No. 23A696

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,

Applicant,

v.

UNITED STATES MILITARY ACADEMY AT WEST POINT; UNITED STATES DEPARTMENT OF DEFENSE; LLOYD AUSTIN, in his official capacity as Secretary of Defense; CHRISTINE WORMUTH, in her official capacity as Secretary of the Army; LIEUTENANT GENERAL STEVEN GILLAND, in his official capacity as Superintendent of the United States Military Academy; and LIEUTENANT COLONEL RANCE LEE, in his official capacity as Director of Admissions for the United States Military Academy at West Point,

Respondents.

On Application for Injunction Pending Appellate Review

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR AN INJUNCTION PENDING APPELLATE REVIEW

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"Eliminating racial discrimination means eliminating all of it." *SFFA v. Harvard*, 600 U.S. 181, 206 (2023). Not yet, says West Point. Even if West Point will likely lose in the end, it wants to keep racially discriminating for the "several … admissions cycles" between now and then. App.14. Our nation's military was one of the first institutions to formally desegregate. But it wants to be the last to tell young Americans that "the touchstone of [their] identity is not challenges bested, skills built, or lessons learned but the color of their skin." *Id.* at 231. This Court needs a powerful reason to put the burden of the status quo on the victims of West Point's racial discrimination, instead of on West Point itself. The government can't get there by pleading for deference (that *Harvard* rejects), criticizing the record (that it created), or griping about bureaucratic burdens (that it invited).

For all its empty gestures to the "record," West Point doesn't identify a single fact that this Court needs before it can decide who is likely to win. The record, by the way, is West Point's *own* account of how it uses race. It never disputes anything that SFFA said about its process. The parties are in full agreement that:

- West Point uses a racially bifurcated process to determine whether applicants are qualified, get superintendent nominations, or receive letters of assurance. SFFA-Br.5-9.
- West Point uses race-based scoring and imposes race-based caps when offering early admission. SFFA-Br.5-6.
- West Point uses the same arbitrary and incoherent racial categories that Harvard used. SFFA-Br.20-21.
- West Point will keep using race until it "'becomes unnecessary,'" U.S.-Br.30, the same nonexistent endpoint that Harvard claimed.

- West Point uses race as a plus for only some groups in a zero-sum process, U.S.-Br.12-13; SFFA-Br.14-15, and its racial preferences meaningfully change the racial composition of its classes, U.S.-Br.30, 32.

- West Point doesn't know what its racial numbers would be if it stopped using race, SFFA-Br.20, let alone have measurable evidence proving that the difference is necessary to achieve its stated interests, U.S.-Br.34.

- The Coast Guard Academy was barred from using race in admissions until 2010, and yet it admitted diverse classes and fulfilled its crucial national-security mission. SFFA-Br.20.

Given all this agreement, West Point is right to concede that this case turns on "legal" questions, not "factual" disputes. U.S.-Br.4. And it's right to concede that "strict scrutiny applies here." U.S.-Br.4. Though the parties disagree about the role that deference plays, deference couldn't rectify these obvious defects.

Because West Point is intentionally discriminating based on race, it cannot defeat an injunction by complaining about the burdens of compliance. Far from the "middle" of its process, U.S.-Br. 5, 9, West Point has made only 25% of the offers it will make for the Class of 2028, *see* U.S.-Br.33 (450 out of 1,800). A prospective injunction will not require West Point to withdraw those offers. For the remaining 75%, they will be helped, not harmed, if West Point can no longer treat them differently based on race. *Cf.* U.S.-Br.34. And West Point will not be harmed if it must "careful[ly] conside[r]" this Court's injunction. U.S.-Br.34. Had it carefully considered *Harvard*, it would have changed its policy already. And if race plays such a "limited" role, U.S.-Br.21, then compliance will be simple. Starting on February 1, West Point will fill the congressional vacancies per usual (where it says it doesn't use race). Then it will pick the qualified alternates per usual (where it says it doesn't use race). And only then

will it pick the additional appointees (where it says it uses race, but only as one small plus factor). This one change, which comes at the end of the process with plenty of time to prepare, won't be "profoundly disruptive." U.S.-Br.34. Certainly no more "profound" than giving West Point a free pass to discriminate against thousands of young Americans.

This Court should enjoin West Point from using race in admissions by January 31. That date is not "artificial." U.S.-Br.5. It's West Point's application deadline for the Class of 2028, after which it starts making general admissions decisions. To be sure, this case won't become *moot* on February 1. This Court could still grant an injunction after that date. But the admissions process for the Class of 2028 will end—and West Point's racial discrimination will be complete—in "April or May 2024." U.S.-Br.2. Every day that passes between now and then is one where West Point, employing an illegal race-based admissions process, can end another applicant's dream of joining the Long Gray Line. This Court should grant interim relief as soon as possible.

I. West Point's race-based admissions, even on the undisputed facts and the record that West Point created, likely violate strict scrutiny.

Like the district court, West Point asserts that the record here is "incomplete." *E.g.*, U.S.-Br.27. But like the district court, West Point never explains what fact is missing, why that missing fact makes it impossible to predict a likely winner, or how that omission isn't fatal for West Point under strict scrutiny. West Point created this record—one that West Point elsewhere praises as "extensive." U.S.-Br. 29, 21.

West Point doesn't identify a single fact in dispute. It accepts SFFA's account of its admissions process, which uses race so much and so mechanically that it resembles the rejected programs in *Bakke* and *Gratz* more than the temporarily accepted program in *Grutter*. West Point concedes that it uses race "as a plus" for only three groups, U.S.-Br.25 n.2; that every rejected applicant goes through a zero-sum, race-based process, SFFA-Br.14-15; and that its racial preferences increase the numbers of its three favored races, U.S.-Br.32, 30. West Point makes no attempt to identify a discernible endpoint, even conceding that it recently *increased* its use of race for Hispanics. U.S.-Br.30. West Point never disputes that it uses the same flawed racial categories that were rejected in *Harvard*. And it agrees—enthusiastically—that courts cannot reliably measure its interests. U.S.-Br.22, 34. West Point frames those interests in terms of "diversity" writ large, as if the academy will somehow become "non-diverse" in a world of race neutrality. But West Point admits that it has no evidence trying to measure the difference. U.S.-Br.34. And it continues to pretend that the Coast Guard Academy, which didn't use race for years, doesn't exist.

Ultimately West Point ends up in the right place: If its race-based admissions can survive strict scrutiny after *Harvard*, West Point must identify "a legal distinction …, not a factual one." U.S.-Br.4; *accord* U.S.-Br.27 (stressing the "legal questions presented here"). No such legal distinction likely exists, a question of law that courts can decide in this posture. The notion that this Court wouldn't grant certiorari to review the Second Circuit's resolution of that question, *see* U.S.-Br.19, is unserious. Even without a circuit split, this Court granted certiorari in *Harvard* to decide

whether the nation's oldest private university and oldest public university could continue using race in admissions. *Harvard*, 600 at 190-91. Whether our nation's oldest military academy can do the same—after *Harvard* banned the practice everywhere else—is an important question that this Court would review, with or without a "circuit conflict." U.S.-Br.19. If it weren't, then *Harvard* wouldn't have gone out of its way to reserve it.

II. West Point cannot cure the defects in its race-based admissions policy by invoking deference.

Rather than distinguishing itself from Harvard, or explaining why it doesn't violate *Harvard*'s holdings, West Point tries to paper over all its problems by invoking deference. It asks this Court to "defe[r]" to the military's "judgmen[t]" no less than 20 times. *E.g.*, U.S.-Br.3, 5, 20, 21-24, 27. This argument—again, a pure question of law—is not likely to succeed.

Even if West Point got deference, that deference wouldn't be enough to save its badly illegal policy. West Point accepts that "strict scrutiny applies here," U.S.-Br.4, and that "the military context does not change the level of scrutiny," U.S.-Br.24. Citing *Johnson v. California*, West Point asks for the same kind of review that the government gets when it uses racial classifications "in the prison context." U.S.-Br.24. But prisons, too, must "demonstrate that any race-based policies are narrowly tailored." 543 U.S. 499, 506 n.1, 514 (2005). And narrow tailoring is particularly problematic for West Point. Courts can defer all they want to its assertions that cohesion, recruitment, retention, and legitimacy are important to the military. But West Point doesn't explain how deference could let it use individuals' race against them, deploy

false and demeaning stereotypes, use incoherent racial categories, or pursue unmeasurable interests indefinitely. This Court has "never permitted admissions programs to work in that way." *Harvard*, 600 U.S. at 230.

Deference, in all events, would be "fundamentally at odds with [this Court's] equal protection jurisprudence." *Johnson*, 543 U.S. at 506 n.1. While the government cites several cases about deferring to the military, not one involves racial classifications. *See* U.S.-Br.22-23. *Korematsu* did: "[A]ll" racial classifications, it said, are "immediately suspect" and call for "the most rigid scrutiny." *Korematsu v. United States*, 323 U.S. 214, 216 (1944). That case was wrongly decided not because it said the test is strict scrutiny, but because it did what West Point advocates here: invoke strict scrutiny, but then heavily defer to the military when applying that test. SFFA-Br.21-22. The government's nonracial cases about vaccines and the like do not help it defend a policy that racially classifies citizens, many of whom are still in high school and none of whom are in the Army. We did not fight a civil war over RFRA or vaccine mandates. *Cf. Austin v. U.S. Navy SEALs 1-26*, 142 S.Ct. 1301 (2022). We fought to vindicate the principle that a person's skin color should have nothing to do with how their government treats them, including their opportunities for "service in the armed forces." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

Also missing from the government's brief is any reference to its ROTC argument in *Harvard*—the last time it asked this Court to defer to the military on questions of race. The government does not deny that it argued, over and over in *Harvard*, that civilian universities needed to use race to preserve the racial diversity of the

ROTC; and yet this Court gave it no deference. *See Harvard*, 600 U.S. at 379 (Sotomayor, J., dissenting) (quoting U.S.-Br. at 12-18). The government cannot explain why it should get near-total, case-changing deference for the 20% of officers who come from West Point but not the 70% of officers who come from ROTC. *See* SFFA-Br.4.

That West Point accounts for only 20% of all Army officers points to a bigger problem for the government under strict scrutiny. West Point says racial classifications are "imperative for national security" and "essential to ensuring the effectiveness of the Army." U.S.-Br. at 5, 21. But it's hard to imagine how those classifications are essential to the Army—a 1.4-million person fighting force—when they affect, at most, only a few hundred Army officers every year. West Point annually commissions "approximately 1,000 cadets," App.99, yet claims to consider race "only a small fraction" of the time, D.Ct.Dkt.47 at 49. And West Point uses race for Native Americans even though it doesn't even *have* a goal for how many should be admitted. D.Ct.Dkt.47 at n.4. Strict scrutiny does not allow West Point to use race—the most odious classification known to law—for benefits that are "minimal" at best. *Parents Involved v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 733-35 (2007).

West Point tries to overcome this basic math problem by asserting a new, standalone "compelling interest in the diversity of … future *senior* Army Officers." U.S.-Br. at 27 (emphasis added). But that assertion has its own problems. For one, the Army does not consider race when making promotions. *See* D.Ct.Dkt.61 ¶41; D.Ct.Dkt.48 ¶36. West Point cannot explain why race is irrelevant when deciding which officers should become generals, but "critical" when deciding which civilian

teenagers should become cadets 30 years earlier. D.Ct.Dkt.10-6 at 97. For another, West Point has no evidence connecting its use of race in admissions to the racial diversity of generals. West Point is not screening racial minorities for their potential to become generals, and it has no idea which admitted cadets will remain in the Army past their initial commitment. If racially balancing the generals were West Point's goal, it has never once come remotely close to achieving it. *See* D.Ct.Dkt.49 ¶11 ("white general officers accoun[t] for 83% of Army general officers, while all other races and ethnicities accounted for only 17%").

III. Students' right to be free from unconstitutional racial discrimination outweighs any potential harm to West Point.

West Point does not explain how, if its race-based admissions are likely unconstitutional, the equities could favor it. Its "[m]ore fundamenta[l]" point—that an injunction would jeopardize national security—assumes this Court will blindly defer to the assertions of "senior military leaders." U.S.-Br.34. Its less fundamental point—that an injunction would be disruptive—is neither true nor decisive.

West Point claims of "disruption" are overwrought. West Point claims that it uses race at "three limited stages": letters of assurance, superintendent nominations, and additional appointees. U.S.-Br.21. Letters of assurance have already gone out for the Class of 2028 and wouldn't be affected by a prospective injunction. Superintendent nominations, West Point says, "rarely" use race at all. U.S.-Br.12. As for additional appointees, West Point does not dispute that it cannot select these positions until the end of the admissions process. By then, it will have plenty of time to "consul[t]" with any "stakeholders" and fully implement this Court's injunction. U.S.-

Br.34. These positions cannot be filled, after all, until all congressional vacancies are filled (which takes time) and all qualified alternates are filled (which takes still more time). *See* App.35 ¶20, 38-39 ¶¶34-36, 47-48 ¶70. And it's not very hard to tell admissions officers, "Consider everything you were considering before, except don't consider applicants' race." West Point's weak speculation about what an injunction "could" require it to do is telling. U.S.-Br.34.

Even if an injunction would be disruptive, such administrative burdens cannot excuse unconstitutional racial discrimination. When Hawaii held a racially exclusive election, it resisted an injunction because the "election [wa]s underway" and "[n]umerous ballots ha[d] already been returned." Hawaii-Br.20, *Akina v. Hawaii*, No. 15A551. This Court granted the injunction anyway. *Akina v. Hawaii*, 577 U.S. 1024 (2015). The minor administrative burdens here are far smaller and were largely invited by West Point. It chose to use race after *Harvard*, even though it knew its race-based admissions program had all the same flaws (and more). And it demanded two months to respond to SFFA's motion for a preliminary injunction, pushing this Court's decision all the way up to the application deadline.

At a minimum, this Court should enjoin West Point from using race starting next cycle. West Point's only response to this alternative relief is that the next application process "will not begin" until August 2024, "more than six months" away. U.S.-Br.35 n.4. But West Point insisted below, and got the district court to agree, that the next application process will start on "February 1, 2024"—mere days from now. App.26; *accord* App.65 ¶115. Even if six months were the right timeframe, six months

is not enough time to litigate SFFA's interlocutory appeal, let alone get to final judgment in the district court after a "'full trial.'" U.S.-Br.32. Unlike SFFA's case against the *Naval Academy*, where the district court put the parties on a heavily expedited schedule for discovery and trial, no such procedure was implemented here. This case is stayed, and both lower courts denied interim relief. If SFFA doesn't get that relief now, it's unclear when it ever could.

Finally, West Point denies that SFFA's members face irreparable harm, *see* U.S.-Br.31-32, but it badly misrepresents both the record and the district court's opinion. Though the district court rejected one theory of irreparable harm, it *agreed* that SFFA's members would suffer irreparable harm if they proved a likely violation of their constitutional right to equal protection. *See* App.23-24. It does not matter whether those members will get "selected" now or in a future cycle. U.S.-Br.32. Their constitutional rights are violated each time they are "denied … the opportunity to compete for admission on an equal basis." *Gratz v. Bollinger,* 539 U.S. 244, 262 (2003). And though West Point bizarrely insists otherwise, both members are "applying to West Point" at this very moment. D.Ct.Dkt.68 ¶2; D.Ct.Dkt.69 ¶2; D.Ct.Dkt.8 ¶6; D.Ct.Dkt.25 ¶5. Member C got her congressional nomination before the district-court record closed, D.Ct.Dkt.69 ¶2, and Member A got his afterward. Neither has been medically or physically disqualified (and Member C passed those tests already once before, D.Ct.Dkt.25 ¶4). Though the district court didn't resolve much below, one thing it clearly found is that both of SFFA's members have standing. App.15-17. West Point's attempt to relitigate that finding is a bad attempt to distract the Court.

CONCLUSION

This Court should enjoin West Point from considering the fact of an applicant's race as a factor in admissions decisions, pending final disposition of the appeal by the Second Circuit.

Respectfully submitted,

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