

No. 26-272

In the Supreme Court of the United States

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UNITED STATES OF AMERICA, ET AL.,

Petitioners,

v.

NICOLAS TALBOTT, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF OF *AMICI CURIAE*
STATE OF WEST VIRGINIA
AND 21 OTHER STATES
IN SUPPORT OF PETITIONERS**

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE**

America needs effective warfighters right now. “In 2024, there were 61 active state-based conflicts across the world, the highest number since the end of World War II.” OFF. OF THE DIR. OF NAT’L INTEL., ANNUAL THREAT ASSESSMENT OF THE U.S. INTELLIGENCE COMMUNITY 14 (2026), <https://tinyurl.com/nhajh4dk>. And those “conflicts resulted in about 129,000 battle-related deaths.” *Id.* Those threats will persist: “Armed conflict across the globe may pose a threat to U.S. interests and forces through the end of the decade,” *id.* (cleaned up), as “developments in recent years point to growing international tensions and a changing global security order,” Kate Bartlett, *Conflicts Are On The Rise Globally, At Highest Level Since WWII, Data Shows*, NPR (June 9, 2026), <https://perma.cc/XF2R-TKUN>.

But while the world has continued to grow more volatile and violent, the United States has simultaneously faced a broad “mental health crisis.” *Protecting the Nation’s Mental Health*, CDC (May 19, 2026), <https://perma.cc/K2QW-WXV6>. More than one-third of all “[y]oung adults aged 18-25 years” have a mental illness. *Mental Illness*, NAT’L INST. OF MENTAL HEALTH, <https://perma.cc/RL8N-DQ72> (last visited Sept. 28, 2026). Five years ago, the Surgeon General issued only the nation’s fourth major public health advisory—an advisory centered on youth mental health. See Thomas Insel, *America’s Mental Health Crisis*, PEW (Dec. 8, 2023), <https://perma.cc/HRA4-ZUUB>. And those young people are now old enough to serve.

* Under Supreme Court Rule 37.2, *amici* timely notified counsel of record of their intent to file this brief.

For obvious reasons, armed conflict and mental illness don't mix. "Service members in combat settings endure stressors such as IEDs [improvised explosive devices], ambushes, severe sleep deprivation, and direct combat and could experience nearly being killed by an IED blast, being ambushed and pinned down by small arms fire during ground combat, or witnessing the death of a shipmate in a fire below decks." Kara Mahoney, *Whose Choice? Psychotropic Medication and the Armed Forces*, 22 S. CAL. REV. L. & SOC. JUST. 201, 207 (2013) (cleaned up). An individual struggling with mental illness may not have the capacity to overcome these exceptional strains and continue the fight. And these uniquely challenging conditions can also produce terrible consequences when combined with mental illness; in 2024, for instance, 471 servicemembers died by suicide. DEP'T OF WAR, CALENDAR YEAR 2024 ANNUAL REPORT ON SUICIDE IN THE MILITARY 5 (2026), <https://perma.cc/EC8A-UFA4>.

Thus, to maintain a cohesive, ready, and lethal fighting force, and mitigate the harms that can follow from placing the mentally ill on the battlefield, the Department of War employs screening, standards, and treatment to tackle mental illness head on. "The mission to ensure a mentally healthy fighting force starts at recruitment." Catherine A. Zebrowski et al., *From the Defense Health Board: Military Accessions and the Continuum of Mental Health Research*, 187 MIL. MED. 308 (2022), available at <https://perma.cc/F5ER-GW93>. That mission then continues for the duration of a servicemember's tenure and beyond. See generally ROBERT J. URSANO & MURRAY B. STEIN, CTR. FOR THE STUDY OF TRAUMATIC STRESS, THE ARMY STUDY TO ASSESS RISK AND RESILIENCE IN SERVICEMEMBERS (vol. 3, issue 2, updated Mar. 25, 2019), <https://perma.cc/G6KV-J553> (cataloguing evidence of mental health issues at various stages of enlistment).

Accession and retention standards are a critical part of the process. “The Armed Forces must adhere to high mental and physical health standards to ensure our military can deploy, fight, and win, including in austere conditions and without the benefit of routine medical treatment or special provisions.” Exec. Order No. 14183, 90 Fed. Reg. 8757, 8757 (Jan. 27, 2025). Thus, our military disqualifies many prospective and active servicemembers with certain psychiatric disorders. C.A.App.979-981.

For the last decade, the military’s disqualifying diagnoses list has included gender dysphoria, a mental disorder recognized in the DSM-5-TR. Gender dysphoria is a clinical condition distinct from transgender status itself. See *Williams v. Kincaid*, 45 F.4th 759, 768 (4th Cir. 2022) (explaining that gender dysphoria, “rather than simply being transgender,” produces “disabling symptoms”). And the policies have drawn the line around gender dysphoria in different places. Pet.7-13. But each has treated the condition as disqualifying in at least some circumstances, and the current Policy rests on the Department’s findings that gender dysphoria can require ongoing treatment unavailable in the operational environment, create disproportionate medical burdens, and present unique clinical risks. Decisions like these—about who is mentally fit to serve—are precisely the “complex, subtle, and professional decisions” committed to the political branches. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

The decision below second-guessed the most recent iteration of these critical military judgments—termed the “Hegseth Policy”—by labeling it an equal protection violation. A divided D.C. Circuit thought the Hegseth Policy and its exclusions of those suffering from gender dysphoria were likely driven by a naked animus towards

transgender people. The court therefore affirmed an injunction against the Hegseth Policy's retention standard exclusion, at least for the time being. In this way, the lower court inappropriately assumed "the task of running the Army." *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953).

Worse, the majority reached that result without applying any standard this Court has recognized. It purported to conduct rational-basis review. But rather than require Respondents to "negative every conceivable basis which might support" the Policy, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (cleaned up), it required the government to show the Policy was "reasonable and evenhanded" in every application, App.31a. That approach inverts a standard that tolerates an "imperfect fit between means and ends." *Heller v. Doe*, 509 U.S. 312, 321 (1993). The result is a test more demanding than heightened scrutiny, applied where deference should be at its height.

This Court has already stayed a parallel injunction against the same Policy. See *United States v. Shilling*, 145 S. Ct. 2695 (2025). That stay reflected "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari" and "a fair prospect that a majority of the Court will vote to reverse." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). It's time for that "probability" to manifest; this Court's intervention is necessary to put political policymaking back in the hands of the political branches. And unfortunately, the decision below doesn't stand alone. Among other things, courts are modifying the rational-basis test to fault governments for not choosing to enact what the court believes to be a better alternative policy.

The States see a serious problem in letting this injunction stand. For one, the military's accession and retention standards apply to National Guardsmen, see 32 U.S.C. §§ 301, 307(a), so the consequences of these court-compelled retentions will spill over into their own forces. But more importantly, the States believe that military judgments like these belong in the hands of our military leaders, not courts. If contentious and complex military judgments like these can become constitutionalized—much as so many other issues of the day have been recently—then our military will spend too much time fighting courtroom battles rather than confronting the increasing challenges on the world stage. And if the lower court's vision of rational-basis review takes hold in other contexts, then States could find it harder to justify all manner of reasonable distinctions in all sorts of contexts well beyond the military.

The Court should grant the petition and return these judgments to the military leaders charged with making them.

SUMMARY OF THE ARGUMENT

I. The lower court tossed out decades of equal-protection cases and fashioned its own test. It then developed a modified version of what it called rational-basis review. Its new test holds the government to a more exacting standard than even heightened scrutiny. And it dispenses with the great deference afforded to military personnel decisions. The Court should grant the petition to reaffirm that the equal-protection analysis actually requires a showing of discrimination, and heightened scrutiny applies only when a policy or law either draws facial sex-based classifications or effects an invidious discriminatory purpose.

II. The lower court also turned rational-basis review inside out. Rather than requiring Respondents to negate every conceivable justification for the government’s policy, the lower court required the *government* to justify any possible situation that might arise in applying its policy. That test flips the burden. Especially in the military context—where courts must afford significant deference—courts must respect the government’s policy choices. And the lower court joined a growing number of courts fudging the rational-basis standard to impose what they believe to be better alternative policies.

ARGUMENT

This Court has already held that classifications based on medical use and medical condition don’t draw impermissible sex-based lines. That holding should have gotten the lower court most of the way to the right answer—refusing an injunction. Instead, the decision below reshapes foundational principles on the way to overturning a military judgment. The Court should grant the petition to fix that.

I. The lower court distorted the equal protection analysis.

A. “The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.” *United States v. Windsor*, 570 U.S. 744, 774 (2013) (cleaned up). The Fourteenth Amendment’s “equal protection guarantee ... makes that Fifth Amendment right all the more specific and all the better understood and preserved.” *Id.* So “[t]his Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the

Fourteenth Amendment.” *Weinberger v. Weisenfeld*, 420 U.S. 636, 638 n.2 (1975).

The Equal Protection Clause prohibits the government from “deny[ing] to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. Put another way, the Equal Protection Clause prevents the government from “treating differently persons who are in all relevant respects alike.” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). That’s not to say that the Clause “forbid[s] classifications.” *Id.* “[M]ost legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.” *United States v. Skrmetti*, 605 U.S. 495, 509 (2025) (cleaned up). “[P]erfection in making the necessary classifications is neither possible nor necessary.” *West Virginia v. B.P.J.*, 146 S. Ct. 2356, 2376 (2026) (cleaned up). Even an imperfect classification is permissible if it “neither burdens a fundamental right nor targets a suspect class” and “bears a rational relation to some legitimate end.” *Skrmetti*, 605 U.S. at 510 (cleaned up).

As the Court well knows, classifications based on sex must clear a slightly higher bar—intermediate scrutiny. *Skrmetti*, 605 U.S. at 510. But “mere reference to sex is [not] sufficient to trigger heightened scrutiny.” *Id.* at 512. Indeed, “[j]ust as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction.” *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 64 (2001).

And plaintiffs, of course, can try to trigger this heightened scrutiny in a few different ways. They can show that a law or policy facially classifies based on sex. Facial classifications explicitly “distribute[] burdens or benefits on the basis of” membership in a protected class. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No.*

1, 551 U.S. 701, 720 (2007). Without a facial classification, a plaintiff can still trigger heightened scrutiny by showing a law or policy has a discriminatory purpose, through either proxy discrimination or pretext. Proxy discrimination asks whether a facially neutral criterion is being used as a stand-in to target a protected trait, see *Geduldig v. Aiello*, 417 U.S. 484, 496 (1974); pretext asks whether a legitimate-sounding reason for an action is a lie and the real reason is discriminatory, see *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Although different, both theories require proof of discriminatory purpose. *Washington v. Davis*, 426 U.S. 229, 240-42 (1976).

B. None of the usual avenues to heightened scrutiny are available to Respondents here.

The Policy is facially neutral; even the lower court didn't hold otherwise. The Policy doesn't distinguish between men and women, and it doesn't even mention transgender servicemembers. C.A.App.50-60. Rather, it applies to "all persons." C.A.App.50. The Policy draws no sex-based classification at all. It takes gender dysphoria—a psychiatric condition that was already conditionally disqualifying—and makes it generally disqualifying. C.A.App.50-60, 979-981.

Proxy discrimination also doesn't fit. This Court has already recognized a "lack of identity" between transgender status" and gender dysphoria. *Skarmetti*, 605 U.S. at 519. Even though "*only* transgender individuals seek treatment for gender dysphoria," the Policy "does not exclude any individual from [military service] on the basis of transgender status." *Id.* at 518-19 (emphasis added). So even if one assumed that transgender discrimination and sex discrimination were one and the same (a deeply flawed assumption in its own right), the

Hegseth Policy’s reference to this medical condition wouldn’t serve as a proxy for either. See, e.g., *Anderson v. Crouch*, 169 F.4th 474, 490 (4th Cir. 2026).

Geduldig v. Aiello illustrates the point. There, a state disability insurance program excluded coverage for “any injury or illness caused by or arising in connection with pregnancy.” *Geduldig*, 417 U.S. at 489 (cleaned up). Of course, “only women can become pregnant.” *Id.* at 496 n.20. But this Court found that “pregnancy is an objectively identifiable physical condition with unique characteristics.” *Id.* So not “every legislative classification concerning pregnancy is a sex-based classification.” *Id.* On the contrary, the exclusion separated beneficiaries “into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.” *Id.* The plan thus did not violate the Equal Protection Clause. *Id.* at 497.

The Hegseth Policy applies in much the same way. Like pregnancy, gender dysphoria is an identifiable condition with defined diagnostic criteria. C.A.App.1292. And the panel majority itself recognized that only a “subset of transgender persons” have it. App.9a-10a. The Policy then separates servicemembers into two groups—individuals with gender dysphoria and individuals without it. While the first group is made up exclusively of transgender individuals, the second includes transgender and non-transgender persons. The Policy thus does not classify based on transgender status.

That leaves pretext, which *Geduldig* itself identified as the only remaining path. 417 U.S. at 496 n.20. (“Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other,” lawmakers

may treat pregnancy “just as with respect to any other physical condition.”). The lower court thought that path might be viable. See App.43a (finding Hegseth Policy’s classification based on gender dysphoria to be “pretextual”). To successfully assert this theory, however, a plaintiff must prove a classification cannot “be plausibly explained on a neutral ground.” *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 275 (1979). So the mere fact that a law primarily—or even exclusively—affects a particular group cannot alone establish an equal protection claim. See *Washington*, 426 U.S. at 242 (holding that “[d]isproportionate impact,” “[s]tanding alone, ... does not trigger” more exacting scrutiny).

Pretext can’t be shown here. The Policy treats gender dysphoria the way the Medical Standards treat other psychiatric conditions: it adds it to the list of conditions that “do not meet the [military’s medical standards] by virtue of current diagnosis, or for which the candidate has a verified past medical history.” C.A.App.942. While only transgender individuals may be diagnosed with gender dysphoria, that reality does not make the Policy discriminatory.

Further, a facially neutral classification is pretextual only if the government adopted it “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Feeney*, 442 U.S. at 279. Impact alone might signal pretext only when it “could not be plausibly explained on a neutral ground.” *Id.* at 275. But the neutral ground is obvious here. The Hegseth Policy supplements the Department of War’s Medical Standards for Military Service: Appointment, Enlistment, or Induction, C.A.App.930-988, and Medical Standards for Military Service: Retention, C.A.App.503-542. The accession standards ensure that servicemembers are “[m]edically

capable of satisfactorily completing required training and initial period of contracted service,” “[m]edically adaptable to the military environment without geographical area limitations,” and “[m]edically capable of performing duties without aggravating existing physical defects or medical conditions.” C.A.App.934. They also ensure that servicemembers are “[f]ree of medical conditions or physical defects that may reasonably be expected to require excessive time lost from duty for necessary treatment or hospitalization, or may result in separation from the Military Service for medical unfitness.” C.A.App.933. The retention standards likewise ensure that servicemembers can “successfully complete their assigned duties” and meet “[d]eployment requirements.” C.A.App.506.

The Policy ties the disqualification directly to those standards: the Secretary concluded that “the medical, surgical, and mental health constraints on individuals with gender dysphoria” are incompatible with them. C.A.App.50. That choice is a readiness judgment, not animus. It reflects the reality of a gender-dysphoria diagnosis. Beyond “marked incongruence between one’s experienced/expressed gender and natal gender,” a gender-dysphoria diagnosis “is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.” C.A.App.1292. By definition, then, every gender-dysphoria diagnosis involves clinically significant distress or functional impairment. Those symptoms place gender dysphoria squarely within the category of psychiatric conditions the Medical Standards already treat as a deployment problem. Occupational impairment might affect every aspect of military duty. And clinically significant distress is likely to only be exacerbated on a battlefield.

The same concerns permeate the disqualifying conditions list. For example, anyone with a “[h]istory of bipolar” or “any eating disorder” or “obsessive-compulsive ... disorder” is disqualified. C.A.App.980-981. Those psychiatric conditions (and more) are generally disqualifying—just like gender dysphoria. *Id.* That’s because “most mental health conditions, as well as the medication used to treat them, limit Service members’ ability to deploy.” C.A.App.105. Indeed, “[a]ny DSM-5 psychiatric disorder with residual symptoms, or medication side effects, which impair social or occupational performance, require[s] a waiver for the Service member to deploy.” *Id.* And “[t]he same is true for mental health conditions that pose a substantial risk for deterioration or recurrence in the deployed environment.” *Id.* So gender dysphoria—which carries diagnostic criteria that includes “clinically significant distress or impairment in social, occupational, or other important areas of functioning,” C.A.App.1292—is not being singled out for disparate treatment. The Hegseth Policy instead recognizes its serious clinical and Service-related complications, just as the Medical Standards recognize, for instance, the risks posed by bipolar disorders.

C. Because none of these avenues point to an invidious discriminatory purpose, rational-basis review applies. *Skrimetti*, 605 U.S. at 516 (“[Courts] do not subject the law to heightened review unless it was motivated by an invidious discriminatory purpose.”). That’s the right approach for the further reason that transgender status isn’t a quasi-suspect class warranting heightened scrutiny in the first place.

The Policy easily satisfies that “exceedingly deferential standard.” *Free Speech Coal., Inc. v. Paxton*, 606 U.S.

461, 469 (2025). Under rational basis review, courts will uphold the decision “so long as there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Skrimetti*, 605 U.S. at 522 (cleaned up). Here, the Department relied on extensive research and literature reviews conducted by experts. A 2021 literature review revealed that “nearly 40% of Service members with gender dysphoria ... were non-deployable over a 24 month period.” C.A.App.64. “This level of non-deployability creates significant readiness risk and places additional burdens on Service members without gender dysphoria to meet requirements.” *Id.* Thus, at a minimum, the Policy’s readiness concern should have been enough to uphold the policy.

D. The lower court nevertheless determined the Policy unconstitutionally discriminated. Its error was based on two major flaws.

First, the lower court applied the wrong standard. Even while recognizing that courts must afford “great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest,” App.25a (cleaned up) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)), the circuit court cobbled together dicta from various cases to establish a new test. Under the lower court’s new formulation, “gender-based classifications [are] not subjected to heightened scrutiny.” App.29a. But military policies are constitutional only if “(1) such classifications were based on detailed study rather than ‘archaic and overbroad generalizations,’ (2) where possible, similarly situated persons were treated similarly, and (3) the classification was not based on invidious discrimination.” *Id.*

That new test is an odd way to show deference. Even under heightened scrutiny, policymakers are not required to show they chose to draw a line only after completing “detailed study.” See *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980) (“[G]ender-based discriminations must serve important governmental objectives and ... the discriminatory means employed must be substantially related to the achievement of those objectives.”). In other words, the panel majority’s version of “deference” demands more of the military than intermediate scrutiny demands of anyone else. The other two prongs fare no better. Asking whether similarly situated persons could “where possible” have been treated alike imposes a tailoring requirement even heightened scrutiny does not. See *Nguyen*, 533 U.S. at 70. And invidious purpose is the question that determines whether heightened scrutiny applies at all, *Skrimmetti*, 605 U.S. at 516, not an extra hurdle for a policy that doesn’t trigger it.

From these flawed premises, the lower court predictably went off track. It acknowledged that “[r]equiring servicemembers to meet [the military’s] high standards is a legitimate government interest, and the Hegseth Policy presented some evidence demonstrating why gender dysphoria was incompatible with readiness, lethality, cohesion and uniformity.” App.33a-34a. That concession should have ended the case. Where there are “plausible reasons” for the government’s action, the “inquiry is at an end.” *Beach Commc’ns*, 508 U.S. at 313-14 (cleaned up). But the lower court wanted more. It docked Petitioners for not also presenting “evidence to establish that persons with gender dysphoria are not honest, humble, and full of integrity,” App.33a, three additional standards mentioned in the President’s Executive Order, 90 Fed. Reg. at 8757.

This Court has specifically rejected this application of underinclusivity in the rational-basis test. Recall that “[p]erfection in making the necessary classifications is neither possible nor necessary.” *B.P.J.*, 146 S. Ct. at 2376 (cleaned up). Issues “in the same field may be of different dimensions and proportions, requiring different remedies.” *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955). So “reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.” *Id.* And “[t]he legislature may select one phase of one field and apply a remedy there, neglecting the others.” *Id.*

The Court has never required a policy to meet every one of its stated objectives in every case. The circuit court was wrong to hold Petitioners to that higher standard, especially considering the deference courts must afford the military.

Second, the lower court held that the Hegseth Policy failed rational-basis review because it was motivated by animus. App.40a. To reach this conclusion, the court repeatedly looked to external statements by President Trump and Secretary Hegseth and online resources from the Department of War. App.40a-44a. In the court’s view, these statements showed that the Department desired merely “to harm a politically unpopular group.” App.7a (cleaned up).

But the standard for animus is an extremely high bar. It must be “impossible to ‘discern a relationship to legitimate state interests,’” and the policy must be “inexplicable by anything but animus.” *Trump v. Hawaii*, 585 U.S. 667, 706 (2018) (cleaned up). *Hawaii* shows why the panel majority’s evidence falls short. There, too, challengers relied on the President’s public statements. The Court nonetheless upheld the policy because it had “a

legitimate grounding in national security concerns, quite apart from any religious hostility.” *Id.* at 706. So too here: the panel majority acknowledged that the Policy serves legitimate interests in readiness, lethality, cohesion, and uniformity. App.32a. Having conceded that independent justification, the court was not free to set it aside in favor of inferred animus.

The panel majority tried to avoid that result by claiming that rational basis requires it to consider *only* the justification openly stated at the time of enactment, if such a justification exists, unless it “could not have been a goal of the legislation.” App.43a (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981)). That’s wrong. Just because policies “specifically declare[] their purpose” does not mean that they “le[ave] no room to conceive of any other purpose for their existence.” *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 530 (1959). Rational basis review requires a challenger to “negative every conceivable basis which might support” a policy. *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012) (quoting *Heller*, 509 U.S. at 320). And “it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.” *Beach Comm’ns*, 508 U.S. at 315. It would be incoherent to make such statements, yet limit courts to only an expressed purpose. So the lower court unjustifiably heightened rational-basis review by limiting itself to the Policy’s stated purposes.

II. The lower court joined a growing group of courts in applying its own perceived better alternative policy.

The lower court didn’t just reach the wrong conclusion. It tossed aside decades of rational-basis cases in favor of a

freewheeling search for what it believed to be the most appropriate policy decision. Its new construction of rational-basis review looks more like strict scrutiny than anything.

To reach its holding, the circuit court repeatedly compared the Hegseth Policy to the Mattis Policy, treating the Mattis Policy as the baseline against which the Hegseth Policy had to justify itself. “[I]nstead of reverting back to the Mattis Policy,” the court wrote, “President Trump went much further.” App.18a. The lower court lamented that “the Hegseth Policy did not treat gender dysphoria the same as all other mental health conditions, as the Mattis Policy had.” App.21a. And because the Hegseth Policy disqualified more individuals with a narrower path to a waiver, the lower court determined that its “contrast with the Mattis Policy alone show[ed] that the Hegseth Policy is far from ... ‘reasonable and evenhanded.’” App.35a (quoting *Goldman*, 475 U.S. at 510).

These comparisons are central to the court’s holding: Because the Mattis Policy advanced the same broad interests as the Hegseth Policy but was less restrictive, the court intuited that the Hegseth Policy has no rational basis and must be motivated by animus.

Courts deployed similar reasoning against the first Trump Administration’s 2017 directive, and then against the Mattis Policy itself. One court reasoned that the Mattis Policy would likely violate rational basis in part because of the alleged “lack of any justification for the abrupt policy change.” *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017). Others blocked the Mattis Policy in part because prior military leadership had examined the same interests and reached a different conclusion. See *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 213 (D.D.C. 2017),

vacated by Doe 2 v. Shanahan, 755 Fed. Appx. 19 (D.D.C. 2019); *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305, at *7 (W.D. Wash. Dec. 11, 2017). Perhaps because of such flawed reasoning, those decisions did not survive. The D.C. Circuit vacated the injunction in *Doe*, and this Court stayed the nationwide injunctions in *Karnoski* and *Stockman*, allowing the Mattis Policy to take effect. See *Trump v. Karnoski*, 586 U.S. 1124 (2019); *Trump v. Stockman*, 586 U.S. 1124 (2019). But the panel majority’s logic also proves too much. Measured against the 2016 policy that preceded it, the Mattis Policy—the very baseline the panel majority used in this case—would itself fail.

And this “must be better than before” type of thinking is hardly unique to military cases. The same line of reasoning—forcing modified policies to prove themselves against their predecessors—has also been added to rational-basis review by other courts facing related issues. See, e.g., *Orr v. Trump*, 778 F. Supp. 3d 394, 416-17 (D. Mass. 2025) (rejecting a narrower policy because a past policy weighed the same interests), *vacated by Orr v. Trump*, 178 F.4th 34 (1st Cir. 2026); *Ray v. McCloud*, 507 F. Supp. 3d 925, 938 (S.D. Ohio 2020) (rejecting the government’s interest because a purportedly more inclusive policy existed before); *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1097-98 (N.D. Cal. 2018) (granting preliminary injunction because, in part, the government made a “substantial and consequential change in practice” and “offered no explanation or justification for th[e] change”), *vacated by Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020), *vacated*, 59 F.4th 1010 (9th Cir. 2020) (granting rehearing en banc), *dismissed by Ramos v. Mayorkas*, No. 18-16981, 2023 WL 4363667 (9th Cir. June 29, 2023).

This way of reasoning leads to the conclusion that the Department could pursue *no* more restrictive policy advancing its interests regarding gender dysphoria. Having failed to regulate to the fullest extent of its power the first time around, the government would now be prevented from ever dealing with the issue more comprehensively. This one-way ratchet blocks shifting executive priorities and the possibility of policymaking in an area of contested and evolving medical findings. See *B.P.J.*, 146 S. Ct. at 2379-80. The most permissive policy any administration ever adopts becomes a constitutional floor. That outcome cannot be correct—certainly not under rational-basis review.

Policymakers are allowed to iterate and innovate on every issue. The Equal Protection Clause imposes “no requirement ... that all evils of the same genus be eradicated or none at all.” *Ry. Express Agency v. New York*, 336 U.S. 106, 110 (1949). “[Policymakers] instead whittle away at [problems] over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.” *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007). Secretary Mattis was thus allowed to decide that individuals “who had suffered from gender dysphoria” could “remain in the military,” App.3a, while Secretary Hegseth is equally entitled to determine that the costs and risks to readiness and cohesion presented by gender dysphoria require a stricter approach, perhaps informed by the greater experience that has come with time.

Courts may look at “[t]he historical background of [policy] decision[s],” including “[s]ubstantive departures.” *Vill. of Arlington Heights*, 429 U.S. at 267. But this inquiry seeks to identify specific motives for specific changes in response to specific events—for example, a

sudden change in zoning after the announcement of integrated housing plans. See *id.* No such event, nor any “series of official actions taken for invidious purposes,” is evident here. *Id.* The factors the Department usually considers—deployability and the treatment of comparable psychiatric conditions—point the same way the Policy does. And a new administration’s change in policy is not evidence of bad faith. The presumption of good faith this Court applies to legislatures, *Abbott v. Perez*, 585 U.S. 579, 603 (2018), should apply with at least equal force to professional military judgments. In other words, *Arlington Heights* is not a sweeping authorization for courts to compare past and present policies and pick their favorites.

Even the Administrative Procedure Act, which demands more of agencies than rational-basis review demands of anyone, does not require what the panel majority did. “An agency is not permanently bound to the first reasoned decision that it makes.” *Gonzales-Veliz v. Barr*, 938 F.3d 219, 234 (5th Cir. 2019). When an agency changes course, it must give “good reasons for the new policy,” but it “need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). If that is true under the APA—where Congress has expressed its will that courts should probe decisions—it is just as true under rational-basis review, especially in the deferential military context.

Grounding rational-basis review in a comparison of past and present policy wrongly raises the standard for the government. Requiring a new policy to serve every interest to a greater degree than the preexisting rule, or at least in a way the reviewing court prefers, adopts a

novel tailoring test applicable only to changed policies. It is a least-restrictive-means requirement, with the prior policy supplying the less restrictive means—a requirement that belongs to strict scrutiny, not rational-basis review. The Court should grant the petition and make clear that the government does not face stricter scrutiny when it regulates in an established context, as opposed to entering a new field.

The lower court also held that the Policy fails rational-basis review for insufficient tailoring. According to the court, the Policy is not reasonably related to governmental interests for a few hyper-specific populations that it covers. App.22a (“While the Mattis Policy disqualification for accession was based on a diagnosis of gender dysphoria within the past three years ..., the Hegseth Policy disqualified all persons with any history of gender dysphoria, regardless of how long ago the person had been stable and symptom-free—even if they were diagnosed as a child.”). In other words, the lower court believed that, when addressing a broad issue, the government must relate each and every restriction to each and every subclass, no matter how small.

This argument once again distorts rational-basis review. *B.P.J.* decisively rejected subclass-by-subclass analysis even for intermediate scrutiny: “[T]his Court’s equal protection precedents allow general classifications ... so long as there is at least a substantial relationship between the classification and the State’s interests.” *B.P.J.*, 146 S. Ct. at 2376. Where, as here, rational-basis review applies, that relationship need only be reasonable, not substantial, though the Policy satisfies both.

The lower court recognized that the Department’s concerns about the costs of treatment and the risks to unit cohesion and force readiness all relate to gender

dysphoria generally. App.32a. Like in the sports context, where governments often need to treat individuals with regard to their sex, *B.P.J.*, 146 S. Ct. at 2376, the military is often required to treat individuals with regard to their health conditions—even if a specific individual with, for example, depression may be able to function perfectly well for the military’s interests. The Department is “not required to conduct an individual-by-individual comparison.” *B.P.J.*, 146 S. Ct. at 2377. Rather, rational basis review is satisfied when the government deals with a general problem generally. The lower court’s “argument is in essence a backdoor argument for strict scrutiny,” *id.* at 2378, the wrong standard for this case.

In any event, the Department provides the opportunity for individualized assessment through waivers. C.A.App.53-55. The lower court shrugged off the Policy’s waiver provisions because they, too, are not narrowly tailored to its liking. App.32a-33a. So in the lower court’s view, even “case-by-case” consideration can’t satisfy rational-basis review if the government has not provided specific justification for every conceivable case. App.33a. That’s narrow tailoring by another name.

Rational basis is the standard that applies to the Hegseth Policy, and it is a deferential standard—especially in the military context, *Goldman*, 475 U.S. at 507-508, and especially when dealing with medical uncertainty, *B.P.J.*, 146 S. Ct. at 2379-80. And the panel majority’s version would not stay confined to the military. States revise their policies constantly: after elections, in response to new evidence, as priorities shift. If a policy change is itself evidence of irrationality or animus, and if every general rule must be justified subgroup by subgroup, no State policy in a contested area is safe.

Policy would thus become trapped in amber. But *Skrmetti* and *B.P.J.* foreclose that approach.

The Court should thus grant the petition before the panel majority's reformulation of rational-basis review takes root.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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