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IN THE SUPREME COURT OF THE UNITED STATES

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JENNIFER GRATZ and :

PATRICK HAMACHER :

Petitioners :

v. :

NO. 02-516

LEE BOLLINGER, et al., :

Respondents. :

-----X

Washington, D.C.

Tuesday, April 1, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

MR. KIRK O. KOLBO, ESQ., Minneapolis, Minnesota; on behalf of the Petitioners.

GENERAL THEODORE B. OLSON, ESQ., Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting the Petitioners.

JOHN PAYTON, ESQ., Washington, D.C., on behalf of the Respondents.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We will hear argument next in No. 02-516, Jennifer Gratz and Patrick Hamacher v. Lee Bollinger.

Mr. Kolbo.

ORAL ARGUMENT OF KIRK O. KOLBO

ON BEHALF OF THE PETITIONERS

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

Jennifer Gratz and Patrick Hamacher were denied admission to the University of Michigan's flagship undergraduate institution, the College of Literature and the Science and the Arts under an admissions-- under admissions policies that facially and flagrantly discriminated on the basis of race.

The history of their case and of the University's defense of its discriminatory admissions policies is a powerful argument about the perils of entrusting to the discretionary judgments of educators the protection of the Constitution's guarantee of equality to all individuals.

For nearly 5 years, the University vigorously defended in the district court and the court of appeals

1 the admissions systems that were in place when petitioners  
2 Gratz and Hamacher applied. These systems featured  
3 separate admissions guidelines for different races,  
4 protected or reserved seats in the class for select  
5 minorities, that is blacks, Hispanics and Native  
6 Americans, racially-segregated wait lists, and a policy of  
7 never automatically rejecting students from their  
8 preferred -- from the preferred minority groups while  
9 doing so for others.

10 QUESTION: Mr. -- Mr. Kolbo, as a preliminary  
11 matter, would you address the question of whether the  
12 named plaintiff Patrick Hamacher has standing in this  
13 case. He was denied admission, I think, in 1997?

14 MR. KOLBO: Correct, Your Honor.

15 QUESTION: And he claimed that he intended to  
16 apply to transfer to the University of Michigan, from  
17 wherever he was going to school, and yet the transfer  
18 admissions policy, I guess isn't before us.

19 MR. KOLBO: The transfer admissions policy  
20 itself is not before you -- the Court, Your Honor.

21 QUESTION: No

22 MR. KOLBO: -- but the policy is essentially the  
23 same with respect to the consideration of race and the  
24 Court did -- we did certify a class in this case, with  
25 respect to Mr. Hamacher, and I believe it was December of

1 1998. We moved for class certification and the district  
2 court granted that certification. And as a result of  
3 that, of course, anything with respect -- anything that's  
4 happened with respect to Mr. Hamacher subsequent to that  
5 time it seems to us is not irrelevant to the consideration  
6 of standing.

7 QUESTION: Are you sure that the transfer policy  
8 is the same as the admissions policy for new freshmen?

9 MR. KOLBO: Well, it's not exactly the --

10 QUESTION: We didn't find any such finding.  
11 There was some little material in the record that gave me  
12 a different thought about it.

13 MR. KOLBO: The transfer policy considers race,  
14 Your Honor.

15 QUESTION: I know it considered race, but not in  
16 precisely the same way as this --

17 MR. KOLBO: Not in precisely the same way, and  
18 the Court -- there -- there is nothing -- it may be,  
19 perhaps included in parts of the appendix materials, but  
20 the district court did not address the issue of the  
21 transfer policy when it -- in Mr. Hamacher's potential for  
22 transferring under the policy.

23 QUESTION: Well, there's nothing, I take it --  
24 if Mr. Hamacher prevails on the transfer -- there is  
25 nothing in his prevailing that would hurt any other class

1 member.

2 MR. KOLBO: Nothing at all, Mr. Chief Justice.

3 I know it considered race, but -- but not in  
4 precisely the same way as this --

5 Not in precisely the same way, and the Court --  
6 there -- there is nothing -- it may be, perhaps included  
7 in parts of the appendix materials, but the district court  
8 did not address the issue of -- of the transfer policy in  
9 it -- in Mr. Hamacher's potential for transferring under  
10 the policy.

11 QUESTION: Well, there's nothing, I take it --  
12 if Mr. Hamacher prevails on the transfer policy, there is  
13 nothing in his prevailing that would hurt any other class  
14 member?

15 MR. KOLBO: Nothing at all, Mr. Chief Justice.

16 QUESTION: It's not a -- okay.

17 MR. KOLBO: No. If Mr. Hamacher prevails, then  
18 the rights of many thousands of others will have been  
19 vindicated and they will be able to compete under a  
20 nondiscriminatory system.

21 QUESTION: Of course that would be true even if  
22 he doesn't have standing.

23 (Laughter.)

24 MR. KOLBO: That's true. Well, Your Honor they  
25 would not be able to compete under a nondiscriminatory

1 system unless this particular system is struck down.

2 QUESTION: I understand if it's struck down, but  
3 that -- that begs the question of whether the named  
4 plaintiff has standing to represent a class of people who  
5 want to get into the freshman class. He wants to get in  
6 as a transferring student. I mean, it -- maybe there's  
7 standing, but the mere fact that if he wins everybody will  
8 benefit certainly doesn't speak to the question whether he  
9 has standing.

10 MR. KOLBO: No, Your Honor, but we -- we do  
11 believe that because the -- the transfer policy and the  
12 original admissions policy are fundamentally the same in  
13 the respect that they both consider race in the admissions  
14 process in a way that is discriminatory and we believe  
15 that's --

16 QUESTION: And therefore if you're right that  
17 any consideration of a race is enough to condemn the  
18 program, then he would have standing, but if it -- if it  
19 requires analysis of the particular components of the  
20 policy, then we ought to know whether the transfer policy  
21 is the same as the original policy.

22 MR. KOLBO: That would be true, Your Honor, if  
23 the case were decided strictly on the issue of narrow  
24 tailoring, but my understanding is that the University  
25 considers race for a purpose to achieve a diversity that

1 we believe is not compelling, and if that is struck down  
2 as a rationale, then the law would be same with respect to  
3 the transfer policy as with respect to the original  
4 admissions policy, Your Honor.

5 QUESTION: Oh, he has standing to challenge.  
6 That's -- that seems clear, but the -- depending on the  
7 rationale that the court adopts if it finds -- if it finds  
8 the program unacceptable, he may not be entitled to  
9 relief.

10 MR. KOLBO: He would be -- it seems to me,  
11 perhaps, Your Honor, entitled for relief for damages.  
12 He's -- he's not at this point seeking to be admitted to  
13 the University. He's graduated with the passage of time,  
14 it's been five-plus years since this suit was filed,  
15 Mr. Hamacher has attended and graduated elsewhere. It  
16 seems to me he would be entitled to damages.

17 QUESTION: And the Court agreed with him as far  
18 as the program that was in place when he applied. The  
19 Court, I thought, held that program unconstitutional.

20 MR. KOLBO: It did, Your Honor.

21 QUESTION: And -- but upheld the program that  
22 came into being after his application, and he hasn't  
23 reapplied under the new -- but he -- but there was a class  
24 certified, so I suppose you could substitute another  
25 plaintiff, someone who is applying under the current

1 system.

2 MR. KOLBO: Well -- well, our position, Your  
3 Honor, is that because the class was certified with  
4 respect to Mr. Hamacher, that that's sufficient; that if  
5 the -- if the system is found unconstitutional, he is an  
6 adequate class representative. Sure. Certainly.

7 One of the critical things that is demonstrated  
8 in this case is how easy it is for one system to be  
9 disguised as another. What has happened in this case is  
10 that for five years again, the University defended the  
11 system with its facially separate admission guidelines,  
12 with its reserved seats, and then in -- two years into  
13 this case, in fact, was still using some of these  
14 particular forms in its admissions policy. It is an  
15 indication, I think, of how difficult it is to conclude  
16 that what we have here is a system that, for example,  
17 comports with what Justice Powell indicated he was -- he  
18 approved of in the -- in the Bakke case.

19 What we have here is a system that was -- is not  
20 narrowly tailored to achieve any governmental interest,  
21 any compelling governmental interest.

22 I would like, if I may, to return to the issue  
23 of diversity and the diversity issue as a -- as a  
24 compelling state interest. The fundamental problem with  
25 the diversity rationale is that it depends upon the

1 standardless discretion of educators.

2           It is a discretion that would be exercised in a  
3 number of different respects. And we need to be clear  
4 about this. The University and its amicus have all made  
5 it clear that in their judgment they ought to be entitled  
6 to use race as much as necessary in their educational  
7 discretion.

8           If that is the rule that we end up accepting,  
9 then universities are free in their discretion to choose  
10 which races are discriminated against, which are favored.  
11 We can have one institution that discriminates against one  
12 group of individuals, and another against another. We can  
13 have with the -- with shifting fashions and -- and  
14 preferences and time, the preferences for the races can  
15 shift. An example of that is found in comparing the facts  
16 of this case to the Bakke case, wherein Bakke, Asian  
17 Americans were included in the preference, and under the  
18 University of Michigan's systems, they are excluded.

19           The -- the exercise of discretion will extend to  
20 who's identified in a particular race.

21           It will be for educators to decide whether  
22 someone of a mixed race is someone that is entitled to a  
23 preference.

24           You can have anomalous situation of the  
25 University's guidelines for example where someone who is

1 both half-white and half-black --

2 QUESTION: How -- how does the University of  
3 Michigan decide those things? Do they -- is it just a  
4 self-reporting type of system on the application?

5 MR. KOLBO: That's correct, Mr. Chief Justice,  
6 it's a matter essentially of self-identification. So if  
7 someone of mixed race who is white and black identifies  
8 himself as white, then as far as the University is  
9 concerned, they don't bring the diversity that they're  
10 looking for. If that person identifies himself as black,  
11 then merely from that identification, they have fallen  
12 within the diversity that the University seeks.

13 QUESTION: And -- and the reason that these --

14 QUESTION: One thing I don't quite understand  
15 what difference does it make to your client whether  
16 they're three or four races or five or six races as long  
17 as she's not one of them?

18 MR. KOLBO: Well, it seems to me, Your Honor,  
19 it -- the problem --

20 QUESTION: She's equally being discriminated  
21 against as a Caucasian, no matter how many other races are  
22 preferred.

23 MR. KOLBO: That's true, Your Honor. I -- I  
24 raised the point because it -- it indicates how  
25 standardless this interest is. It is not defined with

1 respect to any constitutional principle like, for example,  
2 an interest based on remedying discrimination. It is  
3 entirely discretionary with the University.

4 QUESTION: So is it entirely discretionary when  
5 you read a set of exam books, you know, it's highly  
6 subjective, which is a little better than its --

7 Often I'd make a mistake as a professor, so --  
8 so the fact that there aren't written-down standards is --  
9 is -- I'm -- I'm not sure of the Constitutional relevance  
10 of that when what you're trying to do is something lawyers  
11 don't normally do, which is to select among people  
12 individually considered which one is better for this  
13 particular slot. Businesspeople do that, lawyers don't  
14 except when they're hiring.

15 (Laughter.)

16 QUESTION: But -- but I don't -- if you said to  
17 a businessperson, this doesn't have standards, such a  
18 thing, I think they might laugh and say my job and  
19 experience is to select who's better for this slot, so --  
20 so I'm not sure of the constitutional relevance of what  
21 you say, which seems to me to me to grow out of the nature  
22 of the problem.

23 MR. KOLBO: Well, again, Justice Breyer, the  
24 constitutional relevance derives from the fact that we're  
25 talking about a constitutional right here, the use of

1 race, which is not the same thing as --

2 QUESTION: Yes, yes, but I mean, as Justice  
3 Stevens just said, the constitutional problem consists of  
4 the injury to your client and that injury is the same  
5 irrespective of the precise nature of the standards on the  
6 other side. And -- and what I'm sort of struggling for  
7 here is I see your point, if you say you cannot use race  
8 at all, period. No matter what. That's a -- that's a  
9 clear position, which I think is one of your positions.  
10 But once you depart from that, now I'm -- I'm interested  
11 in the detail. At that point I'm not quite sure the  
12 relevance of what you're saying.

13 MR. KOLBO: Well, Your Honor, what I'm  
14 suggesting is the Court itself has made clear that for an  
15 interest to be compelling, one of the considerations that  
16 the Court must look at is whether there are standards --  
17 independent, ascertainable standards apart from the  
18 discretion exercised by, say, an employer to determine  
19 whether the interest is one that's compelling and one that  
20 the Court can oversee. That interest, that standard --  
21 that standard exists, for example, when we have an  
22 interest in remedying identified discrimination. The  
23 Court has made it clear that what with can be done in that  
24 case is you can measure the extent to which there has been  
25 past discrimination, that's not a matter of discretion for

1 the employer to decide, and once you've measured the  
2 extent of that discrimination, you can tailor your remedy  
3 to that interest.

4 QUESTION: Mr. Kolbo, because you mentioned the  
5 employer and the employer's judgment, I gathered from your  
6 brief that this case is not simply about public  
7 universities. Employment -- because you bring up 1981 and  
8 you bring up Title VI -- under Title VI, this case is as  
9 much about Harvard as it is about Michigan, isn't that  
10 true?

11 MR. KOLBO: The same standard would apply,  
12 Justice Ginsburg, that's correct.

13 QUESTION: And it -- and in the private sector,  
14 employment in the private sector, there's 1981. So there,  
15 too. So this case is much larger than private --  
16 public -- public universities. It's all colleges and  
17 universities, and it's the entire realm of employment if  
18 you're right.

19 MR. KOLBO: Well, Your Honor, I want to be clear  
20 about what it is that we're arguing for here today. We  
21 are not suggesting an absolute rule forbidding any use of  
22 race under any circumstances. What we are arguing is that  
23 the interest asserted here by the University, this  
24 amorphous, ill-defined, unlimited interest in diversity is  
25 not a compelling interest. Nothing we argue today and

1 nothing we seek to do today would undo the Court's  
2 precedents that have recognized if some --

3 QUESTION: As far as --

4 QUESTION: But I think you are arguing that  
5 anything except remedies for past discrimination is  
6 impermissible.

7 MR. KOLBO: Your Honor, that is not a conclusion  
8 that we need to follow from this Court's decision.

9 QUESTION: No, I -- I think that's your  
10 position, is it not? That the only permissible use of  
11 race is as a remedy for past discrimination?

12 MR. KOLBO: I would not go that far, Justice  
13 Stevens, there --

14 QUESTION: No, I -- I think that's your  
15 position, is it not? That the only permissible use of  
16 race is as a remedy for past discrimination?

17 MR. KOLBO: I would not go that far, Justice  
18 Stevens, there may be other reasons. I think they would  
19 have to be extraordinary and rare, perhaps, rising to the  
20 level of life or limb. We do know that the Court has  
21 recognized past identified discrimination.

22 QUESTION: What about Weber, to take a specific  
23 case? Employment setting, the employer says I don't want  
24 to confess to having been a past discriminator, but I'm  
25 willing to engage in this voluntary affirmative action. I

1 take it that that would be impermissible if we adopt your  
2 view?

3 MR. KOLBO: Weber, as I understand it, is a  
4 Title VII case, Your Honor and it's not implicated by this  
5 decision.

6 QUESTION: But there's 1981, then -- then the  
7 person who was attacking it on grounds that it's racially  
8 discriminatory just says my lawsuit is under 1981, which  
9 it could be as well as Title VII and then what is the  
10 result?

11 MR. KOLBO: Well, it seems to me, Your Honor,  
12 that -- if the Court could resolve the issue consistent  
13 with Title VII, which has remedial --

14 QUESTION: If the suit is brought under 1981,  
15 the Court can decide what the plaintiff's complaint should  
16 be?

17 MR. KOLBO: No, no, if this Court decides this  
18 case under section 1981, the only interest asserted here  
19 at least is an interest in diversity that we are asking to  
20 strike down. It may be that there are some other  
21 interests, including a remedial one, that would be  
22 justified under some other statute. But the issue is not  
23 presented.

24 QUESTION: But there was no -- this is a  
25 voluntary affirmative action, no admission of prior

1 discrimination. I gather if someone brought a 1981 suit,  
2 to stop that, your theory is that that person would  
3 prevail?

4 MR. KOLBO: The use of race to exceed  
5 nonremedial objectives, I think would have problems, Your  
6 Honor.

7 QUESTION: Congress wanted race to be considered  
8 by private institutions such as Harvard and what-not, if  
9 there's a problem with 1981, or any of the other Federal  
10 statutes, they can simply amend it. What the -- the only  
11 thing that the Constitution applies to is State action.

12 MR. KOLBO: Yes, that's correct, Justice Scalia.

13 QUESTION: And all the rest is simply Congress'  
14 decision to impose a similar restriction upon private  
15 actors, which decision it can change if it wishes.

16 MR. KOLBO: That's my understanding, Your Honor.

17 QUESTION: Or suppose you say you used the word  
18 extraordinary as compelling justification, and the other  
19 side says, yes, extraordinary, we're 280 million people,  
20 we have large racial diversity within the country, the  
21 world is even more diverse, and we think from the point of  
22 view of business, the Armed Forces, law, et cetera, that  
23 this is an extraordinary need to have diversity among  
24 elites throughout the country. That without it, the  
25 country will be much worse off. That's what we're being

1 told.

2 In fact, the country might not function well at  
3 all. And we have to train those people. We have to. All  
4 right, now, how can you say, or can you say, that isn't  
5 extraordinary? That isn't a question of life or limb for  
6 the country? It isn't really that necessary, when so many  
7 people are telling us the contrary?

8 MR. KOLBO: Your Honor, because there are  
9 important constitutional rights at stake. And those  
10 rights are the right to equal protection. And a mere  
11 social benefit that is having more minorities in  
12 particular occupations or the schools simply doesn't rise  
13 to the level of compelling interest.

14 It simply is not -- it doesn't remedy a  
15 constitutional value, like --

16 QUESTION: So if the University president or the  
17 dean told you just what Justice Breyer said, you would  
18 tell them there's -- and that we have underrepresentation  
19 of minorities, you would tell them there's nothing you can  
20 do about it?

21 MR. KOLBO: I would say, Your Honor, that racial  
22 preferences are not the answer. If there are problems  
23 again in not getting a sufficient number of -- if  
24 minorities are not competing at levels of other racial  
25 groups then we should take steps to solve that problem.

1 But racial preferences, because they injure the rights of  
2 innocent people, because it's a prohibition contained in  
3 our Constitution, simply aren't permissible to remedy that  
4 problem. If I may reserve the remainder of my time, Mr.  
5 Chief Justice.

6 QUESTION: Very well, Mr. Kolbo.

7 General Olson, we'll hear from you.

8 ORAL ARGUMENT OF THEODORE B. OLSON

9 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

10 SUPPORTING THE PETITIONERS

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

13 The University of Michigan admissions program  
14 has created a separate path and a separate door for  
15 preferred minorities. For those groups, if they meet  
16 basic if they meet basic qualifications, their path is  
17 always clear and their door is always open.

18 Nonpreferred racial groups face rigorous  
19 competition to get through the other door.

20 The University admits that race is such an  
21 overarching factor in its admissions process that  
22 eventually every qualified underrepresented minority  
23 applicant will be admitted. The 20 point bonus, which is  
24 one full grade point, nearly twice the benefit of a  
25 perfect SAT score, and six times better than an

1 outstanding essay, the -- that bonus is actually  
2 unnecessary with the way the plan actually works, because  
3 every qualified candidate who gets the bonus gets into the  
4 University. It might just as well be an admissions  
5 ticket.

6           The University acknowledges that its pre-1999  
7 admissions program used separate grids, separate  
8 qualifications, separate standards and protected seats.  
9 They acknowledge that this system was -- which was held  
10 unconstitutional and was not challenged, yet they  
11 stipulated that the only changes that they made from that  
12 system affected only the mechanics, not the substance of  
13 how race and ethnicity were considered in the admissions  
14 process.

15           QUESTION: First the changes were sufficient to  
16 convince the district judge that it was on the other side  
17 of the constitutional line?

18           GENERAL OLSON: Notwithstanding the fact that  
19 the -- the University -- we -- we respectfully disagree  
20 with that conclusion, because the -- the University itself  
21 admitted that it only changed the mechanics. It intended  
22 to produce the same --

23           QUESTION: Yes, but isn't -- isn't -- I mean,  
24 mechanics is another word for tailoring. And they're  
25 saying we have tailored it differently. Our objectives

1 are the same. We may be reaching those objectives in  
2 roughly the -- the same proportions, but the argument is  
3 an argument about tailoring and we've changed the  
4 tailoring.

5 GENERAL OLSON: We submit Justice Souter, that  
6 the changes which they referred to as mechanics were  
7 cosmetics, that ultimately, the system was intended to,  
8 and they acknowledge, to produce the same outcome as the  
9 prior system.

10 QUESTION: Yes. The stipulation is that it did  
11 not change the substance of how race and ethnicity were  
12 considered.

13 GENERAL OLSON: Correct, Justice Kennedy. And  
14 what the Court only needs to look at the operation of the  
15 system. That 20 point bonus means that if you pass the  
16 minimum qualification standards at the University of  
17 Michigan, you were admitted.

18 Everyone else just like in the Davis program,  
19 had to compete -- people that were not in the preferred  
20 races, who were not on the preferred class had to compete  
21 with one another.

22 QUESTION: It was the same 20 points given --  
23 socioeconomic status also had 20 points?

24 GENERAL OLSON: Yes, Justice Ginsburg.

25 QUESTION: And athletics, too, I think?

1           GENERAL OLSON: Yes, and you couldn't get both.  
2 But if you had -- whether -- whatever your background,  
3 whether you were an athlete or not, you got the 20 points  
4 solely because of your race. There were other systems,  
5 that the Constitution doesn't implicate.

6           QUESTION: I thought you got only one 20?

7           GENERAL OLSON: That's correct.

8           QUESTION: So if you were an athlete you  
9 wouldn't get race?

10          GENERAL OLSON: That's correct. But if you --  
11 irrespective of those other factors, if you didn't get the  
12 -- the 20 point bonus for being an athlete or -- for  
13 socioeconomic conditions, the only thing that was required  
14 was to be a member of the preferred race. Like the other  
15 program that we're hearing today, the same State, the  
16 state Board of Regents, this plan violates every standard  
17 that this Court has set for the examination of racial  
18 preferences.

19           It is a thinly disguised quota because there's  
20 only one path, a segment -- Justice O'Connor put it this  
21 way in Croson -- a segment of the class reserved  
22 exclusively for certain minority groups. It isn't tied to  
23 a particular number. It's a segment of the class reserved  
24 on the basis of race.

25           It is -- it is based upon the stigmatizing

1 notion that if you are a certain race, you think a certain  
2 way or if you're a certain race, you have certain  
3 experience that's are common.

4 QUESTION: What do you say to the argument that  
5 number one, it's not stigmatizing, because the box study  
6 certainly didn't show that it was, and number two, the  
7 objective is not to show that there is a correlation  
8 between race and one point of view. The objective is to  
9 show students what the correlation or no correlation is  
10 between races and points of view. And it seems to me that  
11 the Michigan plan is equally consistent with the latter  
12 interpretation as with the former.

13 GENERAL OLSON: What we're saying is that if you  
14 assume that because you are white or you are red or you  
15 are brown or you are black, you must have certain  
16 experiences and you must have certain viewpoints.

17 QUESTION: The argument is that you need to have  
18 enough of them to demonstrate that the point of view does  
19 not always fit just one person.

20 GENERAL OLSON: Well, but Justice Stevens --

21 QUESTION: And that was a finding I think?

22 GENERAL OLSON: -- that's a self-contradictory  
23 rational that they've come up. They say first of all you  
24 have these characteristics because you're black but we  
25 must admit enough of you into the class to prove to the

1 other students that -- that black isn't the reason you're  
2 --

3 QUESTION: No that is not -- the argument is  
4 basically that, look, people who have grown up in America  
5 and are black, regardless of race, no, not regardless of  
6 race, regardless of socioeconomic background have  
7 probably, though not certainly, shared the experience of  
8 being subject to certain stereotypical reactions from  
9 people throughout their lives.

10 Now, that may have led them to react one way, or  
11 another way or not react at all.

12 And indeed many of the students in our class  
13 will have stereotypical reactions. And it's good for them  
14 as well as for everyone else to rid themselves of those  
15 reactions. And we want people in this school of all kinds  
16 who are black, because that will be helpful education.

17 Now, that's their argument, I think, in that  
18 respect, not the argument that all black people are poor,  
19 not the argument that all black people have been  
20 discriminated against, not the argument that all black  
21 people share a point of view.

22 As I read it, that's their argument. And so  
23 you're reply to that argument is what?

24 GENERAL OLSON: Well, their argument, A, takes  
25 several forms, at one point it's that, at one point, it's

1 the need to get more people elite -- of different  
2 backgrounds, it's a -- but what this Court has said that  
3 racial preferences, racial stereotyping, which it is, is  
4 stigmatizing, it's divisive, it's damaging to the fabric  
5 of society, it's damaging to the goal ultimately to  
6 eliminate the problems that racial discrimination and  
7 racial differences have created.

8 QUESTION: General -- we're part of a world, and  
9 this problem is a global problem. Other countries  
10 operating under the same equality norm have confronted it.  
11 Our neighbor to the north, Canada, has, the European  
12 Union, South Africa, and they have all approved this kind  
13 of, they call it positive discrimination. Do we -- they  
14 have rejected what you recited as the ills that follow  
15 from this. Should we shut that from our view at all or  
16 should we consider what judges in other places have said  
17 on this subject?

18 GENERAL OLSON: I submit, Justice Ginsburg that  
19 none of those countries has our history, none of those  
20 countries has the Fourteenth Amendment, none of those  
21 histories has the history of the statements by this Court  
22 which has examined the question over and over again that  
23 the ultimate damage that is done by racial preferences is  
24 such that if there ever is a situation in which such  
25 factors must be used that they must be -- race neutral

1 means must be used to accomplish those objective, narrow  
2 tailoring must be applied, and this -- this -- these  
3 programs fail all of those tests.

4 QUESTION: General Olson, do you know whether  
5 any of those countries that Justice Ginsburg referred to  
6 that have gone down the road of racial preferences, racial  
7 entitlements, have ever gotten rid of racial preferences  
8 or racial entitlements?

9 GENERAL OLSON: There --

10 QUESTION: Has it been the road ultimately to a  
11 color blind society or has it been the road to a society  
12 that has percentage entitlements for the various races?

13 GENERAL OLSON: Sadly, I believe that that is  
14 correct, Justice Scalia, and let me conclude by saying  
15 that the Michigan Law School and the University of  
16 Michigan ultimately must make a choice. It may maintain  
17 its elitist, as it refers to it, selection process without  
18 regard to race, or it may achieve the racial diversity it  
19 seeks with race neutral compromises in its admission  
20 standards.

21 But the one thing that it may not do is  
22 compromise its admission standards or change its admission  
23 requirements for one race and not another.

24 That is forbidden by the Equal Protection Clause  
25 of the Constitution.

1           QUESTION: Is it also forbidden for the United  
2 States military academy?

3           GENERAL OLSON: It may well be Justice Stevens.  
4 We're not defending the specifics of those programs, but  
5 we have not examined them individually. We -- we believe  
6 that the ultimate solution to the problem that race has  
7 created -- that difference in race has created in this  
8 country has got to be according to what this Court has  
9 said, the most neutral race -- neutral means possible.

10          QUESTION: Thank you General Olson.

11          Mr. Payton, we'll hear from you.

12                           ORAL ARGUMENT OF JOHN PAYTON

13                           ON BEHALF OF THE RESPONDENTS

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

16                   I think I think I want to spend just a few  
17 minutes briefly setting the record straight on why it is  
18 the educational judgment of the University of Michigan  
19 that the educational benefits that come from a racially  
20 and ethnically diverse student body are crucial for all of  
21 our students and why those benefits do not depend in any  
22 way on the assumption that, for example, all African  
23 Americans think alike.

24                   LS&A, our premiere undergraduate institution, is  
25 an undergraduate college, most of its entering students

1 come in as 18-year-olds, about two-thirds come from  
2 Michigan, and about half from Detroit or the greater  
3 Detroit area. Michigan, I think as everyone knows is a  
4 very segregated State.

5 QUESTION: Half of the ones who come from  
6 Michigan come from Detroit?

7 MR. PAYTON: Yes. Half of our students come  
8 from -- yes.

9 Michigan is a very segregated State. Detroit is  
10 overwhelmingly black. Its suburbs and the rest of the  
11 state are overwhelmingly white. While Michigan is extreme  
12 in this regard, it's not that extreme from the rest of the  
13 country. The University's entering students come from  
14 these settings and have rarely had experiences across  
15 racial or ethnic lines. That's true for our white  
16 students. It's true for our minority students.

17 They've not lived together. They've not played  
18 together. They've certainly not gone to school together.

19 The result is often that these students come to  
20 college not knowing about individuals of different races  
21 and ethnicities. And often not even being aware of the  
22 full extent of their lack of knowledge. This gap allows  
23 stereotypes to come into existence.

24 Ann Arbor is a residential campus, just about  
25 every single entering student lives on campus in a dorm.

1 On campus, these 18-year olds interact with students very  
2 different from themselves in all sorts of ways, not just  
3 race, not just ethnicity, but in all sorts of ways.

4 Students, I think as we know, learn a tremendous amount  
5 from each other.

6 Their education is much more than the classroom.  
7 It's in the dorm, it's in the dining halls, it's in the  
8 coffee houses. It's in the daytime, it's in the  
9 nighttime. It's all the time.

10 Here's how critical mass works in these  
11 circumstances. If there are too few African American  
12 students, to take that same example, there's a risk that  
13 those students will feel that they have to represent their  
14 group, their race. This comes from it isolation and it's  
15 well understood by educators. It results in these token  
16 students not feeling completely comfortable expressing  
17 their individuality.

18 On the other hand, if there are meaningful  
19 numbers of African American students, this sense of  
20 isolation dissipates.

21 QUESTION: Mr. Payton, what is a meaningful  
22 number?

23 MR. PAYTON: It's what we've been referring to  
24 as critical mass.

25 QUESTION: What is critical mass?

1 MR. PAYTON: Critical mass is when you have  
2 enough of those students so they feel comfortable acting  
3 as individuals.

4 QUESTION: How do you know that?

5 MR. PAYTON: I think you know it, because as  
6 educators, the educators see it in the students that come  
7 before them, they see it on the campus.

8 QUESTION: Do they -- professors at the  
9 University of Michigan spend a lot of time with the  
10 students?

11 MR. PAYTON: Yes, they do. This is an  
12 incredibly vibrant and complex campus that has diversity  
13 in every conceivable way. And I think --

14 QUESTION: Do they spend a lot of time with them  
15 other than lecturing to them?

16 MR. PAYTON: They do. In the record, we  
17 actually have an expert report that's not contradicted in  
18 any way by Professor Raudenbush and by Professor Gurin,  
19 just on the issue of how do you know when you have enough  
20 students in different contexts and circumstances that  
21 there will be these meaningful numbers.

22 QUESTION: What do they say?

23 MR. PAYTON: They said that given the numbers  
24 that have been coming through in the last several years,  
25 we are just getting to that critical mass. And the way

1 they analyzed it was to look at the circumstances in which  
2 students interact. Entering seminar, a dorm context, a  
3 student activities context, student newspaper context, to  
4 see what would happen if you distribute the students  
5 across these small encounter opportunities.

6 QUESTION: Does Michigan have, as some schools I  
7 know have, schools that have affirmative action program,  
8 does it have a minority dorm?

9 MR. PAYTON: No. The answer is no. We have  
10 dormitories like I said. Just about every single entering  
11 student stays in a dormitory. We do not have any  
12 dormitories where your entrance into it is governed by  
13 your race. But we have tremendous representation in our  
14 dormitories because everybody has to stay there, okay?

15 So the answer is --

16 QUESTION: I mean, apart from being excluded, if  
17 -- it is in fact the residential pattern quite mixed and  
18 there are no dormitories that are, you know, just as  
19 sometimes there is -- there is the jocks dormitory, there  
20 is really no African American dormitory?

21 MR. PAYTON: The answer is there is no African  
22 American dormitory, put it -- the full answer is more  
23 complex. After students are there for their first year,  
24 they can choose to move off campus. They can choose to  
25 stay on campus. Many stay on campus, many move off

1 campus. Ann Arbor is a college town and off campus is  
2 actually in the larger campus community and what they do  
3 off campus is obviously up to the students themselves, but  
4 I think that's -- you know, that's the real world. If you  
5 have the meaningful numbers of minority students, what  
6 then happens is that students will see a range of ideas, a  
7 range of viewpoints from and among those students and they  
8 will then see things that they may not have expected,  
9 similarities and differences, and those in turn will have  
10 the result of undermining stereotypes, you know, and this  
11 happens for the minority students, and the white students.

12 This happens for all the students. You know,  
13 the benefits from this affect every single student that  
14 comes through. And they're dependent on their being  
15 meaningful numbers, or critical mass, of minority  
16 students, or the benefits don't come about.

17 That's the interest that the University is  
18 asserting. That's why they think that this is so crucial.  
19 Education, understanding, produces citizens and leaders in  
20 our complex society.

21 QUESTION: But where we are is, there's an  
22 assumption, you may not agree with it, but it's one  
23 beginning assumption in this area, that there may not be a  
24 quota, every -- all of the eloquent things you said could  
25 be easily met by a quota. That -- let's just assume for

1 argument, we cannot do.

2 I have to say that in -- in looking at your  
3 program, it looks to me like this is just a -- a disguised  
4 quota. You have a -- a minority student who works very,  
5 very hard, very proud of his athletics, he gets the same  
6 number of points as a minority person who doesn't have any  
7 athletics -- that to me looks like an overt quota.

8 MR. PAYTON: Here's how our system works and I  
9 believe it's not a quota at all and I can believe -- I can  
10 simply explain this. The way it works, an application  
11 comes in, it is reviewed on the basis -- every single  
12 application is read in its entirety by a counselor, every  
13 single application. It is in fact judged on the basis of  
14 the selection index, which has the 20 points for race and  
15 20 points for athletics, but it also has all sorts of  
16 other things that it values, in state, underrepresented  
17 state, underrepresented county within Michigan,  
18 socioeconomic status, what your school is like, what the  
19 curriculum that you took at your school is like.

20 QUESTION: But none of that matters.

21 MR. PAYTON: Your grades --

22 QUESTION: None of that matters if you're  
23 minimally qualified and you're one of the minority races  
24 that gets the 20 points, you're in, correct? The rest is  
25 really irrelevant?

1           MR. PAYTON: The way it works is that every  
2 application comes through and it's read in its entirety,  
3 it is evaluated taking all of these factors into account,  
4 and then based upon the number that comes off the  
5 selection index which can go up to 150, the students are  
6 all competing against each other. There is a score that  
7 is evaluated throughout the year, because there's an  
8 overenrollment problem that always has to be managed and  
9 if the score is higher, you are in, and that doesn't  
10 matter about anything other than what the score is. In  
11 addition, the counselor can on the basis of three factors  
12 see that an application is reviewed by the admissions  
13 review committee.

14           QUESTION: Mr. Payton, in your brief, you say  
15 the volume of applications and the presentation of  
16 applicant information may get impractical for LSA to use  
17 admissions system as the much smaller University of  
18 Michigan Law School.

19           Now, you're saying that every single application  
20 for admission to LSA is read individually?

21           MR. PAYTON: Yes. Sometimes twice. Because  
22 every application is read when it comes in, and those that  
23 a counselor flags that -- because they find that there's  
24 three factors you have to have flag an application --  
25 academically able to do the work, above a certain

1 selection index score and also contributes at least one of  
2 various factors that we want to see in our student body,  
3 including underrepresented minority status, but also very  
4 high class rank and a whole range of other things.

5 QUESTION: When you say underrepresented  
6 minorities, what comparison are you making to say that  
7 it's underrepresented?

8 MR. PAYTON: I think we're taking that term as  
9 the Federal Government has used it, and the reason Asians  
10 aren't included, just to pick up one of the --

11 QUESTION: How does the Federal Government use  
12 it?

13 MR. PAYTON: I think there are three minority  
14 groups, you know. Let me just go back and answer what we  
15 want.

16 QUESTION: Well, I think perhaps I could get a  
17 more direct answer. How do you decide whether, say,  
18 African Americans or Hispanics are quote underrepresented,  
19 close quote?

20 MR. PAYTON: I think this is actually a very  
21 important point. They are underrepresented in our  
22 applicant pool.

23 QUESTION: Compared to what?

24 MR. PAYTON: Compared to -- we have very small  
25 pools of African Americans, for example, that are

1 qualified to the extent that we require students to be  
2 qualified to do the work at the University of Michigan and  
3 what that means is that if we didn't take race into  
4 account, we would not be able to get the numbers of those  
5 students, the critical mass, necessary for the educational  
6 benefits that we want.

7 QUESTION: But --

8 MR. PAYTON: That's underrepresented.

9 QUESTION: When you say underrepresented, it  
10 sounds like something almost mathematical, that you're  
11 saying, we only have a certain percentage of -- and we  
12 should have this percentage, well, what is this  
13 percentage?

14 MR. PAYTON: It's actually not a percentage at  
15 all and it really is driven by the educational benefits  
16 that we want from our diverse student body.

17 If we had in our applicant pool sufficient  
18 numbers of minority students, African Americans, for  
19 example --

20 QUESTION: What is a sufficient number?

21 MR. PAYTON: So that when we made our selection  
22 --

23 QUESTION: I asked you, what is a sufficient  
24 number?

25 MR. PAYTON: Yes.

1 QUESTION: An answer -- would you answer it?

2 MR. PAYTON: A sufficient number so that when we  
3 made our selections, we were achieving the critical mass  
4 of students that we need for the benefits I described.  
5 That is not a fixed precise number at all, as you've  
6 heard. It is -- that's simply not the nature of the  
7 critical mass. But when you're trying to figure out  
8 whether or not in your applicant pool, you have sufficient  
9 numbers, so that the normal operation of our process would  
10 yield a critical mass, that's underrepresented. We are  
11 underrepresented with respect to Hispanics, with respect  
12 to African Americans and with respect to Native Americans.

13 QUESTION: Because your standards are so high,  
14 you say that there are very few of those who can meet your  
15 standards. So why don't you lower your standards,  
16 actually, I mean if this is indeed a significant  
17 compelling State interest, why don't you lower your  
18 standards?

19 MR. PAYTON: We do have sufficient numbers in  
20 our applicant pool to achieve the critical mass that we're  
21 achieving. We're not taking -- you're right we're not --

22 QUESTION: By taking race into account, you can  
23 you can do it. But --

24 MR. PAYTON: But we're not taking students that  
25 aren't qualified, you are correct about that, Justice

1 Scalia.

2 QUESTION: But just lower your qualification  
3 standards, if -- if this value of -- of having everybody  
4 in a mix with people of other races is so significant to  
5 you, just lower your qualifications.

6 MR. PAYTON: It is that significant to us. But  
7 I think that --

8 QUESTION: You don't have to be the great  
9 college you are, you can be a lesser college if that value  
10 is important enough to you.

11 MR. PAYTON: I think that decision which would  
12 say that we have to choose, would be a Hobbesian choice  
13 here. Our premiere institutions of higher education, I'd  
14 say, are part of our crown jewels. We have great  
15 educational institutions in this country. The University  
16 of Michigan is one of them. I think we are the envy of  
17 the world. If we had to say, gee, our educators tell us  
18 that it is crucial that for the full education they want  
19 for those students, all of those students we needed for a  
20 student body, that the decision is, oh, gee, we want to  
21 you decide to either have a poor education for the  
22 essentially white students and/or you can say, change what  
23 you are as an institution. I think we get to decide what  
24 our mission is. I think the Constitution gives us some  
25 leeway in deciding what our mission is and how we define

1 ourselves.

2 QUESTION: And anything that contradicts that  
3 mission is automatically a compelling State interest?

4 MR. PAYTON: No. I think what we're saying is  
5 we can achieve both of those things, because, in fact,  
6 achieving the educational benefits that come from a  
7 diverse student body can be achieved, given our mission,  
8 if we can go about selecting students in a way to achieve  
9 the critical mass of minority students that we need. We  
10 want both of those things. We think that --

11 QUESTION: Go ahead. Are you finished?

12 MR. PAYTON: Yes.

13 QUESTION: I wanted to go back to Justice  
14 Kennedy's question. The point system here, does it meet  
15 the opinion of Justice Powell in Bakke when that was  
16 called for individualized consideration?

17 Now, the concern that it does not, is that you  
18 under this system would seem to have the possibility that  
19 two students -- one is a minority, African American, one  
20 is not, majority, and they seem academically approximately  
21 the same and now we give the black student 20 points and  
22 the white student, let's say, is from the poorest family  
23 around and is also a great athlete, and he just can't  
24 overcome that 20 points -- the best he can do is tie.

25 And so that's the argument that this is not

1 individualized consideration. And I want to be sure I  
2 know what your response is to that argument.

3 MR. PAYTON: I have two responses. The first is  
4 to say that it is individualized if that white student  
5 actually was socioeconomically disadvantaged, that could  
6 be taken into account.

7 QUESTION: But remember he has that and gets 20  
8 points for it?

9 MR. PAYTON: Yes.

10 QUESTION: And he also is a great athlete and  
11 I've constructed this example to make it difficult for  
12 you, and -- but I mean you see he can only get 20 points,  
13 no matter how poor he is. And no matter how great an  
14 athlete he is as well, and the -- let's say the black  
15 student who has neither ties him?

16 MR. PAYTON: Yes.

17 QUESTION: But on individualized consideration,  
18 the black student might lose, if there were the  
19 individualized consideration.

20 MR. PAYTON: Well, he might --

21 QUESTION: And that's -- and that's what you're  
22 giving him. Now what is the answer I'm -- I'm trying to  
23 find your answer?

24 MR. PAYTON: The answer is we value both of  
25 those aspects of diversity. We want both of those

1 represented in our student body, all right, if they tie,  
2 they will being judged exactly the same as far as how the  
3 selection index works.

4 QUESTION: What you're saying is that race is  
5 individualized consideration?

6 MR. PAYTON: I'm saying that each student --

7 QUESTION: Otherwise you're saying that only in  
8 the hypothetical given that only the white student  
9 receives individualized consideration?

10 MR. PAYTON: No, no. They both --

11 QUESTION: Some are more equal than others?

12 MR. PAYTON: They both receive individualized  
13 consideration. They're both reviewed in their totality.  
14 They both may be sent to the admissions review committee  
15 where they get a second reading. In Bakke --

16 QUESTION: If in those circumstances, because we  
17 have the white student who is both a good athlete and also  
18 very poor, and the other student, the minority is not,  
19 could that be sent to the -- the individual -- could that  
20 be sent to the review committee and the review committee  
21 would say, well, we have a special circumstance here, and  
22 even though the points tie, nonetheless when we look at it  
23 carefully, we see that the white student has these extra  
24 pluses, despite the points, we let in the white student?

25 MR. PAYTON: The admissions review committee --

1 about 70 percent of the applications that it reviews in  
2 any given year are white student applications that are  
3 sent to it. Okay. It can reach its judgment irrespective  
4 of whatever happened in the selection index score.

5 QUESTION: So they can ignore the points?

6 MR. PAYTON: They can -- actually once it goes  
7 to them they simply look at the application and make a  
8 judgment.

9 QUESTION: So I want a clear answer to this.  
10 That review committee can look at the applications  
11 individually and ignore the points?

12 MR. PAYTON: It does.

13 QUESTION: Yes. The answer is yes?

14 MR. PAYTON: The answer is yes.

15 QUESTION: Okay.

16 MR. PAYTON: In Bakke, where Justice Powell says  
17 that he could look at one example of an admissions policy  
18 and he discusses briefly the Harvard plan and then he has  
19 a long quote from it, there is the footnote 50 that Ms.  
20 Mahoney mentioned. In both footnote 50 and footnote 51  
21 there is a citation to this study by Carnegie and he  
22 introduces that by saying in the footnote there are in  
23 this study examples of the actions by other leading  
24 institutions, trying to get diverse student bodies. That  
25 study indicates that there are plenty of other models

1 where in fact some effort to come up with a system to  
2 handle these different factors was successful.

3 QUESTION: Mr. Payton, it's easy to say they can  
4 ignore the points. It's easy to say. Do you know of any  
5 case where a minority applicant, one of the minorities  
6 favored in your program, who was minimally qualified, got  
7 the 20-point favor and was rejected?

8 MR. PAYTON: I don't know, Justice Scalia.

9 QUESTION: It's important, I mean, to say  
10 theoretically, it's fine, yes, theoretically, you can  
11 reject it. But as I understand what -- what the other  
12 side is saying, it is automatic, if you are minimally  
13 qualified, and you get those 20 points, you are in, that's  
14 what they claim?

15 MR. PAYTON: Actually --

16 QUESTION: Now, do you assert that that is  
17 false?

18 MR. PAYTON: That is not correctly describing  
19 what happens. The way the policy works and the way it is  
20 implemented is how I described the policy. In fact, the  
21 results of the policy are that most of the qualified  
22 minority applications do end up getting admitted. That's  
23 not the design. The design is here's how you do it,  
24 here's how the decisions are made, either on the selection  
25 index score, some are sent to the admissions review

1 committee. Most of those that are sent to the admissions  
2 review committee are in fact not minority applications,  
3 but the design is not gee, admit all qualified minorities,  
4 the design is to take these different factors into account  
5 in order to achieve the student body that we think is  
6 crucial here.

7 QUESTION: So there are some qualified  
8 minorities who get the 20 points and who are rejected?

9 MR. PAYTON: I believe that is the case, all the  
10 record says in this is that virtually all of the minority  
11 students, as a result of the policy ended up being  
12 admitted. I think there are certainly some, I can't give  
13 you one, I can't give you one, but there are certainly  
14 some where if you work it out, you can see that won't  
15 happen.

16 QUESTION: But the design is to admit a higher  
17 percentage of the qualified minority applicants that you  
18 get, given the numbers that there are today, because if  
19 you do that you won't get your mix?

20 MR. PAYTON: The design is to make sure we get  
21 to the critical mass of the meaningful numbers and given  
22 the small pool size we have, the way it operates is as you  
23 just described, but that's the way it operates, the design  
24 is to make sure we get the critical mass of students that  
25 are, in fact, necessary for the educational benefits that

1 we are asserting here.

2 QUESTION: Has anyone at Michigan ever defined  
3 critical mass as being anything more specific than  
4 something beyond token numbers?

5 MR. PAYTON: I think that the reason I  
6 referenced the two expert reports by Professor Raudenbush  
7 and Professor Gurin is to try to see this -- those two  
8 reports try to put this in sort of an everyday example,  
9 you know, students don't interact with the student body as  
10 a whole, they interact in small settings and it's to see  
11 if you see what our minority student population is how  
12 that would distribute into these small settings. And on  
13 the basis of how that distribution works, Professor Gurin  
14 looked at it to see whether or not that looked like that  
15 would be generating the interactions that she would expect  
16 for these educational benefits.

17 QUESTION: But in the criteria used by the  
18 admissions committee, did anyone put a percentage figure  
19 or a specific number --

20 MR. PAYTON: No.

21 QUESTION: -- beyond the concept you've got to  
22 get more than just token representation?

23 MR. PAYTON: No. The answer is no. And --

24 QUESTION: Mr. Payton, do you know the origin of  
25 critical mass that is being spoken of here as though it

1 were something that were invented? I know it goes back at  
2 least with respect to the enrollment of women in law  
3 school, the schools talked about we want to get a critical  
4 mass, so women will feel welcome because when they were  
5 one at a time curiosities they did have to do as you said  
6 defend -- they were representatives of their sex and if  
7 they failed, all women failed. Once they had a critical  
8 mass, it was no longer necessary, the woman was free to be  
9 who she was.

10 But that term I certainly was familiar with that  
11 term used in that setting. It's -- it comes from  
12 sociology, doesn't it?

13 MR. PAYTON: It does, and I think you described  
14 it exactly as how it has come about with respect to  
15 diversity and critical mass. In the Harvard plan, in  
16 Justice Powell's discussion of the Harvard plan, he  
17 clearly acknowledges and -- because the plan acknowledges  
18 that you must have meaningful numbers and it means more  
19 than token numbers and there's clearly an acknowledgement  
20 that if you have too few numbers you get the dynamics of  
21 isolation that you just discussed.

22 QUESTION: In the law school context, there was  
23 testimony, I think from one of the admissions officers  
24 that said 5 percent is too few, 10 percent might suffice.

25 And he's talking in respect to what is a

1 critical mass. Now, do people coalesce around numbers  
2 like that or is that just out of -- what do I do with that  
3 piece of testimony?

4 MR. PAYTON: I think that in all of this, you  
5 know, there's a false precision here that everybody wants,  
6 which is tell me exactly what this is, and I don't think  
7 it exactly works like that. You know, we have a lot of  
8 experience as, you know, an educational institution about  
9 what has happened on our campus and what has worked. The  
10 class that we've had, the entering classes that we've had  
11 over the last 4 years or so, have ranged from 12 percent  
12 to 17 percent, okay? Twelve percent to 17 percent. I'm  
13 not saying it's a percent and I'm not saying it's that  
14 fixed range, but 12 percent to 17 percent is sort of how  
15 it is ranged and that has generated the representation in  
16 the small groups that is what is working to achieve some  
17 of these educational benefits that we're talking about.

18 But it's not quite that precise as far as how  
19 all of this works.

20 QUESTION: Mr. Payton, let me ask Justice  
21 O'Connor's question, when does all of this come to an end?

22 MR. PAYTON: I think that we all certainly  
23 expect it to come to an end. I think we're all quite  
24 surprised if we looked back at Bakke, in 1978, I think all  
25 of us would be quite surprised from that vantage point to

1 realize that today in Michigan students live in such  
2 segregated circumstances growing up, it's really quite  
3 unbelievable. We could not have foreseen that. I think  
4 people thought that we were coming together in a way and  
5 that hasn't occurred. That's created some educational  
6 challenges and opportunities.

7           The test score gap, I think is narrowing -- we  
8 put that in our brief. I think we're all quite optimistic  
9 about how this is going to progress.

10           Our brief, I think we're all quite optimistic  
11 about how this is going to progress, there is progress. I  
12 think the pool is increasing. But I can't give you how  
13 long is it going to last. I think we're all quite  
14 confident that it's only going to last for X number of  
15 finite years, I just can't answer with any precision that  
16 question either.

17           QUESTION: Suppose the Court were to say that  
18 the 20-point system and the law school system looked just  
19 too much like a quota and that quotas are impermissible?  
20 As of that point, is it our burden to tell you what other  
21 systems to use or is it your burden to come up with some  
22 other system, say, more individualized assessment in order  
23 to attain some of the goals you wish to attain?

24           MR. PAYTON: I guess I'm not sure what the more  
25 individualized assessment would be here. I'm not saying

1 that obviously there are things that could be done  
2 differently. We've done things differently. The two  
3 schools do things quite differently. But I think we're  
4 both trying to achieve the critical mass, that I think  
5 there's no dispute at all from anyone that the critical  
6 mass is essential to get the educational benefits that  
7 we're talking about.

8           If this goal is a compelling interest, then  
9 critical mass is essential to its attainment, given the  
10 small pool size that we're talking about. Can it be  
11 crafted in another way? Obviously, from the amicus  
12 briefs, there are a lot of schools that do it in different  
13 ways. We're doing it in a very individualized way that in  
14 fact does allow students to compete. Every student is  
15 evaluated on the same criteria. You know, head to head.  
16 We do take race into account in the way that you've heard  
17 described. But I'm not sure that lacks the individuality  
18 that you would be striving for.

19           This is, you know, an enormously important case.  
20 When Justice Powell said in Bakke that it's not too much  
21 to say that the Nation's future depends upon leaders  
22 trained through wide exposure to the ideas and mores of  
23 students as diverse as this nation of many peoples, I  
24 think that statement was absolutely correct then. I think  
25 it is, you know, it has never been truer than it is today.

1 This is of enormous importance and correct, not just to  
2 the University of Michigan, I'd say to all of higher  
3 education and I think to our country as a whole to be able  
4 to do things that bring us together, that bring us  
5 understanding, that result in tolerance and, I'd say, make  
6 us the -- more -- closer to the day that we all look  
7 forward to when, in fact, we are beyond some of these  
8 problems that we've been discussing rather intensely here  
9 today.

10 QUESTION: Mr. Payton, do you think that your  
11 admissions standards overall at least provide some  
12 headwind to the efforts that you're taking about?

13 MR. PAYTON: Yes, I do. I think they do in all  
14 sorts of ways. They are certainly producing black  
15 students, white students, Hispanic students, Native  
16 American students who go out into our communities and  
17 change their communities.

18 QUESTION: You may have misunderstood me. I  
19 mean the -- Ms. Mahoney said earlier that the problem of  
20 law school admissions, in response to Justice O'Connor,  
21 that it was for the elite schools, it was more a problem  
22 at the elite schools, when she was talking about Boalt  
23 Hall, for example, you meant -- you suggested or alluded  
24 to in your argument today that, you know, you don't want  
25 to choose between being an elite school and the whole

1 diversity issue.

2           It -- would it be easier to accomplish the  
3 latter if the former were adjusted, that is the overall  
4 admissions standard?

5           MR. PAYTON: I think that --

6           QUESTION: Now, I know you don't want to make  
7 the choice, but will you at least acknowledge that there  
8 is a tension?

9           MR. PAYTON: I think, you know, some of our  
10 other schools, the nonselective schools, actually some can  
11 end up with completely undiverse populations as well; that  
12 the fact that a school does not have selectivity doesn't  
13 mean that the community college, in fact, is diverse.

14           So I don't think it necessarily follows at all  
15 that if you lower your standards and distribute this all  
16 across the country, we will get these educational  
17 benefits, you know, throughout our educational system.

18           QUESTION: Now -- about 10 terms ago, we had the  
19 University of Mississippi higher ed. case in here --

20           MR. PAYRON: Yes.

21           QUESTION: -- and the argument was made that the  
22 historically -- the HBCs, the historically black colleges  
23 provided a different benefit to minorities. Would the  
24 same arguments with respect to diversity apply to those  
25 institutions?

1 MR. PAYTON: Yes. You mean do they benefit if  
2 they had a racially and ethnically diverse student body?  
3 I believe most every single one of them do have diverse  
4 student bodies.

5 QUESTION: Thank you, Mr. Payton.

6 Mr. Kolbo, you have two minutes remaining -- you  
7 have three minutes remaining.

8 REBUTTAL ARGUMENT OF KIRK O. KOLBO

9 ON BEHALF OF THE PETITIONERS

10 MR. KOLBO: With respect to the point system,  
11 Counsel has made it sound as if it's sort of a fortuity  
12 that the University of Michigan has an admissions system  
13 that ends up admitting -- admitting virtually all minority  
14 students. In fact, I want to talk a little bit about the  
15 record here. We put in the record the guidelines from the  
16 original system that was in place in 1995 and 1997. At  
17 the joint appendix, at page 80, it's made very clear that  
18 the guidelines were set in 1995, when Jennifer Gratz  
19 applied to admit all qualified minority students. It's  
20 also undisputed in this record that the way the University  
21 got to the 20 points was to statistically design it based  
22 on the old model. So what they've done is they've taken  
23 the old guidelines that were set to admit all qualified  
24 minority students, statistically figured out how many  
25 points they needed to give -- to give to students under

1 the new system to replicate the old system, and that's how  
2 we ended up with 20 points.

3 So it -- it strikes me as disingenuous to  
4 suggest that it's simply an accident.

5 These policies have a purpose. They grant a  
6 preference for a purpose. And the new system does what  
7 the old system did -- did, which is to create a two-track  
8 system. It's not enough if you're Jennifer Gratz or  
9 Patrick Hamacher to be merely qualified to get admitted to  
10 the University. To be admissible is not simply enough  
11 because of their skin color. If however you're a member  
12 of one of the minority students and you meet those minimum  
13 qualifications, that's sufficient. If that's not a  
14 two-track system, I can't imagine what one -- what one  
15 would actually look like.

16 With respect to test scores, a question was  
17 made -- a question was asked about how long are these  
18 systems going to last. There's actually evidence, and  
19 this was not put in the -- in the record by the  
20 University, with respect to test scores and disparities,  
21 but there's -- there's also opposing opinion which has  
22 indicated that as long as we have these preferences, they  
23 create perverse incentives. We've cited the work of John  
24 McWhorter, for example, in our reply brief indicating that  
25 test scores to the extent that they're not narrowing, or

1 to the extent that the gaps are increasing may, in fact,  
2 be to the fact -- due to the fact of these -- of these  
3 preferences. With respect to the Hobbesian choice that  
4 Mr. Payton has talked about, they have resolved a  
5 different Hobbesian choice. The University has decided  
6 that they are willing to lower their academic standards to  
7 get their critical mass.

8 They've resolved that -- that Hobbesian choice  
9 that way. But they've resolved the other Hobbesian  
10 choice, how to get those objectives and stay selective,  
11 they've resolved that Hobbesian choice on the backs of the  
12 constitutional rights of individuals like Jennifer Gratz  
13 and Patrick Hamacher. They are the ones that are paying  
14 for the Hobbesian choice that the University has resolved  
15 with -- by the use of a two-track admission system.

16 With respect to the concept of critical mass,  
17 all I have to say, if one can't ascertain from the way  
18 it's defined, meaningful means sufficient, sufficient  
19 means critical, critical means sufficient, that meets the  
20 definition, it seems to me, of an interest that's too  
21 amorphous, too ill-defined, too indefinite, just like the  
22 role model theory, just like a remedy for societal  
23 discrimination, too indefinite to support the use of a  
24 compelling -- to suit -- to use -- to be a basis for  
25 racial preferences.

1 CHIEF JUSTICE REHNQUIST: Thank you Mr. Kolbo.  
2 The case is submitted.

3 (Whereupon, at 12:02 p.m., the case in the  
4 above-entitled matter was submitted.)

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