

SUPREME COURT OF THE UNITED STATES

IN THE 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.

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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 -- this Court has
15 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. 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 have -- carry
3 stigmatic 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, most of the Freedmen Bureau's activities
15 are entirely consistent with this Court's
16 existing strict scrutiny rationale, even in the
17 educational context, that remediation is an
18 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 was -- there
10 was a desire to make 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: And was that --

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

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

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

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

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

23 MR. STRAWBRIDGE: Well, and --

24 CHIEF JUSTICE ROBERTS: Maybe, for
25 example, socioeconomic status, maybe attendance

1 at a particular school that's known to be --

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

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

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

25 I think that that's pretty true to

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

5 Is that permissible?

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

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

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

22 MR. STRAWBRIDGE: Right.

23 JUSTICE KAGAN: So the question, I
24 suppose, is why -- I mean, I -- I -- I took your
25 answer, which I welcome, to be yes, of course,

1 the 10 percent plans are constitutional. But I
2 guess I wonder why, given our -- most of our
3 constitutional doctrine, that would be so.

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

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

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

1 analysis. There's burden-shifting that occurred
2 there.

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

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

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

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

24 JUSTICE SOTOMAYOR: But isn't that
25 what this plan in UNC already does? Race is

1 never the determinative factor. That was a
2 finding by the district court.

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

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

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

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

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

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

22 MR. STRAWBRIDGE: No, I think the
23 court acknowledged that race has an influence on
24 1.2 -- 1.2 percent of in-state decisions and
25 5.2 percent of out-of-state decisions.

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

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

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

21 And so I've been struggling to
22 understand exactly -- this is sort of where
23 Justice Sotomayor was coming from. I've been
24 struggling to understand how race is actually
25 factoring into the admissions process here and

1 whether there's any actual redressable injury
2 that arises.

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

6 MR. STRAWBRIDGE: Well --

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

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

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

22 Here, I don't really see that
23 happening because no one is -- first of all, the
24 university is not requiring anybody to give
25 their race at the beginning. When you give your

1 race, you're not getting any special points.
2 It's being treated just on par with other
3 factors in the system.

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

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

14 MR. STRAWBRIDGE: Well, but even --

15 JUSTICE JACKSON: -- can you help me?

16 MR. STRAWBRIDGE: I'm sorry.

17 JUSTICE JACKSON: Yes, please.

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

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

25 MR. STRAWBRIDGE: Well, no, one of the

1 --

2 JUSTICE JACKSON: -- standing.

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

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

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

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

24 MR. STRAWBRIDGE: Well --

25 JUSTICE JACKSON: That you're saying

1 that we can challenge the use of race as a
2 factor without explaining how it's factoring in
3 and how that harms our members.

4 MR. STRAWBRIDGE: Well, I --

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

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

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

21 JUSTICE JACKSON: Are you sure about
22 that?

23 MR. STRAWBRIDGE: Yes.

24 JUSTICE JACKSON: Because I thought
25 that was not a rule, that anyone could get a

1 point for diversity, anyone could get a point
2 for racial diversity, to the extent that the
3 other factors in their application allow for it.

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

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

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

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

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

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

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

19 JUSTICE BARRETT: Have I
20 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 --

3 JUSTICE BARRETT: -- statement?

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

7 JUSTICE BARRETT: Thank you.

8 JUSTICE SOTOMAYOR: What -- where?

9 MR. STRAWBRIDGE: Where?

10 JUSTICE SOTOMAYOR: Where?

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

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

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

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

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

25 JUSTICE SOTOMAYOR: But you're making

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

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

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

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

15 JUSTICE SOTOMAYOR: Well --

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

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

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

22 JUSTICE JACKSON: -- as a result?

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

1 JUSTICE JACKSON: Did they --

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

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

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

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

1 experience of the applicant other than their
2 skin color.

3 JUSTICE KAGAN: And --

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

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

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

25 JUSTICE SOTOMAYOR: Do we -- do we --

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

3 CHIEF JUSTICE ROBERTS: They also --

4 JUSTICE KAGAN: Isn't there a little
5 bit --

6 CHIEF JUSTICE ROBERTS: -- they also
7 --

8 MR. STRAWBRIDGE: -- that those meet.

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

14 MR. STRAWBRIDGE: That's --

15 CHIEF JUSTICE ROBERTS: Because --

16 MR. STRAWBRIDGE: Yes, that is true.
17 And that's -- that's the record in both cases,
18 is that racial preferences operate to the
19 disadvantage of Asian American applicants.

20 JUSTICE KAGAN: Is just --

21 CHIEF JUSTICE ROBERTS: So it is the
22 case that African American applicants can
23 highlight that aspect of their background in
24 situations such as the one that you mentioned
25 and that people reading that file in the

1 admissions office can look at that and take that
2 into account?

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

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

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

24 MR. STRAWBRIDGE: Yes. But our point
25 is that all those other characteristics are not

1 barred by the Constitution, and the use of race
2 as a classification is barred by the
3 Constitution.

4 JUSTICE JACKSON: But it has to be
5 used --

6 MR. STRAWBRIDGE: That's what makes
7 that difference.

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

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

22 JUSTICE JACKSON: No --

23 JUSTICE ALITO: Well, Mr. Strawbridge
24 --

25 JUSTICE JACKSON: -- no -- no -- no --

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

7 MR. STRAWBRIDGE: Well, I don't think
8 --

9 JUSTICE JACKSON: -- if it never comes
10 into play.

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

23 But both experts in this case found
24 that race was, in fact, mattering to a number of
25 applications. You can -- you can debate between

1 our expert and their expert whether it's only
2 500 or it's 1700 or it's 2,000 applications a
3 year, but it is having an effect. If it's not
4 having an effect, they've spent an awful lot of
5 time and money opposing the relief we're seeking
6 in this case.

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

19 Would that be permissible?

20 MR. STRAWBRIDGE: I think that that
21 would generally be permissible because the --
22 the preference in that case is not being based
23 upon the race but upon the cultural experiences
24 or the ability to adapt or the fact of
25 encountering a new language in a new -- in a new

1 environment.

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

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

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

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

23 The only reason why the university
24 knows the race of any of these applicants is
25 because they are voluntarily providing that.

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

5 JUSTICE GORSUCH: Counsel --

6 JUSTICE SOTOMAYOR: Do --

7 JUSTICE GORSUCH: Oh, I'm sorry, go
8 ahead.

9 JUSTICE SOTOMAYOR: No, no, go ahead.

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

17 How are we to think about
18 distinguishing between those concepts?

19 MR. STRAWBRIDGE: Well, so the racial
20 diversity point is interesting because the
21 Court's other precedents have rejected racial
22 diversity as a compelling interest in the
23 employment context with -- in Wygant at least.
24 It's rejected racial diversity as a relevant
25 factor in K-through-12 education.

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

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

14 Would it -- it just -- you know, too
15 bad?

16 MR. STRAWBRIDGE: Well, I don't think
17 that it's going to fall through the floor if the
18 university is actually committed to the broader
19 diversity it wants because it didn't --

20 JUSTICE KAGAN: Right. I know you
21 think that. And there's been -- obviously, a
22 lot of the litigation has been about that, how
23 much will it decline and your expert and their
24 expert. But the logic of your position suggests
25 that that really doesn't matter.

1 I mean, the last 10 pages of your
2 brief where you say is -- is -- is -- has there
3 been narrow tailoring here, it matters in that
4 10 pages. But it doesn't matter if you're
5 saying there's a categorical rule, no race shall
6 be involved in admissions decisions, then it
7 doesn't matter if minority enrollment or
8 particular kinds of minority enrollment fall
9 through the floor, does it?

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

18 I doubt any university would ever make
19 that decision. That has not been the
20 experience, for example, in Florida, which is
21 race-neutral, has very similar demographics to
22 UNC, and by UNC's own admission in this record,
23 actually achieves better racial diversity, as
24 well as 50 percent greater number of Pell Grant
25 recipients.

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

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

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

20 Now, if universities are not racially
21 diverse and your rule suggests that it doesn't
22 matter, well, then all of those institutions are
23 not going to be racially diverse either.

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

25 JUSTICE KAGAN: And -- and I thought

1 that part of what it meant to be an American and
2 to believe in American pluralism is that
3 actually our institutions, you know, are
4 reflective of who we are as -- as a people in
5 all our variety.

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

14 And so, naturally, a government that
15 treats people fairly and that makes opportunity
16 open to all will necessarily see racial
17 diversity.

18 JUSTICE KAGAN: But, Mr. Strawbridge
19 --

20 MR. STRAWBRIDGE: And, indeed, that's
21 been the experience of --

22 JUSTICE KAGAN: -- you -- you -- you
23 said, and I think you're right to say this, you
24 said to one of my colleagues' questions, you
25 know, if this didn't matter, they're spending an

1 awful lot of time and money and -- and anxiety
2 doing something that doesn't matter.

3 So let's presume it does matter.

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

14 MR. STRAWBRIDGE: Well, because I
15 think one of the problems with Grutter is that
16 it suggests that this is somehow costless, that
17 if it's one factor among many and we can't
18 identify, you know, exactly how many points race
19 is getting, although, obviously, statistical
20 analysis does allow us to do that at some point,
21 Grutter says it's not that big of a deal, it's
22 always a plus factor and never a negative.

23 But this is a zero sum game. That is
24 one of the problems with Grutter, is that it
25 suggests that the harm of racial

1 classifications, which this Court have always
2 recognized are inherent and invidious of
3 themselves, can be -- can be -- can be, you
4 know, hidden or pushed down as long as race is
5 just one of many factors.

6 JUSTICE JACKSON: But that doesn't --

7 CHIEF JUSTICE ROBERTS: Counsel, if
8 you have -- I -- I thought your objection is
9 also that the race-neutral alternatives -- you
10 have to try race-neutral alternatives first.

11 You don't think the university has,
12 right?

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

20 CHIEF JUSTICE ROBERTS: So, if -- if
21 they do -- if they cannot take the box being
22 checked into account or -- or can't do that and
23 do try race-neutral alternatives, is there any
24 evidence in the record about what the results of
25 those would be?

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

8 MR. STRAWBRIDGE: I want to make sure
9 I understand Your Honor's question. Is -- is --

10 CHIEF JUSTICE ROBERTS: It might have
11 been a little awkwardly phrased.

12 MR. STRAWBRIDGE: I would -- I would,
13 never suggest that. Is -- is -- is -- is the
14 question as to whether or not there's some sort
15 of cheating going on, or is the question whether
16 the race-neutral --

17 CHIEF JUSTICE ROBERTS: No, not -- not
18 a bit. The question is -- the -- the -- the
19 discussion has been about the dramatic
20 plummeting of the number of African American
21 students that would take place if the practice
22 of checking the box with -- with race is taken
23 away.

24 And my suggestion is, if that's not,
25 then maybe there will be an incentive for the

1 university to, in fact, truly pursue
2 race-neutral alternatives, such as, you know,
3 allowing, which I think would be allowed,
4 students, applicants to indicate experiences
5 they have had because of their race.

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

15 Something like -- like the average
16 median income in North Carolina is about \$53,000
17 a year, but the average UNC student comes from a
18 family making \$153,000 a year, and at least at
19 trial there was testimony from the Director of
20 Admissions that the percentage of
21 first-generation college students and the
22 students who were receiving scholarships under
23 the Carolina Covenant, which is a socioeconomic
24 benefit, had declined in recent years.

25 JUSTICE KAVANAUGH: Your position will

1 put a lot of pressure going forward, if it's
2 accepted, on what qualifies as race-neutral in
3 the first place. You said socioeconomic is
4 race-neutral. Top 10 percent plan,
5 race-neutral.

6 Is -- you want to respond to that?

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

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

20 MR. STRAWBRIDGE: I think descendants
21 of slaves is a very difficult question because
22 it's so -- it's so highly correlated with race
23 in the history of our country. I'm not sure
24 that any college has proposed that kind of a
25 preference. It would have to --

1 JUSTICE KAVANAUGH: Well, I know we
2 have to think forward about what will happen if
3 you prevail in this case, and that seems a
4 potential, so I'm curious about your answer to
5 that question.

6 MR. STRAWBRIDGE: My -- my instinct
7 standing here is, if that were the only basis,
8 then -- then that -- that -- that very quickly
9 starts to look like just a pure proxy for race.
10 It would obviously depend on the actual program
11 as it -- as it was implemented.

12 JUSTICE KAVANAUGH: Could you give a
13 plus to applicants whose parents were immigrants
14 to this country?

15 MR. STRAWBRIDGE: I think that you --

16 JUSTICE KAVANAUGH: Is that
17 race-neutral?

18 MR. STRAWBRIDGE: I think that if it
19 -- if it -- if it is immigrants regardless of
20 country --

21 JUSTICE KAVANAUGH: Yes.

22 MR. STRAWBRIDGE: -- and regardless of
23 their racial descent, I think that that is
24 probably closer to being okay.

25 JUSTICE GORSUCH: Counsel, what did

1 the evidence show in terms of race-neutral
2 alternatives from your perspective?

3 MR. STRAWBRIDGE: There were --

4 JUSTICE GORSUCH: At least in terms --
5 would -- would numbers plummet?

6 MR. STRAWBRIDGE: No. Following the
7 analysis -- following the analysis that was used
8 in the other case, we -- we presented a number
9 of circumstances, some of which -- which assumed
10 a holistic process, just a holistic process that
11 was no longer putting a thumb on the scale for
12 students of particular races.

13 And it showed that you could get to
14 the current academic credentials of UNC, average
15 SAT and -- and GPA within, you know, 15 points,
16 you could get very similar, you know, less than
17 a 1 percentage difference in -- in -- in the
18 individual racial breakdowns to the extent those
19 are relevant, so equal or greater than overall
20 underrepresented minority representation, and,
21 of course, socioeconomic diversity would
22 increase significantly.

23 I think it is telling in the district
24 court's analysis that it gave absolutely little
25 weight to the possibility of a socioeconomic

1 preference. It suggested that that would create
2 a kind of diversity that's different than what
3 UNC prefers. And, of course, we think that's
4 part of the problem.

5 JUSTICE BARRETT: Mr. Strawbridge --

6 JUSTICE SOTOMAYOR: So I looked at all
7 of your simulations, every one of them. So did
8 the district court. And in every one of them,
9 white representation stayed the same or went up.
10 And some minority groups increased, but others
11 did not. Blacks decreased in every one of your
12 simulations.

13 The district court also looked at your
14 simulations and found that each and every one of
15 them had fatal statistical flaws, not the least
16 of which that you relied on unrealistic
17 assumptions about the applicant pool.

18 In one of them, the modified Hoxby
19 simulation, which you seem to be relying on
20 here, assumes UNC could admit the state's 70 --
21 750 highest-scoring, most socioeconomically
22 disadvantaged public high school students. That
23 all of them would apply, that all of them would
24 accept is as unrealistic as you can get.

25 So there isn't one simulation that you

1 put forth that achieved the numbers that are
2 being achieved today. They are imperfect. We
3 have -- we have no racial quotas. We don't have
4 proportionate representation.

5 But show me a simulation in any of
6 your two cases that reached the numbers for
7 every ethnic group in the bottom.

8 MR. STRAWBRIDGE: Well, of course,
9 that suggests that the standard is a particular
10 percentage of representation of the student
11 body, which even Grutter purports --

12 JUSTICE SOTOMAYOR: No.

13 MR. STRAWBRIDGE: -- to disclaim.

14 JUSTICE SOTOMAYOR: No. I'm just
15 saying we know that representation for Asian
16 Americans, for example, has grown dramatically
17 over time. As their numbers in the population
18 have increased, so have their admissions
19 numbers.

20 But I'm just saying, if we don't have
21 proportionality, and no one's seeking that
22 because that would be a racial classification,
23 if we have improvement, all I see in your models
24 is that we step backwards, we don't step
25 forward.

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

3 JUSTICE SOTOMAYOR: Well, the district
4 court --

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

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

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel. You'll be able to return to Justice
21 Sotomayor in just a moment.

22 Justice Thomas, anything further?

23 JUSTICE THOMAS: No, Chief.

24 CHIEF JUSTICE ROBERTS: Justice Alito?
25 Justice Sotomayor?

1 JUSTICE SOTOMAYOR: Yes, just to
2 finish that point.

3 MR. STRAWBRIDGE: Yes.

4 JUSTICE SOTOMAYOR: We do know that
5 when numbers decreased in schools like the
6 University of California, University of
7 Michigan, in the upper-tier schools in the
8 university -- in the Oklahoma system, that
9 blacks have reported feeling isolated and having
10 their voices stifled there.

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

19 And you can see that even at the UNC
20 campus. There are some students even under
21 their policies today who are support -- who --
22 who report feelings of racial isolation. But
23 Native Americans, who, of course, have a small
24 percentage of representation on campus compared
25 to African Americans, report feeling less

1 racially isolated. So I think the suggestion
2 that that can be the standard by which we judge
3 a race-neutral alternative is insufficient.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

12 And assume that that continues to be
13 true, so that using gender-neutral criteria, you
14 know, men are 30 percent of a class or
15 35 percent. And a university said, you know,
16 that's neither healthy for our university life,
17 nor is it healthy for society, that men are so
18 undereducated as compared to women.

19 Could a university put a thumb on the
20 scales and say, you know, it's important that we
21 ensure that men continue to be -- receive
22 college educations at not perfect equality or --
23 you know, but, like, roughly in the same
24 ballpark?

25 MR. STRAWBRIDGE: Well, of course, you

1 know, under -- under this Court's precedent with
2 respect to the Equal Protection Clause, that is
3 -- that is subject to a somewhat lesser level of
4 scrutiny than racial classifications are. So
5 even if they could justify them under this
6 Court's equal protection jurisprudence, I don't
7 think it follows that they can justify racial
8 classifications where --

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

15 MR. STRAWBRIDGE: Well, of course, our
16 position is that white men could not get a thumb
17 on the scale. That sounds like a racial
18 classification. Men could perhaps.

19 JUSTICE KAGAN: Men could?

20 MR. STRAWBRIDGE: But not white men.

21 JUSTICE KAGAN: Oh. Uh-huh.

22 MR. STRAWBRIDGE: Yeah. But the --
23 the answer is, could you survive intermediate --
24 intermediate scrutiny in that case? I don't
25 know, but we've never said that -- that -- that

1 -- that gender differences -- at least the Court
2 has never suggested that sex discrimination
3 under the Equal Protection Clause rises to the
4 inherent invidious level that racial
5 classifications do. And this case, it's about
6 racial classifications.

7 JUSTICE KAGAN: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

10 JUSTICE GORSUCH: Well, this Court in
11 the Virginia Military Institute case said that
12 gender would be an impermissible basis for
13 discriminating against applicants there.

14 MR. STRAWBRIDGE: Yes, and I -- and,
15 obviously, the situation was somewhat different
16 in that it was a total exclusion if I recall
17 correctly in that case. But I -- I -- I do not
18 want to concede that -- that there would ever be
19 an appropriate place to have a sex-based
20 characteristic. I'm just noting it's different
21 under the precedent than race.

22 JUSTICE GORSUCH: And how about
23 religion, for example? There's some evidence,
24 for example, that Harvard adopted its holistic
25 admissions approach in part because it was

1 concerned by the burgeoning number of Jewish
2 persons who were attending, and they were
3 looking for a way to reduce the number of Jewish
4 persons without resorting to a quota. At least
5 that's what some of the amici tell us.

6 MR. STRAWBRIDGE: Yes. I mean, that
7 -- that is the history, and I think it's -- it's
8 an illustration why putting something in a
9 holistic admissions process doesn't -- doesn't
10 prevent the very invidious effects that this
11 Court has always recognized with racial
12 characteristics.

13 JUSTICE GORSUCH: Then I want to ask
14 you about Title VI -- Title VI in isolation.
15 Put aside our precedent for the moment. Title
16 VI says that no person shall be excluded from
17 participation or be subjected to discrimination
18 under any program or activity that receives
19 federal financial assistance.

20 In Bakke, Justice Stevens argued that,
21 whatever the Fourteenth Amendment may allow,
22 Title VI does not permit the use of race. You
23 didn't make much of that point in your briefs,
24 and I just wanted to understand why.

25 MR. STRAWBRIDGE: I don't think it's

1 necessary to make that much point in the brief
2 because, in our view, at least within the
3 educational context, there's really not a
4 difference between how the Fourteenth Amendment
5 should read and Title VI's prohibition should
6 read. We understand that some people view the
7 Title VI language as even more clear. We would
8 obviously win under that view. But it hasn't --
9 it hasn't been briefed.

10 And I don't think it can be justified
11 as a route to decision here as some form -- some
12 sort of constitutional avoidance because the
13 constitutional question has been decided in
14 Grutter. We submit it has been decided
15 incorrectly. And so you wouldn't be avoiding a
16 constitutional decision; you'd just be leaving,
17 in our view, a bad decision on the books.

18 JUSTICE GORSUCH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Kavanaugh?

21 JUSTICE KAVANAUGH: You're asking us
22 to overrule Grutter, but I first want to
23 understand what you think Grutter itself means.
24 It -- it had language in there about a 25-year
25 limit. The decision was in 2003. The current

1 admissions cycle is for the class of '27. It's
2 going to be too late to do anything about that
3 cycle. The next is the class of '28.

4 When do you read or do you calculate,
5 to the extent you consider it at all, the
6 25-year limit? How do -- and, more broadly,
7 just how should we think about that sentence
8 which was part of four important paragraphs in
9 Grutter about the importance of
10 race-conscious decision-making being
11 time-limited and temporary?

12 MR. STRAWBRIDGE: So -- so we do not
13 understand the 25-year limit somehow to have
14 been a -- a -- a -- a -- a hard-and-fast
15 requirement. Certainly, different Justices of
16 the Court in Grutter took differing positions as
17 to -- as to whether it should be --

18 JUSTICE KAVANAUGH: So you think it
19 could go for 35 or 50 years then?

20 MR. STRAWBRIDGE: Well, I think that
21 the -- I think that the language in Grutter at
22 least had an aspirational element to it, but it
23 was aspirational for a reason.

24 And Grutter definitely in those
25 paragraphs that precede that -- that -- that

1 clause make very clear that they want the use of
2 race to be diminishing over time and they want
3 colleges to be seriously looking at how to get
4 away from race.

5 The record in this case indicates that
6 that's not actually happening. Indeed, the head
7 of -- of UNC's race-neutral alternatives
8 committee testified that if the -- if the -- if
9 the racial distribution on campus was 20 percent
10 African American, 20 percent Asian American,
11 20 percent Hispanic, and 20 percent Native
12 American, that was still not sufficient to
13 convince her that they would stop using race.

14 The chancellor at the university said,
15 if UNC had the highest level of minority
16 representation in the country, that would not be
17 sufficient to convince them that they should
18 stop using race.

19 JUSTICE KAVANAUGH: Second question,
20 again, a little off track here, but we're
21 thinking about what would happen if you prevail
22 in this case.

23 There's an amicus brief from Catholic
24 universities that say private religious colleges
25 would have a RFRA or free exercise right to

1 continue to engage in affirmative action because
2 it's part of their religious mission.

3 Do you have any views on that?

4 MR. STRAWBRIDGE: I don't know that
5 our -- that -- that -- that I have any specific
6 views on that brief. I mean, there are some
7 times at least historically there has been
8 sometimes a conflation of race and religion.

9 I think that some people would have
10 thought that Harvard's policy back in the 1920s
11 was a racial policy as opposed to a religious
12 policy. There may be difficult questions there,
13 but I think that in this case, there's no --
14 there's no suggestion that -- that -- that RFRA
15 has any role to play, and we think the Equal
16 Protection Clause dominates.

17 JUSTICE KAVANAUGH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?

20 JUSTICE BARRETT: Mr. Strawbridge, do
21 you agree that universities have a compelling
22 interest in the educational benefits of
23 diversity writ large, not just racial diversity
24 but having, you know, different genders,
25 different religions, different viewpoints in the

1 classroom because of the educational benefit of
2 bringing different perspectives to bear on a
3 question?

4 MR. STRAWBRIDGE: I -- I don't think
5 the compelling interest question can be answered
6 apart from what the -- what the policy that's
7 being considered is. In this case, we don't
8 think it's an interest that is compelling enough
9 to justify a racial classification.

10 JUSTICE BARRETT: I understand that.
11 But do they have -- do you agree -- let's take
12 the compelling away from it. Do you agree that
13 they have an interest in?

14 MR. STRAWBRIDGE: Sure, I'm -- I -- I
15 have no doubt, and I agree that universities
16 have an interest in the broadly defined -- in
17 achieving the kind of broadly defined diversity
18 that is talked about sometimes in Grutter and
19 sometimes in the brief.

20 JUSTICE BARRETT: And how would you
21 suggest that they go about achieving that? Like
22 let's -- let's say that you prevail, but
23 universities still have this interest in -- in
24 assembling diverse classes, you know, full of
25 students that bring different experiences and

1 perspectives to bear, and they decide not to
2 adopt a 10 percent plan. So I assume it's all
3 done then in holistic review.

4 MR. STRAWBRIDGE: Yes. And there's
5 nothing wrong with holistic -- I mean, holistic
6 review takes place today at colleges that do not
7 use race as a factor in admissions. And there's
8 no reason to assume and there's no evidence in
9 the record that the students at those colleges
10 are not receiving the educational benefits of
11 diversity.

12 JUSTICE BARRETT: I guess -- I mean, I
13 guess what I'm concerned about is if it puts a
14 lot of pressure on the essay writing and the
15 holistic review process. You could have
16 viewpoint discrimination issues, I would think,
17 depending on how admissions officers treat
18 essays.

19 You could have free exercise claims,
20 not by religious mission -- religiously
21 affiliated universities who want to give bumps
22 to, say, you know, LDS students, but, you know,
23 if you have Harvard say -- saying, well, we want
24 this many Jews, but we also want this many
25 Christians, you know, and -- and, you know, this

1 many Muslims in a classroom.

2 MR. STRAWBRIDGE: Well, I -- I -- I --
3 I guess -- I guess we don't even understand
4 Grutter in part to be suggesting that the
5 interest in this broad benefit of diversity
6 actually justifies kind of micromanaging the
7 populations on campus in the way that you're
8 suggesting.

9 And I don't think that the
10 universities are doing that with respect to
11 socioeconomic diversity. At least if UNC has a
12 cap on the number of socioeconomically
13 challenged students that they're willing to
14 admit, they haven't -- they haven't said that.

15 So I'm not sure that it follows that
16 -- you know, under the scenario where -- where
17 we prevail, that it's going to affect one way or
18 another the holistic admissions process.

19 Florida is holistic. I believe the
20 California system is holistic. I think Michigan
21 is still holistic.

22 JUSTICE BARRETT: Thanks.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: Yes, two -- two

1 questions. Is there any indication from this
2 record that UNC is doing the kind of
3 micromanaging you're talking about with respect
4 to racial classifications?

5 I -- I didn't see that they were
6 shooting for a particular target or that there
7 was a goal or that -- I -- I thought, in fact,
8 that as the reviewers went through the process,
9 they didn't even know how many other students of
10 color had been admitted and, if they did know,
11 they had to be recused.

12 So they're not operating this system,
13 I thought --

14 MR. STRAWBRIDGE: That was --

15 JUSTICE JACKSON: -- to reach toward
16 some sort of racial goal. Am I wrong about
17 that?

18 MR. STRAWBRIDGE: Well, that policy
19 was instituted after our lawsuit was filed.
20 Before our lawsuit was filed, at least senior
21 admissions officers who were reading files were
22 allowed to see those --

23 JUSTICE JACKSON: So the policy is
24 that they're not reaching toward some sort of
25 goal?

1 MR. STRAWBRIDGE: As a
2 post-litigation, they -- no, I -- I -- I would
3 not go -- go so far as to say that. And, in
4 particular, I would -- I would look at the --
5 the race-neutral alternatives analysis that
6 UNC's own expert proffered, and -- and this is
7 actually throughout the record even in the
8 admissions process --

9 JUSTICE JACKSON: All right. I have
10 little time. I'm sorry. So --

11 MR. STRAWBRIDGE: No, I'm sorry. I
12 don't --

13 JUSTICE JACKSON: Yeah. So -- but you
14 say they've changed the process. But now at
15 least they're not looking toward a goal of --
16 they're not race balancing in that same
17 sentence?

18 MR. STRAWBRIDGE: No. I think they
19 measure their standard as to what they could
20 achieve by race-neutral alternatives by whether
21 they can replicate the precise level of
22 diversity today. So I think that is a form of
23 --

24 JUSTICE JACKSON: All right. So let
25 me ask you another question, because I take it

1 that your position is that UNC is allowed to
2 consider other non-race-based personal
3 characteristics of individual applicants, like
4 someone's status as a parent or a military
5 veteran or a disabled person, and give pluses in
6 the current holistic environment for those
7 characteristics without running afoul of the
8 Fourteenth Amendment.

9 Is that right?

10 MR. STRAWBRIDGE: I -- I -- I think
11 that is generally correct as long as they're the
12 criteria that is not walled off by the
13 Fourteenth Amendment, it's appropriate.

14 JUSTICE JACKSON: They can -- they can
15 get -- they can give pluses. And so what I'm
16 worried about is that the rule that you're
17 advocating, that in the context of a holistic
18 review process, a university can take into
19 account and value all of the other background
20 and personal characteristics of other
21 applicants, but they can't value race, what I'm
22 worried about is that that seems to me to have
23 the potential of causing more of an equal
24 protection problem than it's actually solving.

25 And the reason why I get to that

1 possible conclusion is thinking about two
2 applicants who would like to have their family
3 backgrounds credited in this applications
4 process, and I'm hoping to get your reaction to
5 this hypothetical.

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

16 The second applicant says, I'm from
17 North Carolina, my family's been in this area
18 for generations, since before the Civil War, but
19 they were slaves and never had a chance to
20 attend this venerable institution. As an
21 African American, I now have that opportunity,
22 and given my family -- family background, it's
23 important to me to attend this university. I
24 want to honor my family legacy by going to this
25 school.

1 Now, as I understand your
2 no-race-conscious admissions rule, these two
3 applicants would have a dramatically different
4 opportunity to tell their family stories and to
5 have them count.

6 The first applicant would be able to
7 have his family background considered and valued
8 by the institution as part of its consideration
9 of whether or not to admit him, while the second
10 one wouldn't be able to because his story is in
11 many ways bound up with his race and with the
12 race of his ancestors.

13 So I want to know, based on how your
14 rule would likely play out in scenarios like
15 that, why excluding consideration of race in a
16 situation in which the person is not saying that
17 his race is something that has impacted him in a
18 negative way, he just wants to have it honored,
19 just like the other person had their personal
20 background family story honored, why is telling
21 him no not an equal protection violation?

22 MR. STRAWBRIDGE: Well, I think -- I
23 think -- I think because, if -- if it is the
24 racial aspect of the application, then that's --
25 equal protection requires that -- that people of

1 all races be treated equally.

2 JUSTICE JACKSON: And --

3 MR. STRAWBRIDGE: Now, certainly, UNC
4 shouldn't give a -- a legacy benefit if they
5 don't want to give a legacy benefit. There's no
6 obligation they do that.

7 JUSTICE JACKSON: No, but you --

8 MR. STRAWBRIDGE: And, of course, a
9 first-generation college --

10 JUSTICE JACKSON: I'm sorry, but you
11 said -- you said it was okay if they give him a
12 legacy benefit. And what I'm saying is that in
13 almost exactly the same set of circumstances, a
14 student or an applicant who is African American
15 and who would like to have the fact that he's
16 been in North Carolina for generations through
17 his family and that they've never had a chance
18 to go to this school honored and considered, and
19 it's bound up with his race, you say, I think,
20 that he's not allowed to say that and that the
21 university is not allowed to take that into
22 account.

23 And because it relates to race,
24 precisely because it relates to race, I think
25 you might have an equal protection problem in

1 saying that he can't get credit for that when
2 someone else can.

3 MR. STRAWBRIDGE: Well, for purposes
4 of the hypothetical, I am assuming that the only
5 significant factor in that story happens to be
6 the fact of the race of the applicant and that
7 the race was previously barred from attending
8 UNC. Obviously, nothing stops UNC from honoring
9 those who have overcome slavery or recognizing
10 its -- its -- its past contribution to racial
11 segregation.

12 But the question is, does -- is that a
13 basis to make decisions about admission of
14 students who are born in 2003? And I don't
15 think that it necessarily is. I don't think
16 that the Equal Protection Clause suggests that
17 it is.

18 There are -- there are -- there are
19 many -- there are many factors in an application
20 like that that might be appropriate to consider,
21 including if they are first-generation college
22 or including if they are socioeconomically
23 depressed, but if the only difference is between
24 a white student and a black student, I don't
25 think the Equal Protection Clause permits the

1 admissions decision to hinge on that.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Park.

5 ORAL ARGUMENT OF RYAN Y. PARK

6 ON BEHALF OF THE UNIVERSITY RESPONDENTS

7 MR. PARK: Mr. Chief Justice, and may
8 it please the Court:

9 Diversity is our nation's greatest
10 source of strength, but as our Reconstruction
11 founders understood and our nation's history
12 confirms, it also poses unique challenges to the
13 American experiment. We live in a large and
14 sometimes unwieldy democracy, and for that
15 democracy to flourish, people of all different
16 backgrounds and perspectives have to learn to
17 live together and unite in common purpose.

18 It was Brown's vision that education
19 could be the engine of our democracy, a place
20 where students could prepare for the rights and
21 obligations of citizenship in a diverse and
22 inclusive setting.

23 The University of North Carolina at
24 Chapel Hill seeks to fulfill Brown's vision by
25 assembling a student body that is diverse along

1 the many dimensions that matter in American
2 life, including race, but also social class,
3 geography, military status, intellectual views,
4 and much more.

5 This learning environment helps us
6 seek truth, build bridges across students of
7 different backgrounds, and, critically here,
8 equip students with the tools needed to function
9 effectively as citizens and leaders in our
10 complex and increasingly diverse society.

11 The university pursues these interests
12 in scrupulous compliance with this Court's
13 precedents, which have consistently held for
14 decades that seeking the educational benefits of
15 diversity is a compelling interest of the
16 highest order and that universities may consider
17 all aspects of a applicant's background to build
18 a thriving campus community.

19 The correctness of these precedents is
20 confirmed by the historical record, which shows
21 beyond doubt that our Reconstruction founders
22 believed that race-conscious measures designed
23 to promote an integrated learning environment
24 were consistent with the original public meaning
25 of the Equal Protection Clause.

1 To be clear, UNC would like nothing
2 more than to achieve its educational aims
3 through race-neutral means. It has taken
4 extensive efforts to do so and has seen steady
5 and continuing progress toward this goal.

6 But this progress has been halting,
7 and the university retains a powerful interest
8 in preventing the backsliding that would occur
9 if this Court took away the power to decide this
10 important social policy issue from the people of
11 North Carolina.

12 I welcome the Court's questions.

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

17 The -- and I'd like you first -- you
18 did give some examples in your opening remarks,
19 but I'd like you to give us a specific
20 definition of diversity in the context of the
21 University of North Carolina. And I'd also like
22 you to give us a clear idea of exactly what the
23 educational benefits of diversity at the
24 University of North Carolina would be.

25 MR. PARK: Yes, Your Honor. So,

1 first, we define diversity the way this Court
2 has in this Court's precedents, which means a
3 broadly diverse set of criteria that extends to
4 all different backgrounds and perspectives and
5 not solely limited to race.

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

20 On -- on the educational benefits
21 question, Your Honor, I don't think it's
22 actually disputed here that there are real and
23 meaningful educational benefits that come with
24 diversity of all kinds.

25 SFFA's own expert -- and this is on JA

1 546 -- conceded and agreed enthusiastically, in
2 fact, on the stand that a racially diverse and a
3 diverse -- diversity of all kinds leads to "a
4 deeper and richer learning environment," leads
5 to more creative thinking and exchange of ideas,
6 and, critically, reduced bias between people of
7 different backgrounds and not solely for racial
8 backgrounds.

9 JUSTICE THOMAS: But you still haven't
10 given me the educational benefits, the -- I
11 didn't go to racially diverse schools, but there
12 were educational benefits.

13 And I'd like you to tell me expressly,
14 when a parent sends a kid to college, that they
15 don't necessarily send them there to have fun or
16 feel good or anything like that; they send them
17 there to learn physics or chemistry or whatever
18 they're studying. So tell me what the
19 educational benefits are.

20 MR. PARK: So there's three main
21 buckets, Your Honor, and the first and I think
22 most pertinent to the question that you asked is
23 the actual truth-seeking function of learning in
24 a diverse environment.

25 I would direct the Court to the Major

1 American Businesses brief, which discusses a
2 whole extensive, rigorous peer-reviewed
3 literature that diverse groups of people
4 actually perform at a higher level. So the most
5 concrete possible scenario is -- is stock
6 trading, and there are studies that find that
7 racially diverse groups of people making trading
8 decisions perform at a higher level, make more
9 efficient trading decisions. And the mechanism
10 there is that it reduces group think and people
11 have longer and more sustained disagreement, and
12 that leads to a more efficient outcome.

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

16 I'd like to go to something different,
17 to deference in the area as of a compelling
18 interest. This Court in Grutter did not
19 specifically put the test to Michigan as far as
20 diversity being a compelling interest.

21 I'd like you to explain why, in this
22 area of strict scrutiny, we have a lower
23 standard, we defer to the accused discriminator,
24 but in the instance of sex discrimination at
25 VMI, the accused discriminator was put to the

1 test, and the Court did not defer to VMI, but it
2 deferred to Michigan.

3 Why that difference? And why should
4 you not be treated the way we would treat
5 someone in a Title VII case or a Title VI case
6 and shift the burden to the discriminator to
7 explain the conduct?

8 MR. PARK: Our understanding of the
9 deference that this Court provides and the
10 deference that we request is quite limited, Your
11 Honor. We ask for deference in terms of our
12 educational objectives and not the -- the legal
13 question of whether those objectives constitute
14 a compelling interest.

15 And I think that it's pretty clear to
16 see why. I think that is similar to the VMI
17 context. So, like I mentioned, we have made it
18 a system-wide priority to --

19 JUSTICE THOMAS: Did we -- did -- the
20 Court did not defer in VMI.

21 MR. PARK: So I think it did to the
22 extent that it -- it held that the -- the
23 interest in a rigorous military education is an
24 interest that the -- that the institution had.

25 And so, if UNC decided as a -- at a

1 system-wide level to say we're going to
2 completely change our educational mission and
3 make it into an institution like VMI, I think
4 the compelling interest analysis would proceed
5 with that educational objective in mind. But we
6 do not take the position that the compelling
7 interest standard is somehow subject to
8 deference. That's a legal question.

9 JUSTICE GORSUCH: Just to follow up on
10 Justice Thomas's questions about diversity,
11 again, these holistic admissions approaches seem
12 to stem from the 1920s at Harvard, and they were
13 used as cover for quotas for Jewish persons, who
14 the university apparently felt had too many
15 students attending.

16 And I guess I'm struggling still to
17 understand how you distinguish between what this
18 Court has said is impermissible, a quota, with
19 what you argue should be permissible going
20 forward, which is diversity. How can you do
21 diversity without taking account of numbers?

22 MR. PARK: So I think there's --
23 there's two separate points I'd like to make on
24 that, Your Honor. So, on the -- the sordid
25 history of the early holistic process, I don't

1 think anyone has ever accused the University of
2 North Carolina as having --

3 JUSTICE GORSUCH: I'm not suggesting
4 that.

5 MR. PARK: Yeah. And we -- we took
6 our cues from this Court from the Bakke decision
7 and -- and from the Grutter decision and --

8 JUSTICE GORSUCH: Oh, I understand
9 that too. But I guess my question, again, just
10 to get to the core of it rather than circling
11 around it, is how can you do diversity, which
12 that's what you're arguing for, without taking
13 account of numbers?

14 MR. PARK: Our interest in what we
15 believe that Grutter requires of us is
16 individualized holistic review. And I think
17 there's actually been a lot of misconception
18 that I heard in the --

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

23 MR. PARK: We do so by looking at the
24 individual applicant. We do not have some sort
25 of racial target or a target for other diversity

1 metrics, for example. We don't say we want to
2 have 10 percent of our class be military
3 veterans. We say we value this diversity
4 interest and we're going to look at each
5 individual applicant on -- on that basis.

6 JUSTICE ALITO: What is your goal and
7 how will a court ever be able to determine
8 whether your goal has been reached?

9 MR. PARK: Our -- our goal is to
10 achieve the educational benefits of diversity.
11 And I understand that that is a -- a qualitative
12 standard that is difficult to measure, but I do
13 not believe that a standard merely being
14 qualitative means that it's not susceptible to
15 -- to rigorous review.

16 And if I could give an example. So we
17 are subject to a statutory mandate that we
18 create a -- an open and -- and tolerant speech
19 environment for all sorts of views, even views
20 that many find disagreeable. And we engage in
21 the same kind of analysis to measure whether we
22 are meeting this standard. It's -- it's
23 principally survey-based, as well as examination
24 of objective criteria.

25 JUSTICE ALITO: Your brief repeatedly

1 refers to certain students as members of
2 underrepresented minorities, right? What does
3 that mean? Why is that significant?

4 MR. PARK: So I think this is -- I
5 think this is helpful because this pierces the
6 main, I think, misunderstanding about how our
7 process works. We do define certain groups
8 based on their overall representation in the
9 state of North Carolina.

10 That's -- that stems from a consent
11 decree that the University of North Carolina
12 entered with the Reagan Administration.

13 JUSTICE ALITO: Well, I mean, this is
14 really pretty simple. Suppose you assembled a
15 student body in which the various racial groups
16 coincide almost exactly to the percentage of
17 those racial groups in the general population.
18 Would you say, okay, now we've done it, we've
19 achieved diversity?

20 MR. PARK: No, Your Honor, and I don't
21 think that we would say that we need to -- to
22 reach those levels -- levels either. I think
23 the student intervenors will stand up and say
24 that -- that we should be doing far more.

25 But we are trying to comply with this

1 Court's precedents, which require the -- the
2 minimal consideration of race on a holistic
3 basis.

4 JUSTICE BARRETT: This Court's
5 precedents, I mean, Grutter also says -- sorry,
6 let me put my readers on here -- you know, using
7 racial classifications are so potentially
8 dangerous, however compelling their goals, they
9 can be employed no more broadly.

10 Going down a little bit further, all
11 governmental use of race must have a logical end
12 point, reasonable durational limits, sunset
13 provisions, and race-conscious admissions
14 policies.

15 And I gather, you know, Justice
16 Alito's saying, when does it end? When is your
17 sunset? When will you know? Because Grutter
18 very clearly says this is so dangerous. Grutter
19 doesn't say this is great, we embrace this.
20 Grutter says this is dangerous and it has to
21 have an end point. And I hear you telling
22 Justice Alito there is no end point.

23 MR. PARK: No, Your Honor, and I
24 apologize if I gave that impression. So three
25 points on the end point.

1 We enthusiastically embrace the
2 durational requirement, and we have tried to do
3 everything possible to adopt race-neutral
4 alternatives from the time of Grutter to today
5 to minimize our consideration of race.

6 In a university where our endowment
7 during the -- our endowment during the record
8 was around \$3 billion, we spent well north of a
9 billion dollars on financial aid programs to try
10 to recruit low-income students across the board.
11 And I think that kind of that's the
12 first-generation race-neutral alternative.

13 Then the second are, to try to expand
14 the pool, we have an incredibly extensive
15 program where around half of our transfer
16 students come from community colleges --

17 JUSTICE BARRETT: But, if I could just
18 interrupt for one second, how do you know when
19 you're done? You know, Justice Alito said, if
20 you have exact correlations to the member -- to
21 the number -- the percentage in the population
22 of a particular group, and you said you're not
23 done then.

24 So when would the race-conscious --
25 when would you have the end point? I -- I -- I

1 --

2 MR. PARK: Well -- I see.

3 JUSTICE BARRETT: -- I appreciate that
4 you're undertaking all those efforts, but when
5 is the end point?

6 MR. PARK: I meant to respond to
7 Justice Alito meaning that we do not need to
8 reach that point for us to feel that we have met
9 our diversity goals. I -- I mean, we are --
10 what we're doing today is we feel that we are
11 achieving the educational benefits of diversity
12 and we have --

13 JUSTICE ALITO: So it's not necessary,
14 but is it sufficient?

15 MR. PARK: I think that in that
16 scenario, it might be likely that our
17 qualitative process in terms of constant
18 examination of our campus climate would -- would
19 reach a point where we would feel that we had
20 reached the educational benefits of diversity --

21 CHIEF JUSTICE ROBERTS: But that's --
22 I'm sorry. Finish.

23 MR. PARK: Oh. So I just want to
24 be -- be very clear on -- on the end point if I
25 may. We think that the history shows that these

1 programs can and do end. The early programs, as
2 Justice Ginsburg has mentioned, principally --
3 many of them principally benefitted white women.

4 The program in Bakke and the
5 program -- federal contractor program this Court
6 upheld in Fullilove explicitly included Asian
7 Americans as among their beneficiaries. And we
8 have reached a point now where we feel that we
9 are able to minimally consider race and still --

10 CHIEF JUSTICE ROBERTS: I don't see
11 how -- I don't see how you can say that the
12 program will ever end. Your position is that
13 race matters because it's necessary for
14 diversity, which is necessary for the sort of
15 education you want.

16 It's not going to stop mattering at
17 some particular point. You're always going to
18 have to look at race because you say race
19 matters to give us the necessary diversity.

20 MR. PARK: So I think there's two
21 different questions there. We don't think that
22 the compelling interest in diversity will ever
23 expire. I think the question is whether
24 race-conscious measures need to be taken in the
25 admissions process to reach our diversity goals.

1 CHIEF JUSTICE ROBERTS: You're going
2 to have to check, right? You're not going to
3 know whether you have a sufficient number of
4 African Americans to give you the diversity you
5 say is necessary if you don't look and check.

6 MR. PARK: I think there will be some
7 attention to numbers and -- but the feedback
8 loop between our assessment of our campus
9 environment and the admissions process, we will
10 celebrate the day when we get to the point where
11 we have reached the point where we do now with
12 our minimal consideration of race, which we say
13 --

14 JUSTICE KAVANAUGH: Well, I think that
15 --

16 JUSTICE SOTOMAYOR: Mr. Park --

17 JUSTICE KAVANAUGH: -- the difficulty
18 you're having answering some of these questions
19 about end point were probably in the mind of
20 Justice O'Connor when she wrote the opinion in
21 Grutter for the majority and, as Justice Barrett
22 said, indicated that these racial
23 classifications are potentially dangerous and --
24 and must have a logical end point.

25 Instead of leaving it vague, the

1 opinion didn't say until you reach a point where
2 you're satisfied that diversity has been
3 achieved or something vague like that, it said
4 25 years in there.

5 And so I want to hear how you address
6 that part of the Grutter precedent because, as I
7 understand your answer, you would extend it far
8 beyond 25 years indefinitely, and that would be
9 an extension, I think, but you can tell me how
10 you read the 25-year language.

11 But I think the reason it's there, and
12 I think it's real important because there are
13 four paragraphs leading up to that, is because
14 of the difficulty you're having answering the
15 question when -- without that time limit, when
16 it would otherwise be achieved.

17 MR. PARK: So, of course, we don't
18 read the 25-year as some sort of strict
19 expiration. And I -- I don't think on its face
20 it was structured as such. Even Chief Justice
21 Rehnquist in his dissent said this is not a -- a
22 fixed deadline.

23 JUSTICE KAVANAUGH: Well, Justice
24 Thomas --

25 MR. PARK: But the --

1 JUSTICE KAVANAUGH: -- Justice Thomas
2 in his separate opinion referred to it as a
3 holding. Justice Kennedy referred to it as a
4 pronouncement. So, anyway, just to make sure
5 the full picture is presented there.

6 MR. PARK: Yeah. So, Justice
7 Kavanaugh, I think that every institution in
8 every state will differ. I mean, we have states
9 coming to the Court and saying we have reached
10 our diversity -- educational benefits of
11 diversity goals.

12 We don't need to engage in any
13 race-conscious admissions process at our state
14 flagships, and -- and we are at the point where
15 I think the expert evidence here pretty
16 definitively shows that we are able to meet what
17 we feel is an inclusive diverse environment
18 through minimal consideration of race, and --
19 and I think that we will get there based on this
20 qualitative process, but there is no strict
21 numerical benchmark.

22 JUSTICE KAVANAUGH: One of the things
23 the other side has emphasized is that in the
24 period since Grutter, in the two decades since
25 Grutter, that we have more experience with

1 states that don't allow race-based admissions,
2 California, Florida, Washington, Michigan, and
3 others, and that those examples now show with
4 greater confidence than might have had in 2003
5 that some of the questions we were asking before
6 of some of the race-neutral alternatives cannot
7 have the risk of treating people differently on
8 the basis of race on the file but at the same
9 time produce significant numbers of minority
10 students on campuses.

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

14 MR. PARK: Yes, I think that the
15 experience of the University of Michigan system
16 and University of California system helpfully
17 illustrates the point I'm trying to make, which
18 is they say that in their experience, it's
19 really a campus-by-campus analysis.

20 And, in particular, the most selective
21 public universities are continuing to have major
22 struggles, particularly enrolling a sufficient
23 number of African American students, for them to
24 reach their educational goals. And -- and I
25 would direct the Court to page 26 to 28 of the

1 University of California's brief because what
2 they say they're experiencing is that there is
3 actually an inverse relationship between a --
4 African American students and their -- their
5 sense of belonging and their sense of tokenism
6 and isolation with how selective the university
7 is.

8 And so I think that's why you're
9 seeing this wide spectrum of progress towards
10 the day that we all are looking for where we do
11 -- do no longer have to consider race in
12 admissions.

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

17 MR. PARK: We consider it as -- as
18 part of our holistic process, yes. And so --

19 JUSTICE KAVANAUGH: Could you explain
20 how that works?

21 MR. PARK: Yes. And -- and this is
22 helpful because this is the exact same thing
23 that we do for all of our other diversity goals,
24 is, if in context and in assessment of an
25 individual application -- applicant, their

1 religious background or their religious
2 experiences suggest that they might contribute
3 something to our campus community, then that can
4 be considered a positive attribute that is
5 considered in our holistic process, and --

6 JUSTICE KAVANAUGH: You have them
7 check a box, though, as to what religion they
8 are?

9 MR. PARK: We do not have them check a
10 box.

11 JUSTICE JACKSON: But then --

12 JUSTICE KAVANAUGH: How -- how do you
13 know then what religion the majority of
14 applicants are?

15 MR. PARK: So our analysis on our
16 religious tolerance climate is not pegged to the
17 admissions process, but we do have an entire
18 process set up and a whole range of programs to
19 try to ensure a -- an open and tolerant
20 religious environment. And so we do -- do
21 engage in the same kinds of surveys and
22 qualitative analysis of our campus community.

23 And we're fine that -- we're finding
24 that, on the whole, we feel we're meeting our
25 goals, and we still have some struggles

1 particularly with Jewish and Muslim students
2 feeling like they belong on campus.

3 JUSTICE JACKSON: Is the checking of
4 the box with respect to race voluntary? Is it
5 something that students are required to do or
6 something that they do on their own as a part of
7 the process?

8 MR. PARK: It is entirely voluntary,
9 Your Honor.

10 JUSTICE JACKSON: So you don't know
11 what the race is of all of the applicants who
12 are coming into your community from the
13 admissions standpoint?

14 MR. PARK: That's correct.

15 JUSTICE JACKSON: And can you answer a
16 question about UNC's history of exclusion? You
17 mention it several times in your brief, and I'd
18 like to understand whether and to what extent
19 that matters with respect to the diversity
20 interests that you are asserting.

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

1 So, first, we think it helps explain
2 why the progress that we have been pursuing is
3 perhaps behind the University of Oklahoma, for
4 example. We have a unique racial history in our
5 state. And all these programs take society as
6 they find it.

7 JUSTICE JACKSON: I see. So that
8 might account for why the sort of 25-year
9 expiration deadline can't really be blanketly
10 applied, because we start in different places
11 with respect to how race has been considered to
12 exclude people in -- in our various communities.

13 MR. PARK: Yes, I agree very much with
14 that statement.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas, anything further?

18 JUSTICE THOMAS: What's the difference
19 between -- what is the percentage difference
20 between a non-racial approach and the approach
21 that you're taking?

22 MR. PARK: So the expert evidence in
23 our case suggests that around 1.2 percent of the
24 applicant pool as a whole is affected by our
25 race-conscious admissions program. And how that

1 works out in terms of the relevant denominator
2 is the number of underrepresented minorities on
3 campus, which is still fairly small. It's far
4 lower, for example, than the number of rural
5 students that we have or -- and it's even less
6 than the number of first-generation college
7 students that we have.

8 JUSTICE THOMAS: So --

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

11 JUSTICE THOMAS: -- so do you think
12 that 1.2 percent marginal difference is enough
13 of a compelling interest to continue a
14 race-based program?

15 MR. PARK: What we have tried to do is
16 follow this Court's guidance, particularly in
17 Fisher II, but in other cases where the Court
18 has said that it is a hallmark of narrow
19 tailoring and, therefore, a test of
20 constitutionality that we consider race only
21 minimally.

22 And, of course, seeking the
23 educational benefits of diversity is also a
24 continuum. We think that we would not face some
25 of the struggles that we do in terms of

1 admitting and enrolling underrepresented
2 minorities if we considered it to a larger
3 extent, but we have chosen to, under this
4 Court's precedents, be guided by this Court's
5 precedents to consider it only minimally.

6 JUSTICE THOMAS: So, if someone was
7 bringing a discrimination case against the
8 University of North Carolina and the racial
9 difference composition was 1.2 percent, would
10 they have stated a claim?

11 MR. PARK: I -- I see. Let me just
12 make sure I'm understanding the -- if the --
13 well, so I think that there are -- I mean, it
14 goes to the -- the issue of standing generally
15 and what you need to show to --

16 JUSTICE THOMAS: No, just someone is
17 bringing -- it's statistical and they say the
18 difference between the admission of group A,
19 racial group A, is 1.2 percent more than racial
20 group B. Would that be enough for
21 discrimination?

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

25 I think one other thing to point out,

1 I think, is that there are other aspects of our
2 policy, as I think Justice Jackson was getting
3 at, that have a reverse impact as well. And we
4 haven't modeled this, but any diversity factor
5 could have a disproportionate impact on the
6 racial composition of the class in some other
7 direction. And so I do think this is one of the
8 -- the major concerns that would arise if -- if
9 Grutter is overruled.

10 CHIEF JUSTICE ROBERTS: Justice Alito?

11 JUSTICE ALITO: I'd like your response
12 to the argument that these racial categories are
13 so broad that any use of them is arbitrary and,
14 therefore, unconstitutional.

15 So what would you say to, for example,
16 a student whose family came from Afghanistan and
17 doesn't get in because the student doesn't get
18 the plus factor that the student would get if
19 the student's family had come from someplace
20 else?

21 So you would say to the student:

22 Well, we don't -- we don't need you to
23 contribute to a diversity of views at our school
24 because we already have enough Asians. We have
25 a lot of students whose families came from China

1 or other Asian countries. And the student says:
2 Well, you don't have anybody like me, I'm from
3 Afghanistan.

4 What -- what similarity does a family
5 background to the person from Afghanistan have
6 with somebody whose family's background is in,
7 let's say, Japan?

8 MR. PARK: So, respectfully, what
9 you're describing is the exact opposite of how
10 our process actually works on -- on an
11 individualized basis. This is -- we discuss
12 this on page 11 of our brief. There was a
13 Vietnamese student. The admissions office --
14 the admissions officer testified about a
15 Vietnamese student who immigrated to a remote
16 part of North Carolina and thrived in that
17 setting, and she testified, undisputed, that
18 that was a favorable aspect of her application.

19 JUSTICE ALITO: Well, that's -- that's
20 -- that's an individual aspect of the
21 application and something that has to do with
22 her experience. But what is the justification
23 for lumping together students whose families
24 came from China with someone -- with students
25 whose families came from Afghanistan? What do

1 they have in common?

2 MR. PARK: So I agree that that would
3 be a strange rule. And that is not the rule
4 that this Court has established. It would
5 require --

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

9 MR. PARK: So we think that it depends
10 on the individual circumstances of that person,
11 but I am telling --

12 JUSTICE ALITO: So you don't need the
13 -- you don't need the boxes at all?

14 MR. PARK: So I think that that is not
15 necessarily true on an individualized basis. So
16 another example, so we -- again, as I discussed,
17 we attempt very vigorously to recruit and enroll
18 rural students, and we don't ask them to write
19 an essay about how being from a rural background
20 affects their, you know, sense of self and their
21 experiences, but what we say is that person
22 comes with something that we value, and --

23 JUSTICE ALITO: Well, they may choose
24 to write about it, but what's the answer to my
25 question? Why do you have these boxes? Why --

1 why do you give a student the opportunity to say
2 this one thing about me, I'm Hispanic, I'm
3 African American, I'm Asian? What does that in
4 itself tell you?

5 MR. PARK: We think that it can in
6 context, on a individualized basis, perhaps not
7 in every case but in some cases, give important
8 information about where that person is coming
9 from and what their experiences have been.

10 And, really, this goes to the heart of
11 the dispute that we have between the parties.
12 So they say on page 53 of their brief that race
13 says nothing about who you are. And we just
14 don't think that is true when you look at
15 American society as it exists.

16 We think that in the context of
17 everything else that we know about an applicant,
18 it can matter, not always, and it's not --
19 there's no automatic plus factor that's given,
20 but it can matter what an applicant's racial
21 background is.

22 JUSTICE ALITO: Let me just ask one
23 more related question, and that is the
24 circumstance -- and this is a real problem, and
25 I've heard it described to me by people who face

1 it. When can a student honestly claim to fall
2 within one of these groups that is awarded a
3 plus factor?

4 So let's say the student has one
5 grandparent who falls within that class. Can
6 the student claim to be a member of an
7 underrepresented minority?

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

10 JUSTICE ALITO: One great-grandparent.

11 MR. PARK: If that person believes
12 that that is the accurate expression of their
13 identity, I don't think there would be any --

14 JUSTICE ALITO: One --

15 MR. PARK: -- problem.

16 JUSTICE ALITO: -- great-great
17 grandparent?

18 MR. PARK: I think --

19 JUSTICE ALITO: Are you going to make
20 me continue to go on?

21 MR. PARK: Right, right, right. I
22 think that as we go on, I agree that it would
23 seem less plausible that that person would feel
24 that this is actually capturing my true racial
25 identity, but the same is true for any of the

1 other diversity factors that we rely on.

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

4 MR. PARK: So I -- I think, in that
5 particular circumstance, it would be not
6 accurate for them to say based on family --

7 JUSTICE ALITO: Well, I identify as an
8 American Indian because I've always been told
9 that some ancestor back in the old days was an
10 American -- was an American Indian.

11 MR. PARK: Yes. So I think, in that
12 circumstance, it would be very unlikely that
13 that person was telling the truth. And the same
14 is true for -- you know, we rely on
15 self-reporting for all the -- the demographic
16 and other characteristics that we ask for. And
17 there's nothing special about the racial
18 identification on that score, Your Honor.

19 JUSTICE SOTOMAYOR: Do you get an
20 automatic plus for checking a box?

21 MR. PARK: No.

22 JUSTICE SOTOMAYOR: That's the whole
23 point, isn't it, that checking the box is not
24 what gets you a point?

25 MR. PARK: Right. Right. And I

1 think -- I mean, one helpful illustration of
2 this point, Your Honor, is so SFFA's own expert,
3 their own desk-style analysis finds that among
4 the most academically qualified students, Asian
5 Americans and white applicants actually have a
6 higher acceptance rate than black students.
7 This is their own expert evidence.

8 And this is discussed at Pet. App.
9 78. As the district court commented, that is a
10 particularly strange result if their
11 characterizations of our admissions process are
12 accurate.

13 JUSTICE SOTOMAYOR: Mr. Park, on this
14 issue of when this will end, nine states have
15 chosen to rely just on race-neutral --
16 completely race-neutral, with race being not
17 even a small factor anywhere.

18 Not all of them have been as a result
19 of the people voting. It's been the systems
20 themselves choosing this.

21 Isn't that the case in Florida?

22 MR. PARK: That's my understanding.
23 In Florida, it's an executive order. And there
24 are many states where it's institution by
25 institution. So Georgia, for example, is --

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

4 What we know, we have nine states who
5 have tried it, and in each of them, as I
6 mentioned earlier, whites have either -- white
7 admissions have either remained the same or
8 increased, and, clearly, in some institutions,
9 the numbers for underrepresented groups has
10 fallen dramatically, correct?

11 MR. PARK: That's my understanding,
12 yes.

13 JUSTICE SOTOMAYOR: All right. What
14 we also know in those 20-odd years is that --
15 that racial disparities have grown dramatically
16 as well. Segregation has grown. The disparity
17 between incomes has grown. And so has the
18 effects of these things in terms of the
19 resources that underrepresented groups receive,
20 correct?

21 MR. PARK: I -- I believe that that
22 matches much of my understanding, yes.

23 JUSTICE SOTOMAYOR: And I understood
24 that the district court found that UNC on a
25 continuing basis reassesses its race-neutral

1 factors and is constantly monitoring whether
2 they've reached some form of representation
3 adequate for their system regularly, correct?

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

5 JUSTICE SOTOMAYOR: And that was your
6 point, which is we can't tell you it's going to
7 end in 2029 or 2030, but we're not just assuming
8 it will continue, we're looking at it regularly
9 to see when it ends, correct?

10 MR. PARK: Exactly, Your Honor. And
11 there really is a quite extensive infrastructure
12 that the university has established to
13 continually monitor our progress on this score.
14 I mean, a whole range of committees, but the --
15 the committees actually include some of the
16 world's leading experts on doing these kinds of
17 qualitative assessments.

18 And so it's something that we are
19 continually pursuing, and right now there are --
20 there are many other projects ongoing for us to
21 try to reach the day where we can find a -- a
22 viable race-neutral alternative.

23 JUSTICE SOTOMAYOR: Thank you,
24 counsel.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 Justice Gorsuch?

2 JUSTICE GORSUCH: I'd like to ask you
3 just a hypothetical about narrow tailoring
4 because we're in strict scrutiny land here, and
5 the university has to demonstrate it's narrowly
6 tailored, race is narrowly tailored. And
7 diversity is the rationale you've asserted
8 before us.

9 Universities also have all kinds of
10 other plus factors they use, like for legacies
11 of alumni, for donors' children, for squash
12 players, we learned there are plus factors
13 because those -- we need those too.

14 And I guess I'm wondering, suppose a
15 university, a wealthy university could eliminate
16 those preferences which tend to favor the
17 children of wealthy white parents and achieve
18 diversity without race-consciousness, would
19 strict scrutiny require it to do so?

20 MR. PARK: If I may, I'd like to just
21 make a threshold point that those are not --
22 that doesn't match what I --

23 JUSTICE GORSUCH: Well, I -- I
24 understand, counsel. I understand the
25 hypothetical is not your case and you don't like

1 it.

2 MR. PARK: Right.

3 JUSTICE GORSUCH: I got it.

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

5 JUSTICE GORSUCH: Okay? But if you
6 could --

7 MR. PARK: Yeah.

8 JUSTICE GORSUCH: -- just take a shot
9 at it.

10 MR. PARK: The absolutely critical
11 point if I could just very quickly is that it's
12 undisputed that legacy status is not a -- did
13 not affect --

14 JUSTICE GORSUCH: I understand,
15 counsel.

16 MR. PARK: Yeah.

17 JUSTICE GORSUCH: I do understand and
18 I appreciate that. Okay? I've had to face many
19 hypotheticals at a lectern I didn't like.

20 MR. PARK: Yeah.

21 JUSTICE GORSUCH: But let's just take
22 the hypothetical. We're in strict scrutiny.
23 Compelling interest has to be established.
24 Wealthy university, okay, and it still prefers
25 all of these -- give checks to these kinds of

1 persons not for their academic merit but because
2 it would bring diversity in the form of a squash
3 team or they might bring a new art museum, we
4 heard, for example. Oh, we have to admit that
5 kid because his parents are going to donate an
6 art museum, okay?

7 Suppose the university could achieve
8 race neutrally, just suppose --

9 MR. PARK: Yeah.

10 JUSTICE GORSUCH: -- race neutrally,
11 all of its diversity objectives, if it just
12 eliminated those preferences, would strict
13 scrutiny require it to do so?

14 MR. PARK: I would say yes if three
15 things are true.

16 JUSTICE GORSUCH: All right.

17 MR. PARK: First, that alternative
18 would have to also match the compelling interest
19 because, as I mentioned, this Court has never
20 recognized a compelling interest in --

21 JUSTICE GORSUCH: Is there compelling
22 interest in a squash team composed of really
23 good players or a new art museum? Is that what
24 you're suggesting?

25 MR. PARK: No -- no, Your Honor,

1 that's not what I'm suggesting.

2 JUSTICE GORSUCH: Okay. So there's no
3 compelling interest in those things you're
4 telling us?

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

9 JUSTICE GORSUCH: We'd have a great
10 socioeconomic diversity, we'd have great
11 religious diversity, we just would have a crummy
12 squash team and no art museum. Then what?

13 MR. PARK: Right. Right. And I think
14 the other condition I would try to sneak in is
15 that there wouldn't be a -- a material negative
16 impact on the academic environment.

17 And -- and third is that --

18 JUSTICE GORSUCH: So the GPAs are
19 good.

20 MR. PARK: Right.

21 JUSTICE GORSUCH: So these kids that
22 are being admitted, same GPA, same SAT.
23 Let's -- then what?

24 MR. PARK: Right. And I guess the
25 third would be that -- that the specific goal of

1 racial diversity is not significantly
2 undermined. And so, yeah, with those three
3 conditions, I agree.

4 JUSTICE GORSUCH: Okay, thank you.

5 CHIEF JUSTICE ROBERTS: Justice --

6 JUSTICE KAVANAUGH: How --

7 CHIEF JUSTICE ROBERTS: -- Kavanaugh?

8 JUSTICE KAVANAUGH: -- how are
9 applicants from Middle Eastern countries
10 classified, from Jordan, Iraq, Iran, Egypt and
11 the like?

12 MR. PARK: My understanding is that
13 just like other situations where they might not
14 fit within the particular boxes on the common
15 application, that we rely on self-reporting and
16 we would ask -- you know, they can volunteer
17 their particular country of origin.

18 JUSTICE KAVANAUGH: But, if they
19 honestly check one of the boxes, which one are
20 they supposed to check?

21 MR. PARK: I -- I don't -- do not know
22 the answer to that question. What I can say is
23 that if a person from a Middle Eastern country
24 self-discloses their country of origin, it would
25 be considered in the same way that we consider

1 any box that matches, you know, one of the boxes
2 that's available in the common application,
3 which is it would be an individualized holistic
4 analysis.

5 And I can genuinely say that there
6 would be a similar positive analysis in terms of
7 the contribution that a student like that would
8 contribute. And -- and we do track in
9 particular, again, after the admissions process,
10 religion and -- and country of origin and that
11 sort of thing.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett?

15 JUSTICE BARRETT: I just have one more
16 question about end point. So, you know, Alan
17 Bakke would have been born into a pre-Brown
18 world, you know, and then we have 25 years, we
19 get to Grutter. Grutter says, you know, we
20 cannot imagine -- as I read that language
21 before, this is dangerous, we can't imagine it's
22 going to go on more than another 25 years. And
23 you've been pressed a little bit about what is
24 the end point for you.

25 This -- this distance of time, this 50

1 years since Bakke, suggests accurately, I think,
2 that achieving diversity and diverse student
3 populations in universities has been difficult.
4 What if it continues to be difficult in another
5 25 years? I take it that you, because you've
6 repeatedly said that the 25 years is
7 aspirational and you told Justice Kavanaugh it
8 wasn't a holding, that you don't think that
9 University of North Carolina has to stop in 25
10 years, at that 2028 mark.

11 So what are you saying when you're up
12 here in 2040? Are you still defending it like
13 this is just indefinite, it's going to keep
14 going on?

15 MR. PARK: I think that Grutter is
16 helpfully self-limiting in that it requires
17 aggressive and enthusiastic adoption of
18 race-neutral alternatives. And I think it's --
19 it's a dial, not a switch. And the progress
20 that we've made since Grutter has shown that at
21 -- at the University of North Carolina, we have
22 dialed it down substantially.

23 The -- the expert evidence in -- in
24 that case, obviously, they're different
25 institutions, was that around 70 percent of the

1 underrepresented minorities in the institution
2 at issue in Grutter, it was determinative that
3 they had a certain racial background. And,
4 here, the number is -- is far smaller, and we're
5 -- we anticipate that we will be able to dial it
6 down to -- to zero.

7 And I think the reason why I -- I feel
8 confident in that is because of Grutter's
9 requirement that we continue exploring doggedly
10 race-neutral alternatives. And even as -- since
11 the record has closed, the University of North
12 Carolina has done so and is continually
13 attempting to monitor it.

14 JUSTICE BARRETT: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Jackson?

17 JUSTICE JACKSON: Yes. So we've heard
18 a lot about checking the box in the context of
19 the claims that are being made in this case.
20 And I'm just -- I'm concerned that at least --
21 that I might be confused about the implications
22 for that -- of that.

23 So, first of all, this box is on the
24 common application, right? It's not on North
25 Carolina's form of any sort? Every student who

1 fills out the common application form has the
2 ability --

3 MR. PARK: Correct.

4 JUSTICE JACKSON: -- to -- okay. And
5 so -- have you seen one of these forms? Because
6 I don't know if they're in the record in this
7 case. Is the common application in the record
8 somewhere?

9 MR. PARK: Yes. Yes, it is. I
10 believe it might be completed applications, so
11 it might be the -- the sealed appendix, Your
12 Honor.

13 JUSTICE JACKSON: All right. So we
14 have this form that all students who are
15 applying to any college can -- can use. And I
16 understood the form was basically, you know,
17 reduced to tell us about yourself, that you put
18 all sorts of things. It's not a separate piece
19 of paper that says this is about race. It's
20 just: Who are you? And in the context of that,
21 students check and write in all kinds of things.

22 Am I wrong about that?

23 MR. PARK: Yes, the form has evolved
24 over time --

25 JUSTICE JACKSON: Okay.

1 MR. PARK: -- and the current form --
2 I can't say for certain the forms that are in
3 the record, but the current form does allow for
4 more self-description, so the student with the
5 background that Justice Kavanaugh mentioned
6 would be able to fully describe --

7 JUSTICE JACKSON: And so any -- any --
8 any form of race, it's not like we have to care
9 so carefully about what are the categories in
10 there and how -- anybody, a Caucasian student
11 could check Caucasian? We're just telling who
12 we are as a general matter, right?

13 MR. PARK: Yes, Your Honor.

14 JUSTICE JACKSON: Okay. So everybody
15 who wants to. Does North Carolina require
16 anybody to fill out the box that has to do with
17 race --

18 MR. PARK: No.

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

22 MR. PARK: There certainly are, yes.

23 JUSTICE JACKSON: All right. Isn't
24 the question then what North Carolina is doing
25 with that information? Because, presumably,

1 just knowing that you have people from different
2 races applying to your school is not working an
3 equal protection violation, is it?

4 MR. PARK: I -- I agree with the
5 sentiment behind that question. I think the
6 language of racial classification has been used.
7 And -- and it sincerely does not reflect how our
8 admissions process work -- works. It's
9 race-consciousness. And so --

10 JUSTICE JACKSON: Right. So -- so
11 you're not, like, doing something different with
12 the people who check the box -- box and put
13 certain categories. Everybody then goes into
14 the holistic process of looking at all kinds of
15 other things so that race is never the only
16 criteria that a person is evaluated with respect
17 to, is that right?

18 MR. PARK: Absolutely. And -- and we
19 think the district court made findings on this,
20 in this regard.

21 JUSTICE JACKSON: And even if you
22 check the box, I'm an African American, I'm a
23 Latino, and all the other things, I live in this
24 place, et cetera, et cetera, even if you check
25 that box, in North Carolina's system, do you get

1 a point automatically for having checked that
2 box?

3 MR. PARK: Absolutely not. Absolutely
4 not.

5 JUSTICE JACKSON: And is anybody who
6 did check the box -- are they automatically
7 entered or admitted into the university as a
8 result?

9 MR. PARK: No, no. And, you know, our
10 --

11 JUSTICE JACKSON: All right. So final
12 question, final question. Given a holistic
13 review process like that, is there a risk of
14 treating people differently by not allowing some
15 applicants to talk about that aspect of their
16 identity? I hear a process in which there's a
17 form that says tell us about yourself, and
18 people can put all sorts of things. I'm
19 Catholic. I'm from, you know, Los Angeles. I'm
20 a Latina, whatever.

21 But now we're -- we're entertaining a
22 rule in which some people can say the things
23 they want about who they are and have that
24 valued in the system, but other people are not
25 going to be able to because they won't be able

1 to reveal that they are Latino or African
2 American or whatever.

3 And I'm worried that that creates an
4 inequity in the system with respect to being
5 able to express your identity and, importantly,
6 have it valued by the university when it is
7 considering the goal of bringing in different
8 people. Is that a -- is that -- is that a crazy
9 worry, or is that something that -- that I
10 should be thinking about and concerned about?

11 MR. PARK: Not at all, Your Honor, not
12 crazy at all. We are very concerned with that
13 issue, Your Honor, that if race is the one thing
14 or if there are other factors that are subject
15 to heightened scrutiny, if -- if only those
16 factors cannot be considered in the admissions
17 process, then anyone with a background or
18 perspective that doesn't fit into one of these
19 categories will have an advantage in our
20 admissions process.

21 We think, just as Mr. Strawbridge
22 said, that it's a mathematical exercise. And if
23 you artificially say that only certain people
24 can't tell the university about some of their --
25 important aspect of their background, but

1 underrepresented minorities are -- are barred
2 from doing so or -- or, you know, all people
3 can't discuss their racial background, then
4 certain applicants will be subject to a
5 disadvantage.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Hinojosa.

10 ORAL ARGUMENT OF DAVID G. HINOJOSA
11 ON BEHALF OF THE STUDENT RESPONDENTS

12 MR. HINOJOSA: Mr. Chief Justice, and
13 may it please the Court:

14 This Court must stand firm in its
15 commitment to ensuring racial equality and equal
16 opportunity by affirming the Bakke/Grutter
17 framework. From the Sweatt and Brown cases
18 through Bakke and Grutter, this Court has
19 recognized the paramount roles that integrated
20 education and cross-racial interactions play in
21 building a true democracy, where pathways to
22 leadership are visibly open to all qualified
23 candidates.

24 Brown attempted to shut down this
25 nation's terrible caste system, but stark racial

1 inequalities persisted and stunted this nation's
2 growth. Enter Bakke and Grutter, which have
3 helped universities open the doors of
4 opportunities to highly qualified students of
5 color, who are often overlooked in a process
6 that typically undervalues their talents and
7 perspectives.

8 Racial diversity and its attending
9 social and academic benefits help all students
10 to be better prepared to work and live together
11 and make this nation better as a whole. We have
12 made progress, but many colleges are not there
13 yet, including UNC, which grapples with over 160
14 years of exclusion and its present-day effects.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: Mr. Hinojosa, if this
17 were a Title VI case and there was an allegation
18 of discrimination against the University of
19 North Carolina, who would bear the burden of
20 coming forward?

21 MR. HINOJOSA: Is it within the strict
22 scrutiny --

23 JUSTICE THOMAS: No, just Title VI, a
24 claim of discrimination.

25 MR. HINOJOSA: A normal claim of

1 intentional discrimination, Your Honor?

2 JUSTICE THOMAS: Exactly.

3 MR. HINOJOSA: I would understand that
4 the plaintiff would have that burden to
5 demonstrate.

6 JUSTICE THOMAS: To come forward
7 initially. But then, when the plaintiff makes
8 his or her showing, then what? What's the duty
9 of the -- what's the burden on the administrator
10 -- on the accused?

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

14 JUSTICE THOMAS: Is there any case
15 where the court has deferred to the university
16 or to the alleged discriminator's policies?

17 MR. HINOJOSA: So, in -- for example,
18 you know, I don't know whether or not this has
19 been answered directly in Title VI case law.
20 Title VII case law --

21 JUSTICE THOMAS: Yeah.

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

25 JUSTICE THOMAS: What I'm -- what's

1 interesting here is this is -- I cannot think of
2 another area or another case where the Court
3 deferred to the alleged discriminator on
4 something as important as compelling interest.
5 We don't do it in Title VI. We don't do it in
6 Title VII.

7 You have McDonnell Douglas. You have
8 Arlington Heights. And this is a first. And
9 what I'm asking you is, isn't it odd that you
10 have a framework in Grutter that defers on the
11 critical issue in a case of compelling interest?

12 MR. HINOJOSA: No, Your Honor. I
13 think it's entirely consistent, you know, with
14 this case -- with this Court's framework in
15 judging strict scrutiny. The -- let -- let me
16 make a couple of points first.

17 One is on the discrimination point.
18 This is not discrimination per se. The limited
19 consideration of race in a holistic fashion as
20 this Court has approved is a limited
21 classification that is subject to strict
22 scrutiny, but that whole strict scrutiny process
23 is trying to filter out whether or not we have a
24 legitimate purpose for this or not and whether
25 or not there's a compelling interest that may be

1 sought and achieved, you know, through narrowly
2 tailored means.

3 JUSTICE THOMAS: Let me -- let me ask
4 more specifically: If this was a -- this case
5 involved a school district in Virginia in 1960
6 that is alleged to be discriminating, would this
7 Court defer to its assertion that the races do
8 better if they're segregated?

9 MR. HINOJOSA: Absolutely not, Your
10 Honor, but that's not this case. This case is
11 about a limited classification involving a
12 compelling interest --

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

14 MR. HINOJOSA: -- that the Court
15 itself has recognized.

16 JUSTICE THOMAS: -- that's not what
17 I'm talking about. I'm talking about the
18 Court's deference in that case, the Court would
19 put Virginia to the test. In this case, it does
20 not, and I'm asking you why the difference?

21 MR. HINOJOSA: In this case, Your
22 Honor, it actually is -- the burden is that the
23 university has a high burden of demonstrating
24 its compliance with this Court's standard under
25 strict scrutiny.

1 The only narrow area that this Court's
2 framework, as I understand it, has deferred to
3 the university is establishing its objectives,
4 but the whole framework still requires a
5 well-reasoned explanation for seeking the -- for
6 its own compelling interest. It requires the
7 university to demonstrate that there are no
8 race-neutral alternatives that will work about
9 as well.

10 And so that burden is still heavy on
11 the university to demonstrate compliance with a
12 strict scrutiny framework.

13 JUSTICE SOTOMAYOR: Mr. Hinojosa, in
14 this case, the Petitioner never challenged that
15 diversity was a compelling interest, correct?

16 MR. HINOJOSA: That's correct.

17 JUSTICE SOTOMAYOR: Their own expert
18 said that racial diversity was an important
19 compelling interest, didn't it?

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

22 JUSTICE SOTOMAYOR: But it doesn't --
23 that deference, whatever it's defined at, didn't
24 stop you or the state from meeting its burden of
25 showing why that was a compelling interest,

1 correct?

2 MR. HINOJOSA: That's correct. And
3 there's a 155-page opinion in this case based on
4 the facts and based on significant analysis and
5 testimony from the university administration --

6 JUSTICE SOTOMAYOR: The court below
7 carefully examined whether the university --
8 university's articulated interest was clearly
9 identifiable, measurable, and precise, didn't
10 it?

11 MR. HINOJOSA: Yes, Your Honor.

12 JUSTICE SOTOMAYOR: So it's not much
13 deference. I don't even know why that word is
14 being used, correct?

15 MR. HINOJOSA: That's correct, Your
16 Honor.

17 JUSTICE SOTOMAYOR: Now, in terms of
18 that information, you put on extensive evidence
19 about the history of racism in UNC, correct?

20 MR. HINOJOSA: That's correct, Your
21 Honor, including a history of its own founding
22 to help educate the owner -- the children of
23 slave owners.

24 JUSTICE SOTOMAYOR: And it went
25 through de jure segregation way after Brown,

1 correct?

2 MR. HINOJOSA: Yes, Your Honor.

3 JUSTICE SOTOMAYOR: Until the 1980s.

4 But you didn't stop there, did you? You
5 presented evidence about the continuing
6 Confederate relics that exist on campus?

7 MR. HINOJOSA: Yes, Your Honor.

8 JUSTICE SOTOMAYOR: The continuing
9 white supremacy marches that still go on?

10 MR. HINOJOSA: Yes, Your Honor.

11 JUSTICE SOTOMAYOR: The racial
12 epithets that minority -- that underrepresented
13 groups are experiencing to this -- to this day?

14 MR. HINOJOSA: Yes, Your Honor.

15 JUSTICE SOTOMAYOR: So, given that
16 your adversary says that race can be used to
17 correct past discrimination, why isn't it in
18 this particular university appropriate to use
19 race as one factor among many --

20 MR. HINOJOSA: Yes, Your Honor.

21 JUSTICE SOTOMAYOR: -- to address its
22 history of racial discrimination --

23 MR. HINOJOSA: And if --

24 JUSTICE SOTOMAYOR: -- and its
25 continuing effects on campus?

1 MR. HINOJOSA: Yes, Your Honor. If I
2 understand correctly, we -- I -- I do want to
3 clarify one point, is that we are not
4 suggesting, as I understand the university is
5 not either, that the limited consideration of
6 race in this case is being used as a remedial
7 order to address that.

8 The reason for the importance of those
9 present-day effects of that past discrimination
10 is articulated through the compelling testimony
11 of the Respondent students in this case about
12 how those present-day effects affect their own
13 value on campus looking at these Confederate
14 relics and the like and seeing these white
15 supremacists come on to campus marching, which
16 is certainly a First Amendment right, but it
17 doesn't ignore the fact of how those students
18 feel during those moments.

19 But it also -- so -- and that in turn
20 impacts their own education within the
21 classroom. So it's not just standing alone that
22 you have hypersensitive students, you know,
23 reacting to these marches and -- and these other
24 activities on campus, but it's also making sure
25 about the impacts in the classroom that it, you

1 know, carries forward to and also how it impacts
2 recruitment.

3 When students of color, and they see
4 less than a hundred black males accepted and
5 enrolled at UNC in the 21st Century, when they
6 see that and they hear about all of these
7 present-day effects going on, that impacts their
8 own decision on whether or not they might apply,
9 whether or not they might actually end up going
10 to the great university of the University of
11 North Carolina.

12 JUSTICE ALITO: Counsel --

13 MR. HINOJOSA: That, again, is the --

14 JUSTICE ALITO: -- if all of the
15 individual incidents and artifacts that you
16 mentioned were not in this case and if the
17 university were a state university that never
18 practiced segregation, would you say that the
19 case would come out differently?

20 MR. HINOJOSA: It may, Your Honor.
21 And that's how and why we should not have an
22 across-the-board policy that all of a sudden
23 jettisons the important limited consideration of
24 race that this Court has approved.

25 JUSTICE ALITO: So you would perhaps

1 endorse, say, a system in which a state
2 university in a state that never had de jure
3 segregation would be -- would -- would be
4 prohibited from doing what North Carolina is
5 doing?

6 MR. HINOJOSA: Yes, because the -- the
7 important point here is whether or not the
8 educational benefits of diversity have been
9 established by that particular university. And
10 so, here, at the University of North Carolina,
11 of course, it matters a lot because it affects
12 recruitment and retention and the like.

13 But, at another university where it
14 may not have been, you know, a part of its
15 history, it's still -- the -- the important
16 piece here is whether or not the university
17 itself can establish its own educational
18 benefits of diversity and satisfy that through
19 narrowly tailored means.

20 The University of Michigan in -- in
21 the Grutter case, you know, is a good example of
22 that. I won't pretend to know the history of
23 the state of Michigan, but -- and I know that
24 they were fraught with, you know, desegregation
25 problems themselves, you know, within districts,

1 but whether or not that was a remnant of the
2 state's own de jure segregation, I don't know,
3 but that would be a good example.

4 JUSTICE ALITO: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. You've mentioned the benefits, of
7 course, of diversity, but amici on the other
8 side have argued that one consequence of the
9 school's consideration of race is that it sends
10 the message that race is something you should
11 consider down the line, in other words, in
12 student activities, other sorts of areas, that
13 they get the message from the beginning that
14 race counts, and they carry that forward into
15 other areas where there may not have been a
16 history of discrimination that would, in your
17 terms, justify it.

18 Do you have a response to that?

19 MR. HINOJOSA: Yes, Your Honor. The
20 research -- and there's some of the research
21 that is shown in -- and I apologize if the Court
22 isn't quite getting here, but what I understand
23 the Court is inquiring about is, you know, some
24 of the particular stigma that might be attached
25 to --

1 CHIEF JUSTICE ROBERTS: No, it was the
2 fact that the school is telling students race
3 matters in admissions and that the students may
4 learn from that lesson that race should matter
5 in other areas, where perhaps it doesn't have
6 the same justification as it would have under
7 your view on admissions.

8 MR. HINOJOSA: Yeah. So two points,
9 Your Honor. One is that there's no evidence in
10 this case of the University of North Carolina's
11 own decision to enact race-conscious admissions
12 have led to any negative consequences, much less
13 the negative consequences that you've shared
14 here. But there's also --

15 CHIEF JUSTICE ROBERTS: Do you know --
16 this may be an unfair question -- is race a
17 consideration in the formation of other types of
18 activities that students are engaged in? I get
19 the sense from the briefs anyway that race
20 permeates a lot of what happens at the
21 university. And --

22 MR. HINOJOSA: Yeah.

23 CHIEF JUSTICE ROBERTS: -- you -- you
24 -- you're shaking your head in a way that you
25 don't agree with it.

1 MR. HINOJOSA: Well, Your Honor, you
2 know, it is a bit of the -- reminds me of a
3 storybook when I was a child, Henny Penny and
4 the sky is falling argument, because they're
5 blaming that just about everything is caused by
6 race-conscious admissions.

7 But, in fact, if you look at the
8 research, for example, on the issue of stigma,
9 both internal and external stigma -- and this is
10 referenced in the AERA brief -- it actually
11 shows that race-conscious admissions programs
12 at -- well, universities that have
13 race-conscious admissions programs actually have
14 lesser degree of stigma attached, you know, both
15 internal for the student and external, what
16 they're hearing from other students --

17 CHIEF JUSTICE ROBERTS: Well, I -- I
18 -- I --

19 MR. HINOJOSA: -- than states with
20 bans on --

21 CHIEF JUSTICE ROBERTS: Counsel --

22 MR. HINOJOSA: I'm sorry.

23 CHIEF JUSTICE ROBERTS: -- I'm not
24 talking about stigma. I'm talking about student
25 groups taking its cue from the university and

1 saying we ought to take race into account when
2 we're -- whatever we're doing.

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

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Thomas?

10 JUSTICE THOMAS: Mr. Hinojosa, I may
11 be tone deaf when it comes to all these other
12 things that happens on campus, about feeling
13 good and all that sort of thing. I'm really
14 interested in a simple thing. How -- what
15 benefits academically are there to your
16 definition or your -- the -- the diversity that
17 you're asserting specifically?

18 I know kids feel -- you've got studies
19 that show that people feel better and they don't
20 feel isolated, on and on. I'm focusing on what
21 you went to college to do, to learn something.

22 Do you have anything that demonstrates
23 that?

24 MR. HINOJOSA: Yes, Your Honor. And
25 you're asking for the specific educational

1 benefits of diversity?

2 JUSTICE THOMAS: Yes.

3 MR. HINOJOSA: Those would include,
4 for example, fostering innovation. And there's
5 plenty of testimony in this case from chemists,
6 professors at UNC, and from students themselves
7 who have understood the importance of diversity
8 in helping to foster -- to foster innovation.

9 To broaden perspectives, you know,
10 engaging in students, and this is all the way --
11 harkens back to the Sweatt v. Painter case and
12 the McLaurin cases, where they acknowledge that
13 racial interactions and dialogue, you know,
14 between students, you know, helps better prepare
15 them for the world that they're going to work
16 and live in.

17 There is the reducing stereotypes.
18 You know, for our own students that -- who
19 testified in this case, it's played an
20 incredibly important role in their education.
21 And when you help reduce stereotypes in
22 isolation, you end up impacting the educational
23 environment for all students because they are
24 sharing their perspectives. They're not
25 necessarily feeling isolated as spokespeople.

1 And so those are among the several
2 educational benefits of diversity that have been
3 recognized and that we as the Respondent
4 students support.

5 CHIEF JUSTICE ROBERTS: Justice Alito?

6 JUSTICE ALITO: You make some very
7 good points in your brief, but reading it, I was
8 struck by the fact that the word "Asian" does
9 not appear one time in your brief. Yet, Asian
10 Americans have been subjected to de jure
11 segregation. They have been subjected to many
12 forms of mistreatment and discrimination,
13 including internment.

14 So do you have anything to say this
15 morning about the interests of students of Asian
16 background and how your arguments impact them?

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

22 There were no claims developed by
23 Petitioner involving the mistreatment or
24 maltreatment of Asian American students. And I
25 think that was one of the problems that happened

1 with the first brief, is that they conflated
2 their arguments against Harvard, which
3 Mr. Waxman will, you know, adequately defend
4 shortly, but those arguments conflated the
5 issues.

6 There's no racial balancing claim
7 against UNC. There's no allegation of quota.
8 There's been a lot of talk about quota in this
9 case. There's no claim about that. There's no
10 claim against UNC involving the intentional
11 discrimination against Asian American students
12 vis-à-vis white students or other students.

13 So that record actually doesn't exist.

14 JUSTICE ALITO: So what is your
15 response to the simple argument that college
16 admissions are a zero sum game? And if you give
17 a plus to a person who is an under -- falls
18 within the category of underrepresented minority
19 but not to somebody else, you're disadvantaging
20 the latter student?

21 MR. HINOJOSA: And -- and, Your Honor,
22 you know, that's a -- that's an excellent point,
23 but the record actually bears out about how --
24 in this case, how the holistic admissions plan
25 does end up operating. And it is where an

1 individualized consideration is being made on a
2 student's own talents, on a student's own
3 achievements --

4 JUSTICE ALITO: So you're saying --

5 MR. HINOJOSA: -- and their own
6 challenges.

7 JUSTICE ALITO: -- you're saying that
8 the -- that race in and of itself has no effect
9 in -- at the University of North Carolina?

10 MR. HINOJOSA: Absolutely not, Your
11 Honor. I'm -- I'm saying --

12 JUSTICE ALITO: Okay. Then you would
13 have no objection to an opinion from this Court
14 saying you may not consider race; you may
15 consider other things, but you may not consider
16 the mere fact of race, period? You would have
17 no objection to that?

18 MR. HINOJOSA: Your Honor, I don't
19 know if I'm answering your question with a
20 negative and a double negative here, but I do
21 want to make clear that we fully support the
22 limited consideration of race as it has been
23 authorized by this Court.

24 JUSTICE ALITO: Well, then I -- I just
25 don't --

1 MR. HINOJOSA: Again, it is only on an
2 individual --

3 JUSTICE ALITO: -- I don't understand
4 your answer. Either -- if it's irrelevant, then
5 you shouldn't care whether it's -- it's ruled
6 out.

7 MR. HINOJOSA: And we're not arguing
8 -- if I'm articulating that, Your Honor, I'm not
9 meaning to. We certainly believe that race
10 within the context of an applicant may be
11 considered as a plus factor. That's not only in
12 this --

13 JUSTICE ALITO: Race in itself may be
14 considered a plus factor?

15 MR. HINOJOSA: Yes, Your Honor.

16 JUSTICE ALITO: And, therefore, those
17 who don't get the plus factor have what is
18 essentially a negative factor. They're not the
19 --

20 MR. HINOJOSA: No, Your Honor.

21 JUSTICE ALITO: -- it's not the same
22 thing?

23 MR. HINOJOSA: No, Your Honor, it's
24 not because it's looking at the whole applicant
25 as they apply within their whole application and

1 their resume, et cetera.

2 JUSTICE ALITO: Suppose you have a
3 race, two people are in a race, and you give a
4 plus factor to one of the runners, so that
5 runner gets to start -- well, if it's 100 yards
6 -- a 100-yard dash, let's say he gets to start
7 five yards closer to the finish line.

8 The one who doesn't get that plus
9 factor is disadvantaged, right?

10 MR. HINOJOSA: That would be in that
11 case, but that case is not here. There are no
12 bonus points that are provided to any applicant
13 at the University of North Carolina. That is
14 fully prohibited by this Court's decision in
15 Gratz, and we're not suggesting that it should
16 be reinstated.

17 CHIEF JUSTICE ROBERTS: Justice
18 Sotomayor?

19 JUSTICE SOTOMAYOR: Counsel, a race is
20 sort of an artificial creation, right? It
21 measures how fast you can go from point A to
22 point B, correct?

23 MR. HINOJOSA: In some respects, yes,
24 Your Honor.

25 JUSTICE SOTOMAYOR: All right. But

1 what colleges are doing is not saying -- they're
2 not looking at the runners when putting them in
3 this race; they're looking at the applicant, at
4 the student as a whole measure, correct?

5 MR. HINOJOSA: Yes, Your Honor.

6 JUSTICE SOTOMAYOR: And if we said
7 that applicants from white schools can start
8 here, if applicants from socioeconomic schools
9 don't start at the same place, you're going to
10 push them back, right?

11 MR. HINOJOSA: Yes, Your Honor.

12 JUSTICE SOTOMAYOR: So what the
13 schools are doing is looking at all the factors
14 to try to put the students at the start as
15 equals, correct?

16 MR. HINOJOSA: That's correct, Your
17 Honor.

18 JUSTICE SOTOMAYOR: And race is not
19 defining in that it's not the one factor in any
20 application that makes a difference?

21 MR. HINOJOSA: There is zero evidence
22 of race playing a decisive factor for any
23 applicant. There is zero evidence of any -- of
24 any student who was accepted under the
25 race-conscious admissions plan regardless of

1 race. There is zero evidence of any student
2 being penalized for their race or that that
3 student, if they were admitted, that they were
4 not qualified. They all qualified on their
5 individual merit.

6 JUSTICE SOTOMAYOR: Thank you,
7 counsel.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?
9 Justice Gorsuch?
10 Justice Kavanaugh?
11 Justice Barrett?

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

24 In light of that, I'm wondering if you
25 have anything to say about affinity groups and

1 affinity housing?

2 I think one thing at least insofar as
3 I'm aware at the time Grutter was decided and
4 certainly Bakke, that kind of a phenomenon where
5 you have groups, say, where, you know, black
6 students and allies can live or, you know, black
7 student groups, same for, you know, Hispanic
8 groups, et cetera, was not a phenomenon that was
9 around then.

10 And -- and I think one of the benefits
11 is that it allows minority students to band
12 together to reduce some of the feelings of
13 isolation that you've been talking about.

14 Do your clients have a position on
15 that and whether that would be -- because
16 whatever we say or however broadly we wrote this
17 opinion, that rationale about the educational
18 benefits of diversity presumably might have some
19 bearing on those questions that are
20 post-admission questions?

21 MR. HINOJOSA: Yes, Your Honor. So,
22 you know, those -- those do invite, you know,
23 very difficult questions. And I think that's
24 how and why a potential color-blind ruling from
25 this Court, you know, may disrupt things even

1 further, but also about how, you know, certain
2 conditions may apply on a case-by-case basis.

3 So I may not be making too much sense
4 with what I just said there, but, you know, in
5 terms of affinity groups, for example, research
6 shows that affinity groups have incredible
7 benefits not just, you know, for its own members
8 but in helping the broader community understand,
9 for example, you know, racial and cultural
10 issues, you know, that they might raise.

11 It's not my understanding that there
12 are any affinity groups, especially, for
13 example, you know, black student associations
14 that --

15 JUSTICE BARRETT: I'm really thinking
16 --

17 MR. HINOJOSA: -- exclude any
18 students.

19 JUSTICE BARRETT: -- mostly about
20 affinity housing. And I -- I understand Chapel
21 Hill does not have it, but UNC Wilmington does.

22 Would your clients have a position on
23 affinity housing?

24 MR. HINOJOSA: I -- I -- I do not
25 know, Your Honor.

1 JUSTICE BARRETT: Okay. Thank you.

2 MR. HINOJOSA: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Jackson?

5 JUSTICE JACKSON: Can I just quickly
6 return to Justice Alito's hypothetical, which I
7 think is a little bit helpful in trying to
8 pinpoint a problem that I've been having.

9 It seems from the race hypothetical
10 that if there was only one basis for giving
11 someone a boost and that basis was race, then I
12 see disadvantage, absolutely, to anyone else
13 who's not an underrepresented minority who can
14 get that boost.

15 But I understood that we have here a
16 program in which there are at least -- at least
17 40 different bases for being able to get a boost
18 and not everybody who is an underrepresented
19 minority gets a boost.

20 So it's really hard to figure out if
21 anyone is being disadvantaged in a system like
22 that, and -- and that's where I was worried
23 about standing, because I'm trying to understand
24 how the system is operating to actually
25 advantage minorities in a way that is harmful to

1 anyone else in this system.

2 MR. HINOJOSA: Yeah. And I think that
3 attributes to the careful cue that UNC has taken
4 to this Court's decision in Fisher II, making
5 sure, you know, universities find themselves in
6 this Goldilocks problem about, you know,
7 considering it too much or too little. The
8 university --

9 JUSTICE JACKSON: But there are other
10 considerations is the point. Everyone --

11 MR. HINOJOSA: Yes.

12 JUSTICE JACKSON: -- everyone can get
13 a boost for all sorts of reasons. Minorities
14 don't automatically get a boost under this
15 system, so it's hard to know whether anyone's
16 being disadvantaged from the mere fact that a
17 minority could get a boost in this environment,
18 right?

19 MR. HINOJOSA: That's right. And the
20 evidence also bears it out at Petition Appendix
21 78, where the evidence showed that hundreds of
22 white students with lower combined GPAs and SAT
23 scores were admitted ahead of higher-performing
24 black students, Latinx students, who went to
25 UNC. And I think that bears the hallmark of

1 this -- the type of individualized consideration
2 that this Court wanted.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 MR. HINOJOSA: Thank you.

6 CHIEF JUSTICE ROBERTS: General
7 Prelogar.

8 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
9 FOR THE UNITED STATES, AS AMICUS CURIAE,
10 SUPPORTING THE RESPONDENTS

11 GENERAL PRELOGAR: Mr. Chief Justice,
12 and may it please the Court:

13 For decades, this Court has rightly
14 recognized that student body diversity is a
15 compelling interest that can justify limited
16 consideration of race in university admissions.

17 That holding recognizes a simple but
18 profound truth: When students of all races and
19 backgrounds come to college and live together
20 and learn together, they become better
21 colleagues, better citizens, and better leaders.

22 That truth is vitally important to our
23 nation's military. Our armed forces know from
24 hard experience that when we do not have a
25 diverse officer corps that is broadly reflective

1 of a diverse fighting force, our strength and
2 cohesion and military readiness suffer. So it
3 is a critical national security imperative to
4 attain diversity within the officer corps.

5 And, at present, it's not possible to
6 achieve that diversity without race-conscious
7 admissions, including at the nation's service
8 academies.

9 The military experience confirms what
10 this Court recognized in *Grutter*, that in a
11 society where race unfortunately still matters
12 in countless ways, achieving diversity can
13 sometimes require conscious acts by our leading
14 educational institutions.

15 The Court's precedents strike a
16 careful balance. Race can be considered if
17 truly necessary but only as one factor in a
18 holistic admissions process that prioritizes and
19 values diversity in all of its dimensions. The
20 Court should adhere to that balance today.

21 JUSTICE THOMAS: Once again, would you
22 tell me specifically what is included in
23 diversity for the purposes of education,
24 achieving educational benefits?

25 GENERAL PRELOGAR: Yes, Justice

1 Thomas. And if I could, I'd like to use the
2 service academies as an example here and explain
3 to you the concrete educational benefits that
4 the service academies are seeking to obtain
5 through their use of race-conscious admissions,
6 and it really falls into two separate
7 categories.

8 One is the suite of benefits that the
9 Court's precedents have already recognized,
10 things like increasing cross-racial
11 understanding, which can have direct impacts on
12 challenging stereotypes and assumptions and
13 leading to positive developments with cognitive
14 development that can be perceived as early as a
15 student's second year in college.

16 It can include things like reducing a
17 sense of racial isolation and alienation, and
18 that has proven educational benefits as well in
19 terms of encouraging greater participation by
20 minority students in a classroom environment.

21 And then the second category that I
22 would point to, and this traces directly from
23 Grutter as well, is the Court's recognition that
24 in order to train a set of leaders with
25 legitimacy in the eyes of the public, it is

1 necessary to have our leadership broadly reflect
2 the diversity of our country.

3 And that is a critically important
4 interest in the military because we have had
5 experiences in our past where the officer corps
6 and its racial composition did not reflect the
7 diversity in enlisted service members and that
8 it caused tremendous racial tension and strife.

9 So that is the -- the set of benefits
10 that the service academies are seeking to
11 obtain.

12 JUSTICE KAGAN: And -- and why can't
13 you do it through race-neutral means? Because I
14 think everybody has agreed, all our cases
15 indicate that race-neutral means are better if
16 one can achieve those kinds of objects that you
17 were talking about that way. So why -- why
18 can't you after 20 years?

19 GENERAL PRELOGAR: It's absolutely
20 correct that it's incumbent on universities and
21 on the service academies to take account of
22 race-neutral alternatives and to put those into
23 practice where they can achieve diversity. And
24 that's what the service academies are doing.

25 They have done things like trying to

1 bolster outreach efforts to underserved
2 communities, to try to solicit additional
3 nominations from congressional districts that
4 have traditionally sent fewer cadets to the
5 academy.

6 They've looked into other
7 alternatives, like socioeconomic preferences,
8 but West Point discovered that that would
9 actually increase the number of white men at the
10 academy. And other race-neutral alternatives
11 just don't work in this context for the service
12 academies.

13 For example, a top 10 percent plan
14 wouldn't work because the service academies have
15 to draw from a nationwide applicant pool, and
16 they also have to prioritize and value other
17 characteristics, like physical fitness and
18 leadership potential.

19 So I can't say that we are able to get
20 there all the way right now with race-neutral
21 alternatives. That's what the service academies
22 have seriously studied, but we are trying to
23 make progress toward that goal.

24 CHIEF JUSTICE ROBERTS: General, you
25 have emphasized the service academies today and

1 you did in your brief, and government counsel in
2 Grutter did as well.

3 Are you linking yourself to Harvard
4 and UNC? In other words, you rise or fall with
5 their case?

6 GENERAL PRELOGAR: Well, Mr. Chief
7 Justice, we certainly think that it's critically
8 important for universities throughout the nation
9 to be able to prioritize the educational
10 benefits of diversity, and the ROTC programs are
11 also a compelling interest for us here that
12 exist at those civilian institutions, but I
13 guess, if what you're asking me is whether we
14 think the military has distinctive interests in
15 this context, I would say yes.

16 And I think it's critically important
17 for the Court in its decision in these cases to
18 make clear that those interests are -- are, I
19 think, truly compelling with respect to the
20 military.

21 CHIEF JUSTICE ROBERTS: So, in that
22 situation, I suppose it depends how significant
23 you think those distinctions are, it might make
24 sense for us not to decide the service academy
25 issue in this case?

1 GENERAL PRELOGAR: Well, I -- I would
2 certainly ask the Court to take account of those
3 distinctive interests and -- and I think to
4 recognize the compelling interest and the
5 critical national security interests that I
6 think --

7 CHIEF JUSTICE ROBERTS: I guess I'm
8 saying I would have thought that you might want
9 to distinguish yourself in order to preserve
10 arguments that are particularly applicable, if
11 there are such arguments, to the service
12 academies, rather than take the position here,
13 which is you're going to be bound by whatever we
14 say with respect to the other universities.

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

25 JUSTICE ALITO: What about a college

1 that doesn't have an ROTC program?

2 GENERAL PRELOGAR: I'm sorry, Justice
3 Alito, I didn't hear you.

4 JUSTICE ALITO: I'm -- yeah. What
5 about a college that does not have an ROTC
6 program? Would a -- would a plan that would be
7 permissible in a -- at a college that has a
8 program be impermissible at the latter, at the
9 one that doesn't have the ROTC program?

10 GENERAL PRELOGAR: We're not asking
11 the Court to draw that distinction. And our
12 interest here, I think, does extend more broadly
13 to other federal agencies, to the federal
14 government's employment practices itself, and to
15 having a set of leaders in our country who are
16 trained to succeed in diverse environments.

17 JUSTICE ALITO: Well, then I don't
18 understand the relevance of what you're saying
19 about the link between college education either
20 at a service academy or a school with an ROTC
21 program and the needs of the military if -- if
22 it doesn't matter whether the school has no ROTC
23 program and therefore trains no officers.

24 GENERAL PRELOGAR: Well, Justice
25 Alito, I was trying to focus on the specific

1 question I understood the Chief Justice to be
2 asking about the military's critical interest in
3 this context and just trying to make the point
4 that it's not just confined to the service
5 academies. But we believe deeply in the value
6 of diversity and in universities being able to
7 obtain the educational benefits that correlate
8 with diversity.

9 JUSTICE ALITO: Well, what you say
10 about the military is something that we have to
11 take very seriously. You represent the entire
12 executive branch, including the military, and we
13 have to presume that you are reflecting the
14 views of the military.

15 But what do we do with the fact that
16 the United States was on the opposite side in
17 the Harvard case when the case was in the lower
18 court? And what do we make of the arguments
19 that were made by your predecessor in Grutter?
20 Were they not -- were they insensitive to the
21 needs of the military? Only -- only you have
22 accurately represented the interests of the
23 military?

24 GENERAL PRELOGAR: Well, let me take
25 each of those questions in turn.

1 With respect to the Harvard case, it's
2 true that the United States participated below
3 on the side of Petitioners but only with respect
4 to the factual record and what we thought, my
5 predecessor thought, the evidence showed in the
6 case on the factual issues. We did not take a
7 different position on the legal interests here
8 or assert a different interest on behalf of the
9 military.

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

23 So I do not think that there is a
24 distinction that's been drawn. And it has, in
25 fact, been the consistent judgment of our senior

1 military leaders across the decades and across
2 administrations, including in the last
3 administration, that it is critically important
4 to our national security to have a diverse
5 officer corps. So that has been a constant and
6 a through-line here.

7 JUSTICE SOTOMAYOR: General, what was
8 the factual basis of the prior administration's
9 support of Petitioner here? It was on what
10 factual issue?

11 GENERAL PRELOGAR: It was on the
12 factual issues with respect to what the evidence
13 showed concerning the intentional discrimination
14 claim. And I should be clear that this was only
15 in the Harvard case. It wasn't in participation
16 in this case involving UNC.

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

19 GENERAL PRELOGAR: Not in the UNC
20 case, I don't believe.

21 JUSTICE SOTOMAYOR: So it was only on
22 Harvard --

23 GENERAL PRELOGAR: Only on the Harvard
24 case.

25 JUSTICE SOTOMAYOR: All right.

1 GENERAL PRELOGAR: And I guess what I
2 would say about that, Justice Sotomayor, is it's
3 true my predecessor took a different view of the
4 facts. The district court rejected that view.
5 And the First Circuit affirmed the district
6 court's factual findings. So, as the case comes
7 to this Court, it falls within the Court's
8 two-court rule about usually deferring to the
9 current -- concurrent findings of two lower
10 courts.

11 JUSTICE SOTOMAYOR: Now virtually all
12 of the states that have banned consideration of
13 race in any respect experienced a dramatic drop
14 in enrollment of unrepresented minority
15 students, particularly black students and Native
16 American students, but particularly black
17 students. And even that drop lasted in most of
18 those institutions, if they're not continuing
19 now, at their most prestigious colleges and
20 universities, correct?

21 GENERAL PRELOGAR: That's correct.

22 JUSTICE SOTOMAYOR: So there is --

23 GENERAL PRELOGAR: I think Michigan
24 and --

25 JUSTICE SOTOMAYOR: -- a high price to

1 pay by banning the minor use of race in college
2 admissions, isn't there?

3 GENERAL PRELOGAR: I agree with that,
4 Justice Sotomayor.

5 JUSTICE SOTOMAYOR: And that means
6 that there's a diverse -- there's lesser number
7 of diverse graduates that enter the pipeline not
8 just to the government but to government
9 departments, to the private sector. Many of
10 them require higher education, and so that
11 pipeline is being reduced, correct?

12 GENERAL PRELOGAR: That's correct.

13 JUSTICE SOTOMAYOR: So, in the end,
14 our color blindness, whatever that means because
15 our society is not color blind in its effects,
16 that comes as a high cost not only to UNC and to
17 the state and to the nation as a whole, correct?

18 GENERAL PRELOGAR: That is correct.
19 And I think, again, to return to the example of
20 the military, it's -- the pipeline question is
21 critically important there because the military
22 has a closed personnel system, and what that
23 means is we don't do lateral hiring. And the
24 individuals who are entering college today, the
25 individuals who are participating in ROTC

1 programs today at civilian institutions or who
2 are admitted to the service academies today are
3 the closed universe of individuals who are going
4 to be eligible for leadership in the military in
5 20 and 30 years' time.

6 JUSTICE SOTOMAYOR: So, if we overrule
7 Bakke, Grutter, and Fisher, the diversity
8 admissions programs across the nation based on
9 those cases will have to be reformulated --

10 GENERAL PRELOGAR: Yes.

11 JUSTICE SOTOMAYOR: -- in every
12 instance? We will have to -- we're affecting
13 countless existing programs?

14 GENERAL PRELOGAR: Correct.

15 JUSTICE SOTOMAYOR: We're reducing
16 underrepresented minorities?

17 GENERAL PRELOGAR: Yes.

18 JUSTICE SOTOMAYOR: We are depriving
19 others who are not there of the benefits of
20 diversity?

21 GENERAL PRELOGAR: Yes.

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

25 GENERAL PRELOGAR: Yes.

1 JUSTICE SOTOMAYOR: Seems like a lot
2 to ask.

3 GENERAL PRELOGAR: But I do want to
4 emphasize, to the questions about whether this
5 will end and the questions that, Justice Barrett
6 and Justice Kavanaugh, you were asking about
7 Grutter's 25-year context, that I do think that
8 eventually there is an end point in sight, and
9 it comes directly from the Court's narrow
10 tailoring doctrine in this area.

11 I think that diversity in higher
12 education is absolutely a compelling interest
13 and it will remain so. That is constant.
14 That's not going to change. But our society is
15 going to change in ways that enable more and
16 more universities and colleges to try to achieve
17 the benefits of educational diversity without
18 having to take race explicitly into account.

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

21 GENERAL PRELOGAR: I can't give you a
22 precise number, Mr. Chief Justice, but I can say
23 that I think that our society has made some
24 progress toward that goal. And there are states
25 today that do not take account of race in

1 college admissions. There are universities that
2 don't take account in college admissions. And
3 some of those institutions have still been able
4 to achieve diverse student bodies.

5 And so we are not here to suggest that
6 every college and university in the country
7 needs to have race-conscious admissions in order
8 to achieve these goals. The fact that there has
9 been progress along these lines I think shows
10 that Grutter is working. It shows that as our
11 society continues to make additional progress,
12 this Court's observation there will come to
13 fruition, that we will still be able to achieve
14 those benefits, but we don't need to explicitly
15 take account of race to get there.

16 CHIEF JUSTICE ROBERTS: That's very
17 different from what Justice O'Connor said. She
18 said race-conscious admissions programs must be
19 limited in time. That was a requirement. So
20 that part of Grutter should be disregarded?

21 GENERAL PRELOGAR: No, not at all.
22 This Court has made clear and reemphasized in
23 Fisher I and Fisher II that universities are
24 under a constant obligation to evaluate their
25 policies. They cannot adopt race-conscious

1 admissions and just sit back reflexively and let
2 that play out forever into the future. Instead,
3 they need to continuously reevaluate whether
4 progress has been made such that they can use
5 race-neutral alternatives to achieve the same
6 goals.

7 And I think that the Court has not
8 retreated from that aspect of Grutter but that
9 it would be incorrect as a matter of
10 constitutional principle to instead understand
11 Grutter to have set a firm expiration date on
12 the nature of the compelling interest here.

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

23 Obviously, the -- the particularities
24 would differ, but that the essential nature of
25 the argument would be the same.

1 GENERAL PRELOGAR: That's absolutely
2 correct. And you do have many of those entities
3 participating in this case as amici in support
4 of Respondent to explain how critical it is for
5 them to have access to a pipeline of -- of
6 students who have been trained in diverse
7 environments and who themselves broadly reflect
8 the community.

9 So I think it's -- it's absolutely the
10 case that the business community, that every
11 aspect of society would feel the -- the -- the
12 shock waves if this Court were to retreat from
13 Grutter now.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas?

17 Justice Alito?

18 Justice Kagan?

19 JUSTICE KAGAN: I would ask on a
20 completely different question, but one notable
21 thing about the argument here is that on both
22 sides there's been very little discussion of
23 what originalism suggests about this question.

24 And I -- so I just want to ask, what
25 would a committed originalist think about the

1 kind of race-consciousness that's at issue here?

2 GENERAL PRELOGAR: I think that an
3 originalist would think that this is clearly
4 consistent with the original understanding of
5 the Fourteenth Amendment, that universities have
6 come forward with powerful evidence that
7 surrounding the time of enactment of the
8 Fourteenth Amendment there were federal and --
9 and state laws that took race into account for
10 purposes of trying to achieve the central
11 premise of the Fourteenth Amendment to bring
12 African American citizens to a point of equality
13 in our society.

14 And I think what's so notable if the
15 Court is focused on history here is that
16 Petitioner has come forward with essentially no
17 history to support this color-blind
18 interpretation of the Constitution that would
19 make all racial classifications automatically
20 unconstitutional. There's nothing in history to
21 support that.

22 And it takes aim not only most
23 directly at cases like Bakke and Grutter and
24 Gratz and Fisher and this case but also at the
25 Court's entire structure here of applying strict

1 scrutiny specifically to take into account when
2 a racial classification might serve a compelling
3 interest and be necessary to achieve that
4 interest.

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch?

7 JUSTICE GORSUCH: I -- I'd like to
8 focus for a moment on -- on the statutory
9 question. It's one I raised earlier. I'd like
10 your thoughts on it.

11 We have both a constitutional claim
12 but also a statutory claim, Title VI. And I
13 understand our precedents have often conflated
14 the two, but put that aside for the moment.

15 Justice Stevens made a powerful
16 argument in Bakke that whatever the Fourteenth
17 Amendment permits or does not permit, Title VI's
18 language is plain and clear just as Title VII
19 is. And Title VII does not permit
20 discrimination on the basis of sex, and Title VI
21 does not permit discrimination on the basis of
22 race.

23 Can you help me with that?

24 GENERAL PRELOGAR: Sure, Justice
25 Gorsuch. So I think that the Court in Bakke and

1 Grutter correctly interpreted Title VI, the
2 statute, as --

3 JUSTICE GORSUCH: Where -- where did
4 Justice Stevens err?

5 GENERAL PRELOGAR: In not recognizing
6 that the term "discrimination" in this context
7 is ambiguous. And I think that the legislative
8 history therefore carries --

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

10 GENERAL PRELOGAR: -- forth in this
11 context.

12 JUSTICE GORSUCH: -- we didn't find it
13 ambiguous in Bostock. Why should we find it
14 ambiguous now?

15 GENERAL PRELOGAR: Well, I think that
16 -- I think that the statute doesn't define --

17 JUSTICE GORSUCH: Were we wrong in
18 Bostock?

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

22 JUSTICE GORSUCH: I did.

23 GENERAL PRELOGAR: -- the Court has
24 already resolved this issue. I just would
25 emphasize that --

1 JUSTICE GORSUCH: All right. You're
2 going to go back to that. Okay.

3 GENERAL PRELOGAR: -- we're talking
4 about a statute here, statutory stare decisis
5 considerations have their greatest force.
6 Congress has never overturned this Court's
7 interpretation of Title VI. Petitioners aren't
8 asking this Court to revisit its interpretation
9 of Title VI --

10 JUSTICE GORSUCH: On the text, though,
11 do you have anything else?

12 GENERAL PRELOGAR: I would point to
13 the ambiguity in the term "discrimination."

14 JUSTICE GORSUCH: Okay. But it's not
15 ambiguous in Title VII?

16 GENERAL PRELOGAR: No, and we respect
17 this Court's decision in Bostock.

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

20 GENERAL PRELOGAR: This Court has held
21 that multiple times.

22 JUSTICE GORSUCH: Okay. What do we
23 say to Asian Americans who there's a veritable
24 cottage industry we're told by the briefs that
25 they are encouraging Asian applicants to avoid

1 and beat "Asian quotas"? That's how they
2 perceive it.

3 Is that an important consideration in
4 that they tell applicants -- coaches tell
5 applicants to disguise their backgrounds and
6 their names to the extent possible in order to
7 secure what they view as an even footing in the
8 admissions process?

9 GENERAL PRELOGAR: I find those
10 accounts appalling. They are not permitted
11 under the Constitution. It's very clear that
12 racial identity cannot be treated as a negative.
13 That would be intentional discrimination. It's
14 prohibited under Equal Protection. It's
15 prohibited under Title VI, and Grutter does not
16 countenance it.

17 So, to the extent that that is
18 happening at any educational institution around
19 this country, it's unlawful and the university
20 should be held accountable for it.

21 JUSTICE GORSUCH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh?

24 JUSTICE KAVANAUGH: I understand your
25 point about the race-conscious decision-making

1 being allowed in certain circumstances under the
2 Equal Protection Clause, and, certainly,
3 precedent in the school desegregation cases
4 allows that as well and so -- so does Bakke,
5 obviously.

6 And you read Justice Marshall's
7 opinion in Bakke and that's a very forceful and
8 compelling explanation of why -- why that is so
9 important and why that was in his view necessary
10 for some time.

11 But even in Bakke, Justice Blackmun
12 was saying there must be a time when in he said
13 I hope 10 years, this was in 1978, and he then
14 said that hope is a slim one. And then you got
15 to Grutter, and that was a very similar argument
16 to this one.

17 And -- and we've talked about, just to
18 pick up on the Chief Justice's question, the --
19 the reference there, I think, was because
20 Justice O'Connor's majority opinion was
21 concerned about indefinite extension, and you've
22 said don't worry about that.

23 How will we know when the time has
24 come?

25 GENERAL PRELOGAR: The time will be

1 here when universities are able to enroll
2 diverse student bodies without having to take
3 explicit account of race in the admissions
4 process.

5 JUSTICE KAVANAUGH: So, if I can just
6 break that down, I think what you're saying, but
7 correct me if you disagree, is that when
8 race-neutral alternatives produce a sufficient
9 percentage of underrepresented minority students
10 in the student body.

11 Is that an accurate translation?

12 GENERAL PRELOGAR: Yes, when it allows
13 for meaningful representation and meaningful
14 diversity on those campuses.

15 JUSTICE KAVANAUGH: Okay. And what --
16 I used the word "sufficient," you used
17 meaningful, but what number?

18 GENERAL PRELOGAR: So I -- I -- I
19 think that it's not reducible to a precise
20 number or percentage. The Court has made clear
21 and just recently in Fisher II considered
22 exactly this question and made clear that, of
23 course, there -- there aren't quotas or specific
24 numerical thresholds that need to be reached.
25 That's not the right way to think about the

1 diversity interest in this context.

2 Now I don't want to suggest that --
3 that demographics are wholly irrelevant here.
4 The Court has also said in Grutter and then
5 reiterated in Fisher that numbers can remain
6 relevant for purposes of trying to measure
7 whether there's truly a meaningful opportunity,
8 for example, to have cross-racial interactions.

9 JUSTICE KAVANAUGH: But, if you don't
10 have a number, and I understand why it's
11 difficult, and I understand the problems with
12 that, I get all that, but if you don't have
13 something measurable, it's going to be very hard
14 for this Court, if we're called upon 10 years
15 from now or 20 years from now, it's going to
16 be -- you know, this is a bit of a replay of the
17 Grutter argument, but if we come back to it,
18 okay, are we there yet? What do we look at?

19 You're saying meaningful opportunity.
20 I don't know exactly what that means. I don't
21 know how the schools will know when they have to
22 -- when they've -- the -- the -- when the
23 race-neutral alternative could get them close
24 enough or if it has to meet some threshold. I
25 don't know what "meaningful" means.

1 I know what it means in terms of what
2 you're describing. I don't know how it
3 translates to looking at the composition of a
4 student body achieved through race-neutral
5 alternatives and says, yes, that gives them
6 meaningful opportunity.

7 And I don't know how educators are
8 going to make that decision, so any help you can
9 provide on that I would appreciate.

10 GENERAL PRELOGAR: Sure. And I -- I
11 think that it's going to be tied to the direct
12 educational benefits that the university has
13 articulated that it's trying to achieve, and
14 those can be measured.

15 I would point to, I think, three
16 overarching categories or ways to try to measure
17 progress toward the goal. The first can be
18 quantitative or objective evidence. I'll use
19 the service academies again as another example.

20 One of the things they have looked at
21 and measured is the disparities in graduation
22 and attrition rates. And the Coast Guard
23 Academy, for example, discovered when it went to
24 Congress in the early 2000s to try to ask
25 Congress to lift the ban on the use of race in

1 admissions, which Congress did in 2010, what the
2 Coast Guard Academy said is it had studied the
3 issue with respect to women and discovered that
4 when enrollment of women stabilized at about 25
5 to 30 percent of the population, those
6 disparities of -- of -- of women not graduating
7 in the same -- at the same rate as men fell by
8 the wayside and disappeared. And so I think
9 graduation and attrition rates are relevant.

10 I think that a university can also
11 measure the degree of race-related incidents
12 on -- on campus and whether those are happening.
13 I think the university can look at patterns of
14 enrollment in its classes to determine whether
15 the -- the classroom environment is diverse and
16 there are those opportunities for cross-racial
17 understanding. So that's all the first
18 category.

19 The second category I would point to
20 is the one I've already referenced,
21 demographics. I think that that can be
22 relevant, again, not to set a quota, not to
23 identify a precise numerical threshold but in
24 recognition that when there are extreme
25 disparities in representation of certain groups,

1 it can cause people to wonder whether the path
2 to leadership is open.

3 And if I could, maybe I could just
4 give, I think, a common sense example of that
5 that I would hope would resonate with this
6 Court.

7 The Court is going to hear from 27
8 advocates in this sitting of the oral argument
9 calendar, and two are women, even though women
10 today are 50 percent or more of law school
11 graduates. And I think it would be reasonable
12 for a woman to look at that and wonder, is that
13 a path that's open to me, to be a Supreme Court
14 advocate? Are private clients willing to hire
15 women to argue their Supreme Court cases? When
16 there is that kind of gross disparity in
17 representation, it can matter and it's common
18 sense.

19 And then the third category, to finish
20 this up here, that I think that universities can
21 look at is subjective or qualitative evaluation
22 of actual student experiences. You can do
23 things like conduct high-quality surveys of
24 students to ask them what opportunities have you
25 had to interact with people of a differ- -- of a

1 different race from you? What did you learn
2 from those experiences? Did it challenge your
3 thinking? If you are an underrepresented
4 minority student, do you feel isolated? Do you
5 feel like you have to be a spokesperson for your
6 race? And so that can yield relevant data as
7 well to help measure progress toward these
8 goals.

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 JUSTICE BARRETT: General, I have a
13 question about the originalists' evidence. And,
14 you know, there's nuance in that, and I don't
15 want to get into the details of that, but my
16 question is how it would affect your position in
17 this case. So I entirely agree with you and
18 it's established in our precedent that it's not
19 always illegal to take race-conscious measures.
20 Remedial measures, you know, are -- are an
21 example of that.

22 Do you agree, though, on your
23 understanding of the originalist evidence that
24 strict scrutiny -- and, obviously, we didn't
25 think about scrutiny in those days, but, you

1 know, it's not accurate to say, I agree with
2 you, when you look at the originalist evidence
3 that it was always color-blind, that some
4 race-conscious measures were permitted at least
5 in a remedial sense, right? Desegregation is an
6 example of that. So the question is, under what
7 circumstances have those remedial measures been
8 permitted? And, you know, that's a Section 5
9 question. How would that originalist evidence
10 affect your case?

11 If you were writing on a blank slate,
12 would you say that university affirmative action
13 programs don't implicate the Fourteenth
14 Amendment? Or are you saying that they just
15 very plainly would satisfy our modern tiers of
16 scrutiny because the interest is compelling even
17 if we didn't have Bakke, Grutter, Fisher, et
18 cetera?

19 GENERAL PRELOGAR: I think that
20 because they involve racial classifications, it
21 is necessary to test them under strict scrutiny.
22 And so we're not suggesting that under an
23 originalist case, they would just be
24 automatically exempt.

25 I think the Court has rightly

1 recognized in this context that anytime a racial
2 classification is used, you want to suggest that
3 to the most searching scrutiny in order to test
4 for whether it could possibly be justified based
5 on compelling interest and also, of course, to
6 push on narrow tailoring.

7 But, here, we think that the Court
8 rightly concluded in Bakke and Grutter and
9 Fisher that narrow tailoring and compelling
10 interest are satisfied.

11 JUSTICE BARRETT: Thanks.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: Yes. I just wanted
15 two quick things. One is about the originalist
16 position. Isn't it at least ambiguous as to
17 what the history is telling us about -- about
18 whether or not race-consciousness can be used?

19 I know your position and the position
20 of some folks is that it's clear that the
21 history is saying race-consciousness is okay.
22 And as Justice Barrett mentioned, there is
23 evidence of that.

24 And if there's evidence on the other
25 side, don't we need to have a clear picture of

1 this in order to overcome stare decisis? I
2 mean, we have the historians' brief that says
3 even if the history was unclear, and it's not,
4 overcoming stare -- stare decisis requires
5 something more than ambiguous historical
6 evidence.

7 Do you agree with that?

8 GENERAL PRELOGAR: I do agree with
9 that. I think that Petitioner bears a heavy
10 burden in this case because we're in a situation
11 where stare decisis considerations apply, and I
12 think it would be destabilizing for the Court to
13 turn its back on precedent here.

14 And I think what can undoubtedly be
15 said about history, although there are some
16 complications in the record, what is undoubtedly
17 true is that Petitioner has not been able to
18 point to any clear history to support the notion
19 that racial classifications were automatically
20 and invariably unconstitutional.

21 JUSTICE JACKSON: And, finally, is
22 there some connection between how race is being
23 used and the concerns that some of my colleagues
24 have about the amount of time?

25 So what I'm trying to get at or think

1 about is whether Bakke, for example -- Bakke was
2 a set-aside program as far as I understood, that
3 there was actually 16 seats in a class of a
4 hundred that were being set aside for
5 underrepresented minorities, and, therefore,
6 obviously, the concerns about perniciousness and
7 being problematic and we want it to end, we
8 don't want this going on forever.

9 But, when you have a situation like
10 this in which you're talking about a holistic
11 review, other people are getting pluses in the
12 system, no one's automatically getting a plus in
13 the system, I wonder if the urge to end it --
14 and what is the end it? The end it is to
15 include race alongside 40 other characteristics.
16 I wonder if it implicates the same kinds of
17 concerns about the use of race?

18 GENERAL PRELOGAR: Yes, Justice
19 Jackson. I think that there is a lot of force
20 to that point. And I think that the UNC record
21 really illustrates this point, that UNC has held
22 itself to the standards this Court has
23 articulated in using race as only one of a
24 multitude of factors in holistic admissions and
25 deploying race-neutral alternatives and not

1 using race when it's not necessary to achieve
2 true student body diversity.

3 And maybe that means that given the
4 limited way that race functions, it is taking
5 longer for our society to get to the point that
6 everyone agrees we will eventually reach, but I
7 don't think that that's a basis to condemn
8 Grutter now and halt progress in its tracks.

9 JUSTICE JACKSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 General.

12 Mr. Strawbridge, rebuttal?

13 REBUTTAL ARGUMENT OF PATRICK STRAWBRIDGE
14 ON BEHALF OF THE PETITIONER

15 MR. STRAWBRIDGE: Thank you, Mr. Chief
16 Justice. I'm going to try to make four points
17 here.

18 First, with respect to the military,
19 the -- the United States brief on that is long
20 on assertions that race-neutral alternatives are
21 not available to it and would not work but not
22 actually long on any evidence of that fact. We
23 don't know precisely what race-neutral
24 alternatives they have looked at. We don't know
25 what has been tried. We don't know what else

1 could be available to them, especially with the
2 fact that they can draw on appointed --
3 appointments from the enlisted ranks, as well as
4 from prep schools.

5 The only actual information we have
6 about how race-neutral alternatives might work
7 in the military academy setting is the Coast
8 Guard when it was race-neutral. The last year
9 that the Coast Guard was not using race as a
10 factor in admissions, it expanded race-neutral
11 recruiting and other pipeline initiatives, and
12 it obtained underrepresented minority enrollment
13 within two points of the Air Force Academy and
14 West Point, which were using race as a -- as an
15 admissions factor.

16 Nor is there any evidence to suggest
17 that the ROTC candidates who come from Texas A&M
18 and Florida and California and Michigan are less
19 diverse, let alone have received fewer benefits
20 of educational diversity than those who come
21 from UNC.

22 With respect to the originalism point,
23 obviously, we think that -- that our reading is
24 consistent with the originalists' reading. The
25 best source on this is actually the United

1 States' brief in the Brown reargument hearing.
2 It has, actually, the most complete survey of
3 information about the meaning of the Fourteenth
4 Amendment, and it concludes on page 65 of that
5 brief that a general understanding of the broad
6 scope of the Fourteenth Amendment when it was
7 enacted is that it would "prohibit legal
8 distinctions based on race or color." That is
9 our position. That was the position in Brown.
10 It's the position that prevails today.

11 There is an assertion that California
12 and Michigan have seen their white enrollment go
13 up since they discarded the use of race. That
14 is not true. In Michigan, underrepresented
15 minority is actually higher today than it was
16 during race-conscious admissions. Additionally,
17 Asian American admissions have gone up six
18 points. Asian Americans are not white. It's
19 necessary that the white share of the class has
20 gone down.

21 At California, the -- the most recent
22 -- or the 2021 class of California, and there
23 was testimony about this in the trial record,
24 Berkeley is 19 percent white, it's 15 percent
25 Mexican American, it's 5 percent other Hispanic,

1 it's 16 percent Chinese American, it's 4 percent
2 Vietnamese, it's 4 percent Korean, and it's
3 4 percent black. And we are told that the
4 students there are somehow being deprived of the
5 educational benefits of diversity or are being
6 deprived of diverse environment. I don't think
7 that's correct.

8 Finally, with respect to my friend
9 from UNC, he insisted that they were committed
10 as close as they could to exploring race-neutral
11 alternatives and having an end point. There was
12 no criteria described to this Court by which one
13 could ever -- ever conclude that their interest
14 in obtaining educational benefits have been
15 satisfied. There was a reference to climate
16 surveys, but the Director of Admissions
17 testified at trial that he had not looked at a
18 climate survey in 10 years. There was no ever
19 -- there was no plan ever to consider sunseting
20 their use of race. There was never even a
21 serious effort in the office to measure what the
22 effect of race was in their current admissions
23 program, even though they had done so for
24 gender, for legacy status, and for time of
25 application.

1 I don't think that's consistent with a
2 university that's actually committed to moving
3 off of race. The fact that the district court
4 found this all survived strict scrutiny under
5 Grutter is a reason to overrule Grutter.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel, counsel. The case is submitted.

8 (Whereupon, at 12:47 p.m., the case
9 was submitted.)

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