# Military Necessity and Racial Discrimination

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The authors thank Steven G. Bradbury, GianCarlo Canaparo, Mike Gonzales, and John G. Malcolm for valuable comments on an earlier draft of this Article. Any mistakes are ours. The views expressed in this Article are our own and should not be construed as representing any official position of The Heritage Foundation. 

## INTRODUCTION

Americans celebrate July 4th with beach outings, baseball, hot dogs, and fireworks. Yet it is the last of those items that most signifies the importance of the day. The nation might have *declared* its independence via publication of a document signed by various political leaders at Independence Hall in Philadelphia, Pennsylvania, but America truly *became* independent only by force of arms that were carried and used by Americans willing to place their lives at risk for their families, for their friends, and for the prospect of what Thomas Jefferson's memorable words called "Life, Liberty, and the pursuit of Happiness."[1] Only because there are Americans still willing to go in harm's way does our native tongue remain English rather than German, Japanese, Russian, or Chinese, and the liberties declared in the Declaration and guaranteed by the Constitution remain available to all.

1. Declaration of Independence ¶ 2 (July 4, 1776).

One of those liberties, as Martin Luther King so poetically said in 1963, is the right of Americans "not [to] be judged by the color of their skin but by the content of their character."[2] Yet for more than a century, the nation failed to make that dream a reality. Slavery, and its bastard child Jim Crow, kept black Americans from realizing the benefits that the law should provide to all.[3] Beginning in 1954, however, the nation started to turn the ship around. In *Brown v. Board of Education*, the Supreme Court of the United States held that, based solely on their race, black school-age children cannot be denied access to the same free public-elementary education offered to white students.[4] The Court then began a march through other features of American law that discriminated against blacks, ultimately holding that all state institutions should be open to people of all races without restriction.[5] The Court recently reaffirmed that rule in *Students for Fair Admissions v. Harvard College*, saying, "The conclusion reached by the *Brown* Court was thus unmistakably clear: the right to a public education 'must be made available to all on equal terms.'"[6]

At issue in the *Fair Admission* case was the legality of the undergraduate admissions policies used by Harvard College (Harvard) and the University of North Carolina (UNC). Each school favored black applicants at the expense of applicants of other races.[7] Different lower federal courts upheld the constitutionality of each school's admission process.[8] The Supreme Court reversed, ruling that neither institution had justified its use of race as a legitimate consideration in filling out its entering class.[9] As the Court pointedly noted in its concluding section, "Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points." It added that, "We have never permitted admissions programs to work in that way, and we will not do so today."[10]

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2. Martin Luther King Jr., Speech at the Lincoln Memorial: I Have a Dream (Aug. 28, 1963).

3. *See*, *e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (Updated ed. 2014); KENNETH M. STAMP, THE PECULIAR INSTITUTION (1989); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (2001).

4. 347 U.S. 483, 493 (1954).

5. *See*, *e.g.*, Gayle v. Browder, 352 U.S. 903 (1956) (busing); Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses); Loving v. Virginia, 388 U.S. 1 (1967) (marriage).

6. 600 U.S. 181, 204 (2023) (quoting *Brown*, 347 U.S. at 493).

7. *See id.* at at 190–95 (describing how Harvard's admissions officers consider an applicant's race), 195 ("In the Harvard admissions process, race is a determinative tip for a significant percentage of all admitted African American and Hispanic applicants.") (citation and punctuation omitted); *id.* at 195–97 (describing how UNC's admissions officers consider an applicant's race).

8. For the Harvard case, *see Students for Fair Admissions v. Harvard College*, 397 F. Supp. 3d 126 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020) (both upholding the legality of the Harvard admissions process). For the UNC Case, see 567 F. Supp. 3d 580 (M.D.N.C. 2021) (upholding the constitutionality of the UNC admissions process).

9. *Students for Fair Admissions*, 600 U.S. at 201–30.

10. *Id.* at 230.

There are thousands of private and public degree-granting post-secondary schools nationwide like the two who were parties in *Fair Admissions*.[11] The Supreme Court's ruling in that case applies fully and equally to all such schools, as well as to all private universities that receive federal funds, because Title VI of the Civil Rights Act of 1964 imposes the same requirements on those schools as the Fourteenth Amendment demands of public universities.[12] Only two of these institutions were parties to the *Fair Admissions* case and subject to the judgment entered therein.[13] Nonetheless, they all must operate admissions processes consistently with the law set forth in that decision.[14]

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11. As of 2021, there were 5,916 private and public, four-year and two-year, not-for-profit and for-profit secondary, degree-granting institutions. *Fast Facts*, NAT'L CNTR. FOR EDUCATION STATISTICS, https://nces.ed.gov/fastfacts/display.asp?id=1122 [https://perma.cc/XL6T-CXSD] (last visited July 25, 2023).

12. *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deprive any person within its jurisdiction of the equal protection of the laws"). UNC is a state institution and therefore was directly subject to the Equal Protection Clause. The Fourteenth Amendment does not directly apply to Harvard because it is a private institution. *See United States v. Morrison*, 529 U.S. 598, 620–27 (2000); *The Civil Rights Cases*, 109 U.S. 3 (1883). Harvard is nonetheless subject to the commands of the Equal Protection Clause by virtue of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2018). That law forbids a recipient from discriminating against anyone on the basis of race if it receives federal funds, which Harvard does. Accordingly, as the Court noted in *Fair Admissions*, its equal protection discussion applied in the same manner to each school. 600 U.S. 181, 198 n.2.

13. *See infra* notes 141–42 and accompanying text.

14. *See infra* notes 143–45 and accompanying text. While some postsecondary schools have undertaken an effort to determine how to comply with *Fair Admissions*, it also might be the case that other institutions will try to figure out how to give the appearance of complying while actually continuing to use race as they did prior to *Fair Admissions*. The debate over how to respond is ongoing and often might be entirely internal. *See*, *e.g.*, Editors, *Harvard's Cynical Move to Get Around the Affirmative Action Decision*, NAT'L REV., Aug. 8, 2023, https://www.nationalreview.com/2023/08/harvards-cynical-move-to-get-around-affirmative-action-decision/?bypass_key=ZWhkMlJLOGtPK0dSSHlZN3NjbWpNdz09OjpiRlpsV0ZOQ1oxaDNTekpIV0hJd1RHdFJhblZ0VVQwOQ%3D%3D [https://perma.cc/UX3H-A9RT] ("Last Tuesday, Harvard University—one of the two named defendants in the Supreme Court's ruling—revealed its new set of required admissions essays for fall 2024, and the very first (and thus presumably most important) prompt is as follows: 'Harvard has long recognized the importance of enrolling a diverse student body. How will the life experiences that shape who you are today enable you to contribute to Harvard?' Harvard and others will doubtless gesture to it nonetheless as they pursue their admissions goals by these suggested sub rosa means. For the battle against racial discrimination in education (presently disproportionately against Asian applicants, tomorrow against whatever the elite next decides is an 'overly successful' group) did not end with the Supreme Court's ruling. It has instead moved on to a new phase of quasi-legal 'resistance'—a term that should be depressingly familiar to all who lived through media commentary on the behavior of institutional Washington during the Trump administration, and meant in precisely the same way. Elite progressive educational institutions were unlikely to experience a radical moral epiphany the moment the Supreme Court made its ruling, and abjure their discriminatory impulses and racial fixations. Unless compelled to do so by further legislation or judicial rulings, they will now simply discriminate by other means. Supporters of colorblindness and the rule of law will have to be vigilant and willing to bring new cases to circumvent the circumventors. The next several years of behind-the-scenes racial tinkering in college admissions will be done in defiance of the law, not openly but dressed up in a new 'adding diversity to our community' admissions-essay language."); Melissa Korn, *How Colleges Plan to Factor in Race Without Asking About Race*, WALL ST. J., July 26, 2023, https://www.wsj.com/articles/how-colleges-plan-to-factor-in-race-without-asking-about-race-dee96bb0 [https://perma.cc/ZEH3-8XX8] ("The Wall Street Journal asked more than 50 selective colleges and universities what changes they are making to

There are, however, certain unique schools operated not by private or public trustees and administrators pursuant to state law, but by officials of the federal government. These schools pursue a mission above and beyond educating their students: namely, protecting the nation and its people, and guaranteeing their liberties against foes who mean us ill. They are the five United States Service Academies: the U.S. Military Academy at West Point, New York; the U.S. Naval Academy at Annapolis, Maryland; the U.S. Air Force Academy at Colorado Springs, Colorado; the U.S. Coast Guard Academy at New London, Connecticut; and the U.S. Merchant Marine Academy at Kings Point, New York.[15]

In his majority opinion in *Fair Admissions*, Chief Justice Roberts briefly referred to these schools in response to a point made in Justice Sonya Sotomayor's dissent. She argued that, because those academies expressly use an applicant's race as an admission criterion, other post-secondary schools should be free to adopt the same admissions practice.[16] In a footnote, Chief Justice Roberts said that the *Fair Admissions* case did not address the constitutionality of the service academies' admissions practices because none of them was a party to the case.[17]

This Article analyzes whether, in light of *Fair Admissions*, the service academies may continue to use a race-based admissions policy. As explained below, it is clear that the service academies may not do so. By contrast, in an extremely small

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their applications, fall recruiting calendars or other elements of their admissions process—including the use of binding early-decisions programs and the practice of giving extra credit to athletes or children of alums. About 35 said they were still reviewing the ruling and weren't ready to discuss firm plans. A few said they were advised by legal counsel not to speak publicly about potential changes."); William McGurn, *The Sneaky Road Back to Racial Preferences in Admissions*, WALL ST. J., Jan. 22, 2024, https://www.wsj.com/articles/the-sneaky-road-back-to-race-preferences-will-supreme-court-stop-anti-asian-policies-0b9bf6e4?mod=Searchresults_pos3&page=1 [https://perma.cc/3SBW-PG2Q] ("The smarter ones could see it was coming. Even so, the Supreme Court's June decision in *Students for Fair Admissions v. Harvard* to hold race preferences in admissions unconstitutional came as a thunderbolt to the whole diversity, equity and inclusion crowd. Colleges have been looking for a way around the decision, and they think they've found it: by using proxies for race . . . . . American history is rife with examples. These include how proxies from poll taxes or literacy tests were used to disenfranchise black voters."); Editors, *Race Discrimination Loses Its Legal Protection*, NAT'L REV., June 29, 2023, https://www.nationalreview.com/2023/06/race-discrimination-loses-its-legal-protection/ [https://perma.cc/C38U-RUER] ("Nobody pretends that the nation's colleges will give up looking for ways to quietly discriminate on the basis of race in order to benefit favored groups at the expense of disfavored groups. The ideology of doing so is too entrenched to permit any response but massive resistance. The Court, unwisely in our view, creates an incentive for this by noting that applicants could still discuss their race in their application essays, although it tries to head off mischief by warning universities not to use those essays as a license to continue discriminating. But no matter how the colleges react, at least discrimination on the basis of race will gain no formal sanction under American law. That is progress.").

15. The U.S. Department of Defense operates the Military, Naval, and Air Force Academies. 10 U.S.C. §§ 7011, 7431, 8011, 8451, 9011, 9081, 9082(a), 9082 (c), 9431 (2018). The U.S. Department of Homeland Security operates the Coast Guard Academy, except when it is called into service in the Navy. 14 U.S.C. § 103(a) (2018). The U.S. Department of Transportation operates the Merchant Marine Academy. 46 U.S.C. §§ 51103, 51301 (2018).

16. *See infra* text accompanying notes 138-39.

17. *See infra* text accompanying note 140.

number of instances, the military may have a special operational need to make race-based decisions when using servicemembers for undercover, intelligence-gathering assignments in hostile areas, where an officer would need to resemble the race and ethnicity of the community into which he or she is to be inserted. But those instances are rare, and they require the assignment of officers on an even rarer basis. Accordingly, as explained below, there is no good reason to exempt the service academies from the antidiscrimination rule of law adopted in *Fair Admissions*.

## I. THE MILITARY SERVICE ACADEMIES' ADMISSIONS POLICIES

### *A. The Federal Service Academies*

The United States Service Academies in our country are more than just academic institutions; they prepare men and women to lead their fellow citizens into life-threatening circumstances to defend America. They are institutions where talented men and women go to learn the profession of arms in order to serve something larger than themselves: their country. It's difficult to think of institutions more steeped in American history, tradition, patriotism, selflessness, and excellence than our military service academies (Army, Navy, and Air Force) and federal service academies (Coast Guard and Merchant Marine). Even though the military service academies only produce around 18 or 19% of all commissioned officers in the U.S. armed forces,[18] there is something distinctive about being a graduate of West Point, the Naval Academy, or the Air Force Academy; it shows a dedication and desire to serve.

That's not to say that officers who graduate from our military service academies are more proficient, more intelligent, better leaders, or are better officers than the men and women who get their commissions from Officer Candidate School (OCS) or Reserve Officer Training Corps (ROTC) programs. They aren't. But they are different, as they chose an exclusive path to becoming a commissioned officer that took up a goodly portion of their lives.

When many people think about West Point or the Naval Academy, they think of the Army-Navy football game, a series that began on November 29, 1890. By then, the Military Academy at West Point had been in existence for nearly nine decades (since 1802), and the Naval Academy for nearly five (since 1845). Since the 1800s, our military service academies have offered not only patriotic sporting rivalries that stir the hearts of Americans across the land, but also a unique challenge to anyone with the courage, grit, perseverance, and drive to succeed at one of the world's top military officer training institutions. The Air Force, which grew out of the Army Air Corps in 1947, established its own service academy in

18. *See* GOV'T ACCOUNTABILITY OFF., GAO-22-105130, MILITARY SERVICE ACADEMIES: ACTIONS NEEDED TO BETTER ASSESS ORGANIZATIONAL CLIMATE (2022). The Office of the Under Secretary of Defense for Personnel & Readiness reports that 19 percent of all military officers come from the service academies. See *Active Component Commissioned Officers Corps, FY18: By Source of Commission, Service, Gender, and Race/Ethnicity*, App. B., Tbl. B-33, at 96 (2018).

1954. Since its founding, the Air Force Academy has produced numerous distinguished officers and public servants.

The Coast Guard Academy can trace its roots to Alexander Hamilton, who in 1790 "proposed the formation of the Revenue Marine, a seagoing military service that would enforce the customs and navigation laws, collect tariffs, hail in-bound ships, make inspections and certify manifests."[19] Eighty-six years later, the first Coast Guard Academy, which was called the Revenue Cutter School of Instruction, was founded aboard a ship called the Dobbin.[20] In 1915, the Congress created the U.S. Coast Guard Academy.[21] Finally, the Merchant Marine Academy was established after Congress passed the Merchant Marine Act of 1936.[22] Construction began in 1942, and the site was dedicated by President Franklin D. Roosevelt on September 30, 1943.[23]

The service academies have graduated scores of consequential officers, including Ulysses S. Grant, Douglas MacArthur, George S. Patton, Dwight D. Eisenhower, Jimmy Carter, John McCain, Chester N. Nimitz, Roger Staubach, and James Loy, to name just a few. Each has produced Medal of Honor recipients, Rhodes Scholars, Nobel Prize winners, governors, senators, congressmen, ambassadors, astronauts, or other distinguished Americans.

Admission to the three military service academies and two federal service academies is highly competitive. A student cap of 4,400 is set for each academy, and each one admits between 1,100 and 1,350 students per year.[24] Students at the academies receive fully funded tuition, room and board, and (reduced) military pay and benefits.[25] Given the skyrocketing cost of college tuition these days, even for in-state tuition at state colleges and universities, financial support is one of the many reasons students apply to the academies.[26] Each institution provides a rigorous academic environment, followed by different service obligations.[27]

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19. *See* U.S. COAST GUARD ACADEMY, Coast Guard Academy History, https://uscga.edu/about/history/ [https://perma.cc/A5Y8-LAFN] (last visited Aug. 6, 2023).

20. *Id.*

21. *Id.*

22. *See* U.S. MERCHANT MARINE ACADEMY, United States Merchant Marine Academy History, https://www.usmma.edu/about/usmma-history#:~:text=The%20Academy%20was%20dedicated%20on,Army%20and%20Annapolis%20the%20Navy.%22 [https://perma.cc/MXZ7-NG6B] (last visited Aug. 6, 2023).

23. *Id.*

24. *See* Kristy N. Kamarck, *Defense Primer: Military Service Academies*, Cong. Res. Serv., InFocus, Dec. 9, 2021, https://crsreports.congress.gov/product/details?prodcode=IF11788 [https://perma.cc/2JSZ-3DHJ] (last visited Aug. 8, 2023).

25. *Id.*

26. The services have estimated that the cost per four-year graduate ranges from $400,000 to $600,000 in current dollars. *Id.* Our tax dollars pay for their tuition, although each of the academies also raises money from its respective alumni body and anyone who wants to donate through separate foundations. Congress authorizes and appropriates funding for the service academies through multiple appropriation titles and accounts of each respective service. *Id.*

27. West Point graduates owe the Army eight years of service with a combination of active duty and reserve duty. Naval Academy graduates owe the Navy five years of active-duty service. Air Force Academy graduates owe the Air Force five years of active duty and three years of inactive reserve duty.

Often overlooked is that each of the three military service academies has a preparatory school associated with it. These government-run "prep" schools, discussed briefly below, are essentially 13th grade for high schoolers who aspire to attend the military academies but need additional academic preparation. They also provide a place for active-duty enlisted personnel who want to attend a military service academy but also need additional academic preparation.

The Naval Academy Prep School (NAPS) is located in Newport, Rhode Island. It is a ten-month program for students who, upon successful graduation, gain automatic admission to the United States Naval Academy. "The mission of the Naval Academy Preparatory School is to enhance midshipman candidates' moral, mental, and physical foundations to prepare them for success at the U.S. Naval Academy."[28] Students or enlisted personnel who apply to the Naval Academy and are not offered a direct appointment are automatically considered for NAPS. There is no cost to attend NAPS, as all tuition, room and board is covered by the government.

The mission of United States Military Academy Preparatory School (USMAPS) is "to provide focused academic, military, and physical instruction in a moral-ethical environment to prepare, motivate, and inspire Cadet Candidates in order to qualify for admission to, and graduation from, the United States Military Academy."[29] Its purpose is to prepare candidates for the rigors of West Point. Students selected for West Point's prep school are, like NAPS students, high school graduates or enlisted personnel from the Active, Reserve or National Guard force. Located on the campus of West Point, USMAPS guarantees admission to West Point upon successful completion of the ten-month course of instruction, and, like NAPS, is tuition-free.

Similarly, the United States Air Force has a prep school at the Air Force Academy in Colorado Springs, Colorado. Founded in 1961, the prep school offers "a select group of enlisted personnel and civilians, a potential pathway to join the cadets at the Academy. The school provides the academic, leadership, and physical skills to prepare them for success as future officers."[30] Unlike graduates from the Army or Navy prep schools, graduation from the Air Force prep school does not guarantee admission to the Air Force Academy, but "they earn consideration and a recommendation from the preparatory school commander if they successfully complete the ten-month program."[31]

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Coast Guard Academy graduates owe the Coast Guard five years of active duty. Merchant Marine graduates owe the Merchant Marines five years of active service.

28. *See* U.S. NAVAL ACADEMY, Naval Academy Preparatory School, https://www.usna.edu/NAPS/ [https://perma.cc/Q7Y9-8CP8] (last visited Aug. 6. 2023).

29. *See* U.S. MILITARY ACADEMY AT WEST POINT, United States Military Academy Preparatory School, https://www.westpoint.edu/usmaps [https://perma.cc/LU6H-Q3XW] (last visited Aug. 6, 2023).

30. *See* U.S. AIR FORCE ACADEMY, The U.S. Air Force Preparatory School, https://www.usafa.edu/prep-school/ [https://perma.cc/PE6K-MGNM] (last visited Aug. 6, 2023).

31. *Id.*

Like the military service academies, the federal service academies also have their own forms of prep school. The United States Coast Guard Academy (USCGA) has a prep school program called the Coast Guard Academy Scholars Program (CGAS).[32] It is a one-year preparatory program consisting of up to 70 students per application cycle. Just like the Navy and Army prep schools, applicants are selected from the same applicant pool as the direct appointment pool. A considerable number of CGAS's graduates earn admission to the Coast Guard Academy. For example, the CGAS Class of 2021 included 38 of the 67 students who enrolled, or 55% of the incoming class.[33]

The United States Merchant Marine Academy (USMMA) has a unique prep school pipeline. Rather than having its own prep school, the USMMA has partnered with both the New Mexico Military Institute (NMMI)[34] and Marion Military Institute (MMI).[35] Applicants to the USMMA are automatically considered for both "prep" schools. If they are not offered admission to the USMMA, they are automatically considered for a scholarship (called a "sponsorship") of $4,000 to be put toward the cost of attending either NMMI or MMI. Upon successful graduation from either prep school, students can reapply to the USMMA.

### *B. Oversight and Admissions*

Unlike private and public state colleges and universities, the service academies are overseen by three entities: the Office of the Undersecretary of Defense for Personnel and Readiness, the service secretaries, and the Board of Visitors of each academy.[36] Each academy is led by a superintendent, a military officer who is a three-star general or admiral selected for the position by the President.[37]

In order to be appointed to a service academy, a student applicant must meet certain eligibility requirements and be nominated by an authorized person.[38] Who qualifies as an "authorized person" varies depending on whether, as detailed below, the applicant is applying for a military service academy or a federal service academy. In general, however, categories of nominations include congressional, service connected, academy superintendents, and others.[39] According to a

32. *See* U.S. COAST GUARD ACADEMY DIVERSITY, Report to Congress (2021).

33. *Id.*

34. *See* NEW MEXICO MILITARY INSTITUTE, Admissions Webpage, https://www.nmmi.edu/admissions/academy-prep/ [https://perma.cc/FG55-C2WG] (last visited Aug. 8, 2023).

35. *See* MARION MILITARY INSTITUTE, Service Academy Program, https://marionmilitary.edu/admissions/service-academy-program/ [https://perma.cc/5FUW-3TTQ] (last visited Aug. 8, 2023). Marion graduates have gone on to attend each of the military service academies in addition to the Coast Guard and Merchant Marine Academies.

36. *See* Kamarck, *supra* note 24. The admissions process at West Point and Annapolis is described in Students for Fair Admissions v. U.S. Military Academy (West Point), 2024 WL 36026 (S.D.N.Y. Jan. 3, 2024) [hereinafter *West Point*], and Students for Fair Admissions v. U.S. States Naval Academy, 2023 WL 8806668 (D. Md. Dec. 20, 2023) [hereafter *Annapolis*]. For a discussion of how the academies consider race, see *West Point*, 2024 WL 36026, at *5–6, and *Annapolis*, 2023 WL 8806668, at 6–7.

37. Kamarck, *supra* note 24.

38. *Id.*

39. *Id.*

Congressional Research Service primer on the military service academies, each uses a "whole person approach to admissions by assessing candidates in three areas: academics, physical aptitude, and leadership potential."[40] But that's not the entire story. Each of the military service academies, the two federal service academies, and their respective prep schools use race as a factor in admissions decisions.

As the Solicitor General acknowledged in her amicus curiae brief for the United States in support of Harvard (see Appendix below), the "military service academies cultivate a diverse officer corps by relying on holistic admissions policies that consider race alongside many other qualities relevant to the mission of training the Nation's future military leaders."[41] Quoting various Department of Defense (DoD) and other studies, the Solicitor General described a racially diverse officer corps as a "strategic imperative." Yet, as discussed below, many of the studies referenced in the Solicitor General's brief are decades old, undercutting their applicability to the U.S. military in 2023. Furthermore, the RAND Study from 2021, relied upon extensively by the Solicitor General, does not purport to gauge the effectiveness of officers as leaders according to their race.

There are numerous pernicious aspects of selecting officers for the military based in part on race. One is the effect doing so has on the officers themselves. In a pure meritocracy, where officers were selected purely on the basis of grades, test scores, physical fitness and demonstrated leadership, those selected would not question whether they were admitted to the academy based on anything but race-neutral criteria. Yet because race is a factor in admissions at the academies, its presence can create perceptions by white students that some black students were admitted to the academy or selected for student leadership positions on diversity grounds or to fill a "quota." According to a 2022 Climate survey of students from the three military academies, more than half of the black students and one-third of groups of Hispanic and Pacific Islander students noted that perception. Two of six groups of black students at two academies reported instances in which other cadets assumed they had attended their respective military academy's preparatory school.[42]

### *C. Nominations and Appointments to Military Academies*

Applicants who want to attend the military service academies must navigate a complicated process. There are six nonsequential steps in the process, which contains two broad components: nomination followed by appointment.

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40. *Id.*

41. *See Students for Fair Admissions v. President and Fellows of Harvard College*, Brief for the United States as Amicus Curiae Supporting Respondent 12 (filed Aug. 2022).

42. *See* GOV'T ACCOUNTABILITY OFF., GAO-22-105130, MILITARY SERVICE ACADEMIES: ACTIONS NEEDED TO BETTER ASSESS ORGANIZATIONAL CLIMATE, at 32 (July 2022).

The first step in the process is the application.[43] An eligible candidate must be at least 17 years old and not past their 23rd birthday by July 1 of the calendar year he or she would enter the academy.[44] Each applicant must be a United States citizen and possess good moral character. He or she cannot be married, pregnant, or legally responsible for a dependent. Nor can an applicant have a past felony conviction or history of drug abuse, or be a conscientious objector.[45] Steps two through five involve submitting college entrance examination scores, grades, extracurricular activities, athletic participation, race, ethnicity, gender and other basic demographic information.[46] As you would expect, during these steps, candidates are medically evaluated and must complete a fitness assessment which generally consists of an evaluation of coordination, strength, speed, agility and endurance.[47] According to affidavits filed by the Dean of Admissions at the Naval Academy and West Point, race plays no part in the first five steps of the admissions process.[48]

Once they have completed steps one through five, the sixth step is obtaining a nomination.[49] Every candidate appointed to a military service academy must be nominated as required by federal law.[50] There are two general types of nominations: congressional sources or a "service-connected" nomination.[51] Congressional nominations make up more than 80% of the Naval Academy's student body, and 75% of West Point's cadet corps.[52] If the applicant receives a nomination, the admissions office in the respective academy evaluates each nominee and then offers an appointment to the "most qualified" of those nominated.

In the case of the military service academies, the use of race by those involved in the admissions process is not primarily cabined to the office of admissions as it is in civilian colleges and universities. Nomination sources include members of the U.S. House of Representatives and Senate, the Vice President of the United States, the President of the United States, and other lesser-known routes to nomination.[53] Each member of Congress can have five constituents attending each of

43. *See* Declaration of Colonel Deborah J. McDonald at ¶¶ 19–23, *West Point*, No. 7:23-cv-08262 (S.D.N.Y. Nov. 23, 2023), ECF No. 53 [hereafter McDonald Decl.]; Declaration of Stephen Bruce Latta at ¶¶ 21–23, *Annapolis*, No. 1:23-cv-02699 (D. Md. Dec. 1, 2023), ECF No. 46-2 [hereafter Latta Decl.].

44. *See* McDonald Decl. at ¶ 22; Latta Decl. at ¶ 21.

45. *See* McDonald Decl. at ¶ 22; Latta Decl. at ¶ 21.

46. *See* McDonald Decl. at ¶¶ 24–29; Latta Decl. at ¶¶ 24–28.

47. *See* McDonald Decl. at ¶¶ 26–27; Latta Decl. at ¶¶ 25–26.

48. *See* McDonald Decl. at ¶¶ 19–94; Latta Decl. at ¶¶ 18–80.

49. *See* McDonald Decl. at ¶ 30; Latta Decl. at ¶ 29.

50. *See* 10 U.S.C § 7442 (2024); McDonald Decl. at ¶ 30; Latta Decl. at ¶ 29.

51. *See* McDonald Decl. at ¶ 31; Latta Decl. at ¶ 30.

52. *See* McDonald Decl. at ¶ 32; Latta Decl. at ¶ 31.

53. For example, additional nomination sources for Annapolis include: 170 appointments are available each year to regular and reserve Navy and Marine Corps enlisted personnel. All Navy and Marine Corps ROTC units and all Navy and Marine Corps Junior ROTC units are eligible to nominate three candidates each. Up to 65 Midshipman may be in attendance at the academy based on nominations of children of deceased or disabled veterans, prisoners of war, or those missing in action. Children of Medal of Honor recipients who are fully qualified for admission are automatically appointed. *See* Apply

the three military service academies at any given time. Members of Congress use one of three methods to slate their candidates: the "competitive" method; the "principal numbered-alternative" method, and; the "principal competitive-alternate" method.[54] Similarly, at any given time, five students can attend each of the three military service academies based on a Vice Presidential nomination. Under the "competitive" method, all nominees are submitted to the admissions office without order of preference.[55] In turn, the admissions office ranks the candidate based on his composite score, called a Whole Person Multiple (WPM) score in the Naval Academy and the Whole Candidate Score at West Point.[56] Under the "principal numbered-alternative" method, the member identifies his first choice, followed by a ranked list of alternates.[57] Under the "principal competitive-alternate" method, the member identifies his first choice. If that candidate is not deemed fully qualified by the admissions office or declines an offer of an appointment, the admissions office selects from the remaining candidates on the nomination slate.[58] Although it varies year by year, approximately 65% of members use the "competitive" method for Naval Academy candidates and 85% for West Point candidates.[59]

It is during the selection of candidates where race and ethnicity can play a role at the Naval Academy and West Point.[60] At the Naval Academy, the Slate Review Committee can conclude, after reviewing a candidate with a lower WPS, that "race or ethnicity (across all minority groups) could potentially be one of many nondeterminative factors that bear on the decision, but the decision may not occur because of a candidate's race or ethnicity."[61] At West Point, if there are vacancies in the incoming class of cadets after the process has been completed, the Secretary of the Army may fill those vacancies, and race and ethnicity are one of many factors that the admissions committee may consider as part of their holistic assessment. These additional appointees, according to the Army, do not have to be selected by order of merit.[62]

An unlimited number of presidential nominations are available for children (biological or adopted) whose parent served as a career officer or enlisted personnel in the U.S. armed forces, active or reserve, including the Coast Guard. Only one hundred nominees, however, may be appointed from this nomination category

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to USNA, Nomination Sources, U.S. Naval Academy Admissions, https://www.usna.edu/Admissions/Apply/Nomination-Sources.php [https://perma.cc/M9FZ-RH22] (last visited Aug. 8, 2023).

54. *See* McDonald Decl. at ¶¶ 33–36; Latta Decl. at ¶¶ 33–36.
55. *See* McDonald Decl. at ¶ 34; Latta Decl. at ¶ 34.
56. *See* McDonald Decl. at ¶ 34; Latta Decl. at ¶ 34.
57. *See* McDonald Decl. at ¶ 35; Latta Decl. at ¶ 35.
58. *See* McDonald Decl. at ¶ 36; Latta Decl. at ¶ 36.
59. *See* McDonald Decl. at ¶ 37; Latta Decl. at ¶ 37.
60. *See* McDonald Decl. at ¶ 90–94; Latta Decl. at ¶ 73–76.
61. *See* Latta Decl. at ¶ 58.
62. *See* McDonald Decl. at ¶ 70.

each admissions cycle.[63] Whether a nomination source chooses to use race as a factor in their decision to nominate an applicant would be difficult to prove. The fact is, however, that the use of race as a plus-factor is constitutionally suspect given the Supreme Court's holding in *Fair Admissions*.

### *D. Admission to the USCGA and USMMA*

Admission to the Coast Guard and Merchant Marine academies is also highly competitive.

Unlike the military service academies, the Coast Guard Academy does not require a congressional nomination. The application process is similar to civilian colleges or universities, except for the fact that applicants (understandably) must submit to a medical examination to prove that they are of sound body and mind. Each year, the Coast Guard Academy admits about 300 cadets from thousands of applicants.[64]

The fact that the Coast Guard does not require congressional nominations deprives members of the House of Representatives and Senate of the opportunity to nominate people, including minorities, to the Coast Guard Academy. That inability has frustrated some members of Congress. In 2017, after the University of Southern California's Center for Urban Education published a report criticizing the Coast Guard's "equity scorecard," several Democratic members of Congress introduced legislation to change the academy's admissions policies.[65] Called the "Coast Guard Academy Improvement Act," Rep. Bennie Thompson's bill would have modified the admissions process to require that half of each incoming class be composed of cadets nominated by the Vice President, a Senator, or a member of the House of Representatives. Members of Congress, under the proposed bill, could nominate up to three persons each year.[66] The bill died in committee that year.

The USMMA admissions process is similar to that of the military service academies and requires nomination before consideration by the admissions office for potential appointment. Applicants must be nominated by a member of the House of Representatives or Senate from the applicant's state of residence or domicile.[67] The USMMA does not accept military service-connected, vice presidential, or presidential nominations. Similarly to nominations to the other academies, USMMA nominations do not guarantee appointment to the academy.

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63. *See* Apply to the USNA, Nomination Sources, Presidential Nomination https://www.usna.edu/Admissions/Apply/Presidential-Nomination.php [https://perma.cc/A9LW-C9NP] (last visited Aug. 8, 2023).

64. *See Admissions Requirements*, U.S. COAST GUARD ACADEMY, https://uscga.edu/admissions/admission-requirements/ [https://perma.cc/C3PG-YTAW] (last visited Aug. 8, 2023).

65. *See* Ana Radelat, *Bill to Address Racial Disparities at Coast Guard Academy Proposed as Investigation Continues*, CT MIRROR, Oct. 15, 2018 https://ctmirror.org/2018/10/15/bill-address-racial-disparities-coast-guard-academy-proposed-investigation-continues/ [https://perma.cc/4J8U-GGMD].

66. *See* H.R. 6905, Coast Guard Academy Improvement Act, 115th Cong. (Sept. 26, 2018).

67. *See Apply for a Nomination*, U.S. MERCHANT MARINE ACADEMY, https://www.usmma.edu/admissions/apply-nomination [https://perma.cc/BW66-VU3K] (last visited Aug. 8, 2023).

### *E. Additional Rules Requiring Race as a Consideration*

The military service academies fall under the DoD. Each is subject to DoD Directives, Instructions, or other department-wide rules. For example, DoD Directive 1020.02E establishes policy and assigns responsibilities for addressing unlawful discrimination "and promoting equal opportunity, diversity, and inclusion." Atop that, in 2021, President Joseph Biden issued three broad executive orders on DEI—(1) On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,[68]; (2) Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce,[69]; and (3) Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce," which accelerated a trend that dates back to a diversity and inclusion executive order from President Barack Obama in August 2011.[70] The Obama Executive Order "directs federal departments and agencies to develop strategic plans that identify actions to advance diversity, equity, inclusion, and accessibility in the workforce."[71]

In addition to capacious DEI programs across the military service academies, each academy expends energy and resources recruiting diverse applicants. "The academies have taken actions aimed at improving diverse recruitment, including a number of actions to expand the pool of both potential students and new faculty."[72] The academies "advertise specifically to diverse applicants or to those from underrepresented areas."[73] In 2021, the Naval Academy "began contracting with a civilian college marketing firm that focuses on increasing awareness and interest among underserved groups and in congressional districts from which the academy receives less interest."[74]

A recent GAO report found that "military academy preparatory schools operated by each military department are another key source of outreach and recruiting . . . demographic groups at service academies." That same report found that "in recent years more than 60% of those who attended the Naval Academy Preparatory School have been students from underrepresented demographic groups, according to Naval Academy officials."[75] To put that into perspective, there were 1,184 members of the Class of 2026 admitted to the Naval Academy. Of those, 195 were graduates of NAPS, or 16.4% of the entire class. That means that 117 (60%) of the 195 NAPS graduates were from underrepresented demographic groups.

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68. Proclamation No. 13985, 86 Fed. Reg 7009 (Jan. 20, 2021); Proclamation No. 14035, 86 Fed. Reg. 34593 (June 25, 2021).
69. *Id*.
70. Proclamation No. 13583, 76 Fed. Reg. 52847 (Aug. 18, 2011).
71. *See* Proclamation No. 14035, 86 Fed. Reg. 34593 (June 25, 2021).
72. *See Service Academies*, *supra* note 18, at 50.
73. *Id*.
74. *Id*. at 51.
75. *Id*.

## II. THE SUPREME COURT'S *FAIR ADMISSIONS* DECISION

### *A. The Content of Equal Protection Law*

The Court began its analysis in *Fair Admissions* by chronicling the historical treatment of race under American law.[76]

As the Court recalled, this history began not long after the Fourteenth Amendment became law. In *Strauder v. West Virginia*, the Court held that "the law in the States shall be the same for the black as for the white" and that "all persons, whether colored or white, shall stand equal before the laws of the States."[77] Six years later, the Court reiterated in *Yick Wo v. Hopkins* that what the law deems "not justified" is "hostility to . . . race and nationality,"[78] which, in *Truax v. Raich*, encompassed hostility to "a native of Austria."[79] In 1896, however, the Court did an about-face in *Plessy v. Ferguson*, ruling that "separate but equal" treatment of the races was permissible.[80] Thus began a 50-plus year period in which the Court allowed, for example, separate educational tracks for whites and blacks. Over time, however, the Court recognized and sought to limit "the perniciousness" of that doctrine.[81] In 1954, the Court admitted the error of its ways, ruling in *Brown v. Board of Education* that blacks could not be denied admission because of their race to the same elementary schools open to whites. In the Court's words, the right to a public education "must be made available to all on equal terms."[82]

Settling on this point of the history, the Court found that this rule, and the equal treatment principle that underlay it, reflected the "core purpose of the Equal Protection Clause: doing away with all governmentally imposed discrimination based on race."[83] Moreover, the equal protection principle was transitive: everyone was entitled to the same protection; no one was forced to endure a "separate but equal" status because separation always renders its victim unequal. As the Court in *Fair Admissions* summarized:

> Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies without regard to any

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76. *Students for Fair Admissions v. President and Fellows of Harvard College*, 600 U.S. 181, 201–13 (2023).

77. 100 U.S. 303, 307–08 (1880).

78. 118 U.S. 365, 368-69, 373–74 (1886).

79. 239 U.S. 33, 36 (1915).

80. 163 U.S. 537 (1896). For a contemporary discussion of why *Plessy* was wrong and why today's woke racialists simply repeat the same mistake it made, see GianCarlo Canaparo, *Permission to Hate: Antiracism and* Plessy, 27 TEX. REV. L. & POL. 97 (2023).

81. *Fair Admissions*, 600 U.S. at 205 ("In the decades that followed, this Court continued to vindicate the Constitution's pledge of racial equality. Laws dividing parks and golf courses; neighborhoods and businesses; buses and trains; schools and juries were undone, all by a transformative promise stemming from our American ideal of fairness: the Constitution forbids discrimination by the General Government, or by the States, against any citizen because of his race.") (punctuation omitted).

82. *Brown*, 347 U.S. 483, 493 (1954).

83. *Fair Admissions*, 600 U.S. at 206 (punctuation omitted).

> differences of race, of color, or of nationality—it is universal in its application. For the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.[84]

Equal treatment, accordingly, truly requires *equal* treatment.

As the Court explained, "[a]ny exception to the Constitution's demand for equal protection"—regardless of the race or ethnicity of the party benefited or injured—"must survive a daunting two-step examination" called "strict scrutiny."[85] The exception must be in service of a compelling government interest, and the use of race must be necessary to achieve that goal.[86] It is "rare" for a distinction to pass that test,[87] and there is a powerful reason why: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[88] The only two instances in which the Supreme Court has found the "rare" or "the most extraordinary case"[89] satisfying those requirements are these: (1) "remediating specific, identified instances of past discrimination that violated the Constitution or a statute," and (2) "avoiding imminent and serious risks to human safety in prisons, such as a race riot."[90] Otherwise, the principle forbidding different treatment due to race or ethnicity is a fixed and absolute bar to such discrimination.

### *B. The Pre-*Fair Admissions *Case Law Governing Post-secondary School Admissions*

The Court then canvased its precedents addressing whether, and, if so, how, "a university may make admissions decisions that turn on an applicant's race."[91] The Court's first case—*Regents of University of California v. Bakke*, decided in 1978—involved the admissions program at the University of California, Davis, medical school, which set aside 16 of 100 seats for certain minority groups, who were evaluated separately from the other applicants.[92] The result was a badly splintered ruling with no majority opinion for the Court.[93] Justice Lewis Powell wrote the lead opinion, but no other justice joined it. He rejected as insufficiently compelling three of the justifications that the school offered for its set-aside: remedying the historical shortage of minority physicians, remedying the effects of societal discrimination against minorities, and ensuring that an adequate number

84. *Id.* (citations and punctuation omitted).
85. *Id.*
86. *Id.* at 206–07
87. *Id.* at 208.
88. *Id.* (citations omitted).
89. *Id.* at 207–08 (citations and punctuation omitted).
90. *Id.* at 207; *see also id.* at 248–52 (Thomas, J., concurring).
91. *Id.* at 208; *see id.* at 208–13.
92. 438 U.S. 265, 275 (1978).
93. *Fair Admissions*, 600 U.S. at 208.

of physicians would be available to practice in underserved areas.[94] The only asserted state interest he found compelling—the desire to secure the educational benefits resulting from a racially diverse student body—could draw on First Amendment Free Speech overtones.[95] Nonetheless, the university was limited in the options it could use to further that goal. A quota system was impermissible, as was a multitrack admissions process.[96] Race could be considered as "a 'plus' in a particular applicant's file," but only as part of "all pertinent elements of diversity" given an applicant's overall qualifications.[97]

Not surprisingly, the Court's *Bakke* decision settled little.

The Court revisited the issue 25 years later in *Grutter v. Bollinger*, a case involving the University of Michigan law school.[98] There, in an opinion that "tracked Justice Powell's in many respects,"[99] Justice Sandra Day O'Connor wrote for a five-justice majority that the Michigan law school admission process passed muster. Michigan could determine that racial diversity was "essential" to its educational mission, but it could not use quotas or separate majority-minority admission tracks.[100] Nor could it rely on the belief that there was independent surpassing value in having "some specified percentage of a particular group merely because of its race or ethnic origin."[101] Those limitations were necessary "to guard against two dangers that all race-based government action portends": viz., (1) "the risk that the use of race will devolve into 'illegitimate . . . stereotyping,'" and (2) the danger that "race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference."[102] The Court ended its discussion of its precedent with "the following" caution noted in *Grutter* in 2003: "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[103]

That optimism was unjustified.

### *C. The* Fair Admissions *Decision*

In *Fair Admissions*, the Court ruled that the Harvard and UNC admissions programs—"however well-intentioned and implemented in good faith" they might have been—could not satisfy the "strict scrutiny" that the Equal Protection

94. *Bakke*, 438 U.S. at 306–10 (opinion of Powell, J.).
95. *Id.* at 311–18 (opinion of Powell, J.).
96. *Id.* at 315–18 (opinion of Powell, J.).
97. *Id.* at 317.
98. 539 U.S. 306 (2003).
99. Students for Fair Admissions v. Harvard College, 600 U.S. 181, 211 (2023).
100. *Grutter*, 539 U.S. at 328–34; *Fair Admissions*, 600 U.S. at 211.
101. *Grutter*, 539 U.S. at 329–30; *Fair Admissions*, 600 U.S. at 211.
102. *Fair Admissions*, 600 U.S. at 212 (citations and punctuation omitted).
103. *Grutter*, 539 U.S. at 343.

Clause demands for a race-based program to survive judicial review.[104] Those programs fell short for several reasons: *First*, the Harvard and UNC programs could not survive the "strict scrutiny" that settled Supreme Court case law demands because "the interests they sought to be compelling cannot be subjected to meaningful judicial review," and the "opaque racial categories" and gauzy sociological goals the schools claimed they sought to attain "are not sufficiently coherent for purposes of strict scrutiny" and in fact "are inescapably imponderable."[105] *Second*, those programs "use race as a stereotype or negative."[106] *Third*, those programs had "no end . . . in sight" for their reliance on race in admissions.[107]

### 1. The Harvard and UNC Race-Based Admissions Programs Were Not Susceptible to Judicial Review

Start with the first flaw. The two schools sought to achieve a handful of "educational benefits" from their admissions program, such as "training future leaders" in "an increasingly pluralistic society" and "enhancing appreciation, respect, and empathy," as well as "cross-racial understanding."[108] The flaw in those goals was that "the interests" that Harvard and UNC saw as compelling, while "commendable," nonetheless "are not sufficiently coherent for purposes of strict scrutiny."[109] Why?—Because they "cannot be subjected to meaningful judicial review" due to the inherently uncertain definition of success or failure in attaining a goal. As the Court put it, "[h]ow is a court to know whether leaders have been adequately 'train[ed]'; whether the exchange of ideas is 'robust'; or whether 'new knowledge' is being developed?"[110] On top of these ambiguities, another concern was whether and how those interests were served.[111] Those "inquiries" were necessary to gauge the effectiveness of the Harvard and UNC programs, but they were also ones that "no court could resolve."[112]

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104. *Fair Admissions*, 600 U.S. at 213.

105. *Id.* at 214–15, 217.

106. *Id.* at 213, 218–19.

107. *See id.* at 221–25.

108. "Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors; (2) preparing graduates to adapt to an increasingly pluralistic society; (3) better educating its students through diversity; and (4) producing new knowledge stemming from diverse outlooks. . . . UNC points to similar benefits, namely, (1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes." *Fair Admissions*, 600 U.S. at 214 (citations and punctuation omitted).

109. *Id.*

110. *Id.*

111. *Id.* at 214–15.

112. *Id.*

Only judicially measurable goals could possibly qualify as compelling.[113]

The Harvard and UNC programs also "fail[ed] to articulate a meaningful connection between the means they employ and the goals they pursue."[114] Both universities fit applicants into one (or more) of six racial categories—which themselves were imprecise, overbroad, underinclusive, and (though it therefore might have been redundant to add) arbitrary[115]—without proving that the

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113. As the Court elaborated:

> Comparing respondents' asserted goals to interests we have recognized as compelling further illustrates their elusive nature. In the context of racial violence in a prison, for example, courts can ask whether temporary racial segregation of inmates will prevent harm to those in the prison. See *Johnson* [v. *California*], 543 U.S. [499,] 512–513 [(2005)]. When it comes to workplace discrimination, courts can ask whether a race-based benefit makes members of the discriminated class "whole for [the] injuries [they] suffered." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (internal quotation marks omitted). And in school segregation cases, courts can determine whether any race-based remedial action produces a distribution of students "compar[able] to what it would have been in the absence of such constitutional violations." *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 420 (1977).
>
> Nothing like that is possible when it comes to evaluating the interests respondents assert here. Unlike discerning whether a prisoner will be injured or whether an employee should receive backpay, the question whether a particular mix of minority students produces "engaged and productive citizens," sufficiently "enhance[s] appreciation, respect, and empathy," or effectively "train[s] future leaders" is standardless. [*UNC*,] 567 F. Supp. 3d at 656; [*Harvard*,] 980 F.3d at 173–174. The interests that respondents seek, though plainly worthy, are inescapably imponderable.

*Fair Admissions*, 600 U.S. at 215.

114. *Id.*

115. *Id.* at 216–17:

> To achieve the educational benefits of diversity, UNC works to avoid the underrepresentation of minority groups, 567 F.Supp.3d at 591–592, and n. 7, while Harvard likewise "guard[s] against inadvertent drop-offs in representation" of certain minority groups from year to year, Brief for Respondent in No. 20–1199, at 16. To accomplish both of those goals, in turn, the universities measure the racial composition of their classes using the following categories: (1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American. See, *e.g.*, 397 F.Supp.3d at 137, 178; 3 App. in No. 20–1199, at 1278, 1280–1283; 3 App. in No. 21–707, at 1234–1241. It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.
>
> For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as "Hispanic," are arbitrary or undefined. See, *e.g.*, M. Lopez, J. Krogstad, & J. Passel, Pew Research Center, Who is Hispanic? (Sept. 15, 2022) (referencing the "long history of changing labels [and] shifting categories . . . reflect[ing] evolving cultural norms about what it means to be Hispanic or Latino in the U. S. today"). And still other categories are underinclusive. When asked at oral argument "how are applicants from Middle Eastern countries classified, [such as] Jordan, Iraq, Iran, [and] Egypt," UNC's counsel responded, "[I] do not know the answer to that question." Tr. of Oral Arg. in No. 21–707, p. 107; cf. *post*, at [2210 – 2211] (GORSUCH, J., concurring) (detailing the "incoherent" and "irrational stereotypes" that these racial categories further).
>
> Indeed, the use of these opaque racial categories undermines, instead of promotes, respondents' goals. By focusing on underrepresentation, respondents would apparently prefer a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply because the former contains more Hispanic students than the latter. Yet "[i]t is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is 'broadly diverse.'" *Parents Involved*, 551 U.S. at 724 (quoting *Grutter*, 539 U.S. at 329). And given the mismatch between the means respondents employ and the

assignment "furthers the educational benefits that the universities claim to pursue."[116] Moreover, "given the mismatch between the means respondents employ and the goals they seek, it is especially hard to understand how courts are supposed to scrutinize the admissions programs that respondents use."[117]

In the face of those criticisms, rather than offer factual proof that their categorizations advanced their asserted goals, "[t]he universities' main response . . . is, essentially, 'trust us.'"[118] Yet, the Court noted that "deference does not imply abandonment or abdication of judicial review."[119] The Court went on to make that point quite forcefully:

> Universities may define their missions as they see fit. The Constitution defines ours. Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. As this Court has repeatedly reaffirmed, racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification. . . . The programs at issue here do not satisfy that standard.[120]

### 2. The Harvard and UNC Race-Based Admissions Programs Used an Applicant's Race as a Negative Factor and Operated as a Stereotype

The race of some applicants clearly disadvantaged them. For example, Harvard's policy "result[ed] in fewer Asian American and white students being admitted."[121] That result could not be compared with the result of a race-neutral admissions policy. For example, a student's failure to persuade the admissions committee that he or she would excel in some aspect of life at Harvard is a race-neutral criterion for selecting someone else.[122] Indeed, the Court noted that the alleged comparison was risible.[123] It was also no defense, the Court concluded, that only a small number of applicants were prejudiced. Aside from the fact that "race is determinative for at least some—if not many—of the students," as

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> goals they seek, it is especially hard to understand how courts are supposed to scrutinize the admissions programs that respondents use.

116. *Id.* at 216.
117. *Id.* at 217.
118. *Id.*
119. *Id.* (citing Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)).
120. *Id.* at 217–18 (citation and punctuation omitted).
121. *Id.* at 218 (citation omitted; punctuation omitted and modified).
122. *Id.*
123. *Id.* at 218–19:

> [O]n Harvard's logic, while it gives preferences to applicants with high grades and test scores, "that does not mean it is a 'negative'" to be a student with lower grades and lower test scores. . . . This understanding of the admissions process is hard to take seriously. College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.

Harvard admitted, a negative factor remains a negative factor even if only a few people are disadvantaged. "The equal protection of the laws is not achieved through indiscriminate imposition of inequalities."[124] Nor could Harvard and UNC justify discrimination on the ground that minority students characteristically express a minority or unique viewpoint. The Court had rejected that defense in *Grutter*, the Court pointed out, and it didn't get better with time.[125] "The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well."[126]

### 3. The Harvard and UNC Race-Based Admissions Programs Had No Logical Stopping Point

The *coup de grâce* to these programs was that they "lack[ed] a logical end point."[127] The evidence showed that Harvard and UNC programs operated on the basis of numerical preferences to ensure that a small but "tight band" of minorities are admitted[128]—a practice that was tantamount to "outright racial balancing" which the Court had previously declared was "patently unconstitutional."[129] By arguing that they would cease to discriminate "only when some rough percentage of various racial groups is admitted," Harvard and UNC effectively guaranteed that "race will always be relevant" and that "the ultimate goal of eliminating race as a criterion will never be achieved."[130] The schools' alternative end point—namely, that they would cease their racial discrimination once "students nevertheless receive the educational benefits of diversity"—also lacked merit, because "it is not clear how a court is supposed to determine when

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124. *Id*. (citation omitted; punctuation omitted and modified).
125. *Id*. at 219–20:

> Respondents' admissions programs are infirm for a second reason as well. We have long held that universities may not operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U.S. at 333 (internal quotation marks omitted). That requirement is found throughout our Equal Protection Clause jurisprudence more generally. . . . Yet by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping. The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that "a black student can usually bring something that a white person cannot offer." *Bakke*, 438 U.S. at 316 (opinion of Powell, J.) (internal quotation marks omitted); see also Tr. of Oral Arg. in No. 20–1199, at 92. UNC is much the same. It argues that race in itself "says [something] about who you are." Tr. of Oral Arg. in No. 21–707, at 97; see also *id*., at 96 (analogizing being of a certain race to being from a rural area).
>
> We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those who may have little in common with one another but the color of their skin.

126. *Id*. at 220.
127. *Id*. at 221 (citation and punctuation omitted).
128. *Id*. at 222–23.
129. *Id*. at 223 (citation omitted; punctuation omitted and modified).
130. *Id*. at 223–24 (citation omitted; punctuation omitted).

stereotypes have broken down or 'productive citizens and leaders'" have been created.[131]

The universities' last battlement—viz. that they must be allowed to continue their discrimination because *Grutter* had promised them that they could do so for another 25 years, or until 2028—also did not stand for long. The expectation that *Grutter* expressed that its rule would become unnecessary by 2028 had been "oversold" because it was quite obvious that "[n]either Harvard nor UNC believes that race-based admissions will in fact be unnecessary in five years, and both universities thus expect to continue using race as a criterion well beyond the time limit that *Grutter* suggested."[132] In fact, "Harvard concedes that its race-based admissions program has no end point."[133]

4. The Arguments Made in the Dissents in Favor of the Harvard and UNC Race-Based Admissions Programs Conflicted with Supreme Court Precedent

The *Fair Admissions* majority then turned to arguments made in the dissents, arguments that bring to mind a joke attributed to Judge Henry Friendly when he was a partner at a Wall Street law firm. After reviewing an associate's legal memorandum, Friendly commented that it was both good and novel. Unfortunately, the parts that were good were not novel, and the parts that were novel were not good. The majority thought much the same of the arguments advanced by the dissenting justices.

"The dissents' interpretation of the Equal Protection Clause is not new," Chief Justice Roberts noted, and had been rejected in the Court's precedents.[134] "The dissents here do not acknowledge any of this. They fail to cite [the relevant precedents]. . . . They fail to mention that the entirety of their analysis of the Equal Protection Clause—the statistics, the cases, the history—has been considered and rejected before."[135] Atop that, the Court noted, the dissents would pick and choose among the races and ethnicities that can be made beneficiaries or losers of racial discrimination.

> Most troubling of all is what the dissent must make these omissions to defend: a judiciary that picks winners and losers based on the color of their skin. While the dissent would certainly not permit university programs that discriminated *against* black and Latino applicants, it is perfectly willing to let the programs here continue. In its view, this Court is supposed to tell state actors when they have picked the right races to benefit. Separate but equal is "*inherently* unequal," said *Brown*. . . . It depends, says the dissent.[136]

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131. *Id.* at 224.

132. *Id.*

133. *Id.* at 225.

134. *Id.* at 226 (citing Regents of Univ. of California v. Bakke, 438 U.S. 265, 307, 310 (1978); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); and Shaw v. Hunt, 517 U.S. 899 (1996)).

135. *Id.* at 227.

136. *Id.* at 229 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954)) (emphasis added in *Fair Admissions*).

## III. THE APPLICATION OF *FAIR ADMISSIONS* TO THE U.S. SERVICE ACADEMIES' ADMISSIONS DECISIONS

As noted above, the majority and dissenting opinions jousted over the application of the majority's rule to the U.S. service academies, which were not parties to the case. Technically speaking, the result was to leave for another case to be decided another day whether, and, if so, how, the Supreme Court's *Fair Admissions* ruling applies to the service academies. It turns out, however, that this question has a straightforward answer that follows from well-settled precedent and that should not be controversial when fairly examined.

### *A. The Exchange in* Fair Admissions *Between the Majority and Justice Sotomayor*

To answer that question, it is important to start with the exchange between Justice Sotomayor and Chief Justice Roberts. In her dissent, Justice Sotomayor argued that the United States has used, and may lawfully use, race in making admissions decisions in regard to the service academies because the nation has a compelling interest in ensuring a racially balanced pool of military officers.[137] If so, post-secondary schools that have Reserve Officer Training Corps (ROTC) programs should also be free to make race-based admission decisions. And if that is true, it stands to reason other colleges should be able to make the same type of admission decisions.[138]

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137. *Fair Admissions*, 600 U.S. at 379–80 (Sotomayor, J., dissenting).

138. It is worth repeating what she wrote:

> The majority does not dispute that some uses of race are constitutionally permissible. See *ante*, at [2161–2162]. Indeed, it agrees that a limited use of race is permissible in some college admissions programs. In a footnote, the Court exempts military academies from its ruling in light of "the potentially distinct interests" they may present. *Ante*, at [2166], n. 4. To the extent the Court suggests national security interests are "distinct," those interests cannot explain the Court's narrow exemption, as national security interests are also implicated at civilian universities. See *infra*, at [2260–2261], 358 U.S. 54. The Court also attempts to justify its carveout based on the fact that "[n]o military academy is a party to these cases." *Ante*, at [2166] n. 4. Yet the same can be said of many other institutions that are not parties here, including the religious universities supporting respondents, which the Court does not similarly exempt from its sweeping opinion. See Brief for Georgetown University et al. as *Amici Curiae* 18–29 (Georgetown Brief) (Catholic colleges and universities noting that they rely on the use of race in their holistic admissions to further not just their academic goals, but also their religious missions); see also *Harvard II*, 980 F.3d at 187, n. 24 ("[S]chools that consider race are diverse on numerous dimensions, including in terms of religious affiliation, location, size, and courses of study offered"). The Court's carveout only highlights the arbitrariness of its decision and further proves that the Fourteenth Amendment does not categorically prohibit the use of race in college admissions.
>
> . . . .
>
> The costly result of today's decision harms not just respondents and students but also our institutions and democratic society more broadly. Dozens of *amici* from nearly every sector of society agree that the absence of race-conscious college admissions will decrease the pipeline of racially diverse college graduates to crucial professions. Those *amici* include the United States, which emphasizes the need for diversity in the Nation's military, see United States Brief 12–18, and in the federal workforce more generally, *id.*, at 19–20 (discussing various federal agencies, including the Federal Bureau of Investigation and the Office of the Director of National Intelligence). The United States explains that "the Nation's military strength and readiness depend on a pipeline of officers who are both highly qualified and racially diverse—and who have been educated in diverse

Chief Justice Roberts responded to that argument in footnote 4 of the majority opinion, saying the following:

> The United States as *amicus curiae* contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.[139]

Based on that exchange, some will argue that the *Fair Admissions* decision does not apply to the U.S. service academies. The next section addresses that argument. To put it politely, however, that argument is flatly wrong.

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environments that prepare them to lead increasingly diverse forces." *Id*., at 12. That is true not just at the military service academies but "at civilian universities, including Harvard, that host Reserve Officers' Training Corps (ROTC) programs and educate students who go on to become officers." *Ibid*. Top former military leaders agree. See Brief for Adm. Charles S. Abbot et al. as *Amici Curiae* 3 (noting that in *amici*'s "professional judgment, the status quo—which permits service academies and civilian universities to consider racial diversity as one factor among many in their admissions practices—is essential to the continued vitality of the U.S. military.

Indeed, history teaches that racial diversity is a national security imperative. During the Vietnam War, for example, lack of racial diversity "threatened the integrity and performance of the Nation's military" because it fueled "perceptions of racial/ethnic minorities serving as 'cannon fodder' for white military leaders." Military Leadership Diversity Comm'n, From Representation to Inclusion: Diversity Leadership for the 21st-Century Military xvi, 15 (2011); see also, *e.g*., R. Stillman, Racial Unrest in the Military: The Challenge and the Response, 34 Pub. Admin. Rev. 221, 221–222 (1974) (discussing other examples of racial unrest). Based on "lessons from decades of battlefield experience," it has been the "longstanding military judgment" across administrations that racial diversity "is essential to achieving a mission-ready" military and to ensuring the Nation's "ability to compete, deter, and win in today's increasingly complex global security environment." United States Brief 13 (internal quotation marks omitted). The majority recognizes the compelling need for diversity in the military and the national security implications at stake, see *ante*, at 2166, n. 4, but it ends race-conscious college admissions at civilian universities implicating those interests anyway.

*Fair Admissions*, 600 U.S. at 355, 378–80 (Sotomayor, J., dissenting).

As an aside, Justice Sotomayor's (incomplete) citation to *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958), *summarily aff'g*, 252 F.2d 122 (5th Cir. 1958), is mystifying. *Detiege* was a summary affirmance of a lower court ruling declaring unconstitutional and enjoining enforcement of a municipality's refusal to make a New Orleans park available to blacks. The U.S. District Court for the Eastern District of Louisiana and the U.S. Court of Appeals for the Fifth Circuit held the practice unconstitutional on the basis of the Supreme Court's summary rulings in *Holmes v. City of Atlanta*, 350 U.S. 879 (1955), and *Mayor & City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955), *summarily aff'g* 220 F.2d 386 (4th Cir. 1955), *aff'g Lonesome v. Maxwell*, 123 F. Supp. 193 (D. Md. 1954). Those cases also involved restrictions on the use by blacks of public facilities such as city parks. None of those cases involved the U.S. military, and none held the municipal restrictions unconstitutional on the ground that the nation has a compelling interest in using race in admissions to the service academies. The only explanation for the reference to *Detiege* in Justice Sotomayor's dissent—supported by the fact that the citation is cryptic, at best—is that she forgot to delete it from an earlier draft when the majority likely pointed out its irrelevance to military academy admissions.

139. *Id*. at 213 n.4.

### *B. Foundational Premises*

At the outset, it is important to understand the correct, but limited, point that the Chief Justice made in that footnote. None of the service academies was a party to the *Fair Admissions* case, so none of them will be named in the corrected judgment that the respective district courts by now will have entered on remand to reflect the Supreme Court's decision.[140] That proposition is significant for a reason few nonlawyers likely understand. Were the presidents of Harvard and UNC, overtly or through subterfuge, to stiff arm the Supreme Court,[141] the district courts in the separate cases combined and decided in *Fair Admissions* can hold those individuals in contempt for disobeying the judgments. By contrast, because the service academies were not parties to the *Fair Admissions* case, no court may hold the superintendents of those academies in contempt for refusing to modify their admissions policies to conform with the law that now governs post-secondary admissions decisions. If those superintendents, or the President, as Commander-in-Chief, were to disregard the Court's *Fair Admissions* decision, an aggrieved party would need to file a new lawsuit to obtain relief.

Consider now several incontrovertible points. One is that the Supreme Court's Equal Protection Clause ruling in *Fair Admissions* is the law of the land, binding on every post-secondary school operated by a state or the federal government and any such private school that receives federal educational funds. It has been black-letter law since the Supreme Court's 1803 decision in *Marbury v. Madison* that the Supreme Court can and must "say what the law is."[142] The same goes for the proposition that the Court's holdings are and remain the law unless and until the Court itself overturns its decisions.[143] As a unanimous Court put it not long ago, "it is this Court's prerogative alone to overrule one of its precedents."[144]

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140. *See* Fed. R. Civ. P. 52(a) (requiring findings of fact and conclusions of law in a case tried without a jury); *id.* 54(b)–(c) (noting that a final judgment "should grant the relief to which each party is entitled"); *id.* 58(a) (stating the general rule that "[e]very judgment and amended judgment must be set out in a separate document" and listing certain limited exceptions); Williams v. Zbaraz, 448 U.S. 358, 367–68 (1980) (ruling that a federal court lacks Article III jurisdiction to grant relief to a party on a claim not made in its complaint).

141. *See supra* note 14.

142. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("[I]t is emphatically the province and duty of the judicial department to say what the law is."). The Court has often reiterated that proposition, including this past term. *See*, *e.g.*, Moore v. Harper, 143 S. Ct. 2065, 2079–80 (2023); Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) (quoting *Marbury*); Kisor v. Wilkie, 139 S. Ct. 2400, 2432 (2019) (Gorsuch, J., concurring) ("Determining the meaning of a statute or regulation, of course, presents a classic legal question."); *id.* at 2437–43 (Gorsuch, J., concurring) (noting that Article III grants the courts the power to authoritatively interpret the law); Bank Markazi v. Peterson, 578 U.S. 212, 225–26 (2016); United States v. Windsor, 570 U.S. 744, 762 (2013); City of Boerne v. Flores, 521 U.S. 507, 524 (1997); Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 218–19 (1995). It is also the case, as the majority noted in *Fair Admissions*, that "[a] dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion." *Fair Admissions*, 600 U.S. at 230.

143. *See*, *e.g.*, Bosse v. Oklahoma, 580 U.S. 1, 3 (2016); United States v. Hatter, 532 U.S. 557, 567 (2001); State Oil v. Khan, 522 U.S. 3, 20 (1997); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

144. *Bosse*, 580 U.S. at 3 (citation and punctuation omitted).

The second point is that each of the service academies must operate consistently with the law set forth in *Fair Admissions*. None of those institutions is exempt from the rulings adopted there,[145] nor is the President, despite his Article II role as Commander-in-Chief.[146] The Supreme Court has made it clear that the Due Process Clause incorporates and applies to the federal government the same antidiscrimination rules and principles that the Equal Protection Clause imposes on the states. The Court first announced that proposition in *Bolling v. Sharpe*, a companion case to *Brown v. Board of Education*, ruling that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on a state to afford everyone the equal protection of the law.[147] Since then, the Court has repeatedly reaffirmed that principle.[148] That rule is well-nigh indisputable.

Third, it is noteworthy that the *Fair Admissions* majority said that any possible exemption from its ruling applied *only to the federal service academies*. The majority quite clearly did *not* include public or private schools that offer Reserve Officer Training Corps (ROTC) programs to students. That omission certainly was intentional. Why? Because the *Fair Admissions* majority could not have missed the importance of failing to identify post-secondary institutions with ROTC programs from its potential exemption for the service academies. In its amicus brief, the United States had argued that *both* the service academies *and* other post-secondary officer-training schools should be free to treat race as a dispositive factor in admissions because the nation needs to have an officer corps reflecting the nation's racial makeup, and both the service academies and ROTC

145. *Cf.*, *e.g.*, Am. Tradition P'ship, Inc. v. Bullock, 567 U.S. 516, 516 (2012) ("A Montana state law provides that a corporation may not make an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party. . . . In *Citizens United v. Federal Election Comm'n,* 558 U.S. 310 (2010), this Court struck down a similar federal law, holding that political speech does not lose First Amendment protection simply because its source is a corporation. . . . The question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does. See U.S. Const., Art. VI, cl. 2.") (citations and punctuation omitted).

146. *See* United States v. Lee, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."); *see also*, *e.g.*, Trump v. Vance, 140 S. Ct. 2412 (2020); United States v. Nixon, 418 U.S. 683 (1974); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

147. 347 U.S. 497, 499–500 (1954).

148. *E.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 201 (1995); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975); Jimenez v. Weinberger, 417 U.S. 628, 637 (1974); Frontiero v. Richardson, 411 U.S. 677, 6890 n.5 (1973) (plurality opinion); Schneider v. Rusk, 377 U.S. 163, 168 (1964); *see* Chapman v. United States, 500 U.S. 453, 465 (1991); Jones v. United States, 463 U.S. 354, 362 n.10 (1983); Shapiro v. Thompson, 394 U.S. 618, 641–42 (1969).

programs develop future officers.[149] Moreover, in her dissent, which was joined by Justices Elena Kagan and Ketanji Brown Jackson, Justice Sotomayor expressly noted that ROTC programs are now directly subject to the majority's ruling. Quoting from the Solicitor General's amicus brief, she argued that the need for diversity "is true not just at the military service academies but 'at civilian universities, including Harvard, that host Reserve Officers' Training Corps (ROTC) programs and educate students who go on to become officers.'"[150] Accordingly, the Supreme Court certainly knew the distinction between the service academies and the ROTC programs at other institutions, and the Court expressly limited any possible exemption to the former.

That limitation is an important one. The United States noted in its amicus brief that "[a]pproximately 19% of military officers come from the service academies."[151] Of course, the flip side of that fact is that more than 80% of officers graduate from other post-secondary schools or officer candidate schools, which, going forward, must now comply with the Court's ruling in *Fair Admissions*. Accordingly, any attempt to justify continuing racial discrimination by the service academies must explain why a special rule is necessary for only one-fifth of the officer corps that America's post-secondary schools graduate.

## IV. MAY THE MILITARY EVER CONSIDER RACE IN ITS DECISIONS?

There are occasions in which the *armed forces* will need to consider race when making assignments *for certain mission-specific operational purposes in the field*. But there is no need, and certainly not a compelling one, for the *service academies* to use race-based admissions policies *when selecting students for admission*.

### *A. Selection Decisions for Particular Military Tasks*

There are limited instances in which one or more branches of the armed forces must make a race-based judgment in selecting personnel for a particular task. For example, among the careers that U.S. Army officers can attempt to pursue is becoming a member of Special Forces, such as the Green Berets. While Special Forces soldiers have "a variety of missions," their "primary focus" is "on preventing terrorism through conducting surveillance and developing defense capabilities."[152] The "special reconnaissance" element of that mission is to "[c]onduct surveillance in hostile, denied, or diplomatically or politically sensitive environments,

149. The appendix to this Legal Memorandum reprints the relevant portion of the argument that the United States made in its amicus brief in *Fair Admissions*.

150. Students for Fair Admissions v. Harvard College, 600 U.S. 181, 379 (2023) (Sotomayor, J., dissenting) (quoting Brief for Caroline D. Krass et al. as Amici Curiae Supporting Respondents at 12, Students for Fair Admissions v. Harvard College, 600 U.S. 181 (2023) (No. 20-1199)).

151. Brief for Caroline D. Krass et al. as Amici Curiae Supporting Respondents at 16, Students for Fair Admissions v. Harvard College, 600 U.S. 181 (2023) (No. 20-1199) (citing OFFICE OF THE UNDER SEC'Y OF DEF., Personnel & Readiness, DoD, *Active Component Commissioned Officer Corps, FY18: By Source of Commission, Service, Gender, and Race/Ethnicity*, App. B, Tbl. B-33, at 96 (2018)).

152. U.S. ARMY, Special Forces, https://www.goarmy.com/careers-and-jobs/specialty-careers/special-ops/special-forces.html [https://perma.cc/U5DN-VVL3] (last visited July 27, 2023).

to collect or verify information of strategic significance," by "infiltrating enemy lines through quiet, guerrilla war-style tactics."[153] Critical to the success of that task might be the ability to blend into whatever racial or ethnic makeup a particular nation or locality might have. If you need to infiltrate someone into China to gather intelligence, a person is far less likely to attract attention if he looks Chinese rather than Swedish. In circumstances like those, racial or ethnic considerations have a mission-critical importance if the task is to be accomplished effectively and the assigned personnel able to return safely. Moreover, no reasonable person passed over for such an assignment would deem the decision to be an adverse judgment about his or her moral status as an individual. On the contrary, he or she would assuredly understand and appreciate the mission-critical, life-saving nature of the decision's basis.

Decisions like those are also standard practice in civilian law enforcement and the intelligence community. The government has a compelling need to gather intelligence from secretive criminal organizations, like the Mexican Drug Trafficking Organizations (DTOs), or foreign nations, like China. Unlike violent crimes, such as robbery or assault, where there is an obvious victim who can and will report what happened, vice crimes and intelligence operations generally do not have a specific victim who is willing to or can publicly report what has happened. Private organizations like the Mexican DTOs and national intelligence services like those in China also do not broadcast the plans of their operations or whereabouts of their personnel. Undercover operations are an important, commonly used means of obtaining the information necessary to prevent a crime, stop a terrorist attack, or apprehend the perpetrators.[154]

That longstanding practice is both legitimate and essential for effective enforcement of the criminal law and pursuit of intelligence-gathering objectives.[155] The Supreme Court has recognized that the nation has a compelling

153. *Id.*

154. *See, e.g.*, MICHAEL MCGOWAN & RALPH PEZZULLO, GHOST: MY THIRTY YEARS AS AN FBI UNDERCOVER AGENT (2018); JOSEPH D. PISTONE, DONNIE BRASCO: MY UNDERCOVER LIFE IN THE MAFIA (1988).

155. As one of us has argued before:

> [S]ome offenses cannot be investigated without a federal law enforcement officer becoming involved with suspected offenders and committing criminal acts. Vice crimes, criminal conspiracies, and organized criminal enterprises pose special problems for law enforcement authorities that were unknown in 1787. Vice offenses are materially different from common law crimes such as murder, rape, robbery, or burglary. The latter have distinctly identifiable, injured victims. By contrast, vice crimes are often (albeit mistakenly) called "victimless crimes" because the parties commit those offenses by mutual agreement. Accordingly, there generally is no one to report the transfer of a controlled substance (like heroin) from a willing seller to a willing buyer. Moreover, secrecy is essential to the successful execution of conspiracies and ongoing criminal enterprises, so those crimes make it difficult for law enforcement to disrupt their schemes without being privy to gang members' planning sessions. Law enforcement has sought to prevent those crimes from occurring (or to apprehend the responsible parties) via the modern-day investigatory practice of using undercover agents. That is particularly necessary in the case of drug or organized criminal enterprises. As part of their responsibility "to protect and serve," senior law enforcement officials can, and often do, authorize federal agents or state and local police officers to commit lesser crimes (such as possessing contraband) when engaged in legitimate law enforcement operations (such as

interest in maintaining the secrecy of intelligence and military information. The "state secrets" privilege requires that this secrecy be preserved by dismissal of a lawsuit seeking its disclosure.[156]

To be sure, the Supreme Court has never held that the government has a "compelling interest" in using undercover agents for law enforcement or intelligence purposes. Nonetheless, the Court has often recognized that federal, state, and local law enforcement agencies regularly use this technique, the Court has consistently said that it is a legitimate one,[157] and the justices are savvy enough to know that race plays a critical role in making some undercover decisions.[158] The DEA would not send a Roma Downey-look-a-like to pose as a senior member of a Mexican DTO, and FBI would not ask a black man or woman to pose as an undercover agent within the Ku Klux Klan. Aside from being futile and feckless, any such assignment would obviously lead to the serious injury or death of the law enforcement officer involved.

The same principle applies to intelligence operations. When the target nation or group itself practices racially or ethnically exclusionary discrimination, there

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infiltrating a drug trafficking organization) in order to identify and apprehend individuals who commit greater crimes (such as racketeering). That practice is widely used today by law enforcement agencies of all shapes and sizes.

Paul J. Larkin, *Wholesale-Level Clemency: Reconciling the Pardon and Take Care Clauses*, 19 U. ST. THOMAS L.J. 534, 558 (2023) (footnotes omitted).

156. *See* Totten v. United States, 92 U.S. 105, 105 (1875) ("[T]he President . . . was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy . . . . [P]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."); *see also*, *e.g.*, United States v. Zubaydah, 142 S. Ct. 959 (2022); United States v. Reynolds, 345 U.S. 1, 6–7 (1953); Molerio v. FBI, 749 F.2d 815, 819, 822 (D.C. Cir. 1984) (Scalia, J.); *cf.* Dep't of Navy v. Egan, 484 U.S. 518 (1988).

157. *See* Jacobson v. United States, 503 U.S. 540, 548 (1992) ("[T]here can be no dispute that the Government may use undercover agents to enforce the law. 'It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises.' *Sorrells v. United States,* 287 U.S. 435, 441 (1932)"); *see also*, *e.g.,* United States v. Jimenez Recio, 537 U.S. 270 (2003); Illinois v. Perkins, 496 U.S. 292 (1990); Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973); United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966); Lewis v. United States, 385 U.S. 206 (1966); Lopez v. United States, 373 U.S. 427 (1963); Sherman v. United States, 356 U.S. 369 (1958). The lower federal courts also have not held this practice unlawful, even when the targets are senior elected officials. *See, e.g.*, United States v. Murphy, 642 F.2d 699, 700 (2d Cir. 1980) (Abscam undercover operation); United States v. Myers, 635 F.2d 932, 937–39 (2d Cir. 1980) (same); United States v. Jannotti, 729 F.2d 213, 223–26 (3d Cir. 1984) (same).

158. *See Zubaydah*, 142 S. Ct. at 985 (Gorsuch, J., dissenting) ("There comes a point where we should not be ignorant as judges of what we know to be true as citizens."); Watt v. Indiana, 338 U.S. 49, 52 (1949) (plurality opinion of Frankfurter, J.) ("[T]here comes a point where this Court should not be ignorant as judges of what we know as men."); Child Labor Tax Case, 259 U.S. 20, 37 (1922) (Bailey v. Drexel Furniture Co.) (Taft, C.J.) ("In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?").

is no alternative to limiting undercover assignments to only those types of individuals acceptable to a terrorist group, a Transnational Criminal Organization, or the community in which it might be found. Making assignment decisions based on race or ethnicity in that limited setting is the only effective way to complete a legitimate mission justified by a compelling interest while making sure that law enforcement officers return home safely. In addition, no rational person excluded from any such assignment would feel remotely victimized by the consideration of his or her race as a negative or disqualifying trait.

The same principles apply to the military. In some settings, race or ethnicity can be legitimate considerations in making a mission assignment. Soldiers who cannot blend into a community in Russia, the Middle East, Africa, Southeast Asia, or other areas would not be able successfully to gather intelligence or perform other assigned missions and survive their assignment. Both goals are compelling, and the government cannot achieve them without considering race or ethnicity.[159]

That principle has purchase outside of racial or ethnic factors. For example, exceptionally tall soldiers, sailors, and airmen could not become tank crewmembers, could not serve on a submarine, could not pilot an aircraft or helicopter, and could not operate in other capacities because of their height, regardless of their race or ethnic background.[160] Men could not be used to operate clandestinely among Middle Eastern women, and women could not hope to infiltrate the Taliban or al Qaeda. Marines, soldiers, and sailors who have lost a limb in combat are normally unable to serve in Marine Corps rifle platoon, an Army combat brigade, or in the SEALs, but they might be able to continue to serve in a headquarters or rear position, such as in training, supply, or personnel. There are other scenarios as well in which an unchosen human physical characteristic would prevent someone from carrying out a particular military task.[161] Yet no one would deem any such person morally unfit or inferior because of that feature, which is what racial discrimination under Jim Crow did. It disparaged blacks on the basis of a physical feature that they did not choose and for a reason that was morally repugnant. The same cannot be said if the military, law enforcement or intelligence

159. *See Totten*, 92 U.S. at 105 (quoted *supra* note 156); *Reynolds*, 345 U.S. at 6–7; *cf.* Students for Fair Admissions v. Harvard College, 600 U.S. 181, 207 (2023) (noting that the government has a compelling interest justifying race-based discrimination when necessary to "avoid[] imminent and serious risks to human safety in prisons, such as a race riot"); Johnson v. California, 543 U.S. 499, 512–14 (2005) (same).

160. For example, when the professional basketball player David Robinson was admitted to the Naval Academy, he was six feet eight inches tall, two inches above the maximum permissible height. The Naval Academy superintendent granted Robinson a waiver. Robinson continued to grow while at Annapolis and reached a height of seven feet by the time of his graduation, which prevented him from serving aboard any U.S. Navy ships. Navy Secretary Lehman chose to offer Robinson a commission in the Officers' Sea and Air Mariner Program, and Robinson was commissioned to serve as a civil engineer for two years. U.S. GEN'L ACCOUNTING OFF., *Military Personnel: Treatment of Prominent Athletes on Active Duty* GAO/NSIAD-87-224, at 7–11 (Sept. 1987).

161. Given his height, David Robinson could not have been a Vietnam War "tunnel rat."

communities have legitimate, mission-critical needs for someone of a particular race or ethnic background to accomplish a legitimate mission and return home safely.

### *B. The Service Academies' Admissions Decisions*

Now turn away from battlefield assignments to admissions decisions. Consider first the argument advanced by the United States as amicus curiae in the *Fair Admissions* case. Then, turn to the argument that the government put forward in the litigation over the admissions policies at West Point and Annapolis.

#### 1. The Federal Government's Argument in the *Fair Admissions* Case

The government argued that recruiting a military officer corps matching the racial and ethnic makeup of twenty-first century America is critical to maintaining an effective fighting force.[162] Yet the government was quite short on the specifics, let alone on proof, of why such a prescribed breakdown is necessary. In particular, the government did not explain why having a military that looks like America makes it a better fighting force, why being one race or ethnicity rather than another makes someone a better soldier, sailor, Marine, or airman.

The government said that "[d]uring the Vietnam War, for example, the disparity between the overwhelmingly white officer corps and highly diverse enlisted ranks threatened the integrity and performance of the military."[163] That conclusion, however, is a matter of serious dispute. In 1948, six years before *Brown v. Board of Educatio*n made nondiscrimination in education the law of the land, President Harry Truman issued an executive order abolishing racial discrimination in the military.[164] Fearing racial conflict, the military, particularly the army, was reluctant to integrate units.[165] Yet, when the demands of the Korean War made it critical to reinforce combat units, the army found that black and white soldiers could and did fight together.[166] As a result, even the military came to

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162. *See* App. *infra*.

163. *Id*. (punctuation omitted). That belief is a controversial one, at best.

164. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

165. *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 136–37 (3d rev. ed. 1974) ("Generals and admirals, many of them convinced that it [viz., integration] would not work and fearful or public reaction, nevertheless took their orders and kept news of the revolution from the press. Congressmen entered the conspiracy of silence, so that the full impact of the new policy did not become generally known until 1953.").

166. *See id*. at 137:

> In May 1953 the President received reports that in the navy "Negroes in general service are completely integrated with whites in basic training, technical schools, on the job, in messes and sleeping quarters, ashore and afloat." The air force had integrated about three-fourths of all Negroes in 1,301 mixed Negro-white units and had opened all schools and jobs to both races without discrimination. The army lagged behind until the crisis of the Korean war, which began in the summer of 1950. With a surplus of Negro troops behind the lines and a critical shortage of white troops, who were bearing the brunt of casualties, one regimental commander in Korea explained that the "force of circumstances" compelled him to integrate surplus Negroes into his decimated white platoons. It worked. The Negroes fought better than they had before. Race relations took a turn for the better instead of for the worse as feared.

realize that people of different races ought to and can work together for a common goal.

In any event, whatever might have been the case 50 to 60 years ago, when the entire nation was rent asunder by a host of divisive events, including the Vietnam War, the government does not suggest that minorities will not take orders from an "overwhelmingly white officer corps" *today* or that members of the "highly diverse enlisted ranks" deem white officers unqualified or racist *for that reason alone*. Any such notions would themselves depend upon irrational and illegitimate racial stereotypes. The government did not argue in *Fair Admissions* that racial disparities between the number of officers and enlisted personnel in any one unit has an adverse effect on the *esprit de corps* in that unit or has a spillover effect on the comradeship and effectiveness of other units or branches. Nor does the government maintain that the racial tension that led to isolated incidents of fisticuffs in 1969, 1971, and 1972 still exists now or continues to have that corrosive effect today. The government certainly does not argue that there is any proof to support a claim that there is a correlation between an officer's or enlisted person's race and his or her ability to perform, to lead, or to follow orders. And the government did not claim that subordinate officers and enlisted personnel would refuse to take and follow orders from superior officers of a different race. That omission is quite telling.[167]

Indeed, since President Harry Truman's 1948 Executive Order directing desegregation, the U.S. military of 2023 has transformed into one of the most respected forms of a meritocracy in American society, where selection for promotion, schooling, and command is centered on the basis of demonstrated merit and

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167. A study cited by the government—Dwayne M. Butler & Sarah W. Denton, RAND Corp., *How Effective Are Blinding Concepts and Practices To Promote Equity in the Department of the Air Force?* (Dec. 2021) (hereafter RAND Study)—does not purport to gauge the effectiveness of officers as leaders according to their race. The study states that "[p]art of the reason for a lack of diversity at senior levels is a meritocratic promotion system that seeks to be blind to racial, ethnic, and gender differences," and that "[r]esearch shows that historically disadvantaged communities do not necessarily excel in ways that are rewarded by a purely meritocratic system." *Id.* at 5. That is an odd argument in favor of abandoning a meritocratic system in the military given that the military operates as a team in which individual sacrifice might be necessary to achieve a broader mission. The RAND study states that "[d]ecades' worth of studies show that a diverse workforce measurably improves decision making, problem solving, creativity, innovation, and flexibility; however, most of us also believe that hiring, development, and compensation decisions should come down to merit[.]" *Id.* (punctuation omitted). But the Harvard study cited as authority for that proposition—Lisa Burrell, *We Just Can't Handle Diversity*, HARV. BUS. REV. (July-Aug. 2016)—did not discuss the military and did not explain why a meritocracy is an inappropriate decision-making model for the armed forces. The RAND study also cites a historical analysis—JASON LYALL, DIVIDED ARMIES: INEQUALITY AND BATTLEFIELD PERFORMANCE IN MODERN WAR (2020) (summarized by the author in Jason Lyall, *The Military Is Making Changes in Response to Black Lives Matter. That's Good for Fighting Wars*, WASH. POST, July 28, 2020, https://www.washingtonpost.com/politics/2020/07/28/military-is-making-changes-response-black-lives-matter-protests-thats-good-fighting-wars/)—for the proposition that "research has shown that armies with high rates of inequality have done poorly based on various measures of battlefield performance." RAND Study, *supra*, at 4. The RAND study does not explain, however, how and why a book conducting a worldwide, historical study renders *today's U.S. military* susceptible to that criticism.

performance. Progress in achieving that goal has not been linear and was sometimes halting, but the U.S. military evolved and is continuing to evolve into an institution in which all Americans, regardless of the color of their skin, can fully belong and enjoy equal treatment. The military culture is fundamentally intolerant of racism, sexism, or other forms of bigotry or prejudice because leaders understand their harmful impact on unit cohesion and teamwork.[168] Although admissions decisions occur before individuals enter into military service, the mere idea of using race in this first step of a military career is at complete odds with the current goals and objectives of the U.S. armed forces.

2. The Federal Government's Argument in the West Point and Annapolis Cases

Not long after the Supreme Court decided the *Fair Admissions* case, Students for Fair Admissions brought suit against the United States military academies at West Point and Annapolis, arguing that their race-based admissions policies were unconstitutional under *Fair Admissions* case. The cases are in litigation in the U.S. District Courts for the Southern District of New York and the District of Maryland. Each court has denied the plaintiff's request for a preliminary injunction and ordered the cases to go forward. Each court concluded (among other things) that factual development beyond the affidavits the parties submitted before the court could resolve the merits of the plaintiff's challenges.[169]

The federal government conceded that race plays a role in the admissions processes at West Point and Annapolis. At the outset, the government argued that the courts should defer to the military's judgment that stooping to racism is necessary. The judges in the *West Point* and *Annapolis* cases expressed a willingness to defer to the military's claimed need for discrimination because they read a footnote in the Supreme Court's decision in *Fair Admissions* as reserving room for military necessity.[170] In so concluding, both district courts misread the Supreme Court's *Fair Admissions* decision. Aside from the fact that a footnote is an unlikely source of a major principle of law,[171] the Supreme Court reserved

168. Michael Waltz, et al, *Report of the National Independent Panel on Military Service and Readiness*, HERITAGE FOUND. 14 (2023), https://www.heritage.org/defense/report/report-the-national-independent-panel-military-service-and-readiness (last accessed Aug. 10, 2023).

169. *See* Students for Fair Admissions v. U.S. Military Academy (West Point), 2024 WL 36026, at 12 (S.D.N.Y. Jan. 3, 2024) [hereafter *West Point*] ("A full factual record is vital to answering this critical question whether the use of race in the admissions process at West Point furthers compelling governmental interests and whether the government's use of race is narrowly tailored to achieve that interest."); Students for Fair Admissions v. U.S. States Naval Academy, 2023 WL 8806668, at 13 (D. Md. Dec. 20, 2023) [hereafter *Annapolis*] ("At this stage, SFFA bears the burden to prove that it is likely to succeed on the merits. . . . In light of the language employed in *Harvard* and judicial deference due to the military, at this stage this Court is unpersuaded that the evidence proffered by Plaintiff overwhelms the evidence advanced by Defendants. Quite simply, the issue of a compelling government interest requires development of a factual record.") (citation omitted).

170. *See West Point*, 2024 WL 36026, at 11 (citing *Fair Admissions*, 600 U.S. 213 n.4); *Annapolis*, 2023 WL 8806668, at *11 (same).

171. *See* Wainwright v. Witt, 469 U.S. 412, 422 (1985); McDaniel v. Sanchez, 452 U.S. 130, 141–42 & n.19 (1981).

decision on the issue of how equal protection principles apply to the service academies.[172] In so doing, the Court did not say that the academies are entitled to a "leg up" when it comes to their use of race. Had the Supreme Court intended to grant the academies any such deference, the Court would have needed to explain why a different standard of review applied to the military academies. Footnote 4 in *Fair Admissions* did neither.

The government argued, however, that the armed forces have a "compelling" need to discriminate on the basis of race in their admissions. Discrimination is necessary, the government maintained, for several reasons: (1) to foster the "cohesion" and the "lethality," of military units; (2) for satisfactory recruitment and retention of a top-flight officer corps; (3) to maintain "diversity" within the officer corps," which is necessary to help officers "lead a multicultural force and fight alongside diverse partners and allies"; (4) to "maintain the public trust and its belief that the military serves all of the nation and its population"; and (5) to enhance "the military's legitimacy in the eyes of the nation and the world."[173] While creative, these arguments are quite unpersuasive.

It is far from clear why the government's asserted need for racial discrimination—which did not appear on the websites of the relevant service academies but

172. *See supra* text accompanying note 120 (quoting the relevant footnote in its entirety).

173. *See West Point*, 2024 WL 36026, at 10 ("Defendants also submitted six declarations with their opposition to this motion. Acting Under Secretary of Defense for Personnel and Readiness for the Department of Defense, Ashish S. Vazirani, posits that a racially diverse officer corps (1) is critical to mission readiness and efficacy (Vazirani Decl. ¶ 12); (2) provides a broader range of thoughts and innovative solutions (*id.* ¶ 19); (3) helps military recruitment and retention which is vital to national security interests (*id.* ¶¶ 22, 25); (4) helps maintain the public trust and its belief that the military serves all of the nation and its population (*id.* ¶ 26); and (5) protects the U.S. militaries' legitimacy among international partners (*id.* ¶ 28). Colonel Deborah J. McDonald, the former Director of Admissions at West Point, states that diversity at West Point (1) helps cadets lead a multicultural force and fight alongside diverse partners and allies; (2) is essential for military cohesion; (3) is critical to maintaining diversity in the officer corps; and (4) is necessary to attract top talent."); *Annapolis*, 2023 WL 8806668, at 11 ("Defendants submit that the Naval Academy's consideration of race and ethnicity in admissions serves a compelling national security interest. Specifically, Defendants submit that they have a compelling national security interest in a diverse officer corps, as the military's senior leadership has determined that a diverse officer corps is critical to cohesion and lethality, to recruitment, to retention, and to the military's legitimacy in the eyes of the nation and the world. (ECF No. 46 at 30–47.) In support of this position, they attach, among other things, declarations of a three-star Vice Admiral of the Navy (ECF No. 46-3), the Deputy Assistant Secretary of the Department of the Navy for Manpower and Personnel (ECF No. 46-4), the Acting Under Secretary of Defense for Personnel and Readiness (ECF No. 46-5), and the Under Secretary's Senior Advisor. (ECF No. 46-6.)."); Defendant's Memo., *supra* note 156, at 22 ("The Army has concluded that diversity in the officer corps is vital to national security because it (1) fosters cohesion and lethality; (2) aids in recruitment of top talent; (3) increases retention; and (4) bolsters the Army's legitimacy in the eyes of the nation and the world."); *id.* at 28 ("'The Army, using its best military judgment, has concluded that a diverse officer corps is critical to combat effectiveness and unit cohesion; the recruitment and retention of officers and enlisted personnel alike; and the domestic and international legitimacy of the U.S. Army as an institution.' Stitt Decl. ¶ 12; *see also id.* ¶ 14 ('Developing and maintaining a highly qualified and demographically diverse military leadership is critical for mission effectiveness and is essential to national security.'); Vazirani Decl. ¶¶ 9-30 (explaining why DoD has determined that diversity within the officer corps 'is critical to mission readiness and efficacy'); Haynie Decl. ¶¶ 7-31.").

in affidavits prepared for this litigation—is necessary to achieve the armed forces' mission on an ongoing basis with no end in sight. Start with the alleged need to establish or maintain the "cohesion" of military units.

In any group enterprise, cohesion results from a shared mission, demonstrated respect for each individual, and proven equal treatment—none of which is promoted by favoritism, especially racial favoritism in 2024. If "[s]oldiers fight for the man or woman on their right or left" and "[h]ow hard they fight and whether they can persevere through the hardships that those in the Army are asked to endure depends to a considerable extent on the cohesion of their team,"[174] *any* racial discrimination would be corrosive. That is the case regardless of who is benefitted and who is hurt because those are two sides of the same coin. What is true at other colleges and universities is also true at the service academies: "College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter."[175] The ones injured by favoritism will surely know and feel injured by such mistreatment. Even the government acknowledges that "cohesion cannot exist when there is internal strife, which has sometimes resulted from perceived racial imbalances between enlisted members and officers."[176] Well, an approved and acknowledged policy of racial favoritism will certainly result in "internal strife," and not just sometimes.[177] After all, this policy of discrimination—which goes in only one direction[178]—tells the losers that they are disqualified on a ground over which they have no control. Unless the government can prove that servicemembers will be influenced by the color of their officers—that is, that they will be less likely to fully comply with orders issued by superiors whose skin color does not match their own—it is difficult to understand how or why "cohesion" would be affected by the racial makeup of military personnel that does not match some political ideal.

Also, the government must prove that racial discrimination *today and tomorrow* is justified by a current and prospective military necessity, not merely to atone for the government's past misdeeds. In the *West Point* case, the federal government relied on the history of segregation in the armed forces as a ground for

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174. Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction 3, *in West Point*, 2024 WL 36026, at 29 (filed Nov. 22, 2023) (quoting Stitt Decl. ¶ 14) [hereafter Defendant's Memo.].

175. *Fair Admissions*, 600 U.S. at 218–19.

176. Defendant's Memo., *supra* note 156, at 293.

177. *See Fair Admissions*, 600 U.S. at 220 ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.") (quoting Rice v. Cayetano, 528 U.S. 495, 527 (2000)).

178. *See id*. at 229 ("Most troubling of all is what the dissent must make these omissions to defend: a judiciary that picks winners and losers based on the color of their skin. While the dissent would certainly not permit university programs that discriminated *against* black and Latino applicants, it is perfectly willing to let the programs here continue. In its view, this Court is supposed to tell state actors when they have picked the right races to benefit. Separate but equal is "*inherently* unequal," said *Brown,* 347 U.S. at 495 (emphasis added). It depends, says the dissent.") (emphasis in original and added).

its belief that discrimination—just against different parties—is justified today.[179] The government's argument, however, would treat past discrimination as a form of original sin that would allow future discrimination in perpetuity. Past instances of discrimination are, of course, unfortunate and much to be regretted, but they are not a legally sufficient justification for prospective, unending discrimination.[180] In *Fair Admissions*, the Supreme Court rejected the notion that past discrimination is a justification for the current version. The Court made it clear that race-based preferences are permissible only to "remediat[e] specific, identified instances of past discrimination that violated the Constitution or a statute"[181] and that remedies for specific instances of past discrimination must have a definite logical and temporal endpoint.[182] Surely the government does not mean to suggest that the armed forces can make race-based decisions just to enhance the "cohesion" of a unit from the perspective of political outsiders, especially ones hoping to satisfy a favored interest group.[183] Doing that would corrode whatever *espirit de corps* a unit would need to be effective and survive. Even if there are "isolated instances of white nationalism, racism, and extremism" in the military, and even if the number of such instances is "growing," the government does not claim that the armed forces are rife with those ideologies, nor does it maintain that race-based decisions are the only way to remedy them. All that such a policy would do is trade off one set of victims for another, rather than deal with the offenders. Besides, there are servicemembers who commit crimes, but that does not mean that military bases are examples of a Hobbesian war of all against all drawn along racial lines. So, it is not obvious how or why the government's alleged need for racial discrimination contributes to the "cohesion" of our fighting forces.

In addition, civilian colleges and universities with ROTC programs (or other ones that lead to direct commissions upon graduation) produce the vast majority—82%—of the officers in our armed forces and 67% of the "general officers" (brigadier or higher-ranking generals),[184] yet those schools must comply with the dictates of *Fair Admissions*. The relevant question, therefore, is whether the government has a compelling interest in using race at the service academies to generate the

179. *See* Defendant's Memo., *supra* note 155, at 22–26.

180. The government argued in the West Point case that its race-based admissions program is a proven success because there have been no "internal race riots" since that program was adopted. *Id*. at 41 ("To determine whether the Army is meeting that goal, the court can examine a number of metrics. First, a court can examine whether internal race riots have occurred since the Army made an effort to diversify its officer corps. None have. *See* Bailey Decl. ¶ 81. That alone demonstrates success."). Aside from being a classic example of the *post hoc ergo propter hoc* fallacy, that argument could be used to justify virtually any program.

181. *Fair Admissions*, 600 U.S. at 207.

182. *Id*. at 221–25.

183. Politicians have done that before. *See*, *e.g*., Paul J. Larkin & Dakota Wood, *Clemency for Favored Constituents: The Brittney Griner-Viktor Bout Prisoner Swap*, 56 INT'L LAW. 443 (2023).

184. Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction 3, *in West Point*, 2024 WL 36026 (filed Nov. 22, 2023) [hereafter Defendant's Memo.].

remaining 18% of officers. Perhaps the military or its civilian leadership (which could change every four years) has decided that academy graduates will always be advanced in rank ahead of equally or better-qualified graduates from civilian ROTC programs and, therefore, need to have a racially diverse corps of academy graduates. If so, the government should publicly defend that position and argue that it is a "compelling" justification for racial discrimination. If not, it is difficult to identify a good reason—to say nothing of a "compelling" one—for discriminating against applicants to the service academies.[185]

Now turn to "lethality." That term refers to the military's ability to use lethal force to accomplish its mission. No service branch varies the training afforded cadets (or other servicemembers for that matter) on the basis of their race, assigns different tools of warfare to different soldiers, sailors, airmen, or marines based on that ground, issues different rules of engagement for different races, or makes sure that a ground combat division, fleet, or air wing has just the right number of each type of minority before sending them into combat to ensure that each one is sufficiently lethal. Atop that, why do we need the world to deem the racial composition of our military as "legitimate" for it to fight effectively? Why should we care about any factor other than its ability to protect the nation's people and interests against foreign nations, organizations, or individuals who attempt or wish to do us harm and destroy our way of life? What is more, how do we measure our military's "legitimacy"? What objective standard is there that anyone, let alone the courts, can use to answer that question? Plus, exactly how many minority officers—and of what type, which itself is an imponderable factor[186]—does the military need to cross the line from being an "illegitimate" military to one that is instead "legitimate"? Is that a number, a percentage, or a range? If so, what is it? Or can a "good faith" effort to achieve that result stand in place of whatever figure we need? If so, what does it mean to make a "good faith" effort to achieve just the "right amount" of discrimination? How is that any different in theory, to say nothing of its practical implementation, from blatant racial preferences? Furthermore, at what level must that question be answered—by platoon, brigade, or army? By

185. In the *West Point* case, the government argued that "'[t]he Army currently has 137,000 soldiers in over 140 countries and continues to deploy Soldiers across the globe.' Stitt Decl. ¶ 20. Being able to 'understand[] and effectively navigat[e] diverse people and experiences is therefore a crucial skill set. *Id.*'" Defendant's Memo. 38. Why that skill set cannot be *taught* is left unexplained.

186. See *Fair Admissions*, 600 U.S. at 216 ("[T]he categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as "Hispanic," are arbitrary or undefined. See, *e.g.*, M. Lopez, J. Krogstad, & J. Passel, Pew Research Center, *Who is Hispanic?* (Sept. 15, 2022) (referencing the "long history of changing labels [and] shifting categories . . . reflect[ing] evolving cultural norms about what it means to be Hispanic or Latino in the U. S. today"). And still other categories are underinclusive. When asked at oral argument 'how are applicants from Middle Eastern countries classified, [such as] Jordan, Iraq, Iran, [and] Egypt,' UNC's counsel responded, '[I] do not know the answer to that question." Tr. of Oral Arg. in No. 21–707, p. 107; cf. *post*, at 291–94 (GORSUCH, J., concurring) (detailing the "incoherent" and "irrational stereotypes" that these racial categories further).").

ship, fleet, or ocean? By airplane, squadron, or wing? Whose opinion counts when answering that question? The entire world? Some subunit favored by the administration then in office? The United Nations'? China's? Russia's? Iran's? North Korea's? Does al Qaeda, ISIL, or the Mexican DTOs get a vote? And what is *their* record of illegitimate discrimination in this regard? Do some opinions matter more than others—say, India's, because of its large population? Canada's, because it is a neighbor? Indonesia or the Philippines, because each one has a bazillion islands? The government's claimed need for "legitimacy" is unmeasurable by any objective standard. In truth, it (like the argument for "cohesion") is precisely the sort of political sop that cannot constitute a "compelling" justification for racial discrimination.

The other justifications cited by the government fare no better. The claim that discrimination is necessary to obtain a "broader range of thoughts and innovative solutions"[187] sounds much like the argument that the Supreme Court rejected in *Fair Admissions* as old-fashioned racial stereotyping.[188] The argument that diversity is necessary to enable our servicemembers to "fight alongside diverse partners and allies" implies that our troops will not execute their missions in conjunction with our allies unless we look just like they do. It implies that our military cannot or will not cooperate with partners unless we correspond to *their* racial and ethnic composition. Finally, the defense that racial discrimination "helps maintain the public trust and its belief that the military serves all of the nation and its population" is not credible.[189] The nation has had a military since George Washington became its first commander during the Revolutionary War, and anyone familiar with American history knows that the armed forces have always protected the nation against foreign adversaries—both before and after President Truman integrated the armed forces. The public trusts that the military will protect the nation because it always has carried out that mission, and our elected officials repeatedly tell us that it is still capable of doing so today. If so, how do you measure the public's opinion about the need for *racial discrimination* as being necessary to protect the nation?[190]

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187. *West Point*, 2024 WL 36026, at 10 (quoted *supra* at note 173).

188. *See Fair Admissions*, 600 U.S. at 220 ("The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that "a black student can usually bring something that a white person cannot offer." *Bakke*, 438 U.S. at 316 (opinion of Powell, J.) (internal quotation marks omitted); see also Tr. of Oral Arg. in No. 20–1199, at 92. UNC is much the same. It argues that race in itself "says [something] about who you are." Tr. of Oral Arg. in No. 21–707, at 97; see also *id*., at 96 (analogizing being of a certain race to being from a rural area). [¶] We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those 'who may have little in common with one another but the color of their skin.' *Shaw*, 509 U.S. at 647. The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.").

189. *West Point*, 2024 WL 36026, at 10 (quoted *supra* at note 153).

190. *See Fair Admissions*, 600 U.S. at 215 ("Unlike discerning whether a prisoner will be injured or whether an employee should receive backpay, the question whether a particular mix of minority students

In short, the interests asserted by the government "cannot be subject to meaningful judicial review" because they are not remotely quantifiable. Like the interests asserted by Harvard and North Carolina in *Fair Admissions*, the government's interests are not capable of measurement by a federal court.[191] They also have no logical stopping point because the composition of an all-volunteer military will inevitably change over time as individuals enlist, enter an academy, leave, or retire.[192] Discrimination can last forever if no one can tell whether it has achieved its goals because those goals are immeasurable. That might be the point of the exercise, but it is not a constitutional pursuit.

### *C. The Unique Nature and Needs of the Military*

To be sure, comparing the military and civilian worlds is often like comparing apples and oranges; the differences outnumber and outweigh the commonalities. The President, civilian officials, and military commanders can burden soldiers, sailors, airmen, and marines with tasks that cannot be demanded of civilians.[193] Service members can be ordered to risk life and limb in circumstances where it is certain that some, perhaps even most or all, will not survive. The Supreme Court has often recognized that contrast. Given the unique nature of military life, on and off the battlefield, as well as the special demands that its life-saving mission

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produces engaged and productive citizens, sufficiently enhances appreciation, respect, and empathy, or effectively trains future leaders is standardless. . . . The interests that respondents seek, though plainly worthy, are inescapably imponderable.") (citations and punctuation omitted).

191. *Id.* As the Supreme Court put it in *Fair Admissions*, 600 U.S. at 214–15 (citations and punctuation omitted; emphasis in original):

> [I]t is unclear how courts are supposed to measure any of these goals. How is a court to know whether leaders have been adequately trained; whether the exchange of ideas is robust; or whether new knowledge is being developed? Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? There is no particular point at which there exists sufficient innovation and problem-solving, or students who are appropriately engaged and productive. Finally, the question in this context is not one of *no* diversity or of *some*: it is a question of degree. How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve. . . . Unlike discerning whether a prisoner will be injured or whether an employee should receive backpay, the question whether a particular mix of minority students produces engaged and productive citizens, sufficiently enhances appreciation, respect, and empathy, or effectively trains future leaders is standardless. . . . The interests that respondents seek, though plainly worthy, are inescapably imponderable.

192. *See Fair Admissions*, 600 U.S. at 224 ("Respondents assert that universities will no longer need to engage in race-based admissions when, in their absence, students nevertheless receive the educational benefits of diversity. But as we have already explained, it is not clear how a court is supposed to determine when stereotypes have broken down or 'productive citizens and leaders' have been created. . . . Nor is there any way to know whether those goals would adequately be met in the absence of a race-based admissions program. As UNC itself acknowledges, these 'qualitative standard[s]' are 'difficult to measure.'") (citations omitted).

193. *See*, *e.g.*, Noah Feldman, *Supreme Court Can Let West Point Keep Affirmative Action*, WASH. POST, Sept. 21, 2023, https://www.washingtonpost.com/business/2023/09/21/why-west-point-might-get-supreme-court-s-nod-on-affirmative-action/1d8947a4-5875-11ee-bf64-cd88fe7adc71_story.html (last accessed Jan. 22, 2024).

and life-endangering assignments impose on servicemembers,[194] "civil courts are ill[-]equipped to establish policies regarding matters of military concern."[195] Accordingly, "'[j]udicial deference... is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.'"[196]

Of course, much the same could be said about judicial review of prison management in the civilian world. After all, "[i]n the prison context, ... the government's power is at its apex."[197] Just as courts are "ill[-]equipped" to manage the military—as the Supreme Court recognized in *Solorio v. United States*[198]—so, too, "courts are ill[-]equipped to deal with the increasingly urgent problem of prison administration and reform," as the Court acknowledged in *Procunier v. Martinez*.[199] "Running a prison," the Supreme Court explained in *Turney v. Safley*, "is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."[200] In addition, the task of prison administration "has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint."[201] For that reason, a prison regulation is generally not subject to exacting judicial scrutiny. Rather, the relaxed "rational basis" test is the governing review standard, under which a "regulation is valid if it is reasonably related to legitimate penological interests."[202] That standard is not materially different from the one that the Supreme Court has applied to congressional and executive regulation of the military.

Yet, in its 2005 decision in *Johnson v. California*, the Court rejected the argument that courts should apply the *Turner v. Safley* rational basis standard when a

194. *See* Chappell v. Wallace, 462 U.S. 296, 300 (1983) ("In the civilian life of a democracy many command few; in the military, however, this is reversed, for military necessity makes demands on its personnel without counterpart in civilian life. . . . The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection. [T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty. . . . This becomes imperative in combat, but conduct in combat inevitably reflects the training that precedes combat; for that reason, centuries of experience has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns.") (citations and punctuation omitted).

195. Solorio v. United States, 483 U.S. 435, 448 (1987) (punctuation omitted); *see also*, *e.g.*, *Chappell*, 462 U.S. at 305; Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion).

196. Goldman v. Weinberger, 475 U.S. 503, 508 (1986) (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).

197. Johnson v. California, 543 U.S. 499, 511 (2005).

198. 483 U.S. at 448.

199. 416 U.S. 396, 405 (1974).

200. 482 U.S. 78, 84-85 (1987).

201. *Id.* at 85.

202. *Id.* at 89.

prison segregates inmates by race.[203] As Justice O'Connor explained, "[t]he right not to be discriminated against based on one's race is not susceptible to the logic of *Turner*" because "[i]t is not a right that need necessarily be compromised for the sake of proper prison administration."[204] In fact, "compliance with the Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system."[205] Moreover, exempting prisons from the exacting review necessary to satisfy a race-based government action "would undermine our 'unceasing efforts to eradicate racial prejudice from our criminal justice system.'"[206] Yes, the "necessities of prison security and discipline" can be "a compelling governmental interest" justifying race-based assignment decisions, but *only* when "those uses of race are narrowly tailored to address those necessities."[207]

The Court also rejected the argument made by Justice Thomas in his dissent in *Johnson* that decisions about race-based cell assignments "are better left in the first instance to the officials who run our Nation's prisons."[208] The *Turner* rational-basis test "is too lenient a standard to ferret out invidious uses of race," Justice O'Connor wrote, because it "requires only that the policy be 'reasonably related to 'legitimate penological interests.'"[209] It "would allow prison officials to use race-based policies even when there are race-neutral means to accomplish the same goal" and "even when the race-based policy does not in practice advance that goal."[210] Finally, Justice O'Connor concluded, a rational-basis standard would have "no obvious limit" and so would be used to justify discrimination in settings where it would be altogether unnecessary.[211] Moreover, if prisons—and jails—were exempt from the constitutional ban on discrimination, police and fire departments, emergency medical services battalions, the astronauts program, and other similar critical organizations would have an equal claim to an exemption. The Supreme Court—properly so, we might add—refused to go down that path in *Johnson*.

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203. *Johnson*, 543 U.S. at 509–15.

204. *Id*. at 510.

205. *Id*. at 510–11.

206. *Id*. at 512 (quoting McCleskey v. Kemp, 481 U.S. 279, 309 (1987) (punctuation omitted)).

207. *Id*. (citation and punctuation omitted).

208. *Id*. at 513 (rejecting the argument made at *id*. at 542 (Thomas, J., dissenting) ("As *Turner* pointed out, these judgments are better left in the first instance to the officials who run our Nation's prisons, not to the judges who run its courts.")).

209. *Id*. (quoting *Turner*, 482 U.S. at 89).

210. *Id*.

211. *Id*. at 514 ("Indeed, under Justice THOMAS' view, there is no obvious limit to permissible segregation in prisons. It is not readily apparent why, if segregation in reception centers is justified, segregation in the dining halls, yards, and general housing areas is not also permissible. Any of these areas could be the potential site of racial violence. If Justice THOMAS' approach were to carry the day, even the blanket segregation policy struck down in *Lee* [*v. Washington*, 390 U.S. 333 (1968)] might stand a chance of survival if prison officials simply asserted that it was necessary to prison management. We therefore reject the *Turner* standard for racial classifications in prisons because it would make rank discrimination too easy to defend.").

The teaching of *Johnson* is directly relevant to the issue discussed in this Article. Like prison officials addressing a race riot by making race-based cell assignments, the military has a compelling interest in making race-based assignments when there is a mission-specific need to do so. But service academy admission decisions do not have the same urgency. Moreover, the fact that more than 80 percent of the officers in the armed forces are graduates of college ROTC programs and officer candidate schools rather than one of the academies surely proves that there is no compelling need to discriminate in admissions to the latter. Finally, there are viable alternatives to allowing the academies to make race-based admission decisions if the goal is to encourage minorities to apply, such as the outreach and preparatory programs described above.

It is doubtless true that the military is a unique community, and its mission justifies some measure of respect and deference from the courts. But that does not require or justify the use of race-based admissions policies to achieve the nation's military goals. Prison life is as tension-arousing and conflict-ridden as any life can be, yet wardens cannot make race-based living assignments except where necessary to save lives. To steal a quote from Hobbes, military life is not as "nasty, brutish, cruel, and [potentially] short" as prison life, yet prison officials cannot discriminate. If so, the armed forces cannot do so either.

To be sure, the Constitution applies differently to service members and civilians. Some have argued that, for that reason, the President, civilian officials, and military commanders can burden soldiers, sailors, airmen, and marines with tasks that cannot be demanded of civilians.[212] If so, just as the greater includes the lesser, or so the argument goes, the service academies can afford servicemembers with less than equal protection under the law when it comes to admissions.

It is true that the military, by necessity, can demand sacrifices of servicemembers that it cannot demand of civilians. That is a necessity for the effective operation of a military. Moreover, it will always be a necessity as long as there is the fact or possibility of war, which will always be the case as long as people are people.[213] But the deference that the Supreme Court gives to judgments of military necessity does not trump the anti-discrimination requirement set forth in the *Fair Admissions* case for several reasons.

The fundamental one is that virtually every victim of the service academies' race-based admissions policies is a *civilian*; they are *not* in the armed forces. Save for a few enlisted personnel who apply to an academy, all applicants are

212. *See*, *e.g.*, Noah Feldman, *Supreme Court Can Let West Point Keep Affirmative Action*, WASH. POST, Sept. 21, 2023, https://www.washingtonpost.com/business/2023/09/21/why-west-point-might-get-supreme-court-s-nod-on-affirmative-action/1d8947a4-5875-11ee-bf64-cd88fe7adc71_story.html (last accessed Jan. 22, 2024).

213. As General Douglas Macarthur did in his farewell remarks (attributing the quote to Plato): "Only the dead have seen the end of war." General Douglas MacArthur, *Farewell Speech Given to the Corps of Cadets at West Point*, May 12, 1962, NAT'L CNTR. FOR PUB. POL'Y RESEARCH, https://nationalcenter.org/ncppr/2001/11/04/general-douglas-macarthurs-farewell-speech-to-west-point-1962/ (last accessed Jan. 22, 2024).

civilian high-school seniors or freshmen and sophomores in college. The leeway that the Constitution affords the military to restrain the rights of soldiers, sailors, and airmen does not apply to civilian applicants to the academies. For that reason, the Supreme Court could not "plausibly find" that the equal-protection rights of applicants "are weakened."[214] Nor could this be obscured on the ground that, since accepted cadets and service academy graduates can be subjected to restraints on their liberty, we need to elide the rights of applicants to ensure that the outcome is a diverse officer corps. Ignoring the facts is no more legitimate than ignoring the law in pursuit of any goal.

Atop that, an applicant's rights cannot be subordinated to the overall interest in having a diverse officer corps. In *Fair Admissions*, the Supreme Court rejected for several reasons (such as its uncertain boundaries and eternal nature) the generic concept of racial "diversity" as a legitimate goal of college admissions. More specifically, the Court also rejected the government's argument that race-based admissions are necessary at civilian colleges whose graduates become officers via Reserve Officers' Training Corps (ROTC) direct-commissioning programs. Harvard and every other private and state university must comply with the decision in *Fair Admissions*; yet the ROTC programs at those schools supply *more than 80%* of all military officers. If so, there is no good reason to exempt the service academies from the *Fair Admissions* rule.

Nor can the Supreme Court "sidestep the morally and politically fraught debate"—stemming from "the specter of racial tension between enlisted men and officers in Vietnam"—by deferring to the military on "whether the military can function effectively if it has too few officers of color."[215] This is 2024, not 1970. The reference to racial incidents, or studies from more than 50 years ago during the Vietnam War, when service members were largely drafted rather than voluntarily enlisted, is not a legitimate justification for race-based decisions *today*. In the *Fair Admissions* case, the federal government did not maintain, for understandable reasons, that there is any correlation between an officer's or enlisted person's race and his or her ability to perform, lead, or follow orders. Nor did the government take the position that subordinate officers and enlisted personnel would refuse to take and follow orders from superior officers of a different race. Unless the government can *prove*—not just *allege*—that both propositions are true, what might or might not have been true a half-century ago is immaterial to what is true now.

### *D. The Military Service Academies' Admissions Decisions*

The U.S. service academies graduate officers for hundreds of different "military operational specialties," only a tiny fraction of which potentially involve working in an undercover or intelligence-gathering capacity. Far fewer than 1% of all military personnel, whether officers or enlisted, might be assigned to an

214. Feldman, *supra* note 174.
215. *Id.*

intelligence gathering mission in hostile territory. Only a small fraction of that 1% might be officers. Remember that the service academies generate fewer than 20% of the overall officer corps. And keep in mind that, if necessary, the military could draw upon the resources of the intelligence community to fill a mission-critical need for someone with a particular racial or ethnic background. For those reasons, there is no justification for the academies to make race-based decisions about the admission *of high school students*—who have not yet taken nor passed the qualification courses to become a servicemember, let alone a special operative—when deciding how to fill their graduating classes. This is true of each of the branches of our military, and we discuss them, in turn, below.

*The U.S. Army and Navy*: Consider the U.S. Army and Navy. The Army's "mission" is "[t]o deploy, fight, and win our Nation's wars by providing ready, prompt, and sustained land dominance by Army forces across the full spectrum of conflict as part of the Joint Force."[216] West Point's mission is "to educate, train, and inspire the Corps of Cadets" to ensure that "each graduate is a commissioned leader of character committed to the values of Duty, Honor, Country and prepared for a career of professional excellence and service to the Nation as an officer in the United States Army."[217] Every West Point graduate must serve a minimum of eight years in the U.S. Army.[218] The Naval Academy has a parallel mission "to educate and train midshipmen"to become professional officers of competence, character, and compassion in the U.S. Navy and Marine Corps."[219]

In theory, therefore, West Point and Annapolis might have a legitimate need to ensure that they have an adequate number of potential operators who are black or who have an ethnicity that could be necessary in an intelligence-gathering assignment, such as Middle Eastern, Chinese, Russian, or Vietnamese. Yet, the critical mission-need principle discussed above would apply in a very limited number of instances. That rare, highly contingent, and case-specific need cannot support a broad escape hatch for the service academies to use the same general race-conscious admissions practices held unlawful in *Fair Admissions*. Only units like

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216. U.S. ARMY, The Army People Strategy 2 (Oct. 2019), https://people.army.mil/wordpress/wp-content/uploads/2019/10/The-2020-Army-People-Strategy-Final.pdf (last visited July 30, 2023); *see also* U.S. ARMY, Army People Strategy, Mission & Vision, https://people.army.mil/overview-2/mission-vision/ (last visited July 30, 2023) ("**Mission:** The Total Army will acquire, develop, employ, and retain the diversity of Soldier and Civilian talent needed to achieve Total Army readiness. [¶] **Vision:** We will build cohesive teams for the Joint Force by maximizing the talents of our People, the Army's greatest strength and most important weapon system.").

217. UNITED STATES MILITARY ACADEMY WEST POINT, https://www.westpoint.edu/ (last visited July 27, 2023).

218. *Id*. Frequently Asked Questions: How long must I serve in the Army? ("You must serve a minimum of eight years after you graduate in a combination of Active Duty and Reserve Component Service.").

219. U.S. NAVAL ACADEMY, About USNA, https://www.usna.edu/About/index.php (last visited July 31, 2023); *id*., Mission Statement ("To develop Midshipmen morally, mentally and physically and to imbue them with the highest ideals of duty, honor and loyalty to graduate leaders who are dedicated to a career of naval service and have potential for future development in mind and character to assume the highest responsibilities of command, citizenship and government.").

the Green Berets, Marine Raiders, or Navy Seals have a particularized need to conduct undercover or intelligence-gathering assignments, and, historically speaking, those units have been quite small.

Of course, even then, the military would need to establish far more than just an operational need for a particular mission. That is, each academy would need to prove: (1) race-based admissions are critical for it to achieve a satisfactory number of officers who later qualify for one of those units; (2) it cannot obtain the requisite number of officers for these purposes from among the graduates of university ROTC programs that must comply with *Fair Admissions*; (3) cadets and midshipmen are the type who would satisfactorily complete the rigorous testing processes demanded of Special Forces candidates; and (4) the military cannot rely on members of the intelligence community for the necessary operators. Those are not easy requirements to meet.

Finally, the critical mission-need discussed above would not justify race-based admissions decisions by the academies of the other services—in particular, by the U.S. Air and Space Forces, the Coast Guard, and the Merchant Marine. These are noble institutions, each with a laudable mission, but none has a mission-critical need to use racial or ethnic discrimination to accomplish an undercover or intelligence-gathering assignment. Consider the mission statements for each academy below.

*The U.S. Air and Space Forces*: The mission of the U.S. Air Force is "to fly, fight and win—airpower anytime, anywhere,"[220] while the mission of the U.S. Space Force is, quite literally, "out of this world";[221] namely, "to conduct global space operations that enhance the way our joint and coalition forces fight, while also offering decision makers military options to achieve national objectives."[222] The U.S. Air Force Academy educates and trains its students to become leaders "as pilots, engineers, cyber specialists, space operations officers or otherwise."[223] It does so by combining "a world-class education"—with "more than 30 majors and 13 minors"—and "athletics, character and leadership development, and military training to forge outstanding" Air and Space Force officers "who are ready to lead on day one."[224]

*The U.S. Coast Guard*: The U.S. Coast Guard is "a military service and branch of the armed forces of the United States at all times."[225] Its duties all have a

220. U.S. AIR FORCE, https://www.airforce.com/mission (last visited July 31, 2023).

221. U.S. SPACE FORCE, https://www.spaceforce.mil/ (last visited July 31, 2023) (punctuation modified).

222. *Id.* Mission, https://www.spaceforce.mil/About-Us/About-Space-Force/Mission/ (last visited July 31, 2023).

223. U.S. AIR FORCE ACADEMY, Every Student Majors in the Future (2023), https://www.academyadmissions.com/ (last visited July 31, 2023).

224. *Id.* Admissions, https://www.academyadmissions.com/why/ (last visited July 31, 2023); *id.*, Why the Academy, Follow Your Interests While Supporting the Mission, https://www.academyadmissions.com/why/(last visited July 31, 2023).

225. 14 U.S.C. § 101 (2018).

maritime component.[226] The missions of the Coast Guard, both "Homeland Security Missions" and "Non-Homeland Security Missions,"[227] are Maritime Law Enforcement,[228] Maritime Response,[229] Maritime Prevention,[230] Maritime

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226. Its "primary duties" are the following:

> The Coast Guard shall—
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> (1) enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States;
>
> (2) engage in maritime air surveillance or interdiction to enforce or assist in the enforcement of the laws of the United States;
>
> (3) administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States, covering all matters not specifically delegated by law to some other executive department;
>
> (4) develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, icebreaking facilities, and rescue facilities for the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States;
>
> (5) pursuant to international agreements, develop, establish, maintain, and operate icebreaking facilities on, under, and over waters other than the high seas and waters subject to the jurisdiction of the United States;
>
> (6) engage in oceanographic research of the high seas and in waters subject to the jurisdiction of the United States; and
>
> (7) maintain a state of readiness to assist in the defense of the United States, including when functioning as a specialized service in the Navy pursuant to section 103.

14 U.S.C. § 102. The Coast Guard's website describes the work of the Coast Guard as follows:

> As a branch of the U.S. Armed Forces, a law enforcement organization, a regulatory agency, a member of the U.S. Intelligence Community, and a first responder, the Coast Guard employs a unique mix of authorities, broad jurisdiction, flexible operational capabilities, and a network of partnerships. The Coast Guard is the principal Federal agency responsible for maritime safety, security, and environmental stewardship in U.S. ports and inland waterways, along more than 95,000 miles of U.S. coastline, throughout the 4.5 million square miles of U.S. Exclusive Economic Zone (EEZ), and on the high seas.

UNITED STATES COAST GUARD, About, https://www.uscg.mil/About/ (last visited July 30, 2023).

227. U.S. COAST GUARD, Missions, https://www.uscg.mil/About/Missions/ (last visited July 30, 2023).

228. "**Maritime Law Enforcement:** The Maritime Law Enforcement mission program protects America's maritime borders, defends the Nation's maritime sovereignty, facilitates legitimate use of the waterways, and suppresses violations of U.S. Federal law on, under, and over the seas to include illegal migration and Transnational Organized Crime." *Id.*

229. "**Maritime Response:** The Maritime Response mission program seeks to mitigate the consequences of marine casualties and disastrous events. The Coast Guard is the Nation's premiere maritime first responder, minimizing loss of life and property by searching for and rescuing persons in distress. The Coast Guard is capable of rapidly mobilizing resources to provide an immediate and reliable response to maritime incidents in coordination with, and in support of, Federal, State, local, territorial, and tribal agencies, as well as private sector partners." *Id.*

230. "**Maritime Prevention:** The Maritime Prevention mission program seeks to prevent marine casualties and property losses, minimize security risks, and protect the marine environment. The Coast Guard does so by developing and enforcing federal regulations, conducting safety and security inspections, and analyzing port security risk assessments." *Id.*

Transportation Systems Management,[231] Maritime Security Operations,[232] and Defense Operations.[233] The mission of the Coast Guard Academy complements that of the parent agency. The Coast Guard Academy intends "to develop officer-ready leaders of character who embody Coast Guard values, who influence and inspire others, and who decide what is right and demonstrate the courage to act accordingly."[234] The "USCGA Mission" is:

> To graduate young men and women with sound bodies, stout hearts and alert minds, with a liking for the sea and its lore, and with that high sense of honor, loyalty and obedience which goes with trained initiative and leadership; well-grounded in seamanship, the sciences and amenities, and strong in the resolve to be worthy of the traditions of commissioned officers in the United States Coast Guard in the service of their country and humanity.

None of those missions generally involves the use of Coast Guard officers in an intelligence-gathering or undercover role in a foreign nation (although some might be assigned such roles). In all likelihood, were the Coast Guard to find a need for someone to fill that role, it would seek assistance from the DEA, FBI, CIA, or Special Operations Community for trained personnel with the necessary language-speaking ability. As a result, the Coast Guard could not take advantage of the "special needs" exception discussed above.

*The U.S. Merchant Marine*: The mission of the U.S. Merchant Marine is "to work closely together" with the U.S. Navy "to promote the maximum integration of the total seapower forces of the United States."[235] Also, "in time of war or national emergency," the Merchant Marine can operate "as a naval and military auxiliary."[236] To ensure a qualified officer corps, the U.S. Merchant Marine Academy was established in 1936, as President Franklin Roosevelt said at its opening, "to serve the Merchant Marine as West Point serves the Army and

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231. "**Marine Transportation System Management:** The Marine Transportation System Management mission program seeks to ensure a safe, secure, and environmentally sound waterways system. The Coast Guard works in concert with other Federal, State, local, tribal and territorial agencies, the marine industry, maritime associations, and the international community to safeguard the efficient and economical movement of $5.4 trillion in overall economic activity flowing through the Nation's ports and waterways." *Id*.

232. "**Maritime Security Operations:** The Maritime Security Operations mission program encompasses activities to detect, deter, prevent, and disrupt terrorist attacks, and other criminal acts in the U.S. maritime domain. It includes the execution of antiterrorism, response, and select recovery operations. This mission performs the operational element of the Coast Guard's Ports, Waterways, and Coastal Security mission and complements our Maritime Response and Prevention efforts." *Id*.

233. "**Defense Operations:** The Defense Operations mission program exercises the Coast Guard's unique authorities and capabilities to support the National Defense Strategy. Every day, Coast Guard is deployed around the globe in support of Combatant Commanders to protect the security of our Nation far from U.S. soil." *Id*.

234. UNITED STATES COAST GUARD ACADEMY, Mission, https://uscga.edu/mission/ (last visited July 30, 2023).

235. 46 U.S.C. § 51101 (2018).

236. 46 U.S.C. § 51103(a).

Annapolis the Navy."[237] Like the Coast Guard, the Merchant Marine's mission does not include a need to place its personnel in dangerous undercover or intelligence-gathering positions. It, too, is more likely to draw on the resources of civilian law enforcement agencies, like the DEA or the intelligence community, for such tasks. Accordingly, the Merchant Marine Academy cannot justify a race-based admissions policy.

## CONCLUSION

Congress has chartered the U.S. service academies to graduate officers capable of serving in leadership roles to protect the nation and its citizens. But those institutions, their superintendents, and the President are not above the law. The Supreme Court held in *Fair Admissions* that it meant what it said in *Brown v. Board of Education*: no one should be denied equal educational opportunity due to his or her skin color. Only in extraordinarily rare circumstances—where the government must achieve or protect a compelling interest, such as remedying illegality or saving life; where the government tailors its use of race to achieve only that goal; where there is a clear basis for judicial review of the government's asserted need for discrimination; and where there is a clear temporal and physical limitation on the government's use of race—may the government deny a person a benefit offered to someone else because of race or ethnicity. Just as the civilian law enforcement and intelligence communities may consider race when making undercover assignments, so, too, may the military justify race- or ethnicity-based operational field assignments for personnel serving in an intelligence-gathering capacity.

What does that mean for the U.S. service academies? The academies cannot make a persuasive case for a race-based admissions policy. There is no legally or factually significant difference between those institutions and the public and private institutions that must comply with the Supreme Court's *Fair Admissions* decision. Accordingly, the academies cannot lawfully discriminate on the basis of race when making admission decisions.

237. THE U.S. MERCHANT MARINE ACADEMY, History and Mission, https://wearetheusmma.com/wp-content/uploads/2018/06/USMMA-Fact-Sheet-6.21.18.pdf (last visited July 30, 2023); *see* 46 U.S.C. § 51102.

## APPENDIX

The passage below comes from the Brief for the United States as Amicus Curiae Supporting Respondent in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, No. 20-1199 (filed Aug. 2022) at Pages 12-18. The United States also submitted a Brief for the United States as Amicus Curiae Supporting Respondent in *Students for Fair Admissions, Inc. v. University of North Carolina*, No. 21-707 (filed Aug. 2022), which made the same argument at Pages 12-19.

***1. The United States military depends on a well-qualified and diverse officer corps that is prepared to lead a diverse fighting force***

The United States Armed Forces have long recognized that the Nation's military strength and readiness depend on a pipeline of officers who are both highly qualified and racially diverse—and who have been educated in diverse environments that prepare them to lead increasingly diverse forces. The military service academies cultivate a diverse officer corps by relying on holistic admissions policies that consider race alongside many other qualities relevant to the mission of training the Nation's future military leaders. The military also depends on the benefits of diversity at civilian universities, including Harvard, that host Reserve Officers' Training Corps (ROTC) programs and educate students who go on to become officers. The United States thus has a vital interest in ensuring that the Nation's service academies and civilian universities retain the ability to achieve those educational benefits by considering race in the limited manner authorized by *Bakke*, *Grutter*, and *Fisher*.

a. For decades, the Armed Forces have recognized that building a cohesive force that is highly qualified and broadly diverse—including in its racial and ethnic composition—is "integral to overall readiness and mission accomplishment." Department of Defense (DoD), *Department of Defense Board on Diversity and Inclusion Report: Recommendations To Improve Racial and Ethnic Diversity and Inclusion in the U.S. Military* 3 (2020) (*D&I Report*); see, *e.g.*, DoD, *Diversity and Inclusion Strategic Plan: 2012-2017*, at 3 (2012); DoD Directive No. 1350.2, § 4.4 (Aug. 18, 1995); DoD Directive No. 1350.3, § E1.1.1 (Feb. 29, 1988). DoD has identified diversity as a "strategic imperative[]," and has focused on the need to "ensure that the military across all grades reflects and is inclusive of the American people it has sworn to protect." *D&I Report* vii. Secretary of Defense Lloyd Austin recently emphasized that "[b]uilding a talented workforce that reflects our nation * * * is a national security imperative" that "improves our ability to compete, deter, and win in today's increasingly complex global security environment." *Fiscal Year 2023 Defense Budget Request: Hearing Before the House Armed Services Comm.*, 117th Cong., 2d Sess. (2022); see, *e.g.*, Memorandum from Christopher C. Miller, Acting Sec'y of Def., DoD, for Senior Pentagon Leadership, Commanders of the Combatant Commands, Def. Agency & DoD Field Activity Dirs., *Re: Actions To Improve Racial and Ethnic Diversity and*

*Inclusion in the U.S. Military* 1 (Dec. 17, 2020) (reiterating that racial diversity "is essential to achieving a mission-ready fighting force in the 21st Century").

That longstanding military judgment reflects lessons from decades of battlefield experience. During the Vietnam War, for example, the disparity between the overwhelmingly white officer corps and highly diverse enlisted ranks "threatened the integrity and performance of the military." Military Leadership Diversity Comm'n, *From Representation to Inclusion: Diversity Leadership for the 21st-Century Military* xvi (2011) (*MLDC Report*). Officers often failed to perceive racial tensions that endangered combat readiness. Bernard C. Nalty, *Strength for the Fight: A History of Black Americans in the Military* 303-317 (1986). The absence of diversity in the officer corps also undermined the military's legitimacy by fueling "perceptions of racial/ethnic minorities serving as 'cannon fodder' for white military leaders." *MLDC Report* 15.

Those problems were starkly illustrated by racial conflicts triggered, at least in part, by the "lack of diversity in military leadership." *MLDC Report* xvi; *see id.* at 12. In 1969, fights between Black and white marines at Camp Lejeune left 15 injured and one dead. See Richard Stillman, *Racial Unrest in the Military: The Challenge and the Response*, 34 Pub. Admin. Rev. 221, 221 (1974). In 1971, racially charged conflicts erupted at Travis Air Force Base, lasting for two days and injuring at least ten airmen. See Nicole Leidholm, *Race riots shape Travis' history* (Nov. 8, 2013). And in 1972, racial unrest aboard the *U.S.S. Kitty Hawk* injured 47 sailors and resulted in 26 sailors, all Black, being charged with offenses under the Uniform Code of Military Justice. Stillman 222.

As a result of that Vietnam-era experience, DoD "made a sustained effort to increase the percentage of blacks at senior officer levels." Stillman 223. Over the following decades, those efforts led to "modest increases in minority demographic representation among junior to mid-grade officers," but failed to close the demographic gap and yielded even "less progress" in "diversifying the military's senior leadership." *D&I Report* 2.

In 2009, Congress established the Military Leadership Diversity Commission (MLDC) and charged it with conducting "a comprehensive evaluation and assessment of policies that provide opportunities for the promotion and advancement of minority members of the Armed Forces." *MLDC Report* vii. The resulting report underscored the importance of "[d]evelop[ing] future leaders who represent the face of America and are able to effectively lead a diverse workforce." *Id.* at 8. The MLDC explained that a diverse officer corps would "inspire future servicemembers," "engender trust among the population," and foster trust and confidence "between the enlisted corps and its leaders." *Id.* at 44. Other research has shown that more diverse military organizations "are more effective at accomplishing their missions," while "armies with high rates of inequality have done poorly based on various measures of battlefield performance." Dwayne M. Butler & Sarah W. Denton,

RAND Corp., *How Effective Are Blinding Concepts and Practices To Promote Equity in the Department of the Air Force?* 4 (Dec. 2021).

The military has not yet achieved its goal of building an officer corps that adequately reflects "the racial and ethnic composition of the Service members [officers] lead and the American public they serve." *D&I Report* 9. The officer corps remains "significantly less racially and ethnically diverse than the enlisted corps." *Id.* at 8. White servicemembers are 53% of the active force, but 73% of officers. *Ibid.* Black servicemembers, in contrast, are 18% of the active force but only 8% of officers. *Ibid.* The disparity is similar for Hispanic servicemembers, who constitute 19% of the active force but only 8% of officers. *Ibid.*

b. Because the military generally does not hire officers laterally, tomorrow's military leaders will be drawn almost entirely from those who join the military today. *MLDC Report* xvi. "To achieve a more diverse force at the senior grades," therefore, "DoD must ensure the development of a diverse pipeline of leaders." *D&I Report* 21. The military has thus concluded that fostering diversity at the service academies and the public and private universities that supply officer candidates is essential to fulfilling its mission to defend the Nation.

Commissioned officers generally must have a bachelor's degree, in addition to meeting other requirements. *MLDC Report* 47. And setting aside certain specialized roles, new officers must complete one of three types of commissioning program: A service academy, an ROTC program completed in conjunction with a bachelor's degree, or Officer Candidate School (known as Officer Training School for the Air Force). *Id.* at 53-54.

Approximately 19% of military officers come from the service academies. See Office of the Under Sec'y of Def., Personnel & Readiness, DoD, *Active Component Commissioned Officer Corps, FY18: By Source of Commission, Service, Gender, and Race/Ethnicity*, App. B, Tbl. B-33, at 96 (2018) (*Active Component*). Each service academy has concluded that a diverse student body is essential to preparing cadets to be effective military leaders. "Diversity," as the Air Force Academy has put it, "is a military necessity." *USAFA Diversity, Equity & Inclusion: Strategic Plan 2021*, at 3 (2021) (citation omitted). Likewise, the U.S. Military Academy at West Point has concluded that "its ability to leverage diversity across the spectrum" is critical to the strength of "the cohesive teams that are foundational to Army readiness." *Diversity and Inclusion Plan (2020-2025)*, at 3 (2020). "An Army not representative of the nation risks becoming illegitimate in the eyes of the people." *Id.* at 5. And diversity is crucial to equip "graduates with the skills and competencies needed to lead a diverse and inclusive 21st century Army." *Id.* at 3. The U.S. Naval Academy has similarly concluded that "[a] diverse workforce is a force multiplier required to maintain maritime superiority and dominance on the battlefield." *Diversity and Inclusion Strategic Plan* 1 (Mar. 2021).

The Air Force, Military, and Naval Academies, along with the Coast Guard Academy, all currently employ holistic recruiting and admissions policies that

consider race—along with many other factors—in an individualized review of applicants. Each of those institutions has concluded that this limited consideration of race in a holistic admissions system is necessary to achieve the educational and military benefits of diversity.[238]

The service academies have carefully considered potential race-neutral alternatives, but have concluded that, at present, those alternatives would not achieve the military's compelling interest in fostering a diverse officer corps. A percentage plan, which offers admission to a certain number of students at each high school based solely on class rank, cf. Pet. Br. 84-85, would not be workable for the service academies, which have a nationwide applicant pool and require a combination of academic excellence, leadership skills, physical ability, and personal character for success. Nor is an admissions policy based on socioeconomic status sufficient: West Point, for example, reports that its efforts to emphasize socioeconomic status have actually reduced racial diversity. Cf. *Fisher II*, 136 S. Ct. at 2213 (noting that the University of Texas had likewise "tried, and failed, to increase diversity through enhanced consideration of socioeconomic and other factors"). Finally, the academies employ many additional strategies, including recruiting diverse candidates, but thus far those strategies have proved insufficient on their own.

c. In addition to training officers directly through the service academies, DoD recruits and trains a large share of active-duty officers—over one third of the current officer corps—through ROTC programs at civilian universities. *D&I Report* 22-23. Those programs are particularly important to building a diverse officer corps because racial and ethnic minorities are more likely than white officers to gain their commissions through ROTC programs. *Id.* at 23. Civilian universities also educate approximately 22% of commissioned officers who obtain their commissions through Officer Candidate Schools. See *Active Component* 96. In the judgment of DoD and the Department of Homeland Security, selective universities that provide their students opportunities for cross-racial interaction are a critical source of future officers who are prepared to lead servicemembers of different racial and cultural backgrounds. In sum, what was true when *Grutter* was decided remains true today: "[T]he military cannot achieve an officer corps that is both highly qualified and racially diverse" unless the service academies and, as necessary, universities that host ROTC programs are able to "use[] limited race-conscious recruiting and admissions policies." *Grutter*, 539 U.S. at 331 (citation and emphases omitted).

238. The Merchant Marine Academy considers race for the seats it fills through its appointment process pursuant to its policy to train leaders through "wide exposure to the ideas and mores of students as diverse as this Nation's population." *Superintendent Instruction 2013-01*, at 1 (Jan. 16, 2013). It does not consider race for the seats it fills through the general admissions process.