

No. 11-345

---

IN THE  
**Supreme Court of the United States**

ABIGAIL NOEL FISHER,

*Petitioner,*

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit

**BRIEF OF LT. GEN. JULIUS W. BECTON, JR.,  
GEN. JOHN P. ABIZAIID, ADM. DENNIS C.  
BLAIR, GEN. BRYAN DOUG BROWN, LT. GEN.  
DANIEL W. CHRISTMAN, GEN. WESLEY K.  
CLARK, ADM. ARCHIE CLEMINS, GEN.  
RONALD R. FOGLEMAN, ET AL., AS *AMICI  
CURIAE* IN SUPPORT OF RESPONDENTS**

JOE R. REEDER  
ROBERT P. CHARROW  
GREENBERG TRAURIG  
2101 L Street, N.W.  
Washington, DC 20037  
(202) 331-3100  
reederj@gtlaw.com

PHILIPPA SCARLETT  
*Counsel of Record*  
KIRKLAND & ELLIS LLP  
601 Lexington Avenue  
New York, NY 10022  
(212) 446-4800  
philippa.scarlett@kirkland.com

*Counsel for Amici Curiae*

[Additional *Amici Curiae* Listed on Inside Cover]

---

Additional *Amici Curiae* Represented by Above  
Counsel:

Adm. Edmund P. Giambastiani, Jr.  
Gen. Ronald H. Griffith  
Gen. Richard D. Hearney  
Gen. James T. Hill  
Gen. Joseph H. Hoar  
Adm. Bobby R. Inman  
Gen. John (“Jack”) M. Keane  
Sen. Joseph Robert (“Bob”) Kerrey  
Adm. Charles R. Larson  
Lt. Gen. William J. Lennox, Jr.  
Gen. William R. Looney, III  
Gen. Lester L. Lyles  
Gen. David M. Maddox  
Gen. Robert Magnus  
Adm. Michael G. Mullen  
Gen. Carl E. Mundy, Jr.  
Adm. John B. Nathman  
Lt. Gen. Tad J. Oelstrom  
Gen. Colin L. Powell  
Adm. Joseph W. Prueher  
Hon. Joe R. Reeder  
Lt. Gen. John F. Regni  
Vice Adm. Ann E. Rondeau  
Vice Adm. John R. Ryan  
Gen. Henry H. Shelton  
Gen. Gordon R. Sullivan  
Gen. John H. Tilelli, Jr.  
Gen. Johnnie E. Wilson  
Gen. Anthony C. Zinni

## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES.....	iii
INTERESTS OF <i>AMICI CURIAE</i> .....	ix
SUMMARY OF THE ARGUMENT .....	1
ARGUMENT .....	5
I.    Growing and Maintaining a Highly Qualified and Diverse Officer Corps Remains Critical for Military Effectiveness and Thus Our National Security.....	5
A.    The modern U.S. military commitment to racial diversity in military leadership was born out of many decades of experience. ....	5
B.    The military remains committed to and has made major strides in growing a highly qualified and racially diverse officer corps, but considerable work remains.....	11
II.   Invalidating UT’s Modest Race- Conscious Admissions Policy Would Seriously Disrupt the Military’s Efforts to Maintain Military Cohesion and Effectiveness.....	26

**TABLE OF CONTENTS - continued**

	<b>Page</b>
A. Because of ROTC, the military has a strong interest in the admissions policies of civilian universities.....	26
B. The Court embracing a class-rank cut-off approach to admissions, such as Texas’s Top Ten Percent Law, to the exclusion of race-conscious admissions policies conducted in the context of individualized review would seriously disrupt the military.....	31
III. Respondents’ and the Military’s Race Conscious Policies Are Constitutional.....	34
CONCLUSION .....	37

## TABLE OF AUTHORITIES

Page(s)

### CASES

<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003) .....	<i>passim</i>
<i>Haig v. Agee</i> , 453 U.S. 280 (1981) .....	35
<i>Parents Involved in Community Schools v. Seattle School District No. 1</i> , 551 U.S. 701 (2007) .....	36
<i>Regents of the University of California v. Bakke</i> , 438 U.S. 265 (1978) .....	30
<i>Winter v. Natural Resources Defense Council, Inc.</i> , 555 U.S. 7 (2008) .....	35

### STATUTES

8 U.S.C. § 1440 .....	10
10 U.S.C. § 4342 .....	32
10 U.S.C. § 6954 .....	32
10 U.S.C. § 9342 .....	32

### EXECUTIVE ORDER

Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948) .....	5
--	---

**TABLE OF AUTHORITIES - continued**

	<b>Page(s)</b>
<b>RULE</b>	
Sup. Ct. R. 37.....	ix

**OTHER AUTHORITIES AND SOURCES**

Air Force Instruction 36-3501 at 2.18.2.1.2 (Apr. 28, 2008).....	21
Anny Wong et al., <i>The Use of Standardized Scores in Officer Career Management and Selection</i> (RAND Corp. 2012) .....	21
Army ROTC: Legacy & Value, U.S. Army, <a href="http://www.goarmy.com/rotc/legacy-and-value.html">http://www.goarmy.com/rotc/ legacy-and-value.html</a> .....	12
Bernard C. Nalty, <i>Strength for the Fight: A History of Black Americans in the Military</i> (1986) .....	6
Beth J. Arsch et al., <i>A New Look at Gender and Minority Differences in Officer Career Progression in the Military</i> (RAND Corp. 2012) .....	24, 25
Bryan W. Leach, Note, <i>Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond</i> , 113 Yale L.J. 1093 (2004) .....	6, 7
Charles C. Moskos & John Sibley Butler, <i>All That We Can Be: Black Leadership and Racial Integration the Army Way</i> (1996) .....	7

**TABLE OF AUTHORITIES - continued**

	<b>Page(s)</b>
Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al., in <i>Grutter v. Bollinger</i> , S. Ct. Nos. 02-241 & 02-516 (filed Feb. 21, 2003).....	<i>passim</i>
Daniel de Vise, <i>Naval Academy Professor Challenges School's Push for Diversity</i> , Washington Post (July 3, 2009).....	19, 23
Dep't of Defense, <i>Defense Language Transformation Roadmap</i> (Jan. 2005).....	9
Dep't of Defense, <i>Demographics 2010: Profile of the Military Community</i> , available at <a href="http://www.militaryhomefront.dod.mil/12038/Project%20Documents/MilitaryHOMEFRONT/Reports/2010_Demographics_Report.pdf">http://www.militaryhomefront.dod.mil/ 12038/Project%20Documents/ MilitaryHOMEFRONT/Reports/ 2010_Demographics_Report.pdf</a> .....	22, 28
Dep't of Defense, <i>Diversity and Inclusion Strategic Plan 2012-2017</i> (2012).....	17
Dep't of Defense, <i>Population Representation in the Military Services: Fiscal Year 2010 Summary Report</i> .....	12, 13, 23, 28
Dep't of Justice, <i>Review of Federal Affirmative Action Programs, Report to the President</i> (July 19, 1995) .....	8

**TABLE OF AUTHORITIES - continued**

	<b>Page(s)</b>
Dep't of the Army, <i>United States Army Diversity                      Roadmap</i> (Dec. 2010) .....	11, 29
<i>From Representation to Inclusion: Diversity                      Leadership for the 21st-Century Military,                      Final Report</i> (2011), available at <a href="https://www.hsdl.org/?view&amp;did=11390">https://www.hsdl.org/?view&amp;did=11390</a> .....	<i>passim</i>
John Van Winkle, <i>Academy Says ‘Hello’ to                      Class of 2014, 50 No. 25 Academy Spirit</i> (June 25, 2010), available at <a href="http://www.usafa.af.mil/shared/media/document/AFD-100806-083.pdf">http://www.usafa.af.mil/shared/media/                      document/AFD-100806-083.pdf</a> .....	23, 24
Karen R. Humes et al., <i>2010 Census Briefs,                      Overview of Race and Hispanic Origin:                      2010</i> (Mar. 2011) .....	17
Learn About AFROTC, U.S. Air Force, <a href="http://afrotc.com/learn-about/">http://afrotc.com/learn-about/</a> .....	12
<i>Naval Academy Wooing Minorities,</i> Washington Times (Aug. 23, 2008) .....	16
Nelson Lim et al., <i>Officer Classification                      and the Future of Diversity                      Among Senior Military Leaders:                      A Case Study of the Army                      ROTC</i> (RAND Corp. 2009).....	23, 24, 25, 26
Sheila Nataraj Kirby, et al., <i>Diversity of Service                      Academy Entrants and Graduates</i> (RAND Corp. 2010) .....	<i>passim</i>



## TABLE OF AUTHORITIES - continued

	<b>Page(s)</b>
Tom Roeder, <i>AFA Gets an Extra \$1 Million to Tackle Diversity Issues</i> , <i>Gazette</i> (July 15, 2011).....	21
U.S. Air Force Academy <i>Diversity Plan</i> , available at <a href="http://www.usafa.af.mil/shared/media/document/AFD-110316-012.pdf">http://www.usafa.af.mil/shared/media/document/AFD-110316-012.pdf</a> .....	20
U.S. GAO, GAO-03-1000, <i>Military Education: DOD Needs to Enhance Performance Goals and Measures to Improve Oversight of Military Academies</i> (Sept. 2003).....	19
U.S. GAO, GAO-07-224, <i>Strategic Plan Needed to Address Army's Emerging Officer Accession and Retention Challenges</i> (Jan. 2007).....	17
U.S. Military Academy, <i>Class of 2016 to Enter West Point</i> (June 28, 2012), available at <a href="http://www.usma.edu/news/SitePages/Class%20of%202016%20to%20Enter%20West%20Point.aspx">http://www.usma.edu/news/SitePages/Class%20of%202016%20to%20Enter%20West%20Point.aspx</a> .....	24
U.S. Military Academy, <i>FAQ-Admissions</i> , available at <a href="http://www.westpoint.edu/admissions/SitePages/FAQ_Admission.aspx">http://www.westpoint.edu/admissions/SitePages/FAQ_Admission.aspx</a> (last visited Aug. 12, 2012).....	19

**TABLE OF AUTHORITIES - continued**

	<b>Page(s)</b>
U.S. Naval Academy, <i>Class of 2016 Statistics</i> (June 28, 2012), available at <a href="http://www.usna.edu/PAO/pressreleases/063-12_Class_of_2016_Statistics.htm">http://www.usna.edu/PAO/pressreleases/ 063-12_Class_of_2016_Statistics.htm</a> .....	23
U.S. Naval Academy, <i>Leaders to Serve the Nation: U.S. Naval Academy Strategic Plan 2020</i> (2010) .....	16

## INTERESTS OF *AMICI CURIAE*

*Amici* are former senior officers and civilian leaders of the Armed Forces, including military-academy superintendants and a former member of the U.S. Senate.<sup>1</sup> They are keenly interested in this case because its outcome could affect racial and ethnic diversity in the military's officer corps and hence the military's effectiveness as an institution. *Amici's* submissions are based on decades of experience and service to this country, including at the highest levels in our Nation's military. *Amici's* short biographies listed below only begin to describe their distinguished service to our country.

**Lieutenant General Julius W. Becton, Jr.**, 40-year U.S. Army veteran; Superintendent, Washington, D.C. Public Schools (1996-98); President, Prairie View A&M University in Texas (1989-94).

**General John P. Abizaid**, retired 4-star U.S. Army, Commander, U.S. Central Command (2003-07); Distinguished Chair, Combating Terrorism Center at the U.S. Military Academy at West Point (2007-present).

---

<sup>1</sup> This *amicus* brief is filed with the consent of the parties. Counsel for the petitioner and respondents have granted blanket consent for the filing of *amicus* briefs in this case, in accordance with this Court's Rule 37. Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that no party to this case or their counsel authored this brief in whole or in part, and that no person other than *amici* and their counsel paid for or monetarily contributed toward the preparation or submission of this brief.

**Admiral Dennis C. Blair**, retired 4-star, Director of National Intelligence (2009-10); Commander in Chief, U.S. Pacific Command (1999-2002).

**General Bryan Doug Brown**, retired 4-star, Commander, all U.S. Special Operations Forces (2003-07).

**Lieutenant General Daniel W. Christman**, Superintendent, U.S. Military Academy at West Point (1996-2001), overall responsible for admission criteria.

**General Wesley K. Clark**, retired 4-star U.S. Army, Supreme Allied Commander, Europe (1997-2000); Commander in Chief, U.S. Southern Command (1996-97).

**Admiral Archie Clemins**, retired 4-star, Commander in Chief, U.S. Pacific Fleet (1996-99), the world's largest combined-fleet command.

**General Ronald R. Fogleman**, retired 4-star, Air Force Chief of Staff (1994-97); Commander in Chief of U.S. Transcom (1992-94).

**Admiral Edmund P. Giambastiani, Jr.**, retired 4-star, Seventh Vice Chairman of the Joint Chiefs of Staff (2005-07); NATO Supreme Allied Commander, Transformation (2003-05); Commander, U.S. Joint Forces Command (2002-05).

**General Ronald H. Griffith**, retired 4-star, Vice Chief of Staff, U.S. Army (1995-97); Army Inspector General (1991-95).

**General Richard D. Hearney**, retired 4-star U.S. Marine Corps, Assistant Commandant (1994-96).

**General James T. Hill**, retired 4-star U.S. Army, U.S. Southern Command (2002-04).

**General Joseph P. Hoar**, retired 4-star U.S. Marine Corps, Commander in Chief, U.S. Central Command (1991-94).

**Admiral Bobby R. Inman**, retired 4-star, University of Texas at Austin LBJ Centennial Chair in National Policy (2000-present); Deputy Director, Central Intelligence Agency (1981-82).

**Gen. John (“Jack”) M. Keane**, retired 4-star, Vice Chief of Staff, U.S. Army (1999-2003); currently Chairman of the Board, Institute for the Study of War.

**Senator Joseph Robert (“Bob”) Kerrey**, Congressional Medal of Honor recipient, U.S. Navy SEAL, special forces; President of New School University (2001-11); U.S. Senator (1989-2001); Nebraska Governor (1983-87).

**Admiral Charles R. Larson**, retired 4-star, Commander in Chief, Pacific Fleet (1990-91); Commander in Chief, U.S. Pacific Command (1991-94); Superintendent, U.S. Naval Academy (1983-86; 1994-98).

**Lieutenant General William J. Lennox, Jr.**, Superintendent, U.S. Military Academy at West Point (2001-06).

**General William R. Looney, III**, retired 4-star, Commander, Air Education and Training Command (2005-08); Commandant Armed Forces Staff College (1996-98).

**General Lester L. Lyles, Jr.**, Commander, Air Force Materiel Command (2000-03); Vice Chief of Staff, U.S. Air Force (1999-2000).

**General David M. Maddox**, retired 4-star, Commander in Chief, U.S. Army Europe (1992-94); Commander, NATO Central Army Group (1992-93).

**General Robert Magnus**, retired 4-star, Assistant Commandant, U.S. Marine Corps (2005-08); Chairman, U.S. Marine Corps Scholarship Foundation (2009-11).

**Admiral Michael G. Mullen**, retired 4-star, 17th Chairman of the Joint Chiefs of Staff (2007-11); 28th Chief of Naval Operations (2005-07).

**General Carl E. Mundy, Jr.**, retired 4-star, Commandant, U.S. Marine Corps (1991-95).

**Admiral John B. Nathman**, retired 4-star, Commander U.S. Fleet Forces (2005-07); Vice Chief of Naval Operations (2004-05).

**Lieutenant General Tad J. Oelstrom**, Director, National Security Program, Kennedy School of Government, Harvard University (1998-present); Superintendent of the U.S. Air Force Academy (1997-2000).

**General Colin L. Powell**, retired 4-star U.S. Army, 65th U.S. Secretary of State (2001-05); Chairman of the Joint Chiefs of Staff (1989-1993); Commander, U.S. Army Forces Command (1989); National Security Advisor (1987-89).

**Admiral Joseph W. Prueher**, retired 4-star, U.S. Ambassador to China (1999-2001); Commander in Chief, U.S. Pacific Command (1996-99); 73<sup>rd</sup> Commandant of Midshipmen, U.S. Naval Academy (1989-1991).

**Honorable Joe R. Reeder**, the 14th Under Secretary of the Army (1993-97), had oversight responsibility for admissions criteria for the U.S. Military Academy and all university Reserve Officers' Training Corps ("ROTC") programs.

**Lieutenant General John F. Regni**, Superintendent, U.S. Air Force Academy (2005-09); Commander, Air University (2004-05); Commander, 2nd Air Force (2000-04).

**Vice Admiral Ann E. Rondeau**, President National Defense University (2009-12); Commander, Navy Personal Development Command (2004-05); Commander, Naval Services Training Command (including all ROTC programs) (2001-04); 2d Battalion Officer Naval Academy & Member, Board of Admissions (1990-93).

**Vice Admiral John R. Ryan**, Chancellor, State University of New York (2005-07); Superintendent U.S. Naval Academy (1998-2002).

**General Henry H. Shelton**, retired 4-star, 14th Chairman of Joint Chiefs of Staff (1997-2001); Commander in Chief, U.S. Special Operations Command (1996-97).

**General Gordon R. Sullivan**, retired 4-star, Army Chief of Staff (1991-95), overall responsible for organizing and training over 1 million active duty, Guard, Reserve and civilian members; President, Association of the United States Army (“AUSA”) (1998-present).

**General John H. Tilelli, Jr.**, retired 4-star, Commander in Chief, United Nations Command and Combined Forces Command, Republic of Korea (1996-99); Commanding General, U.S. Army Forces Command (1995-96); Army Vice Chief of Staff (1994-95).

**General Johnnie E. Wilson**, retired 4-star, Commanding General, United States Army Materiel Command (1996-99).

**General Anthony C. Zinni**, retired 4-star U.S. Marine Corps, Special U.S. Peace Envoy to the Middle East (2002); Commander in Chief, U.S. Central Command (1997-2000); endowed-chair professor at eight universities (2000-present).



## SUMMARY OF THE ARGUMENT

For the United States military, a highly qualified and racially diverse officer corps is not a lofty ideal. It is a mission-critical national security interest. The submissions in the military *amicus* brief filed in *Grutter v. Bollinger*, 539 U.S. 306 (2003) (“*Grutter* military brief”) remain true today and *amici* embrace them: Based on decades of experience, the modern United States military regards a highly qualified and racially and ethnically diverse officer corps as vital to military effectiveness.

Unlike many other institutions, the military operates on a closed personnel system with its top leaders chosen not from outside, but rather, promoted from the lower ranks. As a consequence, the demographic composition of initial officer accessions is critical to the achievement of a diverse military officer corps. The Reserve Officers’ Training Corps (“ROTC”), which is comprised of students already admitted to participating civilian colleges and universities, and the service academies operated by each of the military branches, continue to serve as the primary sources for the Nation’s military officers. To achieve diversity in military leadership, both the service academies and ROTC engage in extensive minority outreach and recruiting as well as limited consideration of race as a part of their individualized, whole-person review of admissions applicants. As was the case when *Grutter* was decided, these race-conscious policies are vital to increasing and maintaining the pool of highly qualified minority military officers. And as was true when *Grutter* was decided, there are at present no

race-neutral means for the military to fulfill its critical need for a highly qualified and diverse officer corps.

In addition to its own need to employ modest race-conscious admissions policies, the constitutionality of such policies at the Nation's universities is important to the military for another reason. The military is heavily dependent on ROTC for officers, and ROTC, in turn, is wholly dependent on participating civilian universities for its officer candidates. The class compositions at ROTC-participating universities, including the University of Texas at Austin ("UT"), determine the pool from which ROTC may draw officer candidates. Accordingly, admissions policies of universities including UT matter considerably to the military.

Thus, while this case focuses on university admissions, its impact dramatically transcends academia. In evaluating the constitutionality of respondents' limited consideration of race in admissions decisions, *amici* respectfully submit the Court should consider the military's interests. Fulfillment of the national security interest in officer corps diversity must not be imperiled by a sweeping ruling against race-conscious admissions.

Nor should the Court in its constitutional analysis embrace a race-neutral class-rank approach to admissions to the exclusion of race-conscious admissions conducted in the context of individualized, holistic review. An exclusively one-dimensional approach to admissions like Texas's Top 10% Law would seriously disrupt the military. Under the law, all Texas applicants who rank in the

top ten percent of their high school class automatically are admitted to UT. That approach alone, to the exclusion of limited race-conscious admissions policies, cannot ensure the highly qualified *and* racially diverse officer corps the military has concluded, based on many years of experience, it must have. An exclusively class-rank admissions approach is also undermining because it does not allow the military to assess in applicants character-related qualities it has determined its future leaders must possess. Academics, while important, is not invariably a proxy for the spectrum of leadership and other qualities that round out a leadership corps charged with, for example, inspiring collaboration and unit cohesion among our racially diverse enlisted ranks and leading them in combat. Discerning whether an applicant possesses qualities of a likely military leader requires *individualized*, holistic review that automatic admission based on class-rank alone cannot provide. The ability to employ that holistic approach, including limited consideration of race as a part of the overall inquiry, remains critical to our military leadership and respondents alike.

In *Grutter*, the Court validated the military's long-standing compelling interest in both selectivity and diversity at its commissioning institutions. *Grutter*, 539 U.S. at 331. Recognition of that national security interest enabled the Court to take the next step and validate the interest in selectivity and diversity for other major segments of our society, including institutions of higher learning. *Id.* at 330-31, 343. At bottom, the Court recognized that,

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.

*Id.* at 332.

The same reasoning and conclusion apply here. The military should be permitted to continue to employ race-conscious policies to educate and train a highly-qualified and diverse officer corps to further the compelling governmental interest in an effective military. It also should be permitted to continue to draw from institutions of higher learning, such as UT, highly qualified minority applicants, and applicants of all backgrounds who have been educated in a diverse environment. UT's carefully crafted admissions policy should not be constitutionally invalidated. Nor should the constitutional parameters to race-conscious admissions policies be changed. The military and educational institutions including UT must continue to be permitted to pursue selectivity and diversity.

## ARGUMENT

### **I. Growing and Maintaining a Highly Qualified and Diverse Officer Corps Remains Critical for Military Effectiveness and Thus Our National Security.**

As the *Grutter* military brief explained, and as further demonstrated below, growing and maintaining a highly qualified *and* racially diverse officer corps is for the military a commitment and undertaking on which nothing less than the effectiveness of our military as an institution depends. In the modern military's view, it is simply a must-have for our national security.

#### **A. The modern U.S. military commitment to racial diversity in military leadership was born out of many decades of experience.**

The military learned the importance of racial diversity in its leadership the hard way. After President Truman integrated the military in 1948, *see* Executive Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948), the military became one of America's most integrated institutions. But through the 1960s and 1970s, minorities' presence was almost entirely in the enlisted ranks; the officer corps remained almost exclusively white. Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al., in *Grutter v. Bollinger*, S. Ct. Nos. 02-241 & 02-516 (filed Feb. 21, 2003) ("*Grutter* military brief") at 13-14 (noting, for example, "In 1962, a mere 1.6% of all commissioned military officers were African-American," in stark

contrast to the much larger percentages in the enlisted ranks). As described in some detail in the *Grutter* military brief (at 13-17), which *amici* fully embrace and underscore here, in the context of the Vietnam conflict, a nearly all-white officer corps leading enlisted ranks heavily comprised of minorities proved to be a recipe for intense racial strife; hundreds of racial incidents and race-based violence erupted throughout the military. *Id.* at 15-17. “In 1969 and 1970 alone, the Army catalogued more than 300 race-related internal disturbances, which resulted in the deaths of seventy-one American troops.” Bryan W. Leach, Note, *Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*, 113 *Yale L.J.* 1093, 1111 (2004) (citing Bernard C. Nalty, *Strength for the Fight: A History of Black Americans in the Military* 309 (1986)). See Nalty, *supra*, at 309 (“These attacks came to be grouped under the category of ‘fragging,’ because the fragmentation grenade was a favorite tool of assassination.”).

Bereft of minority officers as support and as a visible proof of overall fairness and that our Armed Forces recognized them as valuable contributors, many black troops lost confidence in the military as an institution. *Grutter* military brief, at 16 & n. 5; Nalty, *supra*, at 309. As the Military Leadership Diversity Commission (“MLDC”), an independent body commissioned by Congress in 2009 to assess diversity in military leadership, recently explained in its final report to Congress and the President,

During the Vietnam War, the lack of diversity in military leadership led to problems that

threatened the integrity and performance of the Nation's military. This is because servicemembers' vision of what is possible for their career is shaped by whether they see individuals with similar backgrounds excelling and being recognized in their Service.

*From Representation to Inclusion: Diversity Leadership for the 21st-Century Military, Final Report* xvi (2011) (“*MLDC Report*”) (internal citation omitted).<sup>2</sup>

By the 1970s, racial tensions in the military ran so high that they actually caused the Armed Forces to teeter “on the verge of self-destruction.” *Grutter* military brief, at 16 (quoting Charles C. Moskos & John Sibley Butler, *All That We Can Be: Black Leadership and Racial Integration the Army Way* 142 (1996)).<sup>3</sup> Years later, the U.S. Department of Justice reported to the President in its review of federal affirmative action programs that “[r]acial conflict within the military during the Vietnam era was a blaring wakeup call to the fact that equal opportunity is absolutely indispensable to unit cohesion, and therefore critical to military

---

<sup>2</sup> Available at <https://www.hsdl.org/?view&did=11390>.

<sup>3</sup> See also Leach, *supra*, at 1110-11 (“Lieutenant General Frank Petersen, Jr., recalled the state of race relations within the Marine Corps during the Vietnam War, saying, ‘In Vietnam, racial tensions reached a point where there was an inability to fight . . . . We were pulling aircraft carriers off line because there was so much internal fighting. . . . Platoons that were 80 percent minority were being led by lieutenants from Yale who had never dealt with ghetto blacks.’”).

effectiveness and our national security.”<sup>4</sup> This trying experience, stretching over many years, shaped the military leadership’s modern view that “success with the challenges of diversity is critical to national security.” *Presidential Report*, at § 7.1. As one senior Pentagon official put it, “[d]oing affirmative action the right way is deadly serious for us—people’s lives depend on it.” *Id.*

That view persists in full force today. Ongoing concern about the diversity in the military’s leadership recently prompted Congress to establish what became the Military Leadership Diversity Commission, an independent body comprised of current and former military officers (including *amicus* Lt. Gen. Julius W. Becton, Jr. who served as its Vice Chairman) and senior enlisted personnel of all the Armed Forces as well as civilians such as senior executives of major corporations, civil servants, and a law school chancellor. After many months of analysis including interviews with military officials, it submitted its final report to the President of the United States in 2011, in which it underscored that “[c]urrent and former military leaders have long argued that developing and maintaining qualified and demographically diverse leadership is critical for mission effectiveness.” *MLDC Report*, at 39.

---

<sup>4</sup> Dep’t of Justice, *Review of Federal Affirmative Action Programs, Report to the President* § 7.5.1 (1995), available at <http://clinton2.nara.gov/WH/EOP/OP/html/aa/aa07.html>. (“*Presidential Report*”).



The post-September 11, 2001 world has heightened the drive for military leadership diversity described above and in the *Grutter* military brief. In addition to military cohesion and perceptions of institutional legitimacy, both enhanced by a demographically diverse officer corps, *see, e.g., Grutter*, 539 U.S. at 332, the modern military recognizes that the U.S. population's heterogeneity offers the military a rich mix of skills and experiences that is needed for modern warfare. It has fueled military pursuit of other kinds of diversity in military leadership, all *in addition to* pursuing demographic diversity. As the MLDC reports, "[i]ncluding a broad range of men and women from different backgrounds can increase the likelihood that the U.S. military 'knows the enemy' and is better able to work with international partners by adding to the cultural and linguistic knowledge base from which U.S. forces may draw." *MLDC Report*, at 17. *See also* Dep't of Defense, *Defense Language Transformation Roadmap 3* (Jan. 2005) ("Conflict against enemies speaking less-commonly-taught languages and thus the need for foreign language capability will not abate. Robust foreign language and foreign area expertise are critical to sustaining coalitions, pursuing regional stability, and conducting multi-national missions especially in post-conflict and other than combat, security, humanitarian, nation-building, and stability operations.")<sup>5</sup>. Diversity of skills, including foreign language skills, and knowledge of other cultures, as well as the ability to collaborate and even culturally

---

<sup>5</sup> Available at <http://www.defense.gov/news/mar2005/d20050330roadmap.pdf>.

empathize with different kinds of people, all are critical to an optimally effective modern military leadership.<sup>6</sup> The Army explains,

We must be prepared to recruit, develop and retain the best of America's diverse talent pool. Our increasingly complex global responsibilities require that we not only attract personnel from diverse backgrounds, but also be knowledgeable of what our Soldiers and Civilians bring to the Army and how to integrate their attributes, experiences and backgrounds into decision-making and problem-solving processes.

---

<sup>6</sup> Examples abound of the Department of Defense ("DOD") efforts to harness the ethnic, cultural and linguistic diversity of its personnel, so as to maximize its ability to work collaboratively in myriad settings. Spanish and Portuguese fluency have always been highly valued in the U.S. Southern Command, just as Arabic, Farsi and Pashtu knowledge is vital to mission success in current U.S. Central Command Operations. *Amicus* Commanding General John P. Abizaid's unique background and fluency in Arabic brought a powerful dimension to his relations with coalition nations and his knowledge of the "human terrain" in the Persian Gulf theater of operations in 2004-06. In 2009, the Secretary of Defense invoked § 329 of the Immigration and Naturalization Act, 8 U.S.C. § 1440, (sometimes called the "wartime naturalization" provision) to authorize the military services to recruit certain legal aliens whose skills are considered vital to national security. Known as the Military Accessions Vital to National Interest ("MAVNI") program, this legal authority has been used to recruit qualified applicants with vitally needed language skills and cultural knowledge. MAVNI program recruits have made crucial contributions to the success of U.S. military operations in Afghanistan, Iraq, and in the global effort to combat international terrorist organizations.

Dep't of the Army, *United States Army Diversity Roadmap 1* (Dec. 2010).<sup>7 8</sup>

**B. The military remains committed to and has made major strides in growing a highly qualified and racially diverse officer corps, but considerable work remains.**

Spurred by the difficult lessons of the Vietnam era, the military remains strongly committed to achieving racial diversity in its officer corps. At the service academies and ROTC—the primary sources of military officers—that ongoing commitment is demonstrated by race-conscious initiatives which seek both to expand the pool of qualified minority applicants to the officer corps *and* to increase the number of minority participants. Those efforts have produced notable results. However, the military

---

<sup>7</sup> Available at

[http://www.armydiversity.army.mil/document/Diversity\\_Roadmap.pdf](http://www.armydiversity.army.mil/document/Diversity_Roadmap.pdf).

<sup>8</sup> General James Mattis, then-Commander of U.S. Joint Forces Command, is reported saying in 2010,

In this age, I don't care how tactically or operationally brilliant you are, if you cannot create harmony—even vicious harmony—on the battlefield based on trust across service lines, across coalition and national lines, and across civilian/military lines, you really need to go home, because your leadership in today's age is obsolete. We have got to have officers who can create harmony across all those lines.

*MLDC Report*, at xiv.

emphasizes that significant work remains to secure a steady stream of highly qualified and racially and ethnically diverse officers.

By way of background, the academies provide tuition-free, four-year undergraduate education and prepare entrants to be officers of the U.S. military services. Graduates are commissioned as officers for a minimum of five years of military service. Each service academy annually admits 1,100 to 1,350 entrants, and this has remained consistent over time and across the academies. Sheila Nataraj Kirby, et al., *Diversity of Service Academy Entrants and Graduates* (RAND Corp. 2010) xvii (“*Diversity of Service Academy Entrants*”).<sup>9</sup> In fiscal year 2010, DoD reported that 18.1% of all officers came from the service academies.<sup>10</sup>

ROTC programs are offered at over 1,000 colleges and universities,<sup>11</sup> including UT.<sup>12</sup> ROTC

---

<sup>9</sup> Available at [http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND\\_MG917.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG917.pdf).

<sup>10</sup> Dep’t of Defense, *Population Representation in the Military Services: Fiscal Year 2010 Summary Report* (“*Population Representation 2010*”), App. B, p. 64 (2012), available at <http://prhome.defense.gov/RFM/MPP/ACCESSION%20POLICY/PopRep2010/appendixb/appendixb.pdf>.

<sup>11</sup> Army ROTC: Legacy & Value, U.S. Army, <http://www.goarmy.com/rotc/legacy-and-value.html> (last visited Aug. 12, 2012); Learn About AFROTC, U.S. Air Force, <http://afrotc.com/learn-about/> (last visited Aug. 12, 2012).

provides military education and training and, for a subset of all ROTC participants, also scholarships to candidates admitted to host colleges or universities. The scholarships include full tuition for up to four years in exchange for a five-year post-graduation commitment to serve in the military. Military regulations govern how many scholarships are available at each participating college and university. In fiscal year 2010, the DoD reported that 36.7% of its officers came from ROTC.<sup>13</sup> Notably, ROTC provided 49.7% of the officer corps of the Army (the largest of the services) and 42.6% of the Air Force's officers in 2010. *Id.*

**1. The military's ongoing commitment to officer diversity is manifest in its many race-conscious initiatives to increase minority applications and accessions to officer commissioning institutions.**

Building on the *Grutter* military brief, contemporary examples demonstrating the military's ongoing dedication and efforts to achieve officer diversity abound. Although each service has its own unique programs and practices to achieve and

---

<sup>12</sup> UT has been a ROTC-participating university for decades; in particular, the Army ROTC program at the university has been in place for over 50 years.

<sup>13</sup> *Population Representation 2010*, App. B, p. 64, available at <http://prhome.defense.gov/RFM/MPP/ACCESSION%20POLICY/PopRep2010/index.html>.

maintain a highly-qualified and racially diverse officer corps, the services share a number of strategies. *See MLDC Report*, at 53. Those efforts include all-important initiatives to retain and support minorities into the officer corps upper ranks, *see, e.g., id.* at 75-88. However, this brief focuses on the initial accessions: the efforts to expand the pool of minority officer applicants to the military's commissioning institutions and to increase minorities' presence in the officer ranks.

**a. Outreach and Recruiting.** With regards to outreach and recruiting of minority officer candidates, the military is engaged in a myriad of initiatives. Each service branch has organizational divisions or offices specifically devoted to recruiting members of demographic groups underrepresented in the military officer corps. *Id.* The services pursue connections with community leaders and affinity groups and participate in affinity group events that include highly qualified minority candidates, such as events by the National Society of Black Engineers and the Society for Advancement of Chicanos and Native Americans in Science. *Id.* at 53. They strategically establish ROTC programs and academic scholarships at Historically Black Colleges and Universities ("HBCUs") and Minority-Service Institutions. *Id.* at 54. They also conduct targeted advertising, such as at HBCUs and Minority-Serving Institutions, and use media channels directed at diverse audiences such as Telemundo and Black Entertainment Television. *Id.* at 53.

Taking the Army as a more specific example, as described in the *Grutter* military brief (at 18), the

U.S. Military Academy at West Point (“USMA” or “West Point”) was the first of the service academies to have a program that succeeded in increasing minority representation. In 1968, there were 30 African-Americans cadets at USMA; that number grew to almost 100 by 1971. *Id.* The most recent DoD-commissioned study on the subject reports that the percentage of minorities at West Point increased from 16% in the 1992-94 class to 23% in the 2007-2009 class. *Diversity of Service Academy Entrants*, at 28-29.

Today, one of West Point’s primary minority recruitment tools is Project Outreach. Project Outreach seeks to identify and nurture through the admissions process talented minority candidates with the ultimate goal of matriculating them to West Point. *Diversity of Service Academy Entrants* at 85-86. Under this program, recent West Point graduates spend a 13-month tour traveling extensively throughout selected U.S. regions to identify and nurture candidates. *Id.* Other major recruiting programs include a visitation program for prospective recruits who visit West Point and the United States Military Academy Prep School; “metropolitan blitzes,” bringing outreach and minority admissions officers to one city; representatives visit with the Congressional Black and Hispanic Caucuses to set up academy days and place cadets as interns in local and Washington, D.C., offices; activating minority cadets for hometown and academy visits; and the Cadet Calling Program, whereby current cadets connect with candidates by phone. *Id.*

The U.S. Naval Academy (“USNA”) also remains keenly focused on racial and ethnic diversity. It lists one of its strategic objectives to “[s]trengthen the Academy’s outreach and recruiting efforts to attract and admit individuals of diverse backgrounds with potential for success at USNA and in the Fleet and Marine Corps.” U.S. Naval Academy, *Leaders to Serve the Nation: U.S. Naval Academy Strategic Plan 2020* 8 (2010).<sup>14</sup> As a recent DoD-commissioned study reports, “[t]he Superintendent of the Naval Academy stated that his number one goal for his tenure is to improve diversity.” *Diversity of Service Academy Entrants* at 88. See also *Naval Academy Wooing Minorities*, Wash. Times (Aug. 23, 2008),<sup>15</sup> (quoting the USNA Superintendant saying, “I don’t need more applications, just to get more applications. I need more applications from underrepresented geography of America...and I need more from what I consider underrepresented ethnic and racial minorities.”). Towards that end, the academy has created a new diversity office, led by a senior naval officer, to coordinate all diversity efforts. *Diversity of Service Academy Entrants*, at 88.

The Air Force too provides a wealth of examples demonstrating the military’s ongoing commitment to diversity. Its current diversity plan

---

<sup>14</sup> Available at <http://www.usna.edu/StrategicPlan/docs/overview.pdf>

<sup>15</sup> Available at <http://www.washingtontimes.com/news/2008/aug/23/naval-academy-wooning-minorities/>.



provides among its guiding principles to “[e]stablish self-sustaining programs that identify diverse candidates” and to “[a]ttract highly qualified, diverse candidates to the cadet wing.” *Id.* at 86-87.

While recognizing the importance of outreach and recruiting, the services also recognize that most often, more is needed to secure the highly qualified and racially diverse officer corps the military must have. As DoD reinforced just this year, “[a]n all-volunteer force *must represent the country it defends*,” Dep’t of Defense, *Diversity and Inclusion Strategic Plan 2012-2017* 4 (2012)<sup>16</sup> (emphasis in original), where 2010 Census data show the U.S. population as 72.4% self-identifying as white; 16.3% as Hispanic; 12.6% as black; 4.8% as Asian; 0.9% as American Indian; and 0.2% as Native Hawaiian and Other Pacific Islander.<sup>17</sup> As the MLDC noted, “[i]n a democracy, it is believed that a broadly representative military force is more likely to uphold national values and to be loyal to the government—and country—that raised it.” *MLDC Report*, at 15 n. 2 (internal quotation omitted). See also U.S. Gov’t Accountability Office, GAO-07-224, *Strategic Plan Needed to Address Army’s Emerging Officer Accession and Retention Challenges*, at 35 (Jan. 2007)<sup>18</sup> (“The services want to retain a diverse,

---

<sup>16</sup> Available at [http://diversity.defense.gov/docs/DoD\\_Diversity\\_Strategic\\_Plan\\_%20final\\_as%20of%2019%20Apr%2012\[1\].pdf](http://diversity.defense.gov/docs/DoD_Diversity_Strategic_Plan_%20final_as%20of%2019%20Apr%2012[1].pdf).

<sup>17</sup> Karen R. Humes et al., *2010 Census Briefs, Overview of Race and Hispanic Origin: 2010*, at 4 (Mar. 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

<sup>18</sup> Available at <http://www.gao.gov/new.items/d07224.pdf>.

experienced officer corps to reflect applicable groups in the nation's population.”).

**b. Limited Use of Race-Conscious Admissions.** Our Armed Forces' steadfast commitment to diversity is also manifest in its continued use of modest race-conscious admissions policies to increase minority enrollment at the service academies and in ROTC.

Similar to respondents' admission's policy, the service academies employ an individualized, “whole person” approach to evaluate applicants. In the most recent detailed government report on the subject, the Government Accountability Office (“GAO”) describes the process, in part, as follows:

The academies do not grant waivers from academic criteria but do not have absolute minimum scores for admission. Under the whole person approach, the academies can admit some applicants whose academic scores are lower than might normally be competitive for admission, but who in their totality (academics, physical aptitude, and leadership potential) are deemed an acceptable risk and qualified to attend an academy. This admissions approach is consistent with the intent of the academies to admit students who also demonstrate leadership and initiative characteristics, which cannot be quantified by purely objective scoring methods.... The subjective nature of this approach is consistent with the intent of the whole person concept, by which the academies want to admit students who also demonstrate

leadership characteristics that cannot be quantified by purely objective scoring methods. Academy officials do not consider these judgments to constitute a waiver of academic standards, but rather a judicious assessment of the whole person.<sup>19</sup>

More recent statements from the academies confirm their ongoing use of this approach. For example, the USMA notes that “[a]dmission to West Point is open to all students. There are no appointments, vacancies, or nominations designed exclusively for minority groups. However, cultural and socio-economic backgrounds are given appropriate consideration while evaluating all applicants.” USMA, FAQ-Admissions, *available at* [http://www.westpoint.edu/admissions/SitePages/FAQ\\_Admission.aspx](http://www.westpoint.edu/admissions/SitePages/FAQ_Admission.aspx) (last visited Aug. 12, 2012). The U.S. Naval Academy describes their admissions process similarly. *See* Daniel de Vise, *Naval Academy Professor Challenges School’s Push for Diversity*, Wash. Post (July 3, 2009)<sup>20</sup> (“Admissions Dean Bruce Latta said admissions is ‘a single process,’ with every applicant considered as an individual. A star student from a low-income community might get credit for overcoming adversity. ‘It’s a whole-person assessment on every person,’ Latta said.”).

---

<sup>19</sup> U.S. GAO, GAO-03-1000, *Military Education: DOD Needs to Enhance Performance Goals and Measures to Improve Oversight of Military Academies*, at 19-20 (Sept. 2003), *available at* <http://www.gao.gov/assets/240/239612.pdf>.

<sup>20</sup> *Available at* <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/02/AR2009070202588.html>.

And the Air Force's current diversity plan affirms that one of its strategic goals is to "[c]ontinue an admissions program that gives individualized consideration to constitutionally permissible diversity factors and ensures the collection of the diversity-factor data necessary to analyze the effectiveness of diversity recruiting efforts." *Diversity of Service Academy Entrants* at 86-87. The U.S. Air Force Academy defines "diversity" to include "race" and "ethnicity" among a large composite of many other individual characteristics such as personal life experiences, geographic background, and cultural and foreign language knowledge. See *USAFA Diversity Plan*, at 3 (June 2009).<sup>21</sup> The Air Force Academy also reportedly seeks "gains in the

---

<sup>21</sup> The Academy's full definition of diversity is as follows:

For Air Force Academy purposes, consistent with the Air Force approach to diversity, "Diversity" is defined as a composite of individual characteristics that includes personal life experiences (including having overcome adversity by personal efforts), geographic background (e.g., region, rural, suburban, urban), socioeconomic background, cultural knowledge, educational background (including academic excellence, and whether an individual would be a first generation college student), work background (including prior enlisted service), language abilities (with particular emphasis on languages of strategic importance to the Air Force), physical abilities (including athletic prowess), philosophical/spiritual perspectives, age (cadet applicants must be within statutory parameters for academy attendance), race, ethnicity and gender.

*USAFA Diversity Plan*, at 3, available at <http://www.usafa.af.mil/shared/media/document/AFD-110316-012.pdf>.

number of black and Hispanic cadets on the campus, who make up a combined 16 percent of the student body, well below their share of the national population. But the Air Force is staying away from quotas.” Tom Roeder, *AFA Gets an Extra \$1 Million to Tackle Diversity Issues*, *Gazette* (July 15, 2011).<sup>22</sup>

<sup>23</sup>

ROTC also employs the whole person approach of individualized, subjective review of its scholarship applicants (who are already admitted students at ROTC-participating colleges and universities), assessing academic aptitude, physical fitness, and leadership abilities. *See, e.g.*, Anny Wong et al., *The Use of Standardized Scores in Officer Career Management and Selection* 13 (RAND Corp. 2012),<sup>24</sup> (DoD-commissioned report noting ROTC “[a]dmission boards consider the candidate’s

---

<sup>22</sup> Available at <http://www.gazette.com/articles/million-121639-diverse-academy.html#ixzz1STPBQIXN>.

<sup>23</sup> Although the Air Force requires its academy admissions decisions to be “made without regard to religion, race, ethnicity, or gender,” Air Force Instruction 36-3501 at 2.18.2.1.2 (Apr. 28, 2008), reading that instruction together with the academy’s strategic goal on diversity in admissions detailed above (with its inclusion of race and ethnicity among the many diversity factors considered), suggests that the academy may be interpreting this instruction as requiring that its admissions criteria “not provide for ‘pluses’ or other admissions benefits based on race, ethnicity or gender.” *USAFA Diversity Plan*, at 3, n. 5.

<sup>24</sup> Available at [http://www.rand.org/content/dam/rand/pubs/technical\\_reports/2012/RAND\\_TR952.pdf](http://www.rand.org/content/dam/rand/pubs/technical_reports/2012/RAND_TR952.pdf).

qualifications broadly using the whole-person concept, which includes a combination of test scores, academic background, athletic accomplishments, field of study in college, and other personal qualities.”).

## **2. Results to date of the military’s race-conscious initiatives.**

Our military’s various initiatives have yielded higher minority participation at both the service academies and in ROTC. However, a significant gap remains between those who serve in active duty and those who are officers.

Overall, about 1.4 million enlisted serve in our active duty forces today, of whom 70% self-identify as white, 17% as African-American, 3.7% as Asian, and 1.7% as Native American.<sup>25</sup> Approximately 10.8% self-identify as being of Hispanic ethnicity. *Id.* From the Vietnam era when minorities were almost nowhere to be found in the officer ranks, *see Grutter* military brief, at 5, 6 n. 2, 17, by fiscal year 2010, of the total officer corps, American Indians comprised 0.54%; Asians, 3.9%; blacks, 8.8%; Hispanics, 5.3%;

---

<sup>25</sup> Dep’t of Defense, *Demographics 2010: Profile of the Military Community*, at 20 (“*Demographics 2010 Report*”), available at [http://www.militaryhomefront.dod.mil/12038/Project%20Documents/MilitaryHOMEFRONT/Reports/2010\\_Demographics\\_Report.pdf](http://www.militaryhomefront.dod.mil/12038/Project%20Documents/MilitaryHOMEFRONT/Reports/2010_Demographics_Report.pdf). The report notes that consistent with Office of Management and Budget Directives, it did not consider Hispanic as a minority race designation beginning in 2009 and used only active duty members’ race to determine minority status in this report. *See id.* at 24 note.

and Native Hawaiian and Pacific Islanders, 0.21%. *Population Representation 2010*, at App. B, p. 48.<sup>26</sup> See also Nelson Lim et al., *Officer Classification and the Future of Diversity Among Senior Military Leaders: A Case Study of the Army ROTC (“Officer Classification”)*, at 1 (RAND Corp. 2009) (“Between 1967 and 1991, the Pentagon almost quadrupled the minority representation in the ranks of its newly commissioned officers.... From 1986 to 2006, minority officer representation increased nearly 5 percent; at the highest levels..., minority representation increased 9 percent.” (citations omitted)).

A look at minority participation at the academies shows the increases even more dramatically. The most recent classes to enter the Naval Academy were the most racially diverse in history, with more than 28-percent minority enrollment. De Vise, *supra*. Indeed, the Naval Academy reported that of the class of 2016, 34 percent are minorities. U.S. Naval Academy, *Class of 2016 Statistics* (June 28, 2012).<sup>27</sup> Similarly, the Air Force Academy class of 2014 boasted 350 minority enrollees or approximately 27.4 percent of the entire class. John Van Winkle, *Acad. Says ‘Hello’ to Class of 2014*, 50 No. 25 Academy Spirit, at 1

---

<sup>26</sup> Available at <http://prhome.defense.gov/RFM/MPP/ACCESSION%20POLICY/PopRep2010/index.html>.

<sup>27</sup> Available at [http://www.usna.edu/PAO/pressreleases/063-12\\_Class\\_of\\_2016\\_Statistics.htm](http://www.usna.edu/PAO/pressreleases/063-12_Class_of_2016_Statistics.htm).

(June 25, 2010).<sup>28</sup> Of the West Point class of 2016, approximately 27 percent were minorities. USMA, *Class of 2016 to Enter West Point* (June 28, 2012).<sup>29</sup>

These advances are important, but military leadership recognizes that significant challenges remain. “Although military accessions of women, blacks, Asians, Hispanics, and persons of other racial backgrounds have increased over time, the proportions of these groups in the senior officer corps remain relatively low.” Beth J. Arsch et al., *A New Look at Gender and Minority Differences in Officer Career Progression in the Military* (“*RAND Career Progression*”) at ix (RAND Corp. 2012) (a DoD-commissioned study).<sup>30</sup> See also *Officer Classification*, at xi (“Still, while the enlisted ranks of the U.S. military exhibit a high level of demographic diversity, the leadership of the military has remained demographically homogenous.”). As the MLDC reports, “*military officers today are less demographically diverse than both the enlisted troops they lead and the broader civilian population they serve.*” *MLDC Report*, at 39 (emphasis in original). The MLDC concluded, “Despite undeniable

---

<sup>28</sup> Available at

<http://www.usafa.af.mil/shared/media/document/AFD-100806-083.pdf>.

<sup>29</sup> Available at

<http://www.usma.edu/news/SitePages/Class%20of%202016%20to%20Enter%20West%20Point.aspx>.

<sup>30</sup> Available at

[http://www.rand.org/content/dam/rand/pubs/technical\\_reports/2012/RAND\\_TR1159.pdf](http://www.rand.org/content/dam/rand/pubs/technical_reports/2012/RAND_TR1159.pdf).



successes, however, the Armed Forces have not yet succeeded in developing a continuing stream of leaders who are as diverse as the Nation they serve.” *Id.* at vii.

These shortcomings are considered serious. As discussed above, *supra* at 5-8, and in the *Grutter* military brief (at 13-18), “[t]he importance of increasing racial/ethnic and gender representation within the military has also been a specific priority of senior military leaders and is argued to be critical to mission effectiveness.” *MLDC Report*, at 39 (citation omitted). The problem is of “ongoing concern within the Department of Defense.” *RAND Career Progression*, at 1. A DoD-commissioned study reports that in response to a 2005 directive from then Secretary of Defense Donald Rumsfeld to “put much more energy into achieving diversity at senior levels of services,” a diversity summit was convened between private and public sector diversity experts with DoD representatives. *Officer Classification*, at 3 (internal quotation omitted). The summit participants concluded that:

[A]s an organization that promotes from within, DoD’s top leadership is dependent upon the pipeline of junior officers. Looking at this pipeline, they found no prospect for an increase in the representation of minorities or women in the higher ranks (flag officers and Senior Executive Service [SES] members) for the next decade. In other words, labor force trends will not cause an increase in minority senior leaders without some kind of policy intervention, and the divergence between the

general population and those in charge of the military is likely to worsen if nothing is done.

*Id.* at 3. MLDC summed up the gravity of the problem as follows: “One need only remember the popular perceptions of racial/ethnic minorities serving as ‘cannon fodder’ for white military leaders in Vietnam to understand how important ethnic, racial, and gender representation is to the psychological well-being and reputation of the U.S. military.” *MLDC Report*, at 15 (citation omitted). Indeed, the MLDC has recently provided detailed and robust policy recommendations for DoD leadership to address this threat to military effectiveness. *See id.* at 117-18, 125-30.

The military’s efforts to achieve a highly qualified and racially diverse officer corps should be permitted to continue in order to preserve the military’s effectiveness as an institution and its ability to protect the Nation’s security. As was the case when *Grutter* was decided, there is not as yet a race-neutral means for the military to fulfill its mission to achieve selectivity and officer diversity. The military commissioning institutions’ race-conscious policies remain vital to the fulfillment of its selectivity and diversity mission.

## **II. Invalidating UT’s Modest Race-Conscious Admissions Policy Would Seriously Disrupt the Military’s Efforts to Maintain Military Cohesion and Effectiveness.**

### **A. Because of ROTC, the military has a strong interest in the admissions policies of civilian universities.**

While this case focuses on university admissions, its impact dramatically transcends academia. Separate and apart from the military's own race-conscious policies discussed above, which should be preserved, because of ROTC's structure, proscribing civilian colleges and universities' modest consideration of race in admissions would seriously disrupt the military's efforts at developing a racially diverse officer corps to lead a diverse fighting force and protect our national security. ROTC far and away remains one of the military's primary sources of officers. *Supra* at 13. And again, students must already be admitted to a college or university to be eligible to gain admission into ROTC. The military therefore *entirely* depends on civilian colleges and universities for its pool of ROTC officer candidates. Invalidation of modest race-conscious admissions policies such as UT's will necessarily affect the composition of the pool of eligible ROTC candidates.

As a threshold matter, and in large measure unrelated to academics, "statistics released by the Pentagon show that 75 percent of young people ages 17-24 are currently not eligible to enlist." *MLDC Report*, at 47 (citing a 2009 study). Indeed, "[t]he **shrinking pool of qualified candidates for service in the Armed Forces is a threat to national security.**" *Id.* at 49 (emphasis in original). What is more, the eligibility requirements tend to exclude minorities disproportionately. *See id.* at 47-48 (explaining how racial and ethnic minorities "tend to meet these eligibility requirements at lower rates than whites"). In this context, ending modest race-conscious admissions policies at our Nation's top universities such as UT, which currently guarantee a

stream (if not yet a critical mass) of highly-qualified minority students, necessarily risks diminishing the pool of highly-qualified minorities who otherwise would be available to apply to ROTC.

This is no small matter. In fiscal year 2010, ROTC was the source for 49.7% of the Army's officers,<sup>31</sup> with the Army being the largest of our service branches.<sup>32</sup> Moreover, ROTC is currently overwhelmingly the primary source for *minority* officers in the Army: 49.8% of all black officers, 46.5% of Native Americans officers, 46% of all Hispanic officers, and 42.9% of Asian officers obtained their commission through ROTC in 2010. *Population Representation 2010*, at App. B, p. 64. Put bluntly, our Army, the largest of the service branches, is dependent on ROTC for fielding *almost half* of its officers and *almost half* of its minority officers. Invalidating race-conscious admissions at ROTC-participating colleges and universities such as UT and ending the critical mass of highly-qualified minority candidates they seek to assemble, would capsize an effort that has been ongoing since the Truman Administration. It would also compound the existing recruiting problem of service men and

---

<sup>31</sup> *Population Representation 2010*, at App. B, p. 64, available at <http://prhome.defense.gov/RFM/MPP/ACCESSION%20POLICY/PopRep2010/appendixb/appendixb.pdf>.

<sup>32</sup> “The Army has the largest number of Active Duty members (561,979) followed by the Air Force (329,640), the Navy (323,139), and the Marine Corps (202,612).” *Demographics 2010 Report*, at iii. “There are also 41,327 Active Duty members of the [Department of Homeland Security’s] Coast Guard.” *Id.*

women of all background that already threatens our national security.

What is more, the post-September 11, 2001 world has inculcated in the military recognition that the ability to lead diverse groups of people and facilitate unit cohesion as well as collaborate well with people of different cultures are invaluable military leader attributes. *Supra* at 9-11. *See also MLDC Report*, at 17 (noting skills needed for modern warfare, including ability to work with international partners). As the Army explains in its *Diversity Roadmap*,

Today's security environment demands more from our military and civilian leaders than ever before.... The unconventional and asymmetrical battlefields of the future mean we must understand people and the environments where they live. A more adaptive and culturally astute Army will enhance our ability to operate in these environments. Training, educating and preparing culturally adaptive leaders, able to meet global challenges because of their ability to understand varying cultures, will continue to help the Army achieve mission readiness.

Dep't of the Army, *United States Army Diversity Roadmap*, at 3 (Dec. 2010).<sup>33</sup> The Army further explains:

---

<sup>33</sup> Available at [http://www.armydiversity.army.mil/document/Diversity\\_Roadmap.pdf](http://www.armydiversity.army.mil/document/Diversity_Roadmap.pdf).

We derive strength from the cultures, perspectives, skills and other qualities of our personnel. The 21st-Century Army is transforming into a versatile, agile Force where knowledge of the battle space is crucial. Soldiers and Army Civilians must now add to our toolboxes not only a cultural understanding of the populations in which we may be deployed, but also a better grasp of the many characteristics and backgrounds in our own formations.

*Id.* at 1.

Colleges and universities whose student bodies are diverse across various matrices, including race and ethnicity, are more likely to produce graduates who possess these modern military leader skills. The experiences of having been educated in a diverse environment and having been exposed to different kinds of people in one's formative years facilitate the development of the ability to work collaboratively with others notwithstanding racial, cultural, linguistic or other differences. Justice Powell's view in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), embraced by the Court in *Grutter*, is particularly true for the military: "[N]othing less than the 'nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.'" *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 313 (Powell, J.) (internal quotation omitted)). Removing the security of a pool of college graduates—of all demographic backgrounds—educated in a diverse environment

jeopardizes the number of such desirable candidates available—and thus the potential for a “visibly open” pathway, *Grutter*, 539 U.S. at 332,—for such candidates into the officer corps through ROTC.

**B. The Court embracing a class-rank cut-off approach to admissions, such as Texas’s Top Ten Percent Law, to the exclusion of race-conscious admissions policies conducted in the context of individualized review would seriously disrupt the military.**

It goes without saying that a sweeping ruling from this Court that race-conscious admissions and recruiting cannot be justified in the face of or coexist with a class rank plan such as Texas’s Top 10% Law would affect other selective institutions far beyond UT. The existence of such a race-neutral admissions plan does not obviate the need for modest race-conscious policies in admissions. As a threshold matter, as respondents explain, the racial and ethnic diversity achieved by the Texas law is mostly a product of the fact that Texas public high schools remain highly segregated by race. Thus, embracing this race-neutral admissions approach under these facts would create “damaging incentives.” App. 58a. Moreover, should the Court embrace an exclusively one-dimensional approach like a class-rank cut-off for admissions, such a ruling would be dangerously counterproductive to the military’s selective institutions (if even administratively feasible, in light of the military academies’ nominations

process<sup>34</sup>). As the *Grutter* military brief foreshadowed:

It is no answer to tell selective institutions, such as the service academies or the ROTC, automatically to admit students with a specified class rank, even if such a system were administratively workable. This lone criterion mandates the admission of students unable to satisfy the academic, physical, and character-related demands of the service academies or the officer training curriculum.

*Grutter* military brief, at 29. This Court recognized this point: “[E]ven assuming such [class rank] plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.” *Grutter*, 539 U.S. at 340.

As to academic qualifications, not all high schools possess the same degree of academic rigor. A top ten percent performer at one high school may not rank even in the top fifty percent at another high school. What is more, not all high schools (*viz* many private schools) even rank their students according to academic performance. Thus, a class rank approach to admission could well compel admission of students of widely varying academic aptitude.

---

<sup>34</sup> In addition to meeting basic eligibility requirements, to apply, potential service academy applicants must secure nomination from the President, the Vice President, or a Member of Congress. Statutes govern the nominations process. *See* 10 U.S.C. §§ 4342, 6954, 9342.



Further, it would likely foreclose highly qualified candidates, including minorities, from non-ranking schools. It would also exclude candidates from competitive high schools whose academic performance is objectively outstanding, but because of the overall superlative performance of all students at the competitive school, might have just missed the top ten percent cut-off.

Even if a class-rank approach somehow assured a consistent level of academically high-achieving applicants and enabled our military to reach these desirable candidates, the Court embracing a pure class-rank approach to admissions at the expense of individualized review, including consideration of a candidate's race as a factor, of a factor, would still undermine the military's institutional needs. Strong academics are important, but are only one of the many criteria military judgment deems essential to military leadership, as the whole person approach in admissions, *supra* at 18-22, suggests. Beyond the numerous basic eligibility requirements for military service such as height, weight, physical fitness, overall health, and, for officers, U.S. citizenship, other attributes are also important—attributes such as leadership potential and moral conduct. *MLDC Report*, at 47. These character-related aspects of an admissions application simply cannot be assessed under a rule where admission is guaranteed based only on class-rank. These attributes by definition require subjective, individualized assessment to discern.

An exclusively class-rank approach would be seriously undermining for another reason: Contemporary warfare challenges such as the increased engagement of U.S. military in multinational operations and nation-building are spurring our military to regard possession of additional intangible skills as prerequisites for its leaders. These skills require heightened ability to work collaboratively, including with different governments and cultures, foreign language capabilities and regional expertise, and the like. *MLDC Report*, at 30 (identifying competencies needed in military leadership based on reports such as the *Quadrennial Defense Review Report*). See *supra* at 11, n. 8 (quote from General James Mattis). The cookie-cutter approach of the race-neutral Top 10% Percent Law cannot, alone, enable our military to identify young potential officers who would enrich and strengthen our military leadership with these other multifaceted and much-needed attributes.

### **III. Respondents' and the Military's Race Conscious Policies Are Constitutional.**

This Court has recognized that racial and ethnic diversity is a compelling state interest of public colleges and universities. *Grutter*, 539 U.S. at 328. In *Grutter*, the Court also consciously upheld its tradition of giving a degree of deference to universities' academic decisions, within constitutionally prescribed limits, finding that a university's "educational judgment that such diversity is essential to its education mission is one to which we defer." *Id.* Relying in part on the military experience detailed in the *Grutter* military

brief, the *Grutter* Court agreed that like selective military institutions, elite civilian institutions also “must remain both diverse and selective.” *Id.* at 331.

The analysis is no different here. As explained in the *Grutter* military brief and again here, the military, based on decades of experience, has determined that a highly qualified and racially diverse leadership is mission-critical. Its overall effectiveness as an institution and thus its ability to protect our Nation’s security hinge on it fulfilling a highly qualified and diverse officer corps. While “military interests do not always trump other considerations, and we have not held that they do,” the Court does “give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24-26 (2008) (internal quotation omitted). The military’s sustained view, learned the hard way from decades of rueful experience, is that a highly-qualified *and* racially diverse officer corps is critical to military effectiveness and indispensable to our Nation’s security. *Amici* respectfully submit that this military judgment deserves deference from the Court. This is particularly so where, as here, the military interest is inextricably tied to the ability to protect the Nation. As this Court has recognized, “[i]t is obvious and unarguable that no governmental interest is more compelling than the security of the Nation,” *Haig v. Agee*, 453 U.S. 280, 307 (1981) (internal quotation omitted).

Currently, no alternative yet exists to the military's limited use of race-conscious recruiting<sup>35</sup> and admissions policies to fulfill its compelling need for selectivity and diversity in its officer corps. For a myriad of reasons, a class-rank approach alone cannot work for the military as the military requires individualized, subjective, holistic review of its officer candidates.

Nor is it any answer to tell the military to try harder in its recruitment efforts to achieve its diversity goals. As detailed above and in the *Grutter* military brief, the military has made and continues to make *extensive* investments of energy and resources to expand the pool of highly qualified minority officer applicants. However, outreach and recruiting alone are most often not enough for the military to achieve its national security interest. Race-conscious admissions policies play an important role. The military needs the flexibility to engage in race-conscious efforts that go beyond outreach and recruiting to achieve critical officer diversity.

Race-conscious admissions policies are key for another reason. Because ROTC continues to be a primary source for military officers, and one may be admitted to ROTC only after being admitted to a ROTC-participating civilian university, there is a national security interest in limited consideration of

---

<sup>35</sup> Race-conscious outreach and recruiting initiatives may not be subject to strict scrutiny at all. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring) (doubting that race-conscious programs such as targeted recruiting and allocation of resources trigger strict scrutiny).

race in admissions by ROTC-participating civilian universities, including UT.

UT's carefully crafted, modest race-conscious admissions policy should not be ruled unconstitutional and the constitutional parameters of race-conscious admissions more generally should not be changed. As *Grutter* affirmed, “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.” *Grutter*, 539 U.S. at 332. Our military should be permitted to continue to fulfill its compelling need for a highly-qualified and diverse officer corps for military effectiveness and our national security. *Amici* respectfully urge the Court to once again take that “small step from this analysis to conclude that our country’s other most selective institutions must remain both diverse and selective.” *Id.* at 331.

## CONCLUSION

The court of appeals correctly confirmed the constitutionality of UT's race-conscious admissions policy under existing precedent, including *Grutter*. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

PHILIPPA SCARLETT  
*Counsel of Record*  
KIRKLAND & ELLIS LLP  
601 Lexington Avenue  
New York, NY 10022  
(212) 446-4800  
philippa.scarlett@kirkland.com

JOE R. REEDER  
ROBERT P. CHARROW  
GREENBERG TRAURIG  
2101 L Street, N.W.  
Washington, DC 20037  
(202) 331-3100  
reederj@gtlaw.com

*Counsel for Amici Curiae*

August 13, 2012