No. 23A_____

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

EMERGENCY APPLICATION FOR AN INJUNCTION PENDING APPELLATE REVIEW

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PARTIES TO THE PROCEEDING & RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

Applicant is Students for Fair Admissions, Inc. SFFA was plaintiff in the district court and is appellant in the court of appeals.

Respondents are 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. They were defendants in the district court and are appellees in the court of appeals.

The related proceedings below are:

1. *Students for Fair Admissions v. U.S. Military Academy at West Point, et al.*, No. 24-40 (2d Cir.) – appeal pending; and

2. *Students for Fair Admissions v. U.S. Military Academy at West Point, et al.*, No. 23-cv-8262 (PMH) (S.D.N.Y.) – order denying preliminary injunction entered January 3, 2024.

CORPORATE DISCLOSURE STATEMENT

SFFA has no parent company or publicly held company with a 10% or greater ownership interest in it.

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TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

After this Court's landmark decision in *SFFA v. Harvard*, no public or private university is openly considering race in admissions, with one exception: our nation's military academies. The government read *Harvard* and decided that, for the upcoming class of 2028, the academies would "'use race as a factor.'" D.Ct.Dkt.1 at 20 ¶75. *Harvard* "does not address" the military academies, 600 U.S. 181, 213 n.4 (2023), and the government reads that language as a "carve out [for] the military academies from [the] decision," D.Ct.Dkt.47 at 63 n.30.

Far from a carveout, *Harvard* "does not address" the military academies because this Court didn't know how they used race. 600 U.S. at 213 n.4. But the opinion says plenty about *the law* that governs them. The academies must satisfy real strict scrutiny: The lesson of *Korematsu* is that even the military must satisfy "'the most rigid scrutiny'" when it racially classifies citizens, *id.* at 207 n.3, and this Court will not defer to the government's assertions of military necessity, like its insistence that civilian universities needed to use race to preserve the diversity of ROTC, *id.* at 379-80 (Sotomayor, J., dissenting). To satisfy strict scrutiny, the academies must identify "distinct interests": They can no longer rely on the educational benefits that *Harvard* rejects. *Id.* at 213 n.4, 214-15 (majority). And even if the academies have distinct interests, they must prove narrow tailoring: They cannot use race as a negative, lack an endpoint, stereotype, deploy arbitrary categories, or pursue interests that courts can't reliably measure. *Id.* at 213-25, 230.

Our Nation's oldest military academy, West Point, finally revealed how it uses race below; and the facts are egregious. In response to SFFA's motion for a preliminary injunction, West Point submitted over 300 pages about its admissions process. Even under its own telling, West Point is violating *Harvard* worse than Harvard itself. While Harvard denied that "some races are not eligible to receive a tip," *id.* at 348 n.27 (Sotomayor, J., dissenting), West Point awards preferences to only three races: blacks, Hispanics, and Native Americans. Worse, in a throwback to *Bakke* and *Gratz*, West Point uses race to determine which office reviews applications, how many early offers it makes, and what scores applicants need to get. West Point concedes that it uses the same racial categories that *Harvard* deemed "'incoherent,'" *id.* at 216 (majority), and that it has no firmer endpoint for its race-based admissions. And its asserted interests would have courts try to measure whether racial preferences are necessary to make the Army "lethal" on the battlefield or "legitimate" in the eyes of foreign countries. Even less amenable to judicial review.

For now, the only question is what should happen as this case proceeds—who should bear the burden of the status quo. Every year this case languishes in discovery, trial, or appeals, West Point will label and sort thousands more applicants based on their skin color—including the class of 2028, which West Point will start choosing in earnest once the application deadline closes on January 31. Should these young Americans bear the burden of West Point's unchecked racial discrimination? Or should West Point bear the burden of temporarily complying with the Constitution's command of racial equality? The answer, as Judge Sutton once explained in a similar

case, "turns on the likelihood of success on the merits." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (cleaned up). And here, West Point is *highly* likely to lose.

"Eliminating racial discrimination means eliminating all of it." *Harvard*, 600 U.S. at 206. This Court should enjoin respondents from using the fact of an applicant's race as a factor in making admissions decisions, pending the Second Circuit's final disposition of SFFA's appeal. *See Akina v. Hawaii*, 577 U.S. 1024 (2015); Final Judgment (Doc. 754), *SFFA v. Harvard*, No. 14-cv-14176 (D. Mass. Jan. 9, 2024). To accommodate West Point's main concerns, this Court should rule by January 31, 2024 (or as soon as possible after that date). This Court could also clarify that its injunction is prospective, meaning it does not require West Point to rescind any offers of admission made before it was entered. *Cf. Andino v. Middleton*, 141 S.Ct. 9, 10 (2020).*

OPINIONS BELOW

The district court's opinion is available at *Students for Fair Admissions v. U.S. Military Academy at West Point*, 2024 WL 36026 (S.D.N.Y. Jan. 3), and reproduced at Appendix ("App.") 1-27.

JURISDICTION

The district court denied SFFA's motion for a preliminary injunction on January 3, 2024. SFFA appealed the same day, 28 U.S.C. §1292(a), and its appeal is pending in the Second Circuit. This Court will have jurisdiction under 28 U.S.C. §1254(1),

* SFFA's emergency motion asking the Second Circuit for the same relief was fully briefed on January 12, yet the Second Circuit has not ruled as of 5:30 p.m. on Friday, January 26. If this Court needs more time, it should administratively enjoin West Point from making any additional offers of admission until this motion is resolved.

so it can grant an injunction pending appellate review under 28 U.S.C. §1651. *E.g.*, *Chrysafis v. Marks*, 141 S.Ct. 2482, 2482-83 (2021).

STATEMENT OF THE CASE

West Point is a four-year college. App.30 ¶7. Graduates earn a bachelor's degree, are officers in the Army, and agree to serve five years. App.31 ¶¶8-9. The Army gets about 20% of its officers from West Point. App.31 ¶9. The rest attend civilian universities, including the 70% who come from ROTC. *Army Officer Commissioning* (May 10, 2019), perma.cc/DH56-2FYT; *see also UNC*-O.A.Tr.8-17 (government: "actually, more officers come from ROTC programs" than from "the service academies"). Among all officers, West Point graduates are the most likely to leave the Army after their fifth year. D.Ct.Dkt.61 at 12 ¶42 & n.14.

I. West Point uses race at the beginning, middle, and end of its highly competitive admissions process.

Admission to West Point is "highly selective." App.4. The number of cadets is capped by statute. 10 U.S.C. §7442(a). Each year West Point receives around 13,000 applications to fill 1,200 spots—meaning the odds of attending are about "ten percent." App.4; App.31 ¶10. That rate mirrors UNC–Chapel Hill's. *See Harvard*, 600 U.S. at 195 (UNC is "'highly selective'" because it "'receives approximately 43,500 applications for its freshman class of 4,200'").

To be "qualified" for West Point, applicants must meet certain minimum conditions. They must be citizens, unmarried, childless, and younger than 23. *See* App.35-36 ¶22. They must take a fitness test and get medically cleared. App.5; App.37 ¶¶26-27. And they must be nominated. App.5. West Point also reviews whether each applicant is qualified in terms of academics, leadership, and physical fitness. App.7.

West Point calls this review "holistic," App.44 ¶60, and it tells admissions officers to consider "all relevant information," including "candidate characteristics" and "biographical data," App.77.

Though West Point says it doesn't use race when determining whether an applicant is qualified, *who* makes that determination depends on race. If applicants check the box for "African American, Hispanic, [or] Native American," then their qualifications are reviewed by the "Diversity Outreach Office." App.33-34 ¶16. If applicants check the box for any other race, then their qualifications are reviewed by a regional admissions officer. App.43 ¶59, 34 ¶17. "Asian and Pacific Islander candidates" are not sent to the diversity office because West Point considers them overrepresented. App.33-34 ¶16. And West Point stopped sending Hispanics to the diversity office "around 2014," but it started back up when it saw "a drop in [their] acceptance rate." D.Ct.Dkt.47 at 66.

Once applicants are deemed qualified, they have four main paths to get into West Point: receive a letter of assurance, get nominated by the Superintendent, have one of the highest whole candidate scores, or get picked as an additional appointee. For at least three of these paths, West Point uses race.

Letters of assurance: Letters of assurance are West Point's version of early admission. App.48 ¶71. These letters are "conditional offers of admission," App.80, meaning recipients "*will* be admitted" if they finish applying and get minimally qualified, App.9 (emphasis added).

West Point sends these letters based on race, caps the number of available letters based on race, and uses different criteria based on race. According to its internal guidance, West Point sends letters of assurance to five categories of applicants: recruited athletes, blacks, Hispanics, scholars, and women. App.93; App.49 ¶75 n.4. West Point also caps the overall number of letters and the number for each category: This cycle, the caps are 160 for athletes, 120 for blacks, 75 for Hispanics, 75 for scholars, and 75 for women. App.93. To get a letter, candidates need certain minimum scores. Blacks are held to the same standard as recruited athletes. Hispanics need higher scores than blacks. Women need higher scores than Hispanics. And "scholars"—the only category that includes white and Asian men who aren't recruited athletes—must have the highest scores.

	Minimum CEER/ACEER (grades, standardized tests)	**Minimum WCS (academics, extracurriculars, physical fitness)**
Recruited Athletes	554	none
Blacks	554	none
Hispanics	554	5600
Women	554	6500
Scholars	650	6801

See App.93.

Superintendent nominations: Up to 50 applicants per year can be nominated by West Point's superintendent. App.40 ¶41. These nominations are usually "reserved for candidates who help meet talent and diversity recruitment." App.78.

There are no restrictions on the superintendent's discretion, App.40 ¶41, so he can and does consider race for blacks, Hispanics, and Native Americans, App.10, 78. And West Point's racially bifurcated review applies to these nominations too. While regional admissions officers typically recommend candidates for Superintendent nominations and letters of assurance, the Diversity Outreach Office makes those recommendations for black, Hispanic, and Native American applicants. App.56-57 ¶94; App.11; App.33 ¶16, 50 ¶78.

Whole candidate scores: West Point assigns every applicant a whole candidate score. This score is first calculated by a formula, which assigns applicants a number based on their academics, extracurriculars, and physical fitness. App.7, 85. But a reviewer can adjust that score up or down 10%. App.42-43 ¶56. Though West Point says it doesn't use race when making these adjustments, no such directive appears in the instructions it gives admissions officers. *See* App.73. These candidates also go through the racially bifurcated "qualification" process, and West Point says it used to consider race when deciding whether to open their applications (but "does not intend to continue" that practice in "future admissions cycles"). App.57 n.7.

West Point uses the whole candidate score to make admissions decisions. About 75% of applicants are nominated by a member of Congress. D.Ct.Dkt.1 at 5 ¶22; App.38 ¶32. If the member does not rank his nominees (most don't), then West Point selects the nominee with the highest whole candidate score. App.8, 38 ¶34, 39 ¶37. Once West Point has selected a nominee for each member of Congress, the academy admits 150 "qualified alternates" in "order of merit." App.78-79. By "merit," it

means the 150 remaining applicants who have the highest whole candidate scores. App.79.

Additional appointees: Applicants who aren't admitted under any other path can still be admitted as additional appointees. Several hundred applicants—about 25% of the class—get in this way. App.92. When choosing additional appointees, West Point can go "out of order," meaning it can take applicants with lower whole candidate scores over applicants with higher scores. App.77. One of the key reasons it goes "out of order" is to treat "race" as a "plus factor for African American, Hispanic, and Native American candidates." App.77, 55-56 ¶93(b). West Point tells admissions officers to plan to admit, as additional appointees, 180 athletes, 100 blacks, 75 women, and 75 Hispanics. App.92.

Under all four paths, West Point "shapes the incoming class" by following class composition goals. App.89. West Point has goals for "talent" and "diversity," though the diversity goal is defined solely in terms of race and sex. App.89. The diversity goals are set by West Point alone; it "does not receive guidance" from the Army on any desired "diversity composition." App.89. West Point sets these diversity goals by trying to make the incoming class "mirror," after accounting for "attrition," the racial composition of the Army's "current" officers. App.89; App.52 ¶¶83-85. So if Hispanics are 8% of officers in the regular army ("RA"), then West Point aims to admit 11% (on the assumption that a quarter won't graduate):

RA Officer Population as a Benchmark of Diversity

Women > 20% (Officer Population – 18%)
Minorities > 37% (Officer Population 29%)
African American > 14% (Officer Population 11%)
Hispanic > 11% (Officer Population 8%)
Asian > 7% (Officer Population 7%)
Other > 5% (Officer Population 3%)

App.89.

West Point tracks its racial goals—and usually hits them—with military precision. Its current guidance for admissions officers starts by stressing that, last cycle, the team "met or exceeded our class composition goals for Asians, Leaders, Scholars, and Soldiers; while falling just a little short in Women, Athletes, African Americans, and Hispanics." App.91. By a "little," West Point means it missed its "goal" of admitting 138 Hispanics by *one person* and its goal of admitting 244 women by *five people*. App.93. For each of the six years of complete data in the record, West Point never missed its target for blacks or Hispanics by more than 3.6 percentage points:

Class	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**	**2027**
Black Admitted (Goal)	10.7% (12-15%)	8.6% (12-15%)	9.5% (12-15%)	13.9% (11-13%)	15.1% (>14%)	13.8% (>14%)	10.4% (>14%)
Hispanic Admitted (Goal)	9.6% (9-12%)	8.6% (9-12%)	11.7% (9-12%)	10.1% (9-12%)	9.7% (>11%)	9.3% (>11%)	10.8% (>11%)

See D.Ct.Dkt.1 at 7 ¶29; App.93. To the extent West Point missed its target for blacks, it wasn't for lack of trying. Its key declarant once confessed that, in a recent admissions cycle, "every qualified African-American applicant w[as] offered admission into West Point, yet the class composition goal was still lacking." D.Ct.Dkt.1 at 9 ¶34; D.Ct.Dkt.10-13 at 3.

For the upcoming class of 2028, West Point's application deadline is January 31, 2024. App.5; App.34-35 ¶20. Though applicants could start the first part of the process in February 2023 and the second part in May 2023, App.34-35 ¶20, 91, West Point's admissions committee did nothing until July, when it started issuing letters of assurance, App.9, 50 ¶77. Its committee did not make any offers of admission or even meet until October 2023, and then started making some offers to special applicants. App.46 ¶69; App.81, 92. But because applicants don't even have to apply until January 31, West Point will make the vast "majority" of admissions decisions after that date—from "the end of January through April" 2024. App.92; App.46 ¶69. Only after January 31 could West Point know who each member of Congress nominated, rank the candidates by whole candidate score, and see who was left to be qualified alternates and additional appointees. *See* App.47-48 ¶70; App.78-79; 10 U.S.C. §§7442(b)(5), 7443.

II. SFFA sues and seeks a preliminary injunction for two of its members, who are applying to West Point this cycle.

SFFA filed this suit in September 2023, alleging that West Point's use of race violates the Constitution's guarantee of equal protection. D.Ct.Dkt.1. SFFA sued on behalf of two members—a high-school senior applying for the first time, and a college freshman applying for the second time—who are fully qualified but white. D.Ct.Dkts.8, 25, 68-69. Because they are applying to West Point now, SFFA immediately moved for a preliminary injunction. D.Ct.Dkt.6. West Point knows how it uses race and, under strict scrutiny, was supposed to know why it used race and have the evidence proving that its use was necessary. *Fisher v. Univ. of Tex. at Austin*, 570

U.S. 297, 312 (2013). But West Point took over *sixty days* to respond to SFFA's motion. D.Ct.Dkt.43. Its response included a 60-page brief, six declarations, and its internal admissions procedures. D.Ct.Dkts.47-53; App.68-95.

West Point argued that it uses race to maintain the current racial mix of the Army's officer corps. D.Ct.Dkt.47 at 60; App.10. That racial balance, in turn, is supposedly necessary to achieve four interests: cohesion, recruitment, retention, and legitimacy. D.Ct.Dkt.47 at 30. Cohesion because minority soldiers have "greater confidence" if their "leaders" share "demographic similarities." D.Ct.Dkt.47 at 39 (cleaned up). Recruitment because, if racial minorities "don't see someone that looks like them in a higher position," then "they're less inclined" to join the Army. D.Ct.Dkt.49 at 11 ¶25. Retention because racial minorities won't stay in the Army without good mentors, and "innate human tendencies" make officers "more apt to mentor members of [their] own phenotype." D.Ct.Dkt.47 at 44-45 n.19 (cleaned up). And legitimacy because, if the Army's officers do not mirror the country's racial demographics, Americans won't trust that soldiers "will faithfully execute their duty to protect all Americans," D.Ct.Dkt.48 at 10 ¶26, and other countries won't trust that soldiers will be "comfortable leading individuals" of different backgrounds, App.60 ¶101.

III. The lower courts deny interim relief.

The district court denied a preliminary injunction on January 3. It found that SFFA had associational standing. App.15-17. It rejected West Point's argument that SFFA filed its motion too late. App.26 n.16. And it acknowledged that a violation of equal protection is an irreparable harm when the claim is likely correct. App.24-26;

see also App.17 (noting that "'[c]onsideration of the merits is virtually indispensable'" in constitutional cases because it's "'the dominant, if not the dispositive, factor'").

But on the likely merits of SFFA's claim, the district court refused to rule. It was "uncertain" about "how deference operates here." App.21 n.11. And it found it "possible that *Harvard*'s equal protection conclusions … apply to West Point." App.22. But the "procedural posture," the court claimed, made it "impossible" to rule one way or the other. App.22. So it declared SFFA unlikely to succeed on the merits—not because West Point's use of race was likely constitutional, but because the court lacked a "full factual record." App.22. The court did not explain what specific facts prevented it from making a prediction about the likely merits at the preliminary-injunction stage. And it did not explain why, even accepting West Point's facts as true and crediting its stated interests, SFFA wouldn't prevail on narrow tailoring. Though the court agreed that the test here is "'strict scrutiny,'" App.17, it put the burden on SFFA to "prove a negative"—to defeat all possible interests and facts that might sustain West Point's use of race, instead of the actual interests and facts that West Point submitted, App.18, 22-23.

SFFA immediately sought an emergency injunction pending appeal, D.Ct. Dkts.79-80, which the district court denied on January 4, App.83. SFFA then immediately asked the Second Circuit for the same relief by January 17, giving the loser two weeks to get relief from this Court before West Point's application deadline closes on January 31. CA2.Dkt.11.1. But the Second Circuit still has not ruled on SFFA's emergency motion, 14 days after it was fully briefed. That long delay, West Point's

rapidly approaching deadline, the need to protect SFFA's members, and the need to give this Court time to rule are "extraordinary circumstances" that require SFFA to file this application now. S.Ct.R.23(3).

REASONS FOR GRANTING THE APPLICATION

SFFA is "clearly … entitle[d] to relief pending appellate review." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 66 (2020). Its constitutional claim is "likely to prevail." *Id.* Denying an injunction will "lead to irreparable injury." *Id.* And granting an injunction will "not harm the public interest." *Id.* Though SFFA appreciates that injunctions are extraordinary, they are necessary when the government refuses to stop facially illegal, rapidly approaching, intentional discrimination. *E.g.*, *Akina*, 577 U.S. at 1024; *Wheaton Coll. v. Burwell*, 134 S.Ct. 2806, 2807 (2014).

I. West Point's use of race in admissions violates the Constitution.

"[T]he Constitution forbids discrimination by the General Government, or by the States, against any citizen because of his race." *Harvard*, 600 U.S. at 205 (cleaned up; quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)). The "'analysis'" that governs the federal government "'is the same as'" the analysis that governs the States "'under the Fourteenth Amendment.'" *Adarand Constructors v. Peña*, 515 U.S. 200, 224 (1995). *Harvard*'s application of strict scrutiny thus governs West Point. West Point is blatantly violating each of *Harvard*'s holdings, and no legal principle exempts West Point from that decision. The district court did not rule otherwise; it refused to predict who was likely to succeed, which is itself reversible error in a constitutional case.

A. West Point violates every principle from *Harvard*.

Per *Harvard*, race-based admissions policies violate equal protection because they "unavoidably employ race in a negative manner," "lack meaningful end points," "involve racial stereotyping," and "lack sufficiently focused and measurable objectives," especially when they use imprecise racial categories. 600 U.S. at 230, 215-17. Those four flaws existed not just at Harvard and UNC, but at the "[m]any universities" that used race-based admissions. *Id.* at 231. They exist at West Point, a fact that the government largely concedes. *E.g.*, U.S.-*Harvard*-Br.5, 24 (explaining that the "service academies" use race like the civilian "universities around the country" did).

1. West Point uses race as a negative. It concedes that it uses race as a "plus" for only three races. App.10; D.Ct.Dkt.47 at 10, 16, 54, 57. Because "admissions are zero-sum," that plus is "necessarily" a minus for all others. *Harvard*, 600 U.S. at 218-19. West Point even suggested below that, if it couldn't use race, it would have to *withdraw* offers already made, meaning race is determinative for some applicants. App.66 ¶117. True, West Point says parts of its process are race neutral, like when it selects some applicants based only on their whole candidate score. But no applicant who is denied admission to West Point—the main victims of the academy's discrimination—goes through a race-neutral process. Rejected whites and Asians, at a minimum, miss out on the racial preferences that West Point awards when selecting additional appointees, who make up the last 25% of the class. App.48 ¶70(b), 92. And West Point's entire defense under strict scrutiny is that, without racial preferences, "the demographics of [its] admitted classes would meaningfully change." *Harvard*, 600 U.S. at 219; *e.g.*, App.61 ¶104 ("would lower" the "rates" of racial minorities);

App.66-67 ¶119 (similar); D.Ct.Dkt.49 at 18 ¶41 (similar). "How else but 'negative' can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been?" *Harvard*, 600 U.S. at 219.

West Point's only response is that, unlike in *Harvard*, the record doesn't yet reveal *how much* of a negative race is for whites and Asians—how many applicants West Point rejects now but would admit under race neutrality. D.Ct.Dkt.47 at 61-62; CA2.Dkt.19.1 at 16-17. That precise figure (which West Point should know, but has conveniently withheld) is irrelevant. Admissions programs that use race as a plus for some "*unavoidably* employ race in a negative manner" for others. *Harvard*, 600 U.S. at 230 (emphasis added). *Harvard* nowhere suggests that it's okay to treat some applicants' race as a negative, so long as it's not too many of them. "[A]n *individual's* race may *never* be used against him." *Id.* at 218 (emphases added). Besides, West Point does quantify the negative effect of race in its process. When it awards letters of assurance to nonathletes, it lets Asian males compete for only 75 letters, while black males can compete for 195. App.93. And changing a male's race from "Hispanic" to "white" means he must score 96 points higher on one metric and 1201 points higher on another. App.93. Not even Harvard used such mechanical racial scorekeeping.

2. West Point's use of race has no meaningful endpoint. Like Harvard, West Point says it's been using race for "over four decades." App.14; 600 U.S. at 225. And this case exists because West Point still insists on using race for the "[Class of] 2028—25 years after *Grutter*." *Harvard*, 600 U.S. at 225. Like Harvard, West Point has no

"'sunset date'" on its racial preferences or even a rough guess when they might end. *Id.* Like Harvard, West Point merely promises that it "does not intend to use race … indefinitely" and that it "periodically reviews" its policies. CA2.19.1 at 16; 600 U.S. at 221, 225. But vague hopes are not a defined "end," and "periodic review" is insufficient. *Harvard*, 600 U.S. at 225.

West Point's race-based admissions couldn't end "any time soon" because, just like Harvard, it uses race to get a "rough percentage" of certain racial groups. *Id.* at 223-25. It tries to match the racial mix of its admitted classes to the current racial mix of all Army officers—an ever-moving target. Proving the point, West Point decreased its use of race for Hispanics after their population grew in 2014, but "recently" ramped it back up because the Hispanic numbers at West Point became misaligned. D.Ct.Dkt.47 at 66; App.58 ¶96. This constant racial engineering "'effectively assure[s] that race will always be relevant'" at West Point. *Harvard*, 600 U.S. at 224.

West Point said below that it doesn't need an endpoint because, like prisons quelling race riots, the military always has an interest in national security. D.Ct.Dkt.47 at 67. West Point's analogy to prisons fails on its own terms: A prison's use of racial segregation to end a race riot must be "temporary" too. *Harvard*, 600 U.S. at 215; *accord Johnson v. California*, 543 U.S. 499, 509 (2005) (same, quoting the United States). But no analogies are needed: "*All* race-conscious admissions programs," the Court has "repeatedly" stressed in this precise context, "*must* have a termination point." *Harvard*, 600 U.S. at 212 (cleaned up; emphases added). They must end, not because the government's interest stops being compelling, but because racial

classifications are "'dangerous.'" *Id.*; *id.* at 313 (Kavanaugh, J., concurring). Over time, their deviation from "the Constitution's unambiguous guarantee of equal protection" cannot be justified. *Id.* at 212 (majority). *Grutter* held that "race-based affirmative action in higher education could continue *only* for another generation," and that "generation has now passed." *Id.* at 315-16 (Kavanaugh, J., concurring).

3. West Point also stereotypes. Under its process, "some students may obtain preferences on the basis of race alone." *Id.* at 220 (majority). For applicants who check the box for black, Hispanic, or Native American, "race *qua* race" dictates which office deems them qualified, how many points they need to get an early offer, and whether they can be picked ahead of someone with a higher whole candidate score. *Id.* West Point thus "stereotypes" by "treat[ing] individuals as the product of their race." *Id.* at 221 (cleaned up). "[W]hen a university admits students on the basis of race, it engages in the offensive and demeaning assumption that students of a particular race, because of their race, think alike—at the very least alike in the sense of being different from nonminority students." *Id.* at 220-21 (cleaned up).

West Point denies that it "assum[es] students of particular races" will further diversity by expressing certain "minority viewpoints." CA2.Dkt.19.1 at 14; D.Ct.Dkt.47 at 18. But it does. *E.g.*, D.Ct.Dkt.51 at 4-5 ¶10 (the "core" reason why the military values "diversity" is because racial minorities have a different "perspective" on "conflict and security"); D.Ct.Dkt.48 at 7 ¶19 (defending racial preferences as a way to get "a broader range of perspectives, experience, and knowledge");

D.Ct.Dkt.47 at 38 ("'racial and ethnic diversity … bring[s] together people with different experiences, identities and perspectives"); D.Ct.Dkt.47 at 42 (defending racial preferences as a way to get different "'mental models'").

And West Point's stated interests traffic in other racial stereotypes. Its logic assumes, at a minimum, that racial minorities care about the precise racial mix of officers when deciding whether to join the Army, fight hard, follow orders, or seek promotions. *See* D.Ct.Dkt.47 at 37-38, 40, 42-44. And West Point assumes that racial minorities—because of their race—make the best leaders, role models, and mentors for other racial minorities. *See* D.Ct.Dkt.49 at 11 ¶25; D.Ct.Dkt.47 at 35-36. Those who defended racial segregation in the military made similar points. D.Ct.Dkt.1 at 16-17 ¶59. So while some of West Point's stereotypes are different from the ones condemned in *Harvard*, its new stereotypes are equally false, equally "'demean[ing],'" and equally illegal. *Harvard*, 600 U.S. at 220; *see* D.Ct.Dkt.61 at 9-11 ¶¶33-34, ¶38; 17-19 ¶55, ¶¶57-60.

4. Nor could a court reliably measure West Point's interests "under the rubric of strict scrutiny." *Harvard*, 600 U.S. at 214. Courts obviously cannot tell whether the troops are "cohesive" enough, or the Army is "legitimate" enough. App.19-20; *see Harvard*, 600 U.S. at 224 (rejecting such "'qualitative'" interests). Courts also cannot tell whether the Army is recruiting and retaining "top talent." App.19-20. West Point, like Harvard, thinks courts can just consult academic studies and surveys. *Compare* D.Ct.Dkt.47 at 40-42, 49-51, *with* Harvard-Br.34, 37. But even if West Point's sources were persuasive, they don't try to prove causation—that West Point's desired ends

are being achieved *because* it uses race-based admissions. Nor could they. West Point says it's been using race for 40 years, App.51 ¶81, yet the military's recruitment and standing with the public are at all-time lows. D.Ct.Dkt.61 at 19-20 ¶¶62-65; D.Ct.Dkt.49 at 12-13 ¶¶27-28. West Point's sources also ignore that racial preferences have costs that counteract their stated goals. *See Johnson*, 543 U.S. at 507, 511 (increased racial hostility and decreased public legitimacy); *Adarand*, 515 U.S. at 229 (increased racial stigma and decreased confidence); D.Ct.Dkts.10-22, 10-23 (deep unpopularity with the American public). More fundamentally, West Point accounts for only 20% of Army officers. App.4, 31 ¶9. Its stated goal—balancing the overall racial mix of the entire officer corps—could not possibly turn on the subset of racial minorities who get into West Point because of racial preferences.

Even more impossible, courts cannot answer the key, reverse-causal question that strict scrutiny asks: "whether [West Point's] goals would adequately be met in the absence of a race-based admissions program." *Harvard*, 600 U.S. at 224. The difference between race-based admissions and race-neutral admissions "is not one of *no* diversity or of *some*: it is a question of degree." *Id.* at 215. West Point will still be diverse without race-based admissions—especially because it can ramp up race-neutral alternatives, and because its civilian competitors are now banned from using race. "[H]ow much" less cohesive, attractive, or legitimate the Army will be under this regime "are inquiries no court could resolve." *Id.* Apparently West Point can't either. Its evidence all treats diversity like an on/off switch, falsely assuming that West Point will no longer be "diverse" if it stops using race. *E.g.*, CA2.Dkt.19.1 at 9-10 (assuming

that, without racial preferences, the Army would return to the racial status quo of "1968"). West Point doesn't even calculate what its racial numbers would *be* if it stopped using race today. And it entirely ignores the Coast Guard Academy, which was banned from using race in admissions until 2010. App.23 n.14. West Point never suggests, let alone proves, that the Coast Guard somehow failed to carry out its critical "national defense" functions during this era. 14 U.S.C. §102(4), (7); §5114(1).

Making matters worse, West Point cannot "articulate a meaningful connection between the means [it] employ[s] and the goals [it] pursue[s]." *Harvard*, 600 U.S. at 215. Harvard tracked race under six categories: "(1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American." *Id.* at 216. This Court called those categories "opaque," "undefined," "imprecise," "arbitrary," "'incoherent,'" "'irrational stereotypes,'" and both "underinclusive" and "plainly overbroad." *Id.* at 216-17 (quoting Justice Gorsuch's concurrence). "Bureaucrats" invented them "in the 1970s to facilitate data collection," "'without any input from anthropologists, sociologists, ethnologists, or other experts.'" *Id.* at 291 (Gorsuch, J., concurring). Yet West Point uses the exact same categories. App.64-65 ¶¶112-13. That the Army also uses these categories for its own recordkeeping, D.Ct.Dkt.47 at 61, is circular and irrelevant. These categories were not designed to achieve any public-policy objective, let alone military ones. *Harvard*, 600 U.S. at 291 (Gorsuch, J., concurring). Because they don't reflect how people see themselves, they "undermin[e]" all of West Point's interests. *Id.* at 217 (majority). And because they

reveal no real information, they make it impossible for courts to "scrutinize" whether West Point is satisfying strict scrutiny. *Id.*

B. West Point is not exempt from *Harvard*.

West Point's main response to these cut-and-dry violations of *Harvard* is that the academies aren't bound by this Court's decision. Either footnote 4 exempts them, or courts owe the military special deference. Neither argument works.

Harvard simply "does not address" the military academies. *Id*. at 213 n.4. "No military academy [wa]s a party" there, and *Harvard* hedged that the academies "may" have "potentially distinct interests." *Id.* The opinion does not say that the academies *do have* those interests. And it does not suggest that, if the military academies identified distinct interests, then those interests could bypass narrow tailoring or satisfy a weaker version of strict scrutiny.

Nor does *Harvard* suggest that the military should get deference when it racially classifies citizens; it says just the opposite. *Harvard* discussed the military academies in footnote 4. But in footnote 3, it stressed that *Korematsu* is "infamous," "'gravely wrong,'" and "overruled" precisely because it failed to make the military satisfy "'the most searching'" scrutiny. *Id.* at 207 n.3; *accord Adarand*, 515 U.S. at 236 ("*Korematsu* demonstrates vividly" that "strict scrutiny" is needed to test the government's assertions of "'military dangers'" and national "'security'"). *Harvard* itself heeded that lesson. The government there, on behalf of the entire military, argued that civilian universities must use race to preserve the diversity of the officers that come from ROTC. *E.g.*, U.S.-*Harvard*-Br.13, 16-19; *UNC*-O.A.Tr.144-51, 155. That

point was the government's main assertion in *Harvard* and a key part of the reasoning in *Grutter*. *See Grutter v. Bollinger*, 539 U.S. 306, 331 (2003). This Court didn't miss the point; it was unpersuaded.

Harvard's refusal to defer to the military followed settled law. As *Adarand* definitively held, "*all* racial classifications, imposed by *whatever* federal, state, or local governmental actor, must be analyzed … under strict scrutiny." 515 U.S. at 227 (emphases added; citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), a case involving a racial classification by the military). Strict scrutiny was first articulated in *Korematsu*, after all—another case involving a racial classification by the military. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("all" racial classifications must receive "the most rigid scrutiny"). Though Japanese internment was far more extreme than race-based admissions, the very "institutions" that authorized internment are "the very *last* ones to be allowed to make race-based decisions, let alone be accorded deference in doing so." *Harvard*, 600 U.S. at 227 n.8. Such "deference" would be "fundamentally at odds with" the strict scrutiny that this Court applies to racial classifications. *Johnson*, 543 U.S. at 506 n.1. Though West Point has cited many precedents giving deference to the military, it hasn't found one involving a racial classification. Race is different: It demands real strict scrutiny, even in areas where the government "traditionally" gets "deference," and even "when the government's power is at its apex." *Id.* at 510-11.

Deference wouldn't change the outcome here anyway. Any deference to West Point should be minimal. *Korematsu* deferred to the military on a national-security

tactic taken during an active world war (and still was "'gravely wrong'"). *Harvard*, 600 U.S. at 207 n.3. This case is nowhere near the battlefield; it affects, at most, the subset of racial minorities who need racial preferences to get into West Point, who graduate, and who join the regular Army four years later. Nor does this case affect the military's control over its own personnel; the main victims of West Point's discrimination are young civilians who aren't yet in the military (and may never be). But even if this Court deferred to West Point on the importance of its stated interests, this Court has never given the government, when it racially classifies citizens, deference *on narrow tailoring*. *Harvard*, 600 U.S. at 217; *Fisher*, 570 U.S. at 310-11. And "deference," wherever it applies, "does not mean wholesale judicial abdication, especially when important questions of … racial discrimination … are raised." *Diocese of Brooklyn*, 141 S.Ct. at 74 (Kavanaugh, J., concurring). West Point's violations of *Harvard* are so obvious that no amount of deference, short of wholesale abdication, would make it likely to prevail.

C. The district court's refusal to decide was itself reversible error.

West Point cannot take refuge in the district court's decision denying a preliminary injunction. The district court didn't find any facts in West Point's favor. It didn't even decide any legal questions in West Point's favor. It refused to decide whether West Point must comply with *Harvard*, whether West Point gets deference, or even whether West Point's use of race is likely constitutional. It thought these questions were "impossible" to decide in this "procedural posture" and insisted on a "full factual record" after a "final trial," on par with the "full trials" that were held "in *Harvard*." App.22-23 & n.13, 25.

But it was certainly "possible" for the district court to decide who will likely succeed on the merits. Preliminary injunctions are "customarily granted" on "evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). "[D]isputed issues of material fact" do not "preclud[e]" courts "from granting a motion for preliminary injunction." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 85 n.10 (1981). And little was missing or disputed. West Point "explain[ed] in detail" how it uses race, App.5, and it thoroughly briefed the four interests it thinks survive strict scrutiny. These submissions were more than enough to conclude that West Point is likely violating *Harvard*. West Point loses if it violates even one of the principles from *Harvard*—if it uses race as a negative, lacks an endpoint, stereotypes, pursues unmeasurable interests, or the like. And those questions are either purely legal (how *Harvard* applies here) or require the application of law to currently undisputed facts (how West Point describes its own admissions process). The district court could have *accepted* West Point's facts as true and *credited* its four interests as compelling, and SFFA still should have prevailed on narrow tailoring.

Even if some crucial fact were missing, the district court's decision to hold any omissions *against SFFA* cannot be squared with strict scrutiny. When the government uses race, it has the burden to identify its interests, explain why they are compelling, and prove that its policy is necessary to achieve them. *Fisher*, 570 U.S. at 309-12. That "burden" remains with the government even when the plaintiff seeks a "preliminary injunction." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). The "movan[t] must be deemed likely to prevail unless the

Government has shown" that it satisfies all aspects of strict scrutiny. *Id.* (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)). If "the record [i]s 'not clear,'" then the government loses. *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 819 (2000). The "risk of nonpersuasion … must rest with the Government, not with the citizen." *Id.* at 818.

The district court not only could have decided whether SFFA will likely prevail, but it *had* to decide that question, given the nature of SFFA's claim. As the district court acknowledged, "[c]onsideration of the merits is virtually indispensable in the context of an alleged Constitutional violation, where the likelihood of success on the merits is the dominant, if not the dispositive, factor." App.17 (cleaned up). If West Point is about to commit illegal racial discrimination against thousands of applicants, as the district court further acknowledged, then irreparable harm (and every other preliminary-injunction factor) necessarily follows. *See* App.23-25. So in a "constitutional case," a "district court necessarily abuses its discretion when it skips analyzing the likelihood of success factor." *Baird v. Bonta*, 81 F.4th 1036, 1041 (9th Cir. 2023). The district court could not say, as it did, that SFFA's members must endure irreparable and unconstitutional discrimination because the merits are difficult and the court prefers more facts. This error is an independent reason why SFFA is "likely to prevail" on appeal. *Diocese of Brooklyn*, 592 U.S. at 16.

II. SFFA's members, who are applying to West Point now, will suffer irreparable harm if West Point's use of race is not quickly enjoined.

Because West Point cannot satisfy strict scrutiny, it's about to illegally discriminate against thousands of applicants for the class of 2028—including two of

SFFA's members—based on their skin color. This discrimination will violate their constitutional rights by "den[ying them] the opportunity to compete for admission on an equal basis." *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003). And for many, it will effectively end their dream of attending West Point. (Because the academy does not take transfers, D.Ct.Dkt.10-4 at 3, students who get in on a second or third try must start over as "plebes"—an unrealistic option for many.) West Point will start this discriminatory process on February 1—mere days from now—and will end it three months later, long before this case could be litigated to final judgment. That rapidly approaching constitutional violation is a "critical and exigent" circumstance that warrants immediate interim relief. *Williams v. Rhodes*, 89 S.Ct. 1, 2 (1968) (Stewart, J., in chambers); *see Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (injunctions are "essential to prevent great, immediate, and irreparable loss of a person's constitutional rights").

This unconstitutional racial discrimination is classic irreparable harm. Denials of "constitutional rights" are generally "irreparable." *Pulliam v. Allen*, 466 U.S. 522, 537 (1984); *e.g.*, *Chrysafis*, 141 S.Ct. at 2482-83 (due process); *Diocese of Brooklyn*, 141 S.Ct. 67-68 (free exercise). The equal-protection right to be free from illegal racial classifications is no exception. *E.g.*, *Bd. of Supervisors of LSU v. Wilson*, 340 U.S. 909 (1951) (race-based denial of university admission); *Akina*, 577 U.S. at 1024 (race-based denial of voting rights). Constitutional violations inflict intangible injuries that cannot be reduced to dollars and cents. *See Diocese of Brooklyn*, 592 U.S. at 19. And money damages cannot remedy how racial classifications cause "'continued

hurt and injury'" and "'demea[n] the dignity and worth of a person.'" *Harvard*, 600 U.S. at 220-21. And besides, all of SFFA's harms are irreparable because the federal government's sovereign immunity bars any possible claim for money damages. *See Am. Trucking Ass'ns v. Gray*, 483 U.S. 1306, 1309 (1987) (Blackmun, J., in chambers).

III. Stopping West Point's illegal racial discrimination serves the public interest.

Injunctions against unconstitutional racial discrimination serve "the highest public interest." *United States v. Raines*, 362 U.S. 17, 27 (1960). These racial classifications "'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality,'" *Shaw v. Reno*, 509 U.S. 630, 643 (1993), and they "perpetuat[e] the very racial divisions the polity seeks to transcend," *Schuette v. BAMN*, 572 U.S. 291, 308 (2014) (op. of Kennedy, J.). "It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 221 (2017).

This principle holds even when the government invokes "national security." This Court does not let the government use "national-security concerns" as a "talisman" to "ward off inconvenient claims—a label used to cover a multitude of sins." *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1862 (2017) (cleaned up). "'Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.'" *Id.* Here, the government's national-security arguments are already baked into the merits. The whole "point of strict scrutiny is to 'differentiate between' permissible and impermissible governmental use of race"—to smoke out whether the government's

interests are really "'important enough'" to use race, and whether its racial classifications really further those interests or instead rest on "'illegitimate'" racial prejudice, politics, or stereotypes. *Adarand*, 515 U.S. at 228, 226. Because West Point likely fails strict scrutiny, its national-security interests, by definition, cannot outweigh applicants' right to be free from unconstitutional racial discrimination. And no one is harmed by losing a policy that is unconstitutional, and thus unenforceable, anyway. 14A C.J.S. Civil Rights §367.

Nor can West Point defeat an injunction by complaining that it would have to change its race-based policy. That concern is "vastly overstated." *Harvard*, 600 U.S. at 229 n.9. Every civilian university just made the same change; and under strict scrutiny, West Point is supposed to be constantly trying to bring its use of race to an end. *See id.* And the change here is simple: If race is a mere "plus" factor that applies at "limited" points in the process, App.10, then West Point just needs to stop considering that one factor at those limited points. Though it will have to inform admissions officers of this change, calling a meeting or writing a memo is not difficult and an inevitable consequence of any injunction. *Cf.* App.13. Any harm was invited by West Point anyway when it read *Harvard* and concluded, implausibly, that it could freely use race for the class of 2028. *See Harvard*, 600 U.S. at 229 n.9. And the burden of changing policies is far outweighed by the constitutional right of young Americans to be free from racial discrimination. This Court has stopped an election in its tracks, even after voting had ended, to prevent similar harm. *See Akina*, 577 U.S. at 1024.

Judge Sutton's opinion for the Sixth Circuit in *Granholm* (the precursor to this Court's decision in *Schuette*) persuasively explains how to balance the equities here. A temporary injunction against the use of race will cause some harm to West Point, which must change its "current admissions … progra[m] during this enrollment cycle." 473 F.3d at 252. And it will "disappoin[t]" the applicants who can't get admitted without racial preferences. *Id.* But if SFFA is likely correct on the "merits," then West Point's use of race will "violat[e]" its members' "federal constitutional rights." *Id.* That irreparable harm dwarfs both West Point's interest in inertia and other applicants' interest in benefiting from unlawful discrimination. The "'public interest'" here thus "'lies in a correct application' of the federal constitutio[n]." *Id.*

This Court can also minimize any disruption to West Point. It can enter an injunction by January 31, the last day that students can submit their applications to West Point for the current cycle. West Point made some offers of admission before that date (though it hasn't told the courts how many), but most admissions decisions will be made after that date. App.46 ¶69, 92. Only after January 31 can West Point know the entire pool of applicants, see who each member of Congress nominated and choose the highest-ranked candidate, rank the remaining candidates by whole candidate score and choose qualified alternates, and then assess the remaining candidates and choose additional appointees. *See* App.35 ¶20, 38-39 ¶¶34-36, 47-48 ¶70. As for the few applicants who have already received offers, SFFA has said all along that an injunction would be prospective, meaning West Point would not need to revoke any letters or offers it made before the injunction was entered. D.Ct.Dkt.60 at 32;

CA2.Dkt.11.1 at 21. This Court could even say so in its order, as it has done before. *Cf., e.g.*, *Andino*, 141 S.Ct. at 10 (granting interim relief but exempting ballots that had been cast already).

Even accepting West Point's arguments about timing, it should at least be enjoined from using race next cycle, for the class of 2029. West Point insists that SFFA's members who are applying now can apply again for that class. D.Ct.Dkt.47 at 28. West Point also says the admissions process for that class technically starts on February 1, 2024—a few days from now. App.14. And that admissions cycle will likewise come and go before this case can reach final judgment, especially since the district-court proceedings are stayed pending appeal, App.18 n.9, and the district court wants *Harvard*-like discovery and a full trial, App.22-23 & n.13, 25. So, as SFFA urged below, it "should at least [get] a preliminary injunction that bars West Point from using race in every cycle after this next one." D.Ct.Dkt.60 at 31.

CONCLUSION

By January 31, this Court should enjoin respondents 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.

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