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IN THE SUPREME COURT OF THE UNITED STATES

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ABIGAIL NOEL FISHER, :

Petitioner : No. 11-345

v. :

UNIVERSITY OF TEXAS AT AUSTIN, :

ET AL. :

- - - - - x

Washington, D.C.

Wednesday, October 10, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

BERT W. REIN, ESQ., Washington, D.C.; on behalf of Petitioner.

GREGORY G. GARRE, ESQ., Washington, D.C.; on behalf of Respondents.

DONALD B. VERRILLI, JR., ESQ., Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondents.

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1 PROCEEDINGS

2 (11:04 a.m.)

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

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

8 ORAL ARGUMENT OF BERT W. REIN
9 ON BEHALF OF THE PETITIONER

10 MR. REIN: Mr. Chief Justice, General Suter
11 trained me too well.

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

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

21 First --

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

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

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

9 JUSTICE SOTOMAYOR: How do you get past
10 Texas v. Lesage with that injury, which says that mere
11 use of race is not cognizable injury sufficient for
12 standing?

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

19 As I said -- and there are several factors
20 in this case that are quite different.

21 First, there is a Constitutional injury as
22 such, and the Court has recognized it.

23 Second, the fact premise, she could not have
24 been allowed in under any circumstance, was never tested
25 below, wasn't raised below. It comes up in a footnote

1 in --

2 JUSTICE SOTOMAYOR: Can I go to another
3 side? She's graduated.

4 MR. REIN: Correct.

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

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

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

15 JUSTICE SOTOMAYOR: But she's graduated.

16 MR. REIN: She has graduated.

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

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

22 JUSTICE SOTOMAYOR: But you have to claim an
23 injury, so what's the injury --

24 MR. REIN: Well --

25 JUSTICE SOTOMAYOR: -- that you're claiming

1 that would sustain a claim of damages?

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

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

9 MR. REIN: Well, if there's --

10 JUSTICE SOTOMAYOR: -- but if there's a --
11 give me another --

12 MR. REIN: Well, I think --

13 JUSTICE SOTOMAYOR: -- damages question.

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

19 Whether we can prove it or can't prove it is
20 something you can't tell on this record. It's merely
21 asserted.

22 And I would point out that Texas said below,
23 there was no way to determine that issue without --

24 JUSTICE SOTOMAYOR: What damages --

25 JUSTICE SCALIA: We've had cases involving

1 alleged discrimination in state -- state contracting,
2 and we haven't required the person who was discriminated
3 against because of race to prove that he would have
4 gotten the contract otherwise, have we?

5 MR. REIN: No, sir.

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

8 MR. REIN: That is our correct, and that is
9 our first premise.

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

16 I think in Parents Involved, the same type
17 of contention was made with respect to the Louisville
18 class plaintiffs whose son had been admitted to the
19 school of his choice, and the Court said damages are
20 enough to sustain standing.

21 There is a live damages claim here, and I
22 don't think there is a question of standing.

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

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

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

6 JUSTICE BREYER: If you are going to the
7 merits, I want to know whether you want us to -- or are
8 asking us to overrule Grutter.

9 Grutter said it would be good law for at
10 least 25 years, and I know that time flies, but I think
11 only nine of those years have passed.

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

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

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

25 JUSTICE BREYER: So your question is

1 whether -- your point is, does your case satisfy
2 Grutter? Is that what you're arguing?

3 MR. REIN: We litigated it on that basis,
4 yes.

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

10 MR. REIN: Well, Justice Breyer, our
11 argument is we can satisfy Grutter if it's properly
12 read.

13 What we've seen --

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

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

22 MR. REIN: Well, I think that there would be
23 flaws under Grutter even if you assumed away something
24 that can't be assumed away because it is a matter of
25 Texas law, that is, there is a top 10 percent program,

1 and that --

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

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

8 In order to satisfy Grutter, you first have
9 to say that you are not just using race gratuitously,
10 but it is in the interest of producing a critical mass
11 of otherwise underrepresented students.

12 And so to be within Grutter framework, the
13 first question is, absent the use of race, would we be
14 generating a critical mass?

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

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

25 We can go back to whether substantial

1 evidence is adequate, is necessary, or not. Why does
2 their test fail?

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

7 JUSTICE SCALIA: Was it done before or after
8 they announced the decision to reinstitute
9 racial quotas?

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

13 JUSTICE SCALIA: Which came almost
14 immediately after our decision on Grutter.

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

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

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

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

25 JUSTICE BREYER: I agree it might, but I

1 want to get to the question, see what I'm trying to
2 pinpoint, because we have such a limited time.

3 And to me, the one thing I want to pinpoint,
4 since you're arguing on that this satisfies Grutter if
5 properly understood, as you say that. In looking up, we
6 have a two-court rule. And two courts have found, it
7 seems to me. That here there is a certain -- there is
8 no quota. It is individualized. It is time limited.
9 It was adopted after the consideration of race-neutral
10 means. Each applicant receives individual
11 consideration, and race did not become the predominant
12 factor.

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

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

20 JUSTICE BREYER: But we have a rule that if
21 two courts say it, we're very reluctant, on something
22 connected with facts, to overturn it. So -- so that's
23 why I mention that.

24 MR. REIN: And -- particularly in the case
25 of considering alternatives that have worked about as

1 well, I think that's a legal question this Court is free
2 to act on.

3 JUSTICE SCALIA: There are facts and there
4 are facts, aren't there?

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

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

15 JUSTICE SCALIA: That -- that's a normal
16 fact that we accede to two-court holdings on: Whether
17 there is or is not a critical mass?

18 MR. REIN: No. I --

19 JUSTICE SCALIA: It's a weird kind of a
20 fact.

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

22 JUSTICE SCALIA: It's an estimation, isn't
23 it? A judgment?

24 MR. REIN: Justice Scalia, that is correct.
25 And in addition, the courts didn't find whether a

1 critical mass --

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

11 MR. REIN: Well, we don't believe that
12 demographics are the key to underrepresentation of
13 critical mass.

14 JUSTICE SOTOMAYOR: No -- putting aside -- I
15 don't -- I'm not going to quarrel with you that if
16 demographics alone were being used, I would be somewhat
17 concerned. But you can't seriously suggest that
18 demographics aren't a factor to be looked at in
19 combination with how isolated or not isolated your
20 student body is actually reporting itself to feel?

21 MR. REIN: Well, I think if you start to
22 split out subgroups of minorities, you mistake I think
23 what I think is the proper thrust of Grutter, or at
24 least ought to be.

25 JUSTICE SOTOMAYOR: It might be -- it might

1 be insulting to some to be thrown into a pot.

2 JUSTICE SCALIA: Why -- why don't you
3 seriously suggest that? Why don't you seriously suggest
4 that demographic -- that the demographic makeup of the
5 State has nothing to do with whether somebody feels
6 isolated, that if you're in a State that is only
7 1 percent black that doesn't mean that you're not
8 isolated so long as there's 1 percent in the class?

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

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

12 MR. REIN: Justice Scalia, racial balancing
13 is not a permissible interest, and we are constantly --
14 this Court has constantly held not a permissible
15 interest. And that is something we certainly agree
16 with.

17 Trying to respond to Justice Sotomayor and
18 in the framework of Grutter, what you're looking at is,
19 do you -- does this person, member of a so-called
20 underrepresented minority -- it's a concept we don't
21 necessarily accept, but it's Texas's concept -- are they
22 isolated? Are they unable to speak out?

23 And I think we've always said if you have a
24 very large number, as Texas did in 2004 when they
25 ostensibly made the decision to reinstitute race, they

1 had a 21 percent admission percentage of what they
2 called the underrepresented minorities. They also had
3 about an 18 percent admission ratio of Asian-Americans.
4 So on campus, you're talking about -- about 40 percent
5 of the class being minorities.

6 JUSTICE BREYER: But the test is -- the test
7 is, in your opinion -- I have to write this in the
8 opinion, you say -- the proper test of critical mass is
9 is the minority isolated, unable to speak out. That's
10 the test. And it wasn't in Grutter or was in Grutter?
11 And in your opinion, it was in Grutter.

12 MR. REIN: Yes. It said expressly in
13 Grutter --

14 JUSTICE BREYER: Isolated. All right. And
15 the reason it was satisfied there and not here is?

16 MR. REIN: In Grutter, the Court assumed
17 that the very small number of admissions, minority
18 admissions, looked at as the whole -- and it was looked
19 at as a whole, only as a whole in Grutter -- would have
20 yielded about 3 or 4 percent minority admission in a
21 class of 350, which means about 12 to 15 students --

22 JUSTICE SOTOMAYOR: So what are you telling
23 us is the standard of critical mass? At what point does
24 a district court or a university know that it doesn't
25 have to do any more to equalize the desegregation that

1 has happened in that particular State over decades, that
2 it's now going to be stuck at a fixed number and it has
3 to change its rules. What's that fixed number?

4 MR. REIN: We -- it's not our burden to
5 establish the number. It was the burden of the
6 University of Texas to determine whether --

7 JUSTICE SOTOMAYOR: Well, they told -- they
8 told the district court. They took a study of students.
9 They analyzed the composition of their classes, and they
10 determined in their educational judgment that greater
11 diversity, just as we said in Grutter, is a goal of
12 their educational program, and one that includes
13 diversifying classes.

14 So what more proof do you require?

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

18 The question is, they have --

19 JUSTICE SOTOMAYOR: Well, but given it was
20 in the evidence, what more do you think they needed? I
21 think I hear all you saying in your brief is the
22 number's fixed now, they got enough, no more is
23 necessary.

24 MR. REIN: What we're saying in the brief
25 was they were generating in fact a very substantial

1 number of minority presence on campus.

2 JUSTICE SOTOMAYOR: That's enough now.

3 MR. REIN: And --

4 JUSTICE SOTOMAYOR: That's what you're
5 saying.

6 MR. REIN: No. And that immediately thrust
7 upon them the responsibility, if they wanted to -- you
8 know, essentially move away from equal treatment, they
9 had to establish we have a purpose, we are trying to
10 generate a critical mass of minorities that otherwise
11 could not be achieved.

12 JUSTICE SOTOMAYOR: Tell me -- tell me what
13 about their use of race did not fit the narrow
14 tailoring, not the necessity prong as you've defined it,
15 but the narrow tailoring that Grutter required? How is
16 race used by them in a way that violated the terms of
17 Grutter?

18 MR. REIN: And for this purpose --

19 JUSTICE SOTOMAYOR: Assuming that the need
20 is there. I know you're challenging the need.

21 MR. REIN: Put -- put aside whether this was
22 necessary and whether it was an appropriate last resort
23 in a quest for diversity and critical mass, because
24 Grutter's not without limits. But I'll put that aside
25 and let me come directly to your question.

1 First of all, if you think about narrow
2 tailoring, you can't tailor to the unknown. If you have
3 no range of evaluation, if you have no understanding of
4 what critical mass means, you can't tailor to it.

5 JUSTICE SOTOMAYOR: So you have to set a
6 quota for critical mass?

7 MR. REIN: No. There's a huge difference,
8 and it's an important one that is not well put out by
9 the University of Texas. Having a range, a view as to
10 what would be an appropriate level of comfort, critical
11 mass, as defined in Grutter, allows you to evaluate
12 where you are --

13 JUSTICE SOTOMAYOR: So we won't call it a
14 quota; we'll call it a goal, something Grutter said you
15 shouldn't have.

16 MR. REIN: Well, Justice Sotomayor, I think
17 it's very important to distinguish between the operative
18 use of that range, in other words, that's where we are,
19 and we're going to use race until we get there every
20 year in consideration of each application, which was a
21 problem.

22 JUSTICE SOTOMAYOR: Boy, it sounds awfully
23 like a quota to me that Grutter said you should not be
24 doing, that you shouldn't be setting goals, that you
25 shouldn't be setting quotas; you should be setting an

1 individualized assessment of the applicants.

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

3 MR. REIN: This system doesn't -- I mean,
4 it's not narrowly tailored because it doesn't fit.
5 There are certain forms of Grutter that it follows.
6 It --

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

10 MR. REIN: Well, it simply reiterated the
11 language of Grutter. They have no definition. They
12 can't fit --

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

20 MR. REIN: Well, let me tell you that if you
21 look outside the Top 10, at the so-called AI/PAI admits
22 only -- forget the Top 10 for a minute, they were
23 generating approximately 15 percent minority admissions
24 outside the Top 10, which is in -- above what the target
25 was in Grutter. So this is not Grutter on its facts.

1 It's vastly different.

2 This is a --

3 JUSTICE GINSBURG: Because of the
4 10 percent.

5 MR. REIN: No, it was -- I'm talking about
6 only the non-Top 10 percent admissions. 15 percent of
7 those were so-called underrepresented minorities. This
8 is without the Top 10. Now, the Top 10 is also a major
9 generator of admissions for underrepresented minorities.

10 JUSTICE KENNEDY: And -- and this was before
11 the adoption of the plan.

12 MR. REIN: That is correct.

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

16 MR. REIN: No. With the 10 percent plan,
17 it's much higher. In 2004, it was 21 percent for just
18 Hispanics and African Americans, and these are the
19 categories they used. If you add in Asians, it was over
20 38 percent.

21 But I'm isolating -- in response to Justice
22 Ginsburg, I'm isolating to the non-top 10 admissions.
23 Those are over 15 percent in that year, and they average
24 very close to that over time.

25 So the -- the total generation of minority

1 presence is a combination of the two in fact, but the
2 AI/PAI system -- which was adopted in response to
3 Hopwood. It was -- as Texas says, it was the first
4 thing they tried to accommodate to their loss of the
5 ability to use race directly, which came up in Hopwood.
6 So that was their first response, to look at a more
7 balanced admission program between Academic Index and
8 Personal Achievement Index.

9 So it is not a system which just excludes
10 minorities.

11 JUSTICE KENNEDY: Could you comment on this,
12 and then I hope we can get back to Justice Alito's
13 question.

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

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

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

22 MR. REIN: Excuse me, Justice Kennedy.

23 JUSTICE KENNEDY: -- that it resulted in the
24 admission of many minorities. Then you'd come back and
25 say, oh, well, this is -- this shows that we were

1 probably wrongly excluded.

2 I --

3 MR. REIN: Well --

4 JUSTICE KENNEDY: -- I see an inconsistency
5 here.

6 MR. REIN: Well --

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

10 MR. REIN: Well, yes, that's part of it.
11 The second is the question of reasonably available
12 alternatives.

13 If we take Texas at its word, and it says
14 they are satisfied, they are happy going on with the way
15 they apply race today, we tried to measure, well, what
16 difference is it making, and could you achieve the same
17 thing with a reasonably available race-neutral
18 alternative.

19 That's a question that was asked in Grutter.
20 They were supposed to analyze that. They didn't look at
21 it. But it --

22 JUSTICE GINSBURG: But -- the race-neutral
23 alternative is the 10 percent plan?

24 MR. REIN: The race-neutral alternative
25 includes an extension of the 10 percent plan because

1 it's a major generator of minority admissions. And
2 right now, that ranges at 30 percent.

3 JUSTICE GINSBURG: But you say, and that's
4 okay because it's -- it's race-neutral, but is it
5 really? I mean, the -- the only reason that they
6 instituted the 10 percent plan was to increase minority
7 enrollment.

8 MR. REIN: Well, we say --

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

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

22 JUSTICE SCALIA: Excuse me. The 10 percent
23 plan is not imposed by the University. It's not their
24 option --

25 MR. REIN: Correct.

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

4 MR. REIN: Correct.

5 JUSTICE SCALIA: Anybody who is in the top
6 10 percent of any school in the state gets into the
7 University of Texas.

8 MR. REIN: Yes. And even the Fifth Circuit
9 said you can't disregard its consequences because it's a
10 matter of law.

11 I'm simply saying they could choose to
12 extend it beyond where it is because it's capped today
13 at 75 percent.

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

19 JUSTICE BREYER: Or they could -- this is
20 what is underlying my thing here. I want to get you
21 directly to answer it. I did look up the figures. And
22 before Hopwood and the 10 percent plan, it looked on the
23 African American side that it averaged about 5 --
24 5 percent per year, really, pretty steadily.

25 Then after Hopwood and 10 percent, it went

1 down a little bit, not a lot, but it went down to about
2 3 and a half percent, 4 percent, maybe. And then they
3 introduced Grutter, and it's back up to 5 percent.

4 MR. REIN: No --

5 JUSTICE BREYER: Okay. Now, is that a lot?
6 Is that a little? There are several thousand admissions
7 officers in the United States, several thousand
8 universities, and what is it we're going to say here
9 that wasn't already said in Grutter that isn't going to
10 take hundreds or thousands of these people and have
11 Federal judges dictating the policy of admission of all
12 these universities?

13 You see why I'm looking for some certainty.

14 MR. REIN: But Justice --

15 JUSTICE BREYER: I saw what happened, you
16 saw the numbers.

17 Sorry, go ahead.

18 MR. REIN: Justice Breyer, just -- I will
19 answer your question. I'd like to reserve a little
20 time.

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

23 (Laughter.)

24 MR. REIN: No, I am perfectly happy to -- to
25 answer your question.

1 I think that the increase in
2 African American admissions that you're looking at was
3 pre-Grutter. It was generated before 2004.

4 JUSTICE BREYER: Uh-huh.

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

14 So there are lots that they could do --

15 JUSTICE SOTOMAYOR: So now we're going to
16 tell the universities how to run and how to weigh
17 qualifications, too?

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

22 JUSTICE SOTOMAYOR: Could you tell me again
23 how race and their use of race overwhelms those other
24 factors in their system as it's created?

25 MR. REIN: I -- the question is not whether

1 it overwhelms them. They're -- but they say, they
2 admit, it is effective. There are admissions that would
3 not have taken place but for; somebody else would have
4 had that place but for the use of race.

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

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

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

19 JUSTICE KENNEDY: And in what respect does
20 this plan fail strict scrutiny under either of those --
21 under both of those categories?

22 MR. REIN: Okay. Under the category -- the
23 first category, was it a necessary means of pursuing a
24 compelling interest, we don't believe they've shown any
25 necessity for doing what they were doing. And

1 certainly, it -- race should have been a last resort; it
2 was a first resort. That's, in a nutshell, that prong
3 of it. And in order -- and they failed in every
4 respect.

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

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

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

23 So even a white student, I presume, who goes
24 to an entirely black or an entirely Latino school, who
25 becomes class president would get some points because he

1 has or she has proven that they foster or can deal in a
2 diverse environment. That's how I understood their
3 plan; that it's not just giving you a plus because of
4 race, it's combining that with other factors.

5 MR. REIN: There is a plus because of race.
6 There are many other factors in the decision. And might
7 I say that this -- the white student president of the
8 class in an ethnically different school is a measure of
9 leadership. Leadership is an independent factor in the
10 PAI. It isn't -- he is not getting that point because
11 of his race; he's getting that point because of his
12 leadership. That race-neutral criteria could work for
13 anybody.

14 So race is an independent add-on, it is
15 something that can be used to boost the PAI score, the
16 PAS element in any way they like, because they say they
17 contextualize it, and we say it's not necessary, it's
18 not narrowly tailored, it ignores available
19 alternatives, it treats -- gives disparate treatment to
20 Asian Americans, because they are minorities as well,
21 and to the extent it depends on the classroom factor
22 there is simply no way to relate or fit what they are
23 doing to the solution of the problem which they used as
24 a major foundation of their proposal, which is the
25 nondiverse classroom. That -- certainly there is just

1 no correspondence there.

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

3 CHIEF JUSTICE ROBERTS: We will afford you
4 rebuttal time since our questions have prevented you
5 from reserving it.

6 MR. REIN: Thank you.

7 CHIEF JUSTICE ROBERTS: Mr. Garre.

8 ORAL ARGUMENT OF GREGORY G. GARRE

9 ON BEHALF OF THE RESPONDENTS

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

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

20 JUSTICE SOTOMAYOR: I -- I put that in the
21 narrow tailoring category, that it is narrowly tailored
22 the way Grutter did, said. Not the necessity prong and
23 not the need prong. Not the necessity prong. I think
24 most of his argument has been centered on that, so --

25 MR. GARRE: That's right, and so that's the

1 second point I was going to make, which is that the
2 holistic admissions process at issue here is a necessary
3 counterpart to the State's Top 10 Percent Law and works
4 to systematic -- to offset the systematic drawbacks of
5 that law in achieving an interest that is indisputably
6 compelling, the university's interest of assembling a
7 broadly diverse student body.

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

12 MR. GARRE: Your Honor, there is a
13 multiracial box. Students check boxes based on their
14 own determination. This is true under the Common
15 Application --

16 CHIEF JUSTICE ROBERTS: Well, I suppose a
17 person who is one-quarter percent Hispanic, his own
18 determination, would be I'm one-quarter percent
19 Hispanic.

20 MR. GARRE: Then they would check that box,
21 Your Honor, as is true --

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

24 MR. GARRE: Your Honor, that was -- they
25 would make that self-determination, Your Honor. If

1 anyone, in any part of the application, violated some
2 honor code then that could come out --

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

6 MR. GARRE: I don't think -- I don't think
7 it would, Your Honor. I don't think that that issue
8 would be any different than the plan upheld in Grutter
9 or the Harvard plan or in Bakke.

10 CHIEF JUSTICE ROBERTS: You don't check in
11 any way the racial identification?

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

15 CHIEF JUSTICE ROBERTS: So how do you know
16 you have 15 percent African American -- Hispanic or
17 15 percent minority?

18 MR. GARRE: Your Honor, the same way that
19 that determination is made in any other situation I'm
20 aware of where race is taken into account.

21 CHIEF JUSTICE ROBERTS: You say the same
22 way. What is that way?

23 MR. GARRE: The persons self-identify on
24 that form.

25 JUSTICE SCALIA: Do they have to

1 self-identify?

2 MR. GARRE: They do not, Your Honor. Every
3 year people do not and many of those applicants are
4 admitted.

5 JUSTICE SCALIA: And how do they decide?
6 You know, it's -- they want not just a critical mass in
7 the school at large, but class by class? How do they
8 figure out that particular classes don't have enough?
9 What, somebody walks in the room and looks them over to
10 see who looks -- who looks Asian, who looks black, who
11 looks Hispanic? Is that how it's done?

12 MR. GARRE: No, Your Honor, and let me try
13 to be clear on this. The university has never asserted
14 a compelling interest in any specific diversity in every
15 single classroom. It has simply looked to classroom
16 diversity as one dimension of student body diversity.

17 JUSTICE SCALIA: I don't know what you are
18 talking about. I mean it is either a factor that is
19 validly in this case or it isn't. Do they look to
20 individual classroom diversity or not? And if so, how
21 do they decide when classes are diverse?

22 MR. GARRE: This Court in Grutter, Your
23 Honor, and maybe the most important thing that was said
24 during the first 30 minutes was, when given an
25 opportunity to challenge Grutter, I understood my friend

1 not to ask this Court to overrule it. This Court in
2 Grutter recognized the obvious fact that the classroom
3 is one of the most important environments where the
4 educational benefits of diversity are realized, and so
5 the University of Texas, in determining whether or not
6 it had reached a critical mass, looked to the classroom
7 along with --

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

10 MR. GARRE: Well, Your Honor --

11 JUSTICE SCALIA: Did they require everybody
12 to check a box or they have somebody figure out, oh,
13 this person looks 1/32nd Hispanic and that's enough?

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

17 JUSTICE SCALIA: What kind of a study? What
18 kind of a study?

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

21 JUSTICE SCALIA: Yes, it doesn't explain to
22 me how they go about, classroom by classroom, deciding
23 how many minorities there are.

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

1 CHIEF JUSTICE ROBERTS: There are student
2 lists in each classroom that have race identified with
3 the students.

4 MR. GARRE: No, no, Your Honor. Of course,
5 each classroom, the university knows which students are
6 taking its classes and one can then, if you want to
7 gauge diversity in the classrooms, go back --

8 CHIEF JUSTICE ROBERTS: Oh, you go back to
9 what they checked on the form.

10 MR. GARRE: Your Honor, this was part of
11 a --

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

16 MR. GARRE: That is information that is
17 available to the university, Your Honor, the race of
18 students if they've checked it on the application. But
19 I do want to be clear on this classroom diversity study.
20 This was only one of many information points that the
21 university looked to.

22 JUSTICE ALITO: Well, on the classroom
23 diversity, how does the non-Top 10 Percent part of the
24 plan further classroom diversity? My understanding is
25 that the university had over 5,000 classes that

1 qualified as small and the total number of African
2 Americans and Hispanics who were admitted under the part
3 of the plan that is challenged was just a little over
4 200. So how does that -- how does that -- how can that
5 possibly do more than a tiny, tiny amount to increase
6 classroom diversity?

7 MR. GARRE: Well, Your Honor, first I think
8 that 200 number is erroneous. There have been many more
9 minority candidates --

10 JUSTICE ALITO: Per class?

11 MR. GARRE: No, not -- not on a per-class
12 basis.

13 JUSTICE ALITO: Individuals in class.

14 MR. GARRE: I think in looking at the
15 classrooms, Your Honor, what the university found was
16 shocking isolation.

17 JUSTICE ALITO: How many -- how many non-Top
18 10 Percent members of the two minorities at issue here
19 are admitted in each class?

20 MR. GARRE: Your Honor, we didn't look
21 specifically at that determination. What we did -- in
22 other words, to try to find whether there were holistic
23 admits or percentage admits, we did conclude in 2004 --
24 and again this was before -- we did the classroom study
25 before the plan at issue was adopted and at that time

1 there were no holistic admits taking race into account.
2 And what we concluded was that we simply -- if you
3 looked at African Americans, for example, in 90 percent
4 of the classes of the most common participatory size --

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

9 MR. GARRE: Yes, Your Honor.

10 JUSTICE ALITO: And you know the total
11 number who were admitted under the Top 10 Percent Plan?

12 MR. GARRE: We do, Your Honor. But again at
13 the time --

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

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

17 JUSTICE ALITO: And what is the value of C
18 per class?

19 MR. GARRE: Your Honor, I don't know the
20 answer to that question, and let me try to explain why
21 the university didn't look specifically to that.
22 Because at the time that the classroom diversity study
23 was conducted, it was before the holistic admissions
24 process at issue here was adopted in 2003-2004. And so
25 that determination wouldn't have been as important as

1 just finding out are African Americans or Hispanics,
2 underrepresented minorities, present at the university
3 in such numbers that we are not experiencing racial
4 isolation in the classroom.

5 CHIEF JUSTICE ROBERTS: What is that number?
6 What is the critical mass of African Americans and
7 Hispanics at the university that you are working toward?

8 MR. GARRE: Your Honor, we don't have one.
9 And this Court in Grutter --

10 CHIEF JUSTICE ROBERTS: So how are we
11 supposed to tell whether this plan is narrowly tailored
12 to that goal?

13 MR. GARRE: To look to the same criteria of
14 this Court in Grutter. This Court in Grutter
15 specifically rejected the notion that you could come up
16 with a fixed percentage. Now --

17 JUSTICE ALITO: Does critical mass vary from
18 group to group? Does it vary from State to State?

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

25 JUSTICE ALITO: But could you answer my

1 question? What does the University of Texas -- the
2 University of Texas think about those questions? Is the
3 critical mass for the University of Texas dependent on
4 the breakdown of the population of Texas?

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

6 JUSTICE ALITO: It's not.

7 MR. GARRE: It's not at all. It's looking
8 to the educational benefits of diversity on campus, and
9 I think we actually agree on what that means and what
10 Grutter said it meant in terms of --

11 JUSTICE GINSBURG: Mr. Garre, could you
12 explain -- I think you were trying to before -- what
13 seems to me the critical question in this case: Why
14 didn't the 10 percent solution suffice? There were a
15 substantial number of minority members admitted as a
16 result of the 10 percent solution. Why wasn't that
17 enough to achieve diversity?

18 MR. GARRE: Let me make a couple of points,
19 Your Honor. First, if you just looked at the numbers --
20 we don't think it's the numbers, but if you looked at
21 the numbers after 7 years, racial diversity among these
22 groups at the University of Texas had remained stagnant
23 or worse. 2002, African American enrollment had
24 actually dropped to 3 percent. That's one part of it.

25 The other part of it is if you look at the

1 admissions under the top 10 percent plan, taking the top
2 10 percent of a racially identifiable high school may
3 get you diversity that looks okay on paper, but it
4 doesn't guarantee you diversity that produces
5 educational benefits on campus. And that's one of the
6 considerations that the university took into account as
7 well.

8 JUSTICE SCALIA: I don't understand that.
9 Why? Why doesn't it?

10 MR. GARRE: Because, Your Honor, as is true
11 for any group, and the Harvard plan that this Court
12 approved in Bakke specifically recognized this, you
13 would want representatives and different viewpoints from
14 individuals within the same -- the same racial group,
15 just as you would from individuals outside of that.

16 JUSTICE SCALIA: What kind of viewpoints? I
17 mean, are they political viewpoints?

18 MR. GARRE: Anyone's experiences, where they
19 grew up, the situations that they -- that they
20 experience in their lives are going to affect their
21 viewpoints.

22 JUSTICE SCALIA: But this has nothing to do
23 with racial diversity. I mean, you're talking about
24 something else.

25 MR. GARRE: Your Honor, I think it directly

1 impacts the educational benefits of diversity in this
2 sense, that the minority candidate who has shown that --
3 that he or she has succeeded in an integrated
4 environment, has shown leadership, community service,
5 the other factors that we looked at in holistic review,
6 is precisely the kind of candidate that's going to
7 come -- come on campus, help to break down racial
8 barriers, work across racial lines, dispel --
9 stereotypes --

10 JUSTICE SCALIA: Also, the kind that is
11 likely to be included within the 10 percent rule.

12 And, incidentally, when was the 10 percent
13 rule adopted?

14 MR. GARRE: 1998, Your Honor.

15 But with respect to your factual point,
16 that's absolutely wrong, Your Honor. If you look at the
17 admissions data that we cite on page 34 of our brief, it
18 shows the breakdown of applicants under the holistic
19 plan and the percentage plan. And I don't think it's
20 been seriously disputed in this case to this point that,
21 although the percentage plan certainly helps with
22 minority admissions, by and large, the -- the minorities
23 who are admitted tend to come from segregated,
24 racially-identifiable schools.

25 JUSTICE ALITO: Well, I thought that the

1 whole purpose of affirmative action was to help students
2 who come from underprivileged backgrounds, but you make
3 a very different argument that I don't think I've ever
4 seen before.

5 The top 10 percent plan admits lots of
6 African Americans -- lots of Hispanics and a fair number
7 of African Americans. But you say, well, it's -- it's
8 faulty, because it doesn't admit enough African
9 Americans and Hispanics who come from privileged
10 backgrounds. And you specifically have the example of
11 the child of successful professionals in Dallas.

12 Now, that's your argument? If you have --
13 you have an applicant whose parents are -- let's say
14 they're -- one of them is a partner in your law firm in
15 Texas, another one is a part -- is another corporate
16 lawyer. They have income that puts them in the top
17 1 percent of earners in the country, and they have --
18 parents both have graduate degrees. They deserve a
19 leg-up against, let's say, an Asian or a white applicant
20 whose parents are absolutely average in terms of
21 education and income?

22 MR. GARRE: No, Your Honor. And let me --
23 let me answer the question.

24 First of all, the example comes almost word
25 for word from the Harvard plan that this Court approved

1 in Grutter and that Justice Powell held out in Bakke.

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

5 MR. GARRE: Because, Your Honor, our point
6 is, is that we want minorities from different
7 backgrounds. We go out of our way to recruit minorities
8 from disadvantaged backgrounds.

9 JUSTICE KENNEDY: So what you're saying is
10 that what counts is race above all.

11 MR. GARRE: No, Your Honor, what counts is
12 different experiences --

13 JUSTICE KENNEDY: Well, that's the
14 necessary -- that's the necessary response to
15 Justice Alito's question.

16 MR. GARRE: Well, Your Honor, what we want
17 is different experiences that are going to -- that are
18 going to come on campus --

19 JUSTICE KENNEDY: You want underprivileged
20 of a certain race and privileged of a certain race. So
21 that's race.

22 MR. GARRE: No, Your Honors, it's -- it's
23 not race. It's just the opposite.

24 I mean, in the LUAC decision, for example,
25 this Court said that failing to take into account

1 differences among members of the same race does a
2 disservice --

3 JUSTICE KENNEDY: But the reason you're
4 reaching for the privileged is so that members of that
5 race who are privileged can be representative, and
6 that's race. I just --

7 MR. GARRE: It's -- it's members of the same
8 racial group, Your Honor, bringing different
9 experiences. And to say that -- if you took any racial
10 group, if you had an admissions process that only tended
11 to admit from a -- people from a particular background
12 or perspective, you would want people from different
13 perspectives.

14 CHIEF JUSTICE ROBERTS: Counsel --

15 MR. GARRE: And that's -- that's the
16 interests that we're discussing here. It's the
17 interests that the Harvard plan specifically adopts
18 and lays out --

19 CHIEF JUSTICE ROBERTS: I understand my job
20 under our precedents to determine if your use of race is
21 narrowly tailored to a compelling interest.

22 The compelling interest you identify is
23 attaining a critical mass of minority students at the
24 University of Texas, but you won't tell me what the
25 critical mass is. How am I supposed to do the job that

1 our precedents say I should do?

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

5 CHIEF JUSTICE ROBERTS: I know what you say,
6 but when will we know that you've reached a critical
7 mass?

8 MR. GARRE: Well --

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

13 MR. GARRE: Your Honor, this question, of
14 course, implicates Grutter itself. And, again, I
15 understood my friend not to challenge that. They
16 haven't challenged that diversity is a compelling
17 interest at all.

18 What -- what we look to, and we think that
19 courts can review this determination, one, we look to
20 feedback directly from students about racial isolation
21 that they experience. Do they feel like spokespersons
22 for their race.

23 CHIEF JUSTICE ROBERTS: So, what, you
24 conduct a survey and ask students if they feel racially
25 isolated?

1 MR. GARRE: That's one of the things we
2 looked at.

3 CHIEF JUSTICE ROBERTS: And that's the basis
4 for our Constitutional determination?

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

7 CHIEF JUSTICE ROBERTS: Okay. What are the
8 others?

9 MR. GARRE: Another is that we did look to
10 enrollment data, which showed, for example, among
11 African Americans, that African American enrollment at
12 the University of Texas dropped to 3 percent in 2002
13 under the percentage plan.

14 CHIEF JUSTICE ROBERTS: At what level will
15 it satisfy the critical mass?

16 MR. GARRE: Well, I think we all agree that
17 3 percent is not a critical mass. It's well beyond
18 that.

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

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

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

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

4 CHIEF JUSTICE ROBERTS: So, I see -- when
5 you tell me, that's good enough.

6 MR. GARRE: No, Your Honor, not at all. You
7 would look to the criteria that we looked at, the
8 enrollment data, the feedback from the students. We
9 also took into account diversity in the classroom. We
10 took into account the racial climate on campus.

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

14 MR. GARRE: Your Honor, I don't think it
15 would. I mean, our concept to critical mass isn't tied
16 to demographic. It's undisputed in this case that we
17 are not pursuing any demographic goal. That's on page
18 138 of the Joint Appendix.

19 All of -- I think many key facts are
20 undisputed here. It's undisputed that race is only a
21 modest factor. It's undisputed that we're taking race
22 into account only to consider individuals in their
23 totality.

24 JUSTICE SOTOMAYOR: Mr. Garre, I think that
25 the issue that my colleagues are asking is, at what

1 point and when do we stop deferring to the University's
2 judgment that race is still necessary? That's the
3 bottom line of this case. And you're saying, and I
4 think rightly because of our cases, that you can't set a
5 quota, because that's what our cases say you can't do.

6 So if we're not going to set a quota, what
7 do you think is the standard we apply to make a
8 judgment?

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

19 And the reason why the University of Texas
20 concluded that that environment was not met here, it
21 laid out in several different information points that
22 this Court can review --

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

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

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

6 MR. GARRE: Well, Your Honor, Grutter is
7 this Court's precedence. We're guided by it here. At
8 least the advocates are. And -- and what we would look
9 to is once -- we're looking at this every year, we're
10 looking at it carefully. And once we reach that point,
11 of course, we're going to stop.

12 But we also take --

13 JUSTICE SOTOMAYOR: Mr. --

14 JUSTICE GINSBURG: Mr. Garre. Mr. Garre.

15 JUSTICE SCALIA: Some of the stuff that
16 Grutter says -- some of the stuff that Grutter says you
17 agree with, some of the stuff that it says you don't
18 agree with.

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

21 JUSTICE GINSBURG: Mr. Garre, before your
22 time is -- runs out, the other point that I'd like you
23 to answer is the argument based on Parents Involved,
24 that the game is just too small to warrant using a
25 racial criteria.

1 MR. GARRE: Your Honor --

2 JUSTICE GINSBURG: Once you have the
3 10 percent, you don't need more. So how do you answer
4 the argument of it being too small?

5 MR. GARRE: First I'd point to my friend's
6 own concessions, that the consideration of race has
7 increased racial diversity at Hispanic and helps with
8 minority enrollment. That's on page 138 of the Joint
9 Appendix.

10 Secondly, I'd point to the fact that African
11 American and Hispanics' admissions did increase.
12 African American admissions doubled from the period of
13 2002 to 2004. So this has had a real important impact
14 on diversity at the University of Texas.

15 JUSTICE ALITO: Well, in terms of diversity,
16 how do you justify lumping together all Asian Americans?
17 Do you think -- do you have a critical mass of Filipino
18 Americans? Cambodian Americans --

19 MR. GARRE: Your Honor --

20 JUSTICE ALITO: -- Cambodian Americans?

21 MR. GARRE: -- the common form that's used
22 has Asian American, but also, next to that, has a form
23 that says country of origin where that can be spelled
24 out.

25 JUSTICE ALITO: But do you have a critical

1 mass as to all the subgroups that fall within this
2 enormous group of Asian Americans?

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

7 I think -- if I can make a quick point on
8 jurisdiction --

9 JUSTICE KENNEDY: If I could, before we get
10 to that.

11 MR. GARRE: I'm sorry.

12 JUSTICE KENNEDY: Suppose we -- that you, in
13 your experience identify a numerical category a
14 numerical standard, a numerical designation for critical
15 mass: It's X percent. During the course of the
16 admissions process, can the admissions officers check to
17 see how close they are coming to this numerical --

18 MR. GARRE: No. No, Your Honor, and we
19 don't. On page 389 --

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

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

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

25 MR. GARRE: It did, Your Honor. It was one

1 of the things --

2 JUSTICE KENNEDY: So are you saying that
3 Grutter is incorrect?

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

7 JUSTICE KENNEDY: I'm -- I'm asking whether
8 or not you could do that. And if --

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

12 CHIEF JUSTICE ROBERTS: They don't -- they
13 don't monitor, but race is the only one of your holistic
14 factors that appears on the cover of every application,
15 right?

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

19 CHIEF JUSTICE ROBERTS: I'm sorry. The
20 question was whether race is the only one of your
21 holistic factors that appears on the cover of every
22 application.

23 MR. GARRE: That -- that is true on the
24 cover of the application.

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

1 CHIEF JUSTICE ROBERTS: We will give you a
2 little more time since I'm going to give your friend a
3 little more time.

4 MR. GARRE: Thank you.

5 The fundamental problem with jurisdiction is
6 this: First of all, they definitively cannot show that
7 she was injured by any consideration of race. That's at
8 pages 415 and 416 of the Joint Appendix, where it makes
9 clear that Ms. Fisher would not have been admitted to
10 the fall 2008 class at University of Texas no matter
11 what her race, because her --

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

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

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

21 MR. GARRE: And there is another part of
22 that that comes from the brief in opposition, Your
23 Honor, which goes to the relief that she has requested.
24 The declaratory and injunctive release -- relief that
25 this case began with, that request has fallen out, and

1 that's undisputed. So the only thing that is live in
2 this case is a request for monetary damages. That
3 request is on page 79 of the Joint Appendix, and it's
4 focused exclusively on a request for the return of
5 admissions fees. And the reason why that is not enough
6 to confer standing is that she would have paid the
7 admissions fee no matter what policy the university
8 admissions had.

9 CHIEF JUSTICE ROBERTS: What about -- what
10 about our Jacksonville case that said it is an injury to
11 be forced to be part of a process in which there is
12 race-conscious evaluation?

13 MR. GARRE: Texas v. Lesage says that
14 that -- that injury is not sufficient in a
15 backward-looking case like this, where you only have
16 monetary damages. In Jacksonville and all the other
17 cases, they involved forward-looking claims for
18 declaratory injunctive release where people who were
19 going to go out and get contracts again. So Texas
20 University --

21 CHIEF JUSTICE ROBERTS: I thought your
22 friend -- your friend told us that these remedial issues
23 and damages issues had been segregated out of the
24 process and are still available for remand.

25 MR. GARRE: Your Honor, that is not an

1 answer to jurisdiction for this reason: It's true that
2 it is bifurcated in the sense that we could go and prove
3 damages, but the complaint makes no doubt that the only
4 request for monetary damages is a request for admissions
5 fees. That -- it says that explicitly. And this Court
6 has said that relief that does not remedy the injury
7 suffered cannot bootstrap a plaintiff into Federal
8 court. That is the very essence of the redressability
9 requirement. That comes from the Seal Co. Case.

10 JUSTICE SCALIA: Well, that's part of the
11 injury she suffered. It's -- it's not the only injury
12 perhaps.

13 MR. REIN: It's the only --

14 JUSTICE SCALIA: But she -- she had to pay
15 an admissions fee for a process in which she was not
16 treated fairly.

17 MR. GARRE: And the reason why --

18 JUSTICE SCALIA: Why shouldn't she get her
19 money back?

20 MR. REIN: The reason why the payment of
21 that fee doesn't redress the injury, Your Honor, is that
22 she would have paid it even if Texas didn't consider
23 race at all; and, therefore, the payment of the
24 application fee back doesn't remedy the injury that she
25 is complaining about.

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

3 I wanted to use accurate numbers, and so I
4 discovered -- I wanted to find out how many universities
5 actually used a Grutter-type process last year or the
6 year before, etcetera. And one of your amici, the
7 admissions officers, according to our library, is the
8 only place that has that information, though it's
9 public, and I didn't want them to do it because they are
10 an amici of yours. And you are both here, both sides,
11 so if you can agree on -- simply, roughly -- what that
12 number is, I would like to know it; otherwise, I will --
13 I can use pre-Grutter numbers which are public and
14 available.

15 MR. GARRE: Your Honor, I don't have
16 specific numbers. Obviously, the Ivy Leagues and Little
17 Ivy Leagues that have filed amicus briefs are using it.
18 And this Court recognized in Grutter that the best
19 universities, many of the best universities in America,
20 have been using these plans for 30 years or more.

21 JUSTICE SCALIA: Since we are asking
22 questions just about just curiosity, I am curious to
23 know how many -- this is a very ambitious racial program
24 here at the University of Texas. How many people are
25 there in the affirmative action department of the

1 University of Texas? Do you have any idea? There must
2 be a lot of people to, you know, to monitor all these
3 classes and do all of this assessment of race throughout
4 the thing. There would be a large number of people be
5 out of a job, wouldn't we, wouldn't they, if we suddenly
6 went to just 10 percent?

7 MR. GARRE: Your Honor, one of the things
8 that the University of Texas does monitor is the racial
9 climate on campus. It does that to improve the
10 experience for all students on campus.

11 JUSTICE SCALIA: How many people?

12 MR. GARRE: I don't --

13 JUSTICE SCALIA: You don't.

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

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 MR. GARRE: Thank you, Your Honor.

20 CHIEF JUSTICE ROBERTS: General Verrilli.

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

22 FOR UNITED STATES, AS AMICUS CURIAE,

23 SUPPORTING THE RESPONDENTS

24 GENERAL VERRILLI: Mr. Chief Justice, and
25 may it please the Court:

1 In resolving this case, it is important to
2 focus on what is, or more precisely, what is not at
3 issue.

4 Petitioner is not challenging Grutter's
5 reaffirmation of the principle of Justice Powell's
6 opinion in Bakke that student body diversity is a
7 compelling interest that can justify the consideration
8 of race in university admissions. Colleges and
9 universities across the country have relied on that
10 principle in shaping their admissions policies, and it
11 is of vital interest to the United States that they
12 continue to be able to do so.

13 The core of our interest is in ensuring that
14 the Nation's universities produce graduates who are
15 going to be effective citizens and effective leaders in
16 an increasingly diverse society, and effective
17 competitors in diverse global markets.

18 JUSTICE ALITO: Does the United States agree
19 with Mr. Garre that African American and Hispanic
20 applicants from privileged backgrounds deserve a
21 preference?

22 GENERAL VERRILLI: I understand that
23 differently, Justice Alito. Here's how we understand
24 what is going on with respect to the admissions process
25 in the University of Texas, and I am going to address it

1 directly. I just think it needs a bit of context to do
2 so.

3 The Top 10 Percent Plan certainly does
4 produce some ethnic diversity. Significant numbers get
5 in. The problem is the university can't control that
6 diversity in the same way it can with respect to the
7 25 percent of the class that is admitted through the
8 holistic process.

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

20 JUSTICE ALITO: If you have two applicants
21 who are absolutely the same in every respect: They both
22 come from affluent backgrounds, well-educated parents.
23 One falls within two of the groups that are given a
24 preference, the other doesn't. It's a marginal case.
25 It's the last -- the last position available in the

1 class. Under the Texas plan, one gets in; one doesn't
2 get in. Now, do you agree with that or not?

3 GENERAL VERRILLI: No. I think --

4 JUSTICE ALITO: Do you agree with -- do you
5 agree that that is an incorrect statement of the facts,
6 or do you agree that that's an incorrect understanding
7 of the Equal Protection Clause?

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

16 JUSTICE SCALIA: Yes, but -- but the
17 hypothetical is that the two applicants are entirely the
18 same in all other respects.

19 GENERAL VERRILLI: Right. But the point --

20 JUSTICE SCALIA: And if -- if the ability to
21 give a racial preference means anything at all, it
22 certainly has to mean that, in the -- in the
23 hypothetical given -- given by Justice Alito, the
24 minority student gets in and the other one doesn't.

25 GENERAL VERRILLI: I disagree,

1 Justice Scalia. What the -- Texas, I think, has made
2 clear -- and I think this is a common feature of these
3 kinds of holistic approaches -- that not everyone in an
4 underrepresented group gets a preference, gets a plus
5 factor.

6 JUSTICE SCALIA: It's not a matter of not
7 everyone; it's a matter of two who are identical in all
8 other respects.

9 GENERAL VERRILLI: Right.

10 JUSTICE SCALIA: And what does the racial
11 preference mean if it doesn't mean that in that
12 situation the minority applicant wins and the other one
13 loses?

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

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

23 GENERAL VERRILLI: I don't think it's a
24 tie-breaker. I think it functions more subtly than
25 that, Justice Kennedy.

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

5 "The district court found that race is
6 indisputably a meaningful factor that can make a
7 difference in the evaluation of a student's
8 application." If it doesn't make a difference, then we
9 have a clear case; they're using race in a way that
10 doesn't make a difference. The supposition has to be
11 that race is a determining factor.

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

16 GENERAL VERRILLI: It can make a difference.
17 It just doesn't invariably make a difference with
18 respect to every minority applicant, and that's the
19 key --

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

22 GENERAL VERRILLI: Yes, it does.

23 CHIEF JUSTICE ROBERTS: Okay.

24 GENERAL VERRILLI: But it doesn't
25 necessarily make a difference in the situation that

1 Justice Alito posited --

2 JUSTICE GINSBURG: But that's the same --
3 the same would be true in -- of the Bakke plan, that in
4 some cases it's going to make a difference. The same
5 would be true under Grutter. The same would be true
6 under the policies now in existence at the military
7 academies.

8 GENERAL VERRILLI: That -- that is exactly
9 right, Justice Ginsburg, but the point is that it's not
10 a mechanical factor.

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

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

1 JUSTICE SOTOMAYOR: General, I think, as I
2 take your answer, is that the supposition of
3 Justice Alito's question is truly impossible under this
4 system. There are not two identical candidates because
5 there are not identical mechanical factors that --
6 except the 10 percent plan.

7 Under the PIA, the factors are so varied, so
8 contextually set, that no two applicants ever could be
9 identical in the sense that they hypothesize.

10 GENERAL VERRILLI: That's correct. They
11 make specific individualized judgments about each
12 applicant --

13 JUSTICE SOTOMAYOR: Because no two people
14 can be the same --

15 CHIEF JUSTICE ROBERTS: To get back to what
16 we're talking about, you -- as I understand it, race by
17 itself is taken into account, right? That's the only
18 thing on the cover of the application; they take race
19 into account.

20 And the district court found -- and you're
21 not challenging -- that race makes a difference in some
22 cases, right?

23 GENERAL VERRILLI: Yes. But the key,
24 Mr. Chief Justice, is the way it makes a difference.
25 And it makes a difference by casting the accomplishments

1 of the individual applicant in a particular light, or
2 the potential of an individual applicant in a particular
3 light.

4 What -- what universities are looking for
5 principally with respect to this individualized
6 consideration is what is this individual going to
7 contribute to our campus? And race can have a bearing
8 on that because it can have a bearing on evaluating what
9 they've accomplished, and it can have a bearing for the
10 reasons I tried to identify earlier to Justice Alito on
11 what they can bring to the table, what they can bring to
12 that freshman seminar, what they can bring to the
13 student government, what they can bring to the campus
14 environment --

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

1 GENERAL VERRILLI: Not necessarily.

2 (Laughter.)

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

5 CHIEF JUSTICE ROBERTS: Gentlemen,
6 don't write --

7 GENERAL VERRILLI: -- neither might get in.

8 JUSTICE ALITO: Let me withdraw that
9 hypothetical if you don't like that.

10 Before your time runs out, let me ask you
11 another question.

12 Your ROTC argument -- you make -- you
13 make -- you devote a lot of attention in your brief to
14 the military. Could you explain your ROTC argument to
15 me?

16 GENERAL VERRILLI: Sure.

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

20 GENERAL VERRILLI: Our -- our military
21 effectiveness depends on a pipeline of well-qualified
22 and well-prepared candidates from diverse backgrounds
23 who are comfortable exercising leadership in diverse
24 settings.

25 JUSTICE ALITO: Oh, I understand that. And

1 just -- I don't want to cut you off, but --

2 GENERAL VERRILLI: Right.

3 JUSTICE ALITO: -- because the time is about
4 to expire, so you've got a marginal candidate who wants
5 to go to the University of Texas at Austin and is also
6 interested in ROTC. Maybe if race is taken into
7 account, the candidate gets in. Maybe if it isn't, he
8 doesn't get in. How does that impact the military?

9 The candidate will then probably go to Texas
10 A&M or Texas Tech? Is it your position that he will be
11 an inferior military officer if he went to one of those
12 schools?

13 GENERAL VERRILLI: No, Justice Alito.

14 JUSTICE ALITO: Then I don't understand the
15 argument.

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

23 And 43 percent of the Officer Corps comes
24 from the ROTC. It's a very significant source of our
25 military leadership.

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

4 GENERAL VERRILLI: I don't think critical --
5 I agree with my friend that critical mass is not a
6 number. I think it would be very ill-advised to suggest
7 that it is numerical.

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

13 GENERAL VERRILLI: May I answer,
14 Mr. Chief Justice?

15 CHIEF JUSTICE ROBERTS: Oh, yes.

16 GENERAL VERRILLI: Thank you.

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

22 I think that the Court ought to -- has to
23 make its own independent judgment. I think the way the
24 Court would go about making that independent judgment is
25 to look at the kind of information that the university

1 considered. That could be information about the
2 composition of the class. It could be information about
3 classroom diversity. It could be information about
4 retention and graduation rates. It could be information
5 about -- that's specific to the university's context in
6 history. Is it a university that has had a history of
7 racial incidents and trouble or not? A series of
8 factors.

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

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

24 JUSTICE SCALIA: We should probably stop
25 calling it critical mass then, because mass, you know,

1 assumes numbers, either in size or a certain weight.

2 GENERAL VERRILLI: I agree.

3 JUSTICE SCALIA: So we should stop calling
4 it mass.

5 GENERAL VERRILLI: I agree.

6 JUSTICE SCALIA: Call it a cloud or
7 something like that.

8 (Laughter.)

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

13 If I may just add one word in conclusion.

14 CHIEF JUSTICE ROBERTS: Sure.

15 GENERAL VERRILLI: Thank you.

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

25 That's what the University of Texas is

1 trying to do with its admissions policy, and it should
2 be upheld.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, General.
5 Mr. Rein, 10 minutes.

6 REBUTTAL ARGUMENT OF BERT W. REIN

7 ON BEHALF OF THE PETITIONER

8 MR. REIN: Thank you, Mr. Chief Justice.
9 That's more than I expected.

10 CHIEF JUSTICE ROBERTS: Just keeping the
11 playing field level.

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

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

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

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

4 JUSTICE SOTOMAYOR: In Arizonans and Alvarez
5 we said any all -- any and other -- all damages is too
6 speculative. Is what you actually see what I said:
7 injunctive relief and the return of the \$100.

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

10 JUSTICE SOTOMAYOR: In --

11 MR. REIN: -- because of --

12 JUSTICE SOTOMAYOR: In Arizonans and Alvarez
13 we said you can't manufacture standing after the fact.
14 Did you ask only for injunctive relief and the \$100,
15 specifically?

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

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

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

1 And the second thing is, because of the way
2 the case was bifurcated, with the agreement of all and
3 the district court as well, we did not develop the
4 additional damages here. We reserved the right to
5 amend, and as things have progressed --

6 JUSTICE SOTOMAYOR: For what, nominal
7 damages?

8 MR. REIN: No --

9 JUSTICE SOTOMAYOR: And then how do you get
10 around Arizonans?

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

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

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

24 Let me go to another issue that, you know, I
25 think I never completed my answer to Justice Breyer.

1 Where we stand on what you should do about Grutter is as
2 follows.

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

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

23 JUSTICE SOTOMAYOR: You are not suggesting
24 that if every minority student that got into a
25 university got into only the physical education program;

1 and in this particular university that -- that physical
2 education program includes all the star athletes; so
3 every star athlete in the school happens to be black or
4 Hispanic or Asian or something else, but they have now
5 reached the critical mass of 10, 15, 20 percent -- that
6 the university in that situation couldn't use race?

7 MR. REIN: Well, I think you are talking
8 about --

9 JUSTICE SOTOMAYOR: In the holistic way that
10 Grutter permits?

11 MR. REIN: Well, if you are saying there's a
12 -- a differentiated department of physical education,
13 which is like a separate college, you have changed the
14 nature of the hypothetical.

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

20 MR. REIN: Well, if that were the case,
21 remember the factor that is causing it, and you are
22 assuming, is choice. You have a critical mass of
23 students. They choose to major in different things, and
24 that's one of the problems with the classroom diversity
25 concept. They never asked the question why, if

1 40 percent of our students are minorities, are they not
2 in the small classrooms? Why does that happen?
3 Statistically you would say that's an aberration. You
4 might ask the question what's causing it? Because in
5 order to fit --

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

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

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

22 And if I might then say to Justice Breyer, I
23 think our answer is, when we see what UT is doing, what
24 we that -- Grutter's -- you know, it has been perceived
25 as a green light; go ahead and use race, race which is

1 otherwise really a highly questionable, an abominable
2 kind of sorting out. That unchecked use of race, which
3 we think is -- has been spawned by misreading of
4 Grutter, needs to be corralled. So what we --

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

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

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

21 I thought your hypothetical, Justice Alito,
22 was entirely fair, because in the way they do their
23 system, in the PAI scoring, you can figure out that two
24 people would have had the same PAI score but for race.
25 It's an add-on. It allows them to boost the PAS

1 component of the PAI score. So -- it is not infrequent.
2 There are many, many candidates who will score the same
3 PAI, may even have the same AI, and then you boost some
4 of them.

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

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

22 So what we have said, and it comes right
23 back to Justice Breyer, how would you write it, you can
24 clarify it, you can say Grutter properly applies,
25 requires you to do A, B, C, and -- and we've said in our

1 brief that would be satisfactory. But to the extent
2 that you then have it surviving side by side, there
3 could be enormous confusion.

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

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

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

1 stated as a narrow window.

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

4 MR. REIN: Excuse me?

5 JUSTICE SOTOMAYOR: You just want to gut it.
6 You don't want to overrule it, but you just want to gut
7 it.

8 MR. REIN: Well --

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

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

20 CHIEF JUSTICE ROBERTS: Thank you, counsel,
21 counsel.

22 The case is submitted.

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

25

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