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1 P R O C E E D I N G S

2 (10:03 a.m.)

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

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

10 So Mr. Rein, no need to rush.

11 (Laughter.)

12 ORAL ARGUMENT OF BERT REIN

13 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 MR. REIN: And --

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

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

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

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

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

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

22 JUSTICE SOTOMAYOR: How does that --

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

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

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

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

19 JUSTICE SOTOMAYOR: How is race given --

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

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

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

1 MR. REIN: Those factors --

2 JUSTICE SOTOMAYOR: So how --

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

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

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

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

25 MR. REIN: I -- I --

1 JUSTICE SOTOMAYOR: -- worse than Bakke?

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

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

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

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

1 addresses only standing within the Texas educational
2 system.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 How do you do that?

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

25 JUSTICE SCALIA: Are there any critical mass

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

2 MR. REIN: None that I know about.

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

6 MR. REIN: No. And --

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

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

17 JUSTICE BREYER: Seven year -- sorry.

18 JUSTICE SCALIA: Excuse me.

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

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

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

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

12 MR. REIN: Well, I think --

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

15 MR. REIN: Let me --

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

24 What more do they need?

25 MR. REIN: Let me start with your first

1 concern, which is this classroom study.

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

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

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

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

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

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

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

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

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

3 JUSTICE BREYER: Well --

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

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

13 MR. REIN: But --

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

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

20 JUSTICE SCALIA: I was going to ask that.

21 Does anybody, except the faculty, know who
22 this elite 25 percent is?

23 MR. REIN: No.

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

1 MR. REIN: No. They do not.

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

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

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

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

11 JUSTICE SOTOMAYOR: Could I --

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

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

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

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

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

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

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

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

23 JUSTICE KENNEDY: In the Fifth Circuit.

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

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

7 MR. REIN: Well --

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

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

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

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

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

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

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

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

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

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

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

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

18 MR. REIN: Well, procedurally --

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

20 MR. REIN: They --

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

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

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

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

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

12 MR. REIN: Correct.

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

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

25 MR. REIN: According to the University of

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

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

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

17 JUSTICE SOTOMAYOR: May I ask --

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

22 MR. REIN: Correct.

23 CHIEF JUSTICE ROBERTS: Yeah.

24 MR. REIN: That would be the measurement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Right. Right.

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

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

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

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

17 MR. REIN: Well, you know --

18 JUSTICE SOTOMAYOR: When your number --

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

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

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

25 CHIEF JUSTICE ROBERTS: The ones who would

1 -- the ones who have made it --

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

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

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

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

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

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

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

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

11 MR. REIN: No. I --

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

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

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

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

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

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

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

25 Okay?

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

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

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

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

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

1 10. You can --

2 JUSTICE BREYER: All right. So we have one.

3 But I'm looking --

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

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

10 MR. REIN: But not --

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

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

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

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

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

1 could do so it is not fatal in fact?

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

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

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

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

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

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

1 any other way.

2 JUSTICE GINSBURG: I --

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

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

10 MR. REIN: No --

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

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

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

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

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

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

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

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

4 MR. REIN: That is correct.

5 JUSTICE SCALIA: Right?

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

9 JUSTICE SCALIA: That's what I thought.

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

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

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

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

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

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

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

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

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

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

24 MR. REIN: Correct.

25 JUSTICE GINSBURG: And you have no class.

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

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

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

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

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

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

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

3 JUSTICE GINSBURG: What are --

4 MR. REIN: They answered --

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

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

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

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

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

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

6 Thank you, Your Honor.

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

10 MR. REIN: Correct.

11 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

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

13 CHIEF JUSTICE ROBERTS: Mr. Garre.

14 ORAL ARGUMENT OF GREGORY G. GARRE

15 ON BEHALF OF THE RESPONDENTS

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

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

1 that University of Texas has adopted a quota.

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

15 Secondly, the record in this case shows --

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

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

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

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

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

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

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

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

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

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

12 MR. GARRE: Okay.

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

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

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

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

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

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

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

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

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

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

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

22 MR. GARRE: We --

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

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

4 MR. GARRE: And the University --

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

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

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

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

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

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

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

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

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

2 Okay?

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

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

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

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

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

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

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

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

10 CHIEF JUSTICE ROBERTS: And --

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

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

14 MR. GARRE: Yes, Your Honor.

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

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

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

1 MR. GARRE: Your Honor --

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

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

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

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

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

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

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

1 are.

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

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

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

25 CHIEF JUSTICE ROBERTS: I understand. I

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

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

8 CHIEF JUSTICE ROBERTS: -- course.

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

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

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

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

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

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

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

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

1 I can tell, to measure that.

2 MR. GARRE: Let me answer that in two ways.

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

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

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

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

23 MR. GARRE: It has.

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

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

1 the five-year analysis --

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

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

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

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

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

25 MR. GARRE: And I would --

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

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

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

17 And let me give you the deposition --

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

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

1 the first problem.

2 And then the second --

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

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

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

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

19 MR. GARRE: Your Honor --

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

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

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

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

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

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

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

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

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

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

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

1 ah-ha, that's your objective.

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

5 Now, the other --

6 JUSTICE SOTOMAYOR: One of the --

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

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

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

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

20 JUSTICE KENNEDY: I understand --

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

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

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

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

11 MR. GARRE: Yes.

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

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

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

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

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

6 JUSTICE SOTOMAYOR: Let me --

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

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

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

1 meeting our educational objectives.

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

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

8 (Laughter.)

9 JUSTICE SOTOMAYOR: Strange, isn't that?

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

12 (Laughter.)

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

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

24 MR. GARRE: Right.

25 JUSTICE SOTOMAYOR: And with deficits that

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

3 MR. GARRE: Right.

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

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

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

9 (Laughter.)

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

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

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

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

21 MR. GARRE: Race-blind --

22 JUSTICE SOTOMAYOR: Race-blind --

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

25 JUSTICE SOTOMAYOR: -- and a certain number

1 of them were with the 10 percent --

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

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

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

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

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

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

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

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

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

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

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

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

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

21 MR. GARRE: Well --

22 JUSTICE KENNEDY: -- is that correct?

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

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

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

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

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

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

1 what you're saying.

2 (Laughter.)

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

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

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

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

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

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

19 MR. GARRE: So this Court --

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

24 MR. GARRE: This Court --

25 JUSTICE SCALIA: I'm just not impressed by

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

9 MR. GARRE: This Court heard and rejected
 10 that argument, with respect, Justice Scalia, in the
 11 Grutter case, a case that our opponents haven't asked
 12 this Court to overrule. If you look at the academic
 13 performance of holistic minority admits versus the top
 14 10 percent admits, over time, they -- they fare better.

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

22 Thank you, Your Honors.

23 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

24 General Verrilli.

25 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

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

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

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

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

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

1 review without race.

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

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

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

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

13 GENERAL VERRILLI: Right.

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

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

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

24 GENERAL VERRILLI: Right.

25 JUSTICE SCALIA: So you could have said

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

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

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

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

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

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

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

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

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

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

15 GENERAL VERRILLI: But I guess --

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

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

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

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

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

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

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

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

6 GENERAL VERRILLI: Well --

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

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

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

14 GENERAL VERRILLI: I think --

15 JUSTICE SCALIA: -- 30 years?

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

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

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

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

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

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

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

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

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

11 GENERAL VERRILLI: Yeah --

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

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

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

1 which it's been implemented. And I think that would be
2 additional relevant information that might help make the
3 judgment.

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

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

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

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

23 Unlike in Michigan, in Texas the percentage
24 of African-American and Hispanics admitted does not
25 mirror the percentage who applied. It's different.

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

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

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

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

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

18 GENERAL VERRILLI: So --

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

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

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

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

12 CHIEF JUSTICE ROBERTS: Okay. So how --

13 GENERAL VERRILLI: And so --

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

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

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

21 GENERAL VERRILLI: So -- so here's how you
22 should do it, and we've -- we've laid it out in our
23 brief: We think that the approach -- we think that
24 approach is always going to be fatal in fact because, if
25 they don't -- they -- they fail strict scrutiny if

1 they --

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

4 (Laughter.)

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

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

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

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

24 CHIEF JUSTICE ROBERTS: -- at a -- at a more
25 concrete -- and so to look at what they say they want

1 and see if they've done it, but how do you see it?

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

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

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

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

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

24 JUSTICE KENNEDY: I -- I'm not quite sure
25 how that works.

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

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

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

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

23 GENERAL VERRILLI: Yes.

24 CHIEF JUSTICE ROBERTS: -- with -- I mean,
25 that was -- this is consideration of race. It's a very

1 serious matter.

2 GENERAL VERRILLI: Yes.

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

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

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

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

21 GENERAL VERRILLI: It -- it -- it --

22 CHIEF JUSTICE ROBERTS: 600?

23 GENERAL VERRILLI: It might well --

24 CHIEF JUSTICE ROBERTS: They wouldn't feel
25 isolated with 600?

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

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

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

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

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

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

23 GENERAL VERRILLI: Here's what I think about
24 that, Justice Alito: I think that we want to make
25 sure -- and this military example is only one of the

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

9 And you can't achieve that --

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

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

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

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

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

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

19 Thank you.

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

22 GENERAL VERRILLI: Oh, I'm sorry.

23 JUSTICE BREYER: No. I'm glad you said
24 that. And -- and I -- this question will sound very
25 nitpicky and detailed and -- compared to what you were

1 talking about.

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

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

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

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

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

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

1 respect to narrow tailoring because they did compare the
2 students one after another and use race as a plus
3 factor.

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

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

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

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

25 Five minutes, Mr. Rein.

1 REBUTTAL ARGUMENT OF BERT REIN

2 ON BEHALF OF THE PETITIONER

3 MR. REIN: Thank you, Chief Justice.

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

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

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

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

20 MR. REIN: He assumed, at the outside, that
21 any of the admits that were actually African-American or
22 Hispanic outside the Top Ten, he said let me take that
23 assumption and see what it would add. And he said it
24 would constitute less than 1 percent and 2.5 percent,
25 respectively, in -- of the entire 6,322-person case --

1 JUSTICE GINSBURG: What are you reading
2 from?

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

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

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

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

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

24 And then -- then we get the same point on
25 this complementary, which was the big theme of the Fifth

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

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

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

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

21 MR. REIN: And that is incorrect.

22 JUSTICE SOTOMAYOR: All white.

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

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

25 MR. REIN: -- that has no basis in this

1 record.

2 JUSTICE SOTOMAYOR: Oh, but there is --

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

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

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

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

9 MR. REIN: With all deference --

10 JUSTICE SOTOMAYOR: -- that Justice --

11 CHIEF JUSTICE ROBERTS: Mr. Rein --

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

14 Let me finish my point.

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

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

1 that are going to reduce its educational quality.

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

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

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

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

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

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

18 MR. REIN: Justice Sotomayor --

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

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

23 If we're just talking numbers, then you have
24 to show the compelling need for more numbers, so that --
25 one of the reasons for defining your compelling need is

1 that you have to then look at necessity in terms of the
2 need.

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

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

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

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

24 And in this case they said, we're ready for
25 summary judgment; we've put in everything we need. If

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

12 Thank you, Your Honor.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 The case is submitted.

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

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