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IN THE SUPREME COURT OF THE UNITED STATES

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ABIGAIL NOEL FISHER, :  
Petitioner : No. 14-981

v. :

UNIVERSITY OF TEXAS AT :  
AUSTIN, ET AL. :

- - - - - x

Washington, D.C.

Wednesday, December 9, 2015

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:03 a.m.

APPEARANCES:

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

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

GEN. 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 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 this morning in Case 14-981, Fisher v. The University of  
5 Texas at Austin.

6 Before we get started, I'll advise the  
7 lawyers that this is our only case this morning, so we  
8 intend to grant the parties ten minutes or so of extra  
9 time and the amicus five minutes.

10 So Mr. Rein, no need to rush.

11 (Laughter.)

12 ORAL ARGUMENT OF BERT REIN

13 ON BEHALF OF THE PETITIONER

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

16 I appreciate the extra time, and I didn't  
17 rush up here to start before you invited me this time.

18 In reviewing the Fifth Circuit's initial  
19 decision in what we call Fisher I, seven members of this  
20 Court reaffirmed that a clear precondition to the use of  
21 race as an admissions factor was the ability to satisfy  
22 what was called the "demanding burden of strict  
23 scrutiny" articulated in Grutter and Bakke.

24 By establishing that she was considered for  
25 admission to UT under a system that discriminated

1 against her on the basis of her race, Ms. Fisher placed  
2 upon UT the burden of -- of proving, by evidence of  
3 record, that its use of race was, first, in pursuit of a  
4 compelling, constitutionally legitimate interest  
5 expressed with sufficient clarity and concreteness to  
6 allow a reviewing court to determine, first, that the  
7 use of race was a necessary last resort in pursuing the  
8 interest defined, taking into account reasonably  
9 available nonracial alternatives.

10 JUSTICE GINSBURG: Mr. Rein, may I ask, if  
11 we didn't have the 10 percent plan, if that were out of  
12 this case, and all that were left were the Grutter-like  
13 plan, would you then recognize that you had no claim?

14 We have the -- what -- what the University  
15 of Texas has added on to the 10 percent plan. But now  
16 we wipe out the 10 percent, and we have only the  
17 Grutter-like plan.

18 MR. REIN: Well, I -- with respect, I -- I  
19 would question the premise of the question because it's  
20 not the Grutter-like plan in its entirety.

21 JUSTICE GINSBURG: I know it's not --

22 MR. REIN: That would be a totally  
23 different --

24 JUSTICE GINSBURG: -- but -- but I'm asking  
25 the hypothetical.

1           MR. REIN:           No. And I'm saying even in the  
2 AI/PAI system it's not a Grutter-like plan. It's not a  
3 plan of shaping a class by individualized one-to-one  
4 comparisons. It's not aimed at a critical mass. It's  
5 not a Grutter plan in that sense.

6           But I think the -- the other part of this is  
7 that's, of course, not the case before us. When you  
8 look at the satisfaction of a compelling interest, you  
9 look and ask: Does my preexisting system satisfy that  
10 interest? Do I have a need to do something else? And  
11 if I have a need to do something, is that something --

12           JUSTICE SOTOMAYOR:           Assume need was proven.  
13 I know. You're -- you're -- you're -- we're putting  
14 aside need. What's wrong with this plan if need is put  
15 aside?

16           MR. REIN:           Well, let's put it this way: We  
17 do not oppose the use of the various PAI factors that  
18 were in place before race was added. What's wrong with  
19 this plan, apart --

20           JUSTICE SOTOMAYOR:           No, no, no, no.

21           MR. REIN:           And --

22           JUSTICE SOTOMAYOR:           I know you're saying  
23 they don't need to do it. I said put it aside and  
24 answer Justice Ginsburg's question.

25           MR. REIN:           And I -- yes, and --

1 JUSTICE SOTOMAYOR: If they had to use race,  
2 how are they using it improperly?

3 MR. REIN: If you have to use race and you  
4 want to use the model that was created in Bakke and  
5 Grutter, you would need to build profiles of individuals  
6 that would allow you to judge them one against another  
7 in the context of the class and the educational  
8 experience you are trying to create.

9 JUSTICE SOTOMAYOR: My God, that sounds like  
10 it's using race more rather than less than this plan  
11 does.

12 MR. REIN: I -- I'm sorry if it sounds that  
13 way. It is not. It simply says, in a situation of the  
14 Bakke situation where you're looking at every aspect of  
15 an individual and you're trying to judge whether one or  
16 another of individuals for the -- for places, the last  
17 places would most benefit the class, the class as a  
18 whole as a learning entity, then you can, as Bakke  
19 indicates, take account of the fact that they may have  
20 different backgrounds, which would contribute different  
21 ideas.

22 JUSTICE SOTOMAYOR: How does that --

23 MR. REIN: Those are whole-person  
24 comparisons. This is not the system that -- this system  
25 doesn't do anything like Bakke.

1           So if -- it's very different.           Even you  
2 separate it from the necessity issue -- which is, of  
3 course, a major issue in this case, but I'm assuming  
4 your question -- that they've shown that they needed to  
5 use race, there was no other way to do whatever they  
6 were trying to do -- which isn't clear to me either --  
7 so you have both the question of whether they've defined  
8 a legitimate compelling interest; you have the question  
9 of whether they've shown any necessity to use race. But  
10 if I -- even I put those aside, whether this is the  
11 narrowly tailored vision that came out of Bakke is a  
12 very serious question. It isn't. It's quite different.  
13 And I can --

14           JUSTICE SOTOMAYOR:           You still haven't  
15 answered why this is worse than Bakke. I mean --

16           MR. REIN:           Because it -- it's not used to  
17 build a class. It's just used to create a racial plus  
18 and to increase the number of minority admissions.

19           JUSTICE SOTOMAYOR:           How is race given --

20           MR. REIN:           It's race as such.

21           JUSTICE SOTOMAYOR:           How is race given a  
22 plus?

23           I -- I thought that what they're looking for  
24 is leaders in diversity, not just of race, but of  
25 experiences generally.

1 MR. REIN: Those factors --

2 JUSTICE SOTOMAYOR: So how --

3 MR. REIN: I'm sorry. But those factors  
4 were in the PAI before they added race. Leadership;  
5 demonstrated awards and success out of school;  
6 overcoming obstacles, like a single-parent family.  
7 Those were all part of the PAI before race was added.  
8 Race was just tacked on, as they said, as a factor of a  
9 factor of a factor.

10 They've shifted position as to how it's  
11 used. In the -- in the district court, it was sort of  
12 minimized, a factor of a factor of a factor. It's a  
13 minor plus; don't worry about it. It's now become,  
14 well, it's a contextualized part of the PAS, which is  
15 part of the PAI, and we can discretionarily jack that up  
16 any way we want.

17 But all those other factors that they  
18 claim --

19 JUSTICE SOTOMAYOR: I think your brief  
20 admitted that this isn't in favor of any particular  
21 race, that white people in some situations can show  
22 leadership, as -- as well as black or Hispanic or Asian  
23 or Native American. Any race could benefit from this  
24 plus factor. So how is this --

25 MR. REIN: I -- I --



1 JUSTICE SOTOMAYOR: -- worse than Bakke?

2 MR. REIN: With respect, we did not concede  
3 that, and we would not concede it because the other PAI  
4 factors might benefit anybody of any race. People's  
5 circumstances, their leadership, their community  
6 efforts -- those are universal, and they can benefit any  
7 candidate. But they don't benefit from the race factor.  
8 The race factor was designed to benefit --

9 JUSTICE GINSBURG: But in Grutter -- in both  
10 Grutter and what Justice Powell said would be proper in  
11 Bakke, race was a factor. Race, itself, was a factor.  
12 And that's why I'm finding it very hard to distinguish  
13 what the university is doing, apart from the 10 percent  
14 plan.

15 But let -- let me ask you about the 10  
16 percent plan itself, because it seems to me that that is  
17 so obviously driven by one thing only, and that thing is  
18 race. It's totally dependent upon having racially  
19 segregated neighborhoods, racially segregated schools,  
20 and it operates as a disincentive for a minority student  
21 to step out of that segregated community and attempt to  
22 get an integrated education.

23 MR. REIN: Justice Ginsburg, let -- let me  
24 respond to this, with respect, this -- this way. The  
25 top 10 plan does not classify anybody by race. It

1 addresses only standing within the Texas educational  
2 system.

3 JUSTICE GINSBURG: But it could work only in  
4 the background.

5 MR. REIN: When you say "work," it works on  
6 a number of fronts. It creates geographic diversity.  
7 It looks all over Texas. It doesn't distinguish between  
8 high schools. It creates socioeconomic diversity. It  
9 does have an effect, a demonstrated effect on race  
10 because a number of minorities, the type they care  
11 about, are admitted under the top 10 program. It's not  
12 based on race. It's based on the degree of effort you  
13 make relative to the other people with whom you're  
14 being --

15 JUSTICE GINSBURG: It is created because of  
16 race.

17 MR. REIN: I -- I'm not in a position to  
18 tell you why it was created. It -- it was created --

19 JUSTICE GINSBURG: Is there any doubt that  
20 it was created to increase the number of minority  
21 students? Was there any other reason for the 10 percent  
22 plan?

23 MR. REIN: Well, I've given you other  
24 reasons, which are it's a -- it's kind of a democratic  
25 recognition that you want to invite people from all over

1 Texas, regardless of the school they went to. You're  
2 looking for those who are trying the hardest, who are  
3 doing the best, who excel in their environment.

4 JUSTICE KENNEDY: It was recreated in the  
5 wake of Hopwood.

6 MR. REIN: That -- that timing, yes.

7 JUSTICE KENNEDY: So I think that was the  
8 purpose, to define a neutral framework within which to  
9 satisfy the States and the universities' objectives.

10 MR. REIN: And certainly one in the  
11 legislature might have looked at the predictable effect,  
12 but that purpose and effect are different. But yes, it  
13 was created, and in part, because certain schools do  
14 have minorities, the idea was, well, that would benefit  
15 those schools just as it would benefit a rural high  
16 school in a white community, which ordinarily would have  
17 very great difficulty placing its students in the  
18 University of Texas. This system --

19 JUSTICE KENNEDY: You argue that the  
20 University of Texas' goals and -- or announced goals are  
21 insufficiently concrete.

22 Can you give an example of what, in your  
23 view, would be a sufficiently concrete criterion or set  
24 of criteria to achieve diversity?

25 MR. REIN: Well, and -- and certainly, the

1 Solicitor General's attempted to do so by breaking down  
2 the abstract goals into concrete objectives. One goal  
3 that certainly Grutter respects is, if you have studied  
4 your campus and you believe there's an inadequate  
5 exchange of views, and the minorities feel so isolated  
6 they cannot properly bring to bear their perspective on  
7 the campus, you can look at measures of how successful  
8 are we in this kind of dialogue and try to investigate  
9 that, and try to say, okay, is there a level -- you  
10 know, when do we reach a level of critical mass, which  
11 is the term in Grutter, where that exchange is vibrant  
12 and is taking place on our campus. That's one measure.

13 CHIEF JUSTICE ROBERTS: Well, but I don't  
14 understand.

15 How do you do that?

16 MR. REIN: It's not easy to do, and it's not  
17 our job to do it. I mean, we're not here to tell them  
18 how to do it, but your -- if one wanted to endeavor to  
19 try to find this kind of concrete level, we're not  
20 saying quota, but we are saying you have to -- you, the  
21 university, if you want to use this forbidden tool, this  
22 odious classification, you've got to find a way to do  
23 it. You've got to be able to explain what your concrete  
24 objective is.

25 JUSTICE SCALIA: Are there any critical mass

1 studies that you can refer to? I mean, are there --

2 MR. REIN: None that I know about.

3 JUSTICE SCALIA: -- scientific studies where  
4 you know at what point you suddenly have enough of a  
5 mass?

6 MR. REIN: No. And --

7 JUSTICE SCALIA: So what did the university  
8 base it on?

9 MR. REIN: The university based it on two  
10 things. It was short of the demographics of the high  
11 school graduating class, which is measurable but not  
12 legitimate, and it claimed that it was basing it on this  
13 classroom, a small-class study which they had conducted  
14 previously, which indicated that minorities were not  
15 present to the -- their satisfaction in a lot of small  
16 classes. That --

17 JUSTICE BREYER: Seven year -- sorry.

18 JUSTICE SCALIA: Excuse me.

19 To their satisfaction. I'm asking: On what  
20 do they base their satisfaction? On what do they base?  
21 Like, 15 percent, 20 percent?

22 MR. REIN: They premised it on good faith,  
23 and that was accepted in the Fifth Circuit on the first  
24 iteration of this case, and this Court said good faith  
25 does not suffice. So --

1 JUSTICE SOTOMAYOR: I'm sorry. I thought  
2 that the study they did showed that in 1996, they had  
3 more participation in these smaller classes. I don't  
4 know if they're really small when they're somewhere  
5 between eight and 25 people. That was a -- but there  
6 were more of those classes in 1996 than in 2003 or '2  
7 when they were looking at that study.

8 It would seem to me that that suggests that  
9 there's less -- what they took from it, that there's  
10 less exchange of ideas in a classroom rather than more,  
11 based on this race-neutral policy.

12 MR. REIN: Well, I think --

13 JUSTICE SOTOMAYOR: What's wrong -- since  
14 you have to infer these things, you can't use a quota.

15 MR. REIN: Let me --

16 JUSTICE SOTOMAYOR: You're saying we  
17 can't -- they can't use demographics. So they use a  
18 study that shows there's less classes. There's less  
19 people in classes. They talk to administrators,  
20 faculty, and students. They're having racial incidents  
21 on campus where students of color are complaining that  
22 they feel isolated, that stereotyping is going on, on  
23 campus.

24 What more do they need?

25 MR. REIN: Let me start with your first

1 concern, which is this classroom study.

2 First thing I would observe about that if I  
3 were in their position, and I'm not, is that the second  
4 study was done at a time when there were more minorities  
5 admitted than the first study, and they claimed it went  
6 backwards. So that might tell me right away that the  
7 problem -- the necessity for using race could not be  
8 demonstrated for that, because when you --

9 JUSTICE BREYER: Yeah. Because the -- the  
10 necessity is not the necessity you're talking about.  
11 It's the -- as I read it. I mean, you use words like  
12 "critical mass" and so forth. It sounds like a cloud of  
13 sort of you don't know what they're talking, but as I  
14 read further into it, it becomes quite specific, that  
15 is, 75 percent of the students are at this university  
16 because they were in the top 10 percent of their class.  
17 And it doesn't take long before students and faculty in  
18 particular situations know who is who. 25 percent of  
19 the students in that class are admitted; they're good  
20 students, not in the top 10 percent on the basis of  
21 leadership, activities, awards, work experience,  
22 community service, family's economic statutes, school  
23 status, family responsibilities, single-parent home,  
24 languages other than English spoken at home, SAT score  
25 relative to school's average and race occasionally, too.

1 Okay? We're talking about that 25 percent. And it  
2 won't take long before students in a class see that in  
3 that 25 percent, which means you aren't just in the top  
4 10 percent of your class, in that 25 percent there is  
5 hardly anybody who is African-American or Hispanic. And  
6 the -- and seven years of experience with that kind of  
7 thing led the faculty at meetings, administrators, and  
8 others to say, we should do more to see that that 25  
9 percent has occasionally somebody who is a minority.

10 JUSTICE SCALIA: Does anybody but the  
11 faculty --

12 JUSTICE BREYER: That's what their program  
13 is. It isn't something like critical mass, et cetera.  
14 And -- and -- and if you have to say, it seems to me,  
15 why is that not a diversity-related judgment of what is  
16 necessary?

17 MR. REIN: So, Justice Breyer, let me answer  
18 that.

19 First of all, one thing your question  
20 establishes quite clearly is if one assumes premises  
21 from evidence that doesn't exist, you can draw  
22 conclusions that are perhaps invalid.

23 So let me go back to -- to where you  
24 started. You say these people are admitted on the basis  
25 of the various PAI factors, which you read. That's not



1 how they're admitted. That PAI is only part of the  
2 admissions criteria.

3 JUSTICE BREYER: Well --

4 MR. REIN: And it's not truly holistic  
5 because in the holistic systems, you look at the person  
6 as a whole. Here you could have the most wonderful PAI  
7 and never come close to admission, because they use the  
8 AI independently. So they're not admitted --

9 JUSTICE BREYER: Every school is like that.  
10 Every school in the country that's a college that I've  
11 ever experienced is a combination of grades, class  
12 position, and a lot of other things.

13 MR. REIN: But --

14 JUSTICE BREYER: So I'm talking about people  
15 who aren't admitted; 75 percent are, solely on the basis  
16 of class ranking.

17 MR. REIN: Yeah. And -- and then you assume  
18 that people could identify them one from another.  
19 They're --

20 JUSTICE SCALIA: I was going to ask that.  
21 Does anybody, except the faculty, know who  
22 this elite 25 percent is?

23 MR. REIN: No.

24 JUSTICE SCALIA: And all of the 10 percent  
25 people identified themselves?

1 MR. REIN: No. They do not.

2 JUSTICE SCALIA: They go around in bunches,  
3 hey, I'm one of the 10 percent?

4 MR. REIN: They don't, and --

5 JUSTICE SCALIA: They don't know who the 10  
6 percent are, do they?

7 MR. REIN: -- and the level of admission to  
8 the faculty at the university subgroup in which they  
9 study, whether it's business or communications, there  
10 it's all done by AI/PAI. They're all --

11 JUSTICE SOTOMAYOR: Could I --

12 MR. REIN: They're all done equal.

13 JUSTICE ALITO: Could I come back to the  
14 issue of classroom diversity? Because that does seem to  
15 me to be something that could be measured. And maybe  
16 there's evidence in the record that measures it. I  
17 don't know. So that's what I want to ask you. But the  
18 University knows which students, even if -- assuming  
19 that the students don't know, this University knows  
20 which students were admitted because they were in the  
21 top 10 percent and which were not.

22 And presumably they have a record of all of  
23 the classes and which students enrolled in which  
24 classes. And so it would seem to me to be possible to  
25 determine whether the students who were admitted under

1 the 10 percent plan were less likely to choose to enroll  
2 in the classes in which minorities are underrepresented  
3 than the students who were admitted under holistic  
4 review. Now, maybe that's in the record. I haven't  
5 found it. Is there anything in the record to show that?

6 MR. REIN: The best of the record, because  
7 they didn't study that specifically. When they did the  
8 classroom study, they -- they did not try to distinguish  
9 who was in the class. It was just a number count by --  
10 by classification, how many minorities of this kind, how  
11 many of that kind. They counted African-Americans.  
12 They counted Hispanic students, or -- and they counted  
13 Asians in that study, but they counted them by race.

14 JUSTICE KENNEDY: I don't want -- I don't  
15 want to pre-demit this line of questioning because I  
16 think it's important and we're well into the substantive  
17 issues.

18 May I begin with almost a procedural point:  
19 Did you object to the University's request that this  
20 case be remanded to the district court?

21 MR. REIN: We did in -- in the Fifth  
22 Circuit.

23 JUSTICE KENNEDY: In the Fifth Circuit.

24 It does seem to me, as Justice Alito's  
25 question, and frankly some of the other questions have

1 indicated, that the litigants, and frankly this Court,  
2 have been denied the advantage and the perspective that  
3 would be gained if there would be additional  
4 fact-finding under the instructions that Fisher sought  
5 to give. And that just -- we're just arguing the same  
6 case.

7 MR. REIN: Well --

8 JUSTICE KENNEDY: It's as if nothing had  
9 happened.

10 MR. REIN: And -- and the reason for that --

11 JUSTICE KENNEDY: And I -- it seems to me  
12 that Justice Alito's question indicates that this is the  
13 kind of thing that we should know but we don't know.

14 MR. REIN: Well, let -- let me point out  
15 that the -- the purpose of strict scrutiny is not just  
16 to adjudicate. It is to instruct the University that  
17 before you use the odious classification, before you  
18 employ race, you ought to know these things. If you're  
19 going to depend on them, you ought to study them and  
20 know them. So the failure to do that so there is no  
21 evidence is not just because they didn't put it in --

22 JUSTICE KENNEDY: But they weren't given the  
23 chance to add additional evidence in order to meet that  
24 standard.

25 MR. REIN: Well, they can't go back and

1 recreate the past. They can't -- they have put in all  
2 the evidence available to them about --

3 JUSTICE KENNEDY: But they could answer some  
4 of the questions as -- like the ones Justice Alito  
5 added. And I think it's a very important point.

6 MR. REIN: They could -- I mean, but they'd  
7 have to go back and study the conditions at the time  
8 they made the decision. And I think that the failure to  
9 do that kind of thing indicates that the retreat to race  
10 was reflexive; was done on the day Grutter came down.

11 JUSTICE SCALIA: Not only that. Also the  
12 failure to put it in. It was their burden to put it in,  
13 wasn't it?

14 MR. REIN: Yes. And they knew that --

15 JUSTICE SCALIA: So we're going to say, oh,  
16 they failed to put it in. Let's give them another  
17 chance.

18 MR. REIN: Well, procedurally --

19 JUSTICE SCALIA: Let's do a do-over.

20 MR. REIN: They --

21 JUSTICE SCALIA: Send it back down so they  
22 can now put in what they should have put in in order to  
23 prevail the first time around.

24 MR. REIN: And that I -- I entirely agree  
25 with that. And in -- in fairness, they knew that the

1 standard was strict scrutiny. Grutter had said strict  
2 scrutiny. Bakke said strict scrutiny. It was no  
3 surprise.

4 And Justice Alito, more directly, the  
5 evidence we did find in the record indicated that where  
6 the most selective schools were concerned, which would  
7 then lead you to the smaller classes, more of the top  
8 ten minorities enrolled in that than the added  
9 minorities that they derived --

10 JUSTICE ALITO: Well, the issue in this case  
11 is not whether the University can have holistic review.

12 MR. REIN: Correct.

13 JUSTICE ALITO: The issue is whether they  
14 can have as a component of holistic review after they  
15 have taken into account other characteristics that are  
16 not dependent on race; they can add race as an  
17 additional characteristic.

18 And so if it were -- is there -- would there  
19 be any way of determining, if there were a remand, which  
20 of the non-top 10 admittees were admitted solely because  
21 of race? In other words, these students would not have  
22 been admitted taking into account leadership and family,  
23 education and socioeconomic background and hardship and  
24 everything else.

25 MR. REIN: According to the University of

1 Texas, the answer to that is no. They cannot make that  
2 determination because, in their view, race is  
3 contextual. You cannot sort out those who could have  
4 made it without race from those who didn't.

5 And -- and just in response to Justice  
6 Breyer, as fact of record, prior to the invocation of  
7 race, 15 percent of the non-top 10 admits were -- were  
8 the minorities who later benefitted from race.

9 So it was not devoid of admits who were  
10 Hispanic or -- or African-American. It was producing 15  
11 percent, a marginal increase out of race was, if you try  
12 to measure it, very small. And -- and I could think of  
13 reasons for that, but -- so they couldn't put that in.  
14 They denied that you could ever identify those students.  
15 So that would be a fruitless pursuit unless they  
16 completely change everything they said before.

17 JUSTICE SOTOMAYOR: May I ask --

18 CHIEF JUSTICE ROBERTS: Could you associate  
19 a number with "the very small"? I guess it would be the  
20 number of students who were admitted with the  
21 consideration of race who were not also --

22 MR. REIN: Correct.

23 CHIEF JUSTICE ROBERTS: Yeah.

24 MR. REIN: That would be the measurement.

25 And -- and there's no perfect answer to that when the

1 University says they can't identify them. But what we  
2 did is we looked at the historic period in which they  
3 were using the PAI, without reference to race, and  
4 compared that to the percentage admitted of the total  
5 student body of those admits in the period when they  
6 were using race, and they compare -- this is about a two  
7 and a half percent difference, so it's very small. And  
8 you would --

9 CHIEF JUSTICE ROBERTS: Two and a half  
10 percent difference in entering class numbers or number  
11 of minorities admitted?

12 MR. REIN: Number of minorities. You can  
13 measure it either way by enrollment or admission. It's  
14 still going to be a very small number. It doesn't  
15 make -- it's statistically lost. So it's a very small  
16 increment. And of course, you --

17 CHIEF JUSTICE ROBERTS: The number is  
18 important to me. Is it -- is what any --

19 MR. REIN: It's under 3 --

20 CHIEF JUSTICE ROBERTS: I can ask your  
21 friend on the other side, but --

22 MR. REIN: It's under 3 percent.

23 CHIEF JUSTICE ROBERTS: Of what? Of numbers  
24 --

25 MR. REIN: Of total admits or the -- and the



1 total enrollees both. And Judge Garza actually premised  
2 it.

3 JUSTICE SCALIA: Of the minority students.  
4 Of blacks.

5 MR. REIN: Of the class itself. So what  
6 percentage of -- yes. Let me be very clear. What  
7 you're trying to measure is to what extent did the use  
8 of race boost over the use of the PAI on a nonracial  
9 basis.

10 JUSTICE SOTOMAYOR: I'm sorry. I thought  
11 you said --

12 CHIEF JUSTICE ROBERTS: But in Parents -- in  
13 Parents Involved, you indicated that at some point the  
14 actual benefit of the program turns out to be not really  
15 worth the very difficult decision to allow race to be  
16 considered if at the end of the day it generates a  
17 certain number. And I'm trying to figure out what that  
18 number is.

19 MR. REIN: And -- and I a.m. saying that, as  
20 we said in our briefs, and we tried to -- there's no  
21 perfect measurement because you don't have them running  
22 simultaneously.

23 CHIEF JUSTICE ROBERTS: Right. Right.

24 MR. REIN: But if you tried to do it by  
25 looking at the results when using the PAI, but not race,

1 versus the results both at the admission and enrollment  
2 stage of using the PAI affected by race, it's a -- it's  
3 under 3 percent. And it's again --

4 JUSTICE SOTOMAYOR: I'm sorry. I'm not sure  
5 where you get that number. As I look at it, between  
6 2004 and 2006 -- '7, it nearly doubled from 3.6 of the  
7 holistic class to 6.8. For Hispanic students -- that's  
8 for blacks -- it went from 11.6 to 16.9. I don't think  
9 that's -- that small a change.

10 In 2008, two -- 20 percent of all black  
11 students and 15 percent of all Hispanic students were  
12 offered admission through holistic review. Black and  
13 Hispanic admission and enrollment rates have increased  
14 since 2005. This is on -- on holistic review. The only  
15 exception was 2008, and that was because 92 percent of  
16 the class came in under the 10 percent plan.

17 MR. REIN: Well, you know --

18 JUSTICE SOTOMAYOR: When your number --

19 MR. REIN: -- when you -- when you use  
20 numbers about --

21 JUSTICE SOTOMAYOR: -- that's not small.

22 MR. REIN: -- admission on holistic review,  
23 that incorporates the ones who would have made it  
24 without race, so it's not a valid comparative number.

25 CHIEF JUSTICE ROBERTS: The ones who would

1 -- the ones who have made it --

2 MR. REIN: -- without race are incorporated  
3 in, quote, "holistic review." So those numbers really  
4 don't tell you anything about the effect of race. They  
5 don't --

6 JUSTICE SOTOMAYOR: Well, wait a minute. I  
7 don't understand how that can be. If the 2004 number  
8 was that much lower than the 2007 number, race has to  
9 have some input in that fact -- in that --

10 MR. REIN: It -- it has some effect. That's  
11 what UT says. They haven't measured, and say they can't  
12 measure the effect. You're dealing with different  
13 classes.

14 JUSTICE SOTOMAYOR: Could I ask you a  
15 different question now? I fear something. I know there  
16 is an educational debate on the benefits and costs of a  
17 10 percent plan. I don't want to get into that debate,  
18 but I do have a worry, which is: If you're reading  
19 proof of a compelling need, or proof of a compelling  
20 need, will any holistic review ever survive?

21 Because as I'm reading your answer, to  
22 narrowly tailor, schools have to use nonracial means of  
23 doing it. And if the 10 percent plan is the only thing  
24 that achieves a greater number in minorities, won't  
25 every school have to use a 10 percent plan?

1           MR. REIN:           We're not, certainly, trying to  
2 dictate that every school use a 10 percent plan, nor is  
3 it the only way in which you can encourage and increase  
4 minority enrollment. So I -- I don't accept that  
5 premise.

6           Strict scrutiny is a -- a heavy burden.           And  
7 the purpose of strict scrutiny as to recognize that the  
8 base --

9           JUSTICE SOTOMAYOR:           So your answer is yes.  
10 If there's no other --

11          MR. REIN:           No. I --

12          JUSTICE SOTOMAYOR:           -- way of doing it, then  
13 the only other race-neutral way -- if offering  
14 scholarships, which this university did, increasing  
15 outreach to minority neighborhoods, they did and  
16 continue to do -- there's a list of about six or eight  
17 other things they did that didn't increase the admission  
18 of minorities.

19          MR. REIN:           There are many other things they  
20 could do. We're not trying to tell them how to run it.  
21 I mean, clearly one of the things they could do is --  
22 even in the PAI, they recognize that by emphasizing, as  
23 they did at first, the two essay scores, which are  
24 strictly composition, grammar, that -- that is as  
25 culturally biased as you can get it. It -- it makes it

1 difficult for those who have gone through an inferior  
2 secondary program to excel.

3           So they cut that score to three.           They could  
4 cut it to two. They could -- they could take measures  
5 which were aimed at looking at potential deficiencies in  
6 initial education because you come from a home where  
7 there isn't a college-educated person and say, we're  
8 going to take those further into account because they  
9 apply equally without regard to race.

10           So there are many things they could do  
11 with --

12           JUSTICE BREYER:           No, but that's exactly the  
13 question, I think. I would -- I can put the same  
14 question -- or suppose we do send it back to the  
15 district court and, put in more evidence, we tell them.  
16 Suppose we did that. And suppose they start with the  
17 basic plan where we want to use race is in the  
18 25 percent of the holistic area. We want to do that.

19           Now, they're using the chart -- and I've  
20 seen the chart -- of the factors that are one, two,  
21 three, four, five, six, seven, eight, nine, ten, eleven,  
22 twelve. You know, using that chart. I've seen the  
23 chart. And at the bottom of the chart in my list is the  
24 word "race." It says "race," r-a-c-e.

25           Okay?

1           What kind of evidence, in your opinion,  
2           could they or anyone else with any roughly similar plan  
3           put in that would show, in your view, that this is  
4           constitutional?

5           MR. REIN:           Well, I mean, you have the  
6           example of Justice Powell's opinion in Bakke. And that  
7           says that if you're looking at the whole person and  
8           you're comparing individuals one to another to say who  
9           will best suit the educational need of the class, then  
10          you take account of a person's race. It's part of  
11          the -- the exercise.

12          You don't isolate it, because if you look at  
13          Justice Bakke's example, he's got A and B, two minority  
14          African-American students, and C. And he says,  
15          depending where the class stands in the overall  
16          composition of this learning entity, you might choose A  
17          under one circumstance; vice versa, you might choose B;  
18          and sometimes you'll choose C without regard to race.  
19          So he's looking at it as a way of looking at the  
20          totality of a person, all of their achievements,  
21          academic and otherwise.

22          So you -- so Bakke's systems are not at  
23          issue here, nor is the top 10 at issue. That's -- that  
24          was accepted in this case. No one challenged it.

25          So I'm saying you don't have to do the top

1 10. You can --

2 JUSTICE BREYER: All right. So we have one.  
3 But I'm looking --

4 MR. REIN: Justice Breyer, you can achieve  
5 this small increment of under 3 percent, in our view, by  
6 a number of alternatives that would -- would -- would  
7 give this same boost. These are the race -- racially  
8 alternative neutral alternatives.

9 JUSTICE BREYER: I have one. I have one.

10 MR. REIN: But not --

11 JUSTICE BREYER: What you're saying is you  
12 should look at the two folders, and as a kind of  
13 tiebreaker, use race. That, to you, is okay.

14 Now, is there -- you said there is several  
15 others? It would be helpful if you -- if you can  
16 summarize them in a sentence, so I get an idea of what  
17 the others are.

18 MR. REIN: You could -- you could give more  
19 emphasis to the socioeconomic factors in the school.

20 JUSTICE BREYER: That's not to use race.  
21 I'm saying r-a-c-e, race. I want to know which are the  
22 things they could do that, in your view, would be okay.  
23 Because I'm really trying to find out. Not fatal in  
24 fact, we've said. Okay? Not fatal in fact. Fine.

25 What are the things, in your view, that they

1 could do so it is not fatal in fact?

2 MR. REIN: And what I've said first is they  
3 could shape their system more toward the Bakke system,  
4 and move toward individualized consideration. That's  
5 one thing. That's not fatal in fact, because this Court  
6 endorsed the -- the view that Justice Powell took of the  
7 Harvard system in Bakke. So that's one.

8 They could expand the top 10. That's  
9 another alternative. That's -- that's available.

10 They could -- as I said, they could rescore  
11 some of this --

12 JUSTICE GINSBURG: But the top 10, you said  
13 it doesn't use race. Justice Breyer is asking, you say  
14 yes, race can be a factor. It was a factor in Bakke.  
15 It was a factor in Grutter. And so far, you're saying  
16 that now it can be a factor only if what?

17 I mean, we're not talking about so-called  
18 neutral factors. We're talking about --

19 MR. REIN: Well, I mean, the first question  
20 is, you know, why are you using it? The why.  
21 Therefore, it can be a factor. You have to clarify the  
22 objective, you have to show the necessity, and you have  
23 to show that, if you, as -- as they do, live with and  
24 accept, over time, a very small increment in a very  
25 small segment of the class, that you can't get it done



1 any other way.

2 JUSTICE GINSBURG: I --

3 MR. REIN: Because race is not the baseline.  
4 It's an odious classification. That's where we differ.

5 JUSTICE SCALIA: As I understand what you're  
6 saying, the Bakke approach -- comparing two individuals  
7 and -- and -- and, where they're tied, giving a -- a  
8 benefit to one for race -- that's okay. Regardless of  
9 whether there are any other means --

10 MR. REIN: No --

11 JUSTICE SCALIA: -- of achieving the -- the  
12 racial balance that you're looking for. Right?

13 MR. REIN: Well, Justice Powell indicated in  
14 Bakke that that approach could be used where it's part  
15 of a greater function form in the class.

16 JUSTICE SCALIA: Understand. Understand.  
17 But --

18 MR. REIN: And that -- and the Court has --

19 JUSTICE SCALIA: But you -- you don't --

20 MR. REIN: -- apparently accepted. We're  
21 not challenging it here.

22 JUSTICE SCALIA: You don't have to apply the  
23 question whether it could possibly be done in any other  
24 way. But you're saying anything beyond that, anything  
25 else, you have to establish first that it couldn't be

1 done another way that doesn't take into account race,  
2 such as expanding the 10 -- top 10 percent or the top  
3 15 percent.

4 MR. REIN: That is correct.

5 JUSTICE SCALIA: Right?

6 MR. REIN: And it's not just me,  
7 Justice Scalia. That's what this Court said in the  
8 prior opinion.

9 JUSTICE SCALIA: That's what I thought.

10 MR. REIN: They had -- it has to be shown to  
11 be necessary.

12 And of course, that's true of all strict  
13 scrutiny. And the Court said in the prior opinion that  
14 it's other strict scrutiny opinions, such as Adarand,  
15 were applicable here. This is not detached. It's not  
16 different.

17 Strict scrutiny is a heavy burden. There's  
18 no question about it. That's why it's strict scrutiny.

19 JUSTICE KENNEDY: Is there any evidence that  
20 the holistic review being used by UT operates as a  
21 quota?

22 MR. REIN: I -- you know, I'm -- we have not  
23 claimed that, but since so much of it is masked and  
24 hidden -- but -- but if -- certainly if you're  
25 motivated, as they said, by demographics, they want to

1 get the number up, it's certainly number-driven.

2 And if you look at -- one thing this Court  
3 said in Grutter, you have to have a basis to review  
4 this, because you would like to make it end. There has  
5 to be an end point. So in -- if you can't find your  
6 objectives, you have no endpoint.

7 But more important, you look at what are  
8 they looking at. What are they measuring each year?  
9 And they're measuring numbers. They want those numbers  
10 to go up. That's what they care about. That's what  
11 this system does.

12 So whether it's a quota in the strict sense,  
13 to wit, we have a -- a definite target, their target may  
14 be equating with the population -- the high school  
15 population. I mean, today they're a majority-minority  
16 campus, the real world. They've -- they've  
17 gone because -- just because of the -- the -- the  
18 demographics of high school.

19 JUSTICE GINSBURG: Mr. Rein, because your  
20 time is running out, there is one preliminary question  
21 I'd like you to address, and that is: What is the  
22 relief you're seeking? I take it not injunctive,  
23 because Ms. Fisher has graduated.

24 MR. REIN: Correct.

25 JUSTICE GINSBURG: And you have no class.

1 So what -- what specific relief are you seeking in this  
2 case?

3 MR. REIN: This case started with a plea for  
4 damages. The damages plea is live. It has never been  
5 challenged.

6 JUSTICE GINSBURG: But what do the damages  
7 consist of?

8 MR. REIN: They were -- the damages  
9 consisted of a -- a refund of the unjustly-committed fee  
10 for application. That was the direct -- one specified  
11 application. We also asked for other just and further  
12 relief, because at that point of the case, we didn't  
13 know anything for certain; to wit, if she was admitted,  
14 it would be one thing. If she wasn't -- weren't  
15 admitted, there would be other damages arising from her  
16 failure to be admitted. And we realized that was a  
17 separate issue. We reserved on it. We -- we've --

18 JUSTICE GINSBURG: If the -- if the  
19 university should say, okay, the application fee and  
20 whatever else we add to that, we -- we offer that so  
21 that this contest will be over; if they offered you the  
22 damages that you are seeking, would the case become  
23 moot?

24 MR. REIN: No. And the reason is the  
25 damages we are seeking were broader than that. That was

1 the specific item of damage that was pleaded. They  
2 didn't challenge it under 12(b)(6).

3 JUSTICE GINSBURG: What are --

4 MR. REIN: They answered --

5 JUSTICE GINSBURG: -- what are the broad --  
6 what are the broader? You gave me the application fee.

7 MR. REIN: Well, now, Ms. Fisher has not  
8 been admitted, and that she has suffered the  
9 consequences of nonadmission, which include she went to  
10 an alternative university; she had to travel as opposed  
11 to being in her home State. There is certainly good  
12 information that within the State of Texas, a degree  
13 from the University of Texas has consequences and  
14 earnings down the road, and that's measurable. And she  
15 doesn't have that benefit.

16 All of those elements, which were not part  
17 of the case originally, because we were trying to enjoin  
18 in a way that would have her admitted, now she's not  
19 admitted. That changes the complexion of the case.

20 That's why we bifurcated -- that's why we  
21 reserved the right to amend within our broader plea for  
22 all other just and relief.

23 So in terms of just standing, we have an  
24 existing claim. They haven't paid us. They threatened  
25 to do that on the first Petition for Cert. They never

1 did it. They didn't tender it. We have an existing  
2 claim. We have broader claims that are inchoate,  
3 because we haven't yet reached the stage of litigating  
4 remedy and damages. So the case continues. There is  
5 standing -- unquestioned standing in this case.

6 Thank you, Your Honor.

7 CHIEF JUSTICE ROBERTS: I suppose -- I  
8 suppose if they tender it, you don't have to accept it  
9 either, right?

10 MR. REIN: Correct.

11 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

12 MR. REIN: I'll reserve the rest of my time.

13 CHIEF JUSTICE ROBERTS: Mr. Garre.

14 ORAL ARGUMENT OF GREGORY G. GARRE

15 ON BEHALF OF THE RESPONDENTS

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

18 To pick up on the questions this morning,  
19 I'd like to focus on three things. One, why the record  
20 supports the Texas legislature's conclusion in 2009 that  
21 the holistic plan at issue was a necessary complement to  
22 the State's Top 10 Percent Law; two, why the record  
23 shows that Texas's holistic policy has had a meaningful  
24 impact on diversity at the University of Texas; and,  
25 three, why the record absolutely forecloses any claim

1 that University of Texas has adopted a quota.

2 With respect to the first question of  
3 necessity, there are three principle ways in which the  
4 record shows that the plan at issue was a necessary  
5 complement. First, as Justice Breyer mentioned, there  
6 is a significant portion of the admissions pool, all  
7 out-of-State students, all students from Texas high  
8 schools that don't rank, some of the best high schools  
9 in the State, and all students just below the top 10  
10 percent who are nevertheless great students who aren't  
11 eligible for admission under the top 10 percent at all.  
12 And the Fifth Circuit found that without the  
13 consideration of race in the mix for those students,  
14 admissions would approach an all white enterprise.

15 Secondly, the record in this case shows --

16 JUSTICE SCALIA: Excuse me. Just the  
17 admissions of people beyond the top 10 percent?

18 MR. GARRE: That's right, which is an  
19 important component of the class, Your Honor.

20 Second, and I think this goes to your point,  
21 Justice --

22 JUSTICE ALITO: Well, on that point, can you  
23 determine which of the holistic admittees would not have  
24 been admitted if race was not added to the -- to the  
25 determination?

1           MR. GARRE:           Okay. This goes to the  
2 meaningful impact point, and I think there are several  
3 ways to address it, Justice Alito.

4           First, what you can do is you can look in  
5 the increase in African-American and Hispanic holistic  
6 admissions after the consideration of race was added.  
7 And what you find is, is that in each year, 2005, 2006,  
8 2007, the percentage of African-American and Hispanics  
9 admitted and enrolled under the holistic plan grew. In  
10 fact, there was a 70 percent --

11          JUSTICE ALITO:           That's not really my  
12 question. My question was if you look at an individual  
13 person, can you tell whether that person was admitted  
14 because -- solely because of race? Whether that person  
15 would not have been admitted were it not for the fact  
16 that the person was an African-American or Hispanic?

17          MR. GARRE:           Your Honor, I think, given the  
18 contextualized and individualized nature of that  
19 inquiry, that's going to be difficult. But I think the  
20 record nevertheless answers your question because you  
21 can show a marked increase in diversity under the plan  
22 at issue. I just -- I've just explained to you how the  
23 record confirms that holistic admissions of  
24 African-Americans and Hispanics increased markedly in  
25 each year.



1           If you look at student body diversity  
2 overall, African-American enrollment increased by two,  
3 doubled from 2002 to 2008 from about 3 percent to about  
4 6 percent.

5           JUSTICE ALITO:           What -- one of the things I  
6 find troubling about your argument is the suggestion  
7 that there is something deficient about the  
8 African-American students and the Hispanic students who  
9 are admitted under the top 10 percent plan. They're not  
10 dynamic. They're not leaders. They're not change  
11 agents. And I don't know what the basis for that is.

12          MR. GARRE:           Okay.

13          JUSTICE ALITO:           It's -- really it's based on  
14 a terrible stereotyping that --

15          MR. GARRE:           Your Honor, it's --

16          JUSTICE ALITO:           What is the basis for  
17 that --

18          MR. GARRE:           It's exactly the opposite. This  
19 Court has said time and again that you can't assume that  
20 minorities think alike just because they have the same  
21 skin color. What the University of Texas does is it  
22 considers -- it takes into account the fact that people  
23 who come from different experiences, different  
24 backgrounds are going to have different contributions to  
25 the class. If you had the situation where all the

1 out-of-State admits or most of the out-of-State admits  
2 were coming predominantly from western States, then the  
3 University of Texas and any university would try to get  
4 out-of-State admits from other parts of the country  
5 because it would want the -- both perspectives.

6 JUSTICE KENNEDY: But -- maybe I  
7 misapprehend either the question or the answer. But  
8 you're the one that says race can be relevant. And then  
9 in answer to Justice Alito's question, you say, oh,  
10 that's stereotyping. It seems to me that you're  
11 inconsistent.

12 MR. GARRE: No. What stereotyping, Your  
13 Honor, is saying, that just because you get a sufficient  
14 number of blacks or Hispanics under the 10 percent plan  
15 means that you can't look at the class holistically and  
16 say, we're not getting a variety of perspectives among  
17 African-Americans or Hispanics.

18 JUSTICE ALITO: Yeah. But what is the basis  
19 for saying that? That's what I don't understand. It's  
20 kind of the assumption that if the -- if a student -- if  
21 a black student or a Hispanic student is admitted as  
22 part of the top 10 percent plan, it has to be because  
23 that student didn't have to compete against very many  
24 whites and -- and Asians. In -- in the high school  
25 class, it's a really pernicious stereotype.

1           MR. GARRE:           It's -- it's not a stereotype at  
2 all, Your Honor. It's based on the undeniable fact  
3 about the manner in which the top 10 percent plan  
4 operates. The Top 10 Percent Law was enacted in  
5 response to Hopwood, and there's nothing -- there's no  
6 challenge to the law in this case that admits many  
7 well-deserving students. But the fact is, is that --  
8 that the way that the Top 10 Percent Law admits minority  
9 students is by admitting those students from the  
10 lower-performing, racially identifiable schools.

11           And the way -- the reason we know that is  
12 because if you look at the bill analysis decided by  
13 Justice Ginsburg in her dissent the last time we were  
14 here, that analysis specifically says on page 4,  
15 "Because of the persistence of segregation in this  
16 State, minority students will be admitted under the top  
17 10 percent plan."

18           JUSTICE ALITO:           I don't doubt that that is  
19 one of the things that it does, and I would have thought  
20 that that would be something that you would regard as  
21 beneficial.

22           MR. GARRE:           We --

23           JUSTICE ALITO:           Wasn't that the -- the  
24 reason for adopting affirmative action in the first  
25 place because there are people who have been severely

1     disadvantaged through discrimination and -- and lack of  
2     wealth, and they should be given a benefit in  
3     admission --

4             MR. GARRE:             And the University --

5             JUSTICE ALITO:             -- but that's one -- one of  
6     the things that it does, but it's not the only thing  
7     that it does.

8             MR. GARRE:             Your Honor, the University of  
9     Texas applauds those students. It wants those students.  
10    Those students are admitted through holistic review as  
11    well. Nevertheless, the University can look at an  
12    incoming class and determine that not all the  
13    perspectives among a particular class of students is  
14    being represented. This is straight out of the Harvard  
15    plan in Bakke --

16            JUSTICE ALITO:            This is a statistic that  
17    jumped out at me, which it seems to me contrary to the  
18    stereotype on which the Fifth Circuit panel proceeds and  
19    on which you proceed. Of the African-American and  
20    Hispanic students who were admitted under the top 10  
21    percent plan, 21 percent had parents who had either a  
22    bachelor's degree or a four-year degree. And for the  
23    holistic admittees, African-Americans and Hispanics,  
24    it's 26 percent. This is from a Class of 2008.

25            So there isn't -- it seems to me it refutes

1 the idea that all of these minority students who were  
2 admitted under -- or most of them admitted under the  
3 10 percent plan come just from these predominantly  
4 overwhelmingly black and Hispanic schools with poor  
5 students. It's just -- it doesn't seem to be true.

6 MR. GARRE: Your Honor, we've never claimed  
7 that all of them do. That's a straw man argument. But  
8 if you look at the data, what you would find, in  
9 particular look at the 2008 profile that we cited in our  
10 last brief on page 33, you do find that on balance,  
11 there is a difference in background of the students,  
12 African-American, Hispanic students, coming in through  
13 the holistic plan versus the top 10 percent plan. And  
14 that's no surprise, given the obvious purpose of the top  
15 10 percent plan. The purpose of the holistic review  
16 plan is to take into account all considerations.

17 JUSTICE BREYER: We know that -- can you --  
18 can you say this? Let me read you two phrases from  
19 Fisher I. The first phrase says this: "The decision to  
20 pursue" -- and Fisher I, obviously, put together a court  
21 of people who don't agree necessarily on affirmative  
22 action. Generally we agreed on those words.

23 Words 1: "The decision to pursue the  
24 educational benefits that flow from student diversity is  
25 in substantial measure an academic judgment to which

1 some, but not complete, judicial deference is proper."

2 Okay?

3 Now, words No. 2: "The University must  
4 provide a, quote, 'reasoned, principled explanation for  
5 the academic decision to pursue diversity.' Your plan  
6 is pursuing diversity among the 25 percent who are not  
7 admitted under the top 10 plan."

8 Your principled, reasoned explanation for  
9 that academic decision is?

10 MR. GARRE: Your Honor, it's set forth in  
11 the 2004 proposal which is in the supplemental joint  
12 appendix. It's elaborated by the deposition testimony.  
13 Let me give you some -- a few pieces of that.

14 Number one is, is the University made clear  
15 it was pursuing the educational benefits of diversity in  
16 the broad sense specifically recognized by this Court.  
17 This is on pages 1 through 3 of the Supplemental Joint  
18 Appendix.

19 Number two, the University made clear that  
20 in its judgment the top 10 percent plan, in particular  
21 as it grew to crowd out the class, was compromising its  
22 educational objectives. That's on page 25a and 31a of  
23 the Supplemental Joint Appendix.

24 Number three, the University made clear that  
25 because of the decrease in student body diversity under

1 the very race-neutral policies that our opponents are  
2 asking this Court to impose, that additional measures  
3 were necessary to make sure that it was achieving its  
4 educational objectives.

5 All of that is laid out in far more detail,  
6 frankly, than it was in Grutter or that it was in the  
7 Harvard plan. It's amplified by the deposition  
8 testimony. In particular, look at the testimony of  
9 Ms. Iship and Mr. Walker. And I can elaborate that --

10 CHIEF JUSTICE ROBERTS: And --

11 MR. GARRE: -- on that, if you would like.

12 CHIEF JUSTICE ROBERTS: And you're talking  
13 about the 2004 plan?

14 MR. GARRE: Yes, Your Honor.

15 CHIEF JUSTICE ROBERTS: Excuse me. One of  
16 the things that it said is that you would review the  
17 plan every five years. Has that happened?

18 MR. GARRE: It absolutely has. We -- in the  
19 record, Your Honor, it's established that we have  
20 reviewed it on an annual basis. We reviewed it on a  
21 five-year basis. I was personally involved in part of  
22 that.

23 CHIEF JUSTICE ROBERTS: How did you  
24 measure -- how did you measure whether or not the plan  
25 was working --

1 MR. GARRE: Your Honor --

2 CHIEF JUSTICE ROBERTS: -- under the review  
3 that you undertook?

4 MR. GARRE: We would look to a number of  
5 different --

6 CHIEF JUSTICE ROBERTS: No. What did you --  
7 what did you look to?

8 MR. GARRE: And -- and I'll answer that  
9 question. We looked -- we looked both to student body  
10 enrollment. We do look to classroom diversity. We look  
11 at feedback from students; from faculty -- after all,  
12 this is an academic judgment, as this Court said in the  
13 Fisher case, and certainly said in the Grutter and the  
14 Bakke case -- we look to -- to the racial climate,  
15 including incidents. There's briefs before you in the  
16 Black Students Association brief, Latino Organization  
17 briefs --

18 JUSTICE SCALIA: Excuse me. It's -- it's an  
19 academic judgment, but the facts are not an academic  
20 judgment.

21 MR. GARRE: It's -- well --

22 JUSTICE SCALIA: To say that, you know, if  
23 the faculty thinks we're doing great, we must be doing  
24 great. I mean, the facts are the facts. I don't think  
25 we give the faculty a leg up on -- on what the facts



1 are.

2 MR. GARRE: And look at the facts, Your  
3 Honor. In 2002, you had 272 African-American enrollees  
4 out of a class of 8,000. Even Judge Garza recognized in  
5 note 11 of his decision that the University of Texas had  
6 not achieved its critical mass or educational benefits  
7 in 2004. So I don't think that that seriously is  
8 debatable. If it is, then we should have a remand and  
9 an opportunity to put in more evidence --

10 CHIEF JUSTICE ROBERTS: Well, you're talking  
11 about the time -- Grutter said that we did not expect  
12 these sort of programs to be around in 25 years, and  
13 that was 12 -- 12 years ago. Are -- are we going to hit  
14 the deadline? Is this going to be done on -- in your  
15 view in 12 years?

16 MR. GARRE: Your Honor, I'm not here to give  
17 you a date, but what I would say is this: There are  
18 systematic problems that these problems -- that these  
19 policies are attempting to address, including the test  
20 score gap between -- between African-Americans and  
21 Hispanics. And -- and the record in this case  
22 overwhelmingly shows that without the addition of race,  
23 student body diversity suffered, particularly among  
24 African-Americans.

25 CHIEF JUSTICE ROBERTS: I understand. I

1 don't know whether that's a yes or no. But it was  
2 important in the Grutter court that these were a  
3 temporary -- as necessary, temporary expedience because  
4 we're talking about giving you the extraordinary power  
5 to consider race in making important decisions. And we  
6 don't do that as a matter of -- matter of --

7 MR. GARRE: And we -- we appreciate the --

8 CHIEF JUSTICE ROBERTS: -- course.

9 And so it was important in Grutter to say,  
10 look, this can't go on forever, 25 years. And when do  
11 you think your program will be done?

12 MR. GARRE: Your Honor, as soon as we -- we  
13 can achieve the same -- sufficient numbers for the  
14 educational benefits of diversity without taking race  
15 into account, we will no longer take race into account.

16 The strict-scrutiny inquiry focuses on  
17 whether or not there are race-neutral alternatives,  
18 which I think really is the way to police this. And in  
19 this case, because it's backward-looking, you look to  
20 whether or not the University policies in place for  
21 seven years -- this is a distinct case. You have a  
22 record of seven years of trying the race-neutral  
23 alternatives that they're proposing, top 10 percent,  
24 plus race-blind holistic review. And the record tells  
25 you what happened.

1 CHIEF JUSTICE ROBERTS: Well, how -- what  
2 percentage of the class is -- what legacy is that a  
3 consideration for?

4 MR. GARRE: University of Texas does not do  
5 legacy, Your Honor.

6 But if you look at what happened -- and this  
7 is the second reason why it's necessary -- it's -- it's  
8 -- I don't think it's debatable that student body  
9 diversity suffered at the University of Texas under the  
10 policies that they're asking this Court to impose. And  
11 in particular under African-Americans where you had  
12 evidence of glaring racial isolation, certainly in the  
13 classroom where 90 percent of the classes, the most  
14 common size, are zero or one African-American --

15 JUSTICE ALITO: Well, on that subject, I  
16 don't know of any -- you haven't mentioned in your  
17 briefs anything that the University of Texas has done to  
18 increase racial diversity at the classroom level, other  
19 than this admissions program.

20 And I mentioned during your -- your friend's  
21 argument a way in which you could determine whether the  
22 top 10 admittees are any more or less likely to enroll  
23 in classes -- small classes where there is a lack of  
24 racial diversity than the holistic admittees. And I  
25 don't see -- and you haven't made any effort, as far as

1 I can tell, to measure that.

2 MR. GARRE: Let me answer that in two ways.  
3 One, doubling the enrollment of African-American  
4 students, which happened from 2002 to 2008, is going to  
5 increase diversity in the classroom. And we've looked  
6 at that, and it has.

7 Secondly, with respect to diversity among  
8 particular majors, University does take holistic  
9 consideration of where -- which schools students are  
10 admitted to as well. So its policy addresses that  
11 concern as well.

12 But what the record does show, Your Honor,  
13 conclusively, I think, is that diversity languished at  
14 the University of Texas in the period where we had  
15 race-blind holistic admissions plus the top 10 percent,  
16 and that the plan at issue here was necessary to  
17 supplement that. The Texas legislature found that.

18 JUSTICE ALITO: But I don't -- you could  
19 have determined whether this is -- whether the  
20 admission -- the addition of race to the holistic  
21 equation has done anything to increase classroom  
22 diversity.

23 MR. GARRE: It has.

24 JUSTICE ALITO: And you haven't done that.

25 MR. GARRE: Your Honor, we've looked at in

1 the five-year analysis --

2 JUSTICE ALITO: No. As -- as comparing,  
3 this goes back to your -- your underlying claim is  
4 there's something deficient about the top 10 admittees,  
5 and I -- maybe -- if you have -- do you have evidence  
6 that they are less likely to -- to enroll in the classes  
7 where there's a lack of classroom diversity --

8 MR. GARRE: There's a different breakdown  
9 there, Your Honor. But I think there's two dimensions  
10 to this diversity issue. One is just the glaring racial  
11 isolation that existed, particularly among  
12 African-Americans.

13 And then two is an effort, through the  
14 addition of holistic review, to admit minorities from  
15 different viewpoints, experiences, and perspectives.  
16 That gets back right to the core of the essence of the  
17 diversity embraced by this Court in Bakke.

18 If you look at the Harvard brief in the  
19 Bakke case, page 17, it specifically says, "Our  
20 interests in the educational benefits of diversity would  
21 not be met if all of minority students were -- were  
22 coming from depressed socioeconomic backgrounds."

23 JUSTICE ALITO: Well, I -- but that's where  
24 I'm looking for evidence that that's true.

25 MR. GARRE: And I would --

1 JUSTICE ALITO: What is it -- what is it --  
2 have you looked at the top 10 percent admittees, for  
3 example, to see how many of them are leaders, which is  
4 certainly -- and certainly a legitimate factor to look  
5 for, students who are leaders.

6 At -- do you say, well, there are -- there  
7 are just not very many leaders here; these are students  
8 who all they do is study. There's no evidence of that  
9 as far as I can tell.

10 MR. GARRE: I don't think it's -- it's  
11 seriously debatable, but if we need evidence on this,  
12 let us put it into the record that a class selected by  
13 the holistic consideration of numerous factors is going  
14 to be more diverse in a way that promotes the  
15 University's educational interests than a class selected  
16 by a single factor.

17 And let me give you the deposition --

18 CHIEF JUSTICE ROBERTS: I'm sorry. That's  
19 not -- that's not the question. It's whether students  
20 selected under the holistic process without giving extra  
21 points because of race.

22 MR. GARRE: And there's two problems with  
23 that. One, they're not -- minority students are not  
24 going to be selected. It's going to become, as the  
25 Fifth Circuit found, an all-white enterprise. That's

1 the first problem.

2 And then the second --

3 CHIEF JUSTICE ROBERTS: Wait. What are you  
4 telling me? The holistic process, if race is not  
5 expressly considered, will not result in any minority  
6 students?

7 MR. GARRE: No. It's not zero, Your Honor.  
8 But take 2002 for example. 272 African-Americans out of  
9 a class of 8,000. That's glaring racial isolation.  
10 University of Texas concluded that was unacceptable.  
11 And I don't think that that's seriously debatable.

12 But again, if we need more evidence on why  
13 having 90 percent of our classrooms of the most common  
14 size was zero or one African-American doesn't achieve  
15 our educational objectives --

16 CHIEF JUSTICE ROBERTS: What -- what unique  
17 -- what unique perspective does a minority student bring  
18 to a physics class?

19 MR. GARRE: Your Honor --

20 CHIEF JUSTICE ROBERTS: You're counting  
21 those among the classes in which there are no minority  
22 students. And I'm just wondering what the benefits of  
23 diversity are in that situation?

24 MR. GARRE: Your Honor, we can talk about  
25 different classes, but -- but this Court has -- has

1 accepted in Bakke and Grutter, and I think it accepted  
2 again in Fisher I, that student body diversity is a  
3 compelling interest.

4 Our friends do not ask this Court to rule --  
5 overrule any aspect of Grutter or of Fisher or of  
6 Bakke --

7 JUSTICE SCALIA: I'm not sure we said it's  
8 class by class.

9 MR. GARRE: And we're not asking --

10 JUSTICE SCALIA: I'm not sure we said it's  
11 the case class by class.

12 MR. GARRE: Your Honor, that's a caricature  
13 of the University's interests here. We made clear in  
14 the 2004 proposal and throughout --

15 JUSTICE SCALIA: It's a caricature of the  
16 argument you're making.

17 MR. GARRE: Student body -- classroom  
18 diversity, Your Honor, if that's what you're focused on,  
19 was one aspect that the University looked to. I mean,  
20 the University is being hit by both sides here. Maybe  
21 that's fair because of the nature of strict scrutiny.

22 But on the one hand, we're going to look to  
23 prove the way in which diversity was lacking with  
24 diversity. And then on the other hand, every time we  
25 point to something, our opponent seizes on it say,



1 ah-ha, that's your objective.

2 Our objective is the educational benefits of  
3 diversity in the very way that this Court has recognized  
4 for decades.

5 Now, the other --

6 JUSTICE SOTOMAYOR: One of the --

7 MR. GARRE: Justice Kennedy, I didn't want  
8 to --

9 JUSTICE KENNEDY: I -- I was going to ask:  
10 What evidence would you have put in if you had been  
11 successful in your motion to remand?

12 And preliminary to that, I assume that  
13 district court would have had authority to remand to --  
14 to allow the summary judgment record to be expanded or  
15 reopened?

16 MR. GARRE: Well, the court of appeals would  
17 have had authority in our view. The district court --  
18 again, this case is on -- here on summary judgment. I  
19 mean, the first question is whether the --

20 JUSTICE KENNEDY: I understand --

21 MR. GARRE: -- the triable issues at fact --

22 JUSTICE KENNEDY: I understand. But -- but  
23 I -- I -- but -- but why did you want a remand? Because  
24 you wanted to expand the summary judgment record? And  
25 if so, what additional evidence would you have put in?

1           MR. GARRE:            Sure.  If there are any  
2  shortcomings that this Court sees, certainly what -- if  
3  they -- if you feel that there are deficiencies in  
4  looking on a more granular basis between the nature of  
5  the holistic admits that are admitted, the unique  
6  skills, qualities, talents that those admits bring as  
7  change agents and bridge builders, we can put that  
8  evidence in.  We can put in additional evidence.

9           JUSTICE KENNEDY:        But you -- but you asked  
10 for the remand --

11          MR. GARRE:            Yes.

12          JUSTICE KENNEDY:        -- and my question was:  
13 What evidence did you propose to put in if your motion  
14 had been granted?

15          MR. GARRE:            Your Honor, we didn't -- we --  
16 we -- we specifically pointed to evidence on standing,  
17 and we talked about that, if the Court would like to  
18 supplement the evidence in other respects.  And I -- and  
19 I think, frankly, we would be entitled to a remand.

20                If you look at the Grutter case, for  
21 example, this Court rejected the argument that the  
22 percentage plan was an adequate substitute for the  
23 holistic consideration of race.  It didn't require  
24 evidentiary findings on that.  But if the Court thinks  
25 these findings are necessary, then the University of

1 Texas can put in -- certainly put in additional evidence  
2 in the record showing why these holistic students,  
3 selected across the broad diversity recognized by Bakke,  
4 contribute meaningfully to the class in this issue.

5 JUSTICE ALITO: I don't know what that --

6 JUSTICE SOTOMAYOR: Let me --

7 JUSTICE ALITO: I don't know what that  
8 proves. Sure. I -- I'm sure that there are holistic  
9 admittees who were great students. They made a  
10 wonderful contribution to the university.

11 I'll -- I don't know whether you're going to  
12 be able to determine that they would have not -- they  
13 would not have been admitted if race hadn't been taken  
14 into account. They probably -- they would have -- many  
15 of them would have been. Maybe all of them. But beyond  
16 that, what is to say that there are not comparable  
17 students who were among the top 10 percent admittees? I  
18 bet there are.

19 MR. GARRE: I -- I think certainly you can  
20 conclude, Your Honor, that, where you have all  
21 out-of-State students, all students from the best  
22 schools in Texas that don't rank, students who fall just  
23 below that 10 percent but nevertheless are great  
24 students, if we're not getting adequate diversity out of  
25 the -- that class, special class of students, we're not

1 meeting our educational objectives.

2 If you have -- if you have doubts about  
3 whether or not the record --

4 JUSTICE SOTOMAYOR: Mr. Garre, this is the  
5 fundamental problem that I think Justice Alito is  
6 pointing to, and you're sort of talking past each other.  
7 So maybe I'll explain his view.

8 (Laughter.)

9 JUSTICE SOTOMAYOR: Strange, isn't that?

10 JUSTICE ALITO: I -- I could use -- I can  
11 use the help.

12 (Laughter.)

13 JUSTICE SOTOMAYOR: I think I'll explain  
14 what his view is.

15 He seems to think that you didn't study the  
16 10 percent admittees enough before -- to make -- to see  
17 whether that group was diverse in and of itself, whether  
18 you had enough people within that group that were change  
19 agents, that were -- had -- were not just poor people,  
20 but people with college-educated parents, whatever other  
21 diverse view factors. He's -- I think he's saying, you  
22 didn't look to see if the 10 percent plan did enough for  
23 you.

24 MR. GARRE: Right.

25 JUSTICE SOTOMAYOR: And with deficits that

1 plan created, that you should have filled in the  
2 holistic-looking. So he thinks it's fatally flawed.

3 MR. GARRE: Right.

4 JUSTICE SOTOMAYOR: All right? Because of  
5 that. So that's his view, I think.

6 So assuming that view, what's your answer?

7 JUSTICE ALITO: Well -- well, that's my  
8 question. But --

9 (Laughter.)

10 MR. GARRE: Well, let me -- let me answer  
11 that question.

12 JUSTICE SOTOMAYOR: I know. He said it  
13 wasn't, right?

14 MR. GARRE: First, we did look at that. We  
15 had seven years of experience under the race-blind  
16 holistic admissions policy. And what the university  
17 found -- this is at page 31 and 25a of the Supplemental  
18 Joint Appendix --

19 JUSTICE SOTOMAYOR: That was with the ten --  
20 so seven years --

21 MR. GARRE: Race-blind --

22 JUSTICE SOTOMAYOR: Race-blind --

23 MR. GARRE: -- race-blind holistic, and up  
24 to 10 --

25 JUSTICE SOTOMAYOR: -- and a certain number

1 of them were with the 10 percent --

2 MR. GARRE: Absolutely. And what we found  
3 was that, particularly as the top 10 percent plan began  
4 to grow and crowd out more of the admissions pool, the  
5 university was not meeting its educational objectives.  
6 That -- that's what it found specifically. It stated  
7 that on page 31a of the Supplemental Joint Appendix.

8 We also knew -- and it's interesting: The  
9 Texas legislature found that the holistic plan was a  
10 necessary complement. The Texas district court judge  
11 did. The Texas Court of Appeals judge and his colleague  
12 did. And all -- what all of them recognized is the  
13 obvious way in which the top 10 percent plan operates  
14 with respect to --

15 JUSTICE KENNEDY: And if you did not have --

16 JUSTICE BREYER: That's right. But  
17 there's --

18 JUSTICE KENNEDY: If -- if you did not have  
19 the top 10 percent plan, but you did have the program  
20 that you're advocating for here, the holistic review,  
21 would you have a better or worse chance of achieving the  
22 diversity you seek?

23 MR. GARRE: Your Honor, I -- I think the  
24 first thing I would like to say is that it's a different  
25 way. And I don't mean to dodge the question by that.

1           But what I would say is, if -- if that's a  
2 meaningful difference, then this plan is -- is in an  
3 even stronger light than the plan in Bakke and the  
4 Harvard plan. Because the University of Texas has  
5 heeded this Court's message. It's taken three-quarters  
6 of the class that it selects through a facially  
7 race-neutral system, the Top 10 Percent Law. And what  
8 we're here debating is whether or not it can complement  
9 that policy by taking race into account for a quarter.

10           Now, it may actually be that the university  
11 could achieve more diversity through the pure  
12 Grutter-Bakke-style plan, but we think, working with the  
13 Texas legislature, we've come up with a hybrid -- hybrid  
14 plan that works together to both -- to both address this  
15 Court's concerns about using race too much in the  
16 process, and addressing University of Texas's  
17 legitimate, core academic concerns about compiling a  
18 class that's diverse in all the ways that are  
19 appreciated by Bakke.

20           If I could read one aspect of the deposition  
21 testimony here. This is from Ms. Ishop on page 253a of  
22 the Joint Appendix, and she explains why top 10 percent  
23 alone is not sufficient.

24           What she says is, quote, "Considering an  
25 applicant on the basis of just their test school and

1 class rank leaves out all of that life experience and  
2 circumstantial experience that an applicant faces. It's  
3 also important not -- not only to how they developed and  
4 the type of student they are, but also to what they  
5 contribute to our campus." That's what the holistic  
6 policy adds.

7 If you exclude race from that mix, you not  
8 only aren't looking at the individual in all its  
9 respects -- and race still does matter in Austin and  
10 across this country -- but you're -- you're preventing  
11 the university from rounding out its class from  
12 complementing the single-minded way that the Top 10  
13 Percent Law could achieve its diversity objectives in a  
14 way that is narrowly tailored to its interests, which  
15 this Court has found compelling.

16 JUSTICE KENNEDY: Well, all of the colloquy  
17 so far indicates to me that, if you had a remand, you  
18 would not have put in much different or much more  
19 evidence than we have in the record right now. Is  
20 that --

21 MR. GARRE: Well --

22 JUSTICE KENNEDY: -- is that correct?

23 MR. GARRE: No, it's not, Your Honor. I  
24 mean, look, we think that the record is sufficient. We  
25 think that the Fifth Circuit got it right.



1           But -- but to be clear, we can certainly put  
2 in plenty of additional evidence. I mean, there was a  
3 trial in Grutter, as Your Honor pointed out in your  
4 decision in Fisher I. There's been no trial here.

5           There is, at a minimum -- if -- if -- if our  
6 evidence doesn't cross the bar on strict scrutiny, at a  
7 minimum, we put in triable issues of fact on whether or  
8 not the holistic plan was a necessary offset, whether or  
9 not the university was achieving its educational  
10 objectives in an environment in which you had 272  
11 African-American students enroll out of an incoming  
12 class of 8,000, an environment in which 90 percent of  
13 the classrooms had -- the most common side had zero to  
14 one.

15           JUSTICE KENNEDY:           But why can't we make  
16 those inferences from the record? I mean, if -- if you  
17 had a trial, you'd have credibility. You'd have experts  
18 and so forth --

19           MR. GARRE:           Well, I -- I -- I think you can  
20 make those going in the university's favor. And one  
21 aspect of that, frankly, is the two-court rule that this  
22 Court usually applies. Both the district court and the  
23 court of appeals looked at this and made findings --

24           JUSTICE KENNEDY:           What you're saying, we --  
25 we have a -- a remand only if we lose. I mean, that's

1 what you're saying.

2 (Laughter.)

3 MR. GARRE: Well, I mean, I don't want to  
4 be result-oriented about this, Your Honor. But -- but I  
5 do think that -- that it's one thing to say in this  
6 record there are no triable facts, where the -- the  
7 courts below have gone that way. It's another thing to  
8 second-guess. And -- and the Court can. It's a summary  
9 judgment issue. But it's another thing, I think, to  
10 overstep the conclusions of the district court and the  
11 court of appeals here.

12 And -- and I think it's particularly  
13 relevant here when it comes to the operation of the Top  
14 10 Percent Law. Our friends have challenged the fact  
15 that the Fifth Circuit discussed the way in which it  
16 operated, saying that that's outside the record. If it  
17 is, let us put all that evidence directly into the  
18 record. But they've never disputed the way in which the  
19 Top 10 Percent Law operates.

20 What -- what I'd like to say too is, if this  
21 Court rules that University of Texas can't consider  
22 race, or if it rules that universities that consider  
23 race have to die a death of a thousand cuts for doing  
24 so, we know exactly what's going to happen. Experience  
25 tells us that.

1 University -- this happened at the  
2 University of Texas after the Hopwood case: Diversity  
3 plummeted, especially among African-Americans.  
4 Diversity plummeted at selective institutions in  
5 California, Berkeley, and UCLA, after Prop 209. And  
6 that is exactly what's taking place today at the  
7 University of Michigan.

8 Now is not the time, and this is certainly  
9 not the case --

10 JUSTICE SCALIA: There are -- there are  
11 those who contend that it does not benefit  
12 African-Americans to -- to get them into the University  
13 of Texas where they do not do well, as opposed to having  
14 them go to a less-advanced school, a less -- a  
15 slower-track school where they do well. One of -- one  
16 of the briefs pointed out that -- that most of the --  
17 most of the black scientists in this country don't come  
18 from schools like the University of Texas.

19 MR. GARRE: So this Court --

20 JUSTICE SCALIA: They come from lesser  
21 schools where they do not feel that they're -- that  
22 they're being pushed ahead in -- in classes that are  
23 too -- too fast for them.

24 MR. GARRE: This Court --

25 JUSTICE SCALIA: I'm just not impressed by

1 the fact that -- that the University of Texas may have  
2 fewer. Maybe it ought to have fewer. And maybe some --  
3 you know, when you take more, the number of blacks,  
4 really competent blacks admitted to lesser schools,  
5 turns out to be less. And -- and I -- I don't think  
6 it -- it -- it stands to reason that it's a good thing  
7 for the University of Texas to admit as many blacks as  
8 possible. I just don't think --

9 MR. GARRE: This Court heard and rejected  
10 that argument, with respect, Justice Scalia, in the  
11 Grutter case, a case that our opponents have and asked  
12 this Court to overrule. If you look at the academic  
13 performance of holistic minority admits versus the top  
14 10 percent admits, over time, they -- they fare better.

15 And, frankly, I don't think the solution to  
16 the problems with student body diversity can be to set  
17 up a system in which not only are minorities going to  
18 separate schools, they're going to inferior schools. I  
19 think what experience shows, at Texas, California, and  
20 Michigan, is that now is not the time and this is not  
21 the case to roll back student body diversity in America.

22 Thank you, Your Honors.

23 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

24 General Verrilli.

25 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

1 FOR UNITED STATES, AS AMICUS CURIAE,  
2 SUPPORTING THE RESPONDENTS

3 GENERAL VERRILLI: Mr. Chief Justice, and  
4 may it please the Court:

5 I'd like to make a point about the  
6 compelling-interest inquiry in light of what this Court  
7 said previously in *Fisher*, and then I'd like to make  
8 point about the process aspect of the now-tailoring  
9 inquiry in light of what this Court said in *Fisher*,  
10 which I believe Justice Kennedy will address your  
11 concerns about whether race is determinative here. And  
12 then I'd like to move on to what I think this case comes  
13 down to, which is whether the University has made a  
14 sufficient showing of need to consider race in -- in its  
15 process.

16 But before I make any of those points, Mr.  
17 Chief Justice, I -- I can provide some specific detail  
18 in response to the question you asked earlier related to  
19 the parents-involved point.

20 Here are the numbers. With respect to  
21 African-American students admitted through the holistic  
22 part of the program, in 2004, which was the last year  
23 before race was expressly considered, that number was  
24 141 admitted through that number. And that was the high  
25 watermark, really, of the period of -- of holistic

1 review without race.

2 CHIEF JUSTICE ROBERTS: In addition to  
3 the -- this is in addition to the 10 percent?

4 GENERAL VERRILLI: Correct. This is just  
5 the holistic numbers.

6 That number then moves up to 176 the  
7 following year, to 220 the year after, and to 262 in  
8 2007. So the number of holistic admissions almost  
9 doubles, and that results in --

10 CHIEF JUSTICE ROBERTS: But the problem, I  
11 guess, which is one issue that we haven't looked at is  
12 how do you tell how many of those --

13 GENERAL VERRILLI: Right.

14 CHIEF JUSTICE ROBERTS: -- would have been  
15 admitted if their race were not --

16 GENERAL VERRILLI: You're right -- you're  
17 right that you can't tell for sure, but you do have a  
18 pretty good benchmark, I think, given that you have a  
19 number of years without considering race where 141 was  
20 the high watermark. And so I do --

21 JUSTICE SCALIA: Well, wait a minute. The  
22 next two years you recited it was going up, even when  
23 race was considered.

24 GENERAL VERRILLI: Right.

25 JUSTICE SCALIA: So you could have said

1 there -- there is a fluctuation before then, when race  
2 wasn't considered. That might have gone up, too.

3 GENERAL VERRILLI: Well, it went -- before  
4 they started considering race, it went up and down,  
5 frankly. But 141 was the high watermark. There wasn't  
6 a consistent trajectory in those numbers.

7 JUSTICE ALITO: Well, there's an aspect of  
8 the holistic review process done at the University of  
9 Texas which may militate against the admission of  
10 African-American and Hispanic students for a -- an  
11 ostensibly race-neutral reason, and that is, that as I  
12 understand it, standardized test scores count pretty  
13 heavily in that process.

14 One of the things the University says it's  
15 looking for is students with high SAT scores who are not  
16 in the top 10 percent of their class. And there are  
17 many who think that SAT scores and ACT scores are  
18 culturally biased. So if you put less emphasis on that,  
19 you might not have the numbers that you just cited.

20 Well, it's rather strange that we -- we  
21 construct the process that may disadvantage  
22 African-American and Hispanic students for an ostensibly  
23 race-neutral reason. So then we have to add race in as  
24 a special factor to counteract that.

25 GENERAL VERRILLI: It's -- or I guess what

1 I'd say about that, Your Honor, is that in Grutter, what  
2 the Court specifically held was that the University is  
3 allowed to make those kinds of judgments in seeking to  
4 advance multiple objectives to maintain an academic  
5 environment of excellence, and to diversify the student  
6 body, both.

7 JUSTICE ALITO: I thought the -- I thought  
8 the record showed the top ten admittees have a higher  
9 grade point average than the holistic African-American  
10 and Hispanic admittees.

11 GENERAL VERRILLI: Well, the -- the SAT  
12 scores are about the same. I'm not sure --

13 JUSTICE ALITO: But, I mean, once they get  
14 to --

15 GENERAL VERRILLI: But I guess --

16 JUSTICE ALITO: Once they get to -- the SAT  
17 is supposed to predict how you are going to do in  
18 college. And I thought the record showed that the  
19 students who have lower SAT scores but did better as  
20 a -- by measure by high school rank did better at the  
21 University of Texas; isn't that -- isn't that the case?

22 GENERAL VERRILLI: So I -- I'm not sure what  
23 the answer to that is, Your Honor, but this all goes to  
24 the compelling-interest inquiry, and let me focus on  
25 that.



1           What the -- what the Court said last time  
2 around is to satisfy the compelling-interest inquiry,  
3 the University has got to articulate a reasoned,  
4 principled explanation for its decision to consider the  
5 educational benefits of diversity in a matter that this  
6 Court has found to be constitutional and substantial.

7           The University of Texas has met that  
8 standard, has articulated exactly the same educational  
9 benefits of diversity at exactly the same level of  
10 specificity that this Court held constituted a  
11 compelling interest in the Grutter case at page 330.  
12 It's exactly the same.

13           And the -- the principal argument that my  
14 friend Mr. Rein makes in challenging that is, well,  
15 actually a lot of that is post hoc rationalization, in  
16 particular, the effort to find whether you call it  
17 qualitative diversity, diversity within diversity is all  
18 post hoc rationalization, that is simply not so.

19           If you look at page 1 of the Supplemental  
20 Joint Appendix, the first page of the 2004 Proposal, the  
21 University specifically says that what it's trying to  
22 accomplish is to create a diversity of perspectives  
23 among minority students. It says it again at page 28 in  
24 that proposal. The Director of Admissions Declaration,  
25 page 43 of the Joint Appendix, says it -- it says it

1 throughout. So that there's no -- there's just no  
2 argument that it's a post hoc rationalization.

3 JUSTICE SCALIA: Mr. Verrilli, do you -- you  
4 think all of this won't be necessary in another 13  
5 years --

6 GENERAL VERRILLI: Well --

7 JUSTICE SCALIA: -- where we stop  
8 disadvantaging some applicants because of their race.

9 GENERAL VERRILLI: What I think about that  
10 is that the -- the Court, I think, made a prediction  
11 in -- in Grutter that that would hopefully be the case.

12 JUSTICE SCALIA: I think that's a -- that's  
13 too short term. What do you think --

14 GENERAL VERRILLI: I think --

15 JUSTICE SCALIA: -- 30 years?

16 GENERAL VERRILLI: I think the University's  
17 always --

18 JUSTICE SCALIA: What is it about this  
19 program that is going to change things, so that -- so  
20 that we can stop classifying people by race?

21 GENERAL VERRILLI: No. I -- I -- I think  
22 the universities do make progress on this, and I think  
23 you do get to a point where you create a virtuous cycle.  
24 And -- and I think it does work, and I think that  
25 there's -- there's -- and -- and I think there's ample

1 reason to -- to believe that it does work. And I think  
2 the key point here with respect to compelling interests  
3 is that this really is -- in -- in terms of having the  
4 educational benefits diversity, that's in the heartland  
5 of what the Court has said, is the area in which the  
6 University's expertise and experience deserves  
7 deference.

8 Now, if I could go to the process point,  
9 with respect to --

10 JUSTICE BREYER: Just before, you -- you  
11 said -- I agreed with you, of course, that is what the  
12 Court said, the reasoned explanation. And it also said  
13 that this is a matter to which this Court will give  
14 some, but not complete, deference to what the University  
15 decides. What you're talking about is the need for the  
16 program.

17 In addition to that -- and this is what I'd  
18 like you to focus on, because there could be a question  
19 of whether to send it back for more evidence or not. So  
20 in looking through the record so far, on this specific  
21 point, I found an affidavit by a person named Walker,  
22 and that person named Walker described seven years of  
23 efforts to measure this stuff; described meetings of the  
24 faculties; described all kinds of discussions; described  
25 conclusions of the faculty members, and the admissions

1 officers, and others, that you did need -- you did need  
2 affirmative action in the 25 percent of the not -- of --  
3 of the holistic part.

4 Now, given that that's there, and I found  
5 nothing to the contrary, is there a need for another --  
6 I mean, this is a loaded question, but I a.m. curious.  
7 If you say "yes," because -- I mean, you know, there may  
8 be something that you should put in as well. You may  
9 think it would help to put something in. You may think  
10 it's not necessary. But just to be safe, what do you  
11 think?

12 GENERAL VERRILLI: Yeah --

13 JUSTICE BREYER: Is that affidavit the  
14 relevant one? Are there others?

15 GENERAL VERRILLI: Yeah. I think -- I  
16 believe that's the affidavit from the director of  
17 admissions. And it is highly relevant, and there is  
18 other information. In the latter part of our brief, we  
19 documented it.

20 We think -- you know, our view, we argued  
21 for affirmance. We think it's sufficient. But if there  
22 is doubt, I do think the additional kind of information  
23 that might be developed in this case would be to look at  
24 the kinds of questions that the Chief Justice was  
25 actually asking about, how did the -- how has the

1 program worked in practice over the period of time in  
2 which it's been implemented. And I think that would be  
3 additional relevant information that might help make the  
4 judgment.

5 If I could go to the process point, and then  
6 I will return to the need point.

7 Process -- what the Court said last time  
8 around in this case was that the Court had to ensure  
9 itself without deference that the process provided for  
10 individualized consideration and that race did not  
11 predominate.

12 Again, the University of Texas' plan has  
13 every one of what the Court in Grutter at page 334 said  
14 were the hallmarks of a narrowly tailored plan. No  
15 quota. Everybody competes against everybody else. No  
16 automatic award of points. Modest factor.

17 And in addition -- and this goes to your  
18 question, Justice Kennedy, about whether there is an  
19 argument here that race is determinative -- Texas is  
20 different from the University of Michigan's law school  
21 plan in every one of the four ways that Your Honor  
22 identified as -- as being potentially troublesome and  
23 making race determinative.

24 Unlike in Michigan, in Texas the percentage  
25 of African-American and Hispanics admitted does not

1 mirror the percentage who applied. It's different.

2 Unlike Texas, the number -- excuse me.

3 Unlike Michigan, the number in Texas of -- of admissions  
4 fluctuates year over year. It's not the same every  
5 year.

6 Unlike in Michigan, the bulk of Hispanic and  
7 African-American students admitted don't come from a  
8 small subset of the pool that's admitted after most are  
9 admitted based on grades.

10 And unlike in Michigan, the -- there -- the  
11 admissions officers don't monitor the process all the  
12 way along, which would, as Your Honor suggested, perhaps  
13 create the risk that race would become determinative in  
14 latter States' admissions. None of that is true here.

15 So -- so I think with respect to --

16 CHIEF JUSTICE ROBERTS: If none of that is  
17 true, how does the University know when it has achieved  
18 its objective?

19 GENERAL VERRILLI: So --

20 CHIEF JUSTICE ROBERTS: At what point does  
21 it say, okay, the plan has worked?

22 GENERAL VERRILLI: So I think -- I was  
23 trying to address process, and I -- and I'll go right  
24 now to need, which I think is -- is -- I really do think  
25 that you're right, Mr. Chief Justice. That's what the

1 case comes down to.

2 And I will answer your question directly,  
3 but I first want to make a point about how you don't --  
4 how you shouldn't do it. And you shouldn't do it the  
5 way the Petitioner has suggested you should do it.

6 What the Petitioner has said is that the --  
7 in order to -- in order to assess need, and the -- and  
8 the only way to meet -- meet the need portion of the  
9 strict-scrutiny analysis, is for the University to set  
10 a, quote, "demographic goal." That's the Petitioner's  
11 language. And then test whether or not they've made  
12 that goal.

13 CHIEF JUSTICE ROBERTS: Okay. So how --

14 GENERAL VERRILLI: And so --

15 CHIEF JUSTICE ROBERTS: -- how should they  
16 do it?

17 GENERAL VERRILLI: So the -- the -- and the  
18 reason, of course, that that's no good is that that's  
19 just a Catch-22.

20 CHIEF JUSTICE ROBERTS: No, no. I  
21 understand you disagree with their proposal.

22 GENERAL VERRILLI: So -- so here's how you  
23 should do it, and we've -- we've laid it out in our  
24 brief: We think that the approach -- we think that  
25 approach is always going to be fatal in fact because, if

1 they don't -- they -- they fail strict scrutiny if  
2 they --

3 CHIEF JUSTICE ROBERTS: I know you don't  
4 agree with their approach.

5 (Laughter.)

6 GENERAL VERRILLI: I -- I promise you I'm  
7 going to answer it. I just think these points are  
8 important.

9 Then -- and so the -- with respect, we think  
10 our approach is faithful to Fisher because it's not  
11 always fatal in fact. What we say is that it's not  
12 an -- a critical mass, numerical kind of analysis. We  
13 say that what you do is you start with the University's  
14 articulation of the educational benefits it's trying to  
15 achieve. You require the University to state in  
16 concrete terms what success will look like. You then  
17 evaluate the evidence and analysis that the University  
18 relied on in order to make the judgment that it isn't  
19 where it needs to be and there -- and needs to consider  
20 race --

21 CHIEF JUSTICE ROBERTS: I'm trying to get at  
22 the --

23 GENERAL VERRILLI: Yes. And so in the kinds  
24 of --

25 CHIEF JUSTICE ROBERTS: -- at a -- at a more



1 concrete -- and so to look at what they say they want  
2 and see if they've done it, but how do you see it?

3 GENERAL VERRILLI: And -- and you -- and so  
4 the kind -- you would look for concrete evidence. You  
5 know, well -- well-done classroom studies.  
6 Well-designed surveys of student attitudes and faculty  
7 attitudes. Graduation and retention rates. Are racial  
8 incidents going up and down -- up or down on -- on  
9 campus in frequency?

10 You -- you know, there could be a whole list  
11 of them. But you would look at those. You would look  
12 at -- you would look at those. You would look at the  
13 University's analysis of those, and then you'd make a  
14 judgment whether the University has substantiated its  
15 case.

16 And the burden, of course, is on the  
17 University. They've got to come in and convince you  
18 that they've substantiated their case that they need to  
19 consider race --

20 JUSTICE KENNEDY: And they -- they can do  
21 that with evidence that -- and -- and of events that  
22 occurred after the suit was brought?

23 GENERAL VERRILLI: Well, I -- I think  
24 what --

25 JUSTICE KENNEDY: I -- I'm not quite sure

1 how that works.

2 GENERAL VERRILLI: Sure. I think that they  
3 can -- and -- and as happened in Grutter, I think they  
4 have -- the -- the interests that they rely on have to  
5 be the interests that they contemporaneously identified  
6 when they adopted the program. I don't think there's an  
7 issue here on that.

8 But I think the evidence can include  
9 evidence of how things are working in practice. For  
10 example, if they adopt a system and it does result in  
11 improvement, that does seem highly relevant and -- and  
12 consistent with what the Court held in Grutter was  
13 appropriate evidence.

14 CHIEF JUSTICE ROBERTS: The reason I -- I  
15 think it's a matter of concern is -- what I heard from  
16 Mr. Garre were a lot of numbers. He said, look, this is  
17 why it's needed, and -- and, you know, we will know  
18 we're doing better when the numbers look better.

19 And I just wonder whether the idea of  
20 surveys -- I looked at one of these surveys -- I don't  
21 remember this record or the -- the prior one -- and I  
22 have to say it was kind of sophomoric. I mean, do you  
23 feel that you've had enough interactions --

24 GENERAL VERRILLI: Yes.

25 CHIEF JUSTICE ROBERTS: -- with -- I mean,

1 that was -- this is consideration of race. It's a very  
2 serious matter.

3 GENERAL VERRILLI: Yes.

4 CHIEF JUSTICE ROBERTS: And to pass out some  
5 survey and see, I don't think is an adequate --

6 GENERAL VERRILLI: It certainly wouldn't be  
7 adequate by itself. It might be probative evidence in  
8 combination with other probative evidence. But -- you  
9 know, but the -- the question of classroom composition  
10 is hard evidence.

11 And at some level, demographics are hard  
12 evidence too, Mr. Chief Justice. When you're talking  
13 about the African-American population at the University  
14 of Texas in -- in Austin, you're talking about a  
15 population of 3 or 400 kids in a class of 6,000, I think  
16 the -- the idea that there is a material risk of racial  
17 isolation in that situation is quite strong. The idea  
18 that there is a material chance that lots and lots of  
19 students are going to go --

20 JUSTICE SCALIA: 600 is going to make the  
21 difference?

22 GENERAL VERRILLI: It -- it -- it --

23 CHIEF JUSTICE ROBERTS: 600?

24 GENERAL VERRILLI: It might well --

25 CHIEF JUSTICE ROBERTS: They wouldn't feel

1 isolated with 600?

2 GENERAL VERRILLI: It might well make a  
3 significant difference.

4 And if I could, in the time I have  
5 remaining, I'd like to just try to refocus the Court on  
6 the importance of what's at stake here.

7 As we told you in our brief, our military  
8 leaders believe that it is imperative that we have  
9 officer corps that are not only diverse but capable of  
10 leading a diverse military, not only for effectiveness  
11 but for the very legitimacy of sending our troops into  
12 harm's way.

13 JUSTICE ALITO: But do you think that the  
14 African-American and Hispanic students who were admitted  
15 under the top 10 percent plan make inferior officers  
16 when compared to those who were admitted under holistic  
17 review?

18 GENERAL VERRILLI: No, I don't. Not at all.  
19 But I --

20 JUSTICE ALITO: Do you think that the --  
21 that the ROTC graduates from the University of Texas  
22 make superior officers to those who -- who graduate  
23 from, let's say, Texas A&M or Texas Tech?

24 GENERAL VERRILLI: Here's what I think about  
25 that, Justice Alito: I think that we want to make

1 sure -- and this military example is only one of the  
2 important interests here. But with respect to that, we  
3 want to make sure, not just that there are strong  
4 African-American and Hispanic candidates in that ROTC  
5 program, but that everybody who graduates from the ROTC  
6 program, University of Texas -- white, black, Asian,  
7 Hispanic -- everybody knows how to lead effectively in  
8 a -- in a diverse environment in which they're going to  
9 be leading diverse troops. That's the interest.

10 And you can't achieve that --

11 JUSTICE ALITO: Now, that's certainly  
12 important, but to come back to my first question, is  
13 there anything to suggest that the top 10 percent  
14 students are less likely to enroll in ROTC or, when they  
15 do, they're not as good as the -- as the holistic  
16 admittees?

17 GENERAL VERRILLI: No. I -- I think with  
18 respect to the University of Texas in particular. But  
19 I -- I'm also -- you know, what the Court is going to  
20 say in this case obviously is going to apply to --  
21 eventually to every university in the country.

22 And this is an important interest for the  
23 United States generally, that when you think about  
24 what's at stake here, that the -- the interest in  
25 ensuring that we have military officers who can lead a

1 diverse military force is critical.

2 The interest in having law enforcement  
3 officers who are not just diverse but who can operate  
4 effectively within every racial and ethnic community in  
5 highly charged situations is critically important.

6 Corporate America has told you that having  
7 a -- a -- a workforce that is able to function  
8 effectively in diverse -- in diverse situations is  
9 critical.

10 And what I would just say in conclusion is  
11 that these are the considered judgments of people who  
12 actually have the responsibility to ensure that the  
13 vital functions of the government protecting the country  
14 with the military and with law enforcement and the vital  
15 functions of commerce -- these are the people who  
16 actually have to make sure that those functions are  
17 carried out. And this is their considered judgment, and  
18 I submit it's -- it's worth considerable weight in your  
19 analysis.

20 Thank you.

21 JUSTICE BREYER: If -- if I can ask a  
22 question.

23 GENERAL VERRILLI: Oh, I'm sorry.

24 JUSTICE BREYER: No. I'm glad you said  
25 that. And -- and I -- this question will sound very

1 nitpicky and detailed and -- compared to what you were  
2 talking about.

3 And I agree. I notice that the briefs in  
4 this case are like the briefs in Grutter. And to me  
5 that does suggest that people in the universities and  
6 elsewhere are worried that we will, to use your  
7 colleague's expression, kill affirmative action through  
8 a death by a thousand cuts.

9 We promised in Fisher I that we wouldn't.  
10 That opinion by seven people reflected no one's views  
11 perfectly. But that's what it says: Not fatal in fact.

12 Okay. That's what I'm focusing on. It  
13 seems to me there are two parts to that, whether we have  
14 to send it back for another hearing or not.

15 Part one you've dealt with. That's is there  
16 a need? A matter which Fisher I says we will give some  
17 but not complete deference to the University, and as you  
18 say, we have -- you went through that.

19 There is a second part which I want you to  
20 address. The second part in Fisher, we said, there is  
21 no deference due the University. On this part it's  
22 called narrow tailoring.

23 You heard your friend on the other side  
24 admit, he said, again. Maybe he believes it firmly.  
25 Why use the word "admit"? He said that, in the plans of

1 Grutter and the plans of Bakke, those were okay in  
2 respect to narrow tailoring because they did compare the  
3 students one after another and use race as a plus  
4 factor.

5 Now, what is there in this record that will  
6 support the view that what Texas has done in respect to  
7 narrow tailoring is no worse than, perhaps even better  
8 than, what happened in Grutter or Bakke?

9 GENERAL VERRILLI: So I -- I would point  
10 Your Honor specifically to the declaration at pages 483a  
11 and 484 -- and 484a of the Joint Appendix of the  
12 admissions director, in which he explains the way race  
13 is considered in the University of Texas system. And  
14 that explanation says expressly, at page 483, that race  
15 is considered in exactly the same manner, and given  
16 exactly the same consideration as every other special  
17 circumstance's factor that the university considers as  
18 part of its holistic review.

19 That -- I think that shows you that actually  
20 you know more about the way this program works than you  
21 did about the program that you affirmed in Grutter, and  
22 you have assurance based on that, and nothing in the  
23 record contradicts it that that's the way it operates.

24 CHIEF JUSTICE ROBERTS: Thank you. Thank  
25 you, General.



1 Five minutes, Mr. Rein.

2 REBUTTAL ARGUMENT OF BERT REIN

3 ON BEHALF OF THE PETITIONER

4 MR. REIN: Thank you, Chief Justice.

5 Let me first indicate that one of the  
6 questions that's been asked repeatedly, as -- well, what  
7 impact did the use of race actually have?

8 Judge Garza -- and this is at Appendix  
9 200 -- tried to make an estimate, because you can only  
10 make an estimate, because UT didn't know, and they don't  
11 know now. His estimate was that a very small number,  
12 and it -- it's in his opinion. It's -- it's not only by  
13 percentage, but it's by number, and that number is  
14 insignificant relative --

15 JUSTICE SOTOMAYOR: Do you think -- do you  
16 think that change has to happen overnight? And do you  
17 think it's --

18 JUSTICE SCALIA: Excuse me. Can I -- can I  
19 hear what you were about to say? What are those  
20 numbers? I was really curious to hear those numbers.

21 MR. REIN: He assumed, at the outside, that  
22 any of the admits that were actually African-American or  
23 Hispanic outside the Top Ten, he said let me take that  
24 assumption and see what it would add. And he said it  
25 would constitute less than 1 percent and 2.5 percent,

1 respectively, in -- of the entire 6,322-person case --

2 JUSTICE GINSBURG: What are you reading  
3 from?

4 MR. REIN: But he did not -- can I finish?

5 JUSTICE GINSBURG: Can you just tell me  
6 where you're reading from?

7 MR. REIN: This is Appendix 250 to 251a. It  
8 is Judge Garza's original dissent. This is -- this is  
9 when -- and he repeated, essentially, the same point.  
10 But he calculated, and he made different assumptions,  
11 depending on how many of the admissions in the holistic  
12 program one would assume would be different because of  
13 race. Because no one knows, and that -- and that's part  
14 of this.

15 And clearly, one -- and -- and -- I can read  
16 you these numbers, but you can read them yourselves.  
17 It's a very small number. And his most realistic  
18 estimate was that it would yield only 15  
19 African-Americans and 40 Hispanic students in a class of  
20 6,000. So we're talking about a very small effect, even  
21 with assumptions that -- that actually exist.

22 You know, one point is it's small. The  
23 second point, equally important, is no one knew because  
24 they didn't study it.

25 And then -- then we get the same point on

1 this complementary, which was the big theme of the Fifth  
2 Circuit, oh, it's a necessary complement. What does  
3 that mean? One sense, you've got to have some plan if  
4 you're going to cap the Top Ten at 75 percent, so it's  
5 necessary to do something. But that doesn't make it a  
6 necessary complement.

7 When you really look what the Fifth Circuit  
8 said, they said it's based on two assumptions: One, the  
9 Top Ten are drawn from these minority high schools.  
10 Where did they come up with that? They never studied  
11 the pattern of the Top Ten admits.

12 How do you know that a Hispanic or an  
13 African-American student can't be in the Top Ten at what  
14 they call an integrated, high-performing high school?  
15 That's a stereotypical assumption.

16 JUSTICE SOTOMAYOR: I -- I -- I -- what  
17 you're saying, basically, is, is this is what the Fifth  
18 Circuit concluded and which the school basically agrees,  
19 okay? If you don't consider race, then holistic  
20 percentage, whatever it is, is going to be virtually all  
21 white.

22 MR. REIN: And that is incorrect.

23 JUSTICE SOTOMAYOR: All white.

24 MR. REIN: And that is an assumption --

25 JUSTICE SOTOMAYOR: And to say -- no --

1 MR. REIN: -- that has no basis in this  
2 record.

3 JUSTICE SOTOMAYOR: Oh, but there is --

4 MR. REIN: It's a stereotypical --

5 JUSTICE SOTOMAYOR: No, it's not --

6 MR. REIN: -- assumption. That is what it  
7 is.

8 JUSTICE SOTOMAYOR: It's not, because the  
9 reality --

10 MR. REIN: With all deference --

11 JUSTICE SOTOMAYOR: -- that Justice --

12 CHIEF JUSTICE ROBERTS: Mr. Rein --

13 JUSTICE SOTOMAYOR: -- Alito wants to rely  
14 on.

15 Let me finish my point.

16 He's right. For their educational needs,  
17 there are competing criteria. They need to keep a  
18 certain SAT, or whatever that's called, AI index, that  
19 has to be high because of the quality they want to keep  
20 the school at. That does discriminate against blacks on  
21 some levels, because the difference in numbers are high.

22 So if you have something like this,  
23 you're -- what you're saying, basically, is, and what  
24 he's proposing, is change your educational needs across  
25 the board, and focus in only on race, and make sure that

1 your school is black, Hispanic, or whatever on numbers  
2 that are going to reduce its educational quality.

3 That's basically what you're arguing, isn't  
4 it?

5 MR. REIN: No. And -- and to be fair, I  
6 mean, the first thing I was just pointing out is that to  
7 get to the conclusion of the Fifth Circuit, you have to  
8 first assume the pattern of admits in the Top Ten, where  
9 they come from, which was never established in the  
10 record, never studied.

11 And the second is that you have to assume  
12 that those coming from -- all students coming from these  
13 integrated, high-performing high schools don't include,  
14 in their Top 10 percent, any minority.

15 JUSTICE SOTOMAYOR: Why? What we know is --

16 MR. REIN: That's what he assumes.

17 JUSTICE SOTOMAYOR: -- the school doesn't  
18 have enough --

19 MR. REIN: Justice Sotomayor --

20 JUSTICE SOTOMAYOR: -- no matter what it  
21 does, it doesn't have enough numbers of black people.

22 MR. REIN: That -- that comes back to the  
23 fundamental point.

24 If we're just talking numbers, then you have  
25 to show the compelling need for more numbers, so that --

1 one of the reasons for defining your compelling need is  
2 that you have to then look at necessity in terms of the  
3 need.

4 So as in Grutter, what they said was we have  
5 insufficient numbers of minorities to provoke the  
6 appropriate dialogue. When we look at the class as a  
7 whole, we think we can do better if we introduce  
8 different points of view. It's very individualized;  
9 it's a small class.

10 So you can then say, increasing numbers --  
11 which they were certainly after, you know, from three to  
12 14 -- will meet that compelling need.

13 Since they never bothered to administer, you  
14 know, to define the needs, it's really hard to say what  
15 they were after and why numbers would or would not  
16 satisfy, and whether the numbers they were generating,  
17 which included 15 percent of the so-called holistic  
18 admits so it wasn't all white enterprise, why that  
19 wouldn't work.

20 The key point is, you have to come to the  
21 Court with the record. You can't make it up later,  
22 because that would say do what you want, and when the  
23 time comes, make it up. That's not -- no way to  
24 litigate.

25 And in this case they said, we're ready for

1 summary judgment; we've put in everything we need. If  
2 you look at their specific proffers -- and the court of  
3 appeals, they said they wanted to take discovery. And  
4 even Judge Higginbotham, their best friend, said, from  
5 who? What does Ms. Fisher know about this? What are  
6 you going to take discovery about? And he found no need  
7 in this Court, all they say is, we'd like to reiterate  
8 the benefits of diversity, but those were accepted, and  
9 we'd like a few testimonials about students admitted  
10 holistically without knowing whether they were the  
11 beneficiaries of the race or not.

12 GENERAL VERRILLI: You can't -- can't  
13 litigate that way.

14 Thank you, Your Honor.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
16 The case is submitted.

17 (Whereupon, at 11:38 a.m., the case in the  
18 above-entitled matter was submitted.)

19  
20  
21  
22  
23  
24  
25

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