

No. 20-19

IN THE
Supreme Court of the United States

GARY L. JACKSON,

Petitioner,

v.

KENNETH J. BRAITHWAITE,
SECRETARY OF THE UNITED STATES
DEPARTMENT OF THE NAVY,

Respondent.

**On Petition for Writ of Certiorari to the United
States Court of Appeals for the
District of Columbia Circuit**

**BRIEF OF PROTECT OUR DEFENDERS AND
BLACK VETERANS PROJECT AS *AMICI CURIAE*
IN SUPPORT OF THE PETITIONER**

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QUESTION PRESENTED

Does Title VII of the Civil Rights Act of 1964, 42
U.S.C. § 2000e-16, apply to the uniformed military?

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
TABLE OF CONTENTS	ii
INTEREST OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	6
I. Invidious racial discrimination in the military is a longstanding and pervasive problem.	6
A.The history of racial discrimination in the military is well established.....	6
B.Contemporary data confirms that racial bias and discrimination remain an intractable problem in the United States military.	11
II. Alternative measures adopted by the military to address discrimination have been ineffective.....	20
A.The military fails to collect data necessary to identify racial disparities.....	20
B.The military’s current anti-discrimination measures have failed to stem racial discrimination in the armed services.....	23

III. Title VII is the appropriate vehicle to address racial discrimination in the military.....	28
CONCLUSION	30

TABLE OF AUTHORITIES

	Page(s)
 Cases	
<i>Chappell v. Wallace</i> , 462 U.S. 296 (1983).....	24
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970).....	26, 27
<i>Green v. Brennan</i> , 136 S. Ct. 1769 (2016).....	28
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<i>Wal-Mart Stores, Inc. v. Dukes</i> , 564 U.S. 338 (2011).....	28
 Statutes	
42 U.S.C. § 2000e-16	28, 29
42 U.S.C. § 2000e-5	29
 Other Authorities	
29 C.F.R. § 1614.109	29
29 C.F.R. § 1614.310	29

29 C.F.R. § 1614.401	29
29 C.F.R. § 1614.501	29, 30
13 Fed. Reg. 4313 (July 28, 1948).....	9
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Brenda S. Farrell, U.S. GAO, MILITARY JUSTICE: DOD AND THE COAST GUARD NEED TO IMPROVE THEIR CAPABILITIES TO ASSESS RACIAL AND GENDER DISPARITIES 2 (June 16, 2020)	<i>passim</i>
Col. Don Christensen (Ret.) & Jennifer Wells, <i>Federal Lawsuit Reveals Air Force Cover Up: Racial Disparities in Military Justice Part II</i> , PROTECT OUR DEFENDERS (2020).....	21
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<https://www.nytimes.com/2017/07/18/opinion/racism-vietnam-war.html>..... 9
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TO REMAIN IN THE MILITARY (2007).....11, 12
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INTEREST OF THE *AMICI CURIAE*¹

Amicus curiae Protect Our Defenders (“POD”) is a nonprofit organization dedicated to ending racial discrimination and bias, rape and sexual assault, and combating a culture of pervasive misogyny, sexual harassment, and retribution against victims in the United States military. POD honors, supports, and gives voice to survivors of military sexual assault and sexual harassment — including servicemembers, veterans, and civilians assaulted by members of the military. POD works for reform to ensure that servicemembers and survivors of military sexual assault and sexual harassment are provided a safe, respectful work environment and have access to a fair and impartial system of justice that is transparent and accountable.

Amicus curiae Black Veterans Project (“BVP”) is an advocacy organization, founded in 2018, focused on advancing research and storytelling to address systemic racial inequities across the military and veteran landscape.

¹ The parties were given timely notice of the filing of this brief and have consented to its filing. No counsel for a party authored this brief in whole or in part, and no counsel or party other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Historically, Black veterans have faced pervasive racial bias in every facet of military life, both while serving on active duty and also with respect to access to post-service benefits and services.

BVP seeks to illuminate and confront the driving factors behind the military's deeply ingrained racism, including the lack of effective mechanisms for Black servicemembers and veterans to report the discrimination they too frequently suffer. To that end, BVP organizes Black veterans and draws on their personal accounts and existing data to foster new research engaging the public, elected officials, and military stakeholders.

SUMMARY OF ARGUMENT

Notwithstanding centuries of institutional racism, Black Americans have proudly served the United States with distinction in all of its military engagements. The Buffalo Soldiers served on the Western frontier after the Civil War. Despite receiving less training, the 369th Infantry Regiment (known as the “Harlem Hellfighters”) earned more citations — including France’s highest military award, the *Croix de Guerre* — than any other regiment in the Allied Expeditionary Force during World War I. And the Tuskegee Airmen — the first Black U.S. military pilots — paved the way for the military’s desegregation after World War II.

No one questions that the military has made significant strides in combatting overt racial discrimination. Today, racial minorities constitute 43 percent of military servicemembers. Nonetheless, contemporary data suggests that racism in the military continues to manifest itself in subtler — but still devastating — ways. Just last year, more than half of minority servicemembers surveyed said they had witnessed instances of ideologically driven racism among their troops; in 2017, a comprehensive study by Protect Our Defenders concluded that Black servicemembers were between 1.29 and 2.61 times more likely than White servicemembers to have disciplinary action taken against them in an average year. Black Americans continue to be a tiny minority

in the top ranks of the military: Only two of the nation's 41 four-star generals and admirals are Black. The Navy has no Black four-star admirals, and the Marine Corps — which for 144 years barred the enlistment of Black and Native Americans — has never had a Black American promoted to four-star rank.

The military's primary anti-discrimination program — the Military Equal Opportunity ("MEO") Program — is a woefully inadequate system for addressing racial bias or discrimination. Specifically, the MEO Program is punitive, not remedial; it does not provide for important procedural protections; and because it involves reporting complaints to a commanding officer, it discourages servicemembers from initiating action against their commanders, which in turn, further exacerbates the racial inequities and biases that persists across all military services.

Title VII does not suffer from any of the deficiencies of the MEO Program. Because Title VII provides an adversarial process that allows servicemembers to file racial discrimination claims without fear of retaliation, it is a far more potent antidiscrimination tool. As racial minorities increasingly constitute a significant proportion of military servicemembers, it becomes even more important for uniformed military servicemembers to be provided with the critical protections afforded by

Title VII: the prohibition of discrimination on the basis of non-merit factors such as race, color, religion, sex, or national origin.

As shown in the Petition for a Writ of Certiorari, the rationales of the courts of appeals in holding that Title VII does not apply to uniformed military members are inconsistent, conflicting and deeply flawed. Allowing servicemembers to bring discrimination claims under Title VII of the 1964 Civil Rights Act would represent a giant leap forward in stemming the racial bias and discrimination that remains deeply ingrained in the United States military. If servicemembers are to be denied that protection, it should be based on a thoughtful decision by this Court. The Question Presented is thus an important one deserving of review.

ARGUMENT

I. Invidious racial discrimination in the military is a longstanding and pervasive problem.

A. The history of racial discrimination in the military is well established.

Black Americans have served the United States in every military engagement since the Revolutionary War. See F. Michael Higginbotham, *Soldiers for Justice: The Role of the Tuskegee Airmen in the Desegregation of the American Armed Forces*, 8 WM. & MARY BILL RTS. J. 273, 277 n.15 (2000). Despite their service, Black Americans in the military have faced an enemy that has persisted throughout American history: racism.

During the War of 1812, when the United States was running low on manpower, it reluctantly turned to enslaved Black Americans, promising them freedom, equal pay, bounties, and a 160-acre land grant if they fought in the war. See DIRECTORATE OF RESEARCH, DEFENSE EQUAL OPPORTUNITY MANAGEMENT INSTITUTE, HISTORICAL OVERVIEW OF RACISM IN THE MILITARY 2–3 (2002). Immediately after victory — indeed, the very next day — their weapons were confiscated, and all promises were revoked. See *id.* at 3.

At the beginning of the Civil War, Black Americans were not accepted by the Union Army. *Id.*

When heavy casualties and shortages in support personnel changed the Union's attitude about Black enlistment, Blacks and other non-White men were placed in segregated units commanded by White officers. *Id.* Moreover, not only were Black soldiers paid a little over half of the amount received by their White counterparts, "[i]n combat, there was no equality. The mortality rate for Blacks was almost 40 percent higher than Whites due to poor equipment, conditions, and non-existent medical facilities." *Id.*

Almost half a century later, the status of Blacks in the armed forces had not improved. During World War I, Black Americans were barred from the Marine Corps, Coast Guard, and Army Aviation Corps. *Id.* at 7. Moreover, the Navy "became increasingly restrictive in its use of Black sailors. Blacks [typically] worked . . . as messmen, cooks, or coal heavers." *Id.* And although all branches of the Army were open to Blacks, an overwhelming percentage of Black soldiers (95 percent) were members of service or supply regiments, serving as stevedores, drivers, engineers, and laborers. *Id.*

During World War II, the military was still segregated. *Id.* at 10. Notwithstanding many calls for desegregation, "[m]ilitary leaders insisted . . . that the policy of racial segregation in the military was the proper course to follow." Ora Fred Harris, Jr., *Protections Against Discrimination Afforded To Uniformed Military Personnel: Sources And*

Directions, 46 MO. L. REV. 265, 271 (1981). Indeed, “[m]any field commanders did not want Blacks in their command. At one point Black officers were told to take orders from White sergeants.” HISTORICAL OVERVIEW OF RACISM IN THE MILITARY, *supra*, at 11.

Shortly after World War II, in 1947, the President’s Committee on Civil Rights issued a report finding that (1) “blacks faced an absolute bar against enlistment in any branch of the Marine Corps other than the stewards branch; (2) the Army had a ceiling of 10% for black personnel; (3) blacks were only 4.4% of the manpower of the Navy and only 4.2% of the Coast Guard; and (4) there was a gross underrepresentation of blacks in the officer corps of the various armed forces, with the Marine Corps having no black officers and the Coast Guard having only one.” Harris, *supra*, at 273 n.56 (citing *To Secure These Rights: Report of the President’s Committee on Civil Rights* (1947)).

The report prompted President Truman to issue Executive Order No. 9981, which mandated “equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion, or national origin.” 13 Fed. Reg. 4313 (July 28, 1948).²

² Following Executive Order No. 9981, “desegregation of the military in the following years was neither smooth nor consistent. Official racial segregation in the military was not fully revoked until 1954[.]” MILITARY LEADERSHIP DIVERSITY

Notwithstanding Executive Order No. 9981, for many Black Americans, equality of opportunity and treatment remained elusive.

The Vietnam War was the first major combat deployment of an integrated military, but treatment of Black servicemembers was still far from equal. Black Americans were disproportionately sent to the front lines, jailed and disciplined at a higher rate than Whites, and promoted less often. See Gerald F. Goodwin, *Black and White in Vietnam*, N.Y. TIMES (July 18, 2017), <https://www.nytimes.com/2017/07/18/opinion/racism-vietnam-war.html> (“Unquestionably, African-Americans were disproportionately punished. A 1972 Defense Department study found that they received 25.5 percent of nonjudicial punishments and 34.3 percent of courts-martial in Vietnam. Not surprisingly, given these numbers, African-Americans were overrepresented in military prison: In December 1969, they represented 58 percent of prisoners at the infamous Long Binh Jail, near Saigon.”).

The Defense Department study also found that when “blacks’ complaints of discrimination were received, they were often not taken seriously. Of the 534 received by the Pentagon’s Office of the Inspector General in 1968-69, only 10 were deemed legitimate.

COMMISSION, *From Representation to Inclusion: Diversity Leadership for the 21st-Century Military*, Final Report 5 (2011).

Id. And perhaps more troubling, a “study commissioned by the Army found that between 1966 and 1969, commanders had failed to report 423 allegations of racial discrimination.” *Id.*

The military has made great strides in combatting overt racial discrimination since the Vietnam War. Yet, seventy-two years after President Truman signed Executive Order No. 9981, “racial animus remains salted through the U.S. military.” Mark Thompson, *Racism in the Ranks: Could the U.S. military finally be changing?* PROJECT ON GOVERNMENT OVERSIGHT (July 8, 2020), <https://www.pogo.org/analysis/2020/07/racism-in-the-ranks/>.

Indeed, as U.S. Defense Secretary, Mark Esper, recently stated, “bias burdens many . . . service members, and has direct and indirect impact on the experiences of [the military’s] minority members, the cultural and ethnic diversity of the force, and representation in [the military’s] officer ranks.” U.S. Dep’t of Defense, *Secretary Mark T. Esper Message to the Force on DOD Diversity and Inclusiveness*, U.S. DEP’T OF DEF. (June 18, 2020), <https://www.defense.gov/Newsroom/Releases/Release/Article/2224494/secretary-mark-t-esper-message-to-the-force-on-dod-diversity-and-inclusiveness/>.

As discussed below, contemporary data confirms that “[r]acism in the military [continues to] manifest[] itself in . . . subtler ways, with effects that can be

difficult to parse out but are nevertheless tremendously consequential.” David Barno & Nora Bensahel, *Reflections On The Curse Of Racism In the U.S. Military*, WAR ON THE ROCKS (June 30, 2020), <https://warontherocks.com/2020/06/reflections-on-the-curse-of-racism-in-the-u-s-military/>.

B. Contemporary data confirms that racial bias and discrimination remain an intractable problem in the United States military.

As a 2019 Congressional Research Service report concluded, “[d]espite great strides in racial equality and nondiscrimination . . . concerns about the treatment of and opportunities for racial minorities have persisted into the 21st century.” CONGRESSIONAL RESEARCH SERVICE, DIVERSITY, INCLUSION, AND EQUAL OPPORTUNITY IN THE ARMED SERVICES: BACKGROUND AND ISSUES FOR CONGRESS 19 (JUNE 5, 2019). Indeed, only two months ago, the Sergeant Major (Michael A. Grinston), the General (James C. McConville), and the Secretary (Ryan D. McCarthy) of the United States Army acknowledged that racial “*division[] live[s] in the Army*.” U.S. Army, *A message to the Army community about civil unrest*, U.S. ARMY (June 3, 2020), https://www.army.mil/article/236157/a_message_to_the_army_community_about_civil_unrest (emphasis added). These conclusions are confirmed by all the relevant data.

First, racial minorities in the military report instances of racial discrimination at a high rate. For example, a 2007 study asked 19,184 servicemembers whether they had experienced racial harassment (defined as racially offensive or threatening encounters) or racial discrimination (defined as “being evaluated unfairly [because of race] or being physically assaulted because of race”). HEATHER ANTECOL & DEBORAH COBB-CLARK, RACIAL HARASSMENT, JOB SATISFACTION, AND INTENTIONS TO REMAIN IN THE MILITARY 1, 7 (2007). 65.1% of all servicemembers reported encountering racial harassment or discrimination. Not surprisingly, minority servicemembers report the highest incident of each type of racial harassment (i.e., racially offensive or threatening encounters). *Id.* at 7. “In particular, reports of offensive encounters are highest among Hispanics (77.5 percent), while reports of threatening encounters were highest among Native Americans (15.7 percent).” *Id.* at 7–8. Racial minorities also reported the highest incidents of racial discrimination. Specifically, 28.7 percent of Black servicemembers reported being evaluated unfairly because of their race or being physically assaulted because of race. *Id.* at 8.

Furthermore, just last year, a Military Times survey that polled 1,630 active-duty servicemembers found that “more than a third of active duty troops — [and more than half (53 percent) of minority servicemembers] — [reported] that they have

witnessed racism in the ranks.” Thompson, *supra*. More troubling, the trend was in the wrong direction: “[t]hose saying they have witnessed racism jumped from 22% in 2018 to 36% in 2019.” *Id.*

Second, relevant data on discipline and punishment in the military reflects institutional discrimination against minorities across all branches of the military. A 2017 study on racial disparities in military justice found that “[f]rom 2006 to 2015, black airmen were 1.71 times (71%) more likely to face court-martial or non-judicial punishment (NJP) than white airmen in an average year.” Col. Don Christensen, (Ret.) & Yelena Tsilker, *Racial Disparities in Military Justice, Findings of Substantial and Persistent Racial Disparities Within the United States Military Justice System*, PROTECT OUR DEFENDERS (2017). Here too, the situation seems to be getting worse, as racial disparities appear to be increasing. In 2006, “black airmen were 1.49 times more likely than white airmen to face disciplinary action, compared to 1.83 times more likely in 2015.” *Id.* at 4. Similar patterns were found when examining rates for court-marital and non-judicial proceedings. *Id.* at 5.

During the same time period, “black Marines were 1.32 times (32%) more likely to have a guilty finding at a court-martial or [non-judicial punishment] proceeding than white Marines in an average year.” *Id.* at 6. “The disparity persisted during each year

analyzed, with the disparity . . . ranging from 1.23 to 1.48.” *Id.* And although “overall findings of guilt have fallen since 2006, the disparity between black and white Marines has grown.” *Id.*

Moreover, the disparity widened for the most serious disciplinary proceedings. Specifically, “[i]n an average year, black Marines were 2.61 times more likely than white Marines to receive a guilty finding at a general court-martial.”³ *Id.* Similarly, at non-judicial proceedings, Black Marines were 1.29 (29%) times more likely than White Marines to receive a guilty finding. *Id.* “Overall, the more serious the proceeding, the greater . . . the disparity between black and white Marines.” *Id.*

Similar disparities are also present in the United States Army and Navy. Specifically, “[f]rom 2006 to 2015, in an average year, black [Army] service members were 1.61 times (61%) more likely to face general or special court-martial compared to white service members.” *Id.* at ii. And “black sailors were 1.40 times (40%) more likely than white sailors to be referred to special or general court-martial and 1.37 [37%] times more likely to have military justice or an

³ General courts-marital are typically reserved for serious offenses, and a guilty finding at that forum often carries severe ramifications, including a criminal record and potential incarceration. See Col. Don Christensen, (Ret.) & Yelena Tsilker, *supra*, at 6.

alternative disposition action taken against them in an average year.” *Id.*

The results of the 2017 study were confirmed by a recent Government Accountability Office (“GAO”) report, which found that “Black and Hispanic servicemembers were more likely than White servicemembers to be the subjects of recorded investigations in all of the military services and were more likely to be tried in general and special courts-martial in the Army, the Navy, the Marine Corps, and the Air Force.” Brenda S. Farrell, U.S. GAO, *MILITARY JUSTICE: DOD AND THE COAST GUARD NEED TO IMPROVE THEIR CAPABILITIES TO ASSESS RACIAL AND GENDER DISPARITIES 2* (June 16, 2020).

Worse yet, the GAO concluded that “[i]n the military services that maintained complete punishment data — the Army, the Navy, the Marine Corps, and the Air Force — . . . minority servicemembers were either less likely to receive a more severe punishment in general and special courts-marital compared to White servicemembers, or there were no statistically significant differences in punishments among racial groups.” *Id.* at 23. That is, racial minorities were more likely to be suspected and investigated for wrongdoing, but ended up being punished at a lower or approximately the same rate as White troops. “In other words, there apparently is some *insidious bias in how the military initiates investigations into wrongdoing that leads to more*

charges than warranted against racial minorities.” Thompson, *supra* (emphasis added).

Accordingly, notwithstanding whether investigations result in a higher rate of convictions for racial minorities — and as demonstrated by the 2017 study, in some instances, they do, see *supra*, at 13 — the fact that racial minorities are hauled before courts martials and other judicial proceedings at a significantly higher rate than their White counterparts is alarming. In addition to the stigma created by meritless accusations, such charges may entirely derail the promising careers of racial minorities who may otherwise be on track for leadership positions in the military. Indeed, “[i]n the Army’s promotion system, one mediocre evaluation is enough to kill your chance for advancement.” Helene Cooper, *African-Americans Are Highly Visible in the Military, but Almost Invisible at the Top*, N.Y. TIMES (May 25, 2020), <https://www.nytimes.com/2020/05/25/us/politics/military-minorities-leadership.html> (quoting Lt. Col. Walter J. Smiley Jr.).

Third, although racial minorities increasingly constitute a greater percentage of active duty servicemembers, they are underrepresented in the military’s leadership ranks. Historically, racial minorities — especially Blacks — were precluded from holding leadership positions in the military. For example, a 1925 guidance memo for Army officers

stated that Black servicemembers were a class “from which [the Army] cannot expect to draw leadership material.” The Army War College, Office of the Commandant, MEMORANDUM FOR THE CHIEF OF STAFF 16 (Oct. 30, 1925). Almost a century later, racial minorities remain severely underrepresented in the military’s upper echelons.

For example, a June 2010 issue paper from the Military Leadership Diversity Commission stated that Black, Hispanic and other minority line officers had lower than average promotion rates. See MILITARY LEADERSHIP DIVERSITY COMMISSION, *Recent Officer Promotion Rates by Race, Ethnicity, and Gender* 1 (2010). Between 1967 and 1991, Black officers had at least 4% lower promotion rates between O-4 and O-6.⁴ In 2009, those numbers were not

⁴ Each branch of the military has different ranks. There are four hierarchical categories: 1) Junior enlisted personnel; 2) Non-commissioned officers; 3) Warrant officers; and 4) Commissioned officers. See *How Military Insignia Works*, MILITARY ONE SOURCE (Dec. 12, 2018), <https://www.militaryonesource.mil/family-relationships/spouse/military-life-for-spouses/how-military-insignia-works>. Military commissioned officers hold the highest military ranks in the pay grades of O1-O10. See U.S. DEPT OF DEF., *U.S. Military Rank Insignia*, <https://www.defense.gov/Resources/Insignia/> (last visited Aug. 6, 2020). These officers hold presidential commissions and are confirmed at their ranks by the Senate. *Id.* Army, Air Force and Marine Corps officers in the paygrades of O1-03 are called company grade officers. *Id.* Officers in paygrades O4-06 are

substantially different. *Id.* at 5. In *all five military services*, “black officers’ promotion rates were *substantially lower than the pay grade-specific average promotion rate for the relevant service.*” *Id.* at 4 (emphasis added).

Moreover, Blacks had below average promotion rates to O-4 and O-5. *Id.* at 2. In the Air Force, Army, Marines, and Navy, the promotion rates for Black officers to O-6 was below average. *Id.* Similarly, Hispanic officers from all five services had below average promotion rates to O-4 and lagged behind their White counterparts in the Navy, Air Force and Marines in O-5 and O-6 promotions. *Id.* at 3.

The following year, a comprehensive report from the same commission concluded that “data on recent accessions suggest that, across the Services, racial/ethnic minorities . . . are still underrepresented even when compared with only the eligible population.” See *From Representation to Inclusion: Diversity Leadership for the 21st-Century Military*, Final Report, *supra*, at 56. For example, although individuals of Hispanic origin (age 18-64) account for approximately 18 percent of the United States population and 18 percent of the active duty enlisted corps, Hispanic officers account for approximately 8 percent of the officer corps and 2 percent of General/Flag officers. See CONGRESSIONAL RESEARCH

referred to as field grade officers, and officers in O7-O10 are referred to as general officers. *Id.*

SERVICE, *supra*, at 20. Similarly, although Black servicemembers represent 19 percent of all enlisted personnel, they make up just 9 percent of officers. See Zachary Cohen & Janie Boschma, *Military data reveals dangerous reality for black service members and veterans*, CNN (June 14, 2020), <https://www.cnn.com/2020/06/13/politics/military-diversity-data/index.html>. For White servicemembers, the trend reverses. “Two-thirds of all enlisted service members are white. But among officer ranks, more than three-quarters are white.” *Id.*

Also, although 43 percent of the 1.3 million men and women on active duty in the United States military are racial minorities, “[o]f the 41 most senior commanders in the military — those with four-star rank in the Army, Navy, Air Force, Marines and Coast Guard — only two are black.” Cooper, *supra*.

Remarkably, the Marine Corps — which for 144 years barred the enlistment of Blacks — has never promoted a Black officer to four-star rank. David Barno & Nora Bensahel, *supra*.

“The absence of minorities at the top means the absence of a voice to point to things that should have been addressed a long time ago. . . . And from a human standpoint [such] absence sends another message that [the military is] another space where [Blacks] are not accepted.” Cooper, *supra* (quoting Iraq and Afghanistan Air Force veteran, Brandy Baxter).

In sum, whether one looks to surveys, disciplinary records, or promotion statistics, the evidence establishes and all of the studies, surveys, anecdotes, and reports confirm a clear conclusion: Racial discrimination remains woven in the fabric of the United States military. See Zachary Cohen & Janie Boschma, *supra* (“As a society, we are just now, hopefully, dealing with the original sin and dealing with a lot of the underlying issues of race and inequality. . . . *[T]he military has not been isolated from that[.]*”) (quoting Bishop Garrison, a Black West Point graduate who served two tours in Iraq) (emphasis added).

II. Alternative measures adopted by the military to address discrimination have been ineffective.

The military’s current measures to combat racial discrimination are woefully inadequate and ineffective. Moreover, because the military does not collect data necessary to identify where racial disparities exist, it is unable meaningfully to address why and how the current system is ineffective.

A. The military fails to collect data necessary to identify racial disparities.

The military “do[es] not systemically track . . . aspects of diversity, such as cultural expertise and ability, and they do not explicitly evaluate the *inclusiveness of the environment*.” See *From Representation to Inclusion: Diversity Leadership for*

the 21st-Century Military, Final Report, *supra*, at 103 (emphasis added).

For example, in 2019, GAO found that “military services did not collect consistent information about race and ethnicity in their investigations, military justice, and personnel databases.” Farrell, *supra*, at 2

Similarly, the Army, Navy, and Coast Guard do not collect data on race, ethnicity, or gender for non-judicial punishments. Col. Don Christensen (Ret.) & Jennifer Wells, *Federal Lawsuit Reveals Air Force Cover Up: Racial Disparities in Military Justice Part II* 3, PROTECT OUR DEFENDERS (2020). Despite acknowledging that racial disparity in the military justice system is a “*persistent*” and “*consistent*” issue, the Air Force has not taken any substantive steps to address the issue. *Id.* at 10 (emphasis added). And the Coast Guard’s military justice database does “not track information about race or ethnicity.” Farrell, *supra*, at 9.

Indeed, “[m]ilitary leadership has been aware of significant racial disparity in its justice process for years, and has made no apparent effort to find the cause of the disparity or remedy it.” Col. Don Christensen, (Ret.) & Yelena Tsilker, *Racial Disparities in Military Justice*, BOTTOM LINE, PROTECT OUR DEFENDERS (July 7, 2017).

The lack of data collection also extends to promotion statistics. None of the military services

track the racial composition of promotions, retention, and assignments for each fiscal year. See MILITARY LEADERSHIP DIVERSITY COMMISSION, *supra*, at 105. Nor is there any strategy or program in place to address the severe underrepresentation of minorities in leadership positions. *Id.* To the contrary, “African-Americans who do become officers are often steered to specialize in logistics and transportation rather than the marquee combat arms specialties that lead to the top jobs.” Cooper, *supra*.

Similarly, although the Department of Defense (“DoD”) has developed well-established metrics for measuring demographic diversity,⁵ it has “not comprehensively studied the causes of [racial disparities in the military],” nor has it ever required the services to internally track racial disparities. Farrell, *supra*, at 26. And although racial disparities exist in military justice investigations, disciplinary actions, and case outcomes, neither the Legislative nor the Executive branch has issued guidance

⁵ Pursuant to DoD Directive 1350.2, Department of Defense Military Equal Opportunity (“MEO”) Program, the Services are required to provide an annual Military Equal Opportunity Assessment that reports the demographic composition of promotions, retention, and assignments each year and includes data on demographic diversity. Although this assessment is the sole reporting mechanism required from the Services on their MEO policies, it is rarely produced by any of the military services. See MILITARY LEADERSHIP DIVERSITY COMMISSION, *From Representation to Inclusion: Diversity Leadership for the 21st-Century Military*, Final Report, *supra*, at 103.

establishing “criteria to specify when any data indicating possible racial or ethnic disparities in the investigations, trials, or outcomes of cases in the military justice system should be further reviewed and to describe what steps should be taken to conduct such a review if it were needed.” *Id.* at 13.

Without the benefit of relevant data to assess racial disparities and how they manifest, neither Congress nor the military has addressed whether the military’s current anti-discrimination measures and procedures are effective in stemming racial bias and discrimination. As explained below, they are not. In fact, the current measures and procedures are not merely inadequate; they actually *discourage servicemembers from initiating racial discrimination claims*.

B. The military’s current anti-discrimination measures have failed to stem racial discrimination in the armed services.

Without Title VII, there is *no* federal statute prohibiting racial discrimination in the armed forces. See CONGRESSIONAL RESEARCH SERVICE, *supra*, at 18–19 (explaining that despite a 1972 military task force’s recommendation for “a specific legislative provision in the [Uniform Code of Military Justice (UCMJ)] to ban discrimination,” “*the UCMJ does not currently have any specific provision banning discrimination*”) (emphasis added).

Likewise, judicial doctrines preclude servicemembers from using other anti-discrimination remedies typically available to civil rights plaintiffs. *See, e.g., Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (barring *Bivens* claim for racial discrimination by enlisted military personnel).

Without a specific federal statute or other remedies, discrimination complaints in the military are primarily handled under an internal policy called the Military Equal Opportunity (“MEO”) Program.⁶ *See* U.S. DEP’T OF DEF., DIR. 1350.2, DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY (MEO) PROGRAM (rev. 8 June 2015) (“MEO Directive”).

For example, the Marine Corps implements its MEO Program via Marine Corps Order 5354.1E (“Order 5354.1E”), which governs the filing of servicemembers’ discrimination complaints. *See* MCO 5354.1E vol. 3, ch. 3 (June 15, 2018), [https://www.marines.mil/Portals/1/Publications/MCO%205354.1E%20\(ENTIRE\).pdf?ver=2019-10-28-](https://www.marines.mil/Portals/1/Publications/MCO%205354.1E%20(ENTIRE).pdf?ver=2019-10-28-)

⁶ Equal Opportunity policies are mandated both by the Department of Defense directives (“DoDD”) — specifically, DoDD 1350.2 — and by the Equal Opportunity policies of the individual military service branches. *See, e.g.,* Army Command Policy § 6-2(c)(1) (Aug. 4, 2001), http://www.apd.army.mil/pdffiles/r600_20.pdf (defining discrimination as “[a]ny action that unlawfully or unjustly results in unequal treatment of persons or groups based on race, color, gender, national origin, or religion”).

133617-023. Servicemembers have several avenues for filing complaints, but the Corps' rules are clear that "[t]he chain of command is the primary and preferred channel for resolving alleged violations . . . at the lowest appropriate level." *Id.* ¶ 0302. Complaints are thus generally filed directly through the chain of command, *id.* ¶¶ 030701, 030702, or through others who report to the complainant's commander, *id.* ¶¶ 30703, 30704. For example, servicemembers may submit complaints to a MEO office, *id.* ¶ 30703, but the staff at these offices — Equal Opportunity Advisors ("EOA") — are their "commander's . . . primary personnel for advice, guidance, and complaint management[.]" *Id.* ¶ 0202. These EOAs explicitly "do *not* serve as victim advocates for those who file equal opportunity (EO) complaints[.]" *Id.* ¶ 020201 (emphasis added).

Complaint processing and appeals are all conducted within the Marine Corps. Commanders investigate and resolve all complaints. See *id.* ¶¶ 0403–08, 0411–13, 0503.⁷ They may "accept" or "dismiss" complaints within the MEO's purview. *Id.* ¶¶ 0403, 0404. A complainant may "appeal" a commander's decision. *Id.* ¶¶ 0414, 0508, 0601, *et seq.* The "first level appeal" is before the general courts

⁷ If the complaint is filed against the commander, it is processed and resolved through the general courts-martial process, which is normally the first level of appellate review, as described *infra*. See Order 5354.1E, vol. 1, ¶ 0309.

martial convening authority (“GCMCA”). *Id.* ¶ 060301. If that decision is adverse, the complainant may file an additional appeal with the Secretary of the Navy. *Id.* ¶ 060302. Appeal procedures are “not an adversarial process, nor [do they] require personal appearances or hearing rights.” MEO Directive § 6.2.10. Following these internal appeals, “[n]o further review or appeal of the matter is permitted.” MCO 5354.1E, vol. 3, ¶ 060604.

The MEO Program is a poor vehicle to stem discrimination. *First*, the MEO process is primarily designed to punish offenders, *not* to protect and redress victims of discrimination. See *id.* vol. 1, ¶ 0104 (“This Order is a punitive lawful general order.”); see also Mary C. Griffin, *Making the Army Safe for Diversity: A Title VII Remedy for Discrimination in the Military*, 96 YALE L.J. 2082, 2088 (1987) (“The cardinal goal of military law and military tribunals is discipline, not justice.” (citations omitted)).

Second, there is no opportunity for review by a forum utilizing an adversarial process or other important procedural mechanisms. The MEO Program’s entire review process is housed within the Marine Corps. This review process is not adversarial and does not grant complainants the right to representation by counsel, request a hearing, or conduct discovery. As this Court has recognized, those very processes are key to determining the truth and ensuring justice. See, e.g., *Goldberg v. Kelly*, 397 U.S.

254, 268–71 (1970) (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” (citations omitted)).

Third, the MEO process always involves reporting complaints to a commanding officer, and complaints are reviewed exclusively within the branch in which the accused serves. Order 5354.1E expressly notes that “[t]he chain of command is the primary and preferred channel for resolving” discrimination allegations. Order 5354.1E, vol. 3, ¶ 0302. This procedure makes it difficult for servicemembers to report discrimination by commanding officers, who have considerable control over their subordinates’ wellbeing. Craig Westergard, *You Catch More Flies with Honey: Reevaluating the Erroneous Premises of the Military Exception to Title VII*, 20 MARQ. BENEFITS & SOC. WELFARE L. REV. 215, 230 (2019) (explaining that employees may fear retaliation from “commanding officers” who have authority to “demot[e],” “suspend[],” or “dock[] [the] pay” of their subordinates). To be sure, complaints against commanders are “processed by the first GCMCA in the chain of command,” Order 5354.1E, vol. 3, ¶ 0309, but the rules do not provide for any method of reporting directly to the GCMCA. See *id.* ¶ 0307. Moreover, the GCMCA — like all bodies of review in the MEO Program — is internal to the service branch which oversees the discrimination reported by the complainant.

Finally, servicemembers are not entitled to damages or attorneys’ fees if they are successful. “Because of this, servicepersons have almost no incentive to report discrimination — particularly discrimination that is effectuated by their commanding officers.” Westergard, *supra*, at 231; see also Andrew F. Popper, *Rethinking Feres: Granting Access to Justice for Service Members*, 60 B.C. L. REV. 1491, 1534 (2019) (explaining that “misconduct in the military” can be explained by, among other things, the lack of “deterrent impact of civil judgments”). Indeed, this Court has recognized that inhibiting the recovery of attorneys’ fees makes it “less likely” that individuals will “undertake the risk” of seeking relief in “civil rights” cases. *Hensley v. Eckerhart*, 461 U.S. 424, 456 (1983).

In sum, the military’s anti-discrimination mechanism is an ineffective tool to combat the widespread discrimination that continues to persist in the military. See *supra* Section I.B.

III. Title VII is the appropriate vehicle to address racial discrimination in the military.

The problematic features of the MEO Program would be remedied by allowing servicemembers to file suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16.

First, unlike the MEO Program, Title VII is remedial in nature. See, e.g., *Green v. Brennan*, 136

S. Ct. 1769, 1778 (2016). Title VII’s “detailed remedial scheme,” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366 (2011), authorizes equitable and monetary relief to compensate and redress victims of discrimination. See 42 U.S.C. § 2000e-16(b); 29 C.F.R. § 1614.501.

Second, unlike the MEO Program, Title VII provides significant procedural protections. At its most fundamental level, Title VII explicitly prohibits racial discrimination, see *id.* § 2000e-16(a) — a statutory protection which does not exist in the military context. Title VII also provides for rights to a hearing before an administrative judge, 29 C.F.R. § 1614.109(a), discovery, *id.* § 1614.109(d), and the ability to call witnesses, *id.* § 1614.109(e). Such adversarial proceedings are a fundamental aspect of due process and are necessary to unearth the truth in often-complex and fact-dependent claims of racial discrimination.

Third, unlike the MEO Program, Title VII provides for review by a third party unaffiliated with the entity with which the complainant and the accused are employed. Title VII complainants may appeal to both the Equal Employment Opportunity Commission, 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.401(a), and the federal courts, 42 U.S.C. §§ 2000e-16(c), 2000e-5, 29 C.F.R. § 1614.310. This impartial review — external to the organization accused of discrimination — provides assurance to complainants that their grievances will be afforded

fair adjudication and that they will be protected from retaliation.

Fourth, unlike the MEO Program, complainants may recover monetary damages such as back pay, 29 C.F.R. § 1614.501(c), and attorneys' fees and costs, *id.* § 1614.501(e). These features provide a greater incentive for affected servicemembers to seek the justice to which they are entitled and to attract competent counsel to help them in so doing.

Finally, the effectiveness of Title VII extends well beyond increasing the presence of racial minorities in particular work environments. A "significant body of empirical research on intergroup interaction" shows that "workplace integration brought about by Title VII reduces racial biases." Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 86 n.464 (2015) (citations and internal quotations omitted). See also Griffin, *supra*, at 2082-83 (stating that "[d]iscrimination . . . poses a grave threat to military discipline, morale, and order").

In sum, Title VII would do what current MEO Program cannot: reduce the prevalence of racial discrimination and promote fairness in the military.

CONCLUSION

The question of whether Title VII applies to military servicemembers is a critically important

question that has not been addressed by this Court.
The Petition should be granted.

Respectfully submitted,

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