No. 23A696

IN THE SUPREME COURT OF THE UNITED STATES

STUDENTS FOR FAIR ADMISSIONS, INC., APPLICANT

v.

UNITED STATES MILITARY ACADEMY AT WEST POINT, ET AL.

RESPONSE IN OPPOSITION TO THE EMERGENCY APPLICATION FOR AN INJUNCTION PENDING APPELLATE REVIEW

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The Solicitor General, on behalf of the United States Military Academy at West Point; the United States Department of Defense; Lloyd J. Austin, III, 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, respectfully files this response in opposition to the emergency application for an injunction pending appeal.

For more than forty years, our Nation's military leaders have determined that a diverse Army officer corps is a national-security imperative and that achieving that diversity requires limited consideration of race in selecting those who join the Army as cadets at the United States Military Academy at West Point. Last year,

in rejecting the consideration of race in the admissions policies employed by some civilian colleges, this Court acknowledged those longstanding military practices and emphasized that its decision "d[id] not address" the "propriety of race-based admissions systems" at "our Nation's military academies" because of "the potentially distinct interests that military academies may present." Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 213 n.4 (2023) (Harvard).

Applicant Students for Fair Admissions (SFFA) now asks this Court to issue an extraordinary injunction requiring West Point to jettison admissions procedures that the Army has deemed a military imperative for generations. SFFA attempts to justify that drastic alteration of the status quo by invoking a purported emergency that will occur after January 31, when SFFA asserts "West Point will start" evaluating applications for the class of 2028 in earnest. Appl. 26; see Appl. 2. But West Point has been reviewing applications since August 2023 and will continue doing so through April or May 2024. It has already issued offers to hundreds of candidates, representing a substantial portion of the appointments available for the class of 2028. The only thing that will happen on January 31 is that the time to apply in this cycle will close -- but SFFA does not explain why that deadline has any relevance to the two individual members it represents in this suit.

The district court correctly held that SFFA has not satisfied

any of the requirements for upending the status quo at this early stage of the litigation, which is only four months old. And SFFA certainly has not met the far higher standard for securing from this Court interim injunctive relief that the lower courts have declined to grant.

First, SFFA has not shown that this Court would likely grant review in this case or that SFFA is likely to succeed on the merits of its claim that West Point's consideration of race violates the Fifth Amendment. The Nation's military leaders have long concluded that a diverse officer corps is necessary for an effective fighting force. SFFA does not seriously argue otherwise. And the Army has also determined that limited consideration of race in West Point's admissions is, at present, necessary to achieve that diversity. Cadets become members of the Army upon entry at West Point and are commissioned as officers upon graduation. SFFA thus seeks to second-guess the Army's "professional decisions" about the "composition" and "training" of "a military force," Winter v. NRDC, Inc., 555 U.S. 7, 24 (2008) (citation omitted) -- matters that lie in the heartland of the military judgments to which this Court has long afforded substantial deference.

In seeking to justify that result, SFFA relies almost exclusively on this Court's decision in Harvard, invoking it dozens of times and insisting that West Point's admissions policies do not satisfy the standards the Court articulated for civilian colleges.

See Appl. 1-3, 13-23. But those arguments ignore this Court's specific statement that Harvard "d[id] not address" the military academies. 600 U.S. at 213 n.4. SFFA dismisses that admonition, asserting (Appl. 1) that the Court was simply acknowledging factual uncertainty about "how [the military academies] used race." But that is not what the Court said. Instead, the Court emphasized the "potentially distinct interests that military academies may present." 600 U.S. at 213 n.4. That is a legal distinction from the civilian context this Court considered in Harvard, not a factual one. And although strict scrutiny applies here too, there is no basis for SFFA's assumption that it imposes the same constraints on consideration of race in the very different context of the Army's efforts to select leaders of an effective fighting force.

Second, SFFA has also failed to establish irreparable harm. It has relied on purported injuries to two of its members who wish to attend West Point. But those members will remain eligible to apply to West Point for at least three additional admissions cycles after this one. They thus face no risk of irreparable harm from leaving the current admissions process in place pending further factual and legal development. In addition, SFFA's sparse declarations do not establish that the two members are qualified for appointment at West Point or that West Point's limited consideration of race is likely to make any difference to their admissions decisions. Indeed, only one of the two members has even attested

to actually applying for a spot this cycle.

Finally, the public interest weighs heavily against SFFA's request for injunctive relief. West Point is in the middle of an admissions cycle. SFFA would have this Court compel West Point to alter its admissions process overnight, retrain admissions officers midstream, restart consideration of candidates for whom a decision has not yet been announced, and either rescind offers already issued or apply different criteria to candidates based on the happenstance of when their applications were reviewed. More fundamentally, SFFA seeks an injunction against policies that military leaders have long deemed essential to ensuring the effectiveness of the Nation's military. SFFA acknowledges that the impact of an injunction on the Army cannot be known, but declares that if events prove it mistaken, the injunction can be reversed. That leap now, look later approach is no way to handle the composition of the Nation's military forces.

The district court did not abuse its discretion when it determined that "to grant a motion of this importance with so much left open would be imprudent." Appl. App. 22. This Court should likewise deny SFFA's request for an extraordinary injunction overriding longstanding military judgments based on a scant factual record, limited development of the legal issues, and a manufactured emergency grounded in an artificial deadline.

STATEMENT

A. The Nation's Military Leaders Have Long Determined That A Well Qualified And Diverse Officers Corps Is Necessary To An Effective Fighting Force

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).

In the district court, senior military leaders submitted declarations explaining that "the United States Army and its most senior leaders have concluded using their best military judgment that the Nation's military strength and readiness depend on a steady pipeline of highly qualified and diverse officers." D. Ct. Doc. 49, ¶ 35 (Nov. 22, 2023); see, e.g., id. ¶¶ 13-34; Appl. App. 51 ¶ 80; D. Ct. Doc. 48, ¶¶ 10-30 (Nov. 22, 2023). Outside this litigation, DoD has likewise 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 and defend." D&I Report vii. Secretary of Defense Lloyd Austin has 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). The Secretary's predecessors have likewise determined that racial diversity "is essential to achieving a mission-ready fighting force in the 21st Century." Memorandum from Christopher C. Miller, Acting Sec'y of Def., DoD, Re: Actions To Improve Racial and Ethnic Diversity and Inclusion in the U.S. Military 1 (Dec. 17, 2020).

A lack of diversity in leadership can jeopardize the Army's ability to win wars. The Army learned that lesson through experience, after decades of unaddressed internal racial tension erupted during the Vietnam War. Plagued by accusations that white officers were using minority servicemembers as "cannon fodder," the Army confronted racial violence that "extended from fire bases in Vietnam to army posts within the United States to installations in West Germany, Korea, Thailand, and Okinawa." D. Ct. Doc. 50, ¶¶ 41, 78 (Nov. 22, 2023); see id. ¶¶ 36-52. The violence and resulting mission disruption fundamentally threatened the Army's "ability to defend the Nation." Id. ¶ 56; see id. ¶¶ 56-74; D. Ct. Doc. 48, ¶ 14; D. Ct. Doc. 49, ¶ 32.

Presidentially appointed committees and other bodies including the Nation's most senior military leaders have repeatedly con-

cluded, from at least 1963 to today, that "the Nation's military strength and readiness depend on Service members, including officers, who are highly qualified and diverse, including racially and ethnically diverse, and who have been educated in diverse environments that prepare them to lead increasingly diverse forces." D. Ct. Doc. 51, ¶ 33 (Nov. 22, 2023); see id. ¶¶ 23-32. Accordingly, as the three-star general who serves as the Army's Deputy Chief of Staff for Personnel explained, "diversity in the Army officer corps directly contributes to operational readiness." D. Ct. Doc. 49, ¶ 14; see id. ¶¶ 1, 13-21; see also D. Ct. Doc. 48, ¶¶ 11-16.

B. West Point's Admissions Process

1. West Point was established in 1802 and prepares cadets to become officers and leaders in the United States Army. Appl. App. 30 ¶ 7. West Point is part of the Army. Id. at 30-31 ¶¶ 7, 10. Its superintendent is the commander of the Academy and the military installation on which it is located. Id. at 31 ¶ 10. Upon entry at West Point, cadets become "members of the Army." Id. at 30 ¶ 7. Cadets are subject to the Uniform Code of Military Justice and participate in rigorous military training. Id. at 30-31 ¶¶ 7, 9. Upon graduation, they are commissioned as Army officers. Id. at 31 ¶ 9.

Because "the military is a closed personnel system" that "does not hire its officer corps laterally, as a corporation might," but

instead develops officers internally, Appl. App. 61 ¶ 103, "West Point is a significant source of officer commissions for the Army," id. at 31 ¶ 9. West Point graduates account for approximately 20% of all Army officers, 33% of general officers (those above the rank of Colonel), and almost 50% of the Army's current four-star generals. Ibid.; D. Ct. Doc. 49, ¶¶ 38-39. Accordingly, "West Point is a vital pipeline to the officer corps, and especially senior leadership, in the Armed Forces." Appl. App. 4 (citation omitted).

Candidates for admission to West Point may begin submitting application materials as early as February of the year before they would enter West Point and must complete their applications by January 31 of the following year. Appl. App. 34-35 ¶ 20, 37 ¶ 29. West Point evaluates completed applications on a rolling basis from August of the year before the candidate would enter West Point through the following April or May. Id. at 45 ¶ 65. West Point is currently in the middle of the admissions process for the class of 2028: It has been evaluating applications for approximately six months and will continue to do so for three to four more months.

2. Key features of West Point's admissions process are fixed by federal statutes and Department of the Army regulations. See 10 U.S.C. 7442-7446; Army Regulation 150-1, Ch. 3. Unlike an applicant seeking admission to a civilian college, a candidate

seeking admission to West Point must secure a nomination either from a statutory nominating authority -- a Member of Congress; the Vice President; Delegates to Congress from American Samoa, the District of Columbia, Guam, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands; the Governor and the Resident Commissioner of Puerto Rico; or the Superintendent of West Point -- or via a service-connected nomination, which are reserved for children of certain servicemembers and candidates who are already enlisted in the Army or members of ROTC programs. 10 U.S.C. 7442-7443; Appl. App. 37-41 ¶¶ 31-48.

Candidates nominated by Members of Congress, the Vice President, Delegates to Congress, and the Governor and Resident Commissioner of Puerto Rico make up 75% of West Point's cadet corps. Appl. App. 38 ¶ 32. Those authorities nominate their slates of candidates using one of three methods: (i) "competitive," in which the nominator submits nominees without any order of preference, leaving it to the Admissions Office to choose among them based on merit; (ii) "[p]rincipal-competing alternate," in which the nominator identifies a principal nominee and a list of unranked alternates; or (iii) "[p]rincipal-numbered alternate," in which the nominator identifies a principal nominee and a ranked list of alternates. Army Regulation 150-1, Ch. 3-4(a)(1)-(3); Appl. App. 38-39 ¶¶ 34-36. West Point may also appoint up to 150 "qualified alternates" from the pool of qualified candidates who were nomi-

nated by those authorities (other than the Vice President) but did not win the vacancy for which they were nominated. 10 U.S.C. 7442(b)(5); see Appl. App. 47 ¶ 70(a).[1] Because of the statutory nomination requirement, nominating authorities, especially Members of Congress, play a dominant role in the admissions process. Appl. App. 40 ¶ 43. And candidates compete primarily against other candidates in their nomination pool, rather than against other candidates generally. Ibid.

In addition to securing a nomination, a candidate must successfully complete a candidate questionnaire, a "second step kit" (requiring submission of school transcripts, standardized test results, essay question responses, and teacher evaluations), a physical fitness assessment, a medical evaluation, and an interview. See Appl. App. 34-37 ¶¶ 19-29.

3. After receiving the candidate questionnaire, the Admissions Office assigns each candidate a "Whole Candidate Score" -- which is based on academic qualifications, a "Community Leader Score," and a fitness assessment. Appl. App. 41-42 ¶¶ 49-54. The Whole Candidate Score does not consider a candidate's race. Id. at 42 ¶ 55, 43 ¶ 58.

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[1] Congress recently increased the statutorily authorized number of qualified alternates to 200 for classes entering West Point "beginning with the 2025-2026 academic year." National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 561, 137 Stat. 136 (2023).

A sizable majority of West Point's incoming class is selected based entirely on a combination of the Whole Candidate Score and the rankings of the nominating authorities. Appl. App. 53-54 ¶ 89. West Point has no control over the nominations or rankings by Members of Congress. Id. at 38 ¶ 32. Since the 1990s, however, white candidates have received a disproportionate share of congressional nominations (approximately 74% despite constituting only 54% of the population of 18- to 24-year-olds). Id. at 63-64 ¶ 110.

Many additional candidates are selected to fill non-congressional vacancies or qualified alternate slots, which are also filled in order of merit based on the Whole Candidate Score without consideration of race. Appl. App. 46-47 ¶¶ 68, 70(a). A much smaller share of each class is selected as "Additional Appointees" or "Superintendent nominations." Id. at 31 ¶ 10, 40 ¶¶ 41-42, 45 ¶ 65, 47-48 ¶ 70(b), 53-54 ¶ 89, 55-56 ¶¶ 93-94. Additional Appointees are qualified candidates who have a nomination from a nominating source other than the Superintendent but were not selected for the vacancy for which they were nominated. See 10 U.S.C. 7443; Appl. App. 47-48 ¶ 70(b). The Admissions Office is permitted to consider race and ethnicity as one factor in a holistic assessment in extending offers to Additional Appointees or recommending candidates for Superintendent nominations, but in practice it rarely does so for Superintendent nominations,

most of which go to athletes. Appl. App. 40 ¶ 41, 47-48 ¶ 70(b), 55-57 ¶¶ 93-94.

The Admissions Office may also consider race and ethnicity as one factor in a holistic assessment in extending letters of assurance (LOAs). Appl. App. 48-50 ¶¶ 71-79, 54-55 ¶ 91. LOAs are not separate pathways to admission; instead, they are conditional offers of admission extended to especially promising candidates early in the admissions cycle. Id. at 48-49 ¶¶ 71, 73. Extending LOAs helps West Point compete for strong candidates despite its inability to provide early admission decisions like those offered by civilian universities. Id. at 48 ¶ 71. Recipients of LOAs must complete the application process and secure admission through one of the pathways described above. Id. at 48-49 ¶ 73, 54-55 ¶¶ 91-92.

West Point considers race and ethnicity as one factor at the Additional Appointee, Superintendent nomination, and LOA stages of the admissions process only to further the Army's distinct interest in developing a diverse officer corps to meet its national-security mission. Appl. App. 51-58 ¶¶ 80-95; see D. Ct. Doc. 48, ¶¶ 8-30. In 2013, for example, "based on the continued underrepresentation of previously excluded groups in the Army's officer corps, the Chief of Staff of the Army, General Raymond T. Odierno, directed West Point to increase diversity among its cadets." Appl. App. 52 ¶ 83. West Point reviews its admissions process every two years

and adjusts it when appropriate to ensure that race plays no greater a role than is necessary to achieve that interest. Id. at 58 ¶ 96. And because West Point has made "substantial progress" toward its goals, "its use of race and ethnicity in the admissions process has become more limited in recent years." Id. at 58 ¶ 95.

C. Proceedings Below

1. On September 19, 2023, SFFA filed a complaint alleging that West Point's admissions policies violate the equal protection component of the Fifth Amendment's Due Process Clause. D. Ct. Doc. 1. That same day, SFFA filed a motion requesting that the district court preliminarily enjoin West Point from considering race as a factor in admissions. D. Ct. Docs. 6-7. SFFA asserted that two of its members -- referred to as Member A and Member C -- would be harmed by West Point's policies.

On January 3, 2024, the district court denied SFFA's motion. Appl. App. 1-27. The court concluded that SFFA had not "show[n] a clear, or otherwise preponderant, likelihood of success on the merits." Id. at 23; see id. at 17-23. "[T]he weight of the evidence," the court found, "does not suggest [that the Army] lack[s] potentially compelling governmental interests; it suggests just the opposite." Id. at 21 n.11. "At best," the court explained, SFFA had identified, at this early stage of the case, factual disputes as to the "nature of the [Army's] asserted reasons for considering race, whether those reasons satisfy a strict scru-

tiny analysis, and whose interests are actually at stake." Id. at 21-22. The court reasoned that a "full factual record" would be "vital" to answering those "critical" questions. Id. at 22. And it declined to immediately enjoin "West Point's use of race in admissions" -- which West Point had used "for over four decades" -- "without a full understanding" of the compelling interests at stake and the tailoring of West Point's admissions process to those interests. Id. at 14, 22-23.

Although that determination would have been sufficient to deny SFFA's motion, the district court also held that SFFA had failed to satisfy "the remaining preliminary injunction requirements." Appl. App. 23; see id. at 23-27. The court found that SFFA's theory of irreparable harm was "speculative" because the two members on which SFFA relied will remain eligible to enter West Point for several years, meaning that "there is significant time to remedy the alleged constitutional injury" and that the court would be able to "issu[e] an effective remedy at the end of a final trial on the merits." Id. at 25 & n.15; see id. at 23-25. The court also observed that SFFA's theory of irreparable harm rests on a "highly attenuated chain of possibilities": that the two members (1) will "complete their West Point applications"; (2) will be found "qualified" for admission; (3) will not be "selected to fill a vacancy or qualified alternate slot," which are filled without consideration of race; (4) will be "considered for

selection as Additional Appointees or Superintendent nominations"; and (5) will not be selected for slots they otherwise would have received "because of West Point's limited consideration of race." Id. at 25 n.15 (citation and internal quotation marks omitted).

The district court next determined that the public interest and balance of equities weighed against an injunction. The court emphasized that "West Point is mid-admissions cycle" and the requested injunction "would require the entire admissions policy to be changed, and a new policy be applied to the current applicant pool midstream," and would also disrupt future admissions cycles. Appl. App. 26.

2. SFFA appealed and moved for an injunction pending appeal. The district court denied the motion. D. Ct. Doc. 83 (Jan. 4, 2024). SFFA then sought an injunction from the Second Circuit, but filed its application in this Court before the Second Circuit ruled. On January 29, the Second Circuit denied SFFA's motion in a unanimous order stating that, "[h]aving weighed the applicable factors," the court "conclude[d] that an injunction pending appeal is not warranted." C.A. Doc. 27.1, at 1.

D. SFFA's Suit Against The Naval Academy

1. On October 5, 2023, SFFA filed a parallel suit against the United States Naval Academy in Maryland district court. D. Ct. Doc. 1, SFFA v. United States Naval Academy, No. 23-2699 (D. Md. 2023) (USNA D. Ct.). SFFA also sought a preliminary

injunction. USNA D. Ct. Doc. 9 (Oct. 6, 2023).

The Maryland district court denied SFFA's motion. USNA D. Ct. Doc. 57 (Dec. 15, 2023); USNA D. Ct. Doc. 60 (Dec. 20, 2023). Like the district court here, the Maryland court determined that "it [was] imperative that a factual record be developed" in order for the court to determine "whether the 'potentially distinct interests that military academies may present' allow [the USNA's] admissions practices to survive strict scrutiny." USNA D. Ct. Doc. 60, at 3 (citation omitted). And the Maryland court likewise concluded that SFFA had not "satisfied [its] burden" "to prove that [it] is likely to succeed on the merits." Id. at 24.

The Maryland court also determined that SFFA had not demonstrated irreparable harm, in part because SFFA's relevant members would remain eligible for admission to the Naval Academy for several more years. USNA D. Ct. Doc. 60, at 34. And the court found that the public interest and balance of equities weighed in favor of the Naval Academy because an injunction would disrupt its ongoing admissions cycle. Id. at 35.

2. SFFA did not appeal the Maryland court's denial of a preliminary injunction. Discovery commenced in that case on January 2, 2024, and trial is currently scheduled to begin on September 9, 2024. USNA D. Ct. Doc. 61, at 1-2 (Dec. 20, 2023).

ARGUMENT

SFFA's request for an extraordinary injunction pending appeal

should be denied. Applicants seeking an interim injunction from this Court must demonstrate that their "claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 16 (2020) (per curiam). Because such an injunction "grants judicial intervention that has been withheld by lower courts," Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers), it "'demands a significantly higher justification' than a request for a stay," Respect Maine PAC v. McKee, 562 U.S. 996, 996 (2010) (citation omitted).

Such an injunction should be granted "sparingly and only in the most critical and exigent circumstances," such as when "the legal rights at issue are 'indisputably clear.'" Wisconsin Right to Life, Inc. v. FEC, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (citations omitted). In addition, the standard for granting "extraordinary relief" entails "not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review" under its traditional certiorari standards. Does 1-3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief). "Were the standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview" on issues that are not yet ripe for this Court's review or in cases that this Court "would be unlikely to take" in the ordinary course. Ibid.

I. SFFA HAS NOT SHOWN THAT THIS COURT WOULD LIKELY REVIEW A DECISION AFFIRMING THE DENIAL OF A PRELIMINARY INJUNCTION

SFFA has not established that this Court would be likely to grant review if the Second Circuit affirmed the district court's denial of a preliminary injunction. This case was filed a mere four months ago, discovery has not yet begun, and the government has not so much as answered the complaint. The district court has issued only a preliminary decision, emphasizing the lack of factual development. See Appl. App. 17-23. And if the Second Circuit affirms, its decision will likewise necessarily rest on an under-developed factual record very different from the full records the Court had before it in past cases considering similar issues. See, e.g., SFFA v. President & Fellows of Harvard Coll., 600 U.S. 181, 198 (2023) (Harvard) (describing eight- and fifteen-day bench trials).

The question presented also has not resulted in an opinion from any other court of appeals, much less a circuit conflict. In fact, SFFA has not even appealed the denial of a preliminary injunction in its parallel suit against the Naval Academy; instead, that case is proceeding to discovery and trial. See pp. 16-17, supra. In these circumstances, SFFA's request for this Court to intervene now amounts to an effort to "use the emergency docket to force the Court to give a merits preview" on a question that is not ripe for review -- "and to do so on a short fuse without benefit of full briefing and oral argument." Does 1-3, 142 S. Ct.

at 18 (Barrett, J., concurring in the denial of application for injunctive relief). This Court should decline that invitation.

II. SFFA HAS NOT SHOWN THAT IT IS LIKELY TO SUCCEED ON THE MERITS

SFFA has not demonstrated that it is likely to succeed on the merits of its claim, let alone an "indisputably clear" right to relief. Wisconsin Right to Life, 542 U.S. at 1306 (citation omitted). SFFA does not and could not dispute that a diverse officer corps furthers compelling national-security interests. And SFFA provides no sound reason to second-guess the Army's longstanding military judgment that limited consideration of race in West Point's admissions is essential to achieving those interests. Instead, SFFA stakes its case on a misguided effort to subject the Army to constraints this Court articulated in the very different context of civilian college admissions.

A. As the most senior leaders of the U.S. Armed Forces have concluded for decades, the Army has a compelling national-security interest in a diverse officer corps. Diversity, including racial and ethnic diversity, makes a more effective fighting force -- more cohesive and lethal, better able to attract and retain top talent, and more legitimate in the eyes of the Nation and the world. See D. Ct. Doc. 48, ¶ 9; D. Ct. Doc. 49, ¶¶ 13-21; D. Ct. Doc. 50, ¶ 87; D. Ct. Doc. 51, ¶¶ 17-28. The Army learned that lesson the hard way, when decades of unaddressed racial tension and disparities fundamentally threatened the military's ability to

protect national security during the Vietnam era. D. Ct. Doc. 48, ¶ 14; D. Ct. Doc. 49, ¶ 32; D. Ct. Doc. 50, ¶¶ 36-52; D. Ct. Doc. 51, ¶ 26. The Nation's military leaders have made a considered professional judgment, since at least 1963, D. Ct. Doc. 51, ¶¶ 9-33; D. Ct. Doc. 48, ¶¶ 11-16; D. Ct. Doc. 49, ¶¶ 13-21; D. Ct. Doc. 50, ¶¶ 9-10, 56-74, that a diverse officer corps is imperative for national security -- undoubtedly "an urgent objective of the highest order." Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010).

In the district court, the Army submitted six declarations -- three from senior military leaders, two from military historians, and one from the former West Point admissions director -- outlining the history of racial conflict in the military, real-world battlefield experience, and quantitative and qualitative studies that support the Army's conclusion that diversity is critical to accomplishing its mission. D. Ct. Docs. 48-53. The preliminary injunction record therefore establishes that the Army has a compelling national-security interest in the diversity of the officer corps, and confirms that the Army's interest is "distinct" from civilian universities' interests in the educational benefits of student-body diversity. Harvard, 600 U.S. at 213 n.4.

To further that compelling interest, West Point considers race and ethnicity at three limited stages of its admissions process. Appl. App. 51-58 ¶¶ 80-96. "[W]hen evaluating whether

military needs justify" a particular practice in the face of a constitutional challenge, "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." Goldman v. Weinberger, 475 U.S. 503, 507 (1986). Given the "vital interest" in maintaining a fighting force "that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances," United States v. O'Brien, 391 U.S. 367, 381 (1968), West Point's limited consideration of race in selecting future officers is amply warranted.

SFFA's request for an emergency injunction seeks to overturn the considered military judgments underlying West Point's policies. SFFA concedes that courts "cannot tell whether the troops are 'cohesive' enough, or the Army is 'legitimate' enough," Appl. 18, but appears to take the view that a court's lack of institutional competence to second-guess military judgments is a reason to reject those judgments. This Court has drawn just the opposite lesson, emphasizing that "judges are not given the task of running the Army." Orloff v. Willoughby, 345 U.S. 83, 93 (1953). For that reason, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." Department of the Navy v. Egan, 484 U.S. 518, 530 (1988). Indeed, "[j]udicial inquiry into the national-security realm raises 'concerns for the separation of powers in trench-

ing on matters committed to the other branches.'" Ziglar v. Abbasi, 582 U.S. 120, 142 (2017) (citation omitted).

On a more practical level, "'decisions as to the composition, training, equipping, and control of a military force,' * * * are 'essentially professional military judgments.'" Winter v. NRDC, Inc., 555 U.S. 7, 24 (2008) (citation omitted). Accordingly, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." Gilligan v. Morgan, 413 U.S. 1, 10 (1973); cf. Bryant v. Gates, 532 F.3d 888, 899 (D.C. Cir. 2008) (Kavanaugh, J., concurring) ("[M]ilitary decisions and assessments of morale, discipline, and unit cohesion * * * are well beyond the competence of judges.").

Those principles apply even in cases governed by strict scrutiny. In Austin v. U.S. Navy SEALs 1-26, 142 S. Ct. 1301 (2022) (No. 21A477), for example, the Court granted the government's application for a partial stay of a preliminary injunction in a case challenging the Navy's COVID-19 vaccination requirement under the Religious Freedom Restoration Act of 1993 and the First Amendment. As Justice Kavanaugh explained, "the President of the United States, not any federal judge, is the Commander in Chief of the Armed Forces," and the district court in that case had erred by "in effect insert[ing] itself into the Navy's chain of command, overriding military commanders' professional military judgments." Id. at 1302 (Kavanaugh, J., concurring).

So too here: It is the Executive officials charged with protecting our national security -- not courts -- that have authority to determine who will become a member of the Army (as cadets do immediately upon entering West Point, see 10 U.S.C. 7075(b)(2)) and who will form the pipeline for the Army's future leaders. And like the plaintiffs in Navy SEALs, SFFA has failed to justify "employing the judicial power in a manner that military commanders believe would impair the military of the United States as it defends the American people." 142 S. Ct. at 1302 (Kavanaugh, J., concurring).

SFFA's contrary argument rests on its assertion (Appl. 1, 21) that the military context is irrelevant because all policies that consider race must be evaluated under strict scrutiny. It is true that the military context does not change the level of scrutiny. See Harvard, 600 U.S. at 207 n.3. But that context is critical in how strict scrutiny applies. Strict scrutiny "is designed to take relevant differences into account." Johnson v. California, 543 U.S. 499, 515 (2005). Just as "the special circumstances" in the prison context may justify racial classifications that would not withstand scrutiny in other contexts, ibid., a military judgment that limited consideration of race is necessary to create an effective fighting force may pass muster even if a civilian college's judgment about the need to consider race to serve purely educa-

tional interests would not.[2]

SFFA's request is particularly misguided because it asks the Court to override considered military judgments based on an underdeveloped factual record and without the benefit of full consideration of the issues by any lower court. As the district court explained, a "full factual record" would be "vital" to answering "critical" questions about the "nature of the [Army's] asserted reasons for considering race" and "whether those reasons satisfy a strict scrutiny analysis." Appl. App. 21-22. SFFA has accordingly failed to establish a likelihood that a court would ultimately deem the Army's reasons insufficient or find that its limited consideration of race is not narrowly tailored to those compelling interests.[3]

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[2] SFFA's repeated efforts (Appl. 1, 21-22) to compare this case to Korematsu v. United States, 323 U.S. 214 (1944), miss the critical differences between considering race as a plus factor in a limited number of admissions decisions (something this Court had, for years, deemed permissible even in the civilian context), and the forcible internment of Americans based solely on race.

[3] SFFA asserts (Appl. 23) that the district court erred by "refus[ing] to decide" whether SFFA established a likelihood of success on the merits. To the contrary, the court concluded that SFFA "has not met its burden, on the present record, to show a clear, or otherwise preponderant, likelihood of success on the merits." Appl. App. 23. And the court found that "the weight of the evidence here" suggests that the Army has "compelling governmental interests." Id. at 21 n.11. The court was correct that the ultimate burden "of demonstrating a likelihood of success on the merits" rested with SFFA as the "party seeking pretrial relief." Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 428 (2006). And the court did not abuse its dis-

B. SFFA asserts (Appl. 13) that it is likely to succeed on the merits because West Point's admissions process "violat[es]" the "holdings" of this Court's decision in Harvard, which concluded that the race-conscious admissions policies previously employed by some civilian colleges violated the Equal Protection Clause. But the Harvard decision rested in part on the Court's determination that the "educational benefits" of diversity identified by civilian universities were "elusive" and "not sufficiently coherent" goals "for purposes of strict scrutiny." 600 U.S. at 214-215. And in response to the government's amicus brief highlighting the limited consideration of race at West Point and other military academies and "contend[ing] that race-based admissions programs further compelling interests at our Nation's military academies," the Court specifically stated that its opinion "d[id] not address" "the propriety of race-based admissions systems" at the military academies. Id. at 213 n.4; see U.S. Br. at 4-5, 12-18, Harvard, supra (No. 20-1199). Instead, the Court expressly recognized that "military academies" warrant separate consideration because they present "potentially distinct interests." Harvard, 600 U.S. at

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cretion in assessing the preliminary injunction record, in expressing doubt about the many assertions SFFA failed to substantiate, or in taking the view that "to grant a motion of this importance with so much left open would be imprudent." Appl. App. 22; see id. at 17-23. As this Court has emphasized, "[a] preliminary injunction is an extraordinary remedy" that is "never awarded as of right" and that demands "a clear showing that the plaintiff is entitled to such relief." Winter, 555 U.S. at 22, 24.

213 n.4. There is thus no basis for SFFA's assumption that the Court's decision in Harvard sets forth the limits on the military academies' consideration of race or otherwise answers the very different legal questions presented here.

Among other things, the Army has identified entirely different interests served by West Point's admissions policies: Not educational benefits, but the necessity of a diverse officer corps for accomplishing the Army's national-security mission. See pp. 20-21, supra. Likewise, the Army has a compelling interest in the diversity of its cadets because they serve as a pipeline for future senior Army Officers. The weight of those interests, and whether West Point's limited consideration of race and ethnicity in its admission of cadets is narrowly tailored to accomplish them, present questions that differ from those addressed in Harvard -- and that must be answered with appropriate deference to the considered military judgments reflected in West Point's policies. SFFA provides no sound basis for rejecting those judgments -- let alone doing so in a rushed preliminary posture on an incomplete record.

C. SFFA errs in asserting (Appl. 14-21) that West Point's consideration of race is not narrowly tailored to serve the Army's compelling national-security interests in cohesion and lethality, recruiting and retention, and legitimacy. As the government's declarations establish (and fact and expert discovery would further confirm), the means West Point employs are narrowly tailored

to achieve the Army's national-security goals. SFFA's contrary arguments rest on the mistaken premise that the standards Harvard articulated for civilian colleges apply equally in this very different context. And those arguments are also unpersuasive even on their own terms.

SFFA first asserts that "West Point uses race as a negative." Appl. 14. As this Court explained in Harvard, race is used as a negative where it "unduly harm[s] nonminority applicants," 600 U.S. at 212 (citation omitted), and there was evidence of such undue harm in that case, id. at 218. But West Point's limited consideration of race does not unduly harm any candidate. Indeed, for a sizable majority of cadets, race and ethnicity play no role in their evaluation by and appointment to West Point. Appl. App. 53-54 ¶ 89; see id. 40 ¶ 42, 45-48 ¶¶ 65-70. And although race and ethnicity are considered for a small number of candidates, that limited consideration both serves vital national-security goals and may compensate for factors outside of West Point's control that skew other aspects of the process against minority candidates. See id. at 51 ¶ 80, 57-58 ¶ 95, 60-62 ¶¶ 100-104, 63-64 ¶ 110.

SFFA also asserts that West Point engages in "stereotyp[ing]." Appl. 17. But West Point's policies do not rest on the "pernicious stereotype that a black student can usually bring something that a white person cannot offer," or that "race in

itself says something about who you are." Harvard, 600 U.S. at 220 (internal quotation marks and alteration omitted); see Appl. App. 57-58 ¶ 95. Rather, history and military judgments demonstrate that diversity in the officer corps itself leads to a more effective fighting force by reducing tensions in the ranks and improving retention and recruitment -- determinations that do not rest on any preconceptions about individuals' beliefs or character based on the color of their skin.

Moreover, unlike the interests of civilian universities, the Army's interests are both "measurable" and "concrete." Harvard, 600 U.S. at 217; but see Appl. 18-21. The Army relies on extensive quantitative and qualitative research demonstrating that the more diverse and inclusive a fighting force is, the more effective and successful it will be. D. Ct. Doc. 51, ¶¶ 9-32 (discussing studies concerning the military and other organizations); D. Ct. Doc. 52, ¶¶ 9-51 (Nov. 22, 2023) (explaining quantitative analysis based on data set compiled from information on nearly 300 armies in 250 wars, as well as qualitative analysis, and concluding that a diverse and inclusive army is better at problem solving, suffers fewer casualties, is more likely to win conflicts, and is more legitimate at home). And the Army measures soldiers' views on diversity, inclusivity, and mission readiness through congressionally mandated annual studies, D. Ct. Doc. 49, ¶¶ 15-16, and other internal surveys, id. ¶ 18.

Finally, SFFA is wrong to assert that West Point's consideration of race "has no meaningful endpoint." Appl. 15. West Point has "made substantial progress toward its goal of a fully integrated, highly qualified, and diverse Corps of Cadets," progress that has already allowed it to make "more limited" use of race and ethnicity in the admissions process in recent years. Appl. App. 57-58 ¶ 95. Indeed, West Point was able to eliminate consideration of race or ethnicity for Hispanic candidates for several years when race-neutral alternatives proved sufficient, although a later drop in admission rates for Hispanic candidates subsequently led it to reinstate the limited consideration of race and ethnicity for those candidates. Id. at 58 ¶ 96. As the declarations establish (and as full factual development would confirm), West Point will eliminate limited consideration of race "when continued consideration of race and ethnicity becomes unnecessary." Ibid. But it is the considered judgment of senior military leaders that, at present, limited consideration of race remains necessary to achieve the Army's national security interests -- and SFFA does not seriously deny that eliminating consideration of race in West Point admissions "would reduce the already limited pool of eligible and well-qualified minority officer candidates, directly impacting the future diversity of the Army's leaders and, in turn, undermining mission and combat readiness." D. Ct. Doc. 49, ¶ 41.

III. THE EQUITIES WEIGH HEAVILY AGAINST INJUNCTIVE RELIEF

SFFA has shown neither that any of its members would suffer irreparable harm absent an injunction pending appeal, nor that an injunction would serve the public interest. "A proper consideration of these factors alone" would "require[] denial of the requested injunctive relief" even if SFFA had "established a likelihood of success on the merits." Winter, 555 U.S. at 23-24.

A. SFFA has not demonstrated irreparable harm. It asserts that two of its members, Member A and Member C, face the denial of the ability to compete on an equal footing for a spot in the class of 2028. According to SFFA's declarations, Member C has not applied for admission to the class of 2028 and does not plan to apply unless "a court * * * order[s] [West Point] to cease the use of race and ethnicity as a factor in admissions." D. Ct. Doc. 25, ¶ 5 (Oct. 6, 2023); see D. Ct. Doc. 69, ¶ 2 (Dec. 18, 2023) (supplemental declaration indicating that Member C has obtained a congressional nomination without stating that the member submitted the other required application materials). Member C's decision not to apply until the admissions process is altered is a quintessential self-inflicted injury. See Clapper v. Amnesty Int'l USA, 568 U.S. 398, 416-418 (2013). In any event, both Member A and Member C are 18 years old or younger, D. Ct. Doc. 68, ¶ 1 (Dec. 18, 2023); D. Ct. Doc. 69, ¶ 1, and cadets may enter West Point if they are not yet 23 years old by July 1 of the year of entry, 10 U.S.C. 7446(a), Appl. App. 35-36, ¶ 22. As the district court

found, there is thus "significant time to remedy the alleged constitutional injury." Appl. App. 25. In fact, the district court could issue a decision "with the benefit of a full trial record," ibid., and all appeals could conclude with time for Members A and C to apply and compete for appointment to West Point in future admissions cycles. Even assuming that the current admissions criteria impose some "burden" on the identified members, that injury is not "irreparable." Nken v. Holder, 556 U.S. 418, 435 (2009).

In addition, the sparse declarations SFFA has provided for its two anonymous members do not establish that either member is qualified for appointment, including having passed the medical and fitness requirements. See D. Ct. Docs. 8, 25, 68-69. Conversely, they do not establish that either member will not be selected through one of the admissions pathways that omits any consideration of race, which are used to fill more than 70% of the available slots, see Appl. App. 53-54 ¶ 89; p. 28, supra. And even if a member's application is considered for an Additional Appointee or Superintendent nomination (the circumstances in which race may be considered), SFFA has not provided any basis to think that West Point's limited consideration of race is likely to be outcome determinative. Nor could it plausibly do so: Although West Point's limited consideration of race has an important impact on the overall composition of its class, it has an almost imperceptible impact on any individual nonminority candidate's chance of

admission. See Sherick Hughes et al., Causation Fallacy 2.0: Revisiting the Myth and Math of Affirmative Action, 30 Educ. Pol'y 63, 80-81 (2015). The negligible prospect that West Point's consideration of race in the current cycle might detrimentally affect two SFFA members -- one of whom may not even have applied -- does not constitute irreparable harm sufficient to justify the disruptive injunction SFFA seeks.

B. Moreover, any potential harm to SFFA's members cannot outweigh the injuries an injunction would inflict on the interests of the government and the public, which "merge" in this context. Nken, 556 U.S. at 435.

As the district court emphasized, "West Point is mid-admissions cycle." Appl. App. 26. West Point's admissions cycle for the class of 2028 opened on February 1, 2023, and West Point began reviewing applications in August 2023. Id. at 34-35 ¶¶ 20-21, 65 ¶ 115. West Point evaluates completed applications on a rolling basis "and tenders most offers of admission between October and April of the year the candidate would enter West Point." Id. at 35 ¶ 21; see id. at 65 ¶ 115. As of January 26, 2024, it has extended approximately 450 offers of appointment, representing a substantial portion of the approximately 1,800 offers it will extend this admissions cycle; West Point has also engaged in substantial review of many additional applications under current criteria. See id. at 31 ¶ 10; see also id. at 65 ¶ 115. Yet SFFA

seeks an immediate injunction requiring West Point to alter its admissions criteria, including changing its policy as "to the current applicant pool midstream." Id. at 26.

Such an injunction would be profoundly disruptive. A change in admissions policies requires careful consideration, including consultation with West Point's Academic Board and possibly other stakeholders. Appl. App. 66 ¶ 116. A mid-cycle change could require West Point to re-review applications that have not yet resulted in an offer of admission; could require West Point to consider whether and how to withdraw previously extended LOAs and offers, id. at 66 ¶ 117; and could mean that candidates for the class of 2028 would be evaluated under different admissions policies depending on when they submitted their applications, id. at 66 ¶ 118.

More fundamentally, the injunction SFFA seeks would force the Army to abandon policies that senior military leaders have deemed imperative to developing an effective fighting force, thereby harming "the public interest in national defense." Winter, 555 U.S. at 24. SFFA readily admits that "no court" can know "[h]ow much less cohesive, attractive, or legitimate the Army will be under [a race-neutral admissions] regime." Appl. 19 (citation and internal quotation marks omitted). Yet it urges the Court to immediately impose that regime without regard for the potential consequences. Considerations of the public interest weigh

strongly against that approach. And such a judicial intrusion on the military's operations is especially unwarranted at this early stage of the case, before a full factual record has been developed or assessed by lower courts.[4]

CONCLUSION

The application should be denied.

Respectfully submitted.

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Solicitor General

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[4] As an alternative, SFFA briefly requests (Appl. 30) that the Court enjoin West Point's admissions policies as applied to candidates for the class of 2029, whose applications West Point will begin to evaluate in August 2024. That request to enjoin a process that will not begin for more than six months does not present the sort of emergency that would justify this Court's immediate intervention. And in any event, SFFA's alternative request should be rejected for many of the same reasons as its primary request: SFFA has failed to establish a likelihood of success on the merits or that the equities justify injunctive relief -- particularly because its members will remain eligible to apply to West Point for multiple cycles after the class of 2029.