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

CHIEF JUSTICE ROBERTS: Well, I get to say that this is Case Number 11-345, Fisher against the University of Texas at Austin. And you get to say --

MR. REIN: Mr. Chief Justice, General Suter trained me too well. Mr. Chief Justice, and members of the Court, and may it please the Court. The central issue here is whether the University of Texas at Austin can carry its burden approving that its use of race as an admissions-plus factor in the consequent denial of equal treatment, which is the central mandate of the Equal Protection Clause, to Abigail Fisher met the two tests of strict scrutiny which are applicable. First --

JUSTICE GINSBURG: Mr. Rein, before we get to that, because the Court is supposed to raise it on its own: The question of standing. The injury -- if the injury is rejection by the University of Texas, and the answer is no matter what, this person would not have been accepted, then how is the injury caused by the affirmative action program?

MR. REIN: Well, Justice Ginsburg, the first injury that was before the court was the use of a system which denied equal treatment. It was a Constitutional injury, and part of the damage claim was premised directly on the Constitutional issue.

JUSTICE SOTOMAYOR: How do you get past Texas v. Lesage with that injury, which says that mere use of race is not cognizable injury sufficient for standing?

MR. REIN: Lesage was litigated on its merits, and the question was whether Lesage could carry his case when -- on summary judgment when it was apparent that his complaint, which was that he was denied access to the graduate program at the University of Texas, was not sustainable. As I said -- and there are several factors in this case that are quite different. First, there is a Constitutional injury as such, and the Court has recognized it. Second, the fact premise, she could not have been allowed in under any circumstance, was never tested below, wasn't raised below. It comes up in a footnote in --

JUSTICE SOTOMAYOR: Can I go to another side? She's graduated.

MR. REIN: Correct.

JUSTICE SOTOMAYOR: She disclaimed the desire after her application to go to the school at all. She was permitted to apply for the summer program and get in automatically, and she didn't, correct?

MR. REIN: No, that's not correct, Your Honor. She -- she was not automatically admitted. She was considered for the summer program and rejected. You are talking about the CAP program, where she could have attended a different university in the Texas system, and had she been able to achieve --

JUSTICE SOTOMAYOR: But she's graduated.

MR. REIN: She has graduated.

JUSTICE SOTOMAYOR: Injunctive relief, she's not going to get. So what measure of damages will she get or will she be entitled to?

MR. REIN: Well, that issue, of course, is bifurcated, and we've reserved the ability to --

JUSTICE SOTOMAYOR: But you have to claim an injury, so what's the injury --

MR. REIN: Well --

JUSTICE SOTOMAYOR: -- that you're claiming that would sustain a claim of damages?

MR. REIN: -- the denial of her right to equal treatment is a constitutional injury in and of itself, and we had claimed certain damages on that. We -- we started the case before it was clear whether she would or wouldn't be admitted.

JUSTICE SOTOMAYOR: You still haven't answered how Lesage gets away from that --

MR. REIN: Well, if there's --

JUSTICE SOTOMAYOR: -- but if there's a -- give me another --

MR. REIN: Well, I think --

JUSTICE SOTOMAYOR: -- damages question.

MR. REIN: On the -- if we then, on remand, were to assert damages contingent upon the fact that she should have been admitted to UT and was not admitted, we would then have to prove that but for the use of race she would be admitted. That's the thrust of Lesage.

Whether we can prove it or can't prove it is something you can't tell on this record. It's merely asserted.

And I would point out that Texas said below, there was no way to determine that issue without --

JUSTICE SOTOMAYOR: What damages --

JUSTICE SCALIA: We've had cases involving alleged discrimination in state -- state contracting, and we haven't required the person who was discriminated against because of race to prove that he would have gotten the contract otherwise, have we?

MR. REIN: No, sir.

JUSTICE SCALIA: It's -- it's been enough that there was a denial of equal protection.

MR. REIN: That is our correct, and that is our first premise. And I would say that the same issue was raised in Bakke. And in Bakke, the contention was he couldn't have gotten into the medical school; therefore, he has no case. The Court said, in footnote 14 to Justice Powell's opinion, that's a matter of merits; it is not a matter of standing. I think in Parents Involved, the same type of contention was made with respect to the Louisville class plaintiffs whose son had been admitted to the school of his choice, and the Court said damages are enough to sustain standing. There is a live damages claim here, and I don't think there is a question of standing.

JUSTICE SCALIA: Her claim is not necessarily that she would have been -- would have been admitted, but that she was denied a fair chance in the admission lottery. Just as when a person is denied participation in the contracting lottery, he has suffered an injury.

MR. REIN: Yes, Justice Scalia, I agree with that.

JUSTICE BREYER: If you are going to the merits, I want to know whether you want us to -- or are asking us to overrule Grutter. Grutter said it would be good law for at least 25 years, and I know that time flies, but I think only nine of those years have passed. And so, are you? And, if so, why overrule a case into which so much thought and effort went and so many people across the country have depended on?

MR. REIN: Justice Breyer, we have said very carefully we were not trying to change the Court's disposition of the issue in Grutter, could there be a legitimate, a compelling interest in moving -- in using race to establish a diverse class. What -- the problem that we've encountered throughout the case is there are varying understandings, not of the legitimacy of the interest, but how you get there; is it necessary to use race to achieve that interest; what does a critical mass --

JUSTICE BREYER: So your question is whether -- your point is, does your case satisfy Grutter? Is that what you're arguing?

MR. REIN: We litigated it on that basis, yes.

JUSTICE BREYER: Well, how do you want to argue it right now in the next ten minutes? I'm interested because I have a very short time to get my question out, and I need to know how you are going to argue it.

MR. REIN: Well, Justice Breyer, our argument is we can satisfy Grutter if it's properly read. What we've seen --

JUSTICE GINSBURG: May I ask you on that specifically, let's take away the 10 percent solution. Suppose the only plan were the one that is before the Court now, no 10 percent. This is the exclusive way that the University is attempting to increase minority enrollment.

Then, if we had no 10 percent solution, under Grutter would this plan be acceptable?

MR. REIN: Well, I think that there would be flaws under Grutter even if you assumed away something that can't be assumed away because it is a matter of Texas law, that is, there is a top 10 percent program, and that --

JUSTICE GINSBURG: Well, then the question is can you have both? But it seems to me that this program is certainly no more aggressive than the one in Grutter; it's more -- in fact, more modest.

MR. REIN: Well, I don't agree with that, and let me explain why. In order to satisfy Grutter, you first have to say that you are not just using race gratuitously, but it is in the interest of producing a critical mass of otherwise underrepresented students. And so to be within Grutter framework, the first question is, absent the use of race, would we be generating a critical mass? To answer that question, you start -- you've got to examine in context the so-called soft factors that are in Grutter. You know, are -- is there an isolation on campus? Do members of minority feel that they cannot speak out?

JUSTICE SOTOMAYOR: The one social studies that this University did said that minority students overwhelmingly, even with the numbers they have now, are feeling isolated. So what do -- why isn't that even under your test? We can go back to whether substantial evidence is adequate, is necessary, or not. Why does their test fail?

MR. REIN: Well, the survey was -- a random survey. It's not reported in any systematic way. They evidently interviewed students. And it was all about classroom isolation. It wasn't about --

JUSTICE SCALIA: Was it done before or after they announced the decision to reinstitute racial quotas?

MR. REIN: It was done after President Faulkner had made the declaration they were going to do it. It was done before --

JUSTICE SCALIA: Which came almost immediately after our decision on Grutter.

MR. REIN: On the -- I believe, on the same day.

JUSTICE SCALIA: And by the way, do you think that Grutter -- this goes to Justice Breyer's question -- do you think that Grutter held that there is no more affirmative action in higher education after 2028?

MR. REIN: No, I don't.

JUSTICE SCALIA: Was that the holding of Grutter?

JUSTICE BREYER: I agree it might, but I want to get to the question, see what I'm trying to pinpoint, because we have such a limited time. And to me, the one thing I want to pinpoint, since you're arguing on that this satisfies Grutter if properly understood, as you say that. In looking up, we have a two-court rule. And two courts have found, it seems to me. That here there is a certain -- there is no quota. It is individualized. It is time limited. It was adopted after the consideration of race-neutral means. Each applicant receives individual consideration, and race did not become the predominant factor. So I take those as a given. And then I want to know what precisely it is that Grutter required in your opinion that makes this different from Grutter, in that it was not satisfied here? The ones I listed two courts say are the same. So maybe there's some others.

MR. REIN: I'm not sure we agree with those courts in their method of analysis.

JUSTICE BREYER: But we have a rule that if two courts say it, we're very reluctant, on something connected with facts, to overturn it. So -- so that's why I mention that.

MR. REIN: And -- particularly in the case of considering alternatives that have worked about as well, I think that's a legal question this Court is free to act on.

JUSTICE SCALIA: There are facts and there are facts, aren't there?

MR. REIN: So if I might try to answer your question, there was no effort in this case to establish even a working target for critical mass. They simply ignored it. They just used words and they said we've got to do more. So they never answered the predicate question which Grutter asks whether Absent the use of race, can we generate a critical mass? So -- I mean, that's a flaw we think is in Grutter. We think it's necessary for this Court to restate that principle. Now, whether that --

JUSTICE SCALIA: That -- that's a normal fact that we accede to two-court holdings on Whether there is or is not a critical mass?

MR. REIN: No. I --

JUSTICE SCALIA: It's a weird kind of a fact.

MR. REIN: And I'm -- I'm not saying --

JUSTICE SCALIA: It's an estimation, isn't it? A judgment?

MR. REIN: Justice Scalia, that is correct. And in addition, the courts didn't find whether a critical mass --

JUSTICE SOTOMAYOR: So could you tell me what a critical mass was? I'm looking at the number of blacks in the University of Texas system. Pre-Grutter, when the State was indisputably still segregating, it was 4 percent. Today, under the post-Grutter system, it's 6 percent. The 2 percent increase is enough for you, even though the State population is at 12 percent? Somehow, they've reached a critical mass with just the 2 percent increase?

MR. REIN: Well, we don't believe that demographics are the key to underrepresentation of critical mass.

JUSTICE SOTOMAYOR: No -- putting aside -- I don't -- I'm not going to quarrel with you that if demographics alone were being used, I would be somewhat concerned. But you can't seriously suggest that demographics aren't a factor to be looked at in combination with how isolated or not isolated your student body is actually reporting itself to feel?

MR. REIN: Well, I think if you start to split out subgroups of minorities, you mistake I think what I think is the proper thrust of Grutter, or at least ought to be.

JUSTICE SOTOMAYOR: It might be -- it might be insulting to some to be thrown into a pot.

JUSTICE SCALIA: Why -- why don't you seriously suggest that? Why don't you seriously suggest that demographic -- that the demographic makeup of the State has nothing to do with whether somebody feels isolated, that if you're in a State that is only 1 percent black that doesn't mean that you're not isolated so long as there's 1 percent in the class?

MR. REIN: Certainly -- racial balance --

JUSTICE SCALIA: I wish you would take that position, because it seems to me right.

MR. REIN: Justice Scalia, racial balancing is not a permissible interest, and we are constantly -- this Court has constantly held not a permissible interest. And that is something we certainly agree with. Trying to respond to Justice Sotomayor and in the framework of Grutter, what you're looking at is, do you -- does this person, member of a so-called underrepresented minority -- it's a concept we don't necessarily accept, but it's Texas's concept -- are they isolated? Are they unable to speak out? And I think we've always said if you have a very large number, as Texas did in 2004 when they ostensibly made the decision to reinstitute race, they had a 21 percent admission percentage of what they called the underrepresented minorities. They also had about an 18 percent admission ratio of Asian-Americans. So on campus, you're talking about -- about 40 percent of the class being minorities.

JUSTICE BREYER: But the test is -- the test is, in your opinion -- I have to write this in the opinion, you say -- the proper test of critical mass is is the minority isolated, unable to speak out. That's the test. And it wasn't in Grutter or was in Grutter? And in your opinion, it was in Grutter.

MR. REIN: Yes. It said expressly in Grutter --

JUSTICE BREYER: Isolated. All right. And the reason it was satisfied there and not here is?

MR. REIN: In Grutter, the Court assumed that the very small number of admissions, minority admissions, looked at as the whole -- and it was looked at as a whole, only as a whole in Grutter -- would have yielded about 3 or 4 percent minority admission in a class of 350, which means about 12 to 15 students --

JUSTICE SOTOMAYOR: So what are you telling us is the standard of critical mass? At what point does a district court or a university know that it doesn't have to do any more to equalize the desegregation that has happened in that particular State over decades, that it's now going to be stuck at a fixed number and it has to change its rules. What's that fixed number?

MR. REIN: We -- it's not our burden to establish the number. It was the burden of the University of Texas to determine whether --

JUSTICE SOTOMAYOR: Well, they told -- they told the district court. They took a study of students. They analyzed the composition of their classes, and they determined in their educational judgment that greater diversity, just as we said in Grutter, is a goal of their educational program, and one that includes diversifying classes. So what more proof do you require?

MR. REIN: Well, if you are allowed to state all the grounds that need to be proved, you will always prove them, in all fairness, Justice Sotomayor. The question is, they have --

JUSTICE SOTOMAYOR: Well, but given it was in the evidence, what more do you think they needed? I think I hear all you saying in your brief is the number's fixed now, they got enough, no more is necessary.

MR. REIN: What we're saying in the brief was they were generating in fact a very substantial number of minority presence on campus.

JUSTICE SOTOMAYOR: That's enough now.

MR. REIN: And --

JUSTICE SOTOMAYOR: That's what you're saying.

MR. REIN: No. And that immediately thrust upon them the responsibility, if they wanted to -- you know, essentially move away from equal treatment, they had to establish we have a purpose, we are trying to generate a critical mass of minorities that otherwise could not be achieved.

JUSTICE SOTOMAYOR: Tell me -- tell me what about their use of race did not fit the narrow tailoring, not the necessity prong as you've defined it, but the narrow tailoring that Grutter required? How is race used by them in a way that violated the terms of Grutter?

MR. REIN: And for this purpose --

JUSTICE SOTOMAYOR: Assuming that the need is there. I know you're challenging the need.

MR. REIN: Put -- put aside whether this was necessary and whether it was an appropriate last resort in a quest for diversity and critical mass, because Grutter's not without limits. But I'll put that aside and let me come directly to your question. First of all, if you think about narrow tailoring, you can't tailor to the unknown. If you have no range of evaluation, if you have no understanding of what critical mass means, you can't tailor to it.

JUSTICE SOTOMAYOR: So you have to set a quota for critical mass?

MR. REIN: No. There's a huge difference, and it's an important one that is not well put out by the University of Texas. Having a range, a view as to what would be an appropriate level of comfort, critical mass, as defined in Grutter, allows you to evaluate where you are --

JUSTICE SOTOMAYOR: So we won't call it a quota; we'll call it a goal, something Grutter said you shouldn't have.

MR. REIN: Well, Justice Sotomayor, I think it's very important to distinguish between the operative use of that range, in other words, that's where we are, and we're going to use race until we get there every year in consideration of each application, which was a problem.

JUSTICE SOTOMAYOR: Boy, it sounds awfully like a quota to me that Grutter said you should not be doing, that you shouldn't be setting goals, that you shouldn't be setting quotas; you should be setting an individualized assessment of the applicants. Tell me how this system doesn't do that.

MR. REIN: This system doesn't -- I mean, it's not narrowly tailored because it doesn't fit. There are certain forms of Grutter that it follows. It --

JUSTICE ALITO: Mr. Rein, do you understand what the University of Texas thinks is the definition of a critical mass? Because I don't.

MR. REIN: Well, it simply reiterated the language of Grutter. They have no definition. They can't fit --

JUSTICE GINSBURG: Mr. Rein, it seems to me that in your talking about critical mass, you are relying entirely on the 10 percent is enough. They don't -- they got minorities through the 10 percent, so they don't need any more. And I tried to get you rigidly to focus on -- forget the 10 percent plan. This is the entire plan.

MR. REIN: Well, let me tell you that if you look outside the Top 10, at the so-called AI/PAI admits only -- forget the Top 10 for a minute, they were generating approximately 15 percent minority admissions outside the Top 10, which is in -- above what the target was in Grutter. So this is not Grutter on its facts. It's vastly different. This is a --

JUSTICE GINSBURG: Because of the 10 percent.

MR. REIN: No, it was -- I'm talking about only the non-Top 10 percent admissions. 15 percent of those were so-called underrepresented minorities. This is without the Top 10. Now, the Top 10 is also a major generator of admissions for underrepresented minorities.

JUSTICE KENNEDY: And -- and this was before the adoption of the plan.

MR. REIN: That is correct.

CHIEF JUSTICE ROBERTS: Well, I'm sorry. Now I'm confused. I thought the 15 percent figure was the one that was arrived at with the 10 percent plan.

MR. REIN: No. With the 10 percent plan, it's much higher. In 2004, it was 21 percent for just Hispanics and African Americans, and these are the categories they used. If you add in Asians, it was over 38 percent. But I'm isolating -- in response to Justice Ginsburg, I'm isolating to the non-top 10 admissions. Those are over 15 percent in that year, and they average very close to that over time.

So the -- the total generation of minority presence is a combination of the two in fact, but the AI/PAI system -- which was adopted in response to Hopwood. It was -- as Texas says, it was the first thing they tried to accommodate to their loss of the ability to use race directly, which came up in Hopwood. So that was their first response, to look at a more balanced admission program between Academic Index and Personal Achievement Index. So it is not a system which just excludes minorities.

JUSTICE KENNEDY: Could you comment on this, and then I hope we can get back to Justice Alito's question. You argue that the University's race-conscious admission plan is not necessary to achieve a diverse student body because it admits so few people, so few minorities. And I had trouble with that reading the brief. I said, well, if it's so few, then what's the problem.

MR. REIN: Well, it's a question --

JUSTICE KENNEDY: Then -- let's assume --

MR. REIN: Excuse me, Justice Kennedy.

JUSTICE KENNEDY: -- that it resulted in the admission of many minorities. Then you'd come back and say, oh, well, this is -- this shows that we were probably wrongly excluded. I --

MR. REIN: Well --

JUSTICE KENNEDY: -- I see an inconsistency here.

MR. REIN: Well --

JUSTICE KENNEDY: Is it -- are you saying that you shouldn't impose this hurt or this injury, generally, for so little benefit; is that the point?

MR. REIN: Well, yes, that's part of it. The second is the question of reasonably available alternatives. If we take Texas at its word, and it says they are satisfied, they are happy going on with the way they apply race today, we tried to measure, well, what difference is it making, and could you achieve the same thing with a reasonably available race-neutral alternative. That's a question that was asked in Grutter. They were supposed to analyze that. They didn't look at it. But it --

JUSTICE GINSBURG: But -- the race-neutral alternative is the 10 percent plan?

MR. REIN: The race-neutral alternative includes an extension of the 10 percent plan because it's a major generator of minority admissions. And right now, that ranges at 30 percent.

JUSTICE GINSBURG: But you say, and that's okay because it's -- it's race-neutral, but is it really? I mean, the -- the only reason that they instituted the 10 percent plan was to increase minority enrollment.

MR. REIN: Well, we say --

JUSTICE GINSBURG: And that -- the only way it works is if you have heavily separated schools. And worse than that, I mean, if you -- if you want to go to the University of Texas under the 10 percent plan, you go to the low-performing school, you don't take challenging courses, because that's how you'll get into the 10 percent. So maybe the University is concerned that that is an inadequate way to deal with it.

MR. REIN: But, Justice Ginsburg, let -- let me say that -- that a lot of that is speculative. There is nothing in the record to support it. We don't know. They've never surveyed the top 10 admits, the minority admits, to see, well, did you --

JUSTICE SCALIA: Excuse me. The 10 percent plan is not imposed by the University. It's not their option --

MR. REIN: Correct.

JUSTICE SCALIA: -- to say this -- this is not good for education because people will take easy courses. It's imposed by state law, isn't it?

MR. REIN: Correct.

JUSTICE SCALIA: Anybody who is in the top 10 percent of any school in the state gets into the University of Texas.

MR. REIN: Yes. And even the Fifth Circuit said you can't disregard its consequences because it's a matter of law. I'm simply saying they could choose to extend it beyond where it is because it's capped today at 75 percent. But that's not the only option. That's not the only alternative. And certainly one simple alternative is they could look at the yield, that is, what percentage of the admitted minorities are they actually encouraging and -- and enrolling.

JUSTICE BREYER: Or they could -- this is what is underlying my thing here. I want to get you directly to answer it. I did look up the figures. And before Hopwood and the 10 percent plan, it looked on the African American side that it averaged about 5 -- 5 percent per year, really, pretty steadily. Then after Hopwood and 10 percent, it went down a little bit, not a lot, but it went down to about 3 and a half percent, 4 percent, maybe. And then they introduced Grutter, and it's back up to 5 percent.

MR. REIN: No --

JUSTICE BREYER: Okay. Now, is that a lot? Is that a little? There are several thousand admissions officers in the United States, several thousand universities, and what is it we're going to say here that wasn't already said in Grutter that isn't going to take hundreds or thousands of these people and have Federal judges dictating the policy of admission of all these universities?

You see why I'm looking for some certainty.

MR. REIN: But Justice --

JUSTICE BREYER: I saw what happened, you saw the numbers. Sorry, go ahead.

MR. REIN: Justice Breyer, just -- I will answer your question. I'd like to reserve a little time.

JUSTICE BREYER: You can answer it later if you want, or not answer it at all if you don't.

(Laughter.)

MR. REIN: No, I am perfectly happy to -- to answer your question. I think that the increase in African American admissions that you're looking at was pre-Grutter. It was generated before 2004.

JUSTICE BREYER: Uh-huh.

MR. REIN: So I just want to make clear the record doesn't depend -- they don't depend on race to do it. It's minimal change with the use of race. And that's why we say there is an alternative which would serve it about as well in increasing yield or, indeed, in reweighting the -- the PAI, which is a critical element here, so that you put more emphasis on the socioeconomic factors and less emphasis on the essays, which are an academic measure within the PAI. So there are lots that they could do --

JUSTICE SOTOMAYOR: So now we're going to tell the universities how to run and how to weigh qualifications, too?

MR. REIN: It's not the job of the Court to tell them how to do it. It's their job to examine the alternatives available to them and see if they couldn't achieve the same thing.

JUSTICE SOTOMAYOR: Could you tell me again how race and their use of race overwhelms those other factors in their system as it's created?

MR. REIN: I -- the question is not whether it overwhelms them. They're -- but they say, they admit, it is effective. There are admissions that would not have taken place but for; somebody else would have had that place but for the use of race. And I think, Justice Kennedy, just to answer your question fully, you have to analyze race-neutral alternatives. And if you look at Parents Involved, that -- that was the critical question. The -- the outcomes were so small that there were readily available alternatives.

JUSTICE KENNEDY: Well, perhaps you could summarize by saying -- by telling us, from your point of view, this plan fails strict scrutiny on one or two or both levels, (a), because the objective is inappropriate or ill defined, and, (b), because of the implementation is defective. Which or both of those are you arguing?

MR. REIN: We have argued both, and we continue to argue both. It is not a necessary --

JUSTICE KENNEDY: And in what respect does this plan fail strict scrutiny under either of those -- under both of those categories?

MR. REIN: Okay. Under the category -- the first category, was it a necessary means of pursuing a compelling interest, we don't believe they've shown any necessity for doing what they were doing. And certainly, it -- race should have been a last resort; it was a first resort. That's, in a nutshell, that prong of it. And in order -- and they failed in every respect. If you go to narrow tailoring, what we are saying is they didn't consider alternatives, and their treatment of, as we have pointed out, Asian Americans and Hispanics makes a -- an incomprehensible distinction. They say, we don't worry about Asians, there are a lot of Asians, it's a demographic measure, which is a forbidden measure. They are in excess of their share of the Texas population. But if you are trying to find individual comfort levels, if you are breaking it down between African Americans and -- and Hispanics, the --

JUSTICE SOTOMAYOR: Counsel, you are the one who in your brief has assumed that they are valuing different races differently. But Asian numbers have gone up, under however they have structured this PAI. And as I understand their position, race is balanced against other issues like socioeconomics, the strength of the classes people took. It's never a stand alone. So even a white student, I presume, who goes to an entirely black or an entirely Latino school, who becomes class president would get some points because he has or she has proven that they foster or can deal in a diverse environment. That's how I understood their plan; that it's not just giving you a plus because of race, it's combining that with other factors.

MR. REIN: There is a plus because of race. There are many other factors in the decision. And might I say that this -- the white student president of the class in an ethnically different school is a measure of leadership. Leadership is an independent factor in the PAI. It isn't -- he is not getting that point because of his race; he's getting that point because of his leadership. That race-neutral criteria could work for anybody. So race is an independent add-on, it is something that can be used to boost the PAI score, the PAS element in any way they like, because they say they contextualize it, and we say it's not necessary, it's not narrowly tailored, it ignores available alternatives, it treats -- gives disparate treatment to Asian Americans, because they are minorities as well, and to the extent it depends on the classroom factor there is simply no way to relate or fit what they are doing to the solution of the problem which they used as a major foundation of their proposal, which is the nondiverse classroom. That -- certainly there is just no correspondence there. I see my time is up, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: We will afford you rebuttal time since our questions have prevented you from reserving it.

MR. REIN: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Garre.

MR. GARRE: Thank you, Mr. Chief Justice, and may it please the Court. For two overriding reasons, the admissions plan before you is constitutional under this Court's precedents. First, it is indistinguishable in terms of how it operates in taking race into account as only one modest factor among many for the individualized considerations of applicants in their totality from plans that this Court has upheld in Grutter and plans that this Court approved in Bakke and the Harvard plan.

JUSTICE SOTOMAYOR: I -- I put that in the narrow tailoring category, that it is narrowly tailored the way Grutter did, said. Not the necessity prong and not the need prong. Not the necessity prong. I think most of his argument has been centered on that, so --

MR. GARRE: That's right, and so that's the second point I was going to make, which is that the holistic admissions process at issue here is a necessary counterpart to the State's Top 10 Percent Law and works to systematic -- to offset the systematic drawbacks of that law in achieving an interest that is indisputably compelling, the university's interest of assembling a broadly diverse student body.

CHIEF JUSTICE ROBERTS: Counsel, before -- I need to figure out exactly what these numbers mean. Should someone who is one-quarter Hispanic check the Hispanic box or some different box?

MR. GARRE: Your Honor, there is a multiracial box. Students check boxes based on their own determination. This is true under the Common Application --

CHIEF JUSTICE ROBERTS: Well, I suppose a person who is one-quarter percent Hispanic, his own determination, would be I'm one-quarter percent Hispanic.

MR. GARRE: Then they would check that box, Your Honor, as is true --

CHIEF JUSTICE ROBERTS: They would check that box. What about one-eighth?

MR. GARRE: Your Honor, that was -- they would make that self-determination, Your Honor. If anyone, in any part of the application, violated some honor code then that could come out --

CHIEF JUSTICE ROBERTS: Would it violate the honor code for someone who is one-eighth Hispanic and says, I identify as Hispanic, to check the Hispanic box?

MR. GARRE: I don't think -- I don't think it would, Your Honor. I don't think that that issue would be any different than the plan upheld in Grutter or the Harvard plan or in Bakke.

CHIEF JUSTICE ROBERTS: You don't check in any way the racial identification?

MR. GARRE: We do not, Your Honor, and no college in America, the Ivy Leagues, the Little Ivy Leagues, that I'm aware of.

CHIEF JUSTICE ROBERTS: So how do you know you have 15 percent African American -- Hispanic or 15 percent minority?

MR. GARRE: Your Honor, the same way that that determination is made in any other situation I'm aware of where race is taken into account.

CHIEF JUSTICE ROBERTS: You say the same way. What is that way?

MR. GARRE: The persons self-identify on that form.

JUSTICE SCALIA: Do they have to self-identify?

MR. GARRE: They do not, Your Honor. Every year people do not and many of those applicants are admitted.

JUSTICE SCALIA: And how do they decide? You know, it's -- they want not just a critical mass in the school at large, but class by class? How do they figure out that particular classes don't have enough? What, somebody walks in the room and looks them over to see who looks -- who looks Asian, who looks black, who looks Hispanic? Is that how it's done?

MR. GARRE: No, Your Honor, and let me try to be clear on this. The university has never asserted a compelling interest in any specific diversity in every single classroom. It has simply looked to classroom diversity as one dimension of student body diversity.

JUSTICE SCALIA: I don't know what you are talking about. I mean it is either a factor that is validly in this case or it isn't. Do they look to individual classroom diversity or not? And if so, how do they decide when classes are diverse?

MR. GARRE: This Court in Grutter, Your Honor, and maybe the most important thing that was said during the first 30 minutes was, when given an opportunity to challenge Grutter, I understood my friend not to ask this Court to overrule it. This Court in Grutter recognized the obvious fact that the classroom is one of the most important environments where the educational benefits of diversity are realized, and so the University of Texas, in determining whether or not it had reached a critical mass, looked to the classroom along with --

JUSTICE SCALIA: Fine. I'm asking how. How did they look to the classroom?

MR. GARRE: Well, Your Honor --

JUSTICE SCALIA: Did they require everybody to check a box or they have somebody figure out, oh, this person looks 1/32nd Hispanic and that's enough?

MR. GARRE: They did a study, Your Honor, that took into account the same considerations that they did in discussing the enrollment categories --

JUSTICE SCALIA: What kind of a study? What kind of a study?

MR. GARRE: Well, Your Honor, it's in the Supplemental Joint Appendix.

JUSTICE SCALIA: Yes, it doesn't explain to me how they go about, classroom by classroom, deciding how many minorities there are.

MR. GARRE: Your Honor, there are student lists in each classroom. The student lists --

CHIEF JUSTICE ROBERTS: There are student lists in each classroom that have race identified with the students.

MR. GARRE: No, no, Your Honor. Of course, each classroom, the university knows which students are taking its classes and one can then, if you want to gauge diversity in the classrooms, go back --

CHIEF JUSTICE ROBERTS: Oh, you go back to what they checked on the form.

MR. GARRE: Your Honor, this was part of a --

CHIEF JUSTICE ROBERTS: That's a yes or no question. You go back to what they checked on their application form in deciding whether Economics 201 has a sufficient number of African Americans or Hispanics?

MR. GARRE: That is information that is available to the university, Your Honor, the race of students if they've checked it on the application. But I do want to be clear on this classroom diversity study. This was only one of many information points that the university looked to.

JUSTICE ALITO: Well, on the classroom diversity, how does the non-Top 10 Percent part of the plan further classroom diversity? My understanding is that the university had over 5,000 classes that qualified as small and the total number of African Americans and Hispanics who were admitted under the part of the plan that is challenged was just a little over 200. So how does that -- how does that -- how can that possibly do more than a tiny, tiny amount to increase classroom diversity?

MR. GARRE: Well, Your Honor, first I think that 200 number is erroneous. There have been many more minority candidates --

JUSTICE ALITO: Per class?

MR. GARRE: No, not -- not on a per-class basis.

JUSTICE ALITO: Individuals in class.

MR. GARRE: I think in looking at the classrooms, Your Honor, what the university found was shocking isolation.

JUSTICE ALITO: How many -- how many non-Top 10 Percent members of the two minorities at issue here are admitted in each class?

MR. GARRE: Your Honor, we didn't look specifically at that determination. What we did -- in other words, to try to find whether there were holistic admits or percentage admits, we did conclude in 2004 -- and again this was before -- we did the classroom study before the plan at issue was adopted and at that time there were no holistic admits taking race into account. And what we concluded was that we simply -- if you looked at African Americans, for example, in 90 percent of the classes of the most common participatory size --

JUSTICE ALITO: I really don't understand your answer. You know the total number of, let's say, African Americans in an entering class, right? Yes or no?

MR. GARRE: Yes, Your Honor.

JUSTICE ALITO: And you know the total number who were admitted under the Top 10 Percent Plan?

MR. GARRE: We do, Your Honor. But again at the time --

JUSTICE ALITO: If you subtract A from B you'll get C, right?

MR. GARRE: Your Honor, at the time --

JUSTICE ALITO: And what is the value of C per class?

MR. GARRE: Your Honor, I don't know the answer to that question, and let me try to explain why the university didn't look specifically to that. Because at the time that the classroom diversity study was conducted, it was before the holistic admissions process at issue here was adopted in 2003-2004. And so that determination wouldn't have been as important as just finding out are African Americans or Hispanics, underrepresented minorities, present at the university in such numbers that we are not experiencing racial isolation in the classroom.

CHIEF JUSTICE ROBERTS: What is that number? What is the critical mass of African Americans and Hispanics at the university that you are working toward?

MR. GARRE: Your Honor, we don't have one. And this Court in Grutter --

CHIEF JUSTICE ROBERTS: So how are we supposed to tell whether this plan is narrowly tailored to that goal?

MR. GARRE: To look to the same criteria of this Court in Grutter. This Court in Grutter specifically rejected the notion that you could come up with a fixed percentage. Now --

JUSTICE ALITO: Does critical mass vary from group to group? Does it vary from State to State?

MR. GARRE: It certainly is contextual. I think it could vary, Your Honor. I think -- let me first say that my friends have, throughout this litigation, not in this Court, asserted 20 percent as a critical mass and that's lumping together different minority groups.

JUSTICE ALITO: But could you answer my question? What does the University of Texas -- the University of Texas think about those questions? Is the critical mass for the University of Texas dependent on the breakdown of the population of Texas?

MR. GARRE: No, it's not at all.

JUSTICE ALITO: It's not.

MR. GARRE: It's not at all. It's looking to the educational benefits of diversity on campus, and I think we actually agree on what that means and what Grutter said it meant in terms of --

JUSTICE GINSBURG: Mr. Garre, could you explain -- I think you were trying to before -- what seems to me the critical question in this case: Why didn't the 10 percent solution suffice? There were a substantial number of minority members admitted as a result of the 10 percent solution. Why wasn't that enough to achieve diversity?

MR. GARRE: Let me make a couple of points, Your Honor. First, if you just looked at the numbers -- we don't think it's the numbers, but if you looked at the numbers after 7 years, racial diversity among these groups at the University of Texas had remained stagnant or worse. 2002, African American enrollment had actually dropped to 3 percent. That's one part of it. The other part of it is if you look at the admissions under the top 10 percent plan, taking the top 10 percent of a racially identifiable high school may get you diversity that looks okay on paper, but it doesn't guarantee you diversity that produces educational benefits on campus. And that's one of the considerations that the university took into account as well.

JUSTICE SCALIA: I don't understand that. Why? Why doesn't it?

MR. GARRE: Because, Your Honor, as is true for any group, and the Harvard plan that this Court approved in Bakke specifically recognized this, you would want representatives and different viewpoints from individuals within the same -- the same racial group, just as you would from individuals outside of that.

JUSTICE SCALIA: What kind of viewpoints? I mean, are they political viewpoints?

MR. GARRE: Anyone's experiences, where they grew up, the situations that they -- that they experience in their lives are going to affect their viewpoints.

JUSTICE SCALIA: But this has nothing to do with racial diversity. I mean, you're talking about something else.

MR. GARRE: Your Honor, I think it directly impacts the educational benefits of diversity in this sense, that the minority candidate who has shown that -- that he or she has succeeded in an integrated environment, has shown leadership, community service, the other factors that we looked at in holistic review, is precisely the kind of candidate that's going to come -- come on campus, help to break down racial barriers, work across racial lines, dispel -- stereotypes --

JUSTICE SCALIA: Also, the kind that is likely to be included within the 10 percent rule. And, incidentally, when was the 10 percent rule adopted?

MR. GARRE: 1998, Your Honor. But with respect to your factual point, that's absolutely wrong, Your Honor. If you look at the admissions data that we cite on page 34 of our brief, it shows the breakdown of applicants under the holistic plan and the percentage plan. And I don't think it's been seriously disputed in this case to this point that, although the percentage plan certainly helps with minority admissions, by and large, the -- the minorities who are admitted tend to come from segregated, racially-identifiable schools.

JUSTICE ALITO: Well, I thought that the whole purpose of affirmative action was to help students who come from underprivileged backgrounds, but you make a very different argument that I don't think I've ever seen before. The top 10 percent plan admits lots of African Americans -- lots of Hispanics and a fair number of African Americans. But you say, well, it's -- it's faulty, because it doesn't admit enough African Americans and Hispanics who come from privileged backgrounds. And you specifically have the example of the child of successful professionals in Dallas. Now, that's your argument? If you have -- you have an applicant whose parents are -- let's say they're -- one of them is a partner in your law firm in Texas, another one is a part -- is another corporate lawyer. They have income that puts them in the top 1 percent of earners in the country, and they have -- parents both have graduate degrees. They deserve a leg-up against, let's say, an Asian or a white applicant whose parents are absolutely average in terms of education and income?

MR. GARRE: No, Your Honor. And let me -- let me answer the question.

First of all, the example comes almost word for word from the Harvard plan that this Court approved in Grutter and that Justice Powell held out in Bakke.

JUSTICE ALITO: Well, how can the answer to that question be no, because being an African American or being a Hispanic is a plus factor.

MR. GARRE: Because, Your Honor, our point is, is that we want minorities from different backgrounds. We go out of our way to recruit minorities from disadvantaged backgrounds.

JUSTICE KENNEDY: So what you're saying is that what counts is race above all.

MR. GARRE: No, Your Honor, what counts is different experiences --

JUSTICE KENNEDY: Well, that's the necessary -- that's the necessary response to Justice Alito's question.

MR. GARRE: Well, Your Honor, what we want is different experiences that are going to -- that are going to come on campus --

JUSTICE KENNEDY: You want underprivileged of a certain race and privileged of a certain race. So that's race.

MR. GARRE: No, Your Honors, it's -- it's not race. It's just the opposite. I mean, in the LUAC decision, for example, this Court said that failing to take into account differences among members of the same race does a disservice --

JUSTICE KENNEDY: But the reason you're reaching for the privileged is so that members of that race who are privileged can be representative, and that's race. I just --

MR. GARRE: It's -- it's members of the same racial group, Your Honor, bringing different experiences. And to say that -- if you took any racial group, if you had an admissions process that only tended to admit from a -- people from a particular background or perspective, you would want people from different perspectives.

CHIEF JUSTICE ROBERTS: Counsel --

MR. GARRE: And that's -- that's the interests that we're discussing here. It's the interests that the Harvard plan specifically adopts and lays out --

CHIEF JUSTICE ROBERTS: I understand my job under our precedents to determine if your use of race is narrowly tailored to a compelling interest.

The compelling interest you identify is attaining a critical mass of minority students at the University of Texas, but you won't tell me what the critical mass is. How am I supposed to do the job that our precedents say I should do?

MR. GARRE: Your Honor, what -- what this Court's precedents say is a critical mass is an environment in which students of underrepresented --

CHIEF JUSTICE ROBERTS: I know what you say, but when will we know that you've reached a critical mass?

MR. GARRE: Well --

CHIEF JUSTICE ROBERTS: Grutter said there has to be a logical end point to your use of race. What is the logical end point? When will I know that you've reached a critical mass?

MR. GARRE: Your Honor, this question, of course, implicates Grutter itself. And, again, I understood my friend not to challenge that. They haven't challenged that diversity is a compelling interest at all. What -- what we look to, and we think that courts can review this determination, one, we look to feedback directly from students about racial isolation that they experience. Do they feel like spokespersons for their race.

CHIEF JUSTICE ROBERTS: So, what, you conduct a survey and ask students if they feel racially isolated?

MR. GARRE: That's one of the things we looked at.

CHIEF JUSTICE ROBERTS: And that's the basis for our Constitutional determination?

MR. GARRE: Your Honor, that's one of the things that we looked at.

CHIEF JUSTICE ROBERTS: Okay. What are the others?

MR. GARRE: Another is that we did look to enrollment data, which showed, for example, among African Americans, that African American enrollment at the University of Texas dropped to 3 percent in 2002 under the percentage plan.

CHIEF JUSTICE ROBERTS: At what level will it satisfy the critical mass?

MR. GARRE: Well, I think we all agree that 3 percent is not a critical mass. It's well beyond that.

CHIEF JUSTICE ROBERTS: Yes, but at what level will it satisfy the requirement of critical mass?

MR. GARRE: When we have an environment in which African Americans do not --

CHIEF JUSTICE ROBERTS: When -- how am I supposed to decide whether you have an environment within particular minorities who don't feel isolated?

MR. GARRE: Your Honor, part of this is a -- is a judgment that the admin -- the educators are going to make, but you would look to the same criteria --

CHIEF JUSTICE ROBERTS: So, I see -- when you tell me, that's good enough.

MR. GARRE: No, Your Honor, not at all. You would look to the criteria that we looked at, the enrollment data, the feedback from the students. We also took into account diversity in the classroom. We took into account the racial climate on campus.

JUSTICE ALITO: But would 3 percent be enough in New Mexico, your bordering state, where the African American population is around 2 percent?

MR. GARRE: Your Honor, I don't think it would. I mean, our concept to critical mass isn't tied to demographic. It's undisputed in this case that we are not pursuing any demographic goal. That's on page 138 of the Joint Appendix. All of -- I think many key facts are undisputed here. It's undisputed that race is only a modest factor. It's undisputed that we're taking race into account only to consider individuals in their totality.

JUSTICE SOTOMAYOR: Mr. Garre, I think that the issue that my colleagues are asking is, at what point and when do we stop deferring to the University's judgment that race is still necessary? That's the bottom line of this case. And you're saying, and I think rightly because of our cases, that you can't set a quota, because that's what our cases say you can't do. So if we're not going to set a quota, what do you think is the standard we apply to make a judgment?

MR. GARRE: I think the standard you would apply is the one set forth in Grutter, and it comes from Justice Powell's opinion in Bakke, that you would look to whether or not the University reached an environment in which members of underrepresented minorities, African Americans and Hispanics, do not feel like spokespersons for their race, members -- an environment where cross-racial understanding is promoted, an environment where the benefit -- educational benefits of diversity are realized. And the reason why the University of Texas concluded that that environment was not met here, it laid out in several different information points that this Court can review --

JUSTICE SCALIA: But that holds for only -- only another what, 16 years, right? Sixteen more years, and you're going to call it all off.

MR. GARRE: Your Honor, we don't read Grutter as establishing that kind of time clock. We are looking at this --

JUSTICE SCALIA: But you're appealing to Grutter, and that's what it said.

MR. GARRE: Well, Your Honor, Grutter is this Court's precedence. We're guided by it here. At least the advocates are. And -- and what we would look to is once -- we're looking at this every year, we're looking at it carefully. And once we reach that point, of course, we're going to stop. But we also take --

JUSTICE SOTOMAYOR: Mr. --

JUSTICE GINSBURG: Mr. Garre. Mr. Garre.

JUSTICE SCALIA: Some of the stuff that Grutter says -- some of the stuff that Grutter says you agree with, some of the stuff that it says you don't agree with.

MR. GARRE: Well, I don't know that I've disagreed with anything it said. It --

JUSTICE GINSBURG: Mr. Garre, before your time is -- runs out, the other point that I'd like you to answer is the argument based on Parents Involved, that the game is just too small to warrant using a racial criteria.

MR. GARRE: Your Honor --

JUSTICE GINSBURG: Once you have the 10 percent, you don't need more. So how do you answer the argument of it being too small?

MR. GARRE: First I'd point to my friend's own concessions, that the consideration of race has increased racial diversity at Hispanic and helps with minority enrollment. That's on page 138 of the Joint Appendix. Secondly, I'd point to the fact that African American and Hispanics' admissions did increase. African American admissions doubled from the period of 2002 to 2004. So this has had a real important impact on diversity at the University of Texas.

JUSTICE ALITO: Well, in terms of diversity, how do you justify lumping together all Asian Americans? Do you think -- do you have a critical mass of Filipino Americans? Cambodian Americans --

MR. GARRE: Your Honor --

JUSTICE ALITO: -- Cambodian Americans?

MR. GARRE: -- the common form that's used has Asian American, but also, next to that, has a form that says country of origin where that can be spelled out.

JUSTICE ALITO: But do you have a critical mass as to all the subgroups that fall within this enormous group of Asian Americans?

MR. GARRE: Your Honor, we've looked to whether or not we have a critical mass of underrepresented minorities, which is precisely what the Grutter decision asks us to do.

I think -- if I can make a quick point on jurisdiction --

JUSTICE KENNEDY: If I could, before we get to that.

MR. GARRE: I'm sorry.

JUSTICE KENNEDY: Suppose we -- that you, in your experience identify a numerical category a numerical standard, a numerical designation for critical mass: It's X percent. During the course of the admissions process, can the admissions officers check to see how close they are coming to this numerical --

MR. GARRE: No. No, Your Honor, and we don't. On page 389 --

JUSTICE KENNEDY: You -- you cannot do that?

MR. GARRE: We -- we wouldn't be monitoring the class. I think one of the problems --

JUSTICE KENNEDY: But isn't that what happened in Grutter; it allowed that.

MR. GARRE: It did, Your Honor. It was one of the things --

JUSTICE KENNEDY: So are you saying that Grutter is incorrect?

MR. GARRE: No, Your Honor. It was one of the things that you pointed out in your dissent. What I'm saying is we don't have that problem, because --

JUSTICE KENNEDY: I'm -- I'm asking whether or not you could do that. And if --

MR. GARRE: I don't think so, because the Grutter majority didn't understand it to be monitoring for the purposes of reaching a specific demographic.

CHIEF JUSTICE ROBERTS: They don't -- they don't monitor, but race is the only one of your holistic factors that appears on the cover of every application, right?

MR. GARRE: Well, all the holistic factors are taking into account on the application, and they're listed at various points on the application.

CHIEF JUSTICE ROBERTS: I'm sorry. The question was whether race is the only one of your holistic factors that appears on the cover of every application.

MR. GARRE: That -- that is true on the cover of the application.

If -- could I make one point on jurisdiction?

CHIEF JUSTICE ROBERTS: We will give you a little more time since I'm going to give your friend a little more time.

MR. GARRE: Thank you.

The fundamental problem with jurisdiction is this that First of all, they definitively cannot show that she was injured by any consideration of race. That's at pages 415 and 416 of the Joint Appendix, where it makes clear that Ms. Fisher would not have been admitted to the fall 2008 class at University of Texas no matter what her race, because her --

CHIEF JUSTICE ROBERTS: Just to be clear, are you arguing that she doesn't have standing in an Article III sense?

MR. GARRE: Yes, Your Honor. And I think --

CHIEF JUSTICE ROBERTS: You address that in your brief in one footnote, right? We have an obligation to consider it in every case, and what you gave us is one footnote in which you said it's hard to see how she could establish cognizable jurisdiction.

MR. GARRE: And there is another part of that that comes from the brief in opposition, Your Honor, which goes to the relief that she has requested. The declaratory and injunctive release -- relief that this case began with, that request has fallen out, and that's undisputed. So the only thing that is live in this case is a request for monetary damages. That request is on page 79 of the Joint Appendix, and it's focused exclusively on a request for the return of admissions fees. And the reason why that is not enough to confer standing is that she would have paid the admissions fee no matter what policy the university admissions had.

CHIEF JUSTICE ROBERTS: What about -- what about our Jacksonville case that said it is an injury to be forced to be part of a process in which there is race-conscious evaluation?

MR. GARRE: Texas v. Lesage says that that -- that injury is not sufficient in a backward-looking case like this, where you only have monetary damages. In Jacksonville and all the other cases, they involved forward-looking claims for declaratory injunctive release where people who were going to go out and get contracts again. So Texas University --

CHIEF JUSTICE ROBERTS: I thought your friend -- your friend told us that these remedial issues and damages issues had been segregated out of the process and are still available for remand.

MR. GARRE: Your Honor, that is not an answer to jurisdiction for this reason: It's true that it is bifurcated in the sense that we could go and prove damages, but the complaint makes no doubt that the only request for monetary damages is a request for admissions fees. That -- it says that explicitly. And this Court has said that relief that does not remedy the injury suffered cannot bootstrap a plaintiff into Federal court. That is the very essence of the redressability requirement. That comes from the Seal Co. Case.

JUSTICE SCALIA: Well, that's part of the injury she suffered. It's -- it's not the only injury perhaps.

MR. GARRE: It's the only --

JUSTICE SCALIA: But she -- she had to pay an admissions fee for a process in which she was not treated fairly.

MR. GARRE: And the reason why --

JUSTICE SCALIA: Why shouldn't she get her money back?

MR. GARRE: The reason why the payment of that fee doesn't redress the injury, Your Honor, is that she would have paid it even if Texas didn't consider race at all; and, therefore, the payment of the application fee back doesn't remedy the injury that she is complaining about.

JUSTICE BREYER: Can I ask you to get -- if this is easy, do it; if not, don't.

I wanted to use accurate numbers, and so I discovered -- I wanted to find out how many universities actually used a Grutter-type process last year or the year before, etcetera. And one of your amici, the admissions officers, according to our library, is the only place that has that information, though it's public, and I didn't want them to do it because they are an amici of yours. And you are both here, both sides, so if you can agree on -- simply, roughly -- what that number is, I would like to know it; otherwise, I will -- I can use pre-Grutter numbers which are public and available.

MR. GARRE: Your Honor, I don't have specific numbers. Obviously, the Ivy Leagues and Little Ivy Leagues that have filed amicus briefs are using it. And this Court recognized in Grutter that the best universities, many of the best universities in America, have been using these plans for 30 years or more.

JUSTICE SCALIA: Since we are asking questions just about just curiosity, I am curious to know how many -- this is a very ambitious racial program here at the University of Texas. How many people are there in the affirmative action department of the University of Texas? Do you have any idea? There must be a lot of people to, you know, to monitor all these classes and do all of this assessment of race throughout the thing. There would be a large number of people be out of a job, wouldn't we, wouldn't they, if we suddenly went to just 10 percent?

MR. GARRE: Your Honor, one of the things that the University of Texas does monitor is the racial climate on campus. It does that to improve the experience for all students on campus.

JUSTICE SCALIA: How many people?

MR. GARRE: I don't --

JUSTICE SCALIA: You don't.

MR. GARRE: -- have a specific number of people, Your Honor, but it is -- it is an important part of improving the educational experience for all students at the University of Texas no matter what their race.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. GARRE: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: General Verrilli.

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

In resolving this case, it is important to focus on what is, or more precisely, what is not at issue.

Petitioner is not challenging Grutter's reaffirmation of the principle of Justice Powell's opinion in Bakke that student body diversity is a compelling interest that can justify the consideration of race in university admissions. Colleges and universities across the country have relied on that principle in shaping their admissions policies, and it is of vital interest to the United States that they continueto be able to do so. The core of our interest is in ensuring that the Nation's universities produce graduates who are going to be effective citizens and effective leaders in an increasingly diverse society, and effective competitors in diverse global markets.

JUSTICE ALITO: Does the United States agree with Mr. Garre that African American and Hispanic applicants from privileged backgrounds deserve a preference?

SOLICITOR GENERAL VERRILLI: I understand that differently, Justice Alito. Here's how we understand what is going on with respect to the admissions process in the University of Texas, and I am going to address it directly. I just think it needs a bit of context to do so. The Top 10 Percent Plan certainly does produce some ethnic diversity. Significant numbers get in. The problem is the university can't control that diversity in the same way it can with respect to the 25 percent of the class that is admitted through the holistic process. So my understanding of what the university here is looking to do, and what universities generally are looking to do in this circumstance, is not to grant a preference for privilege, but to make individualized decisions about applicants who will directly further the educational mission. For example, they will look for individuals who will play against racial stereotypes just by what they bring: The African American fencer; the Hispanic who has -- who has mastered classical Greek. They can also look for people who have a demonstrated track record of --

JUSTICE ALITO: If you have two applicants who are absolutely the same in every respect: They both come from affluent backgrounds, well-educated parents. One falls within two of the groups that are given a preference, the other doesn't. It's a marginal case. It's the last -- the last position available in the class. Under the Texas plan, one gets in; one doesn't get in. Now, do you agree with that or not?

SOLICITOR GENERAL VERRILLI: No. I think --

JUSTICE ALITO: Do you agree with -- do you agree that that is an incorrect statement of the facts, or do you agree that that's an incorrect understanding of the Equal Protection Clause?

SOLICITOR GENERAL VERRILLI: I think it's both. I think the -- there is no automatic preference in Texas. And I think this is right in the -- it says at page 398a of the Joint Appendix -- the -- they describe the process as saying, [An applicant's race is considered only to the extent that the applicant, viewed holistically, will contribute to the broader vision of diversity desired by the university.]

JUSTICE SCALIA: Yes, but -- but the hypothetical is that the two applicants are entirely the same in all other respects.

SOLICITOR GENERAL VERRILLI: Right. But the point --

JUSTICE SCALIA: And if -- if the ability to give a racial preference means anything at all, it certainly has to mean that, in the -- in the hypothetical given -- given by Justice Alito, the minority student gets in and the other one doesn't.

SOLICITOR GENERAL VERRILLI: I disagree, Justice Scalia. What the -- Texas, I think, has made clear -- and I think this is a common feature of these kinds of holistic approaches -- that not everyone in an underrepresented group gets a preference, gets a plus factor.

JUSTICE SCALIA: It's not a matter of not everyone; it's a matter of two who are identical in all other respects.

SOLICITOR GENERAL VERRILLI: Right.

JUSTICE SCALIA: And what does the racial preference mean if it doesn't mean that in that situation the minority applicant wins and the other one loses?

SOLICITOR GENERAL VERRILLI: There may not be a racial preference in that situation. It's going to depend on a holistic, individualized consideration of the applicant.

JUSTICE KENNEDY: I don't understand this argument. I thought that the whole point is that sometimes race has to be a tie-breaker and you are saying that it isn't. Well, then, we should just go away. Then -- then we should just say you can't use race, don't worry about it.

SOLICITOR GENERAL VERRILLI: I don't think it's a tie-breaker. I think it functions more subtly than that, Justice Kennedy.

CHIEF JUSTICE ROBERTS: It doesn't function more subtly in every case. We have findings by both courts below -- and I'm reading from the court of appeals opinion at Petitioner appendix page 33. [The district court found that race is indisputably a meaningful factor that can make a difference in the evaluation of a student's application.] If it doesn't make a difference, then we have a clear case; they're using race in a way that doesn't make a difference. The supposition has to be that race is a determining factor. We've heard a lot about holistic and all that. That's fine. But unless it's a determining factor, in some cases they're using race when it doesn't serve the purpose at all. That can't be the situation.

SOLICITOR GENERAL VERRILLI: It can make a difference. It just doesn't invariably make a difference with respect to every minority applicant, and that's the key --

CHIEF JUSTICE ROBERTS: You have to agree that it makes a difference in some cases.

SOLICITOR GENERAL VERRILLI: Yes, it does.

CHIEF JUSTICE ROBERTS: Okay.

SOLICITOR GENERAL VERRILLI: But it doesn't necessarily make a difference in the situation that Justice Alito posited --

JUSTICE GINSBURG: But that's the same -- the same would be true in -- of the Bakke plan, that in some cases it's going to make a difference. The same would be true under Grutter. The same would be true under the policies now in existence at the military academies.

SOLICITOR GENERAL VERRILLI: That -- that is exactly right, Justice Ginsburg, but the point is that it's not a mechanical factor.

Now, with respect to the implementation of -- and the narrow tailoring inquiry, with respect to the University's implementation of this -- of its compelling interest, I do think it's clear that, although the Petitioner says she's challenging implementation, that this plan meets every requirement of Grutter and addresses the concern of Justice Kennedy that you raised in dissent in Grutter. Whether Texas had to or not, it did address that concern. There's no quota. Everyone competes against everyone else. Race is not a mechanical automatic factor. It's an holistic individualized consideration. And because of the way the process is structured, they do not monitor the racial composition on an ongoing basis.

JUSTICE SOTOMAYOR: General, I think, as I take your answer, is that the supposition of Justice Alito's question is truly impossible under this system. There are not two identical candidates because there are not identical mechanical factors that -- except the 10 percent plan. Under the PIA, the factors are so varied, so contextually set, that no two applicants ever could be identical in the sense that they hypothesize.

SOLICITOR GENERAL VERRILLI: That's correct. They make specific individualized judgments about each applicant --

JUSTICE SOTOMAYOR: Because no two people can be the same --

CHIEF JUSTICE ROBERTS: To get back to what we're talking about, you -- as I understand it, race by itself is taken into account, right? That's the only thing on the cover of the application; they take race into account. And the district court found -- and you're not challenging -- that race makes a difference in some cases, right?

SOLICITOR GENERAL VERRILLI: Yes. But the key, Mr. Chief Justice, is the way it makes a difference. And it makes a difference by casting the accomplishments of the individual applicant in a particular light, or the potential of an individual applicant in a particular light. What -- what universities are looking for principally with respect to this individualized consideration is what is this individual going to contribute to our campus? And race can have a bearing on that because it can have a bearing on evaluating what they've accomplished, and it can have a bearing for the reasons I tried to identify earlier to Justice Alito on what they can bring to the table, what they can bring to that freshman seminar, what they can bring to the student government, what they can bring to the campus environment --

JUSTICE BREYER: All right, sir. But it is the correct answer to Justice Alito's -- if there are ever two applicants where the GPA, the test -- the grades, the SA1, SA2, leadership, activities, awards, work experience, community service, family's economic status, school's socioeconomic status, family's responsibility, single-parent home, languages other than English spoken at home, and SAT score relative to school's average race, if you have a situation where those -- all those things were absolutely identical, than the person would be admitted on the bounds of race.

SOLICITOR GENERAL VERRILLI: Not necessarily.

(Laughter.)

SOLICITOR GENERAL VERRILLI: Because -- because -- I'm trying to make a simple point here. Neither --

CHIEF JUSTICE ROBERTS: Gentlemen, don't write --

SOLICITOR GENERAL VERRILLI: -- neither might get in.

JUSTICE ALITO: Let me withdraw that hypothetical if you don't like that.

Before your time runs out, let me ask you another question.

Your ROTC argument -- you make -- you make -- you devote a lot of attention in your brief to the military. Could you explain your ROTC argument to me?

SOLICITOR GENERAL VERRILLI: Sure.

JUSTICE ALITO: Why is it important for the ROTC program for commissioned officers that Texas have this other plan on top of the top 10 percent plan?

SOLICITOR GENERAL VERRILLI: Our -- our military effectiveness depends on a pipeline of well-qualified and well-prepared candidates from diverse backgrounds who are comfortable exercising leadership in diverse settings.

JUSTICE ALITO: Oh, I understand that. And just -- I don't want to cut you off, but --

SOLICITOR GENERAL VERRILLI: Right.

JUSTICE ALITO: -- because the time is about to expire, so you've got a marginal candidate who wants to go to the University of Texas at Austin and is also interested in ROTC. Maybe if race is taken into account, the candidate gets in. Maybe if it isn't, he doesn't get in. How does that impact the military? The candidate will then probably go to Texas A&M or Texas Tech? Is it your position that he will be an inferior military officer if he went to one of those schools?

SOLICITOR GENERAL VERRILLI: No, Justice Alito.

JUSTICE ALITO: Then I don't understand the argument.

SOLICITOR GENERAL VERRILLI: The point of educational diversity, the point of what the University of Texas is trying to achieve is to create an environment in which everyone develops an appropriate sense of citizenship, everyone develops the capacity to lead in a racially diverse society, and so it will benefit every ROTC applicant from the University of Texas. And 43 percent of the Officer Corps comes from the ROTC. It's a very significant source of our military leadership.

CHIEF JUSTICE ROBERTS: General, how -- what is your view on how we tell whether -- when the University has attained critical mass?

SOLICITOR GENERAL VERRILLI: I don't think critical -- I agree with my friend that critical mass is not a number. I think it would be very ill-advised to suggest that it is numerical.

CHIEF JUSTICE ROBERTS: Okay. I'm hearing a lot about what it's not. I'd like to know what it is because our responsibility is to decide whether this use of race is narrowly tailored to achieving, under this University's view, critical mass.

SOLICITOR GENERAL VERRILLI: May I answer, Mr. Chief Justice?

CHIEF JUSTICE ROBERTS: Oh, yes.

SOLICITOR GENERAL VERRILLI: Thank you.

I think -- I don't think that this is a situation in which the Court simply affords complete deference to the University's judgment that it hasn't yet achieved the level of diversity that it needs to accomplish its educational mission. I think that the Court ought to -- has to make its own independent judgment. I think the way the Court would go about making that independent judgment is to look at the kind of information that the university considered. That could be information about the composition of the class. It could be information about classroom diversity. It could be information about retention and graduation rates. It could be information about -- that's specific to the university's context in history. Is it **is** a university that has had a history of racial incidents and trouble or not? A series of factors. And then what the Court's got to do is satisfy itself that the University has substantiated its conclusion based on that -- based on the information it's considered, that it needs to consider race to further advance the educational goals that Grutter has identified as a compelling interest. And I will say, I do think, as the number of minority enrollees gets higher, the burden on the university to do that is going to get harder to meet. But I don't think -- I don't think there is a number, and I don't think it would be prudent for this Court to suggest that there is a number, because it would raise exactly the kind of problem that I -- that I think Justice Kennedy identified in the Grutter dissent of creating hydraulic pressure towards that number.

JUSTICE SCALIA: We should probably stop calling it critical mass then, because mass, you know, assumes numbers, either in size or a certain weight.

SOLICITOR GENERAL VERRILLI: I agree.

JUSTICE SCALIA: So we should stop calling it mass.

SOLICITOR GENERAL VERRILLI: I agree.

JUSTICE SCALIA: Call it a cloud or something like that.

(Laughter.)

SOLICITOR GENERAL VERRILLI: I agree that critical mass -- the idea of critical mass has taken on a life of its own in a way that's not helpful because it doesn't focus the inquiry where it should be. If I may just add one word in conclusion.

CHIEF JUSTICE ROBERTS: Sure.

SOLICITOR GENERAL VERRILLI: Thank you. I think it is important, Your Honors, not just to the government, but to the country, that our universities have the flexibility to shape their environments and their educational experience to make a reality of the principle that Justice Kennedy identified in Parents Involved, that our strength comes from people of different races, different creeds, different cultures, uniting in a commitment to freedom, and to more a perfect union.That's what the University of Texas is trying to do with its admissions policy, and it should be upheld. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, General.

MR. REIN: Thank you, Mr. Chief Justice. That's more than I expected.

CHIEF JUSTICE ROBERTS: Just keeping the playing field level.

MR. REIN: Well, that's what we're seeking in this case, Mr. Chief Justice, a level playing field for Abby Fisher. So it's most apt at this point. There's just three things I want to touch on. First, there's been a lot of back and forth on standing, but, as we have pointed out, that really relates to merits. And I just want to make clear that we do not accept the premise of that footnote, that she would not have entered under any circumstances; that they've asserted that, but, in fact, she was considered for the summer program, which is --

JUSTICE SOTOMAYOR: Is your complaint limited to injunctive relief and the return of the $ 100? As written, is that what it's limited to?

MR. REIN: No, because it said, [any and all other damages,] at the point when we were writing it, which was --

JUSTICE SOTOMAYOR: In Arizonans and Alvarez we said any all -- any and other -- all damages is too speculative. Is what you actually see what I said: injunctive relief and the return of the $ 100.

MR. REIN: And what I'm saying is that we never had the opportunity to develop the full damages --

JUSTICE SOTOMAYOR: In --

MR. REIN: -- because of --

JUSTICE SOTOMAYOR: In Arizonans and Alvarez we said you can't manufacture standing after the fact. Did you ask only for injunctive relief and the $ 100, specifically?

MR. REIN: The only specific number in the complaint, because of the point in time when it was filed was the application fee, which we believe --

JUSTICE SOTOMAYOR: And you would have paid that no matter what; under any system of admission you would have paid the same $ 100.

MR. REIN: You would have paid the fee in return for a fair processing of the application, which she did not receive, and we think that is a claim that will be sustained. It is not tested at this point. And the second thing is, because of the way the case was bifurcated, with the agreement of all and the district court as well, we did not develop the additional damages here. We reserved the right to amend, and as things have progressed --

JUSTICE SOTOMAYOR: For what, nominal damages?

MR. REIN: No --

JUSTICE SOTOMAYOR: And then how do you get around Arizonans?

MR. REIN: Because as -- as in the BIO, what UT pointed out was there are other kinds of financial injuries which were not ascertainable at the time the complaint was filed because we were trying to put her into the university.

JUSTICE SOTOMAYOR: She was going to get a better job because she went to a different university?

MR. REIN: That's one of the things they suggested. There are differences in cost between the -- what she paid at LSU and what she would have paid at UT. I'm just saying, these are all reserved questions and they don't go to standing. The Court made that clear in Bakke. Let me go to another issue that, you know, I think I never completed my answer to Justice Breyer. Where we stand on what you should do about Grutter is as follows. We recognize, as in the words of -- that the Solicitor General just issued -- that there is an interest which is cognizable in diversity. That is -- that was the root question in Grutter, could you recognize it at all. But what we are concerned about, as you are seeing here, is universities like UT and many others have read it to be green light, use race, no end point, no discernible target, no critical mass, you know, in circumstances reduced to something that can be reviewed. And as long as you don't cross two lines, determinative points and fixed quotas – [quotas] meaning we will fill this quota exclusively with who we deem to be under-represented -- you are okay. We don't think that's the way Grutter was intended. Grutter was intended to say this is an area of great caution; using race itself raises all kinds of red flags, so before you use race make a determination whether really, your interest in critical mass -- that is, in the dialogue and interchange, the educational interest, is that --

JUSTICE SOTOMAYOR: You are not suggesting that if every minority student that got into a university got into only the physical education program; and in this particular university that -- that physical education program includes all the star athletes; so every star athlete in the school happens to be black or Hispanic or Asian or something else, but they have now reached the critical mass of 10, 15, 20 percent -- that the university in that situation couldn't use race?

MR. REIN: Well, I think you are talking about --

JUSTICE SOTOMAYOR: In the holistic way that Grutter permits?

MR. REIN: Well, if you are saying there's a -- a differentiated department of physical education, which is like a separate college, you have changed the nature of the hypothetical.

JUSTICE SOTOMAYOR: No, it's just that every one of their students who happens to be a minority is going to end up in that program. You don't think the university could consider that it needs a different diversity in its other departments?

MR. REIN: Well, if that were the case, remember the factor that is causing it, and you are assuming, is choice. You have a critical mass of students. They choose to major in different things, and that's one of the problems with the classroom diversity concept. They never asked the question why, if 40 percent of our students are minorities, are they not in the small classrooms? Why does that happen? Statistically you would say that's an aberration. You might ask the question what's causing it? Because in order to fit --

JUSTICE SOTOMAYOR: Aren't they saying the same thing when they say, when we are looking at the holistic measure, we are looking for that student who is a -- that minority student who is a nuclear scientist?

MR. REIN: No. Because they don't take into account your interests, they don't ask you, are you going to join ROTC, they don't ask you are you going to major -- major in physics. And when it comes time in the UT system to allocate access to different majors, they do that in a way that is basically premised on academic index. So they have a two-tiered admission system. They are only here focused -- their preference goes to admission as such, it doesn't go to sorting people out by majors. And if I might then say to Justice Breyer, I think our answer is, when we see what UT is doing, what we that -- Grutter's -- you know, it has been perceived as a green light; go ahead and use race, race which is otherwise really a highly questionable, an abominable kind of sorting out. That unchecked use of race, which we think is -- has been spawned by misreading of Grutter, needs to be corralled. So what we --

JUSTICE GINSBURG: Is it any more unchecked than the Harvard plan which -- that started all this off in 1978, decided by Justice Powell? Is it any different from how race is used in our military academies?

MR. REIN: Well, I mean, they are two different questions. The Harvard plan is a very different world. It's a plan of wholly individualized admission comparing individuals one on one, to establish the platonic ideal of the class as the educational mission. This is not what is going on at UT. This is not an individualized, I will look at you. I will score you. I will score you individually. But as they keep saying, at the point of admission, I am not admitting people; I am admitting categories, boxes; and that relates to Justice Alito's question. I thought your hypothetical, Justice Alito, was entirely fair, because in the way they do their system, in the PAI scoring, you can figure out that two people would have had the same PAI score but for race. It's an add-on. It allows them to boost the PAS component of the PAI score. So -- it is not infrequent. There are many, many candidates who will score the same PAI, may even have the same AI, and then you boost some of them. Now, what UT says is, well, we don't boost all the minorities. And that -- they stood here today, and they said in their briefs, we want to boost the ones we like. We want those affluent minorities who we think will improve, in our view, dialogue. That is contrary indeed to the fact that they give points in the same system for socioeconomic disadvantage. It's at odds with itself. But it's purely race, and it comes to the ultimate question then, which, Chief Justice, you were asking: Where is the end point? If you have nothing to gauge the success of the program, if you can't even say at the beginning we don't have critical mass because we don't know what it is and we refuse to say what it is, there is no judicial supervision, there is no strict scrutiny and there is no end point to what they are doing. So what we have said, and it comes right back to Justice Breyer, how would you write it, you can clarify it, you can say Grutter properly applies, requires you to do A, B, C, and -- and we've said in our brief that would be satisfactory. But to the extent that you then have it surviving side by side, there could be enormous confusion.

JUSTICE BREYER: So what you want me to do is go read back what we wrote in Grutter, go look what the underlying determinations of critical mass were there, go look exactly how it is being done in Texas -- which I have charts that help me see that -- and I will find enough of a difference that I can write some words that can be administered by 2,000 or 3,000 -- a thousand Federal judges as they try to deal with programs like this, in -- that's the point, is that right?

MR. REIN: Well, I'm saying if you clarify the needs and the necessity point, if you then look at some of the other deficiencies and clarify the -- the consideration of reasonably available alternatives as a necessity, if you then attribute that -- you attribute the weaknesses of the Texas program to the absence of those factors, I think you can fashion a result in this case which may or may not have to, quote, [overrule] Grutter. It's really a matter, what do you -- do you want to clearly restate what it is that allows the use of this odious classification? That's what we are talking about, it's a narrow window; and it should be stated as a narrow window.

JUSTICE SOTOMAYOR: So you don't want to overrule Grutter, you just want to gut it.

MR. REIN: Excuse me?

JUSTICE SOTOMAYOR: You just want to gut it. You don't want to overrule it, but you just want to gut it.

MR. REIN: Well --

JUSTICE SOTOMAYOR: Now you want to tell universities that once you reach a certain number, then you can't use race anymore.

MR. REIN: Justice Sotomayor, I don't want to gut it. And the only way one could reach that conclusion is to assume that Grutter is an unlimited mandate without end point to just use race to your own satisfaction and to be deferred to in your use of race. That is unacceptable. That is the invasion of Abigail Fisher's rights to equal protection under the law. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel, counsel.