don't want to overrule it, but you just want to gut
4 it.

5 MR. REIN: Well --

6 JUSTICE SOTOMAYOR: Now you want to tell
7 universities that once you reach a certain number, then
8 you can't use race anymore.

9 MR. REIN: Justice Sotomayor, I don't want
10 to gut it. And the only way one could reach that
11 conclusion is to assume that Grutter is an unlimited
12 mandate without end point to just use race to your own
13 satisfaction and to be deferred to in your use of race.
14 That is unacceptable. That is the invasion of Abigail
15 Fisher's rights to equal protection of the law.
16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel,
18 counsel.

19 The case is submitted.

20 (Whereupon, at 12:23 p.m., the case in the
21 above-entitled matter was submitted.)

22

23

24

25

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