

SUPREME COURT OF THE UNITED STATES

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STUDENTS FOR FAIR ADMISSIONS, INC.,)
Petitioner,)
v.) No. 21-707
UNIVERSITY OF NORTH CAROLINA,)
ET AL.,)
Respondents.)
- - - - -

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Washington, D.C.
Monday, October 31, 2022

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

1 APPEARANCES:
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3 on behalf of the Petitioner.
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9 Department of Justice, Washington, D.C.; for the
10 United States, as amicus curiae, supporting the
11 Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 21-707, Students for Fair Admissions versus the University of North Carolina.

Mr. Strawbridge.

ORAL ARGUMENT OF PATRICK STRAWBRIDGE
ON BEHALF OF THE PETITIONER

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

Racial classifications are wrong. That principle was enshrined in our law at great cost following the Civil War. A century of resistance to race neutrality followed, but this Court's landmark decision in Brown finally and firmly rejected the view that racial classifications have any role to play in providing educational opportunities.

Since then, the Court has broadly enforced the Constitution's prohibition on the use of racial classifications. Whatever factors the government may use in deciding which jurors to sit, who you may marry, or which primary schools our children can attend, skin color is

1 not one of them.

2 Grutter is a glaring exception to this
3 rule. This Court should overrule it.

4 First, Grutter is grievously wrong.
5 Its view that the educational benefits of
6 diversity justify racial classifications
7 contradicts the Fourteenth Amendment's guarantee
8 of equal treatment. It relied upon
9 stereotypical assumptions that race is
10 necessarily a proxy for one's viewpoint, and its
11 purported limits are empty and
12 self-contradictory, which is why UNC simply
13 ignores them.

14 Grutter also creates many negative
15 effects. Some applicants are incentivized to
16 conceal their race. Others who were admitted on
17 merit have their accomplishments diminished by
18 assumptions that their race played a role in
19 their admission. And there is no evidence that
20 after two decades Grutter has somehow reduced
21 the role of race on campus.

22 Finally, no one is actually relying on
23 Grutter. The opinion forecast its own demise
24 and it made clear that race-based admissions
25 must be diminishing over time. But that has not

1 happened. UNC officials testified that they
2 cannot imagine any scenario that would actually
3 lead them to end their racial preferences. UNC
4 claims license to use race in perpetuity, and
5 the district court held that Grutter allows
6 this.

7 Racial classifications are wrong, and
8 this Court should overrule Grutter.

9 JUSTICE THOMAS: Mr. Strawbridge, the
10 Respondents argue that if you don't consider
11 race, you won't be able to consider the whole
12 person in the admissions process.

13 How do you respond to that?

14 MR. STRAWBRIDGE: I -- I -- this Court
15 has always said that racial classifications are
16 necessarily invidious. And, certainly, it is
17 possible that -- that an applicant, for example,
18 could write something in which race provides a
19 context for their experience. But just
20 considering race and race alone is -- is not
21 consistent with the Constitution.

22 It's also not consistent with other
23 holistic approaches that this Court takes.
24 There's great freedom, for example, to -- to
25 strike a juror, but one thing you can't strike a

1 juror for in part is their race. You can -- in
2 awarding child custody, the most holistic
3 process perhaps known to law is the best
4 interests of the child. But this Court has held
5 race cannot be one of the factors you analyze in
6 deciding that.

7 JUSTICE THOMAS: Well, I understand
8 that, but on -- we're talking about an
9 application to a university. If you don't
10 include race -- I assume that Respondents think
11 that by including race, it tells you something
12 about a person.

13 If you don't include that, then what
14 do you include on the application?

15 MR. STRAWBRIDGE: Well, you include
16 their experiences. You include, you know, where
17 they grew up. You might include their --
18 include their socioeconomic status. You include
19 all sorts of things that actually lead to
20 broader diversity of viewpoints.

21 The assumption that race necessarily
22 informs something about anyone's qualifications
23 is antithetical to this Court's precedents and
24 to our Constitution.

25 JUSTICE SOTOMAYOR: Can we stop a

1 moment? And I want to break down what you're
2 talking about.

3 Sometimes race does correlate to some
4 experiences and not others. If you're Black,
5 you're more likely to be in an underresourced
6 school. You're more likely to be taught by
7 teachers who are not as qualified as others.
8 You're more likely to be viewed as less academic
9 -- as having less academic potential. Even in
10 your own arguments in your brief, you correlate
11 race to lots of other things that are not
12 necessarily causal -- causal but which do
13 correlate. How do you tease that out?

14 MR. STRAWBRIDGE: Well --

15 JUSTICE SOTOMAYOR: How do you -- you
16 want an admissions officer to say, I'm not going
17 to look at the race of a child to see if they
18 had all of those socioeconomic barriers present
19 and, despite that, that they got very high
20 high-school scores, maybe a little lower or a
21 lot lower SAT scores, but I'm going to think
22 about that? You're asking them to just shunt it
23 aside?

24 MR. STRAWBRIDGE: Yeah, racial --
25 racial classifications have always been

1 disfavored for a number of reasons. They are
2 necessarily divisive. They -- carry stigmatic
3 harm, both --

4 JUSTICE SOTOMAYOR: So why is it that
5 in the Reconstruction era, just when the
6 Thirteenth, Fourteenth Amendments were being
7 passed, Congress spent a lot of money in trying
8 to get Black children, whether they were
9 children of slaves or free slaves, to be
10 educated in integrated schools?

11 They had a belief, didn't they, that
12 integration itself provided a value?

13 MR. STRAWBRIDGE: That is true. Of
14 course, all -- most of the Freedmen Bureau's
15 activities are entirely consistent with this
16 Court's existing strict scrutiny rationale, even
17 in the educational context, that remediation is
18 an acceptable compelling interest.

19 JUSTICE SOTOMAYOR: But that's only
20 remediation for what, for slavery?

21 MR. STRAWBRIDGE: Well --

22 JUSTICE SOTOMAYOR: And these programs
23 were made available to Black free children.

24 MR. STRAWBRIDGE: Well --

25 JUSTICE SOTOMAYOR: Many of them.

1 MR. STRAWBRIDGE: Well, and that's
2 true. And also the Freedmen Bureau --

3 JUSTICE SOTOMAYOR: And the Berea
4 Kentucky school that was supported by federal
5 funds required a 50/50, 50 Black percent
6 children and 50 white percent children.

7 MR. STRAWBRIDGE: I'm -- I'm not sure
8 that the sources that are cited in the briefs
9 support that view. They -- there -- there was a
10 desire to make the education at Berea open to
11 all, but as far as we can tell, the actual
12 policy was they did not make distinction among
13 applicants by race.

14 The only requirement from what we
15 could tell is a willingness to actually be
16 educated in an integrated and coeducational
17 environment at Berea College.

18 JUSTICE SOTOMAYOR: So I'm --

19 MR. STRAWBRIDGE: Berea College, of
20 course, was also a private school.

21 JUSTICE SOTOMAYOR: Now you're
22 assuming in your argument that race is the only
23 factor that gets someone in to a school. Could
24 you point to any application? I thought, under
25 the Grutter -- Grutter framework, you can't use

1 race exclusively, but you can use it as one
2 among many factors.

3 MR. STRAWBRIDGE: Yes, and, obviously,
4 we have quarrels with the logic of that. In a
5 zero sum game like college admissions, if race
6 is going to be counted, that means some people
7 are going to get in and some people are going to
8 be excluded based on race.

9 JUSTICE JACKSON: But -- but not the
10 logic, the fact. What are the facts here about
11 whether or not race is being used singularly
12 to let people in?

13 MR. STRAWBRIDGE: The -- the -- the --
14 the expert that UNC presented argued that
15 1.2 percent of the decisions were -- were
16 influenced by race. We obviously had
17 disagreements with its -- with its
18 characterization of that, but given the fact
19 that they receive 40,000 applications a year,
20 that's hundreds if not thousands of applicants
21 who are being affected by race every year. Our
22 expert's testimony was that race made the
23 difference in basically 700 applications each
24 admission cycle.

25 JUSTICE SOTOMAYOR: That -- was that

1 accepted --

2 CHIEF JUSTICE ROBERTS: Counsel, I
3 couldn't see from your briefs what your position
4 was on race-neutral alternatives.

5 Do you think those are appropriate,
6 even if the intent of the state in adopting them
7 is to reach a certain level of minority
8 students?

9 MR. STRAWBRIDGE: Our position is that
10 this Court has an established framework that it
11 applies to judge facially neutral governmental
12 action that's alleged to be racially
13 discriminatory.

14 If the only reason to adopt a
15 particular admissions policy, if the sole
16 exclusive reason was for racial diversity alone,
17 we think that would probably raise problems
18 under that precedent, but, of course, it's a
19 fact-intensive inquiry under Arlington Heights,
20 but --

21 CHIEF JUSTICE ROBERTS: And I suppose,
22 given that they are race-neutral, most of them
23 would not be defended as for race alone.

24 MR. STRAWBRIDGE: Well, and --

25 CHIEF JUSTICE ROBERTS: If, for

1 example, socioeconomic status, maybe attendance
2 at a particular school that's known to be --

3 MR. STRAWBRIDGE: Correct, all of the
4 race-neutral alternatives and -- and
5 specifically the socioeconomic benefits in the
6 top percentage programs, those can be justified
7 on race-neutral means. They -- they increase
8 socioeconomic diversity, they -- they ensure
9 that people at underresourced schools have an
10 opportunity to attend the university, it create
11 geographic diversity.

12 JUSTICE KAGAN: Why is the question
13 race alone? I mean, usually, when we would look
14 to permissible versus impermissible purposes, we
15 would not say, well, it's only constitutionally
16 impermissible if it's one thing alone. We would
17 say, if it's one thing at all, it infects a
18 governmental action.

19 So suppose that, like, there's a
20 10 percent plan or something like that, and part
21 of the justification is socioeconomic diversity
22 and another part of the justification is we'll
23 also get more racial diversity in this manner.
24 And -- and -- and that's -- you know, that's
25 part of the purpose of the law.

1 I think that that's pretty true to
2 experience, that part of the reason that these
3 kinds of plans have been developed is that
4 people have understood that they will work to
5 create more racially diverse campuses.

6 Is that permissible?

7 MR. STRAWBRIDGE: Well, like I said,
8 it -- it's a different analysis when the -- when
9 the mechanism that's chosen is not a racial
10 classification itself, but I do think that this
11 Court's precedents --

12 JUSTICE KAGAN: Well, I guess the
13 question is why -- why is that true. A lot of
14 our constitutional doctrine suggests that it's
15 not a different analysis.

16 In other words, one way you can offend
17 the Constitution is by using an impermissible
18 classification. Another way you can offend the
19 Constitution is by devising a proxy mechanism
20 with the purpose of using -- of -- of -- of
21 achieving the same results that the
22 impermissible classification would.

23 MR. STRAWBRIDGE: Right.

24 JUSTICE KAGAN: So the question, I
25 suppose, is why -- I mean, I -- I -- I took your

1 answer, which I welcome, to be yes, of course,
2 the 10 percent plans are constitutional. But I
3 guess I wonder why, given our -- most of our
4 constitutional doctrine, that would be so.

5 MR. STRAWBRIDGE: Well, I'm not so
6 sure that's the current state of the law,
7 especially with City of Arlington. I think,
8 under Mt. Healthy and its precedent, if the
9 government can demonstrate that it would have
10 adopted the -- the -- the facially neutral
11 program anyway, then I don't think that there's
12 liability for intentional racial discrimination
13 in that case.

14 JUSTICE KAVANAUGH: So, if they're --
15 if you prevail here, let's say, and a university
16 develops three race-neutral alternatives to
17 consider in the wake of a decision here and they
18 choose the one that's going to lead to the
19 highest number of African American students and
20 they choose that race-neutral alternative for
21 that reason, is that okay?

22 MR. STRAWBRIDGE: If that was the only
23 reason that they were choosing it, I think that
24 that would -- that would require, you know,
25 obviously, an analysis of what the evidence that

1 was brought to bear in an Arlington Heights
2 analysis. There's burden-shifting that occurred
3 there.

4 JUSTICE KAVANAUGH: What if it's one
5 of the reasons?

6 MR. STRAWBRIDGE: Well, I think, if --
7 if they can demonstrate they would have -- they
8 would have pursued that policy anyway, I think
9 it's sufficient for them to escape liability.

10 JUSTICE KAGAN: Well, that really
11 means it's not the reason at all. So you are
12 saying, if the -- if -- if -- if that
13 contributes at all to the decision-making, then
14 that's impermissible?

15 MR. STRAWBRIDGE: No, I don't think
16 that's what I'm saying. I'm saying that --
17 that -- that if the only reason to do it is
18 through the narrow lens of race and there is no
19 other race-neutral justification for it that the
20 government can come forward and demonstrate that
21 would have led it to adopt that policy anyway, I
22 think -- I think that that -- I think that's the
23 only scenario where it would create problems
24 under the Court's precedent.

25 JUSTICE SOTOMAYOR: But isn't that

1 what this plan in UNC already does? Race is
2 never the determinative factor. That was a
3 finding by the district court.

4 Race alone doesn't account for why
5 someone's admitted or not admitted. There's
6 always a confluence of reasons. There are any
7 number of Hispanics, Blacks, Native Americans
8 who are not chosen by schools.

9 So I'm not sure I understand how
10 you're differentiating your answer.

11 MR. STRAWBRIDGE: Well, I'll --

12 JUSTICE SOTOMAYOR: If -- if race is
13 only one among many factors, how can you ever
14 prove, given that the district court found
15 against you, that it's ever a determinative
16 factor?

17 MR. STRAWBRIDGE: Well, I don't think
18 there was a finding from the district court that
19 it was never a determinative factor in any case,
20 and -- and --

21 JUSTICE SOTOMAYOR: Well, what it
22 found is you hadn't proved it was.

23 MR. STRAWBRIDGE: No, I think the
24 court acknowledged that race has an influence on
25 1.2 -- 1.2 percent of in-state decisions and

1 5.2 percent of out-of-state decisions.

2 Now I think the court went out of its
3 way to not specify in greater detail just how
4 many of those were decisive, but I would suggest
5 that that is a flaw both in the district court's
6 reasoning and in Grutter in general in that it
7 encourages and basically nullifies strict
8 scrutiny in some ways when you have this
9 many-factor analysis that makes it more
10 difficult to see what effect the racial
11 classification has had --

12 JUSTICE JACKSON: Can -- can I just
13 ask you about that effect? Because I think we
14 really have to drill down on that from a
15 threshold jurisdictional standpoint.

16 I think we have to understand whether
17 race is being used in this context to give rise
18 to an actual concrete particularized injury that
19 would give the members of your organization
20 standing to challenge the use of race in this
21 context.

22 And so I've been struggling to
23 understand exactly -- this is sort of where
24 Justice Sotomayor was coming from. I've been
25 struggling to understand how race is actually

1 factoring into the admissions process here and
2 whether there's any actual redressable injury
3 that arises.

4 So can you help us with that, figuring
5 out how exactly does UNC's system work in terms
6 of the use of race --

7 MR. STRAWBRIDGE: Well --

8 JUSTICE JACKSON: -- and how your
9 members are being harmed by that?

10 MR. STRAWBRIDGE: So let me start with
11 the legal question, which is concrete injury.
12 Gratz establishes that -- that -- that the
13 denial of an opportunity to fairly compete for
14 admission when one of the factors that's used is
15 racial classifications is sufficient to create
16 concrete injury. There's no dispute that --

17 JUSTICE JACKSON: Except Gratz was --
18 Gratz was like a set-aside. It was a specific
19 set of circumstances. You could see there that
20 the race factor was creating an unequal playing
21 field because of the way in which the program
22 was structured.

23 Here, I don't really see that
24 happening because no one is -- first of all, the
25 university is not requiring anybody to give

1 their race at the beginning. When you give your
2 race, you're not getting any special points.
3 It's being treated just on par with other
4 factors in the system.

5 No one's automatically getting in
6 because race is being used. There's no real
7 work that it's doing, separate and apart from
8 the other factors in any different way, like it
9 was in Gratz.

10 And when you look at that case, it
11 says specifically, when there's a set-aside kind
12 of program, then we have actual injury that --
13 that gives rise to standing. But I'm not sure
14 you have that here. So --

15 MR. STRAWBRIDGE: Well, but even --

16 JUSTICE JACKSON: -- can you help me?

17 MR. STRAWBRIDGE: I'm sorry.

18 JUSTICE JACKSON: Yes, please.

19 MR. STRAWBRIDGE: Even -- even -- even
20 Grutter establishes that a holistic admissions
21 process doesn't make the injury go away.

22 JUSTICE JACKSON: But you've said
23 Grutter needs to be overruled. So we can't -- I
24 don't think we can use that decision as the
25 basis for --

1 MR. STRAWBRIDGE: Well -- well, no,
2 one of the --

3 JUSTICE JACKSON: -- standing.

4 MR. STRAWBRIDGE: -- one of the
5 problems with Grutter that I think illustrates
6 this specifically is Grutter's suggestion that
7 race can only be used as a plus factor and never
8 a minus factor. But, as many of the dissenting
9 opinions in that case observed and -- and cases
10 from --- or opinions from this Court have since
11 observed, that makes no sense in a zero sum
12 game. If we are going to consider race and we
13 argue that a racial classification, which is,
14 you know, highly disfavored at law because of
15 its necessarily invidious nature, is going to be
16 used --

17 JUSTICE JACKSON: But -- but wait. I
18 don't --

19 MR. STRAWBRIDGE: -- then, presumably,
20 it must be doing some work.

21 JUSTICE JACKSON: I -- I -- I actually
22 don't think that that's the way standing
23 ordinarily works, and I'm worried that you're
24 asking us for a special standing rule.

25 MR. STRAWBRIDGE: Well --

1 JUSTICE JACKSON: That you're saying
2 that we can challenge the use of race as a
3 factor without explaining how it's factoring in
4 and how that harms our members.

5 MR. STRAWBRIDGE: Well, I --

6 JUSTICE JACKSON: So why is it that
7 race is doing anything different to your
8 members' ability to compete in this environment?
9 They can still get extra points. You know, the
10 points are not being tallied. There's no goal.
11 There's no target. But, in any event, they can
12 get points for diversity even in this
13 environment.

14 So why does having race as a factor
15 harm your members in a redressable way?

16 MR. STRAWBRIDGE: The record in this
17 case is that UNC gives racial preferences to
18 African Americans, to Hispanic Americans, and to
19 American Indians. It does not give racial --
20 racial preferences to white applicants and to
21 Asian applicants. Moreover --

22 JUSTICE JACKSON: Are you sure about
23 that?

24 MR. STRAWBRIDGE: Yes.

25 JUSTICE JACKSON: Because I thought

1 that was not a rule, that anyone could get a
2 point for diversity, anyone could get a point
3 for racial diversity, to the extent that the
4 other factors in their application allow for it.

5 MR. STRAWBRIDGE: No, the -- UNC --
6 and I think this is in the district court's
7 findings -- specifically gives its racial
8 preferences for what it defines as URMs, which
9 are the three groups that I said.

10 And, moreover, any effect of race in
11 the process is going to give rise to injury
12 because the injury that Gratz recognized and
13 that -- and that Grutter did not hesitate in at
14 least finding standing in that case and moving
15 on to the merits decision is that you are being
16 denied the opportunity to compete on a fair
17 playing field, at least a constitutional playing
18 field.

19 JUSTICE BARRETT: Mr. Strawbridge, can
20 I take you back to Justice Sotomayor's question?
21 She described an applicant who came from a -- an
22 underprivileged school who maybe didn't have the
23 best teaching, best opportunities to score well
24 on the SAT. And I want to know whether in your
25 view of the world, if an -- if a student wrote

1 an essay describing some of the experiences that
2 Justice Sotomayor said, you know, I struggled
3 with socioeconomic diversity, racial prejudice,
4 things that shape who I am, in your view of the
5 world, could a university take that into account
6 without offending the Equal Protection Clause?

7 MR. STRAWBRIDGE: Yes. I think this
8 Court's precedents even note that the act of
9 overcoming discrimination is -- is -- is -- is
10 -- is separate and apart distinction from race,
11 in part because any member of a race may be in a
12 position -- or a member of any race might be put
13 in a position where they feel somewhat isolated
14 or somewhat different, but --

15 JUSTICE BARRETT: Okay. So I
16 understood you telling Justice Sotomayor that
17 you thought that would not be permissible. But
18 that's not your --

19 MR. STRAWBRIDGE: No, no. I think --

20 JUSTICE BARRETT: I misunderstood.

21 MR. STRAWBRIDGE: -- I -- I meant -- I
22 meant to say quite different. What we object to
23 is a consideration of race and race by itself.

24 JUSTICE BARRETT: Race in a
25 box-checking way as opposed to race in an

1 experiential --

2 MR. STRAWBRIDGE: Which -- which --
3 which --

4 JUSTICE BARRETT: -- statement?

5 MR. STRAWBRIDGE: -- which the record
6 in this case is that they can give the
7 preference based on the check of a box alone.

8 JUSTICE BARRETT: Thank you.

9 JUSTICE SOTOMAYOR: What -- where?

10 MR. STRAWBRIDGE: Where?

11 JUSTICE SOTOMAYOR: Where?

12 MR. STRAWBRIDGE: Well, they -- they
13 use a whole -- they --

14 JUSTICE SOTOMAYOR: Show me -- show me
15 one place the district court found that an
16 applicant checking a box automatically gets a --
17 a greater point system.

18 MR. STRAWBRIDGE: Well, I -- I did not
19 say that automatically gets a point. They say
20 that they can take race into account based on
21 that information alone.

22 JUSTICE SOTOMAYOR: Right. But we
23 still know that --

24 MR. STRAWBRIDGE: The testimony is not
25 necessary --

1 JUSTICE SOTOMAYOR: But you're making
2 assumptions with that, because I can look at
3 something and say, okay, now let me read the
4 rest of the application and see if that warrants
5 that extra point. But where -- can you point
6 into the record where merely checking the box,
7 standing alone as one factor, got somebody in?

8 MR. STRAWBRIDGE: Well, of course,
9 there's an e-mail exchange in the record, some
10 of which is sealed, but I think that the Court's
11 familiar with its contents that --

12 JUSTICE SOTOMAYOR: That was one
13 person and not the entire committee.

14 MR. STRAWBRIDGE: It was a -- it was a
15 -- I think it was a chat between three people --

16 JUSTICE SOTOMAYOR: Well --

17 JUSTICE JACKSON: Did that support
18 each point --

19 MR. STRAWBRIDGE: -- who were all
20 admissions officers.

21 JUSTICE SOTOMAYOR: -- it's a
22 40-member committee.

23 JUSTICE JACKSON: -- as a result?

24 JUSTICE SOTOMAYOR: Or is that the
25 Harvard case? I'm sorry. It might be the

1 Harvard case.

2 JUSTICE JACKSON: Did they --

3 JUSTICE KAGAN: May I go back to
4 Justice Barrett's question and -- and -- and
5 just make sure I understand your answer to it?

6 You said not race in a box-checking
7 way, but then Justice Barrett said race in an
8 experiential way, and you said yes to that. And
9 -- and you said, well, of course, you can always
10 say that you've been subject to discrimination.
11 And, certainly, being subject to discrimination
12 is -- is one part of what it means to have race
13 affect your experiences generally.

14 I mean, what are you saying a college
15 can look at and what are you saying a college
16 can't look at when they're reading an essay
17 about, you know, the experiences that -- that a
18 person has had in their lives?

19 MR. STRAWBRIDGE: Well, the -- well,
20 the reason why race may -- may have some
21 contextual relevance when you're evaluating an
22 essay, right, a story about -- about being
23 subjected to racial discrimination obviously
24 indicates that the applicant has grit, that the
25 applicant has overcome some hardship. It -- it

1 tells you something about the character and the
2 experience of the applicant other than their
3 skin color.

4 JUSTICE KAGAN: And --

5 MR. STRAWBRIDGE: So that's what we
6 object to.

7 JUSTICE KAGAN: -- so you said again
8 being subject to discrimination. Are you
9 conceding too that there are other aspects of
10 racial identity that could form part of an essay
11 that universities would want to look at? Or are
12 you saying, no, this just has to be if you have
13 complaints about racial discrimination?

14 MR. STRAWBRIDGE: Well, no. For
15 example, a -- a -- a student, you know, an Asian
16 American student who took an active interest in
17 perhaps, you know, traveling back to their
18 grandmother's, you know, country of origin or
19 somebody who, you know, was involved in some
20 extracurricular activities with a particular,
21 you know, interest in supporting, you know,
22 Asian American students, for example, those kind
23 of show dedication, they show extracurricular
24 involvement, they show perhaps a global interest
25 in the world.

1 JUSTICE KAGAN: Do we -- do we --

2 MR. STRAWBRIDGE: There's all sorts of
3 non-racial criteria --

4 CHIEF JUSTICE ROBERTS: They -- They
5 also --

6 JUSTICE KAGAN: -- vary a little bit
7 --

8 CHIEF JUSTICE ROBERTS: -- they also
9 --

10 MR. STRAWBRIDGE: -- those meet.

11 CHIEF JUSTICE ROBERTS: -- they also
12 show a pretty not very savvy applicant, right?
13 Because the one thing his essay is going to show
14 is that he's Asian American, and those are the
15 people who are discriminated against.

16 MR. STRAWBRIDGE: That's -- that --

17 CHIEF JUSTICE ROBERTS: Because --

18 MR. STRAWBRIDGE: Yes, that is true.

19 And that's -- that's the record in both cases,
20 is that racial preferences operate to the
21 disadvantage of Asian American applicants.

22 JUSTICE KAGAN: Just --

23 CHIEF JUSTICE ROBERTS: So it is the
24 case that African American applicants can
25 highlight that aspect of their background in

1 situations such as the one that you mentioned
2 and that people reading that file in the
3 admissions office can look at that and take that
4 into account?

5 MR. STRAWBRIDGE: Yes. What we object
6 them taking into account is just race,
7 independent of any of that kind of information.

8 JUSTICE JACKSON: But that -- but how
9 are they taking in -- into account race
10 independent of the rest of the information in a
11 holistic review process? That's what -- so my
12 other question was about this same thing, which
13 is how is race being used in this process?

14 You keep saying we object to the use
15 of race standing alone. But, as I read the
16 record and understand their process, it's never
17 standing alone, that it's in the context of all
18 of the other factors. There are 40 factors
19 about all sorts of things that the admissions
20 office is looking at. And you haven't
21 demonstrated or shown one situation in which all
22 they look at is race and take from that
23 stereotypes and other things. They're looking
24 at the full person with all of these
25 characteristics.

1 MR. STRAWBRIDGE: Yes. But -- but our
2 point is that all those other characteristics
3 are not barred by the Constitution, and the use
4 of race as a classification is barred by the
5 Constitution.

6 JUSTICE JACKSON: But it has to be
7 used --

8 MR. STRAWBRIDGE: That's what makes
9 that difference.

10 JUSTICE JACKSON: -- doesn't it? I
11 mean, just because somebody checks a box -- what
12 -- what if they check the box and the university
13 sees that but doesn't look at it, doesn't take
14 it into account in any way in the application?
15 Do we have a constitutional violation just
16 because the student voluntarily -- voluntarily
17 said, I'm an African American, but that never
18 comes into play?

19 MR. STRAWBRIDGE: If the university
20 admissions process, you know, instructs readers
21 not to take that into account or to not award,
22 you know, any benefit toward admission on that
23 basis, then that is not necessarily a problem.

24 JUSTICE JACKSON: No --

25 JUSTICE ALITO: Well, Mr. Strawbridge

1 --

2 JUSTICE JACKSON: -- no -- no -- no --
3 no instruction. It just never actually comes
4 into play. Because, if you say that, what I
5 think you're saying is that people have to mask
6 their identities when they come into contact
7 with the admissions office just on the basis of
8 their difference --

9 MR. STRAWBRIDGE: Well, I don't think
10 --

11 JUSTICE JACKSON: -- if it never comes
12 into play.

13 MR. STRAWBRIDGE: -- I don't think
14 this is a lot different than a couple of other
15 criteria. For example, the -- the UNC's
16 official position at trial was that gender is
17 not a basis for admission, that -- that -- that
18 admissions officers are not supposed to take
19 gender into account. That doesn't mean that
20 they're not aware that there are women applying,
21 but the instructions are not to take gender into
22 account. And -- and -- and, to my knowledge, we
23 don't see a large effect at all suggesting that
24 -- that gender is playing a role.

25 But both experts in this case found

1 that race was, in fact, mattering to a number of
2 applications. You can -- you can debate between
3 our expert and their expert whether it's only
4 500 or it's 1700 or it's 2,000 applications a
5 year, but it is having an effect. If it's not
6 having an effect, they've spent an awful lot of
7 time and money opposing the relief we're seeking
8 in this case.

9 JUSTICE ALITO: Mr. Strawbridge, let
10 me give you a hypothetical along the lines of
11 some of what you've been questioned about
12 already. Suppose that a student is an immigrant
13 from Africa and moves to a rural area in western
14 North Carolina where the population is
15 overwhelmingly white. And the student in an
16 essay doesn't say this, I was subjected to any
17 kind of overt discrimination, but I did have to
18 deal with huge cultural differences, I had to
19 find a way of relating to my classmates who came
20 from very different backgrounds.

21 Would that be permissible?

22 MR. STRAWBRIDGE: I think that that
23 would generally be permissible because the --
24 the preference in that case is not being based
25 upon the race but upon the cultural experiences

1 or the ability to adapt or the fact of
2 encountering a new language in a new -- in a new
3 environment.

4 JUSTICE KAGAN: The race is part of
5 the culture and the culture is part of the race,
6 isn't it? I mean, that's slicing the baloney
7 awfully thin.

8 MR. STRAWBRIDGE: Well, we could -- we
9 could say the same in the jury selection cases.
10 We could say the same in the child custody
11 cases. There's still a -- a -- a -- a
12 difference between using an express racial
13 classification.

14 When you use race, you are telling
15 applicants that their race matters, that it
16 means something. That is inherently divisive.
17 It gets us further away from a world where the
18 government treats race as irrelevant.

19 JUSTICE JACKSON: But they're offering
20 it because they're saying the race -- that race
21 matters to me. I mean, this is not a situation
22 in which the university is asking or telling
23 every applicant: Give us your race so that we
24 can classify people, so that we can give certain
25 people preferences.

1 The only reason why the university
2 knows the race of any of these applicants is
3 because they are voluntarily providing that.

4 MR. STRAWBRIDGE: But it is making
5 distinctions upon who it will admit at least in
6 part on the race of the applicant. Some races
7 get a benefit. Some races do not get a benefit.

8 JUSTICE GORSUCH: Counsel --

9 JUSTICE SOTOMAYOR: Do --

10 JUSTICE GORSUCH: Oh, I'm sorry, go
11 ahead.

12 JUSTICE SOTOMAYOR: No, no, go ahead.

13 JUSTICE GORSUCH: Our -- our -- our
14 precedents, just turning to our precedents for a
15 moment, distinguish on the one hand between
16 racial quotas, which Justice Powell and Bakke
17 said would be impermissible, with pursuing
18 racial diversity and critical mass of different
19 races on campus in Grutter, for example.

20 How are we to think about
21 distinguishing between those concepts?

22 MR. STRAWBRIDGE: Well, so the racial
23 diversity point is interesting because the
24 Court's other precedents have rejected racial
25 diversity as a compelling interest in the

1 employment context with -- in Wygant at least.
2 It's rejected racial diversity as a relevant
3 factor in K-through-12 education.

4 So we think that -- that Grutter is an
5 exception to that and those other cases are
6 better reasoned in this point in terms of
7 disfavoring the use of race by the government.

8 JUSTICE KAGAN: So, on your view, and
9 I take this to be the purport of most of your
10 briefs, not -- putting aside the last 10 pages
11 or so -- but, in your view, it really wouldn't
12 matter if there was a precipitous decline in
13 minority admissions, African American, Hispanic,
14 one or the other, you know, if -- I think there
15 are some numbers in -- in this case, but, you
16 know, suppose that it just fell through the
17 floor.

18 Would it -- it just -- you know, too
19 bad?

20 MR. STRAWBRIDGE: Well, I don't think
21 that it's going to fall through the floor if the
22 university is actually committed to the broader
23 diversity it wants because it didn't --

24 JUSTICE KAGAN: Right. I know you
25 think that. And there's been -- obviously, a

1 lot of the litigation has been about that, how
2 much will it decline and your expert and their
3 expert. But the logic of your position suggests
4 that that really doesn't matter.

5 I mean, the last 10 pages of your
6 brief where you say is -- is -- is -- has there
7 been narrow tailoring here, it matters in that
8 10 pages. But it doesn't matter if you're
9 saying there's a categorical rule, no race shall
10 be involved in admissions decisions, then it
11 doesn't matter if minority enrollment or
12 particular kinds of minority enrollment fall
13 through the floor, does it?

14 MR. STRAWBRIDGE: If the -- if the
15 application process is open and that -- and that
16 is a result of the criteria that the university
17 has elected to choose and it's not
18 discriminatory under this Court's other
19 precedents, then -- then that is the -- that is
20 the -- the educational decision the university
21 has made.

22 I doubt any university would ever make
23 that decision. That has not been the
24 experience, for example, in Florida, which is
25 race-neutral, has very similar demographics to

1 UNC, and by UNC's own admission in this record,
2 actually achieves better racial diversity, as
3 well as 50 percent greater number of Pell Grants
4 on campus.

5 JUSTICE KAGAN: Right. Well, that
6 gets us back to this question of -- of -- of
7 what universities can do with what purpose to
8 achieve racial diversity, even without being
9 explicit about racial classifications.

10 But putting that aside, I mean, I --
11 I -- I -- I guess what I'm saying is your brief
12 -- and this is very explicit in your brief --
13 is, like, it just doesn't matter if our
14 institutions look like America.

15 You say this on page 11 in your reply
16 brief, and I guess what I'm asking you is,
17 doesn't it? I mean, doesn't it? These are the
18 pipelines to leadership in our society. It
19 might be military leadership. It might be
20 business leadership. It might be leadership in
21 the law. It might be leadership in all kinds of
22 different areas. Universities are the pipeline
23 to that leadership.

24 Now, if universities are not racially
25 diverse and your rule suggests that it doesn't

1 matter, well, then all of those institutions are
2 not going to be racially diverse either.

3 MR. STRAWBRIDGE: I -- I don't --

4 JUSTICE KAGAN: And -- and I thought
5 that part of what it meant to be an American and
6 to believe in American pluralism is that
7 actually our institutions, you know, are
8 reflective of who we are as -- as a people in
9 all our variety.

10 MR. STRAWBRIDGE: I -- I think that's
11 right. And I think the reason that we think
12 that and why that is a great American ideal is
13 because we expect that the government is going
14 to be open to everybody who wishes to apply and
15 that because merit and your worth as a person
16 and your value as a contributed -- contributory
17 citizen is not correlated with your skin color.

18 And so, naturally, a government that
19 treats people fairly and that makes opportunity
20 open to all will necessarily see racial
21 diversity.

22 JUSTICE KAGAN: But, Mr. Strawbridge
23 --

24 MR. STRAWBRIDGE: And, indeed, that's
25 been the experience of --

1 JUSTICE KAGAN: -- you -- you -- you
2 said, and I think you're right to say this, you
3 said to one of my colleagues' questions, you
4 know, if this didn't matter, they're spending an
5 awful lot of time and money and -- and anxiety
6 doing something that doesn't matter.

7 So let's presume it does matter.
8 Let's presume it does matter that these -- these
9 programs have been understood to be necessary to
10 ensure that these institutions have a certain
11 level of racial diversity, and I concede what
12 Justice Gorsuch says, that racial diversity and
13 quotas, it's a -- it's a little bit mysterious,
14 but have a certain level of racial diversity
15 that will enable them to get the benefits of all
16 our many different peoples and that enables
17 American society generally to do the same.

18 MR. STRAWBRIDGE: Well, because I
19 think one of the problems with Grutter is that
20 it suggests that this is somehow costless, that
21 if it's one factor among many and we can't
22 identify, you know, exactly how many points race
23 is getting, although, obviously, statistical
24 analysis does allow that -- us to do that at
25 some point, Grutter says it's not that big of a

1 deal, it's always a plus factor and never a
2 negative.

3 But this is a zero sum game. That is
4 one of the problems with Grutter, is that it
5 suggests that the harm of racial
6 classifications, which this Court have always
7 recognized are inherent and invidious of
8 themselves, can be -- can be -- can be, you
9 know, hidden or pushed down as long as race is
10 just one of many factors.

11 JUSTICE JACKSON: But that doesn't --

12 CHIEF JUSTICE ROBERTS: Counsel, if
13 you have -- I -- I thought your objection is
14 also that the race-neutral alternatives -- you
15 have to try race-neutral alternatives first.

16 You don't think the university has,
17 right?

18 MR. STRAWBRIDGE: We do not think that
19 the university has made a commitment to
20 race-neutral alternatives. And we presented a
21 lot of evidence on this case. And we do not
22 think the district court's analysis is
23 consistent with strict scrutiny even as Grutter
24 requires it and certainly not --

25 CHIEF JUSTICE ROBERTS: So, if -- if

1 they do -- if they cannot take the box being
2 checked into account or -- or can't do that and
3 do try race-neutral alternatives, is there any
4 evidence in the record about what the results of
5 those would be?

6 In -- in other words, to take an
7 example, if all of a sudden the number of essays
8 that talk about the experience of being an
9 African American in society rises dramatically,
10 will the consequences of that be the same as if
11 they're not being mentioned, but instead race is
12 taken into account automatically?

13 MR. STRAWBRIDGE: I want to make sure
14 I understand Your Honor's question. Is -- is --
15 is --

16 CHIEF JUSTICE ROBERTS: It might have
17 been a little awkwardly phrased.

18 MR. STRAWBRIDGE: I would -- I would,
19 never suggest that. Is -- is -- is -- is the
20 question as to whether or not there's some sort
21 of cheating going on, or is the question whether
22 the race-neutral --

23 CHIEF JUSTICE ROBERTS: No, not -- not
24 a bit. The question is -- the -- the -- the
25 discussion has been about the dramatic

1 plummeting of the number of African American
2 students that would take place if the practice
3 of checking the box with -- with race is taken
4 away.

5 And my suggestion is, if that's not,
6 then maybe there will be an incentive for the
7 university to, in fact, truly pursue
8 race-neutral alternatives, such as, you know,
9 allowing, which I think would be allowed,
10 students, applicants to indicate experiences
11 they have had because of their race.

12 MR. STRAWBRIDGE: I think that is --
13 is correct. And just so we're clear, there's a
14 lot of -- there's a lot of room for UNC in
15 particular to improve its socioeconomic
16 diversity commitment. It claims to value this,
17 but the preference at least according to our
18 expert's testimony that it gives for
19 socioeconomic status is lesser than it gives to
20 race.

21 Something like -- like the average
22 median income in North Carolina is about \$53,000
23 a year, but the average UNC student comes from a
24 family making \$153,000 a year, and at least at
25 trial there was testimony from the Director of

1 Admissions that the percentage of
2 first-generation college students and the
3 students who were receiving scholarships under
4 the Carolina Covenant, which is a socioeconomic
5 benefit, had declined in recent years.

6 JUSTICE KAVANAUGH: Your position will
7 put a lot of pressure going forward, if it's
8 accepted, on what qualifies as race-neutral in
9 the first place. You said socioeconomic is
10 race-neutral. Top 10 percent plan,
11 race-neutral.

12 Is -- you want to respond to that?

13 MR. STRAWBRIDGE: Well, I'm sorry, I
14 -- I did not mean to interrupt. I just wanted
15 to say that I actually don't think that's been
16 the experience. There are nine states that have
17 -- that have barred the use of race in their
18 college admissions program. We're not aware of
19 anyone who has challenged a race-neutral
20 alternative on the ground that it somehow --

21 JUSTICE KAVANAUGH: Right. I'm just
22 making sure what qualifies as race-neutral in
23 the first place. What if a college says we're
24 going to give a plus to descendants of slaves?
25 Is that race-neutral or not?

1 MR. STRAWBRIDGE: I think descendants
2 of slaves is a very difficult question because
3 it's so -- it's so highly correlated with race
4 in the history of our country. I'm not sure
5 that any college has proposed that kind of a
6 preference. It would have to --

7 JUSTICE KAVANAUGH: Well, I know we
8 have to think forward about what will happen if
9 you prevail in this case, and that seems a
10 potential, so I'm curious about your answer to
11 that question.

12 MR. STRAWBRIDGE: My -- my -- my
13 instinct standing here is, if that were the only
14 basis, then -- then that -- that -- that very
15 quickly starts to look like just a pure proxy
16 for race. It would obviously depend on the
17 actual program as it -- as it was implemented.

18 JUSTICE KAVANAUGH: Could you give a
19 plus to applicants whose parents were immigrants
20 to this country?

21 MR. STRAWBRIDGE: I think that you --

22 JUSTICE KAVANAUGH: Is that
23 race-neutral?

24 MR. STRAWBRIDGE: I think that if it
25 -- if it -- if it is immigrants regardless of

1 country --

2 JUSTICE KAVANAUGH: Yes.

3 MR. STRAWBRIDGE: -- and regardless of
4 their racial descendant, I think that that is
5 probably closer to being okay.

6 JUSTICE GORSUCH: Counsel, what --
7 what did the evidence show in terms of
8 race-neutral alternatives from your perspective?

9 MR. STRAWBRIDGE: There were --

10 JUSTICE GORSUCH: -- in terms -- would
11 -- would numbers plummet?

12 MR. STRAWBRIDGE: No. Following the
13 analysis -- following the analysis that was used
14 in the other case, we -- we presented a number
15 of circumstances, some of which -- which assumed
16 a holistic process, just a holistic process that
17 was no longer putting a thumb on the scale for
18 students of particular races.

19 And it showed that you could get to
20 the current academic credentials of UNC, average
21 SAT and -- and GPA within, you know, 15 points,
22 you could get very similar, you know, less than
23 a 1 percentage difference in -- in -- in the
24 individual racial breakdowns to the extent those
25 are relevant, so equal or greater than overall

1 underrepresented minority representation, and,
2 of course, socioeconomic diversity would
3 increase significantly.

4 I think it is telling in the district
5 court's analysis that it gave absolutely little
6 weight to the possibility of a socioeconomic
7 preference. It suggested that that would create
8 a kind of diversity that's different than what
9 UNC prefers. And, of course, we think that's
10 part of the problem.

11 JUSTICE BARRETT: Mr. Strawbridge --

12 JUSTICE SOTOMAYOR: So I looked at all
13 of your simulations, every one of them. So did
14 the district court. And in every one of them,
15 white representation stayed the same or went up.
16 And some minority groups increased, but others
17 did not. Blacks decreased in every one of your
18 stimulations.

19 The district court also looked at your
20 simulations and found that each and every one of
21 them had fatal statistical flaws, not the least
22 of which that you relied on unrealistic
23 assumptions about the applicant pool.

24 In one of them, the modified Hoxby
25 simulation, which you seem to be relying on

1 here, assumes UNC could admit the state's 70 --
2 750 highest-scoring, most socioeconomically
3 disadvantaged public high school students. That
4 all of them would apply, that all of them would
5 accept is as unrealistic as you can get.

6 So there isn't one stimulation that
7 you put forth that achieved the numbers that are
8 being achieved today. They are imperfect. We
9 haven't -- we have no racial quotas. We don't
10 have proportionate representation.

11 But show me a simulation in any of
12 your two cases that reached the numbers for
13 every ethnic group in the bottom.

14 MR. STRAWBRIDGE: Well, of course,
15 that suggests that the standard is a particular
16 percentage of representation of the student
17 body, which even Grutter purports --

18 JUSTICE SOTOMAYOR: No.

19 MR. STRAWBRIDGE: -- to disclaim.

20 JUSTICE SOTOMAYOR: No. I'm just
21 saying we know that representation for Asian
22 Americans, for example, has grown dramatically
23 over time. As their numbers in the population
24 have increased, so have their admissions
25 numbers.

1 But I'm just saying, if we don't have
2 proportionality, and no one's seeking that
3 because that would be a racial classification,
4 if we have improvement, all I see in your models
5 is that we step backwards, we don't step
6 forward.

7 MR. STRAWBRIDGE: I think I disagree
8 with that for a couple reasons. First of all --

9 JUSTICE SOTOMAYOR: Well, the district
10 court --

11 CHIEF JUSTICE ROBERTS: Why don't you
12 tell us what the reasons are.

13 MR. STRAWBRIDGE: Well, first of all,
14 the district court basically conflated the
15 educational benefits of diversity, which is
16 actually the interest that -- that Grutter
17 recognizes, with raw representation on campus.
18 And I don't think those two things can be tied,
19 and I don't think there's any evidence in the
20 record by UNC, which is supposed to bear the
21 burden of proof under strict scrutiny, that --
22 that having, you know, a Black population on
23 campus of 8.6 percent versus 8.4 percent results
24 in fewer benefits of educational --

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. You'll be able to return to Justice
2 Sotomayor in just a moment.

3 Justice Thomas, anything further?

4 JUSTICE THOMAS: No, Chief.

5 CHIEF JUSTICE ROBERTS: Justice Alito?
6 Justice Sotomayor?

7 JUSTICE SOTOMAYOR: Yes, just to
8 finish that point.

9 MR. STRAWBRIDGE: Yes.

10 JUSTICE SOTOMAYOR: We do know that
11 when numbers decreased in schools like the
12 University of California, University of
13 Michigan, in the upper-tier schools in the -- in
14 the Oklahoma system, that Blacks have reported
15 feeling isolated and having their voices stifled
16 there.

17 MR. STRAWBRIDGE: Yes, although --
18 although the correlation that's offered in some
19 of the amicus briefs breaks down if you actually
20 look at the underlying information. Just to
21 take California, for example, at UC Davis, which
22 has African American representation, you know,
23 several points lower than at -- at UC Merced,
24 there -- there's less reports of isolation.

25 And you can see that even at the UNC

1 campus. There are some students even under
2 their policies today who are support -- who --
3 who report feelings of racial isolation. But
4 Native Americans, who, of course, have a small
5 percentage of representation on campus prepared
6 to African Americans, report feeling less
7 racially isolated. So I think the suggestion
8 that that can be the standard by which we judge
9 a race-neutral alternative is insufficient.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: This is a little bit
12 off the track here, but you made a reference
13 earlier in your remarks about gender
14 differences. And there's a lot of statistical
15 evidence that suggests that colleges now, when
16 they apply gender-neutral criteria, get many
17 more women than men.

18 And assume that that continues to be
19 true, so that using gender-neutral criteria, you
20 know, men are 30 percent of a class or
21 35 percent. And a university said, you know,
22 that's neither healthy for our university life,
23 nor is it healthy for society, that men are so
24 undereducated as compared to women.

25 Could a university put a thumb on the

1 scales and say, you know, it's important that we
2 ensure that men continue to be -- receive
3 college educations at not perfect equality or --
4 you know, but, like, roughly in the same
5 ballpark?

6 MR. STRAWBRIDGE: Well, of course, you
7 know, under -- under this Court's precedent with
8 respect to the Equal Protection Clause, that is
9 -- that is subject to a somewhat lesser level of
10 scrutiny than racial classifications are. So
11 even if they could justify them under this
12 Court's equal protection jurisprudence, I don't
13 think it follows that they can justify racial
14 classifications where --

15 JUSTICE KAGAN: Yeah. I mean -- I
16 mean, you're right about the levels of scrutiny,
17 but that would be peculiar, wouldn't it? Like
18 white men get the thumb on the scale, but people
19 who have been kicked in the teeth by our society
20 for centuries do not?

21 MR. STRAWBRIDGE: Well, of course, our
22 position is that white men could not get a thumb
23 on the scale. That sounds like a racial
24 classification. Men could perhaps.

25 JUSTICE KAGAN: Men could?

1 MR. STRAWBRIDGE: But not white men.

2 JUSTICE KAGAN: Oh. Uh-huh.

3 MR. STRAWBRIDGE: Yeah. But the
4 answer is, could you survive intermediate --
5 intermediate scrutiny in that case? I don't
6 know, but we've never said that -- that -- that
7 -- that gender differences -- at least the Court
8 has never suggested that sex discrimination
9 under the Equal Protection Clause rises to the
10 inherent invidious level that racial
11 classifications do. And this case, it's about
12 racial classifications.

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 JUSTICE GORSUCH: Well, this Court in
17 the Virginia Military Institute case said that
18 gender would be an impermissible basis for
19 discriminating against applicants there.

20 MR. STRAWBRIDGE: Yes, and I -- I --
21 and -- and, obviously, the situation was
22 somewhat different in that it was a total
23 exclusion if I recall correctly in that case.
24 But I -- I -- I -- I -- I do not want to concede
25 that -- that there would ever be an appropriate

1 place to have a sex-based characteristic. I'm
2 just noting it's different under the precedent
3 than race.

4 JUSTICE GORSUCH: And how about
5 religion, for example? There's some evidence,
6 for example, that Harvard adopted its holistic
7 admissions approach in part because it was
8 concerned by the burgeoning number of Jewish
9 persons who were attending, and they were
10 looking for a way to reduce the number of Jewish
11 persons without resorting to a quota. At least
12 that's what some of the amici tell us.

13 MR. STRAWBRIDGE: Yes. I -- I mean,
14 that -- that is the history, and I think it's --
15 it's an illustration why putting something in a
16 holistic admissions process doesn't -- doesn't
17 prevent the very invidious effects that this
18 Court has always recognized with racial
19 characteristics.

20 JUSTICE GORSUCH: Then I want to ask
21 you about Title VI -- Title VI in isolation.
22 Put aside our precedent for the moment. Title
23 VI says that no person shall be excluded from
24 participation or be subjected to discrimination
25 under any program or activity that receives

1 federal financial assistance.

2 In Bakke, Justice Stevens argued that,
3 whatever the Fourteenth Amendment may allow,
4 Title VI does not permit the use of race. You
5 didn't make much of that point in your briefs,
6 and I -- I just wanted to understand why.

7 MR. STRAWBRIDGE: I don't think it's
8 necessary to make that much point in the brief
9 because, in our view, at least within the
10 educational context, there's really not a
11 difference between how the Fourteenth Amendment
12 should read and Title VI's prohibition should
13 read. We understand that some people view the
14 Title VI language as even more clear. We would
15 obviously win under that view. But it hasn't --
16 it hasn't been briefed.

17 And I don't think it can be justified
18 as a route to decision here as some form -- some
19 sort of constitutional avoidance because the
20 constitutional question has been decided in
21 Grutter. We submit it has been decided
22 incorrectly. And so you wouldn't be avoiding a
23 constitutional decision; you'd just be leaving,
24 in our view, a bad decision on the books.

25 JUSTICE GORSUCH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh?

3 JUSTICE KAVANAUGH: You're asking us
4 to overrule Grutter, but first want to
5 understand what you think Grutter itself means.
6 It -- it had language in there about a 25-year
7 limit. The decision was in 2003. The current
8 admissions cycle is for the class of '27. It's
9 going to be too late to do anything about that
10 cycle. The next is the class of '28.

11 When do you read or do you calculate,
12 to the extent you consider it at all, the
13 25-year limit? How do -- and, more broadly,
14 just how should we think about that sentence
15 which was part of four important paragraphs in
16 Grutter about the importance of
17 race-conscious decision-making being
18 time-limited and temporary?

19 MR. STRAWBRIDGE: So -- so we do not
20 understand the 25-year limit somehow to have
21 been a -- a -- a -- a -- a hard-and-fast
22 requirement. Certainly, different Justices of
23 the Court in Grutter took differing positions as
24 to -- as to whether it should be --

25 JUSTICE KAVANAUGH: So, do you think

1 it could go for 35 or 50 years then?

2 MR. STRAWBRIDGE: Well, I think that
3 the -- I think that the language in Grutter at
4 least had an aspirational element to it, but it
5 was aspirational for a reason.

6 And Grutter definitely in those
7 paragraphs that precede that -- that -- that
8 clause make very clear that they want the use of
9 race to be diminishing over time and they want
10 colleges to be seriously looking at how to get
11 away from race.

12 The record in this case indicates that
13 that's not actually happening. Indeed, the head
14 of -- of UNC's race-neutral alternatives
15 committee testified that if the -- if the -- if
16 the racial distribution on campus was 20 percent
17 African American, 20 percent Asian American,
18 20 percent Hispanic, and 20 percent Native
19 American, that was still not sufficient to
20 convince her that they would stop using race.

21 The chancellor at the university said,
22 if UNC had the highest level of minority
23 representation in the country, that would not be
24 sufficient to convince them that they should
25 stop using race.

1 JUSTICE KAVANAUGH: Second question,
2 again, a little off track here, but we're
3 thinking about what would happen if you prevail
4 in this case.

5 There's an amicus brief from Catholic
6 universities that say private religious colleges
7 would have a RFRA or free exercise right to
8 continue to engage in affirmative action because
9 it's part of their religious mission.

10 Do you have any views on that?

11 MR. STRAWBRIDGE: I don't know that
12 our -- that -- that -- that I have any specific
13 views on that brief. I mean, there are some
14 times at least historically there has been
15 sometimes a conflation of race and religion.

16 I think that some people would have
17 thought that Harvard's policy back in the 1920s
18 was a racial policy as opposed to a religious
19 policy. There may be difficult questions there,
20 but I think that in this case, there's no --
21 there's no suggestion that -- that -- that RFRA
22 has any role to play, and we think the Equal
23 Protection Clause dominates.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: Mr. Strawbridge, do
3 you agree that universities have a compelling
4 interest in the educational benefits of
5 diversity writ large, not just racial diversity
6 but having, you know, difference of genders,
7 different religions, different viewpoints in the
8 classroom because of the educational benefit of
9 bringing different perspectives to bear on a
10 question?

11 MR. STRAWBRIDGE: I -- I don't think
12 the compelling interest question can be answered
13 apart from what the -- what the policy that's
14 being considered is. In this case, we don't
15 think it's an interest that is compelling enough
16 to justify a racial classification.

17 JUSTICE BARRETT: I understand that.
18 But do they have -- do you agree -- let's take
19 the compelling away from it. Do you agree that
20 they have an interest in?

21 MR. STRAWBRIDGE: Sure, I'm -- I -- I
22 -- I have no doubt, and I agree that
23 universities have an interest in the broadly
24 defined -- in achieving the kind of broadly
25 defined diversity that is talked about sometimes

1 in Grutter and sometimes in the brief.

2 JUSTICE BARRETT: And how would you
3 suggest that they go about achieving that? Like
4 let's -- let's say that you prevail, but
5 universities still have this interest in -- in
6 assembling diverse classes, you know, full of
7 students that bring different experiences and
8 perspectives to bear, and they decide not to
9 adopt a 10 percent plan. So I assume it's all
10 done then in holistic review.

11 MR. STRAWBRIDGE: Yes. And there's
12 nothing wrong with holistic -- I mean, holistic
13 review takes place today at colleges that do not
14 use race as a factor in admissions. And there's
15 no reason to assume and there's no evidence in
16 the record that the students at those colleges
17 are not receiving the educational benefits of
18 diversity.

19 JUSTICE BARRETT: I guess -- I mean, I
20 guess what I'm concerned about is if it puts a
21 lot of pressure on the essay writing and the
22 holistic review process. You could have
23 viewpoint discrimination issues, I would think,
24 depending on how admissions officers treat
25 essays.

1 You could have free exercise claims,
2 not by religious mission -- religiously
3 affiliated universities who want to give bumps
4 to, say, you know, LDS students, but, you know,
5 if you have Harvard say -- saying, well, we want
6 this many Jews, but we also want this many
7 Christians, you know, and -- and, you know, this
8 many Muslims in a classroom.

9 MR. STRAWBRIDGE: Well, I -- I -- I --
10 I guess -- I guess we don't even understand
11 Grutter in part to be suggesting that the
12 interest in this broad benefit of diversity
13 actually justifies kind of micromanaging the
14 populations on campus in the way that you're
15 suggesting.

16 And I don't think that the
17 universities are doing that with respect to
18 socioeconomic diversity. At least if UNC has a
19 cap on the number of -- of socioeconomically
20 challenged students that they're willing to
21 admit, they haven't -- they haven't said that.

22 So I'm not sure that it follows that
23 -- you know, under the scenario where -- where
24 we prevail, that it's going to affect one way or
25 another the holistic admissions process.

1 Florida is holistic. I believe the
2 California system is holistic. I think Michigan
3 is still holistic.

4 JUSTICE BARRETT: Thanks.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

7 JUSTICE JACKSON: Yes, so, two -- two
8 questions. Is there any indication from this
9 record that UNC is doing the kind of
10 micromanaging you're talking about with respect
11 to racial classifications?

12 I -- I didn't see that they were
13 shooting for a particular target or that there
14 was a goal or that -- I -- I thought, in fact,
15 that as the reviewers went through the process,
16 they didn't even know how many other students of
17 color had been admitted and, if they did know,
18 they had to be recused.

19 So they're not operating this system,
20 I thought --

21 MR. STRAWBRIDGE: That was --

22 JUSTICE JACKSON: -- to reach toward
23 some sort of racial goal. Am I wrong about
24 that?

25 MR. STRAWBRIDGE: Well, that policy

1 was instituted after our lawsuit was filed.
2 Before our lawsuit was filed, at least senior
3 admissions officers who were reading files were
4 allowed to see those --

5 JUSTICE JACKSON: So the policy is
6 that they're not reaching toward some sort of
7 goal?

8 MR. STRAWBRIDGE: As a
9 post-litigation, they -- no, I -- I -- I would
10 not go -- go so far as to say that. And, in
11 particular, I would -- I would look at the --
12 the race-neutral alternatives analysis that
13 UNC's own expert proffered, and -- and this is
14 actually throughout the record even in the
15 admissions process --

16 JUSTICE JACKSON: All right. I have
17 little time. I'm sorry. So --

18 MR. STRAWBRIDGE: No, I'm sorry. I
19 don't --

20 JUSTICE JACKSON: Yeah. Do you -- so
21 -- but you say they've changed the process. But
22 now at least they're not looking toward a goal
23 of -- they're not race balancing in that same
24 sentence?

25 MR. STRAWBRIDGE: No. I think they

1 measure their standard as to what they could
2 achieve by race-neutral alternatives by whether
3 they can replicate the precise level of
4 diversity today. So I think that is a form of
5 --

6 JUSTICE JACKSON: All right. So let
7 me ask you another question, because I take it
8 that your position is that UNC is allowed to
9 consider other non-race-based personal
10 characteristics of individual applicants, like
11 someone's status as a parent or a military
12 veteran or a disabled person, and give pluses in
13 the current holistic environment for those
14 characteristics without running afoul of the
15 Fourteenth Amendment.

16 Is that right?

17 MR. STRAWBRIDGE: I -- I -- that -- I
18 I think that is generally correct as long
19 as they're the criteria that is not walled off
20 by the Fourteenth Amendment, it's appropriate.

21 JUSTICE JACKSON: They can -- they can
22 get -- they can give pluses. And so what I'm
23 worried about is that the rule that you're
24 advocating, that in the context of a holistic
25 review process, a university can take into

1 account and value all of the other background
2 and personal characteristics of other
3 applicants, but they can't value race, what I'm
4 worried about is that that seems to me to have
5 the potential of causing more of an equal
6 protection problem than it's actually solving.

7 And the reason why I get to that
8 possible conclusion is thinking about two
9 applicants who would like to have their family
10 backgrounds credited in this applications
11 process, and I'm hoping to get your reaction to
12 this hypothetical.

13 The first applicant says: I'm from
14 North Carolina. My family has been in this area
15 for generations, since before the Civil War, and
16 I would like you to know that I will be the
17 fifth generation to graduate from the University
18 of North Carolina. I now have that opportunity
19 to -- to do that, and given my family
20 background, it's important to me that I get to
21 attend this university. I want to honor my
22 family's legacy by going to this school.

23 The second applicant says, I'm from
24 North Carolina, my family's been in this area
25 for generations, since before the Civil War, but

1 they were slaves and never had a chance to
2 attend this venerable institution. As an
3 African American, I now have that opportunity,
4 and given my family -- family background, it's
5 important to me to attend this university. I
6 want to honor my family legacy by going to this
7 school.

8 Now, as I understand your
9 no-race-conscious admissions rule, these two
10 applicants would have a dramatically different
11 opportunity to tell their family stories and to
12 have them count.

13 The first applicant would be able to
14 have his family background considered and valued
15 by the institution as part of its consideration
16 of whether or not to admit him, while the second
17 one wouldn't be able to because his story is in
18 many ways bound up with his race and with the
19 race of his ancestors.

20 So I want to know, based on how your
21 rule would likely play out in scenarios like
22 that, why excluding consideration of race in a
23 situation in which the person is not saying that
24 his race is something that has impacted him in a
25 negative way, he just wants to have it honored,

1 just like the other person has their personal
2 background family story honored, why is telling
3 him no not an equal protection violation?

4 MR. STRAWBRIDGE: Well, I think -- I
5 think -- I think because, if -- if it is the
6 racial aspect of the application, then that's --
7 equal protection requires that -- that people of
8 all races be treated equally.

9 JUSTICE JACKSON: And -- and --

10 MR. STRAWBRIDGE: Now, certainly, UNC
11 shouldn't give a -- a legacy benefit if they
12 don't want to give a legacy benefit. There's no
13 obligation they do that.

14 JUSTICE JACKSON: No, but you --

15 MR. STRAWBRIDGE: And, of course, a
16 first-generation college --

17 JUSTICE JACKSON: I'm sorry, but you
18 said -- you said it was okay if they give him a
19 legacy benefit. And what I'm saying is that in
20 almost exactly the same set of circumstances, a
21 student or an applicant who is African American
22 and who would like to have the fact that he's
23 been in North Carolina for generations through
24 his family and that they've never had a chance
25 to go to this school honored and considered, and

1 it's bound up with his race, you say, I think,
2 that he's not allowed to say that and that the
3 university is not allowed to take that into
4 account.

5 And because it relates to race,
6 precisely because it relates to race, I think
7 you might have an equal protection problem in
8 saying that he can't get credit for that when
9 someone else can.

10 MR. STRAWBRIDGE: Well, for purposes
11 of the hypothetical, I am assuming that the only
12 significant factor in that story happens to be
13 the fact that -- that -- of the race of the
14 applicant and that the race was previously
15 barred from attending UNC. Obviously, nothing
16 stops UNC from honoring those who have overcome
17 slavery or recognizing its -- its -- its -- its
18 past contribution to racial segregation.

19 But the question is, does -- is that a
20 basis to make decisions about admission of
21 students who are born in 2003? And I don't
22 think that it necessarily is. I don't think
23 that the Equal Protection Clause suggests that
24 it is.

25 There are -- there are -- there are

1 many -- there are many factors in an application
2 like that that might be appropriate to consider,
3 including if they are first-generation college
4 or including if they are socioeconomically
5 depressed, but if the only difference is between
6 a white student and a Black student, I don't
7 think the Equal Protection Clause permits the
8 admissions decision to hinge on that.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Park.

12 ORAL ARGUMENT OF RYAN Y. PARK
13 ON BEHALF OF THE UNIVERSITY RESPONDENTS

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

16 Diversity is our nation's greatest
17 source of strength, but as our Reconstruction
18 founders understood and our nation's history
19 confirms, it also poses unique challenges to the
20 American experiment. We live in a large and
21 sometimes unwieldy democracy, and for that
22 democracy to flourish, people of all different
23 backgrounds and perspectives have to learn to
24 live together and unite in common purpose.

25 It was Brown's vision that education

1 could be the engine of our democracy, a place
2 where students could prepare for the rights and
3 obligations of citizenship in a diverse and
4 inclusive setting.

5 The University of North Carolina at
6 Chapel Hill seeks to fulfill Brown's vision by
7 assembling a student body that is diverse along
8 the many dimensions that matter in American
9 life, including race, but also social class,
10 geography, military status, intellectual views,
11 and much more.

12 This learning environment helps us
13 seek truth, build bridges across students of
14 different backgrounds, and, critically here,
15 equip students with the tools needed to function
16 effectively as citizens and leaders in our
17 complex and increasingly diverse society.

18 The university pursues these interests
19 in scrupulous compliance with this Court's
20 precedents, which have consistently held for
21 decades that seeking the educational benefits of
22 diversity is a compelling interest of the
23 highest order and that universities may consider
24 all aspects of a applicant's background to build
25 a thriving campus community.

1 The correctness of these precedents is
2 confirmed by the historical record, which shows
3 beyond doubt that our Reconstruction founders
4 believed that race-conscious measures designed
5 to promote an integrated learning environment
6 were consistent with the original public meaning
7 of the Equal Protection Clause.

8 To be clear, UNC would like nothing
9 more than to achieve its educational aims
10 through race-neutral means. It has taken
11 extensive efforts to do so and has seen steady
12 and continuing progress toward this goal.

13 But this progress has been halting,
14 and the university retains a powerful interest
15 in preventing the backsliding that would occur
16 if this Court took away the power to decide this
17 important social policy issue from the people of
18 North Carolina.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: Mr. Park, I've heard
21 the word "diversity" quite a few times, and I
22 don't have a clue what it means. It seems to
23 mean everything for everyone.

24 The -- and I'd like you first -- you
25 did give some examples in your opening remarks,

1 but I'd like you to give us a specific
2 definition of diversity in the context of the
3 University of North Carolina. And I'd also like
4 you to give us a clear idea of exactly what the
5 educational benefits of diversity at the
6 University of North Carolina would be.

7 MR. PARK: Yes, Your Honor. So,
8 first, we define diversity the way this Court
9 has in this Court's precedents, which means a
10 broadly diverse set of criteria that extends to
11 all different backgrounds and perspectives and
12 not solely limited to race.

13 And there's a factual finding in this
14 record Pet. App. 113 that there are many
15 different diversity factors that are considered
16 as a greater factor in our admissions process
17 than race. We have a particular interest in
18 recruiting and enrolling rural North
19 Carolinians. In the last incoming class, four
20 out of every 10 students who entered the campus
21 doors were from rural North Carolina. One out
22 of every 12 students is -- has a military
23 affiliation, including the most veterans on
24 campus since World War II. And so we value
25 diversity of all different kinds in all the ways

1 that people differ in our society.

2 On -- on -- on the educational
3 benefits question, Your Honor, I don't think
4 it's actually disputed here that there are real
5 and meaningful educational benefits that come
6 with diversity of all kinds.

7 SFFA's own expert -- and this is on JA
8 546 -- conceded and agreed enthusiastically, in
9 fact, on the stand that a racially diverse and a
10 diverse -- diversity of all kinds leads to "a
11 deeper and richer learning environment," leads
12 to more creative thinking and exchange of ideas,
13 and, critically, reduced bias between people of
14 different backgrounds and not solely for racial
15 backgrounds.

16 JUSTICE THOMAS: But you still haven't
17 given me the educational benefits, the -- I
18 didn't go to racially diverse schools, but there
19 were educational benefits.

20 And I'd like you to tell me expressly,
21 when a parent sends a kid to college, that they
22 don't necessarily send them there to have fun or
23 feel good or anything like that; they send them
24 there to learn physics or chemistry or whatever
25 they're studying. So tell me what the

1 educational benefits are.

2 MR. PARK: So there's -- there's three
3 main buckets, Your Honor, and the first and I
4 think most pertinent to the question that you
5 asked is the actual truth-seeking function of
6 learning in a diverse environment.

7 I would direct the Court to the Major
8 American Businesses brief, which discusses a
9 whole extensive, rigorous peer-reviewed
10 literature that diverse groups of people
11 actually perform at a higher level. So the most
12 concrete possible scenario is -- is stock
13 trading, and there are studies that find that
14 racially diverse groups of people making trading
15 decisions perform at a higher level, make more
16 efficient trading decisions. And the mechanism
17 there is that it reduces group think and people
18 have longer and more sustained disagreement, and
19 that leads to a more efficient outcome.

20 JUSTICE THOMAS: Well, I guess I don't
21 put much stock in that because I've heard
22 similar arguments in favor of segregation too.

23 I'd like to go to something different,
24 to deference in the area as of a compelling
25 interest. This Court in Grutter did not

1 specifically put the test to Michigan as far as
2 diversity being a compelling interest.

3 I'd like you to explain why, in this
4 area of strict scrutiny, we have a lower
5 standard, we defer to the accused discriminator,
6 but in the instance of sex discrimination at
7 VMI, the accused discriminator was put to the
8 test, and the Court did not defer to VMI, but it
9 deferred to Michigan.

10 Why that difference? And why should
11 you not be treated the way we would treat
12 someone in a Title VII case or a Title VI case
13 and shift the burden to the discriminator to
14 explain the conduct?

15 MR. PARK: Our understanding of the
16 deference that this Court provides and the
17 deference that we request is quite limited, Your
18 Honor. We ask for deference in terms of our
19 educational objectives and not the -- the legal
20 question of whether those objectives constitute
21 a compelling interest.

22 And I -- I think that it's pretty
23 clear to see why. I think that is similar to
24 the VMI context. So, like I mentioned, we have
25 made it a system-wide priority to --

1 JUSTICE THOMAS: Did we -- did we --
2 the Court did not defer in VMI.

3 MR. PARK: So I think it did to the
4 extent that it -- it held that the -- the
5 interest in a rigorous military education is an
6 interest that the -- that the institution had.

7 And so, if UNC decided as a -- at a
8 system-wide level to say we're going to
9 completely change our educational mission and
10 make it into an institution like VMI, I think
11 the compelling interest analysis would proceed
12 with that educational objective in mind. But --
13 but we do not take the position that the
14 compelling interest standard is somehow subject
15 to deference. That's a legal question.

16 JUSTICE GORSUCH: Just to follow up on
17 Justice Thomas's questions about diversity,
18 again, these holistic admissions approaches seem
19 to stem from the 1920s at Harvard, and they were
20 used as cover for quotas for Jewish persons, who
21 the university apparently felt had too many
22 students attending.

23 And I -- I guess I'm struggling still
24 to understand how you distinguish between what
25 this Court has said is impermissible, a quota,

1 with what you argue should be permissible going
2 forward, which is diversity. How can you do
3 diversity without taking account of numbers?

4 MR. PARK: So I think there's --
5 there's two separate points I'd like to make on
6 that, Your Honor. So, on the -- the sordid
7 history of the early holistic process, I don't
8 think anyone has ever accused the University of
9 North Carolina as having --

10 JUSTICE GORSUCH: I'm not suggesting
11 that.

12 MR. PARK: Yeah. And -- and -- we --
13 we took our cues from this Court from the Bakke
14 decision and -- and from the Grutter decision
15 and --

16 JUSTICE GORSUCH: Oh, I understand
17 that too. But I guess my question, again, just
18 to get to the core of it rather than circling
19 around it, is how can you do diversity, which
20 that's what you're arguing for, without taking
21 account of numbers?

22 MR. PARK: Our interest in what we
23 believe that Grutter requires of us is
24 individualized holistic review. And I think
25 there's actually been a lot of misconception

1 that I heard in --

2 JUSTICE GORSUCH: But, if you don't
3 achieve -- you have to achieve diversity,
4 though. That's the goal. So how do you do
5 that -- again, last time I'll ask it -- without
6 looking at numbers?

7 MR. PARK: We do so by looking at the
8 individual applicant. We do not have some sort
9 of racial target or a target for other diversity
10 metrics, for example. We don't say we want to
11 have 10 percent of our class be military
12 veterans. We say we value this diversity
13 interest and we're going to look at each
14 individual applicant on -- on that basis.

15 JUSTICE ALITO: What is your goal and
16 how will a court ever be able to determine
17 whether your goal has been reached?

18 MR. PARK: Our -- our goal is to
19 achieve the educational benefits of diversity.
20 And I understand that that is a -- a qualitative
21 standard that is difficult to measure, but I do
22 not believe that a standard merely being
23 qualitative means that it's -- it's not
24 susceptible to -- to rigorous review.

25 And if I could give an example. So we

1 are subject to a statutory mandate that we
2 create a -- an open and -- and tolerant speech
3 environment for all sorts of views, even views
4 that many find disagreeable. And we engage in
5 the same kind of analysis to measure whether we
6 are meeting this standard. It's -- it's
7 principally survey-based, as well as examination
8 of objective criteria.

9 JUSTICE ALITO: Your brief repeatedly
10 refers to certain students as members of
11 underrepresented minorities, right? What does
12 that mean? Why is that significant?

13 MR. PARK: So I think this is -- I
14 think this is helpful because this pierces the
15 main, I think, misunderstanding about how our
16 process works. We do define certain groups
17 based on their overall representation in the
18 state of North Carolina.

19 That's -- that stems from a consent
20 decree that the University of North Carolina
21 entered with the Reagan Administration.

22 JUSTICE ALITO: Well, I mean, this is
23 really pretty simple. Suppose you assembled a
24 student body in which the various racial groups
25 coincide almost exactly to the percentage of

1 those racial groups in the general population.
2 Would you say, okay, now we've done it, we've
3 achieved diversity?

4 MR. PARK: No, Your Honor, and I don't
5 think that we would say that we need to -- to
6 reach those level -- levels either. I think the
7 student intervenors will stand up and say
8 that -- that we should be doing far more.

9 But we are trying to comply with this
10 Court's precedents, which require the -- the
11 minimal consideration of race on a holistic
12 basis.

13 JUSTICE BARRETT: This Court's
14 precedents, I mean, Grutter also says -- sorry,
15 let me put my readers on here -- you know, using
16 racial classifications are so potentially
17 dangerous, however compelling their goals, they
18 can be employed no more broadly.

19 Going down a little bit further, all
20 governmental use of race must have a logical end
21 point, reasonable durational limits, sunset
22 provisions, and race-conscious admissions
23 policies.

24 And I gather, you know, Justice
25 Alito's saying, when does it end? When is your

1 sunset? When will you know? Because Grutter
2 very clearly says this is so dangerous. Grutter
3 doesn't say this is great, we embrace this.
4 Grutter says this is dangerous and it has to
5 have an end point. And I hear you telling
6 Justice Alito there is no end point.

7 MR. PARK: No, Your Honor, and I
8 apologize if I gave that impression. So -- so
9 three points on the end point.

10 We enthusiastically embrace the
11 durational requirement, and we have tried to do
12 everything possible to adopt race-neutral
13 alternatives from the time of Grutter to today
14 to minimize our consideration of race.

15 In a university where our endowment
16 during the -- our endowment during the record
17 was around \$3 billion, we spent well north of a
18 billion dollars on financial aid programs to try
19 to recruit low-income students across the board.
20 And I think that kind of that's the
21 first-generation race-neutral alternative.

22 Then the second are, to try to expand
23 the pool, we have an incredibly extensive
24 program where around half of our transfer
25 students are -- come from community colleges --

1 JUSTICE BARRETT: But, if I could just
2 interrupt for one second, how do you know when
3 you're done? You know, Justice Alito said, if
4 you have exact correlations to the member -- to
5 the -- the number -- the percentage in the
6 population of a particular group, and you said
7 you're not done then.

8 So when would the race-conscious --
9 when would you have the end point? I -- I -- I
10 --

11 MR. PARK: Well -- I see.

12 JUSTICE BARRETT: -- I appreciate that
13 you're undertaking all those efforts, but when
14 is the end point?

15 MR. PARK: I meant to respond to
16 Justice Alito meaning that we do not need to
17 reach that point for us to feel that we have met
18 our diversity goals. I -- I mean, we are --
19 what we're doing today is we feel that we are
20 achieving the educational benefits of diversity
21 and we have --

22 JUSTICE ALITO: So it's not necessary,
23 but is it sufficient?

24 MR. PARK: I think that in that
25 scenario, it might be likely that our

1 qualitative process in terms of constant
2 examination of our campus climate would -- would
3 reach a point where we would feel that we had
4 reached the educational benefits of diversity --

5 CHIEF JUSTICE ROBERTS: But that's --
6 I'm sorry. Finish.

7 MR. PARK: Oh. So I just want to
8 be -- be very clear on -- on the end point if I
9 may. We think that the history shows that these
10 programs can and do end. The early programs, as
11 Justice Ginsburg has mentioned, principally --
12 many of them principally benefitted white women.

13 The program in Bakke and the
14 program -- federal contractor program this Court
15 upheld in Fullilove explicitly included Asian
16 Americans as among their beneficiaries. And we
17 have reached a point now where we feel that we
18 are able to minimally consider race and still --

19 CHIEF JUSTICE ROBERTS: I don't see
20 how -- I don't see how you can say that the
21 program will ever end. Your position is that
22 race matters because it's necessary for
23 diversity, which is necessary for the sort of
24 education you want.

25 It's not going to stop mattering at

1 some particular point. You're always going to
2 have to look at race because you say race
3 matters to give us the necessary diversity.

4 MR. PARK: So I think there's two
5 different questions there. We don't think that
6 the compelling interest in diversity will ever
7 expire. I think the question is whether
8 race-conscious measures need to be taken in the
9 admissions process to reach our diversity goals.

10 CHIEF JUSTICE ROBERTS: You're going
11 to have to check, right? You're not going to
12 know whether you have a sufficient number of
13 African Americans to give you the diversity you
14 say is necessary if you don't look and check.

15 MR. PARK: I think there will be some
16 attention to numbers and -- but the feedback
17 loop between our assessment of our campus
18 environment and the admissions process, we will
19 celebrate the day when we get to the point where
20 we have reached the point where we do now with
21 our minimal consideration of race, which we say
22 --

23 JUSTICE KAVANAUGH: Well, I think that
24 --

25 JUSTICE SOTOMAYOR: Mr. Park --

1 JUSTICE KAVANAUGH: -- the difficulty
2 you're having answering some of these questions
3 about end point were probably in the mind of
4 Justice O'Connor when she wrote the opinion in
5 Grutter for the majority and, as Justice Barrett
6 said, indicated that these racial
7 classifications are potentially dangerous and --
8 and must have a logical end point.

9 Instead of leaving it vague, the
10 opinion didn't say until you reach a point where
11 you're satisfied that diversity has been
12 achieved or something vague like that, it said
13 25 years in there.

14 And so I want to hear how you address
15 that part of the Grutter precedent because, as I
16 understand your answer, you would extend it far
17 beyond 25 years indefinitely, and that would be
18 an extension, I think, but you can tell me how
19 you read the 25-year language.

20 But I think the reason it's there, and
21 I think it's real important because there are
22 four paragraphs leading up to that, is because
23 of the difficulty you're having answering the
24 question when -- without that time limit, when
25 it would otherwise be achieved.

1 MR. PARK: So, of -- of course, we
2 don't read the 25-year as some sort of strict
3 expiration. And I -- I don't think on its face
4 it was structured as such. Even Chief Justice
5 Rehnquist in his dissent said this is not a -- a
6 fixed deadline.

7 JUSTICE KAVANAUGH: Well, Justice
8 Thomas --

9 MR. PARK: But the --

10 JUSTICE KAVANAUGH: -- Justice Thomas
11 in his separate opinion referred to it as a
12 holding. Justice Kennedy referred to it as a
13 pronouncement. So, anyway, just to make sure
14 the full picture is presented there.

15 MR. PARK: Yeah. So, Justice
16 Kavanaugh, I think that every institution in
17 every state will differ. I mean, we have states
18 coming to the Court and saying we have reached
19 our diversity -- educational benefits of
20 diversity goals.

21 We don't need to engage in any
22 race-conscious admissions process at our state
23 flagships, and -- and we are at the point where
24 I think the expert evidence here pretty
25 definitively shows that we are able to meet what

1 we feel is an inclusive diverse environment
2 through minimal consideration of race, and --
3 and I think that we will get there based on this
4 qualitative process, but there is no strict
5 numerical benchmark.

6 JUSTICE KAVANAUGH: One of the things
7 the other side has emphasized is that in the
8 period since Grutter, in the two decades since
9 Grutter, that we have more experience with
10 states that don't allow race-based admissions,
11 California, Florida, Washington, Michigan, and
12 others, and that those examples now show with
13 greater confidence than might have had in 2003
14 that some of the questions we were asking before
15 of some of the race-neutral alternatives cannot
16 have the risk of treating people differently on
17 the basis of race on the file but at the same
18 time produce significant numbers of minority
19 students on campuses.

20 So, in some ways, the experience, they
21 say, is relevant. I'd be interested in your
22 response of how to think about that.

23 MR. PARK: Yes, I think that the
24 experience of the University of Michigan system
25 and University of California system helpfully

1 illustrates the point I'm trying to make, which
2 is they say that in their experience, it's
3 really a campus-by-campus analysis.

4 And, in particular, the most selective
5 public universities are continuing to have major
6 struggles, particularly enrolling a sufficient
7 number of African American students, for them to
8 reach their educational goals. And -- and I
9 would direct the Court to page 26 to 28 of the
10 University of California's brief because what
11 they say they're experiencing is that there is
12 actually an inverse relationship between a -- an
13 -- African American students and their -- their
14 -- their sense of belonging and their sense of
15 tokenism and isolation with how selective the
16 university is.

17 And so I think that's why you're --
18 you're seeing this wide spectrum of progress
19 towards the day that we all are looking for
20 where we do -- do no longer have to consider
21 race in admissions.

22 JUSTICE KAVANAUGH: Can I -- can I ask
23 a question, following up on Justice Thomas too,
24 about what diversity means? Does the University
25 of North Carolina consider one's religion?

1 MR. PARK: We consider it as -- as
2 part of our holistic process, yes. And so it's
3 --

4 JUSTICE KAVANAUGH: Could you explain
5 how that works?

6 MR. PARK: Yes. And -- and this is
7 helpful because this is the exact same thing
8 that we do for all of our other diversity goals,
9 is, if in context and in assessment of an
10 individual application -- applicant, their
11 religious background or their religious
12 experiences suggest that they might contribute
13 something to our campus community, then that can
14 be considered a positive attribute that is
15 considered in our holistic process, and --

16 JUSTICE KAVANAUGH: You have them
17 check a box, though, as to what religion they
18 are?

19 MR. PARK: We do not have them check a
20 box.

21 JUSTICE JACKSON: But --

22 JUSTICE KAVANAUGH: How -- how do you
23 know then what religion the majority of
24 applicants are?

25 MR. PARK: So our analysis on our

1 religious tolerance climate is not pegged to the
2 admissions process, but we do have an entire
3 process set up and a whole range of programs to
4 try to ensure a -- an open and tolerant
5 religious environment. And so we do -- do
6 engage in the same kinds of surveys and
7 qualitative analysis of our campus community.

8 And we're fine that -- we're finding
9 that, on the whole, we feel we're meeting our
10 goals, and we still have some struggles
11 particularly with Jewish and Muslim students
12 feeling like they belong on campus.

13 JUSTICE JACKSON: Is the checking of
14 the box with respect to race voluntary? Is it
15 something that students are required to do or
16 something that they do on their own as a part of
17 the process?

18 MR. PARK: It is entirely voluntary,
19 Your Honor.

20 JUSTICE JACKSON: So you don't know
21 what the race is of all of the applicants who
22 are coming into your community from the
23 admissions standpoint?

24 MR. PARK: That's correct.

25 JUSTICE JACKSON: And can you answer a

1 question about UNC's history of exclusion? You
2 mention it several times in your brief, and I'd
3 like to understand whether and to what extent
4 that matters with respect to the diversity
5 interests that you are asserting.

6 MR. PARK: Thank you, Your Honor. So
7 we don't think -- we're not pursuing any sort of
8 remedial justification for our policy, but we do
9 think that our university's history is relevant
10 to the diversity analysis in two distinct ways.

11 So, first, we think it helps explain
12 why the progress that we have been pursuing is
13 perhaps behind the University of Oklahoma, for
14 example. We have a unique racial history in our
15 state. And all these programs take society as
16 they find it.

17 JUSTICE JACKSON: I see. So that
18 might account for why the sort of 25-year
19 expiration deadline can't really be blanketly
20 applied, because we start in different places
21 with respect to how race has been considered to
22 exclude people in -- in our various communities.

23 MR. PARK: Yes, I agree very much with
24 that statement.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas, anything further?

3 JUSTICE THOMAS: What's the difference
4 between -- what is the percentage difference
5 between a non-racial approach and the approach
6 that you're taking?

7 MR. PARK: So the expert evidence in
8 our case suggests that around 1.2 percent of the
9 applicant pool as -- as a whole is affected by
10 our race-conscious admissions program. And how
11 that works out in terms of the relevant
12 denominator is the number of underrepresented
13 minorities on -- on campus, which is still
14 fairly small. It's -- it's far lower, for
15 example, than the number of rural students that
16 we have or -- and it's -- it's even less than
17 the number of first-generation college students
18 that we have.

19 JUSTICE THOMAS: So --

20 MR. PARK: So it's around maybe 10,
21 15 percent that --

22 JUSTICE THOMAS: -- so do you think
23 that 1.2 percent marginal difference is enough
24 of a compelling interest to continue a
25 race-based program?

1 MR. PARK: What we have tried to do is
2 follow this Court's guidance, particularly in --
3 in Fisher II, but in other cases where the Court
4 has said that it is a hallmark of narrow
5 tailoring and, therefore, a test of
6 constitutionality that we consider race only
7 minimally.

8 And, of course, seeking the
9 educational benefits of diversity is also a
10 continuum. We think that we would not face some
11 of the struggles that we do in terms of
12 admitting and enrolling underrepresented
13 minorities if we considered it to a larger
14 extent, but we have chosen to, in -- under this
15 Court's precedents, be guided by this Court's
16 precedents to -- to consider it only minimally.

17 JUSTICE THOMAS: So, if someone was
18 bringing a discrimination case against the
19 University of North Carolina and the racial
20 difference composition was 1.2 percent, would
21 they have stated a claim?

22 MR. PARK: I -- I see. Let me just
23 make sure I'm understanding the -- if the --
24 well, so I think that there are -- I mean, it
25 goes to the -- the issue of standing generally

1 and -- and what you need to show to --

2 JUSTICE THOMAS: No, just someone is
3 bringing -- it's statistical and they say the
4 difference between the admission of group A,
5 racial group A, is 1.2 percent more than racial
6 group B. Would that be enough for
7 discrimination?

8 MR. PARK: I think it would be enough
9 to state a claim that someone's candidacy has --
10 has been affected by a policy.

11 I think one other thing to -- to point
12 out, I think, is that there are other aspects of
13 our policy, as I think Justice Jackson was --
14 was getting at, that have a reverse impact as
15 well. And we haven't modeled this, but any
16 diversity factor could have a disproportionate
17 impact on the racial composition of the class in
18 some other direction. And so I -- I do think
19 this is one of the -- the major concerns that
20 would arise if -- if Grutter is overruled.

21 CHIEF JUSTICE ROBERTS: Justice Alito?

22 JUSTICE ALITO: I'd like your response
23 to the argument that these racial categories are
24 so broad that any use of them is arbitrary and,
25 therefore, unconstitutional.

1 So what would you say to, for example,
2 a student whose family came from Afghanistan and
3 doesn't get in because the student doesn't get
4 the plus factor that the student would get if
5 the student's family had come from someplace
6 else?

7 So you would say to the student:
8 Well, we don't -- we don't need you to
9 contribute to a diversity of views at our school
10 because we already have enough Asians. We have
11 a lot of students whose families came from China
12 or other Asian countries. And the student says:
13 Well, you don't have anybody like me, I'm from
14 Afghanistan.

15 What -- what similarity does a family
16 background to the person from Afghanistan have
17 with somebody whose family's background is in,
18 let's say, Japan?

19 MR. PARK: So, respectfully, what
20 you're describing is the exact opposite of how
21 our process actually works on -- on an
22 individualized basis. This is -- we discuss
23 this on page 11 of our brief. There was a
24 Vietnamese student. The admissions office --
25 the admissions officer testified about a

1 Vietnamese student who immigrated to a remote
2 part of North Carolina and thrived in that
3 setting, and she testified, undisputed, that
4 that was a favorable aspect of her application.

5 JUSTICE ALITO: Well, that's -- that's
6 -- that's an individual aspect of the
7 application and something that has to do with
8 her experience. But what is the justification
9 for lumping together students whose families
10 came from China with someone -- with students
11 whose families came from Afghanistan? What do
12 they have in common?

13 MR. PARK: So I agree that that would
14 be a strange rule. And that is not the rule
15 that this Court has established. It would
16 require --

17 JUSTICE ALITO: Well, then why do you
18 have them check a box that I'm Asian? What do
19 you learn from the mere checking of the box?

20 MR. PARK: So we think that it -- it
21 depends on the individual circumstances of that
22 person, but I am telling --

23 JUSTICE ALITO: So you don't need the
24 -- you don't need the boxes at all?

25 MR. PARK: So I think that that is not

1 necessarily true on an individualized basis. So
2 another example, so we -- again, as I discussed,
3 we attempt very vigorously to recruit and enroll
4 rural students, and we don't ask them to write
5 their essay about how being from a rural
6 background affects their, you know, sense of
7 self and their experiences, but what we say is
8 that person comes with something that we value,
9 and --

10 JUSTICE ALITO: Well, they may choose
11 to write about it, but what's the answer to my
12 question? Why do you have these boxes? Why --
13 why do you give a student the opportunity to say
14 this one thing about me, I'm Hispanic, I'm
15 African American, I'm Asian? What does that in
16 itself tell you?

17 MR. PARK: We think that it -- it can
18 in context, on a individualized basis, perhaps
19 not in every case but in some cases, give
20 important information about where that person is
21 coming from and what their experiences have
22 been.

23 And -- and really, this goes to the
24 heart of the dispute that we have between the
25 parties. So they say on page 53 of their brief

1 that race says nothing about who you are. And
2 we just don't think that is true when you look
3 at American society as it exists.

4 We think that in the context of
5 everything else that we know about an applicant,
6 it can matter, not always, and it's not --
7 there's no automatic plus factor that's given,
8 but it can matter what an applicant's racial
9 background is.

10 JUSTICE ALITO: Let me just ask one
11 more related question, and that is the
12 circumstance -- and this is a real problem, and
13 I've heard it described to me by people who face
14 it. When can a student honestly claim to fall
15 within one of these groups that is awarded a
16 plus factor?

17 So let's say the student has one
18 grandparent who falls within that class. Can
19 the student claim to be a member of an
20 underrepresented minority?

21 MR. PARK: Yes, we rely on -- on
22 self-reporting. And -- and we don't give any --

23 JUSTICE ALITO: One great-grandparent.

24 MR. PARK: If that person believes
25 that that is the accurate expression of their

1 identity, I don't think there would be any --

2 JUSTICE ALITO: One --

3 MR. PARK: -- problem.

4 JUSTICE ALITO: -- great-great
5 grandparent?

6 MR. PARK: I think --

7 JUSTICE ALITO: Are you going to make
8 me continue to go on?

9 MR. PARK: Right, right, right. I
10 think that as we go on, I agree that it would
11 seem less plausible that that person would feel
12 that this is actually capturing my true racial
13 identity, but the same is true for any of the
14 other diversity factors that we rely on.

15 JUSTICE ALITO: It's family lore that
16 we have an ancestor who was an American Indian.

17 MR. PARK: So I -- I think, in that
18 particular circumstance, it would be not
19 accurate for them to say based on family lore --

20 JUSTICE ALITO: Well, I -- I identify
21 as an American Indian because I've always been
22 told that some ancestor back in the old days was
23 an American -- was an American Indian.

24 MR. PARK: Yes. So I think, in that
25 circumstance, it would be very unlikely that

1 that person was telling the truth. And the same
2 is true for -- you know, we rely on
3 self-reporting for all the -- the demographic
4 and other characteristics that we ask for. And
5 there's nothing special about the racial
6 identification on -- on that score, Your Honor.

7 JUSTICE SOTOMAYOR: Do you get an
8 automatic plus for checking a box?

9 MR. PARK: No.

10 JUSTICE SOTOMAYOR: That's the whole
11 point, isn't it, that checking the box is not
12 what gets you a point?

13 MR. PARK: Right. Right. And I
14 think -- I mean, one helpful illustration of
15 this point, Your Honor, is so SFFA's own expert,
16 their own desk-style analysis finds that among
17 the most academically qualified students, Asian
18 Americans and white applicants actually have a
19 higher acceptance rate than Black students.
20 This is their own expert evidence.

21 And this is discussed at Pet. App.
22 78. As the district court commented, that is a
23 particularly strange result if their
24 characterizations of our admissions process are
25 accurate.

1 JUSTICE SOTOMAYOR: Mr. Park, on this
2 issue of when this will end, nine states have
3 chosen to rely just on race-neutral --
4 completely race-neutral, with race being not
5 even a small factor anywhere.

6 Not if all of them have been as a
7 result of the people voting. It's been the
8 systems themselves choosing this.

9 Isn't that the case in Florida?

10 MR. PARK: That's my understanding.
11 In Florida, it's an executive order. And -- and
12 there are many states where it's institution by
13 institution. So Georgia, for example, is --

14 JUSTICE SOTOMAYOR: Now even your
15 adversary said he didn't see the 25 years as a
16 set deadline. It was an expectation.

17 What we know, we have nine states who
18 have tried it, and in each of them, as I
19 mentioned earlier, whites have either -- white
20 admissions have either remained the same or
21 increased, and, clearly, in some institutions,
22 the numbers for underrepresented groups has
23 fallen dramatically, correct?

24 MR. PARK: That's my understanding,
25 yes.

1 JUSTICE SOTOMAYOR: All right. What
2 we also know in those 20-odd years is that --
3 that racial disparities has grown dramatically
4 as well. Segregation has grown. The disparity
5 between incomes has grown. And so has the
6 effects of these things in terms of the
7 resources that underrepresented groups receive,
8 correct?

9 MR. PARK: I -- I believe that that
10 matches much of my understanding, yes.

11 JUSTICE SOTOMAYOR: And I understood
12 that the district court found that UNC on a
13 continuing basis reassesses its race-neutral
14 factors and is constantly monitoring whether
15 they've reached some form of -- of
16 representation adequate for their system
17 regularly, correct?

18 MR. PARK: Yes, yes. And --

19 JUSTICE SOTOMAYOR: And that was your
20 point, which is we can't tell you it's going to
21 end in 2029 or 2030, but we're not just assuming
22 it will continue, we're looking at it regularly
23 to see what the -- when it ends, correct?

24 MR. PARK: Exactly, Your Honor. And
25 there really is a quite extensive infrastructure

1 that the university has established to
2 continually monitor our progress on this score.
3 I mean, a whole range of committees, but the --
4 the committees actually include some of the
5 world's leading experts on doing these kinds of
6 qualitative assessments.

7 And so it's something that we are
8 continually pursuing, and right now there are --
9 there are many other projects ongoing for us to
10 try to reach the day where we can find a -- a
11 viable race-neutral alternative.

12 JUSTICE SOTOMAYOR: Thank you,
13 counsel.

14 CHIEF JUSTICE ROBERTS: Justice Kagan?
15 Justice Gorsuch?

16 JUSTICE GORSUCH: I'd like to ask you
17 just a hypothetical about narrow tailoring
18 because we're in strict scrutiny land here, and
19 the university has to demonstrate it's narrowly
20 tailored, race is narrowly tailored. And
21 diversity is the rationale you've asserted
22 before us.

23 Universities also have all kinds of
24 other plus factors they use, like for legacies
25 of alumni, for donors' children, for squash

1 players, we learned there are plus factors
2 because those -- we need those too.

3 And I guess I'm wondering, suppose a
4 university, a wealthy university could eliminate
5 those preferences which tend to favor the
6 children of wealthy white parents and achieve
7 diversity without race-consciousness, would
8 strict scrutiny require it to do so?

9 MR. PARK: If I may, I'd like to just
10 make a threshold point that those are not --
11 that doesn't match our facts --

12 JUSTICE GORSUCH: Well, let's, I -- I
13 understand, counsel. I understand the
14 hypothetical is not your case and you don't like
15 it.

16 MR. PARK: Right.

17 JUSTICE GORSUCH: I got it.

18 MR. PARK: Right, but -- but --

19 JUSTICE GORSUCH: Okay? But if you
20 could --

21 MR. PARK: Yeah.

22 JUSTICE GORSUCH: -- just take a shot
23 at it.

24 MR. PARK: The -- the absolutely
25 critical point if I could just very quickly is

1 that it's undisputed that legacy status is not a
2 -- did not affect --

3 JUSTICE GORSUCH: I understand,
4 counsel.

5 MR. PARK: Yeah.

6 JUSTICE GORSUCH: I do understand and
7 I appreciate that. Okay? I've -- I've had to
8 face many hypotheticals at a lectern I didn't
9 like.

10 MR. PARK: Yeah.

11 JUSTICE GORSUCH: But let's just take
12 the hypothetical. We're in strict scrutiny.
13 Compelling interest has to be established.
14 Wealthy university, okay, and it still prefers
15 all of these -- give checks to these kinds of
16 persons not for their academic merit but because
17 it would bring diversity in the form of a squash
18 team or they might bring a new art museum, we
19 heard, for example. Oh, we have to admit that
20 kid because his parents are going to donate an
21 art museum, okay?

22 Suppose the university could achieve
23 race neutrally, just -- just suppose --

24 MR. PARK: Yeah.

25 JUSTICE GORSUCH: -- race neutrally,

1 all of its diversity objectives, if it just
2 eliminated those preferences, would strict
3 scrutiny require it to do so?

4 MR. PARK: I would say yes if three
5 things are true.

6 JUSTICE GORSUCH: All right.

7 MR. PARK: First, that alternative
8 would have to also match the compelling interest
9 because, as I mentioned, this Court has never
10 recognized a compelling interest in --

11 JUSTICE GORSUCH: Is there compelling
12 interest in a squash team composed of really
13 good players or a new art museum? Is that what
14 you're suggesting?

15 MR. PARK: No -- no, Your Honor,
16 that's not what I'm suggesting.

17 JUSTICE GORSUCH: Okay. So there's no
18 compelling interest in those things you're
19 telling us?

20 MR. PARK: Right. And so, if the
21 alternative didn't have an effect on broad-based
22 diversity, not solely racial diversity, which is
23 our main objection to the RNAs here and --

24 JUSTICE GORSUCH: We'd have a great
25 socioeconomic diversity, we'd have great

1 religious diversity, we just would have a crummy
2 squash team and no art museum. Then what?

3 MR. PARK: Right. Right. And I think
4 the other condition I would try to sneak in is
5 that there wouldn't be a -- a material negative
6 impact on the academic environment.

7 And -- and -- and third is that --

8 JUSTICE GORSUCH: So the GPAs are
9 good.

10 MR. PARK: Right.

11 JUSTICE GORSUCH: So these kids that
12 are being admitted, same GPA, same SAT.
13 Let's -- then what?

14 MR. PARK: Right. And I guess the
15 third would be that -- that the specific goal of
16 racial diversity is not significantly
17 undermined. And so, yeah, with those three
18 conditions, I -- I agree.

19 JUSTICE GORSUCH: Okay, thank you.

20 CHIEF JUSTICE ROBERTS: Justice --

21 JUSTICE KAVANAUGH: How --

22 CHIEF JUSTICE ROBERTS: -- Kavanaugh?

23 JUSTICE KAVANAUGH: -- how are
24 applicants from Middle Eastern countries
25 classified, from Jordan, Iraq, Iran, Egypt and

1 the like?

2 MR. PARK: My understanding is that
3 just like other situations where they might not
4 fit within the particular boxes on the Common
5 Application, that we rely on self-reporting and
6 we would ask -- you know, they can volunteer
7 their particular country of origin.

8 JUSTICE KAVANAUGH: But, if they
9 honestly check one of the boxes, which one are
10 they supposed to check?

11 MR. PARK: I -- I don't -- do not know
12 the answer to that question. What I can say is
13 that if a person from Middle Eastern country
14 self-discloses -- self-discloses their country
15 of origin, it would be considered in the same
16 way that we consider any box that matches, you
17 know, one of the boxes that's available in the
18 Common Application, which is it would be an
19 individualized holistic analysis.

20 And I can genuinely say that there
21 would be a similar positive analysis in terms of
22 the contribution that a student like that would
23 contribute. And -- and we do track in
24 particular, again, after the admissions process,
25 religion and -- and country of origin and that

1 sort of thing.

2 JUSTICE KAVANAUGH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett?

5 JUSTICE BARRETT: I just have one more
6 question about end point. So, you know, Alan
7 Bakke would have been born into a pre-Brown
8 world, you know, and then we have 25 years, we
9 get to Grutter. Grutter says, you know, we
10 cannot imagine -- as I read that language
11 before, this is dangerous, we can't imagine it's
12 going to go on more than another 25 years. And
13 you've been pressed a little bit about what is
14 the end point for you.

15 This -- this distance of time, this 50
16 years since Bakke, suggests accurately, I think,
17 that achieving diversity and diverse student
18 populations in universities has been difficult.
19 What if it continues to be difficult in another
20 25 years? I take it that you, because you've
21 repeatedly said that the 25 years is
22 aspirational and you told Justice Kavanaugh it
23 wasn't a holding, that you don't think that
24 University of North Carolina has to stop in 25
25 years, and at that 2028 mark.

1 So what are you saying when you're up
2 here in 2040? Are you still defending it like
3 this is just indefinite, it's going to keep
4 going on?

5 MR. PARK: I think that Grutter is
6 helpfully self-limiting in that it requires
7 aggressive and enthusiastic adoption of
8 race-neutral alternatives. And -- and I think
9 it's -- it's a dial, not a switch. And the
10 progress that we've made since Grutter has shown
11 that at -- at the University of North Carolina,
12 we have dialed it down substantially.

13 The -- the expert evidence in -- in
14 that case, obviously, they're different
15 institutions, was that around 70 percent of the
16 underrepresented minorities in the institution
17 at issue in Grutter, it was determinative that
18 they had a certain racial background. And,
19 here, the number is -- is far smaller, and we're
20 -- we anticipate that we will be able to dial it
21 down to -- to zero.

22 And I think the reason why I -- I feel
23 confident in that is because of Grutter's
24 requirement that we continue exploring doggedly
25 race-neutral alternatives. And even as -- since

1 the record has closed, the University of North
2 Carolina has done so and is continually
3 attempting to monitor it.

4 JUSTICE BARRETT: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

7 JUSTICE JACKSON: Yes. So we've heard
8 a lot about checking the box in the context of
9 the claims that are being made in this case.
10 And I'm -- I'm just -- I'm concerned that at --
11 that I -- that I might be confused about the
12 implications for that -- of that.

13 So, first of all, this box is on the
14 Common Application, right? It's not on North
15 Carolina's form of any sort? Every student who
16 fills out the Common Application form has the
17 ability --

18 MR. PARK: Correct.

19 JUSTICE JACKSON: -- to -- okay. And
20 so -- I -- have you seen one of these forms?
21 Because I don't know if they're in the record in
22 this case. Is the Common Application in the
23 record somewhere?

24 MR. PARK: Yes. Yes, it is. I
25 believe it might be completed applications, so

1 it might be the -- the sealed appendix, Your
2 Honor.

3 JUSTICE JACKSON: All right. So we
4 have this form that all students who are
5 applying to any college can -- can use. And I
6 understood the form was basically, you know,
7 reduced to tell us about yourself, that you put
8 all sorts of things. It's not a separate piece
9 of paper that says this is about race. It's
10 just: Who are you? And in the context of that,
11 students check and write in all kinds of things.

12 Am I wrong about that?

13 MR. PARK: Yes, the form has evolved
14 over time --

15 JUSTICE JACKSON: Okay.

16 MR. PARK: -- and the -- the current
17 form -- I can't say for certain the forms that
18 are in the record, but the current form does
19 allow for more self-description, so the student
20 with the background that Justice Kavanaugh
21 mentioned would be able to fully describe --

22 JUSTICE JACKSON: And so any -- any --
23 any form of race, it's not like we have to care
24 so carefully about what are the categories in
25 there and how -- anybody, a Caucasian student

1 could check Caucasian? We're just telling who
2 we are as a general matter, right?

3 MR. PARK: Yes, Your Honor.

4 JUSTICE JACKSON: Okay. So everybody
5 who wants to. Does North Carolina require
6 anybody to fill out the box that has to do with
7 race --

8 MR. PARK: No.

9 JUSTICE JACKSON: -- on this form?
10 All right. So there may be some people who
11 don't put anything for race.

12 MR. PARK: There certainly are, yes.

13 JUSTICE JACKSON: All right. Isn't
14 the question then what North Carolina is doing
15 with that information? Because, presumably,
16 just knowing that you have people from different
17 races applying to your school is not working an
18 equal protection violation, is it?

19 MR. PARK: I -- I -- I agree with the
20 sentiment behind that question. I think the
21 language of racial classification has been used.
22 And -- and it sincerely does not reflect how our
23 admissions process worked -- works. It's
24 race-consciousness. And so --

25 JUSTICE JACKSON: Right. So -- so

1 you're not, like, doing something different with
2 the people who check the box -- box and put
3 certain categories. Everybody then goes into
4 the holistic process of looking at all kinds of
5 other things so that race is never the only
6 criteria that a person is evaluated with respect
7 to, is that right?

8 MR. PARK: Absolutely. And -- and we
9 think the district court made findings on this,
10 in this regard.

11 JUSTICE JACKSON: And even if you
12 check the box, I'm an African American, I'm a
13 Latino, and all the other things, I live in this
14 place, et cetera, et cetera, even if you check
15 that box, in North Carolina's system, do you get
16 a point automatically for having checked that
17 box?

18 MR. PARK: Absolutely not. Absolutely
19 not.

20 JUSTICE JACKSON: And is anybody who
21 did check the box -- are they automatically
22 entered or admitted into the university as a
23 result?

24 MR. PARK: No, no. And, you know, our
25 --

1 JUSTICE JACKSON: All right. So final
2 question, final question. Given a holistic
3 review process like that, is there a risk of
4 treating people differently by not allowing some
5 applicants to talk about that aspect of their
6 identity? I hear a process in which there's a
7 form that says tell us about yourself, and
8 people can put all sorts of things. I'm
9 Catholic. I'm from, you know, Los Angeles. I'm
10 a Latina, whatever.

11 But now we're -- we're entertaining a
12 rule in which some people can say the things
13 they want about who they are and have that
14 valued in the system, but other people are not
15 going to be able to because they won't be able
16 to reveal that they are Latino or African
17 American or whatever.

18 And I'm worried that that creates an
19 inequity in the system with respect to being
20 able to express your identity and, importantly,
21 have it valued by the university when it is
22 considering the goal of bringing in different
23 people. Is that a -- is that -- is that a crazy
24 worry, or is that something that -- that I
25 should be thinking about and concerned about?

1 MR. PARK: Not at all, Your Honor, not
2 crazy at all. We are very concerned with that
3 issue, Your Honor, that if race is the one thing
4 or if there are other factors that are subject
5 to heightened scrutiny, if -- if only those
6 factors cannot be considered in the admissions
7 process, then anyone with a background or
8 perspective that doesn't fit into one of these
9 categories will have an advantage in our
10 admissions process.

11 We think, just as Mr. Strawbridge
12 said, that it's a mathematical exercise. And if
13 you artificially say that only certain people
14 can't tell the university about some of their --
15 important aspect of their background, but
16 underrepresented minorities are -- are barred
17 from doing so or -- or, you know, all people
18 can't discuss their racial background, then
19 certain applicants will be subject to a
20 disadvantage.

21 JUSTICE JACKSON: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. Hinojosa.

25

1 ORAL ARGUMENT OF DAVID G. HINOJOSA
2 ON BEHALF OF THE STUDENT RESPONDENTS
3 MR. HINOJOSA: Mr. Chief Justice, and
4 may it please the Court:

5 This Court must stand firm in its
6 commitment to ensuring racial equality and equal
7 opportunity by affirming the Bakke/Grutter
8 framework. From the Sweatt and Brown cases
9 through Bakke and Grutter, this Court has
10 recognized the paramount roles that integrated
11 education and cross-racial interactions play in
12 building a true democracy, where pathways to
13 leadership are visibly open to all qualified
14 candidates.

15 Brown attempted to shut down this
16 nation's terrible caste system, but stark racial
17 inequalities persisted and stunted this nation's
18 growth. Enter Bakke and Grutter, which have
19 helped universities open the doors of
20 opportunities to highly qualified students of
21 color, who are often overlooked in a process
22 that typically undervalues their talents and
23 perspectives.

24 Racial diversity and its attending
25 social and academic benefits help all students

1 to be better prepared to work and live together
2 and make this nation better as a whole. We have
3 made progress, but many colleges are not there
4 yet, including UNC, which grapples with over 160
5 years of exclusion and its present-day effects.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Mr. Hinojosa, if this
8 were a Title VI case and there was an allegation
9 of discrimination against the University of
10 North Carolina, who would bear the burden of
11 coming forward?

12 MR. HINOJOSA: Is it within the strict
13 scrutiny --

14 JUSTICE THOMAS: No, just Title VI, a
15 claim of discrimination.

16 MR. HINOJOSA: A normal claim of
17 intentional discrimination, Your Honor?

18 JUSTICE THOMAS: Exactly.

19 MR. HINOJOSA: I would understand that
20 the plaintiff would have that burden to
21 demonstrate.

22 JUSTICE THOMAS: To come forward
23 initially. But then, when the plaintiff makes
24 his or her showing, then what? What's the duty
25 of the -- what's the burden on the administrator

1 -- on the accused?

2 MR. HINOJOSA: It's not entirely clear
3 from the case law that I'm aware of, Your Honor.
4 Ordinarily --

5 JUSTICE THOMAS: Is there any case
6 where the court has deferred to the university
7 or to the alleged discriminator's policies?

8 MR. HINOJOSA: So, in -- for example,
9 you know, I don't know whether or not this has
10 been answered directly in Title VI case law.
11 Title VII case law --

12 JUSTICE THOMAS: Yeah.

13 MR. HINOJOSA: -- Your Honor, yes, you
14 know, then the burden would shift to -- in that
15 case, it might be the employer.

16 JUSTICE THOMAS: What I'm -- what's
17 interesting here is this is -- I cannot think of
18 another area or another case where the Court
19 deferred to the alleged discriminator on
20 something as important as compelling interest.
21 We don't do it in Title VI. We don't do it in
22 Title VII.

23 You have McDonnell Douglas. You have
24 Arlington Heights. And this is a first. And
25 what I'm asking you is, isn't it odd that you

1 have a framework in Grutter that defers on the
2 critical issue in a case of compelling interest?

3 MR. HINOJOSA: No, Your Honor. I
4 think it's entirely consistent, you know, with
5 this case -- with this Court's framework in
6 judging strict scrutiny. The -- let -- let me
7 make a couple of points first.

8 One is on the discrimination point.
9 This is not discrimination per se. The limited
10 consideration of race in a holistic fashion as
11 this Court has approved is a limited
12 classification that is subject to strict
13 scrutiny, but that whole strict scrutiny process
14 is trying to filter out whether or not that we
15 have a legitimate purpose for this or not and
16 whether or not there's a compelling interest
17 that may be sought and achieved, you know,
18 through narrowly tailored means.

19 JUSTICE THOMAS: Let me -- let me ask
20 more specifically: If this was a -- this case
21 involved a school district in Virginia in 1960
22 that is alleged to be discriminating, would this
23 Court defer to its assertion that the races do
24 better if they're segregated?

25 MR. HINOJOSA: Absolutely not, Your

1 Honor, but that's not this case. This case is
2 about a limited classification involving a
3 compelling interest --

4 JUSTICE THOMAS: I'm not -- I'm not --

5 MR. HINOJOSA: -- that the Court
6 itself has recognized.

7 JUSTICE THOMAS: -- that's not what
8 I'm talking about. I'm talking about the
9 Court's deference in that case, the Court would
10 put Virginia to the test. In this case, it does
11 not, and I'm asking you why the difference?

12 MR. HINOJOSA: In this case, Your
13 Honor, it actually is -- the -- the burden is
14 that the university has a high burden of
15 demonstrating its compliance with this Court's
16 standard under strict scrutiny.

17 The only narrow area that this Court's
18 framework, as I understand it, has deferred to
19 the university is establishing its objectives,
20 but the whole framework still requires a
21 well-reasoned explanation for seeking the -- for
22 -- for its own compelling interest. It requires
23 the university to demonstrate that there are no
24 race-neutral alternatives that will work about
25 as well.

1 And so that burden is still heavy on
2 the university to demonstrate compliance with a
3 strict scrutiny framework.

4 JUSTICE SOTOMAYOR: Mr. Hinojosa, in
5 this case, the Petitioner never challenged that
6 diversity was a compelling interest, correct?

7 MR. HINOJOSA: That's correct.

8 JUSTICE SOTOMAYOR: Their own expert
9 said that racial diversity was an important
10 compelling interest, didn't it?

11 MR. HINOJOSA: That's -- that's
12 correct, Your Honor, in the trial below.

13 JUSTICE SOTOMAYOR: But it doesn't --
14 that deference, whatever it's defined at, didn't
15 stop you or the state from meeting its burden of
16 showing why that was a compelling interest,
17 correct?

18 MR. HINOJOSA: That's correct. And
19 there's a 155-page opinion in this case based on
20 the facts and based on significant analysis and
21 testimony from the university administration --

22 JUSTICE SOTOMAYOR: The court below
23 carefully examined whether the university --
24 university's articulated interest was clearly
25 identifiable, measurable, and precise, didn't

1 it?

2 MR. HINOJOSA: Yes, Your Honor.

3 JUSTICE SOTOMAYOR: So it's not much
4 deference. If -- I don't even know why that
5 word is being used, correct?

6 MR. HINOJOSA: That's correct, Your
7 Honor.

8 JUSTICE SOTOMAYOR: Now, in terms of
9 that information, you put on extensive evidence
10 about the history of racism in UNC, correct?

11 MR. HINOJOSA: That's correct, Your
12 Honor, including a history of its own founding
13 to help educate the owner -- the -- the children
14 of slave owners.

15 JUSTICE SOTOMAYOR: And it went
16 through de jure segregation way after Brown,
17 correct?

18 MR. HINOJOSA: Yes, Your Honor.

19 JUSTICE SOTOMAYOR: Until the 1980s.
20 But you didn't stop there, did you? You
21 presented evidence about the continuing
22 Confederate relics that exist on campus?

23 MR. HINOJOSA: Yes, Your Honor.

24 JUSTICE SOTOMAYOR: The continuing
25 white supremacy marches that still go on?

1 MR. HINOJOSA: Yes, Your Honor.

2 JUSTICE SOTOMAYOR: The racial
3 epithets that minority -- that underrepresented
4 groups are experiencing to this -- to this day?

5 MR. HINOJOSA: Yes, Your Honor.

6 JUSTICE SOTOMAYOR: So, given that
7 your adversary says that race can be used to
8 correct past discrimination, why isn't it in
9 this particular university appropriate to use
10 race as one factor among many --

11 MR. HINOJOSA: Yes, Your Honor.

12 JUSTICE SOTOMAYOR: -- to address its
13 history of racial discrimination --

14 MR. HINOJOSA: And if --

15 JUSTICE SOTOMAYOR: -- and its
16 continuing effects on campus?

17 MR. HINOJOSA: Yes, Your Honor. If I
18 understand correctly, we -- I -- I -- I do want
19 to clarify one point, is that we are not
20 suggesting, as I understand the university is
21 not either, is that the limited consideration of
22 race in this case is being used as a remedial
23 order to address that.

24 The reason for the importance of those
25 present-day effects of that past discrimination

1 is articulated through the compelling testimony
2 of the Respondent students in this case about
3 how those present-day effects affect their own
4 value on campus looking at these Confederate
5 relics and the like and seeing these white
6 supremacists come on to campus marching, which
7 is certainly a First Amendment right, but it
8 doesn't ignore the fact of how those students
9 feel during those moments.

10 But it also -- so -- and that in turn
11 impacts their own education within the
12 classroom. So it's not just standing alone that
13 you have hypersensitive students, you know,
14 reacting to these marches and -- and these other
15 activities on campus, but it's also making sure
16 that -- about the impacts in the classroom that
17 it, you know, carries forward to and also how it
18 impacts recruitment.

19 When students of color, and they see
20 less than a hundred Black males accepted and
21 enrolled at UNC in the 21st Century, when they
22 see that and they hear about all of these
23 present-day effects going on, that impacts their
24 own decision on whether or not they might apply,
25 whether or not they might actually end up going

1 to the great university of the University of
2 North Carolina.

3 JUSTICE ALITO: Counsel --

4 MR. HINOJOSA: That, again, is --

5 JUSTICE ALITO: -- if all of the
6 individual incidents and artifacts that you
7 mentioned were not in this case and if the
8 university were a state university that never
9 practiced segregation, would you say that the
10 case would come out differently?

11 MR. HINOJOSA: It may, Your Honor.
12 And that's how and why we should not have an
13 across-the-board policy that all of a sudden
14 jettisons the important limited consideration of
15 race that this Court has approved.

16 JUSTICE ALITO: So you would perhaps
17 endorse, say, a system in which a state
18 university in a state that never had de jure
19 segregation would be -- would -- would be
20 prohibited from doing what North Carolina is
21 doing?

22 MR. HINOJOSA: Yes, because the -- the
23 important point here is whether or not the
24 educational benefits of diversity have been
25 established by that particular university. And

1 so, here, at the University of North Carolina,
2 of course, it matters a lot because it affects
3 recruitment and retention and the like.

4 But, at another university where it
5 may not have been, you know, a part of its
6 history, it's still -- the -- the important
7 piece here is whether or not the university
8 itself can establish its own educational
9 benefits of diversity and satisfy that through
10 narrowly tailored means.

11 The University of Michigan in -- in
12 the Grutter case, you know, is a good example of
13 that. I -- I won't pretend to know the history
14 of the state of Michigan, but -- and I know that
15 they were fraught with, you know, desegregation
16 problems themselves, you know, within districts,
17 but whether or not that was a remnant of the
18 state's own de jure segregation, I don't know,
19 but that would be a good example.

20 JUSTICE ALITO: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel. You've mentioned the benefits, of
23 course, of diversity, but amici on the other
24 side have argued that one consequence of the
25 school's consideration of race is that it sends

1 the message that race is something you should
2 consider down the line, in other ways, in
3 student activities, other sorts of areas, that
4 they get the message from the beginning that
5 race counts, and they carry that forward into
6 other areas where there may not have been a
7 history of discrimination that would, in your
8 terms, justify it.

9 Do you have a response to that?

10 MR. HINOJOSA: Yes, Your Honor. The
11 research -- and there's some of the research
12 that is shown in -- and I apologize if the Court
13 isn't quite getting here, but what I understand
14 the Court is inquiring about is, you know, some
15 of the particular stigma that might be attached
16 to --

17 CHIEF JUSTICE ROBERTS: No, it was the
18 fact that the school is telling students race
19 matters in admissions and that the students may
20 learn from that lesson that race should matter
21 in other areas, where perhaps it doesn't have
22 the same justification as it would have under
23 your view on admissions.

24 MR. HINOJOSA: Yeah. So two points,
25 Your Honor. One is that there's no evidence in

1 this case of the University of North Carolina's
2 own decision to enact race-conscious admissions
3 had led to any negative consequences, much less
4 the negative consequences that you've shared
5 here. But there's also --

6 CHIEF JUSTICE ROBERTS: Do you know --
7 this may be an unfair question -- is race a
8 consideration in the formation of other types of
9 activities that students are engaged in? I get
10 the sense from the briefs anyway that race
11 permeates a lot of what happens at the
12 university. And --

13 MR. HINOJOSA: Yeah.

14 CHIEF JUSTICE ROBERTS: -- you -- you
15 -- you're shaking your head in a way that you
16 don't agree with it.

17 MR. HINOJOSA: Well, Your Honor, you
18 know, it is a bit of the -- reminds me of a
19 storybook when I was a child, Henny Penny and
20 the sky is falling argument, because they're
21 blaming that just about everything is caused by
22 race-conscious admissions.

23 But, in fact, if you look at the
24 research, for example, on the issue of stigma,
25 both internal and external stigma -- and this is

1 referenced in the AERA brief -- it actually
2 shows that race-conscious admissions programs
3 at -- well, universities that have
4 race-conscious admissions programs actually have
5 lesser degree of stigma attached, you know, both
6 internal for the student and external, what
7 they're hearing from other students --

8 CHIEF JUSTICE ROBERTS: Well, I -- I
9 -- I --

10 MR. HINOJOSA: -- than states with
11 bans on --

12 CHIEF JUSTICE ROBERTS: Counsel --

13 MR. HINOJOSA: I'm sorry.

14 CHIEF JUSTICE ROBERTS: -- I'm not
15 talking about stigma. I'm talking about student
16 groups taking its cue from the university and
17 saying we ought to take race into account when
18 we're -- whatever we're doing.

19 MR. HINOJOSA: And -- and -- and,
20 again, Your Honor, there's no evidence in this
21 case of how that correlates to any consideration
22 of race at UNC or any other university.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas?

1 JUSTICE THOMAS: Mr. Hinojosa, I may
2 be tone deaf when it comes to all these other
3 things that happens on campus, about feeling
4 good and all that sort of thing. I'm really
5 interested in a simple thing. How -- what
6 benefits academically are there to your
7 definition or your -- the -- the diversity that
8 you're asserting specifically?

9 I know kids feel -- you've -- you've
10 got studies that show that people feel better
11 and they don't feel isolated, on and on. I'm
12 focusing on what you went to college to do, to
13 learn something.

14 Do you have anything that demonstrates
15 that?

16 MR. HINOJOSA: Yes, Your Honor. And
17 -- and you're asking for the specific
18 educational benefits of diversity?

19 JUSTICE THOMAS: Yes.

20 MR. HINOJOSA: Those would include,
21 for example, fostering innovation. And there's
22 plenty of testimony in this case from chemists,
23 professors at UNC, and from students themselves
24 who have understood the importance of diversity
25 in helping to foster -- to foster innovation.

1 To broaden perspectives, you know,
2 engaging in students, and this is all the way --
3 harkens back to the Sweatt v. Painter case and
4 the McLaurin cases, where they acknowledge that
5 racial interactions and dialogue, you know,
6 between students, you know, helps better prepare
7 them for the world that they're going to work
8 and live in.

9 There is the reducing stereotypes.
10 You know, for our own students that -- who
11 testified in this case, it's played an
12 incredibly important role in their education.
13 And when you help reduce stereotypes in
14 isolation, you end up impacting the educational
15 environment for all students because they are
16 sharing their perspectives. They're not
17 necessarily feeling isolated as the
18 spokespeople.

19 And so those are among the several
20 educational benefits of diversity that have been
21 recognized and that we as the Respondent
22 students support.

23 CHIEF JUSTICE ROBERTS: Justice Alito?

24 JUSTICE ALITO: You make some very
25 good points in your brief, but reading it, I was

1 struck by the fact that the word "Asian" does
2 not appear one time in your brief. Yet, Asian
3 Americans have been subjected to de jure
4 segregation. They have been subjected to many
5 forms of mistreatment and discrimination,
6 including internment.

7 So do you have anything to say this
8 morning about the interests of students of Asian
9 background and how your arguments impact them?

10 MR. HINOJOSA: Yes, Your Honor. So
11 two points. One is that discrimination against
12 -- against Asian Americans is wrong. It's bad.
13 We do not condone it at all. But, two, our
14 brief actually reflects the record in this case.

15 There were no claims developed by
16 Petitioner involving the mistreatment or
17 maltreatment of Asian American students. And I
18 think that was one of the problems that happened
19 with the first brief, is that they conflated
20 their arguments against Harvard, which
21 Mr. Waxman will, you know, adequately defend
22 shortly, but those arguments conflated the
23 issues.

24 There's no racial balancing claim
25 against UNC. There's no allegation of quota.

1 There's been a lot of talk about quota in this
2 case. There's no claim about that. There's no
3 claim against UNC involving the intentional
4 discrimination against Asian American students
5 vis-à-vis white students or other students.

6 So that record actually doesn't exist.

7 JUSTICE ALITO: So what is your
8 response to the simple argument that college
9 admissions are a zero sum game? And if you give
10 a plus to a person who is an under -- falls
11 within the category of underrepresented minority
12 but not to somebody else, you're disadvantaging
13 the latter student?

14 MR. HINOJOSA: And -- and, Your Honor,
15 you know, that's a -- that's an excellent point,
16 but the record actually bears out about how --
17 in this case, how the holistic admissions plans
18 does end up operating. And it is where an
19 individualized consideration is being made on a
20 student's own talents, on a student's own
21 achievements --

22 JUSTICE ALITO: So you're -- you're
23 saying --

24 MR. HINOJOSA: -- and their own
25 challenges.

1 JUSTICE ALITO: -- you're saying that
2 the -- that race in and of itself has no effect
3 in -- at the University of North Carolina?

4 MR. HINOJOSA: Absolutely not, Your
5 Honor. I'm -- I'm saying --

6 JUSTICE ALITO: Okay. Then you would
7 have no objection to an opinion from this Court
8 saying you may not consider race; you may
9 consider other things, but you may not consider
10 the mere fact of race, period? You would have
11 no objection to that?

12 MR. HINOJOSA: Your Honor, I -- I
13 don't know if I'm answering your question with a
14 negative and a double negative here, but I do
15 want to make clear that we fully support the
16 limited consideration of race as it has been
17 authorized by this Court.

18 JUSTICE ALITO: Well, then I -- I just
19 don't --

20 MR. HINOJOSA: Again, it is only on an
21 individual --

22 JUSTICE ALITO: -- I don't understand
23 your answer. Either -- if it's irrelevant, then
24 you shouldn't care whether it's -- it's ruled
25 out.

1 MR. HINOJOSA: And we're not arguing
2 -- if I'm articulating that, Your Honor, I'm not
3 meaning to. We certainly believe that race
4 within the context of an applicant may be
5 considered as a plus factor. That's not only in
6 this --

7 JUSTICE ALITO: Race in itself may be
8 considered a plus factor?

9 MR. HINOJOSA: Yes, Your Honor.

10 JUSTICE ALITO: And, therefore, those
11 who don't get the plus factor have what is
12 essentially a negative factor. They're not the
13 --

14 MR. HINOJOSA: No, Your Honor.

15 JUSTICE ALITO: -- it's not the same
16 thing?

17 MR. HINOJOSA: No, Your Honor, it's
18 not because it's looking at the whole applicant
19 as they apply within their whole application and
20 their resume, et cetera.

21 JUSTICE ALITO: Suppose you have a
22 race, two people are in a race, and you give a
23 plus factor to one of the runners, so that
24 runner gets to start -- well, if it's 100 yards
25 -- a 100-yard dash, let's say he gets to start

1 five yards closer to the finish line.

2 The one who doesn't get that plus
3 factor is disadvantaged, right?

4 MR. HINOJOSA: That would be in that
5 case, but that case is not here. There are no
6 bonus points that are provided to any applicant
7 at the University of North Carolina. That is
8 fully prohibited by this Court's decision in
9 Gratz, and we're not suggesting that it should
10 be reinstated.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor?

13 JUSTICE SOTOMAYOR: Counsel, a race is
14 sort of an artificial creation, right? It
15 measures how fast you can go from point A to
16 point B, correct?

17 MR. HINOJOSA: In some respects, yes,
18 Your Honor.

19 JUSTICE SOTOMAYOR: All right. But
20 what colleges are doing is not saying -- they're
21 not looking at the runners when putting them in
22 this race; they're looking at the applicant, at
23 the student as a whole measure, correct?

24 MR. HINOJOSA: Yes, Your Honor.

25 JUSTICE SOTOMAYOR: And if we said

1 that applicants from white schools can start
2 here, if applicants from socioeconomic schools
3 don't start at the same place, you're going to
4 push them back, right?

5 MR. HINOJOSA: Yes, Your Honor.

6 JUSTICE SOTOMAYOR: So what the
7 schools are doing is looking at all the factors
8 to try to put the students at the start as
9 equals, correct?

10 MR. HINOJOSA: That's correct, Your
11 Honor.

12 JUSTICE SOTOMAYOR: And race is not
13 defining in that it's not the one factor in any
14 application that makes a difference?

15 MR. HINOJOSA: There is zero evidence
16 of race playing a decisive factor for any
17 applicant. There is zero evidence of any -- of
18 any student who was accepted under the
19 race-conscious admissions plan regardless of
20 race. There is zero evidence of any -- of -- of
21 any student being penalized for their race or
22 that that student, if they were admitted, that
23 they were not qualified. They all qualified on
24 their individual merit.

25 JUSTICE SOTOMAYOR: Thank you,

1 counsel.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 Justice Gorsuch?

4 Justice Kavanaugh?

5 Justice Barrett?

6 JUSTICE BARRETT: One question. One
7 -- one difference between your brief and your
8 position and University of North Carolina's is
9 that from the student's perspective -- and you
10 were getting at this in some of your answers to
11 Justice Sotomayor early on about Confederate
12 statues and the presence of white supremacist
13 groups -- is that from the student perspective,
14 you know, students -- the educational benefit to
15 the students might be in the form of
16 counteracting feelings of isolation, sticking
17 out, not being supported.

18 In light of that, I'm wondering if you
19 have anything to say about affinity groups and
20 affinity housing?

21 I think one thing at least insofar as
22 I'm aware at the time Grutter was decided and
23 certainly Bakke, that kind of a phenomenon where
24 you have groups, say, where, you know, Black
25 students and allies can live or, you know, Black

1 student groups, same for, you know, Hispanic
2 groups, et cetera, was not a phenomenon that was
3 around then.

4 And -- and I think one of the benefits
5 is that it allows minority students to band
6 together to reduce some of the feelings of
7 isolation that you've been talking about.

8 Do your clients have a position on
9 that and whether that would be -- because
10 whatever we say or however broadly we wrote this
11 opinion, that rationale about the educational
12 benefits of diversity presumably might have some
13 bearing on those questions that are
14 post-admission questions?

15 MR. HINOJOSA: Yes, Your Honor. So,
16 you know, those -- those do invite, you know,
17 very difficult questions. And I think that's
18 how and why a potential color-blind ruling from
19 this Court, you know, may disrupt things even
20 further, but also about how, you know, certain
21 conditions may apply on a case-by-case basis.

22 So I may not be making too much sense
23 with what I just said there, but, you know, in
24 terms of affinity groups, for example, research
25 shows that affinity groups have incredible

1 benefits not just, you know, for its own members
2 but in helping the broader community understand,
3 for example, you know, racial and cultural
4 issues, you know, that they may -- might raise.

5 It's not my understanding that there
6 are any affinity groups, especially, for
7 example, you know, Black student associations
8 that --

9 JUSTICE BARRETT: I'm really thinking
10 --

11 MR. HINOJOSA: -- exclude any
12 students.

13 JUSTICE BARRETT: -- mostly about
14 affinity housing. And I -- I understand Chapel
15 Hill does not have it, but UNC Wilmington does.

16 Would your clients have a position on
17 affinity housing?

18 MR. HINOJOSA: I -- I -- I do not
19 know, Your Honor.

20 JUSTICE BARRETT: Okay. Thank you.

21 MR. HINOJOSA: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Jackson?

24 JUSTICE JACKSON: Can I just quickly
25 return to Justice Alito's hypothetical, which I

1 think is a little bit helpful in trying to
2 pinpoint a problem that I've been having.

3 It seems from the race hypothetical
4 that if there was only one basis for giving
5 someone a boost and that basis was race, then I
6 see disadvantage, absolutely, to anyone else
7 who's not an underrepresented minority who can
8 get that boost.

9 But I understood that we have here a
10 program in which there are at least -- at least
11 40 different bases for being able to get a boost
12 and not everybody who is an underrepresented
13 minority gets a boost.

14 So it's really hard to figure out if
15 anyone is being disadvantaged in a system like
16 that, and -- and that's where I was worried
17 about standing, because I'm trying to understand
18 how the system is operating to actually
19 advantage minorities in a way that is harmful to
20 anyone else in this system.

21 MR. HINOJOSA: Yeah. And I think that
22 attributes to the careful cue that UNC has taken
23 to this Court's decisions in Fisher II, making
24 sure, you know, universities find themselves in
25 this Goldilocks problem about, you know,

1 considering it too much or too little. The
2 university --

3 JUSTICE JACKSON: But there are other
4 considerations is the point. Everyone --

5 MR. HINOJOSA: Yes.

6 JUSTICE JACKSON: -- everyone can get
7 a boost for all sorts of reasons. Minorities
8 don't automatically get a boost under this
9 system, so it's hard to know whether anyone's
10 being disadvantaged from the mere fact that a
11 minority could get a boost in this environment,
12 right?

13 MR. HINOJOSA: That's right. And the
14 evidence also bears it out at Petition Appendix
15 78, where the evidence showed that hundreds of
16 white students with lower combined GPAs and SAT
17 scores were admitted ahead of higher-performing
18 Black students, Latinx students, who went to
19 UNC. And I think that bears the hallmark of
20 this -- the type of individualized consideration
21 that this Court wanted.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 MR. HINOJOSA: Thank you.

25 CHIEF JUSTICE ROBERTS: General

1 Prelogar.

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

5 GENERAL PRELOGAR: Mr. Chief Justice,
6 and may it please the Court:

7 For decades, this Court has rightly
8 recognized that student body diversity is a
9 compelling interest that can justify limited
10 consideration of race in university admissions.

11 That holding recognizes a simple but
12 profound truth: When students of all races and
13 backgrounds come to college and live together
14 and learn together, they become better
15 colleagues, better citizens, and better leaders.

16 That truth is vitally important to our
17 nation's military. Our armed forces know from
18 hard experience that when we do not have a
19 diverse officer corps that is broadly reflective
20 of a diverse fighting force, our strength and
21 cohesion and military readiness suffer. So it
22 is a critical national security imperative to
23 attain diversity within the officer corps.

24 And, at present, it's not possible to
25 achieve that diversity without race-conscious

1 admissions, including at the nation's service
2 academies.

3 The military experience confirms what
4 this Court recognized in *Grutter*, that in a
5 society where race unfortunately still matters
6 in countless ways, achieving diversity can
7 sometimes require conscious acts by our leading
8 educational institutions.

9 The Court's precedents strike a
10 careful balance. Race can be considered if
11 truly necessary but only as one factor in a
12 holistic admissions process that prioritizes and
13 values diversity in all of its dimensions. The
14 Court should adhere to that balance today.

15 JUSTICE THOMAS: Once again, would you
16 tell me specifically what is included in
17 diversity for the purposes of education,
18 achieving educational benefits?

19 GENERAL PRELOGAR: Yes, Justice
20 Thomas. And if I could, I'd like to use the
21 service academies as an example here and explain
22 to you the concrete educational benefits the
23 service academies are seeking to obtain through
24 their use of race-conscious admissions, and it
25 really falls into two separate categories.

1 One is the suite of benefits that the
2 Court's precedents have already recognized,
3 things like increasing cross-racial
4 understanding, which can have direct impacts on
5 challenging stereotypes and assumptions and
6 leading to positive developments with cognitive
7 development that can be perceived as early as a
8 student's second year in college.

9 It can include things like reducing a
10 sense of racial isolation and alienation, and
11 that has proven educational benefits as well in
12 terms of encouraging greater participation by
13 minority students in a classroom environment.

14 And then the second category that I
15 would point to, and this traces directly from
16 Grutter as well, is the Court's recognition that
17 in order to train a set of leaders with
18 legitimacy in the eyes of the public, it is
19 necessary to have our leadership broadly reflect
20 the diversity of our country.

21 And that is a critically important
22 interest in the military because we have had
23 experiences in our past where the officer corps
24 and its racial composition did not reflect the
25 diversity in enlisted service members and that

1 it caused tremendous racial tension and strife.

2 So that is the -- the set of benefits
3 that the service academies are seeking to
4 obtain.

5 JUSTICE KAGAN: And -- and why can't
6 you do it through race-neutral means? Because I
7 think everybody has agreed, all our cases
8 indicate that race-neutral means are better if
9 one can achieve those kinds of objects that you
10 were talking about that way. So why -- why
11 can't you after 20 years?

12 GENERAL PRELOGAR: It's absolutely
13 correct that it's incumbent on universities and
14 on the service academies to take account of
15 race-neutral alternatives and to put those into
16 practice where they can achieve diversity. And
17 that's what the service academies are doing.

18 They have done things like trying to
19 bolster outreach efforts to underserved
20 communities, to try to solicit additional
21 nominations from congressional districts that
22 have traditionally sent fewer cadets to the
23 academy.

24 They've looked into other
25 alternatives, like socioeconomic preferences,

1 but West Point discovered that that would
2 actually increase the number of white men at the
3 academy. And other race-neutral alternatives
4 just don't work in this context for the service
5 academies.

6 For example, a top 10 percent plan
7 wouldn't work because the service academies have
8 to draw from a nationwide applicant pool, and
9 they also have to prioritize and value other
10 characteristics, like physical fitness and
11 leadership potential.

12 So I can't say that we are able to get
13 there all the way right now with race-neutral
14 alternatives. That's what the service academies
15 have seriously studied, but we are trying to
16 make progress toward that goal.

17 CHIEF JUSTICE ROBERTS: General, you
18 have emphasized the service academies today and
19 you did in your brief, and government counsel in
20 Grutter did as well.

21 Are you linking yourself to Harvard
22 and UNC? In other words, you rise or fall with
23 their case?

24 GENERAL PRELOGAR: Well, Mr. Chief
25 Justice, we certainly think that it's critically

1 important for universities throughout the nation
2 to be able to prioritize the educational
3 benefits of diversity, and the ROTC programs are
4 also a compelling interest for us here that
5 exist at those civilian institutions, but I
6 guess, if what you're asking me is whether we
7 think the military has distinctive interests in
8 this context, I would say yes.

9 And I think it's critically important
10 for the Court in its decision in these cases to
11 make clear that those interests are -- are, I
12 think, truly compelling with respect to the
13 military.

14 CHIEF JUSTICE ROBERTS: So, in that
15 situation, I suppose it depends how significant
16 you think those distinctions are, it might make
17 sense for us not to decide the service academy
18 issue in this case?

19 GENERAL PRELOGAR: Well, I -- I would
20 certainly ask the Court to take account of those
21 distinctive interests and -- and I think to
22 recognize the compelling interest and the
23 critical national security interests that I
24 think --

25 CHIEF JUSTICE ROBERTS: I guess I'm

1 saying I would have thought that you might want
2 to distinguish yourself in order to preserve
3 arguments that are particularly applicable, if
4 there are such arguments, to the service
5 academies, rather than take the position here,
6 which is you're going to be bound by whatever we
7 say with respect to the other universities.

8 GENERAL PRELOGAR: Well, it is
9 critically important to the military to be able
10 to achieve diverse student bodies in the service
11 academies, but it's also critically important,
12 because, actually, more officers come from ROTC
13 programs, to try to protect and preserve space
14 for universities to also achieve the educational
15 benefits of diversity and provide the paths to
16 leadership that inhere in those programs as
17 well.

18 JUSTICE ALITO: What about a college
19 that doesn't have an ROTC program?

20 GENERAL PRELOGAR: I'm sorry, Justice
21 Alito, I didn't hear that.

22 JUSTICE ALITO: I'm -- yeah. What
23 about a college that does not have an ROTC
24 program? Would a -- would a plan that would be
25 permissible in a -- in -- at a college that has

1 a program be impermissible at the latter, at the
2 one that doesn't have the ROTC program?

3 GENERAL PRELOGAR: We're not asking
4 the Court to draw that distinction. And our
5 interest here, I think, does extend more broadly
6 to other federal agencies, to the federal
7 government's employment practices itself, and to
8 having a set of leaders in our country who are
9 trained to succeed in diverse environments.

10 JUSTICE ALITO: Well, then I don't
11 understand the relevance of what you're saying
12 about the link between college education either
13 at a service academy or a school with an ROTC
14 program and the needs of the military if -- if
15 it doesn't matter whether the school has no ROTC
16 program and therefore trains no officers.

17 GENERAL PRELOGAR: Well, Justice
18 Alito, I was trying to focus on the specific
19 question I understood the Chief Justice to be
20 asking about the military's critical interest in
21 this context and just trying to make the point
22 that it's not just confined to the service
23 academies. But we believe deeply in the value
24 of diversity and in universities being able to
25 obtain the educational benefits that correlate

1 with diversity.

2 JUSTICE ALITO: Well, what you say
3 about the military is something that we have to
4 take very seriously. You represent the entire
5 executive branch, including the military, and we
6 have to presume that you are reflecting the
7 views of the military.

8 But what do we do with the fact that
9 the United States was on the opposite side in
10 the Harvard case when the case was in the lower
11 court? And what do we make of -- of the
12 arguments that were made by your predecessor in
13 Grutter? Were they not -- were they insensitive
14 to the needs of the military? Only -- only you
15 have accurately represented the interests of the
16 military?

17 GENERAL PRELOGAR: Well, let me take
18 each of those questions in turn.

19 With respect to the Harvard case, it's
20 true that the United States participated below
21 on the side of Petitioners but only with respect
22 to the factual record and what we thought, my
23 predecessor thought, the evidence showed in the
24 case on the factual issues. We did not take a
25 different position on the legal interests here

1 or assert a different interest on behalf of the
2 military.

3 With respect to the Grutter case,
4 there too the United States did not take a
5 position to call into question whether diversity
6 could qualify as a compelling interest in this
7 context. Instead, the participation of the
8 United States was confined to the narrow
9 tailoring prong of the analysis and whether
10 race-neutral alternatives were permitted. And
11 my predecessor was asked specifically in that
12 argument whether he thought that the military's
13 and the academies' race-conscious admissions
14 programs were unconstitutional, and he declined
15 to say that they were.

16 So I do not think that there is a
17 distinction that's been drawn. And it has, in
18 fact, been the consistent judgment of our senior
19 military leaders across the decades and across
20 administrations, including in the last
21 administration, that it is critically important
22 to our national security to have a diverse
23 officer corps. So that has been a constant and
24 a through-line here.

25 JUSTICE SOTOMAYOR: General, what was

1 the factual basis of the prior administration's
2 support of Petitioner here? It was on what
3 factual issue?

4 GENERAL PRELOGAR: It was on the
5 factual issues with respect to what the evidence
6 showed concerning the intentional discrimination
7 claim. And I should be clear that this was only
8 in the Harvard case. It wasn't in participation
9 in this case involving UNC.

10 JUSTICE SOTOMAYOR: And it did
11 participate here. Didn't it put a brief in?

12 GENERAL PRELOGAR: Not in the UNC
13 case, I don't believe.

14 JUSTICE SOTOMAYOR: So it was only on
15 Harvard --

16 GENERAL PRELOGAR: Only on the Harvard
17 case.

18 JUSTICE SOTOMAYOR: All right.

19 GENERAL PRELOGAR: And I guess what I
20 would say about that, Justice Sotomayor, is it's
21 true my predecessor took a different view of the
22 facts. The district court rejected that view.
23 And the First Circuit affirmed the district
24 court's factual findings. So, as the case comes
25 to this Court, it falls within the Court's

1 two-court rule about usually deferring to the
2 current -- concurrent findings of two lower
3 courts.

4 JUSTICE SOTOMAYOR: Now virtually all
5 of the states that have banned consideration of
6 race in any respect experienced a dramatic drop
7 in enrollment of unrepresented minority
8 students, particularly Black students and Native
9 American students, but particularly Black
10 students. And even that drop lasted in most of
11 those institutions, if they're not continuing
12 now, at their most prestigious colleges and
13 universities, correct?

14 GENERAL PRELOGAR: That's correct.

15 JUSTICE SOTOMAYOR: So there is --

16 GENERAL PRELOGAR: With respect to
17 Michigan and --

18 JUSTICE SOTOMAYOR: -- a high price to
19 pay by banning the minor use of race in college
20 admissions, isn't there?

21 GENERAL PRELOGAR: I agree with that,
22 Justice Sotomayor.

23 JUSTICE SOTOMAYOR: And that means
24 that there's a diverse -- there's lesser number
25 of diverse graduates that enter the pipeline not

1 just to the government but to government
2 departments, to the private sector. Many of
3 them require higher education, and so that
4 pipeline is being reduced, correct?

5 GENERAL PRELOGAR: That's correct.

6 JUSTICE SOTOMAYOR: So, in the end,
7 our color blindness, whatever that means because
8 our society is not color blind in its effects,
9 that comes as a high cost not only to UNC and to
10 the state and to the nation as a whole, correct?

11 GENERAL PRELOGAR: That is correct.

12 And -- and I think, again, to return to the
13 example of the military, it's -- the pipeline
14 question is critically important there because
15 the military has a closed personnel system, and
16 what that means is we don't do lateral hiring.
17 And the individuals who are entering college
18 today, the individuals who are participating in
19 ROTC programs today at civilian institutions or
20 who are admitted to the service academies today
21 are the closed universe of individuals who are
22 going to be eligible for leadership in the
23 military in 20 and 30 years' time.

24 JUSTICE SOTOMAYOR: So, if we overrule
25 Bakke, Grutter, and Fisher, the diversity

1 admissions programs across the nation based on
2 those cases will have to be reformulated --

3 GENERAL PRELOGAR: Yes.

4 JUSTICE SOTOMAYOR: -- in every
5 instance? We will have to -- we're affecting
6 countless existing programs?

7 GENERAL PRELOGAR: Correct.

8 JUSTICE SOTOMAYOR: We're reducing
9 underrepresented minorities?

10 GENERAL PRELOGAR: Yes.

11 JUSTICE SOTOMAYOR: We are depriving
12 others who are not there of the benefits of
13 diversity?

14 GENERAL PRELOGAR: Yes.

15 JUSTICE SOTOMAYOR: And we're doing
16 all this because race is one factor among many
17 that is never solely determinative, correct?

18 GENERAL PRELOGAR: Yes.

19 JUSTICE SOTOMAYOR: Seems like a lot
20 to ask.

21 GENERAL PRELOGAR: But I do want to
22 emphasize, to the questions about whether this
23 will end and the questions that, Justice Barrett
24 and Justice Kavanaugh, you were asking about
25 Grutter's 25-year context, that I do think that

1 eventually there is an end point in sight, and
2 it comes directly from the Court's narrow
3 tailoring doctrine in this area.

4 I think that diversity in higher
5 education is absolutely a compelling interest
6 and it will remain so. That is constant.
7 That's not going to change. But our society is
8 going to change in ways that enable more and
9 more universities and colleges to try to achieve
10 the benefits of educational diversity without
11 having to take race explicitly into account.

12 CHIEF JUSTICE ROBERTS: Grutter gave
13 us a number. Are you going to give us a number?

14 GENERAL PRELOGAR: I can't give you a
15 precise number, Mr. Chief Justice, but I can say
16 that I think that our society has made some
17 progress toward that goal. And there are states
18 today that do not take account of race in
19 college admissions. There are universities that
20 don't take account in college admissions. And
21 some of those institutions have still been able
22 to achieve diverse student bodies.

23 And so we are not here to suggest that
24 every college and -- and university in the
25 country needs to have race-conscious admissions

1 in order to achieve these goals. The fact that
2 there has been progress along these lines I
3 think shows that Grutter is working. It shows
4 that as our society continues to make additional
5 progress, this Court's observation there will
6 come to fruition, that we will still be able to
7 achieve those benefits, but we don't need to
8 explicitly take account of race to get there.

9 CHIEF JUSTICE ROBERTS: That's very
10 different from what Justice O'Connor said. She
11 said race-conscious admissions programs must be
12 limited in time. That was a requirement. So
13 that part of Grutter should be disregarded?

14 GENERAL PRELOGAR: No, not at all.
15 This Court has made clear and reemphasized in
16 Fisher I and Fisher II that universities are
17 under a constant obligation to evaluate their
18 policies. They cannot adopt race-conscious
19 admissions and just sit back reflexively and let
20 that play out forever into the future. Instead,
21 they need to continuously reevaluate whether
22 progress has been made such that they can use
23 race-neutral alternatives to achieve the same
24 goals.

25 And I think that the Court has not

1 retreated from that aspect of Grutter but that
2 it would be incorrect as a matter of
3 constitutional principle to instead understand
4 Grutter to have set a firm expiration date on
5 the nature of the compelling interest here.

6 JUSTICE KAGAN: And as to the nature
7 of the compelling interest, you've made a very
8 convincing case on behalf of the military. I'm
9 wondering whether if we had somebody
10 representing law firms or representing medical
11 facilities or representing businesses in America
12 or representing any of the wide variety of
13 institutions that -- that are critical to the
14 well-being of this country, whether they might
15 make a similar case.

16 Obviously, the -- the particularities
17 would differ, but that the essential nature of
18 the argument would be the same.

19 GENERAL PRELOGAR: That's absolutely
20 correct. And you do have many of those entities
21 participating in this case as amici in support
22 of Respondent to explain how critical it is for
23 them to have access to a pipeline of -- of
24 students who have been trained in diverse
25 environments and who themselves broadly reflect

1 the community.

2 So I think it's -- it's absolutely the
3 case that the business community, that every
4 aspect of society would feel the -- the -- the
5 shock waves if this Court were to retreat from
6 Grutter now.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Thomas?

10 Justice Alito?

11 Justice Kagan?

12 JUSTICE KAGAN: I would ask on a
13 completely different question, but one notable
14 thing about the argument here is that on both
15 sides there's been very little discussion of
16 what originalism suggests about this question.

17 And I -- so I just want to ask, what
18 would a committed originalist think about the
19 kind of race-consciousness that's at issue here?

20 GENERAL PRELOGAR: I think that an
21 originalist would think that this is clearly
22 consistent with the original understanding of
23 the Fourteenth Amendment, that universities have
24 come forward with powerful evidence that
25 surrounding the time of enactment of the

1 Fourteenth Amendment there were federal and --
2 and state laws that took race into account for
3 purposes of trying to achieve the central
4 premise of the Fourteenth Amendment to bring
5 African American citizens to a point of equality
6 in our society.

7 And I think what's so notable if the
8 Court is focused on history here is that
9 Petitioner has come forward with essentially no
10 history to support this color-blind
11 interpretation of the Constitution that would
12 make all racial classifications automatically
13 unconstitutional. There's nothing in history to
14 support that.

15 And it takes aim not only most
16 directly at cases like Bakke and Grutter and
17 Gratz and Fisher and this case but also at the
18 Court's entire structure here of applying strict
19 scrutiny specifically to take into account when
20 a racial classification might serve a compelling
21 interest and be necessary to achieve that
22 interest.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch?

25 JUSTICE GORSUCH: I -- I'd like to

1 focus for a moment on -- on the statutory
2 question. It's one I raised earlier. I'd like
3 your thoughts on it.

4 We have both a constitutional claim
5 but also a statutory claim, Title VI. And I
6 understand our precedents have often conflated
7 the two, but put that aside for the moment.

8 Justice Stevens made a powerful
9 argument in Bakke that whatever the Fourteenth
10 Amendment permits or does not permit, Title VI's
11 language is plain and clear just as Title VII
12 is. And Title VII does not permit
13 discrimination on the basis of sex, and Title VI
14 does not permit discrimination on the basis of
15 race.

16 Can you help me with that?

17 GENERAL PRELOGAR: Sure, Justice
18 Gorsuch. So I think that the Court in Bakke and
19 Grutter correctly interpreted Title VI, the
20 statute, as --

21 JUSTICE GORSUCH: Where -- where did
22 Justice Stevens err?

23 GENERAL PRELOGAR: In not recognizing
24 that the term "discrimination" in this context
25 is ambiguous. And I think that the legislative

1 history therefore carries --

2 JUSTICE GORSUCH: We didn't find it --

3 GENERAL PRELOGAR: -- forth in this
4 context.

5 JUSTICE GORSUCH: -- we didn't find it
6 ambiguous in Bostock. Why should we find it
7 ambiguous now?

8 GENERAL PRELOGAR: Well, I think that
9 -- I -- I think that the statute doesn't define
10 --

11 JUSTICE GORSUCH: Were we wrong in
12 Bostock?

13 GENERAL PRELOGAR: No, I'm not
14 suggesting that. But, Justice Gorsuch, I know
15 you asked me to put to the side that --

16 JUSTICE GORSUCH: I did.

17 GENERAL PRELOGAR: -- the Court has
18 already resolved this issue. I just would
19 emphasize that --

20 JUSTICE GORSUCH: All right. You're
21 going to go back to that. Okay.

22 GENERAL PRELOGAR: -- we're talking
23 about a statute here, statutory stare decisis
24 considerations have their greatest force.
25 Congress has never overturned this Court's

1 interpretation of Title VI. Petitioners aren't
2 asking this Court to revisit its interpretation
3 of Title VI --

4 JUSTICE GORSUCH: On the text, though,
5 do you have anything else?

6 GENERAL PRELOGAR: I would point to
7 the ambiguity in the term "discrimination."

8 JUSTICE GORSUCH: Okay. But it's not
9 ambiguous in Title VII?

10 GENERAL PRELOGAR: No, and -- and we
11 respect this Court's decision in Bostock.

12 JUSTICE GORSUCH: It's just ambiguous
13 in Title VI, the same word?

14 GENERAL PRELOGAR: This Court has held
15 that multiple times.

16 JUSTICE GORSUCH: Okay. What do we
17 say to Asian Americans who there's a veritable
18 cottage industry we're told by the briefs that
19 they are encouraging Asian applicants to avoid
20 and beat "Asian quotas"? That's how they
21 perceive it.

22 Is that an important consideration in
23 that they tell applicants -- coaches tell
24 applicants to disguise their backgrounds and
25 their names to the extent possible in order to

1 secure what they view as an even footing in the
2 admissions process?

3 GENERAL PRELOGAR: I find those
4 accounts appalling. They are not permitted
5 under the Constitution. It's very clear that
6 racial identity cannot be treated as a negative.
7 That would be intentional discrimination. It's
8 prohibited under Equal Protection. It's
9 prohibited under Title VI, and Grutter does not
10 countenance it.

11 So, to the extent that that is
12 happening at any educational institution around
13 this country, it's unlawful and should -- the
14 university should be held accountable for it.

15 JUSTICE GORSUCH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh?

18 JUSTICE KAVANAUGH: I understand your
19 point about the race-conscious decision-making
20 being allowed in certain circumstances under the
21 Equal Protection Clause, and, certainly,
22 precedent in the school desegregation cases
23 allows that as well and so -- so does Bakke,
24 obviously.

25 And you read Justice Marshall's

1 opinion in Bakke and that's a very forceful and
2 compelling explanation of why -- why that is so
3 important and why that was in his view necessary
4 for some time.

5 But even in Bakke, Justice Blackmun
6 was saying there must be a time when in he said
7 I hope 10 years, this was in 1978, and he then
8 said that hope is a slim one. And then you got
9 to Grutter, and that was a very similar argument
10 to this one.

11 And -- and we've talked about, just to
12 pick up on the Chief Justice's question, the --
13 the reference there, I think, was because
14 Justice O'Connor's majority opinion was
15 concerned about indefinite extension, and you've
16 said don't worry about that.

17 How will we know when the time has
18 come?

19 GENERAL PRELOGAR: The time will be
20 here when universities are able to enroll
21 diverse student bodies without having to take
22 explicit account of race in the admissions
23 process.

24 JUSTICE KAVANAUGH: So, if I can just
25 break that down, I think what you're saying, but

1 correct me if you disagree, is that when
2 race-neutral alternatives produce a sufficient
3 percentage of underrepresented minority students
4 in the student body.

5 Is that an accurate translation?

6 GENERAL PRELOGAR: Yes, when it allows
7 for meaningful representation and meaningful
8 diversity on those campuses.

9 JUSTICE KAVANAUGH: Okay. And what --
10 I used the word "sufficient," you used
11 meaningful, but what number?

12 GENERAL PRELOGAR: So I -- I -- I
13 think that it's not reducible to a precise
14 number or percentage. The Court has made clear
15 and just recently in Fisher II considered
16 exactly this question and made clear that, of
17 course, there -- there aren't quotas or specific
18 numerical thresholds that need to be reached.
19 That's not the right way to think about the
20 diversity interest in this context.

21 Now I don't want to suggest that --
22 that demographics are wholly irrelevant here.
23 The Court has also said in Grutter and then
24 reiterated in Fisher that numbers can remain
25 relevant for purposes of trying to measure

1 whether there's truly a meaningful opportunity,
2 for example, to have cross-racial interactions.

3 JUSTICE KAVANAUGH: But, if you don't
4 have a number, and I understand why it's
5 difficult, and I understand the problems with
6 that, I get all that, but if you don't have
7 something measurable, it's going to be very hard
8 for this Court, if we're called upon 10 years
9 from now or 20 years from now, it's going to
10 be -- you know, this is a bit of a replay of the
11 Grutter argument, but if we come back to it,
12 okay, are we there yet? What do we look at?

13 You're saying meaningful opportunity.
14 I don't know exactly what that means. I don't
15 know how the schools will know when they have to
16 -- when they've -- you know -- the -- the --
17 when the race-neutral alternative could get them
18 close enough or -- it has to meet some
19 threshold. I don't know what "meaningful"
20 means.

21 I know what it means in terms of what
22 you're describing. I don't know how it
23 translates to looking at the composition of a
24 student body achieved through race-neutral
25 alternatives and says, yes, that gives them

1 meaningful opportunity.

2 And I don't know how educators are
3 going to make that decision, so any help you can
4 provide on that I would appreciate.

5 GENERAL PRELOGAR: Sure. And I -- I
6 think that it's going to be tied to the direct
7 educational benefits that the university has
8 articulated that it's trying to achieve, and
9 those can be measured.

10 I would point to, I think, three
11 overarching categories or ways to try to measure
12 progress toward the goal. The first can be
13 quantitative or objective evidence. I'll use
14 the service academies again as another example.

15 One of the things they have looked at
16 and measured is the disparities in graduation
17 and attrition rates. And the Coast Guard
18 Academy, for example, discovered when it went to
19 Congress in the early 2000s to try to ask
20 Congress to lift the ban on the use of race in
21 admissions, which Congress did in 2010, what the
22 Coast Guard Academy said is it had studied the
23 issue with respect to women and discovered that
24 when enrollment of women stabilized at about 25
25 to 30 percent of the population, those

1 disparities of -- of women not graduating in the
2 same -- at the same rate as men fell by the
3 wayside and disappeared. And so I think
4 graduation and attrition rates are relevant.

5 I think that a university can also
6 measure the degree of race-related incidents
7 on -- on campus and whether those are happening.
8 I think the university can look at patterns of
9 enrollment in its classes to determine whether
10 the -- the classroom environment is diverse and
11 there are those opportunities for cross-racial
12 understanding. So that's all the first
13 category.

14 The second category I would point to
15 is the one I've already referenced,
16 demographics. I think that that can be
17 relevant, again, not to set a quota, not to
18 identify a precise numerical threshold but in
19 recognition that when there are extreme
20 disparities in representation of certain groups,
21 it can cause people to wonder whether the path
22 to leadership is open.

23 And if I could, maybe I could just
24 give, I think, a common sense example of that
25 that I would hope would resonate with this

1 Court.

2 The Court is going to hear from 27
3 advocates in this sitting of the oral argument
4 calendar, and two are women, even though women
5 today are 50 percent or more of law school
6 graduates. And I think it would be reasonable
7 for a woman to look at that and wonder, is that
8 a path that's open to me, to be a Supreme Court
9 advocate? Are private clients willing to hire
10 women to argue their Supreme Court cases? When
11 there is that kind of gross disparity in
12 representation, it can matter and it's common
13 sense.

14 And then the third category to -- to
15 finish this up here, that I think that
16 universities can look at is subjective or
17 qualitative evaluation of actual student
18 experiences. You can do things like conduct
19 high-quality surveys of students to ask them
20 what opportunities have you had to interact with
21 people of a -- of a different race from you?
22 What did you learn from those experiences? Did
23 it challenge your thinking? If you are an
24 underrepresented minority student, do you feel
25 isolated? Do you feel like you have to be a

1 spokesperson for your race? And so that can
2 yield relevant data as well to help measure
3 progress toward these goals.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 JUSTICE BARRETT: General, I have a
8 question about the originalists' evidence. And,
9 you know, there's nuance in that, and I don't
10 want to get into the details of that, but my
11 question is how it would affect your position in
12 this case. So I entirely agree with you and
13 it's established in our precedent that it's not
14 always illegal to take race-conscious measures.
15 Remedial measures, you know, are -- are an
16 example of that.

17 Do you agree, though, on your
18 understanding of the originalist evidence that
19 strict scrutiny -- and, obviously, we didn't
20 think about scrutiny in those days, but, you
21 know, it's not accurate to say, I agree with
22 you, when you look at the originalist evidence
23 that it was always color-blind, that some
24 race-conscious measures were permitted at least
25 in a remedial sense, right? Desegregation is an

1 example of that. So the question is, under what
2 circumstances have those remedial measures been
3 permitted? And, you know, that's a Section 5
4 question. How would that originalist evidence
5 affect your case?

6 If you were writing on a blank slate,
7 would you say that university affirmative action
8 programs don't implicate the Fourteenth
9 Amendment? Or are you saying that they just
10 very plainly would satisfy our modern tiers of
11 scrutiny because the interest is compelling even
12 if we didn't have Bakke, Grutter, Fisher, et
13 cetera?

14 GENERAL PRELOGAR: I think that
15 because they involve racial classifications, it
16 is necessary to test them under strict scrutiny.
17 And so we're not suggesting that under an
18 originalist case, they would just be
19 automatically exempt.

20 I think the Court has rightly
21 recognized in this context that anytime a racial
22 classification is used, you want to subject that
23 to the most searching scrutiny in order to test
24 for whether it could possibly be justified based
25 on compelling interest and also, of course, to

1 push on narrow tailoring.

2 But, here, we think that the Court
3 rightly concluded in Bakke and Grutter and
4 Fisher that narrow tailoring and compelling
5 interest are satisfied.

6 JUSTICE BARRETT: Thanks.

7 CHIEF JUSTICE ROBERTS: Justice
8 Jackson?

9 JUSTICE JACKSON: Yes. I just wanted
10 two quick things. One is about the originalist
11 position. Isn't it at least ambiguous as to
12 what the history is telling us about -- about
13 whether or not race-consciousness can be used?

14 I know your position and the position
15 of some folks is that it's clear that the
16 history is saying race-consciousness is okay.
17 And -- and as Justice Barrett mentioned, there
18 is evidence of that.

19 And if there's evidence on the other
20 side, don't we need to have a clear picture of
21 this in order to overcome stare decisis? I
22 mean, we have the historic -- historians' brief
23 that says even if the history was unclear, and
24 it's not, overcoming stare -- stare decisis
25 requires something more than ambiguous

1 historical evidence.

2 Do you agree with that?

3 GENERAL PRELOGAR: I do agree with
4 that. I think that Petitioner bears a heavy
5 burden in this case because we're in a situation
6 where stare decisis considerations apply, and I
7 think it would be destabilizing for the Court to
8 turn its back on precedent here.

9 And I think what can undoubtedly be
10 said about history, although there are some
11 complications in the record, what is undoubtedly
12 true is that Petitioner has not been able to
13 point to any clear history to support the notion
14 that racial classifications were automatically
15 and invariably unconstitutional.

16 JUSTICE JACKSON: And, finally, is
17 there some connection between how race is being
18 used and the concerns that some of my colleagues
19 have about the amount of time?

20 So what -- what I'm trying to get at
21 or think about is whether Bakke, for example --
22 Bakke was a set-aside program as far as I
23 understood, that there was actually 16 seats in
24 a class of a hundred that were being set aside
25 for underrepresented minorities, and, therefore,

1 obviously, the concerns about perniciousness and
2 being problematic and we want it to end, we
3 don't want this going on forever.

4 But, when you have a situation like
5 this in which you're talking about a holistic
6 review, other people are getting pluses in the
7 system, no one's automatically getting a plus in
8 the system, I wonder if the urge to end it --
9 and what is the end it? The end it is to
10 include race alongside 40 other characteristics.
11 I wonder if it implicates the same kinds of
12 concerns about the use of race?

13 GENERAL PRELOGAR: Yes, Justice
14 Jackson. I think that there is a lot of force
15 to that point. And I think that the UNC record
16 really illustrates this point, that UNC has held
17 itself to the standards this Court has
18 articulated in using race as only one of a
19 multitude of factors in holistic admissions and
20 deploying race-neutral alternatives and not
21 using race when it's not necessary to achieve
22 true student body diversity.

23 And -- and maybe that means that given
24 the limited way that race functions, it is
25 taking longer for our society to get to the

1 point that everyone agrees we will eventually
2 reach, but I don't think that that's a basis to
3 condemn Grutter now and halt progress in its
4 tracks.

5 JUSTICE JACKSON: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 General.

8 Mr. Strawbridge, rebuttal?

9 REBUTTAL ARGUMENT OF PATRICK STRAWBRIDGE
10 ON BEHALF OF THE PETITIONER

11 MR. STRAWBRIDGE: Thank you, Mr. Chief
12 Justice. I'm going to try to make four points
13 here.

14 First, with respect to the military,
15 the -- the United States brief on that is long
16 on assertions that race-neutral alternatives are
17 not available to it and would not work but not
18 actually long on any evidence of that fact. We
19 don't know precisely what race-neutral
20 alternatives they have looked at. We don't know
21 what has been tried. We don't know what else
22 could be available to them, especially with the
23 fact that they can draw on appointed --
24 appointments from the enlisted ranks, as well as
25 from prep schools.

1 The only actual information we have
2 about how race-neutral alternatives might work
3 in the military academy setting is the Coast
4 Guard when it was race-neutral. The last year
5 that the Coast Guard was not using race as a
6 factor in admissions, it expanded race-neutral
7 recruiting and other pipeline initiatives, and
8 it obtained underrepresented minority enrollment
9 within two points of the Air Force Academy and
10 West Point, which were using race as a -- as an
11 admissions factor.

12 Nor is there any evidence to suggest
13 that the ROTC candidates who come from Texas A&M
14 and Florida and California and Michigan are less
15 diverse, let alone have received fewer benefits
16 of educational diversity than those who come
17 from UNC.

18 With respect to the originalism point,
19 obviously, we think that -- that our reading is
20 consistent with the originalists' reading. The
21 best source on this is actually the United
22 States' brief in the Brown reargument hearing.
23 It has, actually, the most complete survey of
24 information about the meaning of the Fourteenth
25 Amendment, and it concludes on page 65 of that

1 brief that a general understanding of the broad
2 scope of the Fourteenth Amendment when it was
3 enacted is that it would "prohibit legal
4 distinctions based on race or color." That is
5 our position. That was the position in Brown.
6 It's the position that prevails today.

7 There is an assertion that California
8 and Michigan have seen their white enrollment go
9 up since they discarded the use of race. That
10 is not true. In Michigan, underrepresented
11 minority is actually higher today than it was
12 during race-conscious admissions. Additionally,
13 Asian American admissions have gone up six
14 points. Asian Americans are not white. It's
15 necessary that the white share of the class has
16 gone down.

17 At California, the -- the -- the most
18 recent -- or the 2021 class of California, and
19 there was testimony about this in the trial
20 record, Berkeley is 19 percent white, it's
21 15 percent Mexican American, it's 5 percent
22 other Hispanic, it's 16 percent Chinese
23 American, it's 4 percent Vietnamese, it's
24 4 percent Korean, and it's 4 percent Black. And
25 we are told that the students there are somehow

1 being deprived of the educational benefits of
2 diversity or are being deprived of diverse
3 environment. I don't think that's correct.

4 Finally, with respect to my friend
5 from UNC, he insisted that they were committed
6 as close as they could to exploring race-neutral
7 alternatives and having an end point. There was
8 no criteria described to this Court by which one
9 could ever -- ever conclude that their interest
10 in obtaining educational benefits have been
11 satisfied. There was a reference to climate
12 surveys, but the Director of Admissions
13 testified at trial that he had not looked at a
14 climate survey in 10 years. There was no ever
15 -- there was no plan ever to consider sunseting
16 their use of race. There was never even a
17 serious effort in the office to measure what the
18 effect of race was in their current admissions
19 program, even though they had done so for
20 gender, for legacy status, and for time of
21 application.

22 I don't think that's consistent with a
23 university that's actually committed to moving
24 off of race. The fact that the district court
25 found this all survived strict scrutiny under

1 Grutter is a reason to overrule Grutter.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel, counsel. The case is submitted.

4 (Whereupon, at 12:47 p.m., the case
5 was submitted.)

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