

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

STUDENTS FOR FAIR
ADMISSIONS,

Plaintiff,

v.

23-cv-8262 (PMH)

THE UNITED STATES MILITARY
ACADEMY AT WEST POINT; THE
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,

Defendants.

**BRIEF OF THE NATIONAL ASSOCIATION OF BLACK MILITARY WOMEN, THE
AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES
UNION, AND THE NAACP LEGAL DEFENSE FUND AS AMICI CURIAE IN
OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Sarah Hinger
125 Broad St., 18th Fl.
New York, NY 10004
(212) 519-7882
shinger@aclu.org

NEW YORK CIVIL LIBERTIES UNION
FOUNDATION

Perry Grossman
125 Broad St., 19th Fl.
New York, NY 10004
(212) 607-3300
pgrossman@nyclu.org

November 28, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

INTRODUCTION 2

ARGUMENT 5

 I. Developing A Diverse Officer Corps Is Imperative To Confronting Discrimination And
 Ensuring Equal Opportunity In Today’s Military 5

 A. Hard Won Lessons In The Importance Of Racial Equity 5

 B. Racial Divisions Between The Military’s Enlisted Ranks And Leadership 7

 C. Opening Pathways For Advancement 9

 D. Confronting Workplace Discrimination 13

 E. Push Out Through The Military Justice System 20

 II. Admission To The Service Academies Remains Uniquely Critical To The Development
 Of Officers And Generals Capable Of Leading A Diverse Military 23

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Brown v. Board of Education, 347 U.S. 483 (1954)..... 2

Brown v. Glines, 444 U.S. 348 (1980)..... 25

Jackson v. Modly, 949 F.3d 763 (D.C. Cir. 2020) 17, 25

Mahanoy Area Sch. Dist. v. B. L. by & through Levy, 141 S. Ct. 2038 (2021)..... 2

Schlesinger v. Councilman, 420 U.S. 738 (1975)..... 20, 25

Students for Fair Admissions v. Presidents & Fellows of Harvard Coll., 600 U.S. 181 (2023) 1, 2

Statutes

10 U.S.C. § 886..... 25

10 U.S.C. § 890..... 25

10 U.S.C. § 892..... 25

Other Authorities

Nicole Acevedo, *In Vanessa Guillen Case, Latino Family’s push for Answers Leads to Military Reform*, NBC News (Dec. 10, 2020) 20

ACLU & ACLU of Northern California, *U.S. Army Ends Sexist “Leaders First” Policy in Combat Units After Challenge by Women Servicemembers* (Mar. 14, 2023) 5

Associated Press, *“They Didn’t See the Pride,” West Point Photo Puts Race and Gender in the Spotlight*, The Guardian (May 14, 2016) 17

Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) 6, 7

Blue Star Families, *Blue Star Families’ Social Impact Research 2021: The Diverse Experiences of Military and Veteran Families of Color* (2022)..... 25

Lt. Colonel Maurice Buchanan, *Discrimination and the United States Army Future Senior Leader: Thoughts and Opinions* (1995) (Master’s degree thesis, Shippensburg State University) 14

William Branigin & Dana Priest, *3 White Soldiers Held in Slaying of Black Couple*, Washington Post (Dec. 9, 1995)..... 16

James Burke & Evelyn Espinoza, *Race Relations within the U.S. Military*, 38 Ann. Rev. of Socio. 401 (2012)..... 11, 22

Remo Butler, *Why Black Officers Fail*, 29 U.S. Army War Coll. Q.: Parameters 54 (Aug. 20, 1999) 14

John Sibley Butler & Malcom D. Holmes, *Perceived Discrimination and the Military Experience*, 9 J. of Pol. & Mil. Socio. 17 (1981)..... 11

Christopher S. Chivvis & Sahil Lauji, *Diversity in the High Brass*, Carnegie Endowment for Int’l Peace (Sept. 6, 2022) 10, 12

Cong. Rsch. Serv., R44321, *Diversity, Inclusion, and Equal Opportunity in the Armed Services: Background Issues for Congress* (June 5, 2019) 8

Connecticut Veterans Legal Center & Veterans Inclusion Project, *Gatekeepers to Opportunity: Racial Disparities in Congressional Nominations to the Military Service Academies* (2021). 24

Helene Cooper, *African-Americans Are Highly Visible in the Military, but Almost Invisible at the Top*, New York Times (May 25, 2020)..... 9 10, 11, 16, 24

Council on Foreign Relations, *Demographics of the U.S. Military* (July 13, 2020) 7

Rosalind Chow, *Don’t Just Mentor Women and People of Color. Sponsor Them.*, Harv. Bus. Rev. (June 30, 2021) 11

Defense Equal Opportunity Management Institute, *Phase I Report: An Investigation into the Disparity of Judicial and Non-Judicial Punishment Rates of Black Males in the Armed Forces* (Apr. 21, 1992)..... 21

Department of Defense Appropriations of 1974: Military Personnel: Hearing Before the Subcomm. On the Dep’t of Def of the House Comm. on Appropriations, 93d. Cong. (1974) .. 7

U.S. Department of Defense, *2022 Demographics Interactive Profile of the Military Community: Women in the Military- Active Duty* (last visited Nov. 22, 2023)..... 8, 9, 25

U.S. Department of Defense, *2022 Demographics: Profile of the Military Community* (2022) 7, 8

U.S. Department of Defense, *Report of the Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems* (Aug. 31, 2022)..... 20, 21, 22

U.S. Department of Defense, *Report of the Task Force on the Administration of Military Justice in the Armed Forces* (Volume I) (Nov. 30, 1972) 6, 21

The Inspector General, Department of the Air Force, *Report of Inquiry (S8918P): Independent Racial Disparity Review* (Dec. 2020) 10, 21

Megan Edge, *Army Ends Investigation of “Racial Thursdays” at Alaska Military Base*, Anchorage Daily News (Sept. 28, 2016) 19

Establishing the President’s Committee on Equality of Treatment and Opportunity in the Armed Forces, Exec. Order 9981, 13 Fed. Reg. 4313 (July 28, 1948)..... 5

Sayce Falk & Sasha Rogers, *Junior Military Officer Retention: Challenges & Opportunities*, Harvard University John F. Kennedy School of Government (Mar. 2011)..... 7

Michael E. Flores & Nate Tilton, *Here’s What it’s Like to Put Up with ‘Just Joking’ Racism in the Military*, Task & Purpose (July 23, 2020) 15

Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man* (1997)..... 13

Heidi Glenn, *West Point Graduates’ Letter Calls for the Academy to Address Racism*, NPR (July 6, 2020) 16

Morgan Godvin, *From Handcuffs to Rainbows: Queer in the Military*, JSTOR Daily (June 26, 2023) 5

Jennifer Gonnerman, *Pvt. Danny Chen, 1992-2011*, New York Magazine (Jan. 6, 2012) 19

U.S. Gov’t Accountability Off., *Military Justice: DoD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities*, GAO-19-344 (2019)..... 21

Hope Hodge Seck, *Naval Aviators Say They Were Kicked Out of Training Due to Racial Bias*, Military.com (Apr. 4, 2018)..... 12, 15

Jessica Kegun, *New Figures Reveal Scope of Military Discrimination Against LGBTQ Troops, with over 29,000 Denied Honorable Discharges*, CBS News (June 21, 2023)..... 5

Robert Knowles, *The Intertwined Fates of Affirmative Action and the Military*, 45 Loyola Univ. Chicago L.J. 1027 (2014)..... 6

Daniel Lam, *They Faced Racial Bias in Military Discipline, That Can Impact National Security*, Nat’l Pub. Radio (Sept. 14, 2021)..... 22, 23

James Laporta, Associated Press, *“We Just Feel It’: Racism Plagues U.S. Military Academies*, PBS News Hour (Dec. 3, 2021) 16

Kevin Lilley & Michelle Tan, *Army Report Refutes “Racial Thursdays” Allegations*, Army Times (June 5, 2015)..... 19

Morris J. MacGregor, Jr., *Integration of the Armed Forces 1940-1965* 124–130, Defense Studies Series (1981) 5, 6

David Martin, *Race in the Ranks: Investigating Racial Bias in the U.S. Military*, CBS News 60 Minutes (Mar. 21, 2021) 10, 11

Brief of the Modern Military Association of America, et al. as Amici Curiae, *Nat’l Coal. for Men v. Selective Serv. Sys.*, 141 S. Ct. 1815 (2021) 5

John L. Newby II, *The Fight for the Right to Fight and the Forgotten Negro Protest Movement: The History of Executive Order 9981 and Its Effect Upon Brown v. Board of Education and Beyond*, 10 Tex. J. on C.L. & C.R. 83 (2004)..... 5

The President’s Advisory Commission on Asian American and Pacific Islanders, *A Report on the Welfare of Asian Americans and Pacific Islanders Serving in the United States Military 7* (Nov. 11, 2017)..... 5, 13, 18

Dana Priest, *22 Soldiers at Fort Bragg Tied to Extremist Groups*, Washington Post (Dec. 23, 1995) 16

Kyle Rempfer, *As Nine Alumni Highlight Racism at West Point, The Academy’s IG Starts Review of ‘All Matters Involving Race,’* Army Times (July 7, 2020) 17

Report of the Fort Hood Independent Review Committee (Nov. 6, 2020) 20

Lori Robinson & Michael E. O’Hanlon, *Women Warriors: The Ongoing Story of Integrating and Diversifying the American Armed Forces*, Brookings Institute (May 2020)..... 5

Michelle Ruiz, *A Record Number of African American Women Graduated from West Point in 2020*, Vogue (June 15, 2020)..... 25

Leo Shane III, *Signs of White Supremacy, Extremism Up Again in Poll of Active-Duty Troops*, Military Times (Feb. 6, 2020)..... 14

Kat Stafford, et al., *Deep-rooted Racism, Discrimination Permeate U.S. Military*, Associated Press (May 27, 2021) 9, 12, 15

Phil Stewart, et al., *U.S. Troops Battling Racism Report High Barriers to Justice*, Reuters (Sept. 15, 2020) passim

Michelle Tan, *Army Investigates Alleged ‘Racial Thursdays’ at Unit*, Army Times (Mar. 18, 2015) 18

David A. Thomas, *Race Matters*, Harv Bus. Rev. (Apr. 2001) 11

Tom Vanden Brook, *Where are the Black Officers? U.S. Army Shows Diversity in Its Ranks, But Few Promotions to the Top*, USA Today (Sept. 1, 2020)..... 9, 24

Eleanor Watson, *U.S. Military Finishes Renaming Bases That Previously Honored Confederates*,
CBS News (Oct. 27, 2023) 16

INTEREST OF AMICI¹

The National Association of Black Military Women (NABMW) is a non-profit organization dedicated to giving voice to Black military women across the nation. The organization was founded in 1976 by women who served in World War II, the Korean War, and the Vietnam War. Recognizing that the stories of Black military women were largely absent from the history books, these founders were determined to capture the legacy of Black military women as examples for those who might follow. NABMW continues to seek out, record, and uplift the contributions of Black military women today. NABMW members come from all sectors of the military. They have experienced firsthand the myriad challenges of serving while being both Black and women. They are also deeply aware of the value of role models, of mentors, and of trusted leadership in creating pathways of opportunity to the rewards of military service. Amicus believes that the military academies' ability to consider race in its admissions process is critical to the success of Black women in the military and to the military's success.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of these principles, the ACLU has appeared as direct counsel or amicus curiae in numerous cases concerning educational equity and the rights of students. *E.g.*, *Students for Fair Admissions v. Presidents & Fellows of Harvard Coll.*, 600 U.S. 181 (2023); *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038 (2021). The New York Civil Liberties Union is an affiliate of the ACLU.

¹ No counsel for a party authored this brief in whole or in part, and no person other than Amici Curiae, their members, or their counsel made a monetary contribution to the brief's preparation or submission. The Parties do not oppose the filing of this amicus brief.

The NAACP Legal Defense & Educational Fund, Inc. (“LDF”) was founded in 1940 under the leadership of Thurgood Marshall, who subsequently became the first Black Supreme Court Justice. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to eliminate barriers that prevent Black Americans from realizing their basic civil and human rights. For more than eight decades, LDF has worked to dismantle racial segregation and ensure equal educational opportunity for all students. *E.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

INTRODUCTION

West Point’s consideration of race within its admissions process serves the military’s unique and compelling interest in national security, as set forth in West Point’s *Memorandum in Opposition to Plaintiff’s Motion for Preliminary Injunction*. ECF 47. The Supreme Court likewise recognized the “potentially distinct” interests that separate the U.S. military academies from other colleges in *SFFA v. Harvard*.² This brief is submitted in support of the proposition that the military confronts distinct interests of a compelling nature, and to further expound upon the unique importance of commissioning a racially diverse officer corps to the experiences of service members of all ranks.

Cadets admitted to West Point will become the Army’s top leaders. Indeed, the path to leadership at the highest levels of the military begins, overwhelmingly, with entry into the military academies. As at any college, diversity at West Point is important to the experience of cadets while on campus grounds. But military academies present considerations and concerns that implicate the need for diversity in ways that other academic institutions do not. Admission to

² *Students for Fair Admissions v. Presidents & Fellows of Harvard Coll.*, 600 U.S. 181, 214 n.4 (2023).

the military academies is far more like entry into a job than to a college. The decisions about the composition of the entry class significantly dictate the composition of the workforce for officer positions, and the pool of future candidates for top leadership positions. Those who will ultimately bear leadership responsibilities will maintain significant authority and influence over the working conditions and experiences of those under their command. Their success as leaders is likely to turn on whether they can understand the background and life experiences of those under their command and whether those under their command can identify with them as leaders. In these ways a commitment to diversity is intimately tied to leadership in the military. And that commitment begins with the admissions process at the military academies.

Decades of military leadership have recognized the hard-won lessons of history, that military leadership must be able to understand and respond to the needs of service members of color to succeed and excel. Despite this recognition, the U.S. military continues to struggle with serious issues of racial inequality and discrimination.

Today's military is racially diverse within the enlisted ranks, but disproportionately white within the officer class, particularly at the highest ranks. This lack of diversity becomes self-reinforcing along the path to leadership, as white leaders gravitate toward other white candidates, and service members of color have fewer potential mentors, leaving them without the social capital to succeed. Service members of color grow more aware of differential treatment as they rise through the ranks in ever smaller numbers, while white officers who advance become less attuned to discrimination and disparities in the promotion pipeline. As the highest levels of military leadership decrease in representativeness, they become further distanced from understanding the experiences of the average service member of color. Moreover, this

discrimination has a long tail. Today's top military leadership graduated from service academies in the 1980s. This entering class will set the tone for military leadership into the 2060s.

Military members of all ranks report growing concern with the presence of race discrimination in the armed forces. Service members of color recount enduring racial slurs, as well as undermining remarks, "jokes" about their race, and a questioning of their capacity and authority that can eat away at a person over the course of a career. Military members also too often enter a culture where racist insignia and confederate memorials have endured. As in generations past, these experiences are made worse by shortcomings in leadership which leave service members of color feeling that complaining is futile or worse, will ruin their career.

Beyond an uphill battle to promotion and the endurance of racism on duty, service members of color are also disproportionately pushed out of the military by those in command. Reviews of the Military Justice System spanning a half century have found that service members of color are disparately punished, and that the recommendations of prior reports remain inadequately addressed. In a military justice system that is highly dependent on the discretion of commanding officers, service members of color experience punishments and discipline where a white member would not. How a commanding officer exercises discretion in even relatively minor instances can have a significant impact on a service member's record and their trajectory toward success in a military career or toward an early separation.

The military's compelling interest in admitting a racially diverse officer corps is informed by its unique history and structures. It is important to the experiences of military cadets, to the well-being and equal opportunity of all servicemembers, and to the military as a whole. For all of these reasons and those advanced by the Academy, SFFA does not have a "strong likelihood of success" on the merits of its claim, and its motion for a preliminary injunction should be denied.

ARGUMENT

I. Developing a Diverse Officer Corps is Imperative to Confronting Discrimination and Ensuring Equal Opportunity in Today’s Military.

A. Hard won lessons in the importance of racial equity.

While people of color have served in the United States military throughout its history, the armed forces remained formally segregated until 1948.³ Black Americans had to “fight for the right to fight,”⁴ with Black women “placed at the bottom of the list for consideration for equality.”⁵ As West Point has detailed, ECF 47 at 22–26, and contrary to SFFA’s assertions, Pl.’s Revised Mem. Supp. Mot. Prelim. Inj., ECF 31 at 12, formal desegregation did not erase racial discrimination and unequal treatment within the military.⁶

³ Establishing the President’s Committee on Equality of Treatment and Opportunity in the Armed Forces, Exec. Order 9981, 13 Fed. Reg. 4313 (July 28, 1948). Japanese soldiers were also expelled or segregated during WWII. See The President’s Advisory Commission on Asian American and Pacific Islanders, *A Report on the Welfare of Asian Americans and Pacific Islanders Serving in the United States Military* 7 (Nov. 11, 2017) [hereinafter *Report on the Welfare of Asian American and Pacific Islanders*], [https://www.ppalm.org/resources/Documents/Commission%20Report%20on%20AAPI%20Mil%20and%20Vets%20\(11%20Nov%202017\)%20\(v1.0\).pdf](https://www.ppalm.org/resources/Documents/Commission%20Report%20on%20AAPI%20Mil%20and%20Vets%20(11%20Nov%202017)%20(v1.0).pdf). Women of color have also served throughout the military’s history; however, formal limitations on women’s participation in the military have persisted. For example, only recently was the ban on women in combat roles lifted for much, but not all, of the military. See generally, ACLU & ACLU of Northern California, *U.S. Army Ends Sexist “Leaders First” Policy in Combat Units After Challenge by Women Servicemembers* (Mar. 14, 2023), <https://www.aclu.org/press-releases/u-s-army-ends-sexist-leaders-first-policy-in-combat-units-after-challenge-by-women-servicemembers>; Brief of the Modern Military Association of America et al. as Amici Curiae, *Nat’l Coal. for Men v. Selective Serv. Sys.*, 141 S. Ct. 1815 (2021); Lori Robinson & Michael E. O’Hanlon, *Women Warriors: The Ongoing Story of Integrating and Diversifying the American Armed Forces*, Brookings Institute (May 2020), <https://www.brookings.edu/articles/women-warriors-the-ongoing-story-of-integrating-and-diversifying-the-armed-forces>. LGBTQ individuals were barred from service then subject to the military’s “don’t ask, don’t tell” policy until 2010. See, e.g., Jessica Kegou, *New Figures Reveal Scope of Military Discrimination Against LGBTQ Troops, with over 29,000 Denied Honorable Discharges*, CBS News (June 21, 2023), <https://www.cbsnews.com/news/military-gay-lesbian-service-members-denied-honorable-discharges>; Morgan Godvin, *From Handcuffs to Rainbows: Queer in the Military*, JSTOR Daily (June 26, 2023), <https://daily.jstor.org/from-handcuffs-to-rainbows-queer-in-the-military>.

⁴ See generally, John L. Newby II, *The Fight for the Right to Fight and the Forgotten Negro Protest Movement: The History of Executive Order 9981 and Its Effect Upon Brown v. Board of Education and Beyond*, 10 Tex. J. on C.L. & C.R. 83 (2004); Morris J. MacGregor, Jr., *Integration of the Armed Forces 1940-1965* 124–130, Defense Studies Series (1981), https://history.army.mil/html/books/050/50-1-1/cmhPub_50-1-1.pdf.

⁵ Newby, *supra* note 4, at 92 (citation omitted).

⁶ See, e.g., MacGregor, *supra* note 4, at 202 (“The interval between [WWII and the Korean War] ended just as it began with the majority of white soldiers serving in combat or administrative units and the majority of black soldiers continuing to work in service or combat support units.”) (citation omitted); *id.* at 224–227 (discussing the ways in which the army continued to segregate Black soldiers while avoiding “the obvious discrimination of separate

The unequal treatment of service members of color in this period occurred in a context in which the military's officer class remained overwhelmingly white.⁷ “Between 1963 and 1968 the three service academies graduated just fifty-one black officers.”⁸ Confronting this divide between leadership and the military rank and file, military leaders identified several concerning implications. The lack of Black officers in positions of leadership deprived Black service members of role models and mentors, key means of professional development.⁹ Additionally, the discrimination and unequal treatment that Black service members faced was compounded by white commanders' failure to address their concerns.¹⁰ These experiences led to disillusionment and distrust, contributing to further degradation of understanding and communication.¹¹ Confronting these myriad issues, the military concluded that addressing race discrimination and inequality was critical to the effective operation of the military and that this in turn required confronting the disparity between leadership and the enlisted ranks. ECF 47 at 26–27.

The consideration of race in admissions at the service academies is a response to these historical lessons. Then as now, military commanders are developed from within, reliant on entryways principally through the academies and ROTC programs, with West Point serving as the Army's most prestigious entryway for officers. *Id.* at 3 (citation omitted). The military has

units”); *id.* at 238–243 (discussing the assignment of Black sailors into the Navy's separate and unequal Stewards Branch); *id.* at 418 (“As late as 1957 no black officer [in the Navy] had ever commanded a ship, and while both black and white officers started up the same promotion ladder, the blacks were usually transferred out of the line into staff billets”).

⁷ *Id.* at 539.

⁸ *Id.* at 569 (referring to the Army, Navy, and Air Force Academies).

⁹ U.S. Dep't of Defense, *Report of the Task Force on the Administration of Military Justice in the Armed Forces* 57–59 (Volume I) (Nov. 30, 1972) [hereinafter *Task Force on Military Justice of 1972*] (“the armed forces comprise an institution of society which is largely white at top and in the middle but is becoming increasingly diverse racially toward the bottom.”), <https://ctveteranslegal.org/wp-content/uploads/2013/03/DoD-Task-Force-on-the-Administration-of-Military-Justice-in-the-Armed-Forces-v1.pdf>; see also Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents at 16, *Grutter v. Bollinger*, 539 U.S. 306 (2003) [hereinafter Becton Brief] (citations omitted).

¹⁰ Robert Knowles, *The Intertwined Fates of Affirmative Action and the Military*, 45 Loyola Univ. Chicago L.J. 1027, 1033 (2014).

¹¹ MacGregor, *supra* note 4, at 579–80.

maintained its commitment to developing a diverse officer corps ever since, *id.* at 27–28,¹² including through its consideration of race in academy admissions.

Despite improvements, the military continues to struggle with a culture that has permitted discrimination and left service members of color feeling that they do not belong and do not have a voice. Service members of color today continue to face discrimination and continue to feel pressure to swallow their mistreatment to succeed. These experiences directly refute SFFA’s assertion that racial animosity “has been virtually nonexistent post-Vietnam.”¹³ ECF 31 at 12.

B. Racial divisions between the military’s enlisted ranks and leadership.

Today, people of color are underrepresented in officer ranks in relation to both their presence in the enlisted ranks and their share of the general population, and are particularly underrepresented at the highest levels of leadership.¹⁴ For example, in 2018, Black individuals made up 13.7% of the U.S. population, and 18.5% of enlisted forces, but only 8.1% of the officer

¹² See also Becton Brief at 18 (citing Department of Defense Appropriations of 1974: Military Personnel: Hearing Before the Subcomm. On the Dep’t of Def of the House Comm. on Appropriations, 93d. Cong., 308–09 (1974)) (including testimony that “[in]creasing the number of minority cadets at [West Point] and in the ROTC program” was a critical component of improving the Army’s race relations”).

¹³ SFFA further references a study finding “71% of active-duty officers believe the military would retain more talent if opportunities depended solely on merit.” ECF 31 at 14 (citing Ex. T at 13). Amici could not find direct support for this statement within the cited report, which did not consider race or issues of racial disparity or discrimination. See Sayce Falk & Sasha Rogers, *Junior Military Officer Retention: Challenges & Opportunities* 13, Harvard University John F. Kennedy School of Government (Mar. 2011), <https://officercandidatesschool.com/wp-content/uploads/2019/03/Junior-Military-Officer-Retention-Challenges-and-Opportunities-by-Sayce-Falk-Sasha-Rogers-John-F.-Kennedy-School-of-Government-Harvard-University.pdf>.

The report’s survey results do include officer recommendations that correlate with barriers to the advancement for service members of color, namely, a desire for more “active mentoring,” “flexible assignments in more desirable locations,” and “to not have such a rigid career path. We shouldn’t force people to be S-1s [personnel and administration] or S-4s [supply and logistics] just because everyone else has followed that path.” *Id.* at 13. Beyond this, SFFA’s assertion ignores the reality that officers of color are treated differently on the basis of race, and that their merit and abilities do not explain the disparities within the military. West Point’s consideration of race as a component of its admissions is directed at remedying these realities.

¹⁴ See, e.g., Council on Foreign Relations, *Demographics of the U.S. Military* (July 13, 2020), <https://www.cfr.org/backgroundunder/demographics-us-military>; U.S. Dep’t of Defense, *2022 Demographics: Profile of the Military Community* 27 (2022) [hereinafter *Dep’t of Defense 2022 Demographics*], <https://download.militaryonesource.mil/12038/MOS/Reports/2022-demographics-report.pdf>.

corps and of General/Flag officers.¹⁵ Hispanic people make up 17.9% of the population and 17.5% of enlisted members, but only 7.6% of officers and 2.1% of General/Flag officers.¹⁶

Race and Ethnic Representation in the Active Component and U.S. Population¹⁷
As of May 2018

Rank and Grade	White	Black	Asian	American Indian/ Alaskan Native	Native Hawaiian/ Pacific Islander	Multi/ Unknown	Hispanic*
General/Flag Officer (O-7 and above)	87.5%	8.1%	1.8%	none	0.3%	2.4%	2.1%
Officer (all)	77.3%	8.1%	5.2%	10.1%	0.5%	8.2%	7.6%
Warrant Officer	69.0%	16.0%	3.1%	0.8%	0.6%	10.4%	11.6%
Senior Enlisted (E-7 and above)	63.1%	19.1%	3.8%	1.3%	1.2%	11.5%	14.3%
Enlisted (all)	67.4%	18.5%	4.3%	1.3%	1.3%	7.3%	17.5%
Total Active Duty	69.1%	16.8%	4.4%	1.2%	1.1%	7.5%	15.8%
U.S. Resident Population (age 18-64)	76.2%	13.7%	6.3%	1.2%	0.3%	2.2%	17.9%

In the Army specifically, Black people make up 23.4% of enlisted members, but only 12.3% of officers.¹⁸ People of color collectively make up as much as 37% of the enlisted ranks, but just 14.8% of the highest pay grade officers.¹⁹ Women make up 14.7% of active-duty enlisted soldiers and 18.8% of officers.²⁰ Within the already under-represented presence of women, Black women account for 37.3% of enlisted women in the Army, but only 20.1% of women officers and 8% of women officers at the highest pay grade.²¹ Hispanic women make up 23.6% of enlisted women, 11% of officers, and are not represented at the highest pay grades.²²

¹⁵ Cong. Rsch. Serv., R44321, *Diversity, Inclusion, and Equal Opportunity in the Armed Services: Background Issues for Congress* 21 (June 5, 2019), <https://crsreports.congress.gov/product/pdf/R/R44321>.

¹⁶ *Id.*

¹⁷ *Id.* (citations omitted).

¹⁸ *Dep't of Defense 2022 Demographics*, *supra* note 14, at 27.

¹⁹ *Id.* at 30.

²⁰ *Id.* at 20.

²¹ U.S. Dep't of Defense, *2022 Demographics Interactive Profile of the Military Community: Women in the Military-Active Duty* [hereinafter *2022 Women in the Military-Active Duty*] (last visited Nov. 22, 2023), <https://demographics.militaryonesource.mil/women-in-the-military-demographics>.

²² *Id.*

At the highest pay grade, 4% of women are Asian and no Native Hawaiian, Pacific Islander, American Indian, or Alaska Native women are represented.²³

The Army has 96 operational brigades of roughly 4,000 soldiers each.²⁴ In 2020, just two of the 96 incoming commanders of these units were Black.²⁵ One echelon lower, at the battalion level, where lieutenant colonels oversee about 700 soldiers, “there are 13 Black commanders out of 231 combat units, or 5.6%”.²⁶ These are the pipelines to the top of Army leadership.

C. Opening pathways for advancement.

Representation within leadership is an important aspect of opening opportunities to service members of all races and all ranks. Marine Major Tyrone Collier recounted his experience when a young Black enlisted Marine confided in him, “[w]e never see Black officers. We never see people like you and it makes me extraordinarily proud.”²⁷ The pride in that moment was offset by its rarity. “You can imagine what it’s like for a Black enlisted Marine who, for example, might want to consider becoming a warrant officer or a commissioned officer or who served under commander after commander and received so few opportunities to see people that look like them in higher ranks,” Collier said.²⁸ For service members of color, the absence of people of color in military leadership “sends another message that here’s another space where we are not accepted.”²⁹ NABMW member and retired Chief Warrant Officer 2 Latia Suttle recalls having to work harder to achieve her position as information on the steps needed to

²³ *Id.*

²⁴ Tom Vanden Brook, *Where are the Black Officers? U.S. Army Shows Diversity in Its Ranks, But Few Promotions to the Top*, USA Today (Sept. 1, 2020), <https://www.usatoday.com/in-depth/news/politics/2020/09/01/military-diversity-army-shows-few-black-officers-top-leadership/3377371001>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Kat Stafford, et al., *Deep-rooted Racism, Discrimination Permeate U.S. Military*, Associated Press (May 27, 2021), <https://apnews.com/article/us-military-racism-discrimination-4e840e0acc7ef07fd635a312d9375413>.

²⁸ *Id.*

²⁹ Helene Cooper, *African-Americans Are Highly Visible in the Military, but Almost Invisible at the Top*, New York Times (May 25, 2020), <https://www.nytimes.com/2020/05/25/us/politics/military-minorities-leadership.html>; see also Vanden Brook, *supra* note 24.

apply was not made available. She can trace the disparities in mentorship and recruitment still further. As a high school student, she recalls meeting with Army recruiters, but never hearing anything about attending a service academy or becoming an officer.

The lack of representation in leadership is a self-reinforcing problem that takes concerted effort to overcome. Each officer of color who reaches a position of leadership must persevere on a path that becomes increasingly isolating as it ascends through the ranks. General Chiarelli summed up the common-sense implications for officers of color: “If I had to go to work every day, for 38 years, where I was the only person of color in the room — wow . . . I don’t know how I would feel about that.”³⁰

Military officers frequently recount that those responsible for making promotions and providing mentorship tend to gravitate towards those who seem like them. In the words of Former Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, “ducks pick ducks.”³¹ This human tendency means that the military must do more to overcome a status quo in which military leadership is predominately white. A 2020 Air Force internal review for example identified the connection between disparities in officer promotions and mentorship, concluding that “bias in the system may cause black officers to be underexposed to career-broadening opportunities, less aware of or not pushed for key developmental positions, and less afforded mentorship engagements.”³² As former Assistant Secretary of Defense Derek Chollet put it,

³⁰ Cooper, *supra* note 29.

³¹ David Martin, *Race in the Ranks: Investigating Racial Bias in the U.S. Military*, CBS News 60 Minutes (Mar. 21, 2021), <https://www.cbsnews.com/news/us-military-racism-60-minutes-2021-03-21>; *see also* Christopher S. Chivvis & Sahil Lauji, *Diversity in the High Brass*, Carnegie Endowment for Int’l Peace (Sept. 6, 2022), <https://carnegieendowment.org/2022/09/06/diversity-in-high-brass-pub-87694>; Cooper, *supra* note 29.

³² The Inspector General, Dep’t of the Air Force, *Report of Inquiry (S8918P): Independent Racial Disparity Review 73* (Dec. 2020) [*hereinafter Dep’t of the Air Force, Independent Racial Disparity Review*], <https://www.af.mil/Portals/1/documents/ig/IRDR.pdf>.

“[i]t’s about who’s going to take care of you. . . . if you don’t have senior leadership that makes fixing this a priority, it’s very hard to see it happening.”³³

Research shows that effective mentorship of people of color requires an intimate understanding of the challenges race can play in a protégé’s career progression.³⁴ It is much harder for white officers to develop this understanding, particularly if they too have risen in the military surrounded mostly by others like them. Indeed, researchers find that Black service members perceptions of inequality in the military increase as they rise through the ranks,³⁵ “congruent with the objective evidence.”³⁶ Conversely, higher ranking white service members perceive less discrimination than those of lower ranks, which researchers hypothesize “may be attributable to the maintenance of cognitive consistency,” or a desire to believe that the pathway that allowed them to succeed was unflawed.³⁷ The largest gap in perceptions separates white men and Black women, “whose perceptions of equal opportunity climates are the least positive.”³⁸

With few people of color in top leadership positions, the opportunity for service members of color to be supervised by someone who understands their cultural background and the challenges they face is increasingly rare the further they progress. And those responsible for awarding promotions are only as diverse as those within their rank. As one general who served on several promotion boards recounted, it was not uncommon to have only one woman and one

³³ Cooper, *supra* note 29; *see also* Martin, *supra* note 31.

³⁴ *See, e.g.*, David A. Thomas, *Race Matters*, Harv Bus. Rev. (Apr. 2001), <https://hbr.org/2001/04/race-matters>; Rosalind Chow, *Don’t Just Mentor Women and People of Color. Sponsor Them.*, Harv. Bus. Rev. (June 30, 2021), <https://hbr.org/2021/06/dont-just-mentor-women-and-people-of-color-sponsor-them>.

³⁵ John Sibley Butler & Malcom D. Holmes, *Perceived Discrimination and the Military Experience*, 9 J. of Pol. & Mil. Socio. 17, 27 (1981); *see also* James Burke & Evelyn Espinoza, *Race Relations within the U.S. Military*, 38 Ann. Rev. of Socio. 401, 407 (2012) (collecting additional similar studies).

³⁶ Sibley Butler & Holmes, *supra* note 35, at 23.

³⁷ *Id.* at 24.

³⁸ Burke & Espinoza, *supra* note 35, at 407.

person of color on a board of fourteen to sixteen people, and “[t]here were various boards where zero minorities or females were selected for promotion.”³⁹

In turn, officers of color face the added pressure to conform to a predominately white military culture in an effort to succeed. As one senior officer described this experience:

There were assumptions that there were officers that just fit into the military culture and others who don’t. At most functions, they played golf and country music. There was an underlying assumption that we were expected to conform to this culture The tension of not losing my own background was something I had to wrestle with.⁴⁰

Another retired Marine infantry colonel recalled a conversation he had with a selection officer while up for promotion as a young officer. On witnessing him chatting with the only other Black officer up for promotion, the selection officer advised him that the two “might not want to isolate [themselves] in this way because it might not look good.”⁴¹

The challenges are that much greater for women of color. As one senior Black woman officer related, “I missed out on having the commander’s ear I wasn’t part of the good ole boys’ system.”⁴² As NABMW President and retired Colonel Doctor Annette Tucker Osborne recalls, “although African American women have succeeded and excelled in newly acceptable jobs, specialties, and skills, we still face stereotypes about who are and how capably we perform our duties.” It was not easy for her “to move up the ladder to the rank of Colonel” and she knew throughout that she would “have to fight harder to get what I wanted.”

³⁹ Chivvis & Lauji, *supra* note 31.

⁴⁰ *Id.*; see also Hope Hodge Seck, *Naval Aviators Say They Were Kicked Out of Training Due to Racial Bias*, Military.com (Apr. 4, 2018), <https://www.military.com/daily-news/2018/04/04/naval-aviators-say-they-were-kicked-out-training-due-racial-bias.html> (as one Black Navy pilot recounted: “Being an African-American, we’re different. We like rap music, we watch different things on TV; we have a different culture I don’t want to go and say everybody is racist. But you look different, so you get more attention placed on you.”).

⁴¹ Stafford, et al., *supra* note 27.

⁴² Chivvis & Lauji, *supra* note 31.

⁴² *Id.*

Service members of color often internalize that they must work twice as hard to prove themselves. But racial stereotypes can come to frame even this hard work. As one Indian military officer recounted, “[i]nstead of viewing my hard work for what it was, [commanders] thought my being Indian made me overly ambitious. This was seen as a negative, and it was clear to me that my ethnicity would keep me on the outside of their inner circle.”⁴³

D. Confronting workplace discrimination.

In addition to the challenges of advancing within a culture shaped by decades of overwhelmingly white leadership, service members of color continue to face more overt forms of discrimination. In the 1990’s, General Colin Powell spoke about the racism he endured in the military. “When I was a young lieutenant I would have commanders come up to me and say, ‘Powell, you’re doing great—God damn, you’re the best black lieutenant I’ve ever seen,’” he recounted. “And I’d say, ‘Thank you.’ Just file it away.”⁴⁴ When Air Force General Charles Brown Jr. became the first Black chief of a military service roughly three decades later in 2020, he recounted similar experiences, including one example of wearing the same flight suit and wings as his peers “and then being questioned by another military member: ‘Are you a pilot?’”⁴⁵

In a 2013 pentagon survey, 39% of service members of color reported experiences of discrimination prohibited by military policy and thirty percent said they considered leaving the

⁴³ *Report on the Welfare of Asian Americans and Pacific Islanders*, *supra* note 3, at 26.

⁴⁴ Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man* 81 (1997).

⁴⁵ Phil Stewart, et al., *U.S. Troops Battling Racism Report High Barriers to Justice*, Reuters (Sept. 15, 2020), <https://www.reuters.com/investigates/special-report/usa-military-civilrights>.

military.⁴⁶ A 2017 survey reporting similar findings was not publicly disclosed until 2021.⁴⁷ A still more recent Military Times survey suggests that these concerns are growing, finding that approximately “one-third of active duty troops and more than half of” service members of color reported having witnessed evidence of white nationalism or ideological-driven racism from fellow troops; those numbers increased significantly from results of the same poll in 2018.⁴⁸

The experiences of service members of color continue to include undermining comments and sense of being judged differently. When retired Colonel Doctor Annette Tucker Osborne entered basic training in 1984, she recalls being told, “you are not different,” which, “as a woman, was actually refreshing to hear, because it was the opposite of degrading. We were equals in that camp.” As important as these experiences were, Dr. Tucker Osborne also came to understand that prejudice does exist in the military.

When she was serving as Chief Nurse in a medical brigade, her commander thought that she would be a good candidate for a deployment to Kuwait and sent her resume on to the mission commander. When the soldiers all met for the first time, Dr. Tucker Osborne recounts, the new commander “looked at me, then down at my resume. He seemed unable to equate a Black woman with the well-polished and extremely qualified person on paper.” He asked her whether she was up for the challenge. He seemed to be suggesting that another white woman could take her place. Offended, Dr. Tucker Osborne recalls telling him, “Sir, what you see on that resume is

⁴⁶ *Id.*; Surveys from earlier decades similarly indicated the continued presence of discrimination within the services, and a divide between white and Black service members. *See, e.g.*, Remo Butler, *Why Black Officers Fail*, 29 U.S. Army War Coll. Q.: Parameters 54, 61 (Aug. 20, 1999) (quoting Lt. Colonel Maurice Buchanan, Discrimination and the United States Army Future Senior Leader: Thoughts and Opinions 2 (1995) (Master's degree thesis, Shippensburg State University) (highlighting a 1995 survey that found that “100 percent of black males, 75 percent of white females, and 50 percent of Hispanic males agree that institutional racism still exists in the Army while only 40 percent of white males agree.”).

⁴⁷ Stewart, et al., *supra* note 45.

⁴⁸ Leo Shane III, *Signs of White Supremacy, Extremism Up Again in Poll of Active-Duty Troops*, Military Times (Feb. 6, 2020), <https://www.militarytimes.com/news/pentagon-congress/2020/02/06/signs-of-white-supremacy-extremism-up-again-in-poll-of-active-duty-troops>.

me. I've worked hard for what's on my resume." For the six months of her tour, Dr. Tucker Osborne was the only African American woman Colonel on the base. Young white soldiers wouldn't salute her. "I cannot tell you how many times I would have to stop soldiers reminding them of my rank," she recalls. "It became exhausting."

Stephanie Davis, who retired as a commander of flight medicine recounted similar experiences over the course of her career.⁴⁹ During residency, white colleagues gave her the call sign of ABW, for "angry black woman," insisting it was a "joke," subordinates refused to salute her and patients refused to call her by her proper rank.⁵⁰ Davis recalled that after being "taught to believe that [the military is] the one place where everybody has a level playing field," initial experiences of racism and discrimination can leave people feeling blindsided.⁵¹

Michael Flores is Filipino and served seven years as an infantry medic. He recalls that one day, a fellow soldier pulled him aside and referenced another soldier using the n-word, "as if I was in on a great secret," he recalls.⁵² Just a few weeks before, the same soldier had made a racist gesture toward Flores in reference to his Asian ancestry. "Was it because I had let him make fun of me that made him think it was OK[?]" he wondered.⁵³ He hadn't wanted to "create a ruckus" in either instance, but in hindsight, Flores wishes he'd spoken out. "If there's one thing I've learned from it," he said, "it's that racists don't think they're being racist. . . . [w]hen they're being racist, they often play it off as a joke."⁵⁴

Imagery of Nazism and white supremacy has also permeated military culture. Around the time retired Chief Warrant Officer 2 Latia Suttle served at Fort Bragg, a base named in honor of

⁴⁹ Stafford, et al., *supra* note 27.

⁵⁰ *Id.*

⁵¹ *Id.*; see also Hodge Seck, *supra* note 40 (recounting the use of racially coded call signs among Naval aviators).

⁵² Michael E. Flores & Nate Tilton, *Here's What it's Like to Put Up with 'Just Joking' Racism in the Military*, Task & Purpose (July 23, 2020), <https://taskandpurpose.com/news/racist-jokes-in-the-military>.

⁵³ *Id.*

⁵⁴ *Id.*

a confederate general, Army soldiers who espoused white supremacist views murdered two Black civilians; a subsequent investigation found 22 soldiers with ties to extremist groups or holding extremist views.⁵⁵ Marine Corps sniper troops have often used the Nazi SS lightning bolt insignia as a stand in for “Scout Sniper.”⁵⁶ The Marine Corps Leadership took action to stop the use of the symbol after a photo of the unit using the SS flag surfaced publicly in 2012.⁵⁷ However, in 2021, Marines said that the symbol persisted, “like a secret handshake.”⁵⁸ In 2018, a Black airman reported a white airman hanging a noose near him, a whip displayed in the hanger with the slogan “Fuckin Attitude Adjuster,” and a swastika and SS symbol scrawled in the bathroom.⁵⁹ The Air Force ultimately censured several people. But the airman found himself pushed out of the service after suffering depression and anxiety.⁶⁰ In 2019, West Point’s football team removed from its flag initials of a slogan demanding loyalty by the Aryan Brotherhood of Texas.⁶¹ And until this year, service members were assigned to duty stations with names honoring confederate soldiers.⁶²

Cadets at the service academies have endured a similar range of experiences of discrimination, and the experiences of alumni and current cadets has been well documented in recent years.⁶³ As but one example, after becoming the first Black person to be the top-ranked

⁵⁵ See William Branigin & Dana Priest, *3 White Soldiers Held in Slaying of Black Couple*, Washington Post (Dec. 9, 1995), <https://www.washingtonpost.com/archive/politics/1995/12/09/3-white-soldiers-held-in-slaying-of-black-couple/1f11ca9f-9fe2-4e28-a637-a635007decaf/>; Dana Priest, *22 Soldiers at Fort Bragg Tied to Extremist Groups*, Washington Post (Dec. 23, 1995), <https://www.washingtonpost.com/archive/politics/1995/12/23/22-soldiers-at-fort-bragg-tied-to-extremist-groups/33c8184b-19a3-46f9-b032-ceb10e7cbaf1/>.

⁵⁶ Cooper, *supra* note 29.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Stewart, et al., *supra* note 45.

⁶⁰ *Id.*

⁶¹ Cooper, *supra* note 29.

⁶² Eleanor Watson, *U.S. Military Finishes Renaming Bases That Previously Honored Confederates*, CBS News (Oct. 27, 2023), <https://www.cbsnews.com/news/u-s-military-renaming-bases-previously-honored-confederates/>.

⁶³ See, e.g., James Laporta, Associated Press, *“We Just Feel It’: Racism Plagues U.S. Military Academies*, PBS News Hour (Dec. 3, 2021); Heidi Glenn, *West Point Graduates’ Letter Calls for the Academy to Address Racism*,

cadet at West Point in 2018, Army First Lieutenant Simone Askew found a photoshopped picture of her slipped under her door, “with a monkey’s face over [her] own.”⁶⁴

When officers in leadership are not adequately attentive to discrimination, service members do not have an external source of recourse. Civilian employees are protected under Title VII and can file a complaint through the EEOC and state civil rights offices. In contrast, Title VII does not protect service members,⁶⁵ and “the military investigates itself.”⁶⁶ Service members can report complaints to internal military offices of Equal Opportunity (“EO”). However, in contrast to the body of surveys through which service members report experience with discrimination, strikingly few members pursue the EO process.⁶⁷ Military members report feeling that the process is futile, with a very small number of complaints are substantiated by the EO investigation process.⁶⁸ Worse, they are acutely aware that filing an EO complaint can backfire and is often viewed as an act of defiance.⁶⁹ This is consistent with the reflections of service members of color who succeeded in their careers by silently persevering. As Vincent Stewart, a retired Marine three star general, put it, “[i]f you want to progress, you don’t make a whole lot of waves, do you? There’s no great incentive to come forward.”⁷⁰

The experiences of service members who have received some degree of vindication through the process give an indication of the personal costs involved. In 2016, Lieutenant

NPR (July 6, 2020), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/06/887540591/west-point-graduates-letter-calls-for-academy-to-address-racism>; Kyle Rempfer, *As Nine Alumni Highlight Racism at West Point, The Academy’s IG Starts Review of ‘All Matters Involving Race,’* Army Times (July 7, 2020), <https://www.armytimes.com/news/your-army/2020/07/07/as-nine-alumni-highlight-racism-at-west-point-the-academys-ig-starts-review-of-all-matters-involving-race/>; Associated Press, “*They Didn’t See the Pride,*” *West Point Photo Puts Race and Gender in the Spotlight*, The Guardian (May 14, 2016), <https://www.theguardian.com/us-news/2016/may/14/west-point-black-women-graduation-photo-cadets-identity>.

⁶⁴ Stewart, et al., *supra* note 45.

⁶⁵ See *Jackson v. Modly*, 949 F.3d 763, 768 (D.C. Cir. 2020).

⁶⁶ Stewart, et al., *supra* note 45.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

Commander Kimberly Young-McLear filed a formal complaint regarding discrimination on the basis of her race, gender, and sexual orientation experienced as a professor at the U.S. Coast Guard Academy.⁷¹ The Coast Guard failed to respond to the discrimination and harassment, and she was retaliated against with lower performance evaluations, as the investigation eventually found.⁷⁴ The fear and anxiety in announcing her intent to file a formal complaint were so great that Young-McLear for a time contemplated suicide.⁷²

In another example, an AAPI Army dental officer reported being “compared to having a likeness of ‘ISIS’ by his direct supervisor.”⁷³ After several months of requesting an EO investigation, the officer heard nothing. More than a year later, outside advocacy was able to obtain responsive action from the Army. However, by this time, the officer had opted to pursue separation due to the toll of the experience and the adverse command climate.⁷⁴

The handling of a complaint alleging a practice of “Racial Thursdays” in one Army platoon provides some indication of how service members may experience their concerns minimized by the EO process. The soldier who made the complaint described a “tradition . . . made up where you can say any racist remark you want without any consequences.”⁷⁵ A junior enlisted soldier recalled witnessing racial remarks lobbed as “jokes,” against another Latino soldier.⁷⁶ He was afraid to complain. As he explained, “[f]or the soldiers who are minorities, we don’t want to be looked down upon or looked at as outcasts or traitors or Blue Falcons, so we didn’t open our mouths.”⁷⁷

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Report on the Welfare of Asian Americans and Pacific Islanders Serving in the United States Military supra* note 3, at 27.

⁷⁴ *Id.*

⁷⁵ Michelle Tan, *Army Investigates Alleged ‘Racial Thursdays’ at Unit*, Army Times (Mar. 18, 2015), <https://www.armytimes.com/news/your-army/2015/03/19/army-investigates-alleged-racial-thursdays-at-unit/>.

⁷⁶ *Id.*

⁷⁷ *Id.*

An Army investigation found that numerous soldiers in the platoon were familiar with the term “Racial Thursdays,” although it concluded the term was used in response to racially charged comments, as in “save that for racial Thursdays.”⁷⁸ The findings indicated “limited use of racial jokes within the unit amongst junior enlisted Soldiers” as distinct from one substantiated “allegation of a racially insensitive remark” directed toward a Muslim soldier.⁷⁹ The investigation found that no member of the chain of command had endorsed the practice, and concluded that there were “no systemic issues.”⁸⁰ The Army did require a training on equal opportunity for the unit, and called for punishment in relation to specific incidents.⁸¹ The Army saw this as evidence that “the equal opportunity process worked in a timely manner.”⁸² But in an environment with few leaders of color, service members of color are left to fend for themselves. Leadership minimized the existence of “racially charged comments” and “jokes,” and distanced command staff from any responsibility.

The shortcomings of the military’s internal EO process mask the experiences of service members of color and allow problems to fester. As a Reuters investigation concluded, “[t]he end result of fewer complaints . . . is that the military is likely less aware of discrimination happening day-to-day.”⁸³ Service members should not have to endure discrimination in silence in exchange for the opportunity to succeed within the military. Moreover, as history makes clear, the failure of military leadership to understand and respond to the experiences of service members of color weakens the trust and cohesion necessary to the military’s operation.

⁷⁸ Kevin Lilley & Michelle Tan, *Army Report Refutes “Racial Thursdays” Allegations*, Army Times (June 5, 2015), <https://www.armytimes.com/news/your-army/2015/06/05/army-report-refutes-racial-thursdays-allegations/>; see also Megan Edge, *Army Ends Investigation of “Racial Thursdays” at Alaska Military Base*, Anchorage Daily News (Sept. 28, 2016), <https://www.adn.com/military/article/army-investigation-racial-thursdays-concluded/2015/06/11>.

⁷⁹ Lilley & Tan, *supra* note 78.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Stewart, et al., *supra* note 45.

A military culture in which discrimination is permitted to fester can also have deadly consequences for service members. In 2011, Private Danny Chen committed suicide while deployed to Afghanistan after enduring racial slurs and hazing over his Chinese ancestry.⁸⁴ The murder of Latina Army Specialist Vanessa Guillen after experiencing ongoing sexual harassment prompted numerous service members to recount their own experiences under the hashtag #IAmVanessaGuillen.⁸⁵ An investigation sparked by the mass calls for justice found “the command climate at [Guillen’s former base] has been permissive of sexual harassment [and] sexual assault,” and that the “command climate that failed to instill [] core values.”⁸⁶

E. Push out through the Military Justice System.

Disparities in military leadership also contribute to a culture in which service members of color are disproportionately pushed out of the service entirely. The military operates under its own Code of Military Justice, and has its own military police units and judicial system. This system addresses offenses involving military personnel ranging from minor to major criminal infractions, and these decisions are not reviewable by the federal civil courts.⁸⁷ While relatively few service members face adverse action through the military justice system, such actions have a broader impact. As the Department of Defense observed, “[r]acial disparities in these highly visible processes affect unit cohesion, perceptions of fairness, and trust in the system.”⁸⁸ Military officers play a crucial role in ensuring fairness within the military justice system. They are

⁸⁶Jennifer Gonnerman, *Pvt. Danny Chen, 1992-2011*, New York Magazine (Jan. 6, 2012), <https://nymag.com/news/features/danny-chen-2012-1>.

⁸⁵ Nicole Acevedo, *In Vanessa Guillen Case, Latino Family’s push for Answers Leads to Military Reform*, NBC News (Dec. 10, 2020), <https://www.nbcnews.com/news/latino/vanessa-guill-n-case-latino-family-s-push-answers-leads-n1250570>.

⁸⁶ *Report of the Fort Hood Independent Review Committee* iii (Nov. 6, 2020), https://www.army.mil/e2/downloads/rv7/forthoodreview/2020-12-03_FHIRC_report_redacted.pdf.

⁸⁷ *Schlesinger v. Councilman*, 420 U.S. 738 (1975).

⁸⁸ U.S. Dep’t of Defense, *Report of the Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems* 8 (Aug. 31, 2022), <https://media.defense.gov/2023/Jun/08/2003238260/-1/-1/1/IRT-REPORT.PDF> [hereinafter *Report on Racial Disparities in the Investigative and Military Justice Systems*].

“discrete discretionary actors” at many steps in the military justice process, and “also bear ultimate responsibility and accountability for the climate and culture of their organizations.”⁸⁹

Reviews of the Military Justice system from 1972 through the present have identified the need to address racial discrimination and disparities. In a 2019 study, for example, the Government Accountability Office found that “Black, Hispanic, and male service-members were more likely than White or female members to be the subjects of investigation . . . and to be tried by general and special courts-martial in all of the military services when controlling for attributes such as rank and education.”⁹⁰ The Army’s own 2022 review found “indications of racial disparities throughout the military justice process.”⁹¹ Further, the Department of Defense found in 2022 that many reforms proposed by prior investigations “remain unaddressed or only partially addressed.”⁹²

Military leadership first developed through the academies has an important role in responding to racial disparities in the military justice system. The highest levels of leadership must recognize the harms of racial disparities within the system, take action to implement recommended reforms that have remained unaddressed, and prepare commanding officers to be able to “help identify issues and develop corrective action plans.”⁹³ Commanding officers issue nonjudicial punishments, approve administrative discharges, and may convene court martial.⁹⁴

Beyond this, junior officers play an early role in steering a servicemembers trajectory, including

⁸⁹ *Id.* at 33.

⁹⁰ U.S. Gov’t Accountability Off., *Military Justice: DoD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities*, GAO-19-344 (2019); see also Dep’t of the Air Force, *Independent Racial Disparity Review*, *supra* note 32; Defense Equal Opportunity Management Institute, *Phase I Report: An Investigation into the Disparity of Judicial and Non-Judicial Punishment Rates of Black Males in the Armed Forces* (Apr. 21, 1992); *Task Force on Military Justice of 1972*.

⁹¹ *Report on Racial Disparities in the Investigative and Military Justice Systems*, *supra* note 88, at 11 (citing Dep’t of the Army, *Holistic Evaluation and Assessment of Racial Disparity in Military Justice* (2022)).

⁹² *Id.* at 15.

⁹³ *Id.* at 32.

⁹⁴ *Id.* at 20 (citation omitted).

providing (or failing to provide) positive mentorship, exercising discretion in responding to misconduct and performance deficiencies, and “ultimately, whether they are put on a path to inclusion or separation.”⁹⁵ The absence of command leaders who can understand the cultural background of service members of color may contribute to system in which servicemembers of color are perceived as insubordinate when white workers are not.⁹⁶ Better preparing these junior leaders again requires action by senior leadership. The need for improved training and guidance for these junior leaders, who “were trained on the mechanics of filling out counseling paperwork,” but “lacked a deeper understanding of when and how to use performance counseling to leverage a Service member’s talent” was identified as a primary need and recommendation of the Department of Defense.⁹⁷

Service member experiences exemplify how discretion in the military justice system can alter the trajectory of a military career. Crystal Ellington was an Army specialist in 2018 when she flew from her duty station to visit her two-year-old son over Thanksgiving weekend. Ellington’s return flight ended up delayed due to snow, and she arrived back six hours later than her planned Monday morning return.⁹⁸ “Almost instantly,” she recalls, she received an Article 15 non-judicial punishment for being absent without leave. Ellington’s commanders, all of whom were white men, assigned her extra duty manual labor. From Ellington’s perspective, other service members who were white sometimes returned late without facing repercussions.

⁹⁵ *Id.* at 21.

⁹⁶ Burke & Espinoza, *supra* note 35, at 410.

⁹⁷ *Report on Racial Disparities in the Investigative and Military Justice Systems*, *supra* note 88, at 25; *see also id.* at 17, 22.

⁹⁸ Daniel Lam, *They Faced Racial Bias in Military Discipline, That Can Impact National Security*, Nat’l Pub. Radio (Sept. 14, 2021), <https://www.npr.org/2021/08/22/1028765938/racial-bias-military-discipline-national-security-combat-readiness>.

Moreover, she was stung that no one who knew about her approved trip had stuck up for her. “I felt not only alone, but I felt betrayed,” she recalled.⁹⁹

Army veteran Victor LaGroon recounted a similar experience early in his career. He and his peers witnessed a white superior discipline a Latino soldier for being late; when a white soldier showed up still later, he received no punishment.¹⁰⁰ Witnessing this disparate treatment shook LaGroon’s trust in his superiors. When a superior is seen to apply discipline unequally, he recounted, soldiers are left questioning, “How fair are you? . . . How much can I trust you?”¹⁰¹ These experiences erode trust in commanders and in the military.

. . .

Diversity among the military’s officer corps and senior leadership is essential to the military’s success. Historic and present-day experience reflects that military leadership is overwhelmingly lacking in diversity and has failed to adequately address the discrimination and unequal opportunity experienced by service members of color. These are not “infantilizing stereotypes,” ECF 31 at 13, but the real experiences of service members that SFFA contends West Point should be forced to ignore. The law does not require the military to shut its eyes to these realities and history caution that it must not.

II. Admission to the Service Academies Remains Uniquely Critical to the Development of Officers and Generals Capable of Leading a Diverse Military.

As it has been historically, admission to the service academies is directly related to the development of military leadership. If the military does not develop a diverse officer corps capable of working across racial differences at the point of college admissions, it will not have a pool of candidates from which to select the most effective top leadership. “There’s no lateral

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

entry for an infantry or armored battalion or brigade commander.”¹⁰² In this way, the military is unlike any private company or civilian organization. As General Peter Chiarelli, former Army Vice Chief of Staff explained, “[i]f I’m a C.E.O., I can go outside to look for a person if I don’t have one internally in my organization,” in contrast, the Army “can choose from only the colonels before them,”¹⁰³ who in turn come through the military’s college pipeline.

Additionally, because top military leadership comes solely from within, correcting course to establish diverse leaders who can instill a culture of equal opportunity cannot be done in a year or several years. As one retired Marine observed, “individuals in that room with the secretary of defense represent decisions that were made 35 years ago.”¹⁰⁴ The diversity of today’s cadet class will dictate the diversity of top leadership, and the culture within which military members serve, decades into the future.

The academies commission nearly 20% of officers and a larger percentage of generals and the military’s top leadership.¹⁰⁵ Within the Army, West Point graduates account for 33% of generals and 50% of four star generals. ECF 47 at 3. While diversity has increased, the academies continue to enroll disproportionately low numbers of Black and Hispanic students and disproportionately high number of white students, including when compared to other four-year colleges.¹⁰⁶ Looking at the representation of Black women makes clear the work still to be done. In 2020, West Point graduated a record 38 Black women cadets. While this is a mark of

¹⁰² Vanden Brook, *supra* note 24.

¹⁰³ Cooper, *supra* note 29.

¹⁰⁴ *Id.*; see also Vanden Brook, *supra* note 24.

¹⁰⁵ Connecticut Veterans Legal Center & Veterans Inclusion Project, *Gatekeepers to Opportunity: Racial Disparities in Congressional Nominations to the Military Service Academies* 8 (2021), https://law.yale.edu/sites/default/files/area/clinic/document/3.16.2021_clean_embargoed_gatekeepers_to_opportunity_racial_disparities_in_congressional_nominations_to_the_service_academies3.pdf.

¹⁰⁶ *Id.* at 10.

improvement, the 38 cadets represented just 3.7% of the graduating class of 1,107.¹⁰⁷ By comparison, Black women make up 7% of the U.S. population and 37.3% of enlisted women.¹⁰⁸

Military leadership developed principally through the service academies have a uniquely important role in ensuring equal opportunity for all service members. Members of the armed services are asked to follow a command structure that holds broad authority over day-to-day working conditions and influence over many other aspects of life.¹⁰⁹ Military members are not free to leave their job when faced with racial discrimination and hostility and could face discipline and court martial if they did so.¹¹⁰ Their civil rights and liberties may yield as “the military must insist upon a respect for duty and a discipline without counterpart in civilian life.”¹¹¹ The sacrifices asked of military members mean they are uniquely dependent on military leadership to ensure that race discrimination and disparities do not undermine their ability to serve. Military leadership bears a commensurately larger responsibility to these members. The military’s ability to admit a diverse corps of cadets is the critical foundation for leadership that will impact the equal treatment of service members in far reaching ways.

CONCLUSION

For the foregoing reasons, SFFA’s motion for a preliminary injunction should be denied.

¹⁰⁷ Michelle Ruiz, *A Record Number of African American Women Graduated from West Point in 2020*, Vogue (June 15, 2020), <https://www.vogue.com/article/record-number-african-american-female-graduates-west-point>.

¹⁰⁸ U.S. Dep’t of Defense, *2022 Women in the Military- Active Duty*, *supra* note 21.

¹⁰⁹ Many aspects of service members lives, and those of their family members—including the communities where they live, health care, and education—are closely tied to military structure, and to the influence of military leadership. Today, Blue Star Families continues to identify concerns with equity in these areas and to call for diversity in military leadership as important to responding to these needs. Blue Star Families, *Blue Star Families’ Social Impact Research 2021: The Diverse Experiences of Military and Veteran Families of Color* (2022), https://bluestarfam.org/wp-content/uploads/2022/02/BSF_MFC_REI_FullReport2021-final.pdf.

¹¹⁰ *See, e.g., Jackson*, 949 F.3d at 770–71 (“If an enlisted serviceman or a commissioned officer attempts to leave the military or refuses to work before the required time of service is completed, he can be punished by court-martial. Such a court-martial can result in imprisonment.”) (citing 10 U.S.C. §§ 886, 890, 892).

¹¹¹ *Schlesinger*, 420 U.S. at 757 (finding acts of court martial not reviewable by civil courts); *see also Brown v. Glines*, 444 U.S. 348, 354 (1980) (quoting *Schlesinger* and finding service members’ First Amendment rights must yield to the military’s judgment of the need for discipline).

Dated: Nov. 29, 2023

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

/s/ Sarah Hinger
Sarah Hinger
125 Broad St., 18th Fl.
New York, NY 10004
(212) 519-7882
shinger@aclu.org

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

/s/ Perry Grossman
Lanessa Owens-Chaplin
Arthur N. Eisenberg
125 Broad St., 19th Fl.
New York, NY 10004
(212) 607-3300
pgrossman@nyclu.org

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States District Court for the Southern District of New York by CM/ECF. All participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

/s/ Sarah Hinger

Sarah Hinger

125 Broad St., 18th Fl.

New York, NY 10004

(212) 519-7882

shinger@aclu.org