

No. 26-272

IN THE
Supreme Court of the United States

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 *Amicus Curiae* of
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America's Future,
Citizens United, Citizens United Foundation,
Public Advocate of the United States,
Public Advocate Foundation,
U.S. Constitutional Rights Legal Defense Fund,
and Conservative Legal Defense and
Education Fund
in Support of Petitioners**

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INTEREST OF THE *AMICI CURIAE*¹

Amicus curiae Lt. Gen. Michael T. Flynn (USA-ret.) is a 33-year veteran of the U.S. Army, the former Director of the Defense Intelligence Agency, and served as National Security Advisor to President Donald Trump in his first term. *Amici curiae* America's Future, Citizens United, Citizens United Foundation, Public Advocate of the United States, Public Advocate Foundation, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income taxation under Section 501(c)(3) or Section 501(c)(4) of the Internal Revenue Code, which have filed scores of *amicus curiae* briefs in federal and state courts.

These *amici* filed an *amicus* brief in this case in the D.C. Circuit almost exactly one year ago. See *Talbott v. United States*, U.S. Court of Appeals for the D.C. Circuit, No. 25-5087, Brief Amicus Curiae of Lt. Gen Michael T. Flynn, et al. (Sept. 30, 2025).

In addition, some of these *amici* filed an *amicus* brief in *Doe v. Trump* in the U.S. Court of Appeals for the D.C. Circuit when it was considering a challenge to a similar policy during the first Trump Administration. See Brief Amicus Curiae of Public

¹ It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Advocate of the United States, et al., Doe v. Trump, (Dec. 15, 2017). These *amici* also filed an *amicus* brief in this Court last year to support the stay of an injunction in a similar case. *See United States v. Shilling*, U.S. Supreme Court, No. 24A1030, Brief Amicus Curiae of Lt. Gen Michael T. Flynn, et al. (May 1, 2025).

STATEMENT OF THE CASE

On January 20, 2025, President Trump revoked former President Biden’s Executive Order (“EO”) 14004, which, for the first time in the history of the U.S. military, had eliminated most restrictions on persons identifying as “transgender” from serving in the military. One week later President Trump issued Executive Order 14183, which stated, “[i]t is the policy of the United States Government to establish high standards for troop readiness, lethality, cohesion,” and “uniformity,” among other factors, but the Biden policy was “inconsistent with the medical, surgical, and mental health constraints on individuals with gender dysphoria.” 90 *Fed. Reg.* 8757 (Feb. 3, 2025).

Pursuant to EO 14183, Secretary of Defense Hegseth promulgated a policy (“the Policy”) that “individuals with a history of gender dysphoria or related interventions are generally disqualified from military service.” Petition for Certiorari (“Pet.”) at 2. The standards, *inter alia*, “generally disqualifie[d] from military service individuals who have a history or current diagnosis of gender dysphoria, who ‘exhibit symptoms consistent with’ gender dysphoria, or who have a history of ‘cross-sex hormone therapy or sex

reassignment or genital reconstruction surgery as treatment for gender dysphoria or in pursuit of a sex transition.” *Id.* at 12. Each of the previous three administrations (Biden, the first Trump administration, and Obama) had promulgated Gender Dysphoria Policies, some more permissive than others, but each of them made at least some exclusions from military service. *Id.* at 5-12.

Respondents are “various trans-identifying individuals” who sued in the U.S. District Court for the District of Columbia, challenging the Executive Order and the Policy as a violation of equal protection. *Id.* at 13. Some respondents were serving in the military at the time, and others sought to join it. Each respondent “has a history of gender dysphoria or related interventions.” *Id.*

On March 18, 2025, the district court ruled that “Plaintiffs are likely to succeed on their claim that the Military Ban is subject to intermediate scrutiny because it classifies based on sex and transgender status, two distinct quasi-suspect classes.” *Talbott v. United States*, 775 F. Supp. 3d 283, 316 (D.D.C. 2025) (“*Talbott I*”). The district court applied *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020), where this Court performed a statutory interpretation of Title VII, to understand a constitutional provision. *Talbott I* at 316-17. Then, finding that the plaintiffs face irreparable harm and that the balance of equities and the public interest favor the plaintiffs, the district court issued a preliminary injunction against the Policy, applying the injunction nationwide in favor of the plaintiffs and any other current or aspiring

servicemember similarly situated. *Id.* at 332-34. On March 26, 2025, the district court denied a government motion to stay its decision pending appeal. *Talbott v. United States*, 775 F. Supp. 3d 445 (D.D.C. 2025).

The following day, the D.C. Circuit granted the government's motion for an administrative stay. *Talbott v. United States*, 2025 U.S. App. LEXIS 7225 (D.C. Cir. 2025). On December 9, 2025, a motions panel of the D.C. Circuit granted the Petitioner's request for a stay pending appeal. *Talbott v. United States*, 2025 U.S. App. LEXIS 32166 (D.C. Cir. 2025). The panel cited this Court's decision in *United States v. Shilling*, 145 S. Ct. 2695 (2025), to stay an injunction against the policy entered by federal court in Washington State, and concluded that the Policy likely does not violate equal protection.

On June 1, 2026, the D.C. Circuit, in an opinion by Judge Wilkins, "affirm[ed] the preliminary injunction as it pertains to the Hegseth Policy for current servicemembers, but ... vacate[d] the preliminary injunction with respect to the provisions of the Hegseth Policy applicable to those persons seeking to enlist in the military." *Talbott v. United States*, 176 F.4th 720, 729 (D.C. Cir. June 1, 2026) ("*Talbott II*"). Judge Rogers filed an opinion concurring in part and dissenting in part. Judge Walker filed a dissenting opinion, writing that "Only the Executive and Congress are responsible for systemwide military judgments about the composition of the armed forces. The Supreme Court has never assumed that role for itself. Neither has the D.C. Circuit. Not until today." *Id.* at 778 (Walker, J., dissenting).

SUMMARY OF ARGUMENT

The preliminary injunction issued and then affirmed below was based on the district court's view that transgender persons should be treated as a quasi-suspect class based on both sex and transgender status. As to sex discrimination, the district court improperly relied on *Bostock* which provided only a narrow statutory interpretation of Title VII which has no application to understanding any constitutional provision. As to transgender discrimination, this Court's decision in *United States v. Skrametti* makes clear that transgender persons do not meet any of the standards for, and have not been held to constitute, a quasi-suspect class. The circuit court based its view on an ever weaker ground — the perceived “reasonableness” of the policy. *Talbott II* at 738.

Both district and circuit courts felt at liberty to invoke the equal protection component of the Fifth Amendment based on their repeated, but unsupported, accusations of Trump Administration animus. Three of the four judges below appear to have embraced the transgender agenda, but their policy preferences provides no basis whatsoever to impute animus or to override a military readiness policy. The courts below rejected any concerns about service by transgender persons based on their belief that transgenderism is entirely normal, disregarding evidence of higher suicide rates, etc. Judge Walker's dissent detailed the evidence supporting the challenged policy which was “ground[ed] in national security concerns” and chastised the panel majority for imputing animus.

The courts below wrote off every reason offered by the military for the policy, forgetting this Court’s warning that federal judges “‘have less competence’ here than in almost any ‘area of governmental activity.’” Then based on imputed animus, the courts applied the atextual equal protection “component” of the Fifth Amendment as if this case did not involve a military readiness issue.

These *amici* are unaware of any case where the federal judiciary has taken control of any military readiness matters, and certainly not based on equal protection grounds. Innumerable decisions of this Court have deferred to such military decisions, coming close to, but never articulating, what may be the better view — that the judiciary has no jurisdiction whatsoever over such matters. Whether review is based on deference or jurisdiction, the Petition should be granted.

ARGUMENT

I. BOTH THE DISTRICT AND THE CIRCUIT COURTS BASED THEIR DECISIONS ON THEIR ERRONEOUS VIEW THAT TRANSGENDER PERSONS CONSTITUTE A QUASI-PROTECTED CLASS AND THAT THERE WAS NO MILITARY READINESS REASON FOR THE POLICY.

On March 18, 2025, the district court preliminarily enjoined the challenged policy solely based on plaintiff’s theory that the challenged policy “violates the equal protection component of the Due Process

Clause of the Fifth Amendment.” *Talbott I* at 298; *see also id.* at 298 n.12. There were two primary bases for that decision, neither of which is valid.

First, the district court ruled that “Plaintiffs are likely to succeed on their claim that the Military Ban ... classifies based on sex and transgender status, two distinct quasi-suspect classes.” *Id.* at 316. The assertion that this ban violates equal protection because of sex was based on *Bostock v. Clayton Cnty.*, 590 U.S. 644, 660 (2020), which decided that firing an employee for being transgender or homosexual constituted a violation of a statute, Title VII, which prohibits discrimination “because of sex.” These *amici* believe that this was a deeply flawed decision, inventing a right based on statutory language written to achieve an entirely different purpose than Congress was addressing when it adopted the Civil Rights Act of 1964.² Additionally, and as Justice Kavanaugh explained in dissent, that decision mangled “textualism” by violating longstanding rules of construction by taking a phrase completely out of its context, defining it, and applying it into a different setting.³ However, even those who believe *Bostock* was correctly decided will recall that Justice Gorsuch explained the ruling was a narrow statutory interpretation, applying to no other law, and certainly

² Some of these *amici* filed an *amicus* brief in this case. *See* U.S. Supreme Court, Nos. 17-1618 & 17-1623, Brief Amicus Curiae of Public Advocate of the United States, et al. (Aug. 23, 2019).

³ *See Bostock* at 783-89 (Kavanaugh, J., dissenting).

not applying to the Equal Protection Clause or any other constitutional protection. *See Bostock* at 681.

As to the justification that the injunction protected a “quasi-suspect class” of transgender persons, that basis was eliminated exactly three months after the district court’s March 18, 2025 ruling, when this Court decided *United States v. Skrmetti*, 145 S. Ct. 1816 (2025).⁴ There, this Court explicitly noted that it “has not previously held that transgender individuals are a suspect or quasi-suspect class” (*id.* at 1832) and confined the statutory interpretation in *Bostock* to Title VII only.

The D.C. Circuit’s decision was issued June 1, 2026, nearly a full year after *Skrmetti*, and thus cannot be excused for its apparent continued reliance on *Bostock*. *Talbott II* at 728, 740. Indeed, the circuit court tried to draw support from *Skrmetti* by narrowing its holding to only sanctioning a statutory “prohibition on the prescription of puberty blockers and hormones” for minors, believing not what the Court said, but rather creatively relying on what it felt this Court had “strongly implied.” *Id.* at 743. The circuit court disregarded the views of Justice Barrett (joined by Justice Thomas) and Justice Alito — half of the 6-justice majority — who wrote separately to explain why transgender status could not qualify as a suspect or quasi-suspect class. *See Skrmetti* at 1851-53 (Barrett, J., concurring) and *id.* at 1855 (Alito, J.,

⁴ Some of these *amici* filed an *amicus* brief in this case. *See* U.S. Supreme Court, No. 23-477, Brief of Amici Curiae America’s Future, et al. (Oct. 15, 2024).

concurring). Those justices explained the lack of an obvious, immutable, discrete characteristic of transgender persons that could in any way be comparable to race or sex, as well as the ability of people to enter or leave the category, and the absence of a history of legal discrimination.

Second, the district court asserted that the Government failed to “show that burdening these Plaintiffs’ equal protection rights is related to furthering a government interest.” *Talbott I* at 313. The circuit court adopted this same view. *Talbott II* at 740-42. The dissent was particularly strong in criticizing this holding, based on the record:

Military service, the [February 26, 2025 policy] memo emphasized, requires personnel who are “mentally and physically fit for duty” and able to “deploy, fight, and win, including in austere conditions and without the benefit of routine medical treatment or special provisions.” The memo cited a 2021 Department of Defense study finding that “nearly 40% of Service members with gender dysphoria ... were non-deployable over a 24 month period” and a 2025 medical-literature review reporting significantly elevated rates of suicidal ideation, suicide attempts, and psychiatric diagnoses among transgender people. Continued service by people with gender dysphoria, the memo concluded, was incompatible with the military’s “rigorous standards and national security imperative to

deliver a ready, deployable force.” [*Talbott II* at 759-60 (Walker, J., dissenting).]

Judge Walker found this Court’s ruling in *Trump v. Hawaii*, 585 U.S. 667 (2018) particularly applicable, explaining that the policy “‘has a legitimate grounding in national security concerns’ as do all military readiness policies. And courts must ‘uphold the policy so long as it can reasonably be understood to result from a justification of constitutional grounds.’” *Talbott II* at 777 (Walker, J., dissenting) (citation omitted).

II. THE COURTS BELOW IMPUTED ANIMUS TO THE MILITARY POLICY WITHOUT BASIS, THEREBY REVEALING WHAT COULD BE VIEWED AS JUDICIAL ANIMUS TOWARD THE TRUMP ADMINISTRATION.

Both the district and the circuit courts repeatedly faulted the Trump Administration for crafting a military force readiness policy they claimed was “soaked in animus and dripping with pretext.” *Talbott I* at 326 and approvingly quoted in *Talbott II* at 728. Before addressing the supposed evidence for such a proposition, we collect the accusations from the circuit court opinion, often quoting from the district court opinion:

- “both arbitrary and based upon **animus**.” *Id.* at 726 (emphasis added);
- “the Hegseth Policy still violated equal protection because it was an ‘**unadulterated** expression of **animus**.’” *Id.* (emphasis added).

The courts below describe the policy as hostile “targeting”:

- “the Hegseth Policy, as well as EO 14183, a White House Fact Sheet that accompanied that Executive Order, Secretary Hegseth’s contemporaneous tweet regarding the Policy, as well as other factors demonstrat[ed] that the government ‘has **targeted** transgender persons writ large.’” *Id.* at 728-29 (emphasis added);
- “the record shows that the purpose of the Hegseth Policy is to **target** applicants and servicemembers who express what the Administration believes is a ‘false gender identity.’” *Id.* at 729 (emphasis added);
- “The extirpation from the military of all persons with a ‘false gender identity’ was Secretary Hegseth’s explicit goal. **Targeting** persons with a history of gender dysphoria was merely the means of achieving that end.” *Id.* at 735 (emphasis added).

Then these judges went even further to attack the Trump Administration and the Government’s position:

- “**disparaging** characterizations of American citizens.” *Id.* at 726 (emphasis added);
- “driven by the **bare desire to harm** a politically unpopular group.” *Id.* (emphasis added);
- “Executive Order **denouncing** transgender people and the whole concept of transgender identity as inconsistent with ‘biological truth.’” *Id.* at 734 (emphasis added);

- “(‘EO 14183’), which emphatically **rejected the legitimacy** of people who identify as transgender and withdrew federal recognition of transgender people.” *Id.* (emphasis added).
- “The central tenet of EO 14168 was that transgender people perpetrate a **lie**.” *Id.* (emphasis added);
- “In sum, the Commander-in-Chief declared transgender people as categorically unfit for military service explicitly because of their gender identity. To add insult, the President labeled transgender persons as **dishonorable, undisciplined, arrogant, selfish liars**.” *Id.* (emphasis added).

By any standards, these courts below have gone over the top. Evidencing the bare desire to harm? From these comments, it is clear that three of the four judges below are completely on-board with the transgender movement, demonstrating overt hostility to those who disagree. Fortunately, the transgender craze is even losing support of the American People, and some of its strongest supporters, including those who have profited financially from providing so-called transgender care to minors, have gone into retreat mode.

The Cass Review (2024) reported the lack of evidence behind “transgender care.”⁵ Our own Department of Health and Human Services (“HHS”) has joined the UK National Health Service in

⁵ Hilary Cass, “The Cass Review Final Report,” *nationalarchives.gov.uk* (Apr. 2024).

reversing course on irreversible treatments. HHS released a peer-reviewed study highlighting the dangers of surgical and chemical interventions attempting to reverse nature.⁶ The American Society of Plastic Surgeons (“ASPS”) announced that it recommends that surgeons not operate on school-age children.⁷ A spokesman for the American Medical Association (“AMA”), which previously appeared to adopt the politicized WPATH Standards of Care wholesale, supported that change, saying that “the evidence for gender-affirming surgical intervention in minors is insufficient for us to make a definitive statement. In the absence of clear evidence, the AMA agrees with ASPS that surgical interventions in minors should be generally deferred to adulthood.”⁸

Apparently designed to emphasize their disgust with the Government’s position, the district court used strong language (repeated by the circuit court), that: “the government had ‘regurgitat[ed]’ its arguments from before....” *Talbott II* at 729. Traditionally used synonyms, such as “recycled,” “restated,” “rehashed,”

⁶ Dept. of Health and Human Services, “Supplement to Treatment for Pediatric Gender Dysphoria: Review of Evidence and Best Practices” (Nov. 19, 2025).

⁷ See American Society of Plastic Surgeons, “Position Statement on Gender Surgery for Children and Adolescents” (Feb. 3, 2026); Paige Cunningham, “First major medical group opposes gender transition surgeries for youth,” *Washington Post* (Feb. 3, 2026).

⁸ “Fact-Checking Claims About Our American Medical Association Coverage,” *New York Times* (Mar. 27, 2026).

or “parroted” were not chosen in favor of a more colorful verb.

It is always an interesting exercise to find the best way to refute a baseless accusation, such as responding to the proverbial question, “when did you stop beating your wife?” However, in his dissent, Judge Walker explained what the other two judges chose to ignore, that, far from being animus-based:

The policy ... reflects a synthesis of military, medical, and operational judgments of the sort courts have consistently declined to reweigh. One might *disagree* with the military’s conclusions, but it’s hard to look at the reasons and evidence the military provided in its action memo and say that the military acted “unthinkingly” or “reflexively and not for any considered reason.” [*Id.* at 772 (Walker, J., dissenting).]

Judge Walker concluded: “the policy is not ‘based upon animus.’ It ‘has a legitimate grounding in national security concerns’ — as do all military readiness policies.” *Id.* at 777 (Walker, J., dissenting). Since “courts must ‘uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds,’” he found that the Plaintiffs’ arguments “conflict[] with the military’s common practice in areas undoubtedly free of animus [and] conflict with the plaintiffs’ own words. None of them proves animus.” *Id.* (citations omitted).

III. THE COURTS BELOW DISREGARDED ALL THE REASONS OFFERED IN SUPPORT OF THE CHANGE IN POLICY.

The district court opinion is grounded not in law, but in high-sounding idealism, as it sought to establish the predicate for the takeover of the composition of the U.S. military by a single, unelected, federal district judge. The district court states that the singular “premise” of the court’s Opinion is “simple” — “that ‘all people are created equal,’ ... Nothing more and certainly nothing less.” *Talbott I* at 293. Based on that premise, any district judge armed with the so-called “equal protection component” of the Fifth Amendment can feel empowered to micromanage the composition of the U.S. Armed Forces. The district court then treated this case as a garden-variety Fourteenth Amendment equal protection case.⁹

⁹ In cases such as this, it is worth remembering that the Fifth Amendment has no “equal protection clause.” The only reason this Court discovered such an “equal protection component” was that it would be “unthinkable to impose the rule of *Brown v. Board of Education*, 347 U.S. 483 (1954) on the states, while allowing the District of Columbia to continue “separate but equal” schools. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). This rule violates the obvious fact that the framers of the Fourteenth Amendment did not believe equal protection was part of due process since they separately included both protections, and a 1791 text cannot be read to incorporate a principle written into the Constitution in 1868. This lack of textual or historical support has been pointed out recently by Justice Thomas. See *United States v. Vaello Madero*, 596 U.S. 159, 171 (2022) (“the text and history of the Fifth Amendment’s Due Process Clause provide limited support for reading into that provision an equal protection guarantee.” (Thomas, J., concurring)). He is not alone. John

Even if a general rule has developed that the scope of equal protection against state action under the Fourteenth Amendment, and federal action under the Fifth Amendment, is comparable, there will always be differences in application based on the context of the claimed violation. Here the context is a rule for federal military — the area where federal courts should have the greatest reluctance to use equal protection rules to override the Executive’s authority over the military. And, as Judge Walker stated regarding military matters, the federal judges “‘have less competence’ here than in almost any ‘area of governmental activity.’” *Id.* at 775 (Walker, J., dissenting) (citing *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)). Unfortunately, the limitations inherent in the military context were largely ignored by the district court and the circuit panel majority.

The district court believed it had the authority to prefer the Biden EO over the Trump EO because “[n]o one knows what [President Trump] relied on, if anything.... This was rushed by any measure.” *Talbott I* at 302. The district court claimed that “the Hegseth Policy provide[s] nothing to support Defendants’ view that transgender military service is inconsistent with military readiness,” and that the prior policy “‘was based on years of thoughtful policymaking supported by peer-reviewed scientific research.”” *Id.* at 303, 308.

Hart Ely called this “reverse incorporation” doctrine “gibberish both syntactically and historically.” John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980) at 32.

At the same time, the district court acknowledged that the Government relied on “(1) the ‘SecDef Memorandum’ from February 22, 2018 (*i.e.*, the Mattis Policy); (2) ‘a 2021 review conducted by ... the Accession Medical Standards Analysis and Research Activity,’ (AMSARA Report), (3) ‘[a] 2025 medical literature review,’ (Medical Literature Review), and (4) ‘a review of cost data.’” *Id.* at 303. It appeared to concede that a presumption of deference is owed, conceding that:

The Mattis Policy resulted from the work over many months of “a Panel of Experts comprised of senior uniformed and civilian Defense Department and U.S. Coast Guard leaders.” ... It “included combat veterans to ensure that our military purpose remained the foremost consideration.” ... And it “met with and received input from transgender Service members, commanders of transgender Service members, military medical professionals, and civilian medical professionals with experience in the care and treatment of gender dysphoria.” [*Id.*]

But in the end, the court discounted all of the Government evidence, in favor, apparently, of more “persuasive data,” consisting of four declarations attached to the plaintiffs’ complaint. *Id.* at 308-09. Translated, the district court believed the Biden policy is preferable to the Trump policy.

This Court has repeatedly counseled that “judges are not given the task of running the Army.... The

military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.” *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953).

Even when considering constitutional challenges, the judiciary historically has been far more deferential to the Government’s judgment in military matters than in civilian matters. As the Government noted in the circuit court below, this Court has made clear that “judicial ‘review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.” Appellant’s Brief (“Aplt. Br.”) at 23 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)).

Until now, “courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.” *Dep’t of the Navy v. Egan*, 484 U.S. 518, 530 (1988). It has been understood that courts should “indulge the widest latitude of interpretation to sustain [the President’s] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring).

The Supreme Court has even deferred to Congress in military matters in cases of differential treatment

between the sexes. In 1981, the Court upheld the male-only draft as within the elected branches' power to prescribe:

The Senate Report, evaluating the testimony before the Committee, recognized that “[the] argument for registration and induction of women ... is not based on military necessity, but on considerations of equity.” S. Rep. No. 96-826, p. 158 (1980). **Congress was certainly entitled, in the exercise of its constitutional powers to raise and regulate armies and navies, to focus on the question of military need rather than “equity.”** [*Rostker v. Goldberg*, 453 U.S. 57, 79-80 (1981) (emphasis added).]

The district court claimed that it need not “rubber-stamp illogical judgments based on conjecture.” *Talbott I* at 312. However, given the “medical literature review” cited by the Government here of increased suicide risks and other mental health issues among the “transgender” population, the Defense Department’s determinations of injury to military readiness are entitled to deference. At minimum, the case is all the stronger given that the Policy is not unlike the policy that governed the U.S. military until 2015.

Just as Congress was sanctioned to do in *Rostker*, the President in this case is “certainly entitled, in the exercise of [his] constitutional powers ... to focus on the question of military need rather than ‘equity.’” *Rostker* at 80. It is not the job of the courts to substitute their

preferred policy judgments for the considered military decisions of the President and the Defense Department. The Government noted in the circuit court that the role of courts is rather to “give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.” *Aplt. Br.* at 28-29 (quoting *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008)). This is because “complex, subtle, and professional decisions as to the composition ... of a military force” are “essentially professional military judgments.” *Winter* at 24 (citation omitted).

IV. THE DISTRICT COURT INJUNCTION AFFIRMED BY THE CIRCUIT COURT USURPED THE AUTHORITY OF THE POLITICAL BRANCHES.

A. The Constitution Does Not Empower the Judiciary to Second-Guess Military Readiness Policies.

Although this case has been argued in terms of the extent of federal deference given to military readiness policies, it is not clear that federal courts have any jurisdiction to entertain such challenges, particularly those based on the Fifth Amendment’s Equal Protection component. The Constitution designates the President as the nation’s “Commander in Chief.” Article II, sec. 2. The congressional role is discussed, *infra*. Article III makes no mention of a role for the judiciary. These *amici* are unaware of any prior successful challenge in the history of our Republic.

Intrusions by the judiciary into such matters is not a matter to be taken lightly. Alexander Hamilton clearly explained “[t]he judiciary ... has **no influence over ... the sword....**” *Federalist* 78 (emphasis added). Joseph Story explained why the Framers vested command of the military in a single hand:

The command and application of the public force ... are powers so obviously of an executive nature, and require the exercise of qualities so peculiarly adapted to this [executive] department, that a well-organized government can scarcely exist when they are taken away from it. Of all the cases and concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. Unity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a **single magistrate is entrusted exclusively with the power.**¹⁰

The Constitution vests in Congress plenary authority to “make Rules for the Government and Regulation of the land and naval Forces.” Article I, sec. 8, cl. 14. This Court has asserted that it: “has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own

¹⁰ Joseph Story, II Commentaries on the Constitution of the United States, 3d ed. at 360 (1858) (emphasis added).

during its long history.” *Parker v. Levy*, 417 U.S. 733, 743 (1974). *Parker* relied on an 1886 decision of this Court, in turn relying on English cases, which explained the limitation of judges to decide certain matters:

[M]ilitary or naval officers, from their training and experience in the service, are **more competent judges than the courts of common law....** Now this procedure is founded upon the usages and customs of war, upon the regulations issued by the Sovereign, and upon old practice in the army, as to all which points common law judges have no opportunity, either from their law books or from the course of their experience, to inform themselves. [*Smith v. Whitney*, 116 U.S. 167, 178-79 (1886) (emphasis added).]

This principle has carried through the history of our country, and this Court has agreed that “[o]rderly government requires that the judiciary be ... scrupulous not to interfere with legitimate Army matters....” *Orloff* at 94. In 1983, the High Court recognized “the special relationships that define military life.” *Chappell v. Wallace*, 462 U.S. 296, 305 (1983). Even activist, jurist, and civil libertarian Chief Justice Earl Warren acknowledged the need for the judiciary to adopt essentially a “‘hands-off’ attitude” to the military. “Many of the problems of the military society are, in a sense, alien to the problems with

which the judiciary is trained to deal.”¹¹ *See also Solorio v. United States*, 483 U.S. 435, 448 (1987) (“[t]he notion that civil courts are ‘ill equipped’ to establish policies regarding matters of military concern is substantiated by experience....”).

The courts below felt at liberty to disregard military cohesion concerns, but, as then-Chairman of the Joint Chiefs of Staff General Colin Powell testified before the Senate Armed Services Committee, any breach of military cohesion, threatens the lives of those in the military:

To win wars, we create **cohesive teams** of warriors who will bond so tightly that they are prepared to go into battle and give their lives if necessary for the accomplishment of the mission and for the **cohesion of the group** and for their individual buddies. We cannot allow anything to happen which would disrupt that **feeling of cohesion** within the force.¹²

The principle involved here has been described as deference, but the better view is that the judiciary has no authority to second-guess the President and Congress in matters involving military readiness by

¹¹ Earl Warren, “The Bill of Rights and the Military,” 37 N.Y.U. L. Rev. 181, 187 (1962).

¹² S. Rep. No. 112, 103d Cong., 1st Sess. at 275, testimony of General Colin L. Powell, U.S. Army, Chairman of the Joint Chiefs of Staff, before the Senate Armed Services Committee (July 20, 1993) (emphasis added).

applying rules designed and developed for the private sector.

B. Congress Has Not Acted Despite Shifting Policies Concerning Transgender Persons.

The authority of the Secretary of Defense originated with the first Congress when, on March 4, 1789, Congress delegated broad authority.¹³ Congress’s authority to “make rules” for the military continues to today, delegated to the Secretary of Defense, who is: “the principal assistant to the President in all matters relating to the Department of Defense.” 10 U.S.C. § 113(b). A half-century after the Constitution was ratified, this Court asserted: “The power of the executive to establish rules and regulations for the government of the army, is undoubted.” *United States v. Eliason*, 41 U.S. 291, 301 (1842). “Such regulations **cannot be questioned** or defied, because they may be thought unwise or mistaken.” *Id.* at 302 (emphasis added). This includes the authority to determine which persons or classes of persons are eligible for enlistment and the terms of such enlistment.

This Court has recognized that “‘it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.’... The responsibility for determining how best our Armed Forces shall attend to that business rests with

¹³ 1st Congress, Chapter VII, Sess. 1, 1 Stat. 49-50 (1789).

Congress ... and with the President.” *Rostker* at 70-71 (citations omitted). Here, both elected branches are in accord. Secretary Hegseth has exercised his delegated authority, as did his four immediate predecessors, to determine under what conditions “transgender” troops could serve or not. This Court quite properly never has asserted authority to reverse any of those policies.

Rule by judges would have devastating consequences if allowed to continue unchecked. Should this Court fail to reverse this unconstitutional injunction, it will have obliterated the constitutional entrustment of military decisions to the elected branches, leaving some 400 unelected judges poised to each impose their personal preferences as national military policy. It would usher in the “very definition” of the threat Justice Story warned of: “enfeebl[ing] the system, divid[ing] the responsibility, and not unfrequently defeat[ing] every energetic measure” the military might undertake. Story at 360. “Unity of plan, promptitude, activity, and decision” would all be paralyzed by 400 decision-makers. *Id.* One President and one Secretary of Defense would be replaced by 400-plus Presidents/Secretaries in black robes. The destruction wreaked on military readiness and capabilities would be incalculable.

Both elected branches — the only two with constitutional roles to play in military decision-making — have rendered their verdict. The district and circuit courts below, with no constitutional role, disagree. This Court’s responsibility is to end the usurpation of authority exercised below to make decisions constitutionally reserved to the other branches.

Indeed, as this Court has recognized, “it is difficult to conceive of an area of governmental activity in which the courts have less competence.” *Gilligan* at 10. Accordingly, it held:

The complex, subtle, and professional decisions as to the **composition**, training, equipping, and control of a **military force** are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The **ultimate responsibility** for these decisions is appropriately **vested in branches** of the government which are periodically **subject to electoral accountability**. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system. [*Id.* at 10 (bold added).]

Former U.S. Attorney General Edwin Meese, who retired from the Army Reserve as a colonel, explained the principle at stake:

Regardless of the merits or substance of the policy in question, when judges refuse to respect the legitimate constitutional authority of the Executive and Legislative branches, and through preliminary injunctions order the military to replace long-established qualification standards with untested practices imposed by an outgoing

administration, the rule of law has given way to the edict of unelected judges.¹⁴

CONCLUSION

For the foregoing reasons, these *amici* urge the Court to grant the petition.

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¹⁴ Edwin Meese, “The Solemn Duty of Government and the Military,” *Heritage Foundation* (Mar. 28, 2018).