

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

STUDENTS FOR FAIR ADMISSIONS, INC.,)
) Petitioner,)
) v.) No. 20-1199
PRESIDENT AND FELLOWS OF)
HARVARD COLLEGE,)
) Respondent.)

Pages: 1 through 120
Place: Washington, D.C.
Date: October 31, 2022

HERITAGE REPORTING CORPORATION

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6 PRESIDENT AND FELLOWS OF)
7 HARVARD COLLEGE,)
8 Respondent.)
9 - - - - -
10 Washington, D.C.
11 Monday, October 31, 2022

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

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

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P R O C E E D I N G S

(12:58 p.m.)

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

Mr. Norris.

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

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

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

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

Harvard ranks Asians less likable,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 JUSTICE BARRETT: But --

6 MR. NORRIS: That is over --

7 JUSTICE BARRETT: Oh, sorry. Finish.

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

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

21 But what if -- you know, Justice
22 Jackson had asked in the last argument, you
23 know, about pride. What if a -- what if an
24 applicant wrote an essay about how integral
25 their racial identity was to them as a source of

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

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

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

1 believe, as race.

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

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

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

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

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

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

24 MR. NORRIS: Correct.

25 JUSTICE KAGAN: Or did I misunderstand

1 what you were saying?

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

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

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

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

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

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

24 So they're not looking at just being
25 black and white. They're rejecting a lot of the

1 10 percent applicants who have higher numbers
2 than, I guess, whites and Asian Americans.

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

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

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

22 JUSTICE SOTOMAYOR: I'll let Mr.
23 Waxman debate that because that's not the way I
24 saw that record. It was very clear that the
25 district court found, for example, that being

1 Asian or not being Asian wasn't involved
2 statistically in any amount -- in any of the
3 admissions, whether for ADLCs or for non-ADLCs.

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

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

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

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

21 MR. NORRIS: I think it's entirely
22 consistent, Your Honor. The Freedmen's Bureau
23 for the most part did not draw any racial
24 classifications. It was classifications on the
25 basis of being a former slave or a refugee. And

1 the refugees at the time from the Civil War were
2 mostly white.

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

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

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

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

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

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

23 MR. NORRIS: Right. Okay.

24 JUSTICE KAVANAUGH: You -- you said --
25 you said, I think, to Justice Gorsuch, and I'm

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

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

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

22 JUSTICE GORSUCH: Okay. If I might
23 just finish up. The Freedmen's Bureau is on the
24 federal side. We have briefs before us that
25 also talk about practice on the state side.

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

8 Could you address those?

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

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

22 Now the Kentucky statute is even
23 clearer. It gave benefits -- it was a racial
24 classification, but it gave benefits to a group
25 of people in Mercer County, Kentucky, who had no

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

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

22 MR. NORRIS: I think there's something
23 to that, Justice Gorsuch. Justice Scalia
24 recounted some of that history I think in Croson
25 and maybe Adarand, where he said there's no

1 reason to think that the same distrust of the
2 federal government would have been there at the
3 time.

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

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

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

25 JUSTICE SOTOMAYOR: So what do we --

1 MR. NORRIS: That's not race
2 consciousness.

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

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

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

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

24 However, Harvard has not made that
25 argument and has no factual record that you

1 would need to support that argument. It does
2 not justify its use of race based on its own
3 prior discrimination against blacks and
4 Hispanics.

5 JUSTICE ALITO: Are you aware of de
6 jure segregation today?

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

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

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

24 MR. NORRIS: Absolutely. And I -- I
25 think the top 10 percent program in Fisher,

1 which really got a bad wrap in Fisher II but was
2 meant -- solutions like that are meant to
3 account for residential segregation in a
4 race-neutral way.

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

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

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

24 JUSTICE SOTOMAYOR: Blacks wouldn't
25 increase.

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

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

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

23 MR. NORRIS: Not at all, Your Honor.
24 I don't -- I think strict scrutiny means you
25 need to -- you need to be able to reject

1 race-neutral alternatives because they don't
2 satisfy the compelling interest, and the
3 compelling interest is overall broad-based
4 diversity, not declines in our -- our fencing
5 status, not drops in five points on the U.S.
6 News and World Report, but it's diversity.

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

17 JUSTICE KAVANAUGH: You heard the --

18 JUSTICE KAGAN: But, Mister --

19 JUSTICE KAVANAUGH: Go ahead.

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

21 JUSTICE KAVANAUGH: Uh-uh.

22 JUSTICE KAGAN: I mean, are you saying
23 now that there is an interest and a compelling
24 interest in racial diversity among other kinds
25 of diversity? I mean, putting Harvard's -- you

1 know, whether Harvard should be more
2 socioeconomically diverse, it probably should
3 be. But putting that -- I mean, is there an
4 interest in racial diversity?

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

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

19 And that must be because you think
20 it's just not important enough, isn't that
21 right?

22 MR. NORRIS: I don't think that's
23 right. So we have very detailed record evidence
24 here that if Harvard just turned off race on its
25 admissions process, it would still have

1 6 percent African Americans, I believe it's
2 9 percent Hispanics, so 15 percent
3 underrepresented minority --

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

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

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

23 MR. NORRIS: I don't think there's any
24 level that justifies explicit racial
25 classifications. But I'm going to fight the

1 hypothetical one more time if you'll let me
2 because race-neutral alternatives --

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

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

19 MR. NORRIS: I -- I don't know that
20 the -- that the evidence about the diversity of
21 doctors and patients or anything about the
22 medical field in that sense --

23 JUSTICE KAGAN: It wouldn't matter?
24 Yeah, okay, or maybe it would. You don't know.
25 If you're a police department and you serve a

1 diverse community, is it super-important to you
2 to have a diverse set of police officers?

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

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

14 MR. NORRIS: Absolutely can think
15 about it. The Court's decision in Feeney says
16 knowledge of race is not the violation. It is
17 using it as a factor to distinguish --

18 JUSTICE KAGAN: I'm using -- let's say
19 a judge says I want a diverse set of clerks.
20 That's -- you know, I want clerks who would --
21 you know, great on any number of criteria, but I
22 also want a diverse set of clerks. So, over the
23 years, people will look at that and they'll say:
24 There are Asian Americans there, there are
25 Hispanics there, there are African Americans

1 there, as well as there are whites there.

2 Can a judge not do that?

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

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

19 JUSTICE KAGAN: Yeah, but the point
20 here is, look, everybody would rather achieve
21 all our racial diversity goals through
22 race-neutral means. Everybody would rather
23 that. And that's certainly what our cases say
24 you have to do.

25 The question is, when the race-neutral

1 means don't get you there, are you prevented
2 from taking race into account in all those ways
3 that I said? And I could add a dozen more.
4 Businesses who find it necessary, you know, in
5 order to achieve their economic objectives to
6 have racially diverse workforces. I mean, I
7 could go on and on and on.

8 And the question is, when race-neutral
9 means can't get you there, don't get you there,
10 when you've tried and tried and they still won't
11 get you there, can you go race-conscious?

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

18 And I don't -- I mean, this is not --
19 this doesn't have to be hypothetical. We
20 presented an alternative to Harvard that would
21 achieve socioeconomic diversity for the first
22 time, that would boost underrepresented minority
23 representation, that would lower the number of
24 white students on campus. And so we're talking
25 not about no diversity and diversity. We're

1 talking about 10 percent black representation or
2 14 percent black representation.

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

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

20 MR. NORRIS: Well, I think you need to
21 be measuring -- well, I mean, if you just take
22 Grutter's interest as a given, you need to be
23 measuring whether your student body is diverse
24 on all dimensions. I don't think Harvard is
25 very --

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

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

19 Now, in this case, Harvard -- the only
20 testimony we have is that Harvard doesn't know
21 what number it needs to get the educational
22 benefits of diversity. It doesn't know what
23 evidence to consult to know whether it has that.
24 It doesn't know what the evidence would even
25 look like, as Dean Fitzsimmons testified, and

1 the only evidence is Harvard's report on -- on
2 the importance of diversity, which made --

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

12 And as I look at that, I want to know,
13 what does that mean, effective or adequate?
14 What -- what's the measurement? Really, the
15 same question I had for the Solicitor General.
16 It's asking us to say, yes, that's adequate, but
17 what does that -- it's got to say more than
18 that, I think.

19 MR. NORRIS: Part of the problem, I
20 think, is the fuzziness of the interest in
21 Grutter itself, but --

22 JUSTICE KAVANAUGH: No, no, no. No.
23 Accept the interest.

24 MR. NORRIS: Okay.

25 JUSTICE KAVANAUGH: Sorry to

1 interrupt. Accepting that the interest,
2 race-neutral, this is the back half of your --
3 back part of your brief, race-neutral
4 alternatives are adequate.

5 And I -- I just want to know, okay,
6 well, California, Florida, great. That's
7 adequate because?

8 MR. NORRIS: The --

9 JUSTICE KAVANAUGH: And that could be
10 translated to Harvard because?

11 MR. NORRIS: The University of
12 California system is the most racially diverse
13 elite institution in the world. Whites are the
14 third most represented group on campus. So, if
15 racial diversity has these educational benefits,
16 then they've achieved them.

17 I think that they studied their
18 undergraduates on your racial consciousness and
19 your cross-racial understanding. They get
20 really high scores at Berkeley. Berkeley and
21 all the UC system tells prospective students
22 that we have a very diverse student body and
23 that the educational benefits were -- that you
24 would expect to get from that are present. It's
25 the top ranked public university in the country.

1 It's great.

2 JUSTICE KAVANAUGH: And your point
3 then, the necessary add-on point is, and that
4 could be translated to Harvard in essence or
5 something sufficient could be translated to
6 Harvard, and I just want you to fill in the
7 blank there. Why?

8 MR. NORRIS: I -- I think it can. Our
9 race-neutral alternative that we've focused on,
10 Simulation D is what we called it, would make
11 Harvard go -- it would go from 82 percent
12 economically advantaged to 51 percent. You
13 would actually have pure socioeconomic diversity
14 where it's about 50/50.

15 The number of white students would
16 decrease. The number of Asian students would
17 increase. The number of Hispanic students would
18 increase. I think you'd see lots of benefits in
19 that.

20 JUSTICE KAVANAUGH: The number of
21 black students would decrease from what to what?

22 MR. NORRIS: Would decrease from
23 14 percent to 10 percent was the number. And
24 our expert testified that that number --
25 10 percent is an absolute floor because he

1 only -- the number couldn't be higher because
2 his socioeconomic preference didn't have the
3 sophisticated data that Harvard has.

4 I think that's successful on any -- on
5 any metric. And I -- I've never heard Harvard
6 prove the -- the -- the delta there as being
7 necessary for educational benefits of diversity.

8 JUSTICE SOTOMAYOR: Counsel, I don't
9 know what to do in a situation like this one.
10 If you have perfect scores on every metric,
11 you're not guaranteed a spot at Harvard because
12 they have enough people with perfect scores of
13 every background that exceeds their class limit.

14 At some point, something has to break
15 the tie. And as we know, top 10 percent
16 students of Asian and of black and Hispanic
17 backgrounds in academic and extracurricular
18 activities are not being admitted to Harvard.

19 So it's not as if once we say take
20 race out of this that all of the people who are
21 -- that you consider super-qualified are going
22 to get in. But, on every matrix, there's going
23 to be competing applicants.

24 And you're saying a school can't look
25 at its general diversity figures and say, among

1 equal applicants, I might make race a
2 tie-breaker if the numbers that I have on that
3 matrix seem fairly low otherwise. You're
4 saying, no, you can't do that.

5 MR. NORRIS: No, you cannot do that.
6 That's what Title VI prevents. It doesn't
7 prevent --

8 JUSTICE SOTOMAYOR: And that basically
9 what you're saying is really race diversity is
10 not important?

11 MR. NORRIS: Race --

12 JUSTICE SOTOMAYOR: So I don't
13 actually see why all the race-based -- because
14 all of the alternatives, whether it's the
15 10 percent plan, whether it's socioeconomic,
16 they're all subterfuges to reaching some sort of
17 diversity in race.

18 You're touting them as race-neutral,
19 but none of them are race-neutral. You're doing
20 them because you believe in racial diversity. I
21 just don't understand why considering race as
22 one factor but not the sole factor is any
23 different than using any of those other metrics.

24 MR. NORRIS: Well, I don't think those
25 are -- those are racial classifications in

1 disguise. Harvard's never criticized Simulation
2 D that we presented as a racial classification
3 in disguise. It criticizes it because it
4 doesn't hit Harvard's precise racial numbers.

5 It's based on socioeconomic status.
6 And I don't think anyone thinks eliminating the
7 legacy --

8 JUSTICE SOTOMAYOR: No. It -- it
9 reduces SAT score averages. It reduces lots of
10 other factors to get to your numbers.

11 MR. NORRIS: I mean, I think that's
12 our point, that -- that SAT scores would go from
13 the 99th percentile to the 98th percentile.
14 That's not sacrificing academic excellence.
15 That's moving Harvard from Harvard to Dartmouth.
16 Dartmouth is still a great school. They get
17 98th percentile SAT scores. We've got to make
18 some sacrifices.

19 JUSTICE SOTOMAYOR: I -- I -- I don't
20 -- I -- I actually --

21 JUSTICE KAGAN: There are those who
22 love it.

23 JUSTICE SOTOMAYOR: Yeah.

24 (Laughter.)

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

3 JUSTICE THOMAS: Nothing.

4 CHIEF JUSTICE ROBERTS: Justice Alito?

5 JUSTICE ALITO: No.

6 CHIEF JUSTICE ROBERTS: Anything

7 further, Justice Kagan?

8 Justice Kavanaugh?

9 JUSTICE KAVANAUGH: One question about
10 the -- how to think about the 25-year sentence
11 in Grutter and the surrounding discussion.

12 MR. NORRIS: Yeah, absolutely. I
13 think that what people forget about the 25-year
14 mark or the four paragraphs you mentioned before
15 where they explain that racial preferences, they
16 will fail their own acid test unless they make
17 themselves unnecessary.

18 So I think what Justice O'Connor was
19 saying is that in 25 years, if we still need
20 race, it's not that you get another 25 years.
21 It's that we then declare racial preferences to
22 be a failure and call it off and go to race --
23 race neutrality and try that instead.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett?

1 JUSTICE BARRETT: But we're not to
2 that 25-year point yet, right? So, if -- if it
3 has its own self-destruct mechanism where it
4 says like, hey, Grutter says we've got to call
5 it quits because they're just not working, are
6 we obligated to give more time?

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

11 And I think the only legal standard
12 this Court has ever recognized for when do you
13 stop using race in education is in Brown with --
14 with all deliberate speed.

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

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Waxman.

24

25

1 ORAL ARGUMENT OF SETH P. WAXMAN
2 ON BEHALF OF THE RESPONDENT

3 MR. WAXMAN: Mr. Chief Justice, and
4 may it please the Court:

5 The evidence and findings in this case
6 confirm what this Court has long recognized,
7 that a university student body comprising a
8 multiplicity of backgrounds, experiences, and
9 interests vitally benefits our nation,
10 stereotypes are broken down, prejudice is
11 reduced, and critical thinking and
12 problem-solving skills are improved.

13 Student body diversity makes our
14 businesses more innovative and globally
15 competitive, our scientists more creative, our
16 medical professionals more effective, and our
17 military more cohesive.

18 Experience has more than borne out
19 Justice Powell's observation that our future as
20 a country depends on having leaders who have
21 enjoyed wide exposure to students as diverse as
22 the nation itself.

23 And so, as this Court has consistently
24 held, if necessary to achieve genuine diversity,
25 a university need not blind itself to race,

1 which like the type of high school an applicant
2 attended, their socioeconomic and family
3 background or the part of the country they live
4 in, forms a part of who they are.

5 Now SFFA attempts to use Harvard's
6 admissions program as some sort of proof that
7 settled constitutional precedent is egregiously
8 wrong, but while SFFA is fully entitled to its
9 own legal arguments, it is not entitled to its
10 own facts.

11 Following exhaustive discovery in this
12 case, the trial court considered the testimony
13 of 30 witnesses and detailed expert analysis and
14 made extensive meticulous findings which the
15 court of appeals robustly affirmed, and those
16 findings, applying strict scrutiny, are that
17 Harvard does not improperly emphasize race in
18 its admissions decisions, it does not engage in
19 racial balancing, it most certainly does not
20 discriminate against Asian American applicants,
21 and it does not yet have a current workable
22 race-neutral alternative.

23 The false narrative to which SFFA
24 clings is no basis to dismantle decades of
25 precedent confirming the constitutionality of

1 limited race consciousness in admissions.

2 And I very much welcome the Court's
3 questions.

4 JUSTICE THOMAS: Mr. Waxman, the
5 Petitioner argues that over 80 percent -- that,
6 actually, you could -- you do have available a
7 non- -- a race-neutral approach that would yield
8 different but excellent results.

9 And the argument includes the fact
10 that, at least as they argue, that you're over
11 80 percent wealthy students, that that's not
12 diverse, and that over 30 percent -- or
13 30 percent or so of a class is made up of ALDC
14 students and that if you were to lower those
15 numbers, you could achieve far more diverse
16 results without -- along socioeconomic lines. I
17 don't think it's arguable that Harvard is
18 socioeconomically diverse. But -- at least it
19 doesn't appear that way. But it seems -- and
20 that would not have a constitutional problem if
21 you did it socioeconomically.

22 And I'd like you simply to address
23 their argument.

24 MR. WAXMAN: Yes. Thank you.

25 First of all, the numbers that my

1 friend is throwing around are not, in fact, the
2 numbers that actually reflect, for example,
3 socioeconomic diversity at Harvard, where, as it
4 stands now, 20 percent of all matriculants pay
5 nothing, 70 percent of underrepresented
6 minorities pay nothing, and well over half of
7 all applicants get substantial financial aid.

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

21 This -- the data in this case shows
22 that if that -- if race were eliminated, you
23 couldn't consider race, and you also could give
24 none of those preferences, the racial diversity
25 of the matriculating class would go down. The

1 -- the representation of African Americans, if
2 you just stopped considering race, would go from
3 14 to 6 percent, but if you also stopped
4 considering ALDCs, it would go to 5 percent.

5 With respect to --

6 JUSTICE GORSUCH: Let's just say
7 hypothetically, though, hypothetically, and I --
8 I know I'm going to get --

9 MR. WAXMAN: I -- I know all the usual
10 caveats --

11 JUSTICE GORSUCH: All right. All
12 right.

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

14 JUSTICE GORSUCH: Thank you,
15 Mr. Waxman.

16 (Laughter.)

17 MR. WAXMAN: Yes.

18 JUSTICE GORSUCH: Thank you.

19 MR. WAXMAN: I'm pretty sure, since
20 you're asking me, I'm not going to like the
21 hypothetical.

22 JUSTICE GORSUCH: You're not going to
23 like it. But let's assume that a very wealthy
24 university could pay for everybody to go and
25 still increase its endowment. It's a perpetual

1 motion machine, Malcolm Gladwell called them.

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

11 MR. WAXMAN: So I'm not claiming --
12 I'm accepting your hypothetical as hard as it is
13 for me in light of what the evidence in this
14 case shows.

15 JUSTICE GORSUCH: I understand that.
16 There we go.

17 MR. WAXMAN: I -- I am not claiming
18 that there is a compelling interest in having
19 donors per se, there is a compelling interest in
20 your proverbial art museum, there is a
21 compelling --

22 JUSTICE GORSUCH: There is a
23 compelling interest in the art museum?

24 MR. WAXMAN: No, no.

25 JUSTICE GORSUCH: No.

1 MR. WAXMAN: These are the claims that
2 I'm not claiming.

3 JUSTICE GORSUCH: Okay. Okay. I'm
4 sorry.

5 MR. WAXMAN: Okay? I'm disclaiming
6 all of those things.

7 JUSTICE GORSUCH: All right.

8 MR. WAXMAN: When you look at a
9 so-called race-neutral alternative, the question
10 that this Court -- that Justice Powell
11 articulated in Bakke and this Court underscored
12 and amplified in Grutter and then in Fisher is,
13 how does -- is -- does that race-neutral
14 alternative actually substantially impact the
15 character of the institution and the education
16 that's being provided? And here --

17 JUSTICE GORSUCH: Oh. Now let me stop
18 you there because -- and I'm sorry to
19 interrupt -- but, surely, getting rid of those
20 preferences would substantially impact the
21 university.

22 MR. WAXMAN: And -- and --

23 JUSTICE GORSUCH: But you -- you're
24 saying they are not a compelling interest for
25 constitutional purposes --

1 MR. WAXMAN: So, no, what I'm -- what
2 I'm saying --

3 JUSTICE GORSUCH: -- for the
4 Fourteenth Amendment? Or does the Fourteenth
5 Amendment make -- make legacy children and donor
6 --

7 MR. WAXMAN: Of course --

8 JUSTICE GORSUCH: Okay. So we agree?

9 MR. WAXMAN: Of course not. And the
10 truth of the matter is that if this were a case
11 in which the evidence showed that eliminating a
12 legacy preference made a substantial difference,
13 the district judge who -- to say that the
14 district judge was applying strict skeptical
15 scrutiny on the narrow tailoring principles is
16 quite an understatement --

17 JUSTICE GORSUCH: Okay.

18 MR. WAXMAN: -- might have decided
19 otherwise. What the district court found --

20 JUSTICE GORSUCH: Okay.

21 MR. WAXMAN: And, Justice Gorsuch, if
22 I can just --

23 JUSTICE GORSUCH: Sure.

24 MR. WAXMAN: -- make one comment about
25 the record which I think responds to at least

1 the gist and spirit of your hypothetical. With
2 respect to race-neutral alternatives, the -- the
3 simulation, what has come to be called
4 Simulation D in this Court, the district court
5 found that "the Simulation D would require
6 'sacrifices on almost every' " -- "'every
7 dimension important to Harvard's admissions
8 process.' "

9 Among other things -- and these are
10 all recited in the Smith Committee report, they
11 are recited in the -- the extensive discussion
12 of race-neutral alternatives in both the
13 district court opinion and the court of appeals
14 opinion -- are that, for example, with respect
15 to academic excellence, the academic factor, the
16 number of -- of matriculants with -- who score 1
17 or 2 on the five-point scale would go down
18 17 percent.

19 JUSTICE GORSUCH: I'm familiar.

20 Mr. Waxman --

21 MR. WAXMAN: Yeah.

22 JUSTICE GORSUCH: -- I am familiar.

23 I'll follow that along with --

24 MR. WAXMAN: So, in other words, it's

25 not --

1 JUSTICE GORSUCH: -- we go down from
2 99 to 98th percentile. I've got it. If I might
3 --

4 MR. WAXMAN: No, no.

5 JUSTICE GORSUCH: -- if I might shift
6 gears. Okay. I -- I -- I -- I am familiar with
7 all those, and I appreciate that, and I
8 understand your point. It was a hypothetical.

9 What do we do about history here?
10 Because one -- one of -- one -- one thing we
11 know or we think we know or we're told in the
12 briefs at least is that Harvard's move to a
13 holistic application approach happened in the
14 1920s because it wanted to impose a quota on
15 Jewish applicants, but it didn't want to do
16 through the front door, so it used diversity as
17 a -- as a subterfuge for racial quotas.

18 MR. WAXMAN: What the record in this
19 case shows, and it's -- it's discussed in some
20 detail in the -- I'm going to blank on the names
21 of the reports, but the various reports that
22 Harvard has done over the years on diversity and
23 diverse admissions in the case, one is the
24 so-called Rudenstine Report and the other is the
25 Khurana Report, both of which are in the Joint

1 Appendix, is that Harvard actually even before
2 the Civil War has as an admissions policy an
3 effort to, in fact, diversify on both viewpoint
4 and geography the class.

5 Now it is no -- there's no doubt, and
6 Harvard acknowledges and is ashamed, that in
7 1920, one of its presidents, President Lowell,
8 decided that there were too many Jews and that
9 they were then going to start asking questions
10 on the application that would allow them to take
11 into effect character.

12 The notion that that bears at all on
13 the way that Harvard's current admissions
14 process, which uses a 40-person admissions
15 committee that meets and decides each
16 application en banc, in discussion, has any
17 resemblance whatsoever to the racist,
18 anti-Semitic policy of a single Harvard
19 president is insubstantial, as the courts found.

20 JUSTICE GORSUCH: Okay. How do you
21 respond then to -- again, we have many briefs on
22 this point from Asian American applicants who
23 have -- and they say there's an entire industry
24 to help them appear less Asian on their college
25 applications and that they consider elite

1 colleges to have Asian quotas effectively, if
2 not in name.

3 MR. WAXMAN: I'll say two things, one,
4 generally about the amicus briefs, and, two,
5 specifically about Harvard, and I -- I certainly
6 want to get to number two.

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

19 Now, with respect to Harvard, there
20 was -- to say that there was evidence in this
21 case is quite an understatement. The district
22 court found -- I'm citing -- I'm quoting page
23 261 of the Joint Appendix, and it's reiterated
24 by the court of appeals on page 80 of the Joint
25 Appendix -- that there was "no evidence of

1 discrimination against Asian Americans
2 whatsoever."

3 Again, now on page 264, there was
4 consistent, unambiguous, and convincing
5 testimony that there was no discrimination in
6 the administration -- administrative --
7 admissions process in general and the personal
8 rating in particular.

9 The plaintiffs in this case could not,
10 after four years of discovery in which they
11 hand-picked applications to view in total, they
12 could not produce a single witness to testify
13 that he or she had been --

14 JUSTICE ALITO: Well, Mr. --

15 MR. WAXMAN: -- discriminated against.

16 JUSTICE ALITO: -- Mr. Waxman, let me
17 stop you there because you referred to the
18 personal score, and that's a score that Harvard
19 gives based on character traits such as
20 integrity, courage, kindness, and empathy. But
21 the record shows that Asian student applicants
22 get the lowest personal scores of any other
23 group.

24 What accounts for that? Is it -- it
25 has to be one of two things. It has to be that

1 they really do lack integrity, courage,
2 kindness, and empathy to the same degree as
3 students of other races, or there has to be
4 something wrong with this personal score.

5 MR. WAXMAN: That's -- that is -- I
6 mean, I want to get to what the evidence was
7 there, but that -- that syllogism, with all due
8 respect, is wrong. There was, for example, a
9 study that was done in 1983 that looked at why
10 it was that female applicants to graduate school
11 at the University of --

12 JUSTICE ALITO: No, just address this.

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

14 JUSTICE ALITO: The personal score
15 that's given to Asian applicants to Harvard, why
16 do they -- why are they given a lower score than
17 any other group?

18 MR. WAXMAN: Okay. So the answer to
19 why they -- as a group, why there is a slight
20 numerical disparity with respect to the personal
21 rating of Asian Americans, but -- and also a
22 slight numerical disparity to the advantage of
23 Asian Americans with respect to the
24 extracurricular rating and the academic rating
25 was the answer that their expert gave with

1 respect to the latter two, which is that the
2 only way that you can -- the only model that can
3 be created to figure out what was going into the
4 personal rating couldn't look at almost anything
5 that admissions officers look at in those
6 ratings.

7 It can't -- there's no way that it
8 could model what the guidance counselor letters
9 said, what the teacher letters said, what the
10 essays said, what the interviewers' letters
11 said. In other words, what they --

12 JUSTICE ALITO: Well, I thought the
13 interviewers did not rate the applicants lower
14 than other -- than other applicants based on
15 race.

16 MR. WAXMAN: There --

17 JUSTICE ALITO: There was not the
18 disparity in what was done by -- what was said
19 by the interviewers.

20 MR. WAXMAN: The -- with respect to
21 the alumni interviewers --

22 JUSTICE ALITO: The alumni
23 interviewers.

24 MR. WAXMAN: -- based on -- based on
25 the subset that was included here, that their

1 subset, by the way, excluded all ALDC
2 applicants, that is, even though they
3 acknowledged that there was not only no evidence
4 of discrimination against Asian American ALDCs,
5 but they did better, they eliminated from their
6 -- their model applicants that represent on
7 average 30 percent of the admitted class --

8 JUSTICE ALITO: I -- I -- I still --
9 putting aside the teacher recommendations or
10 guidance counselor recommendations, which I'll
11 come to, I still haven't heard any explanation
12 for the disparity between the personal scores
13 that are given to Asians. They rank below
14 whites. They rank way below Hispanics and
15 really way below African Americans.

16 What -- and you're talking about
17 hundreds and hundreds of applicants, maybe
18 thousands. What is the explanation for that?

19 MR. WAXMAN: So the explanation that
20 was -- I can't do better than the findings of
21 fact in the trial court as affirmed. And I --
22 and I -- but I want to make two points very
23 clear with respect to your question.

24 We -- all of this evidence was -- all
25 of this was on display and in front of the trial

1 court for, this Asian American part of it, for
2 well more than a week, maybe two weeks.

3 The district court found, considering
4 all of the evidence, that there is "no credible
5 evidence that corroborates the improper
6 discrimination suggested by SFFA's
7 interpretation of the personal rating," page
8 264.

9 JUSTICE ALITO: Well, all right. I'll
10 try one more time. The district court found "a
11 statistically significant and negative
12 relationship between Asian American identity and
13 the personal rating assigned by Harvard
14 admissions officers."

15 MR. WAXMAN: That's correct. And what
16 she said is the record will not allow a full
17 explanation of that because, if the -- the --
18 this -- this -- there is -- there was no
19 evidence with respect to what teachers said,
20 what guidance counselors said, what these
21 students wrote -- wrote about.

22 But what we can say with respect to
23 the allegation of discrimination in this case,
24 which was the -- the -- the definition of
25 discrimination that was at issue in Bakke and

1 Grutter and Fisher and which their expert, which
2 their lawyer got up at opening statement and
3 said: When we talk about discrimination in this
4 case, we're talking about discrimination in
5 admissions outcomes.

6 And here again, the district court
7 found and the court of appeals also concluded
8 that there was no evidence of discrimination in
9 admissions outcomes against Asian Americans --

10 JUSTICE ALITO: If you -- if you --

11 MR. WAXMAN: -- whatever you think
12 about the personal rating, which is, after all,
13 simply a number that --

14 CHIEF JUSTICE ROBERTS: Justice --
15 Justice Alito would like to ask a question.

16 MR. WAXMAN: I'm sorry.

17 JUSTICE ALITO: Go ahead.

18 MR. WAXMAN: I'm not trying to
19 filibuster you.

20 JUSTICE ALITO: Finish your -- finish
21 your sentence.

22 MR. WAXMAN: Okay.

23 JUSTICE ALITO: Then I will ask one
24 more question on this.

25 MR. WAXMAN: I just -- I -- I want to

1 make one other thing clear to the extent that
2 it's not clear from the record. The personal
3 rating, like the academic rating and the
4 extracurricular rating and the athletic rating,
5 is a number that is put down by a "first
6 reader." That is, the file comes in, it's not
7 usually complete, and just as a matter of
8 triage, one of the 40 admissions officers goes
9 through and gives these numerical numbers.

10 It is -- the testimony was it is not
11 considered in any way once the subcommittees and
12 committees meet. It "fades into the
13 background." It is not the basis of admissions
14 decisions.

15 And so not only did the court find as
16 fact that those -- that that slight disparity
17 was not evidence of discrimination even in the
18 personal rating, it had no effect with respect
19 to outcomes.

20 JUSTICE ALITO: It makes no difference
21 whatsoever?

22 MR. WAXMAN: It's --

23 JUSTICE ALITO: It doesn't affect --

24 MR. WAXMAN: -- it's not that it makes
25 no difference whatsoever. Look at what the

1 expert testimony was, and I realize we're --

2 JUSTICE ALITO: Does it make a
3 difference or doesn't it make a difference?

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

6 JUSTICE ALITO: Then why do you do it?

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

8 JUSTICE ALITO: Then why do you do it?

9 MR. WAXMAN: We said -- I mean, as --

10 JUSTICE ALITO: If it doesn't matter,
11 why do you do it?

12 MR. WAXMAN: We do it as a matter of
13 triage. Right now, Harvard is getting -- last
14 year got 61,000 applications for 1600 slots.
15 And it is an entirely rational way of figuring
16 out where -- how you're going to allocate your
17 attention to ask an admissions officer, as the
18 file is being developed, just go through in a
19 very rough way and rate a particular application
20 based on what you can see on these four metrics.

21 The fact that Asian Americans got a
22 marginally -- on average, a marginally lower
23 personal rating score is no more evidence of
24 discrimination against them than the fact that
25 they got a marginally higher rating than any

1 data can show on academics and extracurriculars.
2 It doesn't mean that they're either smarter or
3 people think they're smarter.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 JUSTICE SOTOMAYOR: Counsel --

7 CHIEF JUSTICE ROBERTS: We'll get to
8 you in a moment.

9 There's been a lot of talk about
10 African American applicants to Harvard in sort
11 of a general indistinguishable way when, in
12 fact, they cover a very broad swath of -- of
13 applicants.

14 MR. WAXMAN: Of course.

15 CHIEF JUSTICE ROBERTS: What do you do
16 with respect to an African American applicant?
17 I mean, you're concerned about diversity of
18 viewpoint. Let's say his viewpoints tend to be
19 very close to, you know, the white applicants,
20 and he grew up in Grosse Point, you know, had a
21 great upbringing, comfortable, his parents went
22 to Harvard, he's a legacy, and yet, under your
23 system, when he checks African American, he gets
24 a tip. He gets a benefit from that.

25 Isn't that --

1 MR. WAXMAN: So --

2 CHIEF JUSTICE ROBERTS: -- isn't that
3 very stereotypical on -- under the Harvard
4 program?

5 MR. WAXMAN: -- I -- I think it's --
6 it's -- well, first of all, it is simply not the
7 case that every -- every black applicant gets a
8 "tip." In fact, I'll direct the Court's
9 attention to page 1,811 of the Joint Appendix,
10 which includes this beautiful chart which
11 represents an undisputed model of the relative
12 importance of race on application outcomes.

13 And the one that you cannot actually
14 even see to your far right is race. Race
15 explains --

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

18 (Laughter.)

19 MR. WAXMAN: Nonetheless, you have the
20 page reference.

21 CHIEF JUSTICE ROBERTS: -- it is not
22 zero.

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

25 CHIEF JUSTICE ROBERTS: Well, so

1 there's only a little racial discrimination in
2 the case.

3 MR. WAXMAN: Are you asking me whether
4 Harvard is -- you're asking me to answer a
5 question that assumes that Harvard is
6 discriminating on the basis of race? No. I
7 can't accept that.

8 CHIEF JUSTICE ROBERTS: Well, isn't
9 that --

10 MR. WAXMAN: What Harvard says is --

11 CHIEF JUSTICE ROBERTS: -- isn't that
12 what -- Mr. Waxman, isn't that what the case is
13 about, the discrimination against Asian
14 Americans?

15 MR. WAXMAN: There was a -- Count I of
16 the complaint was that Harvard was intentionally
17 discriminating against Asian Americans. The --
18 the entire evidence in that case, all of the
19 plaintiff's proof, was that Asian Americans are
20 treated worse than white applicants; that is,
21 that there was prejudice, intentional
22 discrimination. That could not -- the evidence
23 could not --

24 CHIEF JUSTICE ROBERTS: What do you do
25 with the -- what do you do with the charts --

1 MR. WAXMAN: -- more soundly have
2 refuted that.

3 CHIEF JUSTICE ROBERTS: -- what do you
4 do with the charts in their brief, I think
5 they're on page 24 --

6 MR. WAXMAN: Twenty-four.

7 CHIEF JUSTICE ROBERTS: -- to 43, the
8 academic decile and the comparative treatment of
9 African Americans, Hispanics, and Asian
10 Americans? You don't see a surprising disparity
11 in that?

12 MR. WAXMAN: So there's a lot to be
13 said about that, but I guess the first thing I
14 would say about that chart is that their own
15 expert agreed that because that chart is simply
16 a descriptive statistic, it is "not equal to
17 evidence of discrimination." It reflects a
18 pattern which might or might not be real.

19 Now understand that that chart that
20 they've displayed for you, they have eliminated
21 all ALDC applicants. So one-third of the
22 admitted class, over six years, they're not even
23 in that chart. They have -- that chart is
24 predicated on something called an academic
25 index. An academic index is a formula that

1 looks at two things, high school grades and test
2 scores. The academic --

3 CHIEF JUSTICE ROBERTS: And so people
4 in the different racial categories, they have a
5 different result based on other factors, which
6 include race?

7 MR. WAXMAN: They -- they have a
8 different result because, among the many, many,
9 many characteristics of any particular
10 individual applicant that Harvard considers, one
11 that it does not consider is the academic index.
12 That is, the very metric that they're displaying
13 for you Harvard doesn't even use.

14 The only -- the testimony in the case
15 was the only reason that the academic index is
16 even calculated is because the Ivy League
17 athletic rules require that your recruited
18 athlete class, the AA for your -- AI for your
19 recruited athlete class not be more than two
20 standard deviations below --

21 CHIEF JUSTICE ROBERTS: Okay, Mr.
22 Waxman, put aside --

23 MR. WAXMAN: -- the matriculating
24 class last year.

25 CHIEF JUSTICE ROBERTS: -- put aside

1 the hypothetical about the African American
2 applicant who's a legacy. Take two African
3 American applicants in the same category,
4 however you want to take it. They both get or
5 both can get a tip, right, based on their race.

6 And yet they may have entirely
7 different views. Some of their views may
8 contribute to diversity from the perspective of
9 Asians or whites. Some of them may not. And
10 yet it's true that they're eligible for the same
11 increase in the opportunities for admission
12 based solely on their skin color?

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

14 CHIEF JUSTICE ROBERTS: That was a
15 question.

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

18 There is no doubt that for -- as the
19 testimony showed, that for applicants who are
20 essentially so strong on multiple dimensions, so
21 extraordinarily strong on multiple dimensions
22 that they are sort of on the bubble, that they
23 might -- they have a real candidate for
24 admission, African American -- being African
25 American or being Hispanic or in some instances

1 being Asian American can provide one of many,
2 many tips that will put you in.

3 CHIEF JUSTICE ROBERTS: Well, people
4 say that, yes, but you will have to concede, if
5 it provides one of many, that in some cases it
6 will be determinative.

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

8 CHIEF JUSTICE ROBERTS: Okay. So
9 we're talking about race as a determining factor
10 in admission to Harvard.

11 MR. WAXMAN: Race in some -- for some
12 highly qualified applicants can be the
13 determinative factor, just as being the -- you
14 know, an oboe player in a year in which the
15 Harvard-Radcliffe orchestra needs an oboe player
16 will be the tip.

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

19 MR. WAXMAN: I --

20 CHIEF JUSTICE ROBERTS: We did fight a
21 Civil War to eliminate racial discrimination,
22 and that's why it's a matter of -- of
23 considerable concern.

24 And I think it's important to -- for
25 you to establish whether or not granting a

1 credit based solely on skin color is based on a
2 stereotype when you say this brings diversity of
3 viewpoint. It may not bring diversity of
4 viewpoint -- viewpoint in a particular case at
5 all.

6 MR. WAXMAN: Well, number one,
7 viewpoint diversity, while Harvard values it and
8 seeks it, is not the only reason -- by far the
9 only reason for wanting a genuinely diverse
10 class. We want a diverse class for backgrounds
11 and interests and lots of things other than just
12 viewpoint.

13 If we were to use, for example, the
14 example that has been discussed, I believe, for
15 every other advocate that has stood up this
16 morning, you know, and ask what about taking
17 race into account if the student writes about
18 it, the fact of the matter is Harvard is
19 attempting not to have among it -- among a class
20 of -- that is diverse among many generations, a
21 class that is racially diverse only for people
22 for whom their racial identity and their racial
23 experiences is of such compelling importance
24 that they write about it, right?

25 Your hypothetical about the black

1 student who may have very different views than
2 the stereotypical -- the stereotype of what a
3 black student will have was, in fact -- is, in
4 fact, the subject of the -- that's discussed in
5 the Khurana Report.

6 The Khurana Report gave in its
7 analysis of the importance and dimensions of
8 diversity an actual example that came from
9 Richard Light's book, published book, which had
10 a particular class. It happened to have three
11 African American students in it. An African
12 American student gave an answer in a discussion,
13 which another African American student said:
14 That is not my view. My view is quite the
15 opposite. And a third one said: I wasn't
16 actually going to say anything, but I have a
17 completely different view.

18 That was an incredible learning
19 experience not only for the non-African
20 Americans in the discussion but for them. And
21 that's what Harvard is trying to get at.

22 CHIEF JUSTICE ROBERTS: Thank you, Mr.
23 Waxman.

24 MR. WAXMAN: I'm sorry for taking so
25 long to get at that.

1 CHIEF JUSTICE ROBERTS: No, no. I
2 appreciate your answers.

3 Justice Thomas?

4 Justice Alito?

5 JUSTICE ALITO: In -- in Bakke,
6 Justice Powell chose Harvard's admission program
7 as a model, and that selection has had an
8 enormous effect for the last 50 years. Harvard
9 submitted a brief in Bakke, along with a number
10 of other colleges. I went back and I looked at
11 it and noticed that the brief talked about
12 Harvard's program going back 30 years, but it
13 didn't say anything about President Lowell or
14 what Harvard had done back in the 1920s.

15 So my question is, did Harvard sell
16 Justice Powell a bill of goods? Do you think
17 Justice Powell would have championed, would have
18 held up the Harvard program as a model, as an
19 exemplar for the whole country if he knew about
20 the origins of the holistic program?

21 MR. WAXMAN: Justice Powell used the
22 Harvard -- used Harvard's description about its
23 admissions process and the limited extent to
24 which it was then and for the past 30 years had
25 been using race as one factor among many to

1 achieve genuine diversity in its student body.

2 Harvard -- the Harvard brief --
3 Justice Powell didn't take it or not take it
4 because, prior to the Civil War, Harvard College
5 was a leader in encouraging diversity in its
6 undergraduate applications, any more than the
7 fact that it had a terrible stain on its history
8 a hundred years ago.

9 It was taken for what it was presented
10 as, and it was -- and it fairly presented how
11 the Harvard admissions process worked then and
12 works now.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor?

15 JUSTICE SOTOMAYOR: Counsel, there are
16 two questions that I want to get to that were
17 asked of you. The first was Justice Alito's
18 about the poor personal rating. It seems to me
19 that Petitioner claims that Harvard's
20 discriminating against Asian Americans because
21 it uses subjective criteria that's affecting the
22 personnel ratings. That's how I think I read
23 his question, correct?

24 So it's not that it's using race in
25 admitting people. It's that it's using a

1 corrupted personnel rating, correct?

2 MR. WAXMAN: Well, I don't want to
3 speak for Justice -- I don't want to presume to
4 speak for Justice Alito.

5 JUSTICE SOTOMAYOR: I agree.

6 MR. WAXMAN: I think it is -- it is
7 fair to say that the criticism of the -- this --
8 the personal rating --

9 JUSTICE SOTOMAYOR: Right.

10 MR. WAXMAN: -- relates to the
11 "subjectivity" that is involved really in all of
12 the ratings but particularly in the personal
13 rating.

14 JUSTICE SOTOMAYOR: Well, it goes --
15 the evaluations that use words like "not a" --
16 "non-leader," "not caring," "not" whatever --

17 MR. WAXMAN: Yes. Yeah.

18 JUSTICE SOTOMAYOR: -- it applies to
19 all races, correct?

20 MR. WAXMAN: Of course.

21 JUSTICE SOTOMAYOR: All races --
22 applicants receive those ratings as well,
23 correct?

24 MR. WAXMAN: Correct.

25 JUSTICE SOTOMAYOR: And I think what

1 the expert was saying, the fact that you have
2 these numbers, standing alone don't tell you
3 anything, correct, you have to look at all the
4 input that goes into why --

5 MR. WAXMAN: Correct. Correct.

6 JUSTICE SOTOMAYOR: -- whether there
7 was discrimination or not, correct?

8 MR. WAXMAN: Correct.

9 JUSTICE SOTOMAYOR: All right. So the
10 numbers alone tell you nothing.

11 MR. WAXMAN: That's -- that's right.
12 The numbers can tell you -- you could -- you can
13 tote up 100,000 applications and look at what
14 the first reader says -- scored and measure it
15 against declared race and come up with a feature
16 that says, gee, across these 150,000 or, in this
17 case, 150,000 minus all the ALDCs, it looks
18 like, you know, on average, Asian American --
19 self-declared Asian Americans have this number
20 and self-declared whites have this number.

21 It tells you nothing about why that
22 number was given, any more than why --

23 JUSTICE SOTOMAYOR: And -- and I don't
24 want to cut you off, but I want to get --

25 MR. WAXMAN: No, I -- I -- I need to

1 be cut off.

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

6 MR. WAXMAN: There was actual proof
7 that it did not reflect discrimination. There
8 was a multi -- there was expert analysis on --
9 on -- on multi-dimensionality and that looked at
10 the non-academic index that showed that, for
11 example, white applicants who got a 1 or a 2 on
12 academics and Asian Americans who got 1 or 2 on
13 academics, for whatever reason, the latter group
14 got lower teacher ratings than the former.

15 And the same with guidance counselor
16 ratings. It doesn't tell you why. It doesn't
17 permit -- and it certainly doesn't permit an
18 inference that Harvard is discriminating. The
19 -- the district court could not have been more
20 definitive about the absence of any racial
21 discrimination or discrimination against Asian
22 Americans than it was.

23 A finding that the Office of Civil
24 Rights in the early 19 -- in -- in -- in 1990
25 also found.

1 JUSTICE SOTOMAYOR: Could you deal
2 with Simulation D? I think that you were trying
3 to explain why the district court rejected that
4 stimulation -- simulation.

5 MR. WAXMAN: Simulation.

6 JUSTICE SOTOMAYOR: Simulation, I'm
7 sorry, simulation numbers as meaningful. Could
8 you finish your answer?

9 MR. WAXMAN: Yes. And, you know, in
10 particular, I'll -- you know, I'll -- I'll point
11 the Court to -- because I'm not going to be able
12 to do it as well as the district court -- to
13 pages 208 to 220 of the Joint Appendix, which is
14 the district court's findings on this, and 73 to
15 79, which is the court of appeals, and 1307 to
16 1325, which is the Smith Committee's analysis of
17 this.

18 But, basically, what the district
19 court found was, as I said, that Simulation D
20 would require significant sacrifices -- I don't
21 have the quote right in front of me now -- on
22 almost every dimension that Harvard values,
23 including a substantial decline -- we're not
24 talking about a decline in SAT scores or going
25 from the 99th percentile to the 98th percentile.

1 We're talking about the following things that
2 the court found.

3 The percentage of the matriculating
4 class that would be academic 1s or 2s would go
5 down by 17 percent. Every other factor would go
6 down by at least 10 percent, between 10 and
7 22 percent.

8 The number of -- of matriculates
9 interested in majoring in the humanities, which
10 is a major tip that Harvard gives because of
11 Harvard's recent inability to matriculate
12 excellent students who want to major in the
13 humanities, would go down by 14 percent.

14 The number of African Americans
15 admitted would go down from 14 to 10 percent.
16 It was the whole confluence of all of those
17 consequences that led the district court to
18 confirm that it was not a workable, effective
19 race-neutral alternative.

20 JUSTICE SOTOMAYOR: Well, it seems
21 that for Justice Gorsuch, none of those other
22 things are compelling interest. And how do --

23 MR. WAXMAN: Well --

24 JUSTICE SOTOMAYOR: -- you respond to
25 that? He would say --

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

3 JUSTICE SOTOMAYOR: Well, I -- I --
4 but he seemed to say an art museum is not
5 important. So, if the matrix shows that those
6 interested in the arts falls to -- falls
7 dramatically, that might be of concern to
8 Harvard. I think it was valuable, but --

9 MR. WAXMAN: It might very well be a
10 concern. Would it -- would it lead -- would it
11 lead a judge skeptically applying strict
12 scrutiny to say: Oh, it just doesn't work,
13 you're not going to have an art museum, or
14 you're not going to have a squash team, or
15 you're not going to have, you know, alumni
16 contributions.

17 It wasn't any of those things. It's a
18 caricature to say that those were the reasons
19 why this particular thing wasn't a race-neutral
20 alternative.

21 Now I just want to say, if you think,
22 notwithstanding the findings, that the district
23 court and the court of appeals didn't properly
24 apply the kind of strict scrutiny and narrow
25 tailoring analysis that it should have, okay,

1 that's a remand.

2 I don't think the record will bear
3 that out. It is not a reason to dispense with
4 decades of constitutional precedent that has
5 allowed all of these, what this Court has
6 properly considered to be a compelling national
7 interest in having this kind of learning
8 environment.

9 CHIEF JUSTICE ROBERTS: Thank you.

10 Justice Kagan?

11 JUSTICE KAGAN: Mr. Waxman, there have
12 been a lot of questions today, and I take these
13 to be important questions, about what is the end
14 point. If -- if we can achieve racial diversity
15 through neutral mechanisms rather than through
16 race-conscious mechanisms, we should. We've
17 said that many times.

18 So the question is, when can we say
19 that we can achieve our racial diversity goals
20 in that way? And I guess I have a two-part
21 question and -- and then an assumption that I
22 want you to bake into the two parts.

23 The first is, what is Harvard doing in
24 an ongoing way to test whether that is true?
25 And the second is, does Harvard see any progress

1 along that dimension? In other words, I think
2 it was said by Petitioner's counsel, oh, Harvard
3 is doing -- you know, is putting this -- is --
4 is -- is using as great a preference as it ever
5 did. And the question is, over time, has
6 Harvard found that it has become less necessary
7 to use race-conscious means or not?

8 Here's the assumption that I want to
9 have you bake into this, which is I take
10 Petitioners to be saying, and I think that this
11 is an important thing, that it doesn't matter if
12 some part of the reason for adopting
13 race-neutral approaches is to achieve racial
14 diversity. I think that they very clearly said
15 that. I'm not sure I understand why given their
16 legal arguments, but I think that they very
17 clearly said that.

18 So assume that you can, you know, sit
19 down and say we're -- we're -- we're -- we're
20 trying to figure out what race-neutral
21 mechanisms to use, and part of the goal is to
22 achieve racial diversity. What is Harvard doing
23 to answer that question and is it any closer?

24 MR. WAXMAN: I have firmly in mind the
25 second part of your question. If I don't also

1 answer the first, please remind me.

2 The evidence in the case is that for
3 decades Harvard has been taking steps other than
4 the conscious -- other than race-consciousness
5 to increase the level of diversity, including
6 ethnic and racial diversity.

7 And these are discussed, actually, in
8 the Smith Committee report and the -- and Dean
9 Smith's testimony and in the findings. It, for
10 example, in the wake of Grutter and actually
11 before substantially increased the amount of
12 resources that it put in outreach, in partnering
13 with organizations that -- that assist and, you
14 know, advance the educational potential of
15 minority and low socioeconomic students.

16 It has -- it has achieved some success
17 in -- in -- in getting additional applications
18 not just from minorities but from minority
19 applicants who are actually really qualified to
20 attend Harvard.

21 It thought about, well, maybe a way to
22 increase this is to substantially increase our
23 financial aid, and there's evidence in the case,
24 there's actually a beautiful chart that shows
25 how the level of financial aid went up at

1 various points over two decades and what
2 happened with respect to the racial diversity of
3 the applicant class and the matriculating class.

4 And what the testimony showed and the
5 findings was it made a difference to a point.
6 After a certain point, it no longer made any
7 difference. Harvard tested the proposition that
8 its early action program, it's -- it's not early
9 decision in the way that most schools are
10 because you're not committed to it, but that by
11 admitting a significant percentage, I don't
12 know, 20 or 25 percent of its class for people
13 who applied, you know, early, early on in the
14 academic year, it was disadvantaging minority
15 applicants and applicants from low socioeconomic
16 circumstances because they didn't have the kind
17 of resources, guidance counselors and test prep
18 and all that sort of stuff, to be able to take
19 advantage of it.

20 They -- they -- they ended it and
21 asked other universities to do the same thing.
22 With two exceptions, no one else did. And what
23 they found at the end of five years was that it
24 had the opposite result; that is, it made it
25 more difficult for them to recruit and

1 matriculate underrepresented minorities.

2 And there were -- there were a bunch
3 of other things in the record about things that
4 Harvard has done, some of which have had
5 substantial success. And so the notion that
6 Harvard is doing things the same way and is
7 always going to do the same things the same way
8 is just wrong.

9 Harvard is -- Harvard completely
10 recognizes and endorses this Court's statement
11 in Grutter that "there are serious problems of
12 justice connected with the idea of preference
13 itself." That's why it holds itself -- why it
14 is attempting to achieve all of the compelling
15 benefits of -- of a genuinely diverse student
16 body in the most race-neutral way that it can.

17 And in terms of -- I don't know if
18 this is the first part of your question, but
19 Harvard is actually attempting -- is measuring
20 how it is doing in terms of diversity and the
21 benefits of diversity and what needs to be done
22 and what other things can be done in a
23 race-neutral way on a very regular basis.

24 And I can give you the data on -- you
25 know, with respect to either, but, for example,

1 Harvard -- there is a -- Harvard said --
2 committed itself in 2018 that it would, you
3 know, continue to look for race-neutral
4 alternatives and have another systematic review,
5 you know, a systematic, statistically, you know,
6 rigorous review about how it is doing.

7 That committee has been formed and has
8 already met for the five years that will -- you
9 know, that will transpire next year. Yes, we
10 are trying. Yes, we have tried other things
11 that have helped. Are we there yet? No. And
12 that's the reason why the 45 percent -- the
13 district court's finding of 45 percent. That's
14 what it shows. It shows --

15 JUSTICE KAGAN: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you, Mr.
17 Waxman.

18 Justice Gorsuch?

19 JUSTICE GORSUCH: Yeah. I -- I just
20 was hoping to get an answer to the second half
21 of the question --

22 MR. WAXMAN: Oh, okay.

23 JUSTICE GORSUCH: -- which was when --
24 when does Harvard anticipate this will end?

25 MR. WAXMAN: Yeah.

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

8 MR. WAXMAN: So Harvard, like the
9 Solicitor General and like UNC, understood all
10 four paragraphs of what Justice O'Connor wrote
11 in her opinion and takes it to heart. What
12 Justice O'Connor said was it's been 25 years
13 since Grutter, there's evidence that our society
14 is changing, it is -- we expect that 25 years
15 from now the use of racial preferences will no
16 longer be necessary.

17 JUSTICE GORSUCH: So Harvard agrees
18 with that?

19 MR. WAXMAN: And --

20 JUSTICE GORSUCH: Does Harvard agree
21 with that?

22 MR. WAXMAN: I don't -- I -- Harvard
23 does not currently, based on its data, expect
24 that in 2028 it will have achieved -- been able
25 to use a -- only race-neutral alternatives.

1 JUSTICE GORSUCH: So --

2 MR. WAXMAN: But what this --

3 JUSTICE GORSUCH: -- so -- so --

4 MR. WAXMAN: -- but what I do agree
5 with --

6 JUSTICE GORSUCH: -- what -- what are
7 -- what are Harvard's --

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

9 JUSTICE GORSUCH: I'm just -- I'm just
10 -- just -- it's a real simple question. If
11 Harvard doesn't have an answer, that's fine, but
12 does Harvard have some view about when?

13 MR. WAXMAN: Harvard -- yes, Harvard's
14 view about when doesn't have a date on it.
15 Harvard takes to heart Justice O'Connor's
16 opinion that "in the context of higher
17 education, the durational requirement can be met
18 by periodic reviews to determine whether racial
19 preferences are still necessary" --

20 JUSTICE GORSUCH: Okay.

21 MR. WAXMAN: -- "to achieve student
22 body diversity."

23 JUSTICE GORSUCH: Thank you.

24 MR. WAXMAN: And we want to be put to
25 that strict scrutiny test.

1 JUSTICE GORSUCH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh?

4 JUSTICE KAVANAUGH: I do have two or
5 three questions.

6 First, you're seeking educational
7 diversity, as I understand it, at Harvard, but
8 my understanding, correct me if I'm wrong, is
9 that you don't ask about religion.

10 And why the disparate treatment of
11 religion and race when -- when evangelical
12 Christians, Catholics, Muslims add to the
13 educational diversity at Harvard and other
14 religious groups add to the diversity and why --
15 why not ask about that?

16 MR. WAXMAN: So Harvard greatly values
17 religious diversity. It is extraordinarily
18 proud of the religious diversity --

19 JUSTICE KAVANAUGH: How can it track
20 it if it doesn't ask about it?

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

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

25 MR. WAXMAN: Okay. Harvard is not

1 tracking it in the admissions process other than
2 to the extent that many, many students indicate
3 what their religion is. Harvard -- Harvard has
4 not provided, thought it necessary, and so far
5 as I know, nobody has suggested that Harvard has
6 any need to provide a tip for religious
7 diversity because the Harvard undergraduate
8 population is so religiously diverse.

9 There are currently 47 --

10 JUSTICE KAVANAUGH: That answers my --

11 MR. WAXMAN: -- chaplains --

12 JUSTICE KAVANAUGH: -- that answers my
13 question.

14 MR. WAXMAN: Yeah.

15 JUSTICE KAVANAUGH: I understand.

16 Okay.

17 MR. WAXMAN: I just -- I just want to
18 say that our ministry minister -- ministers to
19 27 different religious denominations.

20 JUSTICE KAVANAUGH: All right. It was
21 a factual question.

22 Second, I think you agree that the
23 baseline in our precedents, operating within the
24 confines of our precedents, as you want us to
25 do, is race neutrality. And we've allowed,

1 though, limited consideration of race in
2 educational -- in higher educational admissions.
3 As you've heard, two limits on that, as I
4 understand it, one, the adequate race-neutral
5 alternatives; two, the durational limits, the 25
6 years or whatever durational limit you think
7 works there.

8 I just want to make -- make sure you
9 agree with how I set that up. In other words,
10 race neutrality is the baseline. There are two
11 limits on the consideration of race-conscious
12 educational admissions at colleges and
13 universities. Adequate race-neutral
14 alternatives would be one. A durational limit,
15 25 or something else, would be the other. Is
16 that how you read our precedents or not?

17 MR. WAXMAN: I read your precedent in
18 that -- I think you have other requirements too,
19 which is it has to be flexible, it has to be one
20 factor among many, you know, et cetera, et
21 cetera.

22 JUSTICE KAVANAUGH: Right.

23 MR. WAXMAN: But, with -- the only --
24 I agree with your two categorizations, except
25 that with respect to the durational

1 requirements, we understand it to be the -- the
2 -- the -- consistent with the language from
3 Justice O'Connor's opinion that I quoted the
4 Court --

5 JUSTICE KAVANAUGH: Okay.

6 MR. WAXMAN: -- which is that the
7 narrow tailoring requirement and the
8 race-neutral alternative requirement, strictly,
9 scrupulously, and skeptically applied, will tell
10 us when race-neutral alternative --

11 JUSTICE KAVANAUGH: Okay. And one
12 last one. This picks up on Justice Kagan's and
13 Justice Gorsuch's questions, I believe.

14 But, on the adequate race-neutral
15 alternatives question, it seems that Harvard
16 would have to sacrifice potentially something
17 else to achieve what you think would be
18 meaningful, sufficient racial diversity. And I
19 think the questions, Justice Gorsuch, were,
20 well, why don't you have to then sacrifice those
21 something elses to achieve the -- if you're
22 going to otherwise use race-conscious means?

23 MR. WAXMAN: There's no question
24 that our --

25 JUSTICE KAVANAUGH: In other words, we

1 -- I think that's a legal question we're going
2 to have to ultimately figure out. Does a
3 university have to sacrifice those other things
4 or not?

5 MR. WAXMAN: And so what this Court's
6 precedents say, you know, Bakke, Grutter, and
7 Fisher, are, of course, race -- you know, there
8 are race-neutral alternatives that may require
9 some sacrifices. A university is not required
10 to sacrifice, you know, so much that it changes
11 the essential character. I -- I -- I wish I had
12 the -- this Court's own words, but I think
13 that's the test, and that was certainly the test
14 the district court applied.

15 JUSTICE KAVANAUGH: That -- that
16 suffices and you answered it. Thank you.

17 MR. WAXMAN: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?

20 JUSTICE BARRETT: Mr. Waxman, this is
21 not a question about Harvard's history of
22 anti-Semitism, but I do want to go back to the
23 opinion in Bakke and Justice Powell's holding up
24 Harvard's application process as a model and
25 then Justice O'Connor in Grutter again referred

1 back to Harvard's admissions process.

2 And I want to know whether Harvard's
3 admissions process has meaningfully changed from
4 the time that Justice Powell held it up? I
5 mean, what Justice Powell found attractive about
6 it, what Justice O'Connor endorsed, was the
7 holistic aspect of it and that race can be used
8 as a tip. In its essence, is it the same?

9 MR. WAXMAN: Yes, race can be used as
10 a tip, as one of many, many, many tips in an
11 effort to achieve diversity that is across many,
12 many dimensions beyond ethnicity.

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

16 MR. WAXMAN: Yes. Harvard is -- can I
17 just give a one-sentence --

18 JUSTICE BARRETT: Yeah. Sure.

19 MR. WAXMAN: -- explication of that?

20 What the Harvard admissions committee
21 is attempting to do, with the benefit -- the
22 luxury of a pool of applicants that is supremely
23 qualified, is to bring together a class of 1600
24 matriculants who are best in the judgment of the
25 admissions committee and the faculty that

1 oversees it, are best able to learn from and
2 teach each other as an organic whole.

3 JUSTICE BARRETT: So my question is --
4 we've been talking a lot about end point, and my
5 question is: So Bakke was, you know, almost 50
6 years ago now. If Harvard's admissions process
7 is essentially the same in the way that it
8 accounts for race and thinking about end points,
9 and I -- I recognize and you described some of
10 the things that Harvard is doing to try to
11 recruit more minority applicants, but why are we
12 to think that there will be an end point?

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

18 MR. WAXMAN: So the system that is
19 we're taking race into account as one factor
20 among many, obviously, the extent to which race
21 is race qua race is a factor, is dependent on
22 the extent to which so-called race-neutral
23 alternatives have already helped Harvard to
24 matriculate a class that is diverse along this
25 dimension and others.

1 And Harvard does track its progress in
2 this regard and accommodate the admissions
3 process. For example, in terms of where we are,
4 when will we get there, you know, the -- the
5 record contains, you know, any number of a
6 faculty committee study, a working group, a task
7 force, all of which made reports about this, but
8 it also annually does a comprehensive survey of
9 its graduating seniors and asks them questions
10 that go to this.

11 And the -- the survey in the record on
12 the benefits side to -- I think to Harvard's
13 great satisfaction showed that two-thirds of all
14 of the seniors said that their Harvard
15 experience strengthened their ability to relate
16 to people of different races, nations, and
17 religions, and 70 percent said that Harvard's
18 experience had led them to seriously question or
19 rethink their beliefs about a race or ethnic
20 group different than their own. That is --

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

23 MR. WAXMAN: And it shows that -- it
24 shows that in terms of are we there yet, you
25 know, we're not going to achieve a

1 hundred percent. Honestly, 70 percent is pretty
2 darn good.

3 And it would not have been -- at the
4 time that Harvard wrote its brief in the Bakke
5 case and at the time that Grutter was decided,
6 those were not the statistics.

7 JUSTICE BARRETT: So you think you're
8 getting closer to a termination point?

9 MR. WAXMAN: I -- we are very
10 definitely getting closer to a termination point
11 both in terms of engineering race-neutral
12 alternatives but also achieving a class that is
13 diverse across religious viewpoint, racial,
14 ethnic, you know, academic, political -- you
15 know, yes, we are -- we -- we are proud of the
16 progress we've made.

17 As Dean Smith said, we still have work
18 to do, including with respect to the way in
19 which we treat students and allow students to
20 interact with each other once they get here.

21 JUSTICE BARRETT: Okay. Thank you.

22 MR. WAXMAN: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 MR. WAXMAN: Thank you.

1 CHIEF JUSTICE ROBERTS: General
2 Prelogar. Welcome back.

3 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
4 FOR THE UNITED STATES, AS AMICUS CURIAE,
5 SUPPORTING THE RESPONDENT

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

8 The Court has heard hours of argument
9 on the constitutional issues in this case, and
10 so I would like to take a step back and focus on
11 the profound consequences of the Court's
12 decision here for the nation that we are and the
13 nation that we aspire to be.

14 Petitioner seeks a sweeping ruling
15 that would harm students at schools and colleges
16 throughout the nation. A blanket ban on
17 race-conscious admissions would cause racial
18 diversity to plummet at many of our nation's
19 leading educational institutions.

20 Race-neutral alternatives right now
21 can't make up the difference, so all students at
22 those schools would be denied the benefits of
23 learning in a diverse educational environment,
24 and because college is the training ground for
25 America's future leaders, the negative

1 consequences would have reverberations
2 throughout just about every important
3 institution in America.

4 For the United States military, as
5 I've explained, having a diverse officer corps
6 is a critical national security imperative. For
7 corporate America, diversity is essential to
8 business solutions. For the medical community
9 and scientific researchers, diversity is an
10 essential element of innovation and delivering
11 better health outcomes.

12 Overruling Grutter would have
13 devastating effects on our nation's efforts to
14 move ever closer to a more perfect union where
15 our nation's diversity is a source of its
16 greatest strength. And I think the Court should
17 not take the destabilizing step of overruling
18 precedent here.

19 Justice Gorsuch, you asked a series of
20 questions about race-neutral alternatives, and I
21 want to offer the position of the United States.
22 I think, Justice Barrett, you also asked these
23 questions about things like legacy, donors,
24 children of faculty and staff.

25 And I want to be very clear on behalf

1 of the United States that if it could be shown
2 that eliminating those kinds of preferences
3 would actually enable a university to meet its
4 -- its diversity goals and to be able to offer
5 the educational benefits of a diverse student
6 body, then, yes, we think absolutely that can
7 function as a race-neutral alternative. And
8 it's incumbent on universities to consider those
9 kinds of options as they chart a path forward.

10 And so I think, to -- to the extent
11 that the Court has any concerns about that or
12 thinks that the lower court in this case did not
13 apply that kind of standard, that would be wrong
14 because the Court has made clear that strict
15 scrutiny in this context is strict and that
16 universities have to undertake continual
17 obligations to search for those types of
18 alternatives in order to be able to achieve
19 diverse student enrollment without taking race
20 into account.

21 JUSTICE ALITO: Grutter was about
22 college admissions, but in your opening
23 statement, it seemed to me you want to extend it
24 to employment. Is that right?

25 GENERAL PRELOGAR: No, Justice Alito,

1 I was trying to make the observation that the
2 experience of students in those four years of
3 college have effects on the course of their
4 life.

5 JUSTICE ALITO: Then why were you
6 talking about corporate America?

7 GENERAL PRELOGAR: Because corporate
8 America, like the United States military, relies
9 on having a diverse pipeline of individuals who
10 had the experience of learning in a diverse
11 educational environment and who themselves
12 reflect the diversity of the American
13 population.

14 We're not asking the Court to extend
15 Grutter in any way here. We're only asking the
16 Court to reject Petitioner's request for the
17 Court to overrule that precedent because I think
18 it would have these destabilizing ramifications
19 in just about every important industry in
20 America.

21 JUSTICE BARRETT: General, if we were
22 talking about the 25-year mark, so let's imagine
23 we fast-forward and it's, you know, five years
24 from now and we're considering whether to --
25 same question, would it be overruling Grutter at

1 that point to say this is the end point, we're
2 at 25 years, no more race-consciousness in
3 admissions?

4 GENERAL PRELOGAR: I think it would if
5 this Court based that decision on the nature of
6 the compelling interest here. I just don't
7 think it's a tenable way to read Grutter to say
8 that the Court was suggesting that 25 years from
9 now, poof, the interest in diversity in higher
10 education is no longer compelling.

11 That is and will remain a compelling
12 interest. And Grutter observed that over time,
13 it would be possible for schools and
14 universities to achieve that interest without
15 having to take race into account.

16 And I understand the concerns, Justice
17 Barrett, that you've raised, Justice Kavanaugh,
18 that you've raised about the fact that the arc
19 of progress in society has perhaps been slower
20 than the Grutter Court imagined.

21 I think, if this Court has those
22 concerns, it could emphasize that the narrow
23 tailoring requirement remains very strict in
24 this case. Universities should be held to a
25 high standard and a heavy burden to explore

1 those alternatives, to put into practice the
2 race-neutral alternatives that currently exist
3 and to try to get to the point that the Grutter
4 Court imagined and that we will eventually reach
5 as a nation where it is no longer necessary to
6 take race into account.

7 JUSTICE BARRETT: But what if the
8 structural barriers -- I mean, remedial --
9 there's not a remedial justification on the
10 table here. Our precedents rule that out.

11 What if the structural barriers just
12 make it impossible 25 years from now to sit here
13 and say that without race-conscious admissions,
14 you know, especially if Harvard wants to keep
15 everything exactly the same with respect to its
16 other metrics like SAT scores not dropping at
17 all and -- and the museum and the squash team
18 and all of that stuff, what if it's just
19 impossible?

20 And so what if Grutter was grossly
21 optimistic in what it thought was achievable and
22 perhaps, you know, Grutter, as we've talked
23 about earlier in the argument, emphasized the
24 risky and potentially poisonous nature of race
25 classifications, what if there's no end point?

1 I mean, could we still say that
2 there's a compelling interest in the educational
3 benefit of a diverse classroom if it comes at
4 the cost of something that Grutter itself
5 recognized was very dangerous and corrosive to
6 society?

7 GENERAL PRELOGAR: I do think that,
8 yes, the compelling interest would still exist
9 there. I recognize the force of the point that
10 there are structural barriers that can impede
11 progress, but I think it would be wrong to
12 suggest that those barriers are going to exist
13 in perpetuity in all places and with respect to
14 all schools.

15 The states are not similarly situated
16 in this regard. There are nine states, as
17 Petitioner has emphasized, that have barred the
18 use of race in college admissions, and many of
19 the universities and colleges in those states
20 have been able still to achieve enrollment of
21 diverse student bodies.

22 And I think that it's incumbent on --
23 on every college and university around the
24 nation to study from and learn from those
25 examples, and it's not accurate to say that if

1 we look forward into the future in 25 years,
2 still, all places throughout the nation, it will
3 be necessary to have race-conscious admissions.

4 But I do want to be responsive as well
5 to the point that -- that you made about
6 resisting any changes whatsoever and be clear,
7 again, on behalf of the United States that we do
8 not think that a university could reject a
9 race-neutral alternative because it would have
10 those kinds of modest impacts on things like SAT
11 scores.

12 I think that that can clearly be the
13 kind of thing that would qualify as a viable or
14 workable race-neutral alternative. And if the
15 Court has any concerns that lower courts are not
16 applying that stringent standard, then I would
17 urge the Court to make that clear in a decision
18 and -- and provide guidance going forward.

19 JUSTICE KAVANAUGH: I think that's
20 very important, what you just said. So you're
21 saying an adequate race-neutral alternative, it
22 would be permissible for the Court to say that
23 you have to eliminate things like legacy,
24 children of donors, if you could obtain a
25 sufficient -- meet its diversity goals, was your

1 word, by doing so and doing race-neutral
2 admissions. Do I have that correct?

3 GENERAL PRELOGAR: Yes, that's exactly
4 right, Justice Kavanaugh. And I think that that
5 flows directly from this Court's emphasis --

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

9 GENERAL PRELOGAR: Yes, and I was
10 speaking --

11 JUSTICE SOTOMAYOR: And -- and -- or
12 there is a point at which a change is
13 significant or insignificant.

14 GENERAL PRELOGAR: I agree, Justice
15 Sotomayor. And I think that the -- the lines
16 that the Court has drawn in this context --
17 context flow from Grutter itself, where the
18 Court made clear that a university doesn't have
19 to sacrifice its reputation for academic
20 excellence. In other words, it doesn't have to
21 accept those kinds of dramatic changes to the
22 academic quality of the incoming student class.

23 I was speaking to --

24 JUSTICE SOTOMAYOR: Well, your
25 adversary on Simulation D says the change was

1 only from -- it was less than a 40-point change,
2 and so he says that's insignificant.

3 Why do you think his point is not
4 valid?

5 GENERAL PRELOGAR: With respect to
6 Simulation D in particular, it wasn't just
7 changes to SAT scores. I think the most
8 substantial reason that the district court
9 rejected that as a workable alternative here is
10 because it would have had a precipitous decline
11 in the number of African American students.
12 They would fall by about 30 percent in the
13 enrollment of the class. And that was coupled
14 with the impact on reductions in the number of
15 students who had the highest academic and
16 extracurricular ratings who could then be
17 admitted in the class. But I don't --

18 JUSTICE SOTOMAYOR: So you're
19 sacrificing the essence of Harvard, academic
20 excellence?

21 GENERAL PRELOGAR: That was what the
22 district court found with respect to Simulation
23 D. But, you know, I guess I would say I think
24 that that was a factual finding in this case.
25 The First Circuit affirmed it. But, as Mr.

1 Waxman said, if you do not think the district
2 court applied the right stringent standard in
3 evaluating that as a race-neutral alternative,
4 then that is a basis to send this case back,
5 because we agree that strict scrutiny is strict
6 in this context.

7 JUSTICE KAVANAUGH: The other side
8 points to the examples, as you've heard
9 throughout, of California and Washington,
10 Michigan and Florida and other states and says,
11 well, if they just put their effort to it, they
12 will be able to use race-neutral alternatives
13 and still be able to achieve its diversity
14 goals -- I'm going to bracket the fact that "its
15 diversity goals" is still pretty vague, but we
16 talked about that in the last case -- but would
17 still be able to do so.

18 Do you want to respond to that?

19 GENERAL PRELOGAR: So, as I was saying
20 to Justice Barrett, I do think it's the case
21 that there are some states and certainly some
22 institutions today that can fully achieve a
23 diverse student body without needing to take
24 race into account.

25 With respect to California and

1 Michigan in particular, since your question
2 referred to them, I would point the Court to the
3 amicus brief filed by those university systems
4 in those states, which have explained that,
5 actually, they have struggled, despite
6 implementing any number of race-neutral
7 alternatives, to actually see true diversity
8 across all of their campuses, including their
9 most selective campuses.

10 And University of California in
11 particular points to Berkeley and UCLA as places
12 where there have been these dramatic declines in
13 diversity, racial diversity, on campus.

14 JUSTICE KAVANAUGH: I -- I guess this
15 will be repetitive, but you've said "true
16 diversity," "meet its diversity goals." You
17 know, I'm not sure exactly what that means, and
18 that's -- I'm going to have to figure that out,
19 I guess, but without any more precise guidance
20 on what exactly "meet its diversity goals" means
21 as to numbers, it's a little hard to assess, I
22 think.

23 GENERAL PRELOGAR: Well, let me try to
24 be more precise. I think that the relevant
25 compelling interest here comes directly from

1 Grutter, where the Court recognized that it is
2 student body diversity in all of its many
3 manifestations. The Court has made clear it's
4 not simple ethnic or racial diversity, and
5 that's what creates a lot of the guardrails in
6 this area in terms of no racial quotas, no
7 automatic awards of points, no separate
8 set-asides or separate admissions tracks.

9 The nature of the interest in not in
10 achieving a precise numerical threshold of
11 minority enrollment at a particular university.
12 Instead, the Court has defined this as the
13 educational goals that derive from having a
14 diverse student body along multiple dimensions.
15 And that is the -- the ultimate aim of these
16 policies.

17 JUSTICE GORSUCH: So -- so a
18 university that -- that did use a numerical goal
19 or did grant a -- a tip based on race alone
20 would be a problem?

21 GENERAL PRELOGAR: Yes, I think, if a
22 university used a numerical goal and that
23 functioned as an inflexible goal for the
24 university or functioned as a quota system,
25 that's plainly unconstitutional. This Court's

1 precedents don't countenance that.

2 JUSTICE GORSUCH: And when we --

3 GENERAL PRELOGAR: With respect --

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

6 GENERAL PRELOGAR: Okay.

7 JUSTICE GORSUCH: Go ahead and finish.

8 GENERAL PRELOGAR: I just wanted also
9 to try to be responsive to your point about
10 using race as a -- as a tip or a preference.
11 And to be clear, that there as well, the Court
12 made clear that that can't be mechanical
13 application, so you can't preference every
14 single person automatically or inflexibly.

15 JUSTICE GORSUCH: Okay. And on -- but
16 -- but what do we -- what is a court, a lower
17 court, all right, faced with, you know,
18 diversity and very hard standards to apply,
19 supposed to do when a university's admissions
20 data with respect to race looks more or less
21 identical every single year?

22 GENERAL PRELOGAR: So I think, at that
23 point, the district court needs to probe whether
24 impermissible racial balancing is happening.
25 The Court has made clear that that is not

1 appropriate, that the relevant compelling
2 interest here is not in trying to achieve a
3 precise percentage of particular racial or
4 ethnic groups in the class year over year. And
5 so, if that kind of evidence existed, then I
6 think it would be incumbent on the university to
7 -- to establish that it is not actually engaging
8 in racial balancing.

9 JUSTICE GORSUCH: Thank you.

10 JUSTICE SOTOMAYOR: I think, in this
11 case, wasn't it clear there were variations
12 among the groups?

13 GENERAL PRELOGAR: Yes, that's exactly
14 right, Justice Sotomayor. And what the district
15 court said with respect to the Harvard facts is
16 that there were greater fluctuations with
17 respect to the number of students in each group
18 who were admitted year over year than there were
19 fluctuations in the applicant pool of
20 individuals of those particular races.

21 And so the -- the district court said
22 that runs completely contrary to a theory of
23 racial balancing in this case.

24 JUSTICE SOTOMAYOR: Now going back to
25 the earlier argument, Petitioner's counsel in

1 rebuttal raised Berkeley's figures, and I don't
2 remember it exactly, but it was like a third
3 white, a third Hispanic, a third this. He -- at
4 the end, he mentioned a black population that
5 seemed tiny.

6 But how do you deal with answering
7 Justice Kavanaugh's question of what constitutes
8 adequacy?

9 GENERAL PRELOGAR: So --

10 JUSTICE SOTOMAYOR: Because he seemed
11 to imply, your opponent, opposing counsel, that
12 -- that Berkeley was already diverse. It had
13 numbers that were close to the population.

14 GENERAL PRELOGAR: Well, Justice
15 Sotomayor, I would point to the brief filed by
16 the University of California system in this
17 case, and they have explained in detail how
18 Berkeley has -- has experienced a substantial
19 decline in the African American student
20 population. I think it's gone down to
21 3 percent. And they further have explained the
22 toll that's taken on their ability to offer the
23 educational benefits of diversity, as well as
24 the glaring sense of racial isolation that those
25 students have on the Berkeley campus.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 General.

3 Justice Thomas?

4 Justice Alito?

5 Justice Kagan?

6 JUSTICE KAGAN: General, one of the
7 through lines of the briefs in this case is -- I
8 think it's actually the first line of the
9 Petitioner's brief or something like it -- is --
10 is essentially Brown compels the overruling of
11 Grutter.

12 And the Petitioners actually haven't
13 given a whole lot of attention to that argument,
14 but the idea is, and some of the questioning has
15 reflected this -- this idea, is that, you know,
16 we have this long and horrible history of racial
17 discrimination, and, surely, that functions here
18 to prevent racial classifications or to prevent
19 race consciousness of the kind that Harvard and
20 UNC are using.

21 And I just thought I'd give you an
22 opportunity to discuss what you think of that
23 argument.

24 GENERAL PRELOGAR: I think that
25 argument is wrong in just about every respect.

1 There is a world of difference between the
2 situation this Court confronted in Brown, the
3 separate but equal doctrine that was designed to
4 exclude African Americans based on notions of
5 racial inferiority and subjugate them, which, as
6 this Court recognized, the school children
7 affected their hearts and minds in a way
8 unlikely ever to be undone, a world of
9 difference between that and the university
10 policies at issue in this case, which are not
11 intended to exclude anyone on the basis of race
12 or -- or even to benefit particular racial
13 groups on the basis of race but, rather, are
14 designed to bring individuals of all races
15 together so that they can all learn together and
16 benefit from that diverse educational
17 environment.

18 And I think it is profoundly
19 ahistorical to say, as Petitioners do, that
20 those situations are precisely equivalent, and
21 it also trivializes the grievous moral and legal
22 wrongs of state-sponsored segregation and the
23 enormous harms that millions of Americans
24 suffered under it.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 JUSTICE GORSUCH: Just to return to
3 Justice Sotomayor's question to you, you
4 indicated, I believe, that -- that percentages
5 varied dramatically over the years. I must be
6 missing something.

7 On page 23 of the Petitioner's brief,
8 they have the statistics from Harvard from 2006
9 through 2018, and the share of Asian American
10 students varied three -- three -- between 17 and
11 20 percent every year, 17 percent actually being
12 the outlier. Am I missing something?

13 GENERAL PRELOGAR: No, Justice
14 Gorsuch. I think that the point I was trying to
15 make is that that band is actually a greater
16 amount of fluctuation than was present in the
17 applicant pool with respect to the number of
18 Asian Americans who were applying to Harvard
19 every year.

20 But let me just say this --

21 JUSTICE GORSUCH: Is the same thing
22 true with Hispanics and African Americans,
23 because the numbers are pretty similar --
24 similarly banded for those?

25 GENERAL PRELOGAR: Yes, that's my

1 understanding, that the district court's factual
2 finding in this regard is that there was
3 relative stability with respect to the number of
4 individuals in those groups who were applying
5 and greater fluctuation with respect to
6 admissions decisions.

7 JUSTICE GORSUCH: No, these -- these
8 are -- these -- these are admitted students I'm
9 talking about here.

10 GENERAL PRELOGAR: Yes. And the
11 district court was drawing a comparison between
12 the -- the -- the bands that you were just
13 describing and the bands that exist to --

14 JUSTICE GORSUCH: The point is
15 whatever the pool is, every year the percentage
16 is the same. And the U.S. Government below said
17 this manifest steadiness speaks for itself.

18 Am I missing something?

19 GENERAL PRELOGAR: Well, let me just
20 say that the district court made a factual
21 finding of no racial balancing. But, if you
22 think the district court was wrong about that
23 and this is clearly erroneous, then that is
24 clearly impermissible and -- and the Court
25 should send it back.

1 That would provide a basis to reverse
2 on clear error, and we are not here to suggest
3 that racial balancing is okay under this Court's
4 precedents. Grutter doesn't countenance it and
5 the Court could make that clear.

6 JUSTICE GORSUCH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh?

9 JUSTICE KAVANAUGH: I appreciate your
10 statement about Brown. I want to ask a
11 question. Justice Thomas's opinion in Grutter
12 said: "I agree with the Court's holding that
13 racial discrimination in higher education
14 admissions will be illegal in 25 years."

15 And taking that statement, it would
16 seem that extending it beyond 25 years would
17 itself be overruling Grutter. And I just want
18 you to have a chance to respond.

19 Is that an -- not an accurate
20 characterization of the Court's holding in your
21 view, or -- or what is your response to that
22 description of what the Court did? A variation
23 on questions you've had before, but I wanted to
24 give you an opportunity to address that in
25 particular.

1 GENERAL PRELOGAR: I do think that
2 that is not how the Court itself understood the
3 language. The Court made clear in the four
4 paragraphs that we've been discussing that the
5 Court expected that universities would no longer
6 be able to justify race-conscious admissions
7 policies over time, but that was because the
8 Court expected that, due to the rate of change
9 in society, they would be able to achieve the
10 benefits of student body diversity without
11 taking race into account.

12 And so I don't think that it's tenable
13 to read the majority opinion in that case as
14 having determined that there was a -- a 25-year
15 clock that would be inflexible. Instead, it was
16 an expectation about how -- what changes we
17 would see in society.

18 JUSTICE KAVANAUGH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett?

21 Thank you, General.

22 Rebuttal, Mr. Norris?

23 REBUTTAL ARGUMENT OF CAMERON T. NORRIS

24 ON BEHALF OF THE PETITIONER

25 MR. NORRIS: Thank you, Mr. Chief

1 Justice. Just a few points.

2 First, I think what's lost in the
3 United States' argument and Harvard's argument
4 and in Grutter itself is that racial
5 classifications themselves have harms. They
6 stigmatize their intended beneficiaries, they
7 increase racial consciousness, which delays the
8 day in which we can move to true racial
9 neutrality, and they cause resentment by
10 treating people differently based on something
11 they can't change that's cosmetic and that's
12 irrelevant to their ability to get educational
13 opportunities.

14 The Court said that in Adarand. It
15 said it in Shaw. It said it in Croson. Harvard
16 doesn't challenge any of those precedents.

17 Secondly, race-neutral alternatives.
18 There were a few pleas for a remand that I heard
19 from my friends, but it's hard to take those
20 seriously when Harvard thumbed its nose at
21 Grutter for 14 years to not consider
22 race-neutral alternatives one time until three
23 years after we filed a lawsuit against it.

24 I understand Mr. Waxman to say he'll
25 no longer defend his legacy preferences, but now

1 what -- what's at stake in terms of race-neutral
2 alternatives are a decline, a slight decline in
3 profile ratings, which Mr. Waxman said are not
4 that important to the admissions process when he
5 talked about Asian Americans, a 3 percentage
6 point decline in people who want to major in the
7 humanities.

8 Students change majors like they
9 change socks. I mean, speaking from experience,
10 there will be people who think that they're
11 going to major in the hard sciences and then
12 find themselves majoring in the humanities.
13 That's not the stuff of strict scrutiny.

14 Then we have the 4 percentage point
15 decline in black admissions. Our expert
16 testified without contradiction that that is an
17 absolute floor, that Harvard could get that
18 number almost to parity if it considered wealth
19 instead of income.

20 And Harvard already sacrifices on all
21 of these metrics in order to meet its racial
22 goals. It should do the same for racial
23 equality.

24 This Court made schools close to
25 comply with Brown, as it should have. Harvard

1 should have to sacrifice for the same reasons.

2 Lastly, Harvard thankfully does say it
3 is ashamed of its history of Jewish
4 discrimination. I hope someday it says the same
5 about how it's treating Asians.

6 It is undisputed that Harvard --
7 there's a statistically significant relationship
8 between being Asian and getting a low personal
9 rating, which is supposed to measure things like
10 confidence, likability, and kindness.

11 Harvard's witnesses consistently
12 testified that Asians don't deserve lower
13 personal ratings in their experience. Harvard
14 didn't submit a model of the personal rating
15 itself, which means I think they probably did
16 study it and realized they couldn't get rid of
17 the disparity.

18 In the model, when you take the
19 personal rating out of an admissions model, it
20 shows a statistically significant disparity
21 against Asian Americans in admissions decisions.

22 Now the district court said I believe
23 Harvard that it doesn't discriminate, but we
24 don't typically let people satisfy strict
25 scrutiny with just their testimony. Mr. Waxman

1 said it's attributable -- attributable to
2 unobservables in the model, but unobservables is
3 code for Asians really deserve it, and that's
4 simply not true. That was not ever supported by
5 any evidence in the record.

6 And we keep saying Asians. These are
7 not Asians. They're not from Asia. These are
8 people who are Americans. They were born in
9 Texas, California, Ohio, Tennessee. They should
10 not be the victims.

11 They were born in 2005, the people who
12 are applying to college now. They should not be
13 the victims of Harvard's racial experimentation.
14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you to
16 all counsel in both cases. The case is
17 submitted.

18 (Whereupon, at 2:55 p.m., the case was
19 submitted.)

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