

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JENNIFER GRATZ
AND PATRICK HAMACHER,
Petitioners

v.

LEE BOLLINGER, ET AL.

CASE NO: 02-516

WASHINGTON, D.C.

DATE: TUESDAY, APRIL 1, 2003

PAGES: 1-54

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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

3

(11:05 a.m.)

4

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

7

Mr. Kolbo.

8

ORAL ARGUMENT OF KIRK O. KOLBO

9

ON BEHALF OF THE PETITIONER

10

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

12

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

18

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

24

For nearly 5 years, the University vigorously
25 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 in 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 QUESTION: It's not a -- okay.

4 MR. KOLBO: No. If Mr. Hamacher prevails, then
5 the rights of many thousands of others will have been
6 vindicated and they will be able to compete under a non-
7 discriminatory system.

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

10 (Laughter.)

11 MR. KOLBO: That's true. Well, Your Honor they
12 would not be able to compete under a non-discriminatory
13 system unless this particular system is struck down.

14 QUESTION: I understand if it's struck down, but
15 that -- that begs the question of whether the named
16 plaintiff has standing to represent a class of people who
17 want to get into the freshman class. He wants to get in
18 as a transferring student. I mean, it -- maybe there's
19 standing, but the mere fact that if he wins everybody will
20 benefit certainly doesn't speak to the question whether he
21 has standing.

22 MR. KOLBO: No, Your Honor, but we -- we do
23 believe that because the -- the transfer policy and the
24 original admissions policy are fundamentally the same in
25 the respect that they both consider race in the admissions

1 process in a way that is discriminatory and we believe
2 that's --

3 QUESTION: And therefore if you're right that
4 any consideration of a race is enough to condemn the
5 program, then he would have standing, but if it -- if it
6 requires analysis of the particular components of the
7 policy, then we ought to know whether the transfer policy
8 is the same as the original policy.

9 MR. KOLBO: That would be true, Your Honor, if
10 the case were decided strictly on the issue of narrow
11 tailoring, but my understanding is that the University
12 considers race for a purpose to achieve a diversity that
13 we believe is not compelling, and if that is struck down
14 as a rationale, then the law would be same with respect to
15 the transfer policy as with respect to the original
16 admissions policy, Your Honor.

17 QUESTION: Oh, he has standing to challenge.
18 That's -- that seems clear, but the -- depending on the
19 rationale that the court adopts if it finds -- if it finds
20 the program unacceptable, he may not be entitled to
21 relief.

22 MR. KOLBO: He would be -- it seems to me,
23 perhaps, Your Honor, entitled for relief for damages.
24 He's -- he's not at this point seeking to be admitted to
25 the University. He's graduated with the passage of time,

1 it's been five-plus years since this suit was filed,
2 Mr. Hamacher has attended and graduated elsewhere. It
3 seems to me he would be entitled to damages.

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

7 MR. KOLBO: It did, Your Honor.

8 QUESTION: And -- but upheld the program that
9 came into being after his application, and he hasn't
10 reapplied under the new -- but he -- but there was a class
11 certified, so I suppose you could substitute another
12 plaintiff, someone who is applying under the current
13 system.

14 MR. KOLBO: Well -- well, our position, Your
15 Honor, is that because the class was certified with
16 respect to Mr. Hamacher, that that's sufficient; that if
17 the -- if the system is found unconstitutional, he is an
18 adequate class representative. Sure. Certainly.

19 One of the critical things that is demonstrated
20 in this case is how easy it is for one system to be
21 disguised as another. What has happened in this case is
22 that for five years again, the University defended the
23 system with its facially separate admission guidelines,
24 with its reserved seats, and then in -- two years into
25 this case, in fact, was still using some of these

1 particular forms in its admissions policy. It is an
2 indication, I think, of how difficult it is to conclude
3 that what we have here is a system that, for example,
4 comports with what Justice Powell indicated he was -- he
5 approved of in the -- in the Bakke case.

6 What we have here is a system that was -- is not
7 narrowly tailored to achieve any governmental interest,
8 any compelling governmental interest.

9 I would like, if I may, to return to the issue
10 of diversity and the diversity issue as a -- as a
11 compelling state interest. The fundamental problem with
12 the diversity rationale is that it depends upon the
13 standardless discretion of educators.

14 It is a discretion that would be exercised in a
15 number of different respects. And we need to be clear
16 about this. The University and its amicus have all made
17 it clear that in their judgment they ought to be entitled
18 to use race as much as necessary in their educational
19 discretion.

20 If that is the rule that we end up accepting,
21 then universities are free in their discretion to choose
22 which races are discriminated against, which are favored.
23 We can have one institution that discriminates against one
24 group of individuals, and another against another. We can
25 have with the -- with shifting fashions and -- and

1 preferences and time, the preferences for the races can
2 shift. An example of that is found in comparing the facts
3 of this case to the Bakke case, wherein Bakke, Asian
4 Americans were included in the preference, and under the
5 University of Michigan's systems, they are excluded.

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

8 It will be for educators to decide whether
9 someone of a mixed race is someone that is entitled to a
10 preference.

11 You can have anomalous situation of the
12 University's guidelines for example where someone who is
13 both half-white and half-black --

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

17 MR. KOLBO: That's correct, Mr. Chief Justice,
18 it's a matter essentially of self-identification. So if
19 someone of mixed race who is white and black identifies
20 himself as white, then as far as the University is
21 concerned, they don't bring the diversity that they're
22 looking for. If that person identifies himself as black,
23 then merely from that identification, they have fallen
24 within the diversity that the University seeks.

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

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

5 MR. KOLBO: Well, it seems to me, Your Honor,
6 it -- the problem --

7 QUESTION: She's equally being discriminated
8 against as a Caucasian, no matter how many other races are
9 preferred.

10 MR. KOLBO: That's true, Your Honor. I -- I
11 raised the point because it -- it indicates how
12 standardless this interest is. It is not defined with
13 respect to any constitutional principle like, for example,
14 an interest based on remedying discrimination. It is
15 entirely discretionary with the University. .

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

19 Often I'd make a mistake as a professor, so --
20 so the fact that there aren't written-down standards is --
21 is -- I'm -- I'm not sure of the Constitutional relevance
22 of that when what you're trying to do is something lawyers
23 don't normally do, which is to select among people
24 individually considered which one is better for this
25 particular slot. Businesspeople do that, lawyers don't

1 except when they're hiring.

2 (Laughter.)

3 QUESTION: But -- but I don't -- if you said to
4 a businessperson, this doesn't have standards, such a
5 thing, I think they might laugh and say my job and
6 experience is to select who's better for this slot, so --
7 so I'm not sure of the constitutional relevance of what
8 you say, which seems to me to me to grow out of the nature
9 of the problem.

10 MR. KOLBO: Well, again, Justice Breyer, the
11 constitutional relevance derives from the fact that we're
12 talking about a constitutional right here, the use of
13 race, which is not the same thing as --

14 QUESTION: Yes, yes, but I mean, as Justice
15 Stevens just said, the constitutional problem consists of
16 the injury to your client and that injury is the same
17 irrespective of the precise nature of the standards on the
18 other side. And -- and what I'm sort of struggling for
19 here is I see your point, if you say you cannot use race
20 at all, period. No matter what. That's a -- that's a
21 clear position, which I think is one of your positions.
22 But once you depart from that, now I'm -- I'm interested
23 in the detail. At that point I'm not quite sure the
24 relevance of what you're saying.

25 MR. KOLBO: Well, Your Honor, what I'm

1 suggesting is the Court itself has made clear that for an
2 interest to be compelling, one of the considerations that
3 the Court must look at is whether there are standards --
4 independent, ascertainable standards apart from the
5 discretion exercised by, say, an employer to determine
6 whether the interest is one that's compelling and one that
7 the Court can oversee. That interest, that standard --
8 that standard exists, for example, when we have an
9 interest in remedying identified discrimination. The
10 Court has made it clear that what with can be done in that
11 case is you can measure the extent to which there has been
12 past discrimination, that's not a matter of discretion for
13 the employer to decide, and once you've measured the
14 extent of that discrimination, you can tailor your remedy
15 to that interest.

16 QUESTION: Mr. Kolbo, because you mentioned the
17 employer and the employer's judgment, I gathered from your
18 brief that this case is not simply about public
19 universities. Employment -- because you bring up 1981 and
20 you bring up Title VI -- under Title VI, this case is as
21 much about Harvard as it is about Michigan, isn't that
22 true?

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

25 QUESTION: And it -- and in the private sector,

1 employment in the private sector, there's 1981. So there,
2 too. So this case is much larger than private --
3 public -- public universities. It's all colleges and
4 universities, and it's the entire realm of employment if
5 you're right.

6 MR. KOLBO: Well, Your Honor, I want to be clear
7 about what it is that we're arguing for here today. We
8 are not suggesting an absolute rule forbidding any use of
9 race under any circumstances. What we are arguing is that
10 the interest asserted here by the University, this
11 amorphous, ill-defined, unlimited interest in diversity is
12 not a compelling interest. Nothing we argue today and
13 nothing we seek to do today would undo the Court's
14 precedents that have recognized if some --

15 QUESTION: As far as --

16 QUESTION: But I think you are arguing that
17 anything except remedies for past discrimination is
18 impermissible.

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

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

24 MR. KOLBO: I would not go that far, Justice
25 Stevens, there may be other reasons. I think they would

1 have to be extraordinary and rare, perhaps, rising to the
2 level of life or limb. We do know that the Court has
3 recognized past identified discrimination.

4 QUESTION: What about Weber, to take a specific
5 case? Employment setting, the employer says I don't want
6 to confess to having been a past discriminator, but I'm
7 willing to engage in this voluntary affirmative action. I
8 take it that that would be impermissible if we adopt your
9 view?

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

13 QUESTION: But there's 1981, then -- then the
14 person who was attacking it on grounds that it's racially
15 discriminatory just says my lawsuit is under 1981, which
16 it could be as well as Title VII and then what is the
17 result?

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

21 QUESTION: If the suit is brought under 1981,
22 the Court can decide what the plaintiff's complaint should
23 be?

24 MR. KOLBO: No, no, if this Court decides this
25 case under section 1981, the only interest asserted here

1 at least is an interest in diversity that we are asking to
2 strike down. It may be that there are some other
3 interests, including a remedial one, that would be
4 justified under some other statute. But the issue is not
5 presented.

6 QUESTION: But there was no -- this is a
7 voluntary affirmative action, no admission of prior
8 discrimination. I gather if someone brought a 1981 suit,
9 to stop that, your theory is that that person would
10 prevail?

11 MR. KOLBO: The use of race to exceed non-
12 remedial objectives, I think would have problems, Your
13 Honor.

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

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

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

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

24 QUESTION: Or suppose you say you used the word
25 extraordinary as compelling justification, and the other

1 side says, yes, extraordinary, we're 280 million people,
2 we have large racial diversity within the country, the
3 world is even more diverse, and we think from the point of
4 view of business, the Armed Forces, law, et cetera, that
5 this is an extraordinary need to have diversity among
6 elites throughout the country. That without it, the
7 country will be much worse off. That's what we're being
8 told.

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

15 MR. KOLBO: Your Honor, because there are
16 important constitutional rights at stake. And those
17 rights are the right to equal protection. And a mere
18 social benefit that is having more minorities in
19 particular occupations or the schools simply doesn't rise
20 to the level of compelling interest.

21 It simply is not -- it doesn't remedy a
22 constitutional value, like --

23 QUESTION: So if the University president or the
24 dean told you just what Justice Breyer said, you would
25 tell them there's -- and that we have underrepresentation

1 of minorities, you would tell them there's nothing you can
2 do about it?

3 MR. KOLBO: I would say, Your Honor, that racial
4 preferences are not the answer. If there are problems
5 again in not getting a sufficient number of -- if
6 minorities are not competing at the same level as other
7 racial groups then we should take steps to solve that
8 problem. But racial preferences, because they injure the
9 rights of innocent people, because it's a prohibition
10 contained in our Constitution, simply aren't permissible
11 to remedy that problem. If I may reserve the remainder of
12 my time, Mr. Chief Justice.

13 QUESTION: Very well, Mr. Kolbo.

14 General Olson, we'll hear from you.

15 ORAL ARGUMENT OF THEODORE B. OLSON

16 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

17 SUPPORTING THE PETITIONERS

18 GENERAL OLSON: Mr. Chief Justice, and may it
19 please the Court:

20 The University of Michigan admissions program
21 has created a separate path and a separate door for
22 preferred minorities. For those groups, if they meet
23 basic qualifications, their path is always clear and their
24 door is always open.

25 Non-preferred racial groups face rigorous

1 competition to get through the other door.

2 The University admits that race is such an
3 overarching factor in its admissions process that
4 eventually every qualified underrepresented minority
5 applicant will be admitted. The 20 point bonus, which is
6 one full grade point, nearly twice the benefit of a
7 perfect SAT score, and six times better than an
8 outstanding essay, the -- that bonus is actually
9 unnecessary with the way the plan actually works, because
10 every qualified candidate who gets the bonus gets into the
11 University. It might just as well be an admissions
12 ticket.

13 The University acknowledges that its pre-1999
14 admissions program used separate grids, separate
15 qualifications, separate standards and protected seats.
16 They acknowledge that this system was -- which was held
17 unconstitutional and was not challenged, yet they
18 stipulated that the only changes that they made from that
19 system affected only the mechanics, not the substance of
20 how race and ethnicity were considered in the admissions
21 process.

22 QUESTION: First the changes were sufficient to
23 convince the district judge that it was on the other side
24 of the constitutional line?

25 GENERAL OLSON: Notwithstanding the fact that

1 the -- the University -- we -- we respectfully disagree
2 with that conclusion, because the -- the University itself
3 admitted that it only changed the mechanics. It intended
4 to produce the same --

5 QUESTION: Yes, but isn't -- isn't -- I mean,
6 mechanics is another word for tailoring. And they're
7 saying we have tailored it differently. Our objectives
8 are the same. We may be reaching those objectives in
9 roughly the -- the same proportions, but the argument is
10 an argument about tailoring and we've changed the
11 tailoring.

12 GENERAL OLSON: We submit Justice Souter, that
13 the changes which they referred to as mechanics were
14 cosmetics, that ultimately, the system was intended to,
15 and they acknowledge, to produce the same outcome as the
16 prior system.

17 QUESTION: Yes. The stipulation is that it did
18 not change the substance of how race and ethnicity were
19 considered.

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

25 Everyone else just like in the Davis program,

1 had to compete -- people that were not in the preferred
2 races, who were not on the preferred class had to compete
3 with one another.

4 QUESTION: It was the same 20 points given --
5 socioeconomic status also had 20 points?

6 GENERAL OLSON: Yes, Justice Ginsburg.

7 QUESTION: And athletics, too, I think?

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

13 QUESTION: I thought you got only one 20?

14 GENERAL OLSON: That's correct.

15 QUESTION: So if you were an athlete you
16 wouldn't get race?

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

1 It is a thinly disguised quota because there's
2 only one path, a segment -- Justice O'Connor put it this
3 way in Croson -- a segment of the class reserved
4 exclusively for certain minority groups. It isn't tied to
5 a particular number. It's a segment of the class reserved
6 on the basis of race.

7 It is -- it is based upon the stigmatizing
8 notion that if you are a certain race, you think a certain
9 way or if you're a certain race, you have certain
10 experience that's are common.

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

20 GENERAL OLSON: What we're saying is that if you
21 assume that because you are white or you are red or you
22 are brown or you are black, you must have certain
23 experiences and you must have certain viewpoints.

24 QUESTION: The argument is that you need to have
25 enough of them to demonstrate that the point of view does

1 not always fit just one person.

2 GENERAL OLSON: Well, but Justice Stevens --

3 QUESTION: And that was a finding I think?

4 GENERAL OLSON: -- that's a self-contradictory
5 rationale that they've come up with. They've said first
6 of all you have these characteristics because you're black
7 but we must admit enough of you into the class to prove to
8 the other students that -- that black isn't the reason
9 you're --

10 QUESTION: No that is not -- the argument is
11 basically that, look, people who have grown up in America
12 and are black, regardless of race, no, not regardless of
13 race, regardless of socioeconomic background have
14 probably, though not certainly, shared the experience of
15 being subject to certain stereotypical reactions from
16 people throughout their lives.

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

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

24 Now, that's their argument, I think, in that
25 respect, not the argument that all black people are poor,

1 not the argument that all black people have been
2 discriminated against, not the argument that all black
3 people share a point of view.

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

6 GENERAL OLSON: Well, their argument, A, takes
7 several forms, at one point it's that, at one point, it's
8 the need to get more people elite -- of different
9 backgrounds, it's a -- but what this Court has said that
10 racial preferences, racial stereotyping, which it is, is
11 stigmatizing, it's divisive, it's damaging to the fabric
12 of society, it's damaging to the goal ultimately to
13 eliminate the problems that racial discrimination and
14 racial differences have created.

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

25 GENERAL OLSON: I submit, Justice Ginsburg that

1 none of those countries has our history, none of those
2 countries has the Fourteenth Amendment, none of those
3 histories has the history of the statements by this Court
4 which has examined the question over and over again that
5 the ultimate damage that is done by racial preferences is
6 such that if there ever is a situation in which such
7 factors must be used that they must be -- race neutral
8 means must be used to accomplish those objective, narrow
9 tailoring must be applied, and this -- this -- these
10 programs fail all of those tests.

11 QUESTION: General Olson, do you know whether
12 any of those countries that Justice Ginsburg referred to
13 that have gone down the road of racial preferences, racial
14 entitlements, have ever gotten rid of racial preferences
15 or racial entitlements?

16 GENERAL OLSON: There --

17 QUESTION: Has it been the road to ultimately a
18 color blind society or has it been the road to a society
19 that has percentage entitlements for the various races?

20 GENERAL OLSON: Sadly, I believe that that is
21 correct, Justice Scalia, and let me conclude by saying
22 that the Michigan Law School and the University of
23 Michigan ultimately must make a choice. It may maintain
24 its elitist, as it refers to it, selection process without
25 regard to race, or it may achieve the racial diversity it

1 seeks with race neutral compromises in its admission
2 standards.

3 But the one thing that it may not do is
4 compromise its admission standards or change its admission
5 requirements for one race and not another.

6 That is forbidden by the Equal Protection Clause
7 of the Constitution.

8 QUESTION: Is it also forbidden for the United
9 States military academy?

10 GENERAL OLSON: It may well be Justice Stevens.
11 We're not defending the specifics of those programs, but
12 we have not examined them individually. We -- we believe
13 that the ultimate solution to the problem that race has
14 created -- that difference in race has created in this
15 country has got to be according to what this Court has
16 said, the most neutral race -- neutral means possible.

17 QUESTION: Thank you General Olson.

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

19 ORAL ARGUMENT OF JOHN PAYTON

20 ON BEHALF OF THE RESPONDENTS

21 MR. PAYTON: Mr. Chief Justice and, may it
22 please the Court:

23 I think I want to spend just a few minutes
24 briefly setting the record straight on why it is the
25 educational judgment of the University of Michigan that

1 the educational benefits that come from a racially and
2 ethnically diverse student body are crucial for all of our
3 students and why those benefits do not depend in any way
4 on the assumption that, for example, all African Americans
5 think alike.

6 LS&A, our premiere undergraduate institution, is
7 an undergraduate college, most of its entering students
8 come in as 18-year-olds, about two-thirds come from
9 Michigan, and about half from Detroit or the greater
10 Detroit area. Michigan, I think as everyone knows is a
11 very segregated State.

12 QUESTION: Half of the ones who come from
13 Michigan come from Detroit?

14 MR. PAYTON: Yes. Half of our students come
15 from -- yes.

16 Michigan is a very segregated State. Detroit is
17 overwhelmingly black. Its suburbs and the rest of the
18 state are overwhelmingly white. While Michigan is extreme
19 in this regard, it's not that extreme from the rest of the
20 country. The University's entering students come from
21 these settings and have rarely had experiences across
22 racial or ethnic lines. That's true for our white
23 students. It's true for our minority students.

24 They've not lived together. They've not played
25 together. They've certainly not gone to school together.

1 The result is often that these students come to
2 college not knowing about individuals of different races
3 and ethnicities. And often not even being aware of the
4 full extent of their lack of knowledge. This gap allows
5 stereotypes to come into existence.

6 Ann Arbor is a residential campus, just about
7 every single entering student lives on campus in a dorm.
8 On campus, these 18-year olds interact with students very
9 different from themselves in all sorts of ways, not just
10 race, not just ethnicity, but in all sorts of ways.
11 Students, I think as we know, learn a tremendous amount
12 from each other.

13 Their education is much more than the classroom.
14 It's in the dorm, it's in the dining halls, it's in the
15 coffee houses. It's in the daytime, it's in the
16 nighttime. It's all the time.

17 Here's how critical mass works in these
18 circumstances. If there are too few African-American
19 students, to take that same example, there's a risk that
20 those students will feel that they have to represent their
21 group, their race. This comes from isolation and it's
22 well understood by educators. It results in these token
23 students not feeling completely comfortable expressing
24 their individuality.

25 On the other hand, if there are meaningful

1 numbers of African-American students, this sense of
2 isolation dissipates.

3 QUESTION: Mr. Payton, what is a meaningful
4 number?

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

7 QUESTION: Okay, what is critical mass?

8 MR. PAYTON: Critical mass is when you have,
9 enough of those students so they feel comfortable acting
10 as individuals.

11 QUESTION: How do you know that?

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

15 QUESTION: Do they -- professors at the
16 University of Michigan spend a lot of time with the
17 students?

18 MR. PAYTON: Yes, they do. This is a incredibly
19 vibrant and complex campus that has diversity in every
20 conceivable way. And I think --

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

23 MR. PAYTON: They do. In the record, we
24 actually have an expert report that's not contradicted in
25 any way by Professor Raudenbush and by Professor Gurin,

1 just on the issue of how do you know when you have enough
2 students in different contexts and circumstances so that
3 there will be these meaningful numbers.

4 QUESTION: What do they say?

5 MR. PAYTON: They said that given the numbers
6 that have been coming through in the last several years,
7 we are just getting to that critical mass. And the way
8 they analyzed it was to look at the circumstances in which
9 students interact. A entering seminar, a dorm context, a
10 student activities context, student newspaper context, to
11 see what would happen if you distribute the students
12 across these small encounter opportunities.

13 QUESTION: Does Michigan have, as some schools I
14 know have, schools that have affirmative action program,
15 does it have a minority dormitory?

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

22 So the answer is --

23 QUESTION: I mean, apart from being excluded, if
24 -- it is in fact the residential pattern quite mixed and
25 there are no dormitories that are, you know, just as

1 sometimes there is -- there is the jocks dormitory, there
2 is really no African American dormitory?

3 MR. PAYTON: The answer is there is no African
4 American dormitory, put it -- the full answer is more
5 complex. After students are there for their first year,
6 they can choose to move off campus. They can choose to
7 stay on campus. Many stay on campus, many move off
8 campus. Ann Arbor is a college town and off campus is
9 actually in the larger campus community and what they do
10 off campus is obviously up to the students themselves, but
11 I think that's -- you know, that's the real world. If you
12 have the meaningful numbers of minority students, what
13 then happens is that students will see a range of ideas, a
14 range of viewpoints from and among those students and they
15 will then see things that they may not have expected,
16 similarities and differences, and those in turn will have
17 the result of undermining stereotypes, you know, and this
18 happens for the minority students, and the white students.

19 This happens for all the students. You know,
20 the benefits from this affect every single student that
21 comes through. And they're dependent on their being
22 meaningful numbers, or critical mass, of minority
23 students, or the benefits don't come about.

24 That's the interest that the University is
25 asserting. That's why they think that this is so crucial.

1 Education, understanding, produces citizens and leaders in
2 our complex society.

3 QUESTION: But where we are is, there's an
4 assumption, you may not agree with it, but it's one
5 beginning assumption in this area, that there may not be a
6 quota, every -- all of the eloquent things you said could
7 be easily met by a quota. That -- let's just assume for
8 argument, we cannot do.

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

15 MR. PAYTON: Here's how our system works and I
16 believe it's not a quota at all and I can believe -- I can
17 simply explain this. The way it works, an application
18 comes in, it is reviewed on the basis -- every single
19 application is read in its entirety by a counselor, every
20 single application. It is in fact judged on the basis of
21 the selection index, which has the 20 points for race and
22 20 points for athletics, but it also has all sorts of
23 other things that it values, in state, underrepresented
24 state, underrepresented county within Michigan,
25 socioeconomic status, what your school is like, what the

1 curriculum that you took at your school is like.

2 QUESTION: But none of that matters.

3 MR. PAYTON: Your grades --

4 QUESTION: None of that matters if you're
5 minimally qualified and you're one of the minority races
6 that gets the 20 points, you're in, correct? The rest is
7 really irrelevant?

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

21 QUESTION: Mr. Payton, in your brief, you say
22 the volume of applications and the presentation of
23 applicant information may get impractical for LSA to use
24 the same admissions system as the much smaller University
25 of Michigan Law School.

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

3 MR. PAYTON: Yes. Sometimes twice. Because
4 every application is read when it comes in, and those that
5 a counselor flags that -- because they find that there's
6 three factors you have to have flag an application --
7 academically able to do the work, above a certain
8 selection index score and also contributes at least one of
9 various factors that we want to see in our student body,
10 including underrepresented minority status, but also very
11 high class rank and a whole range of other things.

12 QUESTION: When you say underrepresented
13 minorities, what comparison are you making to say that
14 it's underrepresented?

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

18 QUESTION: How does the Federal Government use
19 it?

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

23 QUESTION: Well, I think perhaps I could get a
24 more direct answer. How do you decide whether, say,
25 African Americans or Hispanics are quote underrepresented,

1 close quote?

2 MR. PAYTON: I think this is actually a very
3 important point. They are underrepresented in our
4 applicant pool.

5 QUESTION: Compared to what?

6 MR. PAYTON: Compared to -- we have very small
7 pools of African Americans, for example, that are
8 qualified to the extent that we require students to be
9 qualified to do the work at the University of Michigan and
10 what that means is that if we didn't take race into
11 account, we would not be able to get the numbers of those
12 students, the critical mass, necessary for the educational
13 benefits that we want.

14 QUESTION: But --

15 MR. PAYTON: That's underrepresented.

16 QUESTION: When you say underrepresented, it
17 sounds like something almost mathematical, that you're
18 saying, we only have a certain percentage of -- and we
19 should have this percentage, well, what is this
20 percentage?

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

24 If we had in our applicant pool sufficient
25 numbers of minority students, African Americans, for

1 example --

2 QUESTION: What is a sufficient number?

3 MR. PAYTON: So that when we made our selection

4 --

5 QUESTION: I asked you, what is a sufficient

6 number?

7 MR. PAYTON: Yes.

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

9 MR. PAYTON: A sufficient number so that when we

10 made our selections, we were achieving the critical mass

11 of students that we need for the benefits I described.

12 That is not a fixed precise number at all, as you've

13 heard. It is -- that's simply not the nature of the

14 critical mass. But when you're trying to figure out

15 whether or not in your applicant pool, you have sufficient

16 numbers, so that the normal operation of our process would

17 yield a critical mass, that's underrepresented. We are

18 underrepresented with respect to Hispanics, with respect

19 to African Americans and with respect to Native Americans.

20 QUESTION: Because your standards are so high,

21 you say that there are very few of those who can meet your

22 standards. So why don't you lower your standards,

23 actually, I mean if this is indeed a significant

24 compelling State interest, why don't you lower your

25 standards?

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

4 QUESTION: By taking race into account, you can
5 you can do it. But --

6 MR. PAYTON: But we're not taking students that
7 aren't qualified, you are correct about that, Justice
8 Scalia.

9 QUESTION: But just lower your qualification
10 standards, if -- if this value of -- of having everybody
11 in a mix with people of other races is so significant to
12 you, just lower your qualifications.

13 MR. PAYTON: It is that significant to us. But
14 I think that --

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

18 MR. PAYTON: I think that decision which would
19 say that we have to choose, would be a Hobbesian choice
20 here. Our premiere institutions of higher education, I'd
21 say, are part of our crown jewels. We have great
22 educational institutions in this country. The University
23 of Michigan is one of them. I think we are the envy of
24 the world. If we had to say, gee, our educators tell us
25 that it is crucial that for the full education they want

1 for those students, all of those students we needed for a
2 student body, that the decision is, oh, gee, we want to
3 you decide to either have a poor education for the
4 essentially white students and/or you can say, change what
5 you are as an institution. I think we get to decide what
6 our mission is. I think the Constitution gives us some
7 leeway in deciding what our mission is and how we define
8 ourselves.

9 QUESTION: And anything that contradicts that
10 mission is automatically a compelling State interest?

11 MR. PAYTON: No. I think what we're saying is
12 we can achieve both of those things, because, in fact,
13 achieving the educational benefits that come from a
14 diverse student body can be achieved, given our mission,
15 if we can go about selecting students in a way to achieve
16 the critical mass of minority students that we need. We
17 want both of those things. We think that --

18 QUESTION: Go ahead. Are you finished?

19 MR. PAYTON: Yes.

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

24 Now, the concern that it does not, is that you
25 under this system would seem to have the possibility that

1 two students -- one is a minority, African American, one
2 is not, majority, and they seem academically approximately
3 the same and now we give the black student 20 points and
4 the white student, let's say, is from the poorest family
5 around and is also a great athlete, and he just can't
6 overcome that 20 points -- the best he can do is tie.

7 And so that's the argument that this is not
8 individualized consideration. And I want to be sure I
9 know what your response is to that argument.

10 MR. PAYTON: I have two responses. The first is
11 to say that it is individualized if that white student
12 actually was socioeconomically disadvantaged, that could
13 be taken into account.

14 QUESTION: But remember he has that and gets 20
15 points for it?

16 MR. PAYTON: Yes.

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

23 MR. PAYTON: Yes.

24 QUESTION: But on individualized consideration,
25 the black student might lose, if there were the

1 individualized consideration.

2 MR. PAYTON: Well, he might --

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

6 MR. PAYTON: The answer is we value both of
7 those aspects of diversity. We want both of those
8 represented in our student body, all right, if they tie,
9 they will be judged exactly the same as far as how the
10 selection index works.

11 QUESTION: What you're saying is that race is
12 individualized consideration?

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

14 QUESTION: Otherwise you're saying that only in
15 the hypothetical given that only the white student
16 receives individualized consideration?

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

18 QUESTION: Some are more equal than others?

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

23 QUESTION: If in those circumstances, because we
24 have the white student who is both a good athlete and also
25 very poor, and the other student, the minority is not,

1 could that be sent to the -- the individual -- could that
2 be sent to the review committee and the review committee
3 would say, well, we have a special circumstance here, and
4 even though the points tie, nonetheless when we look at it
5 carefully, we see that the white student has these extra
6 pluses, despite the points, we let in the white student?

7 MR. PAYTON: The admissions review committee --
8 about 70 percent of the applications that it reviews in
9 any given year are white student applications that are
10 sent to it. Okay. It can reach its judgment irrespective
11 of whatever happened in the selection index score.

12 QUESTION: So they can ignore the points?

13 MR. PAYTON: They can -- actually once it goes
14 to them they simply look at the application and make a
15 judgment.

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

19 MR. PAYTON: It does.

20 QUESTION: Yes. The answer is yes?

21 MR. PAYTON: The answer is yes.

22 QUESTION: Okay.

23 MR. PAYTON: And it does. In Bakke, where
24 Justice Powell says that he could look at one example of
25 an admissions policy and he discusses briefly the Harvard

1 plan and then he has a long quote from it, there is the
2 footnote 50 that Ms. Mahoney mentioned. In both footnote
3 50 and footnote 51 there is a citation to this study by
4 Carnegie and he introduces that by saying in the footnote
5 there are in this study examples of the actions by other
6 leading institutions, trying to get diverse student
7 bodies. That study indicates that there are plenty of
8 other models where in fact some effort to come up with a
9 system to handle these different factors was successful.

10 QUESTION: Mr. Payton, it's easy to say they can
11 ignore the points. Easy to say. Do you know of any case
12 where a minority applicant, one of the minorities favored
13 in your program, who was minimally qualified, got the
14 20-point favor and was rejected?

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

16 QUESTION: Well, it's important, I mean, to say
17 theoretically, it's fine, yes, theoretically, you can
18 reject it. But as I understand what -- what the other
19 side is saying, it is automatic, if you are minimally
20 qualified, and you get those 20 points, you are in, that's
21 what they claim?

22 MR. PAYTON: Actually --

23 QUESTION: Now, do you assert that that is
24 false?

25 MR. PAYTON: That is not correctly describing

1 what happens. The way the policy works and the way it is
2 implemented is how I described the policy. In fact, the
3 results of the policy are that most of the qualified
4 minority applications do end up getting admitted. That's
5 not the design. The design is here's how you do it,
6 here's how the decisions are made, either on the selection
7 index score, some are sent to the admissions review
8 committee. Most of those that are sent to the admissions
9 review committee are in fact not minority applications,
10 but the design is not gee, admit all qualified minorities,
11 the design is to take these different factors into account
12 in order to achieve the student body that we think is
13 crucial here.

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

16 MR. PAYTON: I believe that is the case, all the
17 record says in this is that virtually all of the minority
18 students, as a result of the policy ended up being
19 admitted. I think there are certainly some, I can't give
20 you one, I can't give you one, but there are certainly
21 some where if you work it out, you can see that won't
22 happen.

23 QUESTION: But the design is to admit a higher
24 percentage of the qualified minority applicants that you
25 get, given the numbers that there are today, because if

1 you don't do that you won't get your mix?

2 MR. PAYTON: The design is to make sure we get
3 to the critical mass of the meaningful numbers and given
4 the small pool size we have, the way it operates is as you
5 just described, but that's the way it operates, the design
6 is to make sure we get the critical mass of students that
7 are, in fact, necessary for the educational benefits that
8 we are asserting here.

9 QUESTION: Has anyone at Michigan ever defined
10 critical mass as being anything more specific than
11 something beyond token numbers?

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

24 QUESTION: But in the criteria used by the
25 admissions committee, did anyone put a percentage figure

1 or a specific number --

2 MR. PAYTON: No.

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

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

6 QUESTION: Mr. Payton, do you know the origin of
7 critical mass that is being spoken of here as though it
8 were something that were invented? I know it goes back at
9 least with respect to the enrollment of women in law
10 school, the schools talked about we want to get a critical
11 mass, so women will feel welcome because when they were
12 one at a time curiosities they did have to do as you said
13 defend -- they were representatives of their sex and if
14 they failed, all women failed. Once they had a critical
15 mass, it was no longer necessary, the woman was free to be
16 who she was.

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

20 MR. PAYTON: It does, and I think you've
21 described it exactly as it has come about with respect to
22 diversity and critical mass. In the Harvard plan, in
23 Justice Powell's discussion of the Harvard plan, he
24 clearly acknowledges and -- because the plan acknowledges
25 that you must have meaningful numbers and it means more

1 than token numbers and there's clearly an acknowledgement
2 that if you have too few numbers you get the dynamics of
3 isolation that you just discussed.

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

7 And he's talking in respect to what is a
8 critical mass. Now, do people coalesce around numbers
9 like that or is that just out of -- what do I do with that
10 piece of testimony?

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

25 But it's not quite that precise as far as how

1 all of this works.

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

4 MR. PAYTON: I think that we all certainly
5 expect it to come to an end. I think we're all quite
6 surprised if we looked back at Bakke, in 1978, I think all
7 of us would be quite surprised from that vantage point to
8 realize that today in Michigan students live in such
9 segregated circumstances growing up, it's really quite
10 unbelievable. We could not have foreseen that. I think
11 people thought that we were coming together in a way and
12 that hasn't occurred. That's created some educational
13 challenges and opportunities.

14 The test score gap, I think is narrowing -- we
15 put that in our brief. I think we're all quite optimistic
16 about how this is going to progress. There is progress.
17 I think the pool is increasing. But I can't give you how
18 long is it going to last. I think we're all quite
19 confident that it's only going to last for X number of
20 finite years, I just can't answer with any precision that
21 question either.

22 QUESTION: Suppose the Court were to say that
23 the 20-point system and the law school system looked just
24 too much like a quota and that quotas are impermissible?
25 As of that point, is it our burden to tell you what other

1 systems to use or is it your burden to come up with some
2 other system, say, more individualized assessment in order
3 to attain some of the goals you wish to attain?

4 MR. PAYTON: I guess I'm not sure what the more
5 individualized assessment would be here. I'm not saying
6 that obviously there are things that could be done
7 differently. We've done things differently. The two
8 schools do things quite differently. But I think we're
9 both trying to achieve the critical mass, that I think
10 there's no dispute at all from anyone that the critical
11 mass is essential to get the educational benefits that
12 we're talking about.

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

24 This is, you know, an enormously important case.
25 When Justice Powell said in Bakke that it's not too much

1 to say that the Nation's future depends upon leaders
2 trained through wide exposure to the ideas and mores of
3 students as diverse as this nation of many peoples, I
4 think that statement was absolutely correct then. I think
5 it is, you know, it has never been truer than it is today.
6 This is of enormous importance and correct, not just to
7 the University of Michigan, but I'd say to all of higher
8 education and I think to our country as a whole to be able
9 to do things that bring us together, that bring us
10 understanding, that result in tolerance and, I'd say, make
11 us the -- more -- closer to the day that we all look
12 forward to when, in fact, we are beyond some of these
13 problems that we've been discussing rather intensely here
14 today.

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

18 MR. PAYTON: Yes, I do. I think they do in all
19 sorts of ways. They are certainly producing black
20 students, white students, Hispanic students, Native
21 American students who go out into our communities and
22 change their communities.

23 QUESTION: You may have misunderstood me. I
24 mean the -- Ms. Mahoney said earlier that the problem of
25 law school admissions, in response to Justice O'Connor,

1 that it was for the elite schools, it was more a problem
2 at the elite schools, when she was talking about Boalt
3 Hall, for example, you meant -- you suggested or alluded
4 to in your argument today that, you know, you don't want
5 to choose between being an elite school and the whole
6 diversity issue.

7 It -- would it be easier to accomplish the
8 latter if the former were adjusted, that is the overall
9 admissions standard?

10 MR. PAYTON: I think that --

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

14 MR. PAYTON: I think that, you know, some of our
15 other schools, the non-selective schools, actually some
16 can end up with completely undiverse populations as well;
17 that the fact that a school does not have selectivity
18 doesn't mean that the community college, in fact, is
19 diverse.

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

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

1 MR. PAYRON: Yes.

2 QUESTION: -- and the argument was made that the
3 historically -- the HBCs, the historically black colleges
4 provided a different benefit to minorities. Would the
5 same arguments with respect to diversity apply to those
6 institutions?

7 MR. PAYTON: Yes. You mean do they benefit if
8 they had a racially and ethnically diverse student body?
9 I believe most every single one of them do have diverse
10 student bodies.

11 QUESTION: Thank you, Mr. Payton.

12 Mr. Kolbo, you have two minutes remaining -- you
13 have three minutes remaining.

14 REBUTTAL ARGUMENT OF KIRK O. KOLBO

15 ON BEHALF OF THE PETITIONERS .

16 MR. KOLBO: With respect to the point system,
17 Counsel has made it sound as if it's sort of a fortuity
18 that the University of Michigan has an admissions system
19 that ends up admitting -- admitting virtually all minority
20 students. In fact, I want to talk a little bit about the
21 record here. We put in the record the guidelines from the
22 original system that was in place in 1995 and 1997. At
23 the joint appendix, at page 80, it's made very clear that
24 the guidelines were set in 1995, when Jennifer Gratz
25 applied to admit all qualified minority students. It's

1 also undisputed in this record that the way the University
2 got to the 20 points was to statistically design it based
3 on the old model. So what they've done is they've taken
4 the old guidelines that were set to admit all qualified
5 minority students, statistically figured out how many
6 points they needed to give -- to give to students under
7 the new system to replicate the old system, and that's how
8 we ended up with 20 points.

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

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

22 With respect to test scores, a question was
23 made -- a question was asked about how long are these
24 systems going to last. There's actually evidence, and
25 this was not put in the -- in the record by the

1 University, with respect to test scores and disparities,
2 but there's -- there's also opposing opinion which has
3 indicated that as long as we have these preferences, they
4 create perverse incentives. We've cited the work of John
5 McWhorter, for example, in our reply brief indicating that
6 test scores to the extent that they're not narrowing, or
7 to the extent that the gaps are increasing may, in fact,
8 be to the fact -- due to the fact of these -- of these
9 preferences. With respect to the Hobbesian choice that
10 Mr. Payton has talked about, they have resolved a
11 different Hobbesian choice. The University has decided
12 that they are willing to lower their academic standards to
13 get their critical mass.

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

22 With respect to the concept of critical mass,
23 all I have to say, if one can't ascertain from the way
24 it's defined, meaningful means sufficient, sufficient
25 means critical, critical means sufficient, that meets the

1 definition, it seems to me, of an interest that's too
2 amorphous, too ill-defined, too indefinite, just like the
3 role model theory, just like a remedy for societal
4 discrimination, too indefinite to support the use of a
5 compelling -- to suit -- to use -- to be a basis for
6 racial preferences.

7 CHIEF JUSTICE REHNQUIST: Thank you Mr. Kolbo.
8 The case is submitted.

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