

1 IN THE SUPREME COURT OF THE UNITED STATES
2 -----X
3 BARBARA GRUTTER, :
4 Petitioner :
5 v. : NO. 02-241
6 LEE BOLLINGER, et al., :
7 Respondents. :
8 -----X
9 Washington, D. C.
10 Tuesday, April 1, 2003
11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:04 a.m.
14 APPEARANCES:
15 MR. KIRK O. KOLBO, ESQ., Minneapolis, Minnesota; on
16 behalf of the Petitioner.
17 GENERAL THEODORE B. OLSON, ESQ., Solicitor General,
18 Department of Justice, Washington, D. C.; as amicus
19 curiae, supporting Petitioner.
20 MAUREEN E. MAHONEY, ESQ., Washington, D. C., on
21 behalf of the Respondents.
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in No. 02-241, Barbara Grutter v. Lee Bollinger.

Mr. Kolbo.

ORAL ARGUMENT OF KIRK O. KOLBO
ON BEHALF OF THE PETITIONER

THE WITNESS: Mr. Chief Justice and May it
please the Court:

Barbara Grutter applied for admission to the
University of Michigan Law School with a personal right
guaranteed by the Constitution that she would not have her
race counted against her. That race -- that the
application would be considered for free from the taint of
racial discrimination. The law school intentionally
disregarded that right by discriminating against her on
the basis of race as it does each year in the case of
thousands of individuals who apply for admission.

The law school defends its practice of race
discrimination as necessary to achieve a diverse student
body. With the loss -- with the diversity that the law
school is committed to ensuring and meaningful numbers or
critical mass, is of a narrow kind defined exclusively by
race and ethnicity.

The constitutional promise of equality would not

1 be necessary in a society composed of a single homogenous
2 mass.

3 It is precisely because we are a nation teeming
4 with different races and ethnicities -- one that is
5 increasingly interracial, multiracial, that it is so
6 crucial for our Government to honor its solemn obligation
7 to treat all members of our society equally without
8 preferring some individuals over others.

9 QUESTION: Well, of course, you -- I mean, a
10 university or a law school is faced with a serious problem
11 when it's one that gets thousands of applications for just
12 a few slots. Where it has to be selective. And inherent
13 in that setting is making choices about what students to
14 admit.

15 So you have an element here that suggests that
16 there are many reasons why a particular student would be
17 admitted or not. And a lot of factors go into it.

18 So how do you single this out and how are we
19 certain that there's an injury to your client that she
20 wouldn't have experienced for other reasons?

21 MR. KOLBO: Well, Your Honor, first of all, race
22 is impermissible because of the constitutional command of
23 equality. The university is certainly free to make many
24 different kinds of choices in selecting students.

25 And to look for all kinds of different

1 diversity, experiential diversity, prospective diversity
2 without regard to race, but race because, Your Honor, of
3 the constitutional command of equality, must be beyond the
4 bounds --

5 QUESTION: You say that's not -- it can't be a
6 factor at all. Is that it? Is that your position that it
7 cannot be one of many factors?

8 MR. KOLBO: Our view, Your Honor, is that race
9 itself should not be a factor among others in choosing
10 students because of the Constitution.

11 QUESTION: Well, you have some -- some
12 precedents out there that you have to come to grips with,
13 because the Court obviously has upheld the use of race in
14 making selections or choices in certain contexts, for
15 instance, to remedy prior to discrimination in other
16 contexts.

17 MR. KOLBO: Oh, absolutely, Your Honor.

18 QUESTION: All right.

19 MR. KOLBO: And I want to be clear about that.
20 We are --

21 QUESTION: Well, but you are speaking in
22 absolutes and it isn't quite that. I think we have given
23 recognition to the use of race in a variety of settings.

24 MR. KOLBO: And we absolutely agree, Justice
25 O'Connor.

1 QUESTION: Is it cause for concern with your --
2 if you're the dean of the law school or the president in
3 the university or the Governor of the State that minority
4 students, particularly from the Black and Hispanic
5 community are underrepresented by a large factor,
6 according to their -- their share of the population.

7 Suppose you have a law school with two or three
8 percent Hispanic and -- and black students, is that a
9 legitimate concern for the university and for the State
10 officials?

11 MR. KOLBO: We believe not, Your Honor, for the
12 reason that we need to get away from the notion that
13 there's some right number for each racial group.

14 QUESTION: So if year after year after year
15 there's an underrepresentation, there is no cause for the
16 State or the Government or its educational experts to be
17 concerned whatsoever?

18 MR. KOLBO: I wouldn't say not to be concerned,
19 Your Honor, I think the mere fact of underrepresentation,
20 that is that say, blacks are not represented as they are
21 in the population is not a concern that would justify
22 racial preferences. It certainly would justify perhaps
23 broad social and political concerns.

24 QUESTION: Well, it's a broad social and
25 political concern that there are not adequate members of

1 -- of a profession which is designed to protect our rights
2 and to -- and to promote progress. I would -- I should
3 think that's a very legitimate concern on the part of the
4 State.

5 MR. KOLBO: The current concern there, Your
6 Honor, ought to be addressed by -- by addressing the
7 problem. If there is some reason that -- that particular
8 minority groups are not participating as fully in the
9 fruits of our society such as being represented at the
10 schools, we need to address those problems.

11 But racial preferences don't address those
12 problems.

13 QUESTION: Mr. Kolbo, may I call your attention
14 in that regard to the brief that was filed on behalf of
15 some retired military officers who said that to have an
16 officer corps that includes minority members in any
17 number, there is no way to do it other than to give not an
18 overriding preference, but a plus for race. It cannot be
19 done through a percentage plan, because of the importance
20 of having people who are highly qualified. What is your
21 answer to the argument made in that brief that there
22 simply is no other way to have Armed Forces in which
23 minorities will be represented not only largely among the
24 enlisted members, but also among the officer cadre?

25 MR. KOLBO: Justice Ginsburg, I don't believe we

1 have an adequate record in this case from which to
2 conclude that we wouldn't have representation of
3 minorities. The military in the absence of --

4 QUESTION: Suppose that were true. Let's take
5 that as the fact, would you still say nonetheless even if
6 it's true that there will be very few, if any, minority
7 members admitted to the military academies, still you
8 cannot use race?

9 MR. KOLBO: I believe race could not be used,
10 Your Honor. I think that other solutions could be looked
11 at addressing the problem why they are not minorities in
12 the military. I note that the United States has not taken
13 a position. We have the brief as Your Honor has mentioned
14 from several individuals, the United States has not taken
15 a position in this case, the military academies have not
16 taken a position.

17 QUESTION: Yes, they have, if the brief is
18 accurate about the regulations, the academies have taken a
19 position?

20 MR. KOLBO: As I understand it, Justice Stevens,
21 the briefs are filed on the behalf of individuals.

22 QUESTION: I understand that. But they are
23 quoting material that the academies have distributed,
24 which indicate they do give preferences.

25 MR. KOLBO: Well, Your Honor --

1 QUESTION: Do you challenge the fact -- that
2 that is a matter of fact?

3 MR. KOLBO: We don't challenge what they say,
4 Your Honor. We're just suggesting -- we don't have a
5 record in this case.

6 QUESTION: No, but do you challenge the fact
7 that they are giving the preference?

8 MR. KOLBO: We don't have enough information on
9 it to know whether --

10 QUESTION: Are you serious that you think there
11 is a serious question about that? That we cannot take
12 that green brief as a representation of fact?

13 MR. KOLBO: I just don't know, Your Honor, what
14 the facts are with respect to the military because this
15 case was --

16 QUESTION: It depends on what factor you're
17 talking about, doesn't it? You accept the fact that
18 they're giving preferences, but that doesn't convert to
19 the fact that if they didn't give preferences, there is no
20 other way to get an officer corps that includes some
21 minority people, does the brief say that?

22 MR. KOLBO: It does not, Your Honor. We have no
23 evidence as to what the extent of representation is.

24 QUESTION: The issue as I understand it is not
25 whether without preferences there can be a military

1 academy population with some minorities, the question is
2 whether without the -- the weighting of race that they do
3 in fact give, they can have an adequate number of
4 minorities in the academies to furnish ultimately a
5 reasonable number of minorities in the officer corps,
6 that's the issue, isn't it?

7 MR. KOLBO: Well, Your Honor, again, the -- the
8 terms you've used, reasonable and adequate, we have no
9 information in this record on which I can make those --

10 QUESTION: More than what would happen if they
11 did nothing?

12 MR. KOLBO: And that number, Your Honor, I don't
13 know what it is. Again, because it wasn't part of this
14 case. I think it's more --

15 QUESTION: More than what would happen if they
16 did something else, such as making special provision for
17 all people of economically disadvantaged background. We
18 don't know whether that would have produced the same
19 number, either.

20 MR. KOLBO: That's correct, Your Honor. As the
21 Court --

22 QUESTION: Do you believe that that would be an
23 adequate -- at least means of experimenting here -- take
24 it as an alternative?

25 MR. KOLBO: Taking race neutral alternatives

1 into consideration?

2 QUESTION: Well, taking for example economic
3 disadvantage?

4 MR. KOLBO: Yes, Your Honor.

5 QUESTION: Do you seriously believe that that
6 would be anything but a surrogate to race? It would take
7 the word race out of the categorization of the label that
8 we put on it, but do you believe it would function in a
9 different way but as a surreptitious approach to race?

10 MR. KOLBO: It certainly functions differently,
11 Your Honor. Race controls --

12 QUESTION: Do you think it would?

13 MR. KOLBO: Certainly, yes --

14 QUESTION: Is there any reason to believe that
15 it would?

16 MR. KOLBO: I do, Your Honor, because it's not
17 just minorities that are socioeconomically disadvantaged
18 in this country. That happens with respect across racial
19 lines. So race neutral alternatives --

20 QUESTION: The object -- but the object I would
21 have assumed given the dialogue, the object is to increase
22 the racial number of the percentage of minorities. If
23 that is the object, than whatever it is, it's not a race
24 neutral measure.

25 MR. KOLBO: Well, I would disagree, Your Honor,

1 because I think if you have a race neutral means that
2 accomplishes many purposes, and one of them is race, that
3 is not necessarily under this Court's precedents
4 unconstitutional. The Court --

5 QUESTION: Well, let me ask you this, it's about
6 the military brief that you didn't come here to argue
7 about, but it will maybe get you back to your case.

8 MR. KOLBO: Sure.

9 QUESTION: The military brief tells us -- the
10 green brief -- that there are preparatory schools that the
11 academies have and 40 percent of the registration in those
12 preparatory schools are racial minorities.

13 And they -- suppose the Government does this and
14 expends money for the purpose of recruiting and helping
15 racial minorities apply to the academies and succeed
16 there.

17 Is that a proper constitutional purpose?

18 MR. KOLBO: I see no constitutional objection
19 there, Justice Kennedy. For the reason I think it -- it's
20 quite permissible in principle to draw a line between
21 casting a wider net, recruiting and -- and the point of
22 competition where people -- where people -- where the
23 decision must be made whether people are going to be
24 treated on the basis of the same --

25 QUESTION: Would you allow recruiting targeted

1 at minorities?

2 MR. KOLBO: I don't see the constitutional
3 objection with that, Your Honor.

4 QUESTION: Fine. If you can use race as a
5 criterion for spending money, I take it one argument on
6 the other side, which I'd like you to address, is that we
7 live in a world where more than half of all the
8 minority -- really 75 percent of black students below the
9 college level are at schools that are more than 50 percent
10 minority. And 85 percent of those schools are in areas of
11 poverty.

12 And many among other things that they tell us on
13 the other side is that many people feel in the schools,
14 the universities, that the way -- the only way to break
15 this cycle is to have a leadership that is diverse. And
16 to have a leadership across the country that is diverse,
17 you have to train a diverse student body for law, for the
18 military, for business, for all the other positions in
19 this country that will allow us to have a diverse
20 leadership in a country that is diverse.

21 Now, you're familiar with that argument. But if
22 it is reasonable to use race as a criterion, as a plus for
23 spending money, why isn't it also reasonable to use it as
24 a plus to see that -- to obtain that set of objectives
25 that I've tried to summarize in a second that you're very

1 familiar with.

2 MR. KOLBO: Because very simply, Justice Breyer,
3 the Constitution provides the right of -- individuals with
4 the right of equal protection. And by discriminating on
5 the basis of race at a point of competition, innocent
6 individuals are being injured in their constitutional
7 rights. That's the distinction between that and simply
8 trying to cast a wider net, recruiting spending money on
9 outreach efforts, a very principal line it seems to me can
10 be drawn between those two things.

11 QUESTION: The reason that the injury is more
12 severe to the white person who doesn't get in when that
13 white person doesn't get in because she's not an athlete
14 or he's not a -- he's not a alumnus or he's not any of the
15 other things that fits within these other criteria? What
16 is the difference there is?

17 MR. KOLBO: The difference is the Equal
18 Protection Clause, Your Honor. It does not apply to
19 alumni preferences in scholarships. It applies to race.

20 QUESTION: That's the legal conclusion. But the
21 reason if I thought, for example, that there is a
22 difference under the Equal Protection Clause, between a
23 system that says to the discriminated-against people, the
24 law does not respect you, and a system that says the law
25 does respect you, but we are trying to help some others,

1 suppose I thought that that is a sound legal distinction
2 as reflected in this Court's cases, you would reply that?

3 MR. KOLBO: Sound and reasonable, Your Honor, is
4 not enough when it comes to race. It must be a compelling
5 purpose. And that is the difference. There are many
6 policy choices a university can make that I may disagree
7 or agree with, and that I have no legal standing or no
8 client has a legal standing to challenge, because they
9 don't implicate important constitutional rights. There is
10 something special about race in this country. It's why we
11 have a Constitution about it. It's why we have a
12 constitutional amendment about it.

13 QUESTION: Why -- why do you draw the line at --
14 you said you can recruit -- you can use a race criterion,
15 if I understood you correctly, to recruit, you could have
16 minority students only given the benefit of scholarships
17 to go to these preparatory schools. You were surely
18 recognizing the race criterion there. Why is that
19 permissible?

20 MR. KOLBO: Because it doesn't prevent someone
21 from applying. The key is to be able to compete on the
22 same footing at the point of competition.

23 QUESTION: These preparatory schools -- do you
24 concede that they're only for minority students? I'm
25 familiar with those preparatory schools, familiar or not?

1 MR. KOLBO: Certainly not --

2 QUESTION: The majority of the people that
3 attend them are young men and women who really want to get
4 into the service academies, but don't have the grades for
5 it. And the service academy tells them whether they're
6 black, white or anything else, go to these preparatory
7 schools and you'll have a better chance next time around.

8 MR. KOLBO: That --

9 QUESTION: It isn't just for minorities.

10 MR. KOLBO: They're not, Your Honor. They are
11 open to -- accessible to all.

12 QUESTION: I was asking you about your answer to
13 the question, not -- the fact may very well be, but I
14 thought you had answered the question, yes, you could have
15 special preparation for minorities only, yes, you could
16 have recruitment for minorities only. I thought that that
17 was your answer.

18 MR. KOLBO: I believe you can -- as part of a
19 broad program, I believe you could. You could seek
20 outreach for minority students, because it's very simple
21 it seems to me to draw a principal distinction between
22 outreach, casting a wider net and applying the same
23 standard at the point of -- at the point of competition.

24 QUESTION: Including at the point of giving the
25 benefit of going to one of these preparatory schools. You

1 wouldn't allow one of these preparatory schools to be for
2 minority only, would you?

3 MR. KOLBO: No, of course not, Your Honor. And
4 I'm not suggesting that outreach would be limited to
5 minorities only. I'm just suggesting that -- I don't
6 understand why there would be a constitutional objection
7 to trying to cast a wider net by focusing as part of a
8 broader effort of outreach in recruiting minority students
9 and it can be quite -- it's quite easy to draw the line
10 between that and -- and the point of competition.

11 QUESTION: May I ask --

12 QUESTION: If you're right -- if you're right
13 about what equal protection requires and we have also two
14 statutes that incorporate the equal protection principle,
15 then there could be no affirmative action, I take it, in
16 employment?

17 MR. KOLBO: There could be, Your Honor, to
18 remedy past identified discrimination, but not to exceed
19 diversity and there is not today as I understand it any
20 compelling interest in the employment context with respect
21 to --

22 QUESTION: So, for example, if we have a prison
23 that was largely minority population and the state wanted
24 to give a preference so that it would have a critical mass
25 of correction officers of the minority race, that would be

1 impermissible?

2 MR. KOLBO: It would be impermissible, Your
3 Honor, unless based upon a compelling interest and the
4 only one that has been recognized in the employment
5 context is identified discrimination. And I don't see
6 that in your hypothetical.

7 QUESTION: No, it's not in my hypothetical.

8 MR. KOLBO: Mr. Chief Justice.

9 QUESTION: Can I ask you one question about the
10 extent of your position? There's a brief applied, I think
11 it's by the Potawatomi tribe. If Michigan had made -- the
12 governor of Michigan many years ago had made a commitment
13 to an Indian tribe to allow three persons into the
14 University of Michigan every year, three tribemen, and
15 nothing else, would that be constitutionally permissible?

16 MR. KOLBO: I don't believe so Your Honor.
17 Again, it's a distinction drawn on the basis of race.

18 QUESTION: Or just one, still would be a -- that
19 would exclude an impermissible number of slots for --

20 MR. KOLBO: If it's slots on the basis of race,
21 Your Honor. And if there are no further questions, if I
22 may reserve the balance of my time, Mr. Chief Justice.

23 QUESTION: Very well, Mr. Kolbo.
24 General Olson, we'll hear from you.

25 ON BEHALF OF THE UNITED STATES,

1 AS AMICUS CURIAE,
2 IN SUPPORT OF THE PETITIONER
3 GENERAL OLSON: Mr. Chief Justice and may it
4 please the Court:
5 The Michigan law school admissions program fails
6 every test this Court has articulated for evaluating
7 governmental racial preferences.
8 First, it is --
9 QUESTION: General Olson, just let me get a
10 question out and you answer it at your convenience. I'd
11 like you to comment on Carter Phyllip's brief. What is
12 your view of the strength of that argument?
13 GENERAL OLSON: Well, I'm not sure --
14 QUESTION: That's the one about the generals and
15 about the military academies.
16 GENERAL OLSON: I understand -- the -- our
17 position with respect to that is we respect the opinions
18 of those individuals, but the position of the United
19 States is that we do not accept the proposition that black
20 soldiers will only fight for -- black officers or the
21 reverse that race neutral means should be used in the
22 academies as well as other places.
23 And that to the extent that there's any
24 difference in analysis, the Court might consider its
25 position, the position it articulated in connection with

1 the military in Rostker v. Goldberg. But our position
2 with respect to that brief is that --

3 QUESTION: Your suggestion is that the military
4 has broader latitude than the private university?

5 GENERAL OLSON: No, I'm suggesting that --

6 QUESTION: Well, you're pointing to Rostker
7 suggests that.

8 GENERAL OLSON: Yes, I'm suggesting that the
9 Court will want to look at each of these individual
10 situations according to the circumstances and that may be
11 a factor in that context. But I started my answer,
12 Justice Stevens, by saying you do not accept the
13 proposition that race neutral means should not be used and
14 employed fully to -- to make sure that the academies are
15 accessible and open and -- and offer opportunities for as
16 many people as possible.

17 QUESTION: But you recognize, General Olson,
18 that here and now, all of the military academies do have
19 race preference programs in admissions?

20 GENERAL OLSON: The Coast Guard does not. It's
21 prohibited by Congress from doing so. I do acknowledge,
22 Justice Ginsburg that the other academies are doing so.
23 It's the position of the United States --

24 QUESTION: Is that that's illegal what they're
25 doing?

1 GENERAL OLSON: Pardon me?

2 QUESTION: Is it -- that it is illegal, a

3 violation of the Constitution?

4 GENERAL OLSON: We haven't examined that and we

5 haven't presented a brief with respect to the specifics of

6 each individual academy. And we would want to take into

7 consideration any potential impact suggested by the Court

8 in the Rostker case.

9 QUESTION: What do you -- what do you think is

10 the -- is the principal race neutral means, that the

11 academy should use?

12 GENERAL OLSON: Well --

13 QUESTION: Without criticizing necessarily what

14 they're doing now, what would be the -- in your judgment,

15 the best race neutral way for them to go about reaching

16 your objective?

17 GENERAL OLSON: Well, there are a variety of

18 race neutral means and narrowly tailored methods by which

19 academies and universities can reach out to people of all

20 backgrounds to make sure that they've eliminated --

21 QUESTION: No, no. I realize your position.

22 But specifically, which -- which of the race neutral

23 suggestions that have been considered do you think would

24 be, you know, most adaptable to the academy situation?

25 MR. KOLBO: Widespread recruiting, making sure

1 that there's opportunities for education and advancement
2 in the -- in the academies.

3 QUESTION: Recruiting with an objective of
4 minority students?

5 GENERAL OLSON: Not limited, a race neutral
6 system of broad scale recruiting that this Court has
7 always supported the proposition that efforts may be made
8 by governmental institutions to eliminate barriers that
9 have existed where artificial barriers --

10 QUESTION: Okay. But my question is, if they
11 don't do it with a racial objective, how does the
12 recruiting respond to the position taken in -- in Mr.
13 Phillips's brief that without the kind of -- of racial
14 weighting and admissions that is given now, they simply
15 will not reach a -- a -- a substantial number of -- or be
16 able to attain a substantial number of minority slots in
17 the class?

18 GENERAL OLSON: That is the opinion of certain
19 individuals. It is -- we do not accept that conclusion
20 based upon those opinions. And this Court has repeatedly
21 held that race neutral means must be demonstrated and will
22 be accepted, and will not -- and the Court will not accept
23 the proposition that race neutral means will not be
24 successful unless they've been attempted and demonstrated.
25 These -- this program at the University of Michigan Law

1 School fails every one of the Court's tests. First, it's
2 a thinly disguised quota which sets aside a significant
3 portion of each year's entering class for preferred ethnic
4 groups.

5 Secondly, it overtly employs stigmatizing and
6 divisive racial stereotypes, what the law school calls
7 diversity-relevant characteristics. It identifies persons
8 by diversity-relevant characteristics.

9 QUESTION: Well, what they do is they use race.

10 GENERAL OLSON: Exactly.

11 QUESTION: I know. But they have a reason for
12 it. The reason for it is they want to produce a diverse
13 class and the reason they want to do that, using it as a
14 plus, they say, is to do the things I said before. They
15 think it breaks down stereotypes within the class. They
16 think it's educationally beneficial. They think it
17 supplies a legal profession that will be diverse and they
18 think a legal profession like business and the military
19 that is diverse is good for America from a civics point of
20 view, et cetera, breaks the cycle. Those are the
21 arguments which you well know.

22 So what is your response?

23 GENERAL OLSON: Well, a response to those many
24 arguments is that they've -- they're using stereotypes to
25 in an effort, they say to break down stereotypes, they're

1 using race as a -- a surrogate for experience. And if
2 they want to look at experience, they can look at
3 experience. If they want to improve the educational
4 opportunities of minority groups, one of the biggest
5 problems --

6 QUESTION: That's not what they say. They say
7 they're not using race as a surrogate for anything,
8 because if you have a person who went to Exeter who's very
9 rich and happens to be black and is a conservative
10 Republican, it's great for the class to know that, too.
11 And that's why they want a certain number.

12 GENERAL OLSON: But that person -- that person
13 if he went to Exeter and he has a great GPA and so forth
14 gets an extra opportunity either a portion of the class is
15 set aside for that individual solely on the basis of race,
16 irrespective of his experience. And the -- and the
17 application isn't examined for the type of experience or
18 the type of viewpoint that race-diversity characteristic
19 is used as a substitute for any examination of the
20 individual on the individual.

21 QUESTION: General Olson, do you -- do you agree
22 with the articulated proposal of Justice Powell in the
23 Bakke case of using race as a plus factor as he -- as he
24 saw the use of it. Do you disagree with that approach?

25 GENERAL OLSON: We disagree with that approach

1 in the sense that we -- we -- in the first place, contrary
2 to what our opponents have said, we would not believe that
3 that single opinion, which was the only opinion, to
4 examine the issue of diversity under a compelling argument
5 --

6 QUESTION: I don't think it commanded a court.
7 I'm just asking if you agreed with that approach.

8 GENERAL OLSON: We're reluctant to say never,
9 Justice O'Connor. But this test -- every test that
10 Justice Powell applied in that opinion, the law school
11 program here fails. It's a stereotype.

12 QUESTION: But General Olson, is race different
13 from sex in that regard? I thought we have -- we have
14 disapproved using sex as just a plus factor? That is one
15 factor among many, but, you know, when you get down to it,
16 this is -- this person is a male and therefore we'll put
17 that into the mix and that'll favor the person. We've
18 disapproved that with regard to sex discrimination,
19 haven't we?

20 GENERAL OLSON: I don't disagree with that.

21 QUESTION: Why would race discrimination be any
22 different?

23 GENERAL OLSON: I'm suggesting that the programs
24 here, without getting to the point of whether are there
25 any other circumstances whether they be remedial, which

1 this Court -- a factor of the Court has recognized before,
2 or something else in an unusual situation, where it could
3 be appropriate. I don't know what that might be. But
4 this test --

5 QUESTION: I think Santa Clara -- I think what
6 Justice Scalia said bears modification, because in fact in
7 Santa Clara, the highway dispatcher, there was a plus for
8 sex, although there was no proven discrimination against
9 that particular woman and this Court approved that.

10 GENERAL OLSON: I would also say that it's
11 conceivable if you're constructing -- the National
12 Institutes of Health is constructing this study of
13 diseases that focus on particular races, the race may be a
14 factor but the fact is that the law school program here,
15 not only is a set aside and a quota, but it -- but it --
16 --

17 QUESTION: General Olson, I'm not sure you
18 answered Justice O'Connor's question.

19 Do you agree with Justice Powell's suggestion
20 that race could be used as a plus in something like the
21 Harvard program?

22 GENERAL OLSON: No, the Harvard program A wasn't
23 examined according to to any compelling governmental
24 interest. It was examined only --

25 QUESTION: So your answer is no, you would not

1 agree with that?

2 GENERAL OLSON: We would not based upon any what
3 we see in that opinion, which is --

4 QUESTION: Would you disagree with his use of
5 the term diversity as being a permissible governmental
6 goal?

7 GENERAL OLSON: Well, the only way to answer
8 that Justice Kennedy is that the word diversity means so
9 many things to so many different people. It means both a
10 means to get experience and a diversity of experience. It
11 also means, I think what the law school has done, it's an
12 end in and of itself. If it's an end in and of itself,
13 obviously it's constitutionally objectable that this Court
14 --

15 QUESTION: So is the Texas plan constitutional?
16 If it's designed solely in order to have a diverse mix in
17 the colleges they take 10 percent, but their motive stated
18 and their purpose is to have diversity in the college?

19 GENERAL OLSON: Justice Breyer, I don't believe
20 that that is the stated motive of the Texas plan or the
21 California or the Florida plan. Those are intended to
22 open up those institutions to a broader selection, one of
23 the ways in which this Court has accepted the institution
24 such as universities may operate is to make sure that
25 barriers are broken down, accessibility is made more

1 available and that is one very race neutral means of
2 accomplishing that legitimate objective.

3 QUESTION: General, what do you say to the
4 argument that the only reason accomplishes it is because
5 it depends on segregation at the lower level of the
6 schools, otherwise it would not accomplish that?

7 GENERAL OLSON: No, there is no evidence that it
8 depends upon segregation of the schools in Texas or in any
9 other place.

10 It is a diverse selection of the high schools in
11 that state.

12 QUESTION: Thank you, General Olson.

13 MS. Mahoney, we'll hear from you.

14 ORAL ARGUMENT OF MAUREEN MAHONEY

15 ON BEHALF OF THE RESPONDENTS

16 MS. MAHONEY: Mr. Chief Justice, and may it
17 please the Court:

18 The Solicitor General acknowledges that
19 diversity may be a compelling interest but contends that
20 the University of Michigan Law School can achieve a
21 diverse student body through facially race neutral means.

22 His argument ignores the record in this case.

23 QUESTION: I'm not sure -- in his brief does he
24 acknowledge that can be a compelling interest?

25 MS. MAHONEY: The brief says that it is one of

1 the paramount interests of government to have diversity in
2 higher education. And it has certainly been the
3 consistent position of the Department of Education for the
4 past 25 years that Bakke is the governing standard, that
5 schools are encouraged to use programs to achieve
6 diversity, because of the important interests it serves
7 for students of all color.

8 QUESTION: Ms. Mahoney, supposing that after our
9 Bakke decision came down, whereas Cal. Davis set aside 16
10 seats for disadvantaged minorities, and Cal. Davis said
11 we're going to try to get those 16 seats in some other
12 way, we're going to try high school graduates, we're going
13 to try socioeconomic and none of the -- none of those
14 methods get the 16 seats that they want.

15 Can they then go back and say we've tried
16 everything, now we're entitled to set aside 16 seats?

17 MS. MAHONEY: I don't think so, Your Honor. I
18 think what the Court's judgment in Bakke said and
19 certainly what Justice Powell's opinion said is that it's
20 simply not necessary to do a set aside because a plan like
21 the Harvard plan, which takes race into account as one
22 factor can be used as an effective means to --

23 QUESTION: But my hypothesis was, they wanted 16
24 seats and that plan just won't give it to them?

25 MS. MAHONEY: Well, if -- if the program was

1 designed to have a fixed 16 seats, no matter what the
2 qualifications of the applicant pool, no matter what the
3 disparities between the minority and majority students
4 would be, then I think it's fair to say that that would be
5 a quota.

6 If that is the nature of the program But here
7 the record indicates that the -- the law school's program
8 is nothing of the kind.

9 That what has occurred over the years with this
10 program is that there have been offers that have ranged
11 from 160 to 232 over the course of eight years there have
12 been enrollments that went from 44 to 73. It has been a
13 very flexible program

14 QUESTION: Ms. Mahoney, I -- I find it hard to
15 take seriously the State of Michigan's contention that
16 racial diversity is a compelling State interest,
17 compelling enough to warrant ignoring the Constitution's
18 prohibition of discrimination on the basis of race.

19 The reason I say that is that the problem is a
20 problem of Michigan's own creation, that is to say, it has
21 decided to create an elite law school, it is one of the
22 best law schools in the country. And there are few State
23 law schools that -- that get to that level.

24 Now, it's done this by taking only the best
25 students with the best grades and the best SATs or LSATs

1 knowing that the result of this will be to exclude to a
2 large degree minorities.

3 It is -- it's not unconstitutional to do that,
4 because it's -- that's not -- not the purpose of what
5 Michigan did, but it is the predictable result.
6 Nonetheless, Michigan says we want an elite law school.

7 Now, having created this situation by making
8 that decision, it then turns around and says, oh, we have
9 a compelling State interest in eliminating this racial
10 imbalance that we ourselves have created.

11 Now, if Michigan really cares enough about that
12 racial imbalance, why doesn't it do as many other State
13 law schools do, lower the standards, not have a flagship
14 elite law school, it solves the problem

15 MS. MAHONEY: Your Honor, I don't think there's
16 anything in this Court's cases that suggests that the law
17 school has to make an election between academic excellence
18 and racial diversity. The interest here is having a --

19 QUESTION: If it claims it's a compelling State
20 interest. If it's important enough to override the
21 Constitution's prohibition of racial discrimination, it
22 seems to me it's important enough to override Michigan's
23 desire to have a super-duper law school?

24 MS. MAHONEY: Your Honor, the question isn't
25 whether it's important to override the prohibition on

1 discrimination. It's whether this is discrimination.

2 Michigan -- what Michigan is doing benefits --

3 QUESTION: No, no. No. The question is whether
4 or not there is a compelling interest that allows race to
5 be used.

6 MS. MAHONEY: That's correct, Your Honor.

7 QUESTION: And Justice Scalia's question is
8 designed to put to you the fact that this isn't a
9 compelling interest, because it's a choice that the
10 Michigan law school has made to be like this.

11 MS. MAHONEY: Your Honor, the issue is whether
12 it is sufficiently compelling to allow Michigan to take
13 race into account in this limited fashion in order to
14 provide a much better education for students of all races.
15 The benefits are race neutral, Your Honor, and the burdens
16 are really quite limited.

17 What we're talking about here --

18 QUESTION: But the question put to you is
19 Michigan has designed its school in a particular way and
20 it doesn't have to do that.

21 MS. MAHONEY: But Your Honor there is a
22 compelling interest in having an institution that is both
23 academically excellent and richly diverse, because our
24 leaders need to be trained in institutions that are
25 excellent, that are superior academically, but they also

1 need to be trained with exposure to the viewpoints, to the
2 perspectives, to the experiences of individuals from
3 diverse backgrounds.

4 QUESTION: But -- but that brings us to the
5 question of the use of race, which is being used here.

6 Let me ask you this: Suppose there's a
7 reasonable disagreement as to whether or not the so-called
8 critical mass is, in fact, a disguised quota, you would
9 say it is not. Suppose there's a reasonable disagreement
10 on that point, if that's so, you lose, is that not
11 correct.

12 MS. MAHONEY: No, Your Honor, because the
13 district court did not make any factual findings that
14 would support the conclusion that this is a disguised
15 quota.

16 QUESTION: Is it beyond this Court's capacity to
17 say that? It certainly at a minimum a mixed question of
18 law and fact. You're arguing here that it isn't. I'm
19 certainly -- at least open the possibility that we can
20 disagree with you.

21 MS. MAHONEY: Well, Your Honor, the -- there has
22 to be evidence in the record that would support the
23 conclusion that it's a quota. And what this Court has
24 said that means is a fixed number -- that is sufficiently
25 rigid that no matter what the qualifications of the

1 applicant pool, the law school is going to adhere to a
2 fixed minimum and I think it's important to say what the
3 judge found on this issue, at 230A of the position of
4 appendix, the judge says in conclusion, the Court finds
5 that the law school wants, 10 to 17 percent of each class
6 to consist of African Americans, Native Americans and
7 Hispanics. Wants. That's an aspiration.

8 QUESTION: It says wants or wants Maureen?

9 MS. MAHONEY: Wants. Wants.

10 QUESTION: Wants. Okay.

11 MS. MAHONEY: Wants, Your Honor. That's an
12 aspiration, that is not a fixed minimum. He made no
13 findings that there was a fixed minimum.

14 QUESTION: Is there in fact a difference between
15 the Michigan plan and the Harvard plan that the Harvard
16 plan is touted in Bakke, it seems to me, that they were
17 pretty close and is there any suggestion that Michigan is
18 looking for critical mass that Harvard didn't look for?

19 MS. MAHONEY: Absolutely not, Your Honor. The
20 evidence indicates that the Harvard plan works in exactly
21 the way the Michigan plan does. In fact, Harvard's brief
22 in this case indicates that under their plan over the last
23 four years, they enrolled eight to 9 percent African
24 Americans which is a stable range. In the last four years
25 of the record evidence here, the University of Michigan

1 Law School enrolled 7 to 9 percent African Americans.

2 QUESTION: Excuse me. Did Bakke hold that the

3 Harvard plan was constitutional?

4 MS. MAHONEY: Yes, Your Honor.

5 QUESTION: If adopted by -- by a State

6 institution?

7 MS. MAHONEY: Yes, Your Honor.

8 QUESTION: It held that it was constitutional?

9 MS. MAHONEY: Yes. What we --

10 QUESTION: We didn't even -- we didn't even have

11 the details of the Harvard plan before us?

12 MS. MAHONEY: Your Honor, in fact, the Court

13 appended -- or Justice Powell appended the Harvard plan to

14 his opinion in this case and there were five votes that

15 the reason that the mandate of the California Supreme

16 Court should be reversed was because there was an

17 effective alternative for -- for enrolling minorities and

18 that effective alternative was a plan like the Harvard

19 plan.

20 And the -- the dissenting --

21 QUESTION: Did -- did the Court know what --

22 what social scientists have later pointed out and many

23 people knew before it that when the Harvard plan was

24 originally adopted, its purpose was to achieve diversity

25 by reducing the number of Jewish students from New York

1 that were -- that were -- that were getting into Harvard
2 on the basis of merit alone?

3 MS. MAHONEY: Your Honor, I don't think that was

4 --

5 QUESTION: Did that come up in the course of the
6 case?

7 MS. MAHONEY: Your Honor, I don't think that's
8 the purpose of the Harvard plan that was attached.

9 QUESTION: Not today, I'm sure. But -- but --
10 but that was its origin.

11 MS. MAHONEY: Your Honor, there is -- there is
12 certainly a major difference between an educational policy
13 that is motivated by an intent to exclude people based on
14 racial animus and one like the Law School's policy and the
15 Harvard plan, which is designed to include students of all
16 races, so that the education of all students will be
17 enriched as a result.

18 QUESTION: But not too many of any race?

19 MS. MAHONEY: Well, Your Honor --

20 QUESTION: Or not too many of any religion, I
21 assume?

22 MS. MAHONEY: Your Honor it is not a question of
23 not too many. It's that the law school has attempted to
24 take race into account in a very modest limited fashion,
25 no more than necessary to achieve the goal of trying to

1 have sufficient numbers of minorities that there can be an
2 excellent educational experience for everyone.

3 QUESTION: But -- but without a quota? Just
4 sufficient numbers, but that's not a quota?

5 MS. MAHONEY: Your Honor it is not a quota.

6 QUESTION: When you say sufficient numbers,
7 you're -- I mean that suggests to me that there is --
8 there is some minimum. Now, you don't name it. But there
9 has to be some minimum. But you say there isn't a
10 minimum?

11 MS. MAHONEY: Your Honor there is not a minimum.

12 QUESTION: Well, then you have to eliminate the
13 word sufficient.

14 MS. MAHONEY: Your Honor, it -- it can be
15 related to numbers without being a quota. In fact, the
16 Department of Education in 1979 after Bakke came out,
17 issued a policy interpretation at 44 Federal register
18 58510 which specifically says authorizes schools to
19 establish and pursue numerical goals, end quote, as long
20 as they don't set aside a fixed number of places or make
21 race the sole criterion for eligibility. That was the
22 Department of Education's interpretation.

23 QUESTION: Certainly they don't interpret the
24 Constitution?

25 MS. MAHONEY: No, they don't Your Honor, but

1 that is what Bakke held. That was -- that was the -- what
2 was at issue in that case, that that was the difference
3 between the program that U C Davis had used and the
4 program that was at issue in the Harvard plan.

5 QUESTION: Is it fair to say that the -- what
6 the -- what -- what Justice Powell and the five who agreed
7 or the four who agreed on the Harvard plan were getting at
8 was that there is a permissible zone between a purely
9 token number and a quota or a set aside and you can shoot
10 for something in that zone? Is that a fair --

11 MS. MAHONEY: Absolutely Your Honor. What
12 Justice Powell's opinion says when paraphrasing the
13 Harvard plan is that there needs to be an awareness of the
14 necessity for more than token numbers. And that's because
15 the educational benefits of diversity can't be achieved.

16 QUESTION: It's hard to see that that's --
17 that's true here, when every day the admission staff looks
18 to see what the numbers are based on race?

19 MS. MAHONEY: Your Honor, that's not correct.
20 The -- there is a report which is called The Daily. But
21 it is not looked at everyday. The evidence was clear that
22 it is simply something that can be printed out.

23 QUESTION: You just have a daily report that
24 they look at once a week?

25 MS. MAHONEY: Your Honor, the reason it's called

1 a daily is that it is a running database that allows for
2 the report to be printed at any time.

3 And -- and the evidence indicated that --

4 QUESTION: To show how well they're doing in
5 getting the so-called critical mass which is just a
6 synonym for a number?

7 MS. MAHONEY: Your Honor, the dailies actually
8 track a whole variety of admissions information including
9 deposits, they're trying to see how they're doing in terms
10 of whether --

11 QUESTION: They -- they don't track, as I
12 understand it, the other pluses that the University talks
13 about?

14 MS. MAHONEY: Well, they track -- they track
15 residency, they track gender, they don't track, for
16 instance, socioeconomic status which is a plus or, in
17 fact, the evidence is uncontradicted that the University
18 takes any racial background, any ethnic background, any
19 unusual characteristic that would add to the diversity of
20 the class into account, but it doesn't find a need to
21 track that, because of the nature of the applicant pool.

22 QUESTION: Is two percent a critical mass, Ms.
23 Mahoney?

24 MS. MAHONEY: I don't think so, Your Honor.

25 QUESTION: Okay. Four percent?

1 MS. MAHONEY: No, Your Honor, what --

2 QUESTION: You have to pick some number, don't

3 you?

4 MS. MAHONEY: Well, actually what --

5 QUESTION: Like eight, is eight percent?

6 MS. MAHONEY: Now, Your Honor.

7 QUESTION: Now, does it stop being a quota

8 because it's somewhere between 8 and 12, but it is a quota

9 if it's 10? I don't understand that reasoning. Once you

10 use the term critical mass and -- you're -- you're into

11 quota land?

12 MS. MAHONEY: Your Honor, what a quota is under

13 this Court's cases is a fixed number. And there is no

14 fixed number here. The testimony was that it depends on

15 the characteristics of the applicant pool.

16 QUESTION: As long as you say between 8 and 12,

17 you're okay? Is that it? If you said 10 it's bad you but

18 between 8 and 12 it's okay, because it's not a fixed

19 number? Is that -- that's what you think the Constitution

20 is?

21 MS. MAHONEY: No, Your Honor, if it was a fixed

22 range that said that it will be a minimum of 8 percent,

23 come hell or high water, no matter what the qualifications

24 of these applicants look like, no matter what it is that

25 the majority applicants could contribute to the benefits

1 of diversity, then certainly that would be a quota, but
2 that is not what occurred here. And in fact the testimony
3 was undisputed, that this was not intended to be a fixed
4 goal.

5 QUESTION: Ms. Mahoney may I shift focus away
6 from this to another point before you're finished, that I
7 am concerned about. In all programs which this Court has
8 upheld in the area of -- you want to label it affirmative
9 action, there's been a fixed time period within which it
10 would operate. You could see at the end -- an end to it,
11 there is none in this, is there? How do we deal with that
12 aspect?

13 MS. MAHONEY: What the policy says, of course,
14 is that it will only take race into account as long as it
15 is necessary in order to achieve the educational
16 objectives.

17 I don't think that this Court should conclude
18 that this is permanent, because there are two things that
19 can happen that will make this come to an end. The first
20 is that the number of high-achieving minorities will
21 continue to grow and that law school will be able to
22 enroll a sufficient number to have a critical mass or
23 meaningful numbers or substantial presence without having
24 to take race into account.

25 The second thing that can happen, Your Honor, is

1 that we could reach a point in our society where the
2 experience of being a minority did not make such a
3 fundamental difference in their lives, where race didn't
4 matter so much that it's truly salient to the law school's
5 educational mission.

6 While that I can't say when that will happen, we
7 certainly know that as a nation, we have made tremendous
8 progress in overcoming intolerance. And we certainly
9 should expect that that will occur with respect to
10 minorities.

11 QUESTION: We approved any other affirmative
12 action program with such a vague distant termination base?

13 MS. MAHONEY: Well, in Bakke itself, Your Honor.
14 In Bakke itself, there were five votes to allow the
15 University of California Davis to use a plan modeled on
16 the Harvard plan. It's been in effect for about 25 years.
17 It has reaped extraordinary benefits for this country's
18 educational system

19 And I think it's far too soon for this Court to
20 include that --

21 QUESTION: Can -- can we tell from the
22 statistics whether things have been improved say, more and
23 more minorities are getting in on their own to the
24 University of Michigan Law School without the quotas?

25 MS. MAHONEY: Yes.

1 QUESTION: Or whether --

2 MS. MAHONEY: Yes, they're not quotas, Your

3 Honor.

4 QUESTION: The critical mass?

5 MS. MAHONEY: We do know -- aspirations --

6 QUESTION: Aspirations.

7 MS. MAHONEY: -- but we do know Your Honor that

8 there has been improvement, in fact, Justice Powell cited

9 to a study, it was done by Manning it's in footnote 50 of

10 Justice Powell's opinion and it gives the number of

11 minorities who had achieved a 165 and a 3.5 on the LSAT.

12 QUESTION: How about say the last 15 years, at

13 the University of Michigan, which wasn't being under

14 consideration which Justice Powell's opinion?

15 MS. MAHONEY: I think the answer would be that

16 we do know that in 1964 when there was a race-blind

17 policy, there were no blacks admitted, and under a

18 race-blind policy today, probably six blacks would be

19 admitted without consideration of race.

20 So there has not been enough progress to allow

21 for meaningful numbers at this point, but there has been

22 progress.

23 QUESTION: Do we know what's happened in the law

24 schools in California since it was determined by State law

25 affirmative action?

1 MS. MAHONEY: Yes, Your Honor. We know that for
2 the first -- I think, 4 or 5 years, both only enrolled
3 about -- between I think zero and 7 African-American
4 students. They do better on Hispanics because of the
5 demographics of that State, where it's virtually 50
6 percent Hispanic at the college-age level. But what we
7 have learned is that in the -- they changed their program
8 2 years ago and this fall they succeeded in enrolling 14
9 African-American students, but what we know from talking
10 to the law school admissions counsel with Boalt's
11 permission is that the African-Americans who were enrolled
12 under that program have a 9 point LSAT score gap from the
13 whites who have been enrolled, so the same gap --

14 QUESTION: Well, there are other law schools in
15 California, too, are there not?

16 MS. MAHONEY: Yes, UCLA, well, this is mainly a
17 problem Your Honor for the highly selective schools
18 because of the nature of the pool.

19 QUESTION: You have some good law schools, you
20 have UCLA, you have USC?

21 MS. MAHONEY: UCLA.

22 QUESTION: SC is private?

23 MS. MAHONEY: Yes.

24 QUESTION: But UCLA?

25 MR. KOLBO: UCLA -- UCLA had -- the class that's

1 graduatiing this year, for instance, I believe had five
2 blacks in it. So I believe last fall they did better and
3 we have been told that that's because they were able to
4 recruit some additional numbers of black students because
5 of a special critical race studies program they're
6 offering but that's not a solution to the pool problem,
7 Your Honor.

8 The pool problem is that if we look at the
9 ranges of LSATs where the University of Michigan takes its
10 students, there are literally about 30 in the entire
11 country, three or four per top 10 schools.

12 So some kind of, you know, race-conscious
13 recruiting that schools are using doesn't solve that
14 problem.

15 And if I could go back to Boalt for just another
16 minute, because that is something that the petitioners
17 raised in their reply brief, is that given that we know
18 that they have exactly the same nine-point LSAT gap that
19 Michigan gets under its program, there is no reason to
20 think that what they are doing would satisfy the
21 petitioner's conception of the Equal Protection Clause.

22 QUESTION: That's difficult when it's not in the
23 record.

24 I do have one more question on this quota point.

25 I don't think the answer that you gave to

1 Justice Scalia was in -- in all respects complete. You
2 said well, if -- if there were a program that no matter
3 what you used a somewhat different phrase, no matter what,
4 there would be people taken regardless of qualifications
5 -- that would be a quota.

6 Suppose the pool is large enough so that you can
7 find minorities to fill your 15 percent aspiration. Why
8 isn't that a quota even if they're qualified?

9 MS. MAHONEY: Because, Your Honor I think --

10 QUESTION: It seems to me that that was a -- a
11 really a false -- or an improper qualification that you
12 gave to your answer?

13 MS. MAHONEY: I don't think so, Your Honor.
14 Because I think -- certainly if it's a fixed number that
15 you're going to take no matter what, then that is a quota,
16 but I think the difference between a quota and a goal is
17 the flexibility.

18 And what this Court, for instance, said in
19 Johnson when talking about, they authorized the use of a
20 goal and they said that the line between a goal and a
21 quota is in fact whether or not you have to automatically
22 and blindly promote people in order to meet the goal or
23 whether it is a factor that is taken into account and
24 that's exactly what occurs here.

25 QUESTION: How does the University determine

1 from one year to the next, you say some years it'll come
2 out eight percent, some year nine percent, do they make a
3 conscious decision?

4 MS. MAHONEY: No, Your Honor, the evidence shows
5 --

6 QUESTION: Just toss a coin?

7 MS. MAHONEY: No, it's not tossing a coin, but
8 it is not a fixed number. What they do is, they look --
9 it's responsive to the applicant pool. They look at the
10 applicants, they are looking at a variety of factors on a
11 holistic basis and they find the applicants that they
12 think are going to bring the most in toto to the law
13 school class, but it is not measured against a specific
14 numerical target. And the district court did not find
15 otherwise.

16 It is simply looking at that pool and what
17 Michigan is --

18 QUESTION: Ms. Mahoney, do you know any quota
19 program that would take somebody to fill the quota no
20 matter what? All the quota programs I know start off by
21 saying we will only take qualified applicants, but then
22 setting the level of qualified low enough that they can
23 fill the quota. I don't know any program that said no
24 matter what we're going to fill this quota.

25 MS. MAHONEY: Your Honor --

1 QUESTION: To establish that kind of a standard
2 for quota is -- is to -- is to just eliminate the -- the
3 whole purpose of -- of that aspect of our law.

4 MS. MAHONEY: Actually, Your Honor, the way that
5 in Bakke it worked, it wasn't the situation that they
6 would take someone no matter what, but they did have a
7 rule, that you could not be considered for the spaces that
8 had been set aside if you were white. And so it works in a
9 very different way, Your Honor.

10 There -- Bakke applied, there were four spaces
11 available in the special admissions program, but he
12 couldn't be considered for them, because of his race.

13 That doesn't happen at the University of
14 Michigan. When someone applies, whether they're white, it
15 doesn't matter how many minorities have been accepted or
16 rejected. They are considered on their merits just like
17 every other applicant. That's the defining difference
18 between what happened in the UC Davis program

19 QUESTION: But they aren't just like every
20 applicant. Some applicants are given a preference because
21 of their race.

22 MS. MAHONEY: Your Honor, they are given extra
23 weight in the process, because they have something unusual
24 and important to bring to the class. That's what every --
25 that's the way every applicant is considered and --

1 QUESTION: Which you say automatically follows
2 from race?

3 MS. MAHONEY: Your Honor, they also write essays
4 about diversity. Every applicant is given the chance to
5 write an essay about diversity. The law school does --

6 QUESTION: Ms. Mahoney, how does the Michigan
7 plan differ or the Harvard plan, for that matter, from
8 what was familiar, that is, highly selected schools will
9 reject a certain number of people, take a number of people
10 as automatic acceptance and in the large middle will say,
11 well, we'll -- we'll take people because they're
12 different, because they play the bassoon, because they
13 belong to a minority race? Because in the days that when
14 I went to law school, they are female, because we want the
15 class to be diverse and so they used race, they used sex,
16 they used --

17 MS. MAHONEY: That's exactly what the University
18 of Michigan Law School plan does. It looks at all
19 potential contributions to diversity. And what the
20 evidence shows in this case is that it is common for white
21 applicants to be admitted with lower grades and test
22 scores than even minorities who are rejected because --

23 QUESTION: Does the Constitution prohibit
24 discrimination against -- against oboe players as opposed
25 to flute players?

1 MS. MAHONEY: No, Your Honor.

2 QUESTION: Does it prohibit discrimination on
3 the basis of alumni status?

4 MS. MAHONEY: No, Your Honor.

5 QUESTION: But it does prohibit discrimination on
6 the basis of race?

7 MS. MAHONEY: But the question is whether this
8 is prohibited discrimination. And the answer that we
9 would ask this Court to give is that a minority applicant
10 brings something special. They are not similarly situated
11 to the white applicant who has the exact same grades and
12 test scores.

13 QUESTION: Ms. Mahoney, may I ask you a question
14 that is really prompted by Justice O'Connor's question
15 about the terminal point in all of this? And we're all
16 hoping some day race will be a totally irrelevant factor
17 in all decisions. One of the arguments on the other side
18 of your case is that there's actually -- these programs
19 actually generate racial hostility particularly on the
20 part of the excluded members. And that in turn delays the
21 ultimate day we are all hoping for.

22 What is your comment about that?

23 MS. MAHONEY: The record certainly does not
24 support that inference under this program. And the reason
25 is this: The program -- one of the ways to prevent that

1 from happening is to have a narrowly tailored program to
2 have very limited consideration of race and not to, for
3 instance, have two great a disparity between the
4 qualifications of the white students who are admitted and
5 the minority students who are admitted under the program.
6 Here it's actually quite limited. In fact, you know, the
7 vast -- the most -- the most of the minorities who are
8 admitted are in the top 16 percent of all LSAT takers in
9 the country. So we're talking about a really exceptional
10 group of students.

11 By keeping the relative qualifications fairly
12 close, like that, you really minimize the potential for
13 any kind of stigmatizing or hostility, that sort of thing.

14 And what the record shows is that in the Orfield
15 study which was done of Harvard and University of
16 Michigan's students, it's in the record at Exhibit 167,
17 that there is overwhelming support by the students at
18 Harvard and Michigan Law Schools for maintaining the
19 diversity program, because they regard it as so positive.
20 That's --

21 QUESTION: Sure, they're in already.

22 MS. MAHONEY: Your Honor that's for the --

23 QUESTION: The people you want to talk to are
24 the high school seniors who have seen -- who have seen
25 people visibly less qualified than they are get into

1 prestigious institutions where they are rejected. If you
2 think that is not creating resentment, you are just wrong.

3 MS. MAHONEY: Well, Your Honor, certainly the
4 minorities who have been admitted under the program are
5 not feeling stigmatized by it. If they continue to
6 support the program in the ways that they do. In
7 addition, the whites who are seeing their performance in
8 the class and who are confirming that they find it highly
9 beneficial to have the -- the chance to share the
10 experiences of the minority students when they are
11 learning about the law, has to be given substantial weight
12 in considering whether this is somehow stigmatizing or
13 perpetuating historic stereotypes, which is really the
14 test that this Court used in VMI to determine whether or
15 not something really should be condemned because of its
16 potential to stigmatize.

17 QUESTION: If Justice Powell's opinion in Bakke
18 can be viewed as, yes, you can use race as a plus factor,
19 where the program is not against anyone, but you cannot go
20 too far, and it says individualized consideration is
21 necessary there, what in your opinion would be going too
22 far, other than quotas? How would this be maintained
23 within limits?

24 MS. MAHONEY: I think there are really three
25 things other than a quota to look for. The first is

1 whether there is flexible consideration of the diversity
2 contributions of every potential student, which Michigan
3 program clearly satisfies, whether the minorities who are
4 being admitted are well qualified, because you don't want
5 to have a situation where they can't contribute to the
6 class and can't succeed, and the third is the degree of
7 the burden on the rejected applicants, that's certainly
8 relevant under any narrow tier learning program. And
9 here, what the record tells us is that 95 percent of all
10 the admissions decisions that are made each year are not
11 affected by the consideration of race.

12 That the chance -- that there are about 2500
13 students who are rejected each year probably only 80 of
14 them would have been -- would have gotten an offer of
15 admission from Michigan under a race-blind system.

16 That is a very small and diffuse burden. It's
17 not one to be minimized. It's certainly something that
18 the Court has to pay attention to, but this is extremely
19 limited in scope and relative to the benefits to students
20 of all races and to our Nation. It has to be weighed in
21 the balance and this Court certainly should conclude that
22 the interests that are being served, the legitimate
23 interests that are being served are sufficiently
24 compelling to allow this kind of limited consideration of
25 race.

1 QUESTION: Do we know what would be the increase
2 of the named Plaintiffs, the increase in their chance of
3 admission, were there no affirmative action programs?

4 MS. MAHONEY: I don't know what the increase for
5 the -- for Barbara Grutter would have been, for instance,
6 we do know that across the class, it would have been
7 approximately 5 percent.

8 One might say that that could vary, you know, by
9 individual. The record evidence would indicate, however,
10 that Barbara Grutter would not have been admitted under a
11 race-blind program, although that issue has not been
12 litigated to conclusion.

13 QUESTION: I don't know any other area where we
14 -- where we decide the case by saying well, there are very
15 few people who are being treated unconstitutionally.

16 I mean, if this indeed is an unconstitutional
17 treatment of -- of this woman, because of her race,
18 surely, it doesn't make any difference whether she is one
19 of very few who have been treated unconstitutionally.

20 QUESTION: I think you can regard that as a
21 statement rather than a question.

22 MS. MAHONEY: Thank you, Your Honor.

23 CHIEF JUSTICE REHNQUIST: Mr. Kolbo, you have
24 two minutes remaining.

25 REBUTTAL ARGUMENT OF KIRK KOLBO

1 ON BEHALF OF THE PETITIONER

2 THE WITNESS: Thank you, if I may follow-up on
3 the last question.

4 Counsel's answer to the last couple of
5 questions, I think, really crystallizes the difference
6 between their position and ours. The University of
7 Michigan sees this as a question of group rights. There
8 are rights on the part of minorities. And there are
9 rights -- there are rights on the part of whites and
10 Asians and other -- other groups.

11 We see it very differently. The Constitution
12 protects the rights of individuals, not racial groups.

13 The Bakke case opening up 16 spaces in the class
14 when that system was struck down meant that about 2,500
15 students, 2,500 to 3,000 students who had previously been
16 discriminated against now had an opportunity to compete
17 for those seats.

18 So it seems to me the question is not answered
19 by how many have been discriminated against.

20 The question is whether in fact discrimination
21 is occurring against the individual and it certainly is in
22 this particular case.

23 Counsel was asked some questions about the
24 open-ended nature of the policy at issue here. And I
25 think it's very critical that we understand that if the

1 interests that they are asserting here to be compelling is
2 upheld as compelling by this Court, we have in fact the
3 first indefinite, ongoing, unlimited compelling interest.

4 The Court previously has confined its analysis
5 to remedying -- remedying identified discrimination. A
6 remedy based on societal discrimination or a role-model
7 theory for example in *Wygant*. A couple of the reasons
8 that the Court struck down those rationals was because
9 they were so unlimited, so amorphous, indefinite with
10 respect to time.

11 That certainly is the case with the interest
12 that is being urged here today.

13 And it seems to me that that is -- it becomes
14 very clear in the University's argument that what they've
15 done -- and they didn't argue so much this in the lower
16 court, but they made it very clear that their
17 justification for the preferences is based in effect on
18 remedying societal discrimination.

19 Their argument and their briefs and in this
20 Court has been that when the day comes, someday and maybe
21 it will come someday, we hope that it will, that someday
22 that we will be able to stop using race for these
23 purposes.

24 And the opinion that accepted that rationale it
25 seems to me would be a dramatic step backward from this

1 Court's precedents which have rejected the notion that
2 something as amorphous as societal discrimination would be
3 sufficient.

4 CHIEF JUSTICE REHNQUIST: Thank you Mr. Kolbo.
5 The case is submitted.

6 (Whereupon, at 11:04 a.m., the case in the
7 above-entitled matter was submitted.)

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