IN THE
SUPREME COURT OF THE UNITED STATES

No. 24A1030

UNITED STATES OF AMERICA, *et al.*,
Applicants,

v.

EMILY SHILLING, *et al.*,
Respondents.

On Application for Stay Pending Appeal

BRIEF *AMICUS CURIAE* OF LT. GEN MICHAEL T. FLYNN (USA-Ret.), AMERICA'S FUTURE, CITIZENS UNITED, 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 APPLICATION FOR STAY OF INJUNCTION

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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, 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 hundreds of *amicus curiae* briefs in federal and state courts. 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 Advocate of the United States, *et al.* (Dec. 15, 2017).

STATEMENT OF THE CASE

On January 20, 2025, "President Trump issued Executive Order ('EO') 14148, revoking President Biden's Executive Order 14004, which permitted transgender individuals to serve openly" in the U.S. military. *Shilling v. United States*, 2025 U.S. Dist. LEXIS 57869, at *3 (W.D. Wash.). The following week, "the President issued Executive Order 14183," requiring Secretary of Defense Pete Hegseth to discharge all service members identifying as "transgender" within 60 days. *Id.* at

[1] It is hereby certified 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.

*3-4. Hegseth issued his policy on February 26, requiring the military to begin the removal process on March 26. *Id.* at *4.

Seven plaintiffs sued to stop implementation of the policy, led by "Emily Shilling," the named plaintiff, a biological male identifying as female, who "transitioned" during service in the Navy in 2021. *Id.* at *5. The district court for the Western District of Washington ruled that the Hegseth policy "discriminates on basis of transgender status" in violation of the Fifth Amendment's equal protection component, and applied intermediate scrutiny. *Id.* at *39. Citing *Bostock v. Clayton Cnty*, 590 U.S. 644 (2020),which was a case of statutory interpretation, the district court declared that the policy is "discrimination ... based on sex." *Id.* at *42. It ruled that the policy failed intermediate scrutiny, and that plaintiffs were likely to succeed on their equal protection claim. *Id.* at *49. It also ruled that they were likely to succeed on their free speech claims, because the policy requires the use of biologically accurate male/female pronouns to refer to service members. *Id.* at *61, 63. And it ruled that the plaintiffs were likely to succeed on their procedural due process claim. *Id.* at *70.

Despite the fact that President Trump's Executive Order merely revoked President Biden's Executive Order, the district court granted a nationwide injunction against the reversal in policy, barring defendants from enforcing the executive orders or the Hegseth policy against any service member. *Id.* at *84.

On April 18, 2025, the Ninth Circuit Court of Appeals denied the Administration's request to stay the injunction while litigation is underway, finding that the government had not demonstrated irreparable harm disregarding the government's showing of impairment of force readiness and other military justifications. *See Shilling v. Trump*, 2025 U.S. App. LEXIS 9437 (9th Cir. 2025).

The military readiness policies of the Trump Administration are being rewarded with increased retention in the Army. *See* "This Week in DOD: 100 Days of Success, Accelerated Retention, Bringing Back Discharged Service Members" *U.S. Dept. of Def.* (Apr. 25, 2021) ("The Army revealed, April 22, 2025, that it had surpassed its fiscal year 2025 reenlistment goal by retaining 15,600 soldiers, 800 more than the target of 14,800. That feat was accomplished well before the end of the fiscal year in September.").

SUMMARY OF ARGUMENT

As the government's Application for Stay notes, this Court was asked to resolve the same issue raised here — restricting who may serve in the nation's Armed forces — during President Trump's first term. The matter came to this court after multiple district courts had issued injunctions against the Mattis Policy of 2018. "This Court stayed those injunctions, *see Trump v. Karnoski*, 586 U.S. 1124 (2019); *Trump v. Stockman*, 586 U.S. 1124 (2019), and it should do the same here." Application for Stay ("App.") at 2. Since "the district court failed to identify any relevant difference in the 2025 policy that would justify a different conclusion here"

(id.), that decision should end the case. Should this Court believe the 2025 policy is different in some material respect, these *amici* present additional arguments as to why Plaintiffs have not demonstrated a likelihood of success on the merits.

First, the district court basically treated this case as if it arose in a civilian, not military, context. Then it disregarded all of the compelling reasons for the rule change offered by the government. There was no deference given, and even no self-awareness of how profoundly unsupported the district court decision was. Thus far, the case has been litigated in terms of deference, which is addressed in Section I, *infra.*

However, there is reason to believe that the Framers of our Constitution intended that the courts would have no authority — no jurisdiction — to second guess decisions by the Executive Branch, authorized by Congress, on matters of force readiness. Although not stated in absolute jurisdictional terms, numerous authorities advance the view that such decisions belongs only to the President and Congress, not the Courts. *See* Section II, *infra.*

The district court improperly relied on this Court's *Bostock* decision, as demonstrated in Section III, *infra.* Lastly, these *amici* present in Section IV, *infra*, some additional reasons that force readiness and force cohesion is being damaged each and every day that the injunction is allowed to remain in effect.

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY DISREGARDED ALL THE REASONS OFFERED IN SUPPORT OF THE CHANGE IN POLICY.

The district court treated this case as a garden-variety civil rights case addressing discrimination outside of the military context, giving no attention to the reasons and interests asserted by the President and the Secretary of Defense in this case. Until the district court's decision, it had been the practice that one President's Executive Order may be overridden by a succeeding President's Executive Order. However, the district court apparently believed, as George Orwell discussed in Animal Farm, that "all executive orders are equal, but some executive orders are more equal than others." The court believed it had the authority to prefer the Biden EO, because the Trump EO evidenced a "rush to issue the Military Ban and Hegseth Policy with no new military study, evaluation, or evidence." *Shilling* at *46.

The court basically attacked the Defense Department for "its irrational use of the evidence that it relies on, [and] the lack of evidence it provides and the ample evidence it simply ignores." *Id.* at *48. Translated, the district court believed the Biden policy is preferable to the Trump policy. However, this would be an excellent case for the court to apply "the shoe on the other foot" rule. If a district court judge can enjoin the exercise of this President's and this Secretary of Defense's authority over the military, then that same rule should apply to a next President of a different party, with whom the district could would likely find to act reasonably. In

the process, Presidential elections will be robbed of their significance, as the will of the American people is overridden by the policy preferences of an unelected judge.

The district court mentioned, "[r]egarding suicide risk [among individuals with gender dysphoria], the government relies on the medical literature review." *Id.* at *49. The court further acknowledged that the government relied on its "Accession Medical Standards Analysis and Research Activity (AMSARA)." *Id.* at *22. It also acknowledged that the government relied on the DoD's 2018 "Mattis Policy" which was in effect under the first Trump Administration. It appeared to concede that "a presumption of deference is owed, because the Mattis Policy appears to have been the product of independent military judgment." *Id.* at *46 (citing *Karnoski v. Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019)). But in the end, the court discounted all the government evidence, in favor, apparently, of more "persuasive data," consisting only of four plaintiff declarations attached to the complaint.

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 notes, this Court has "explain[ed] 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.'" App. at 17 (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).

This Court has even deferred to Congress in military matters even in cases of differential treatment between the sexes. In 1981, this 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, 102 (1981) (emphasis added).]

The district court claimed that it "need not defer to unreasonable uses or *omissions in evidence*." 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. The case is all the stronger given that the Hegseth Policy is essentially identical to the policy for the entire history of the U.S. military until 2015.

As Congress was allowed 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 102. 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. As the government notes in its Application for Stay, 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." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (*quoting Goldman* at 507). App. at 2. As the government explains, this is because "complex, subtle, and professional decisions as to the composition ... of a military force" are "essentially professional military judgments"). App. at 17 (quoting *Winter* at 24) (citation omitted).

II. THE DISTRICT COURT INJUNCTION VIOLATES THE SEPARATION OF POWERS.

A. The Constitution Does Not Empower the Judiciary to Second Guess the Military Personnel Readiness Policies of the President and Secretary of Defense.

The district court states:

> Plaintiffs' primary claim is that the Military Ban, and the Hegseth Policy, and other guidance implementing it, violate their Fifth

> Amendment Constitutional right to Equal Protection under the law. They argue that the government is not free to disregard this protection even when it acts in the area of military affairs, there is no "different equal protection test" for the "military context." [*Shilling* at *34.]

The district court then states its "first step in evaluating an Equal Protection claim is to 'determine what level of scrutiny applies'" (*id* at *36) and views the fact this challenge arises in the context of the military as only a minor matter, only allowing for whatever deference the district judge may choose to grant to the Executive Branch officials (*id*. at *37). Its decision reveals that the deference being given is very little indeed. It concludes: "the court need not defer to unreasonable uses or omissions in evidence." *Shilling* at *37.

Believing it had jurisdiction to review the challenged decision, the district court felt free to impose its own policy preferences, declaring the Hegseth Policy invalid. The district court gave little deference to how the Constitution bears on this issue. It never considered whether the issue of military readiness might be an area where the political branches are accountable not to the courts, but only to the People. Nonetheless, there is good reason to believe that the decision regarding military readiness challenged here has been Constitutionally vested in the Executive and Legislative branches, with no role whatsoever for the judiciary to play. Thus, the issue is a jurisdictional one, and the district judge would be jurisdictionally prevented from overruling the decision.

Under Article II, section 2, the President is the nation's only Commander-in-Chief. Congress was given the power "[t]o raise and support Armies" (Art. I, sec. 8,

cl. 12), and, importantly here, "[t]o make Rules for the Government and Regulation of the land and naval Forces" (*id*. at cl. 14). Article III certainly makes no mention of a role for the judiciary over military readiness decisions.[2]

The judiciary's recognition of limitations on its jurisdiction is not a matter to be taken lightly, as James Madison warned our liberty depends upon it: "the preservation of liberty requires, that the three great departments of power should be separate and distinct." *Federalist 47*. Federalist 78 actually states "[t]he judiciary ... has **no influence over either the sword**...." *Federalist 78* (emphasis added). Since the district court's belief that it can supervise the military was apparently accepted by the Ninth Circuit, it is worth revisiting first principles, including Joseph Story's explanation of the reasons 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 interested exclusively with the power.[3]

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[2] *See* S. Grammel, "Old Soldiers Never Die: Prior Military Service and the Doctrine of Military Deference on the Supreme Court," 223 MIL. L. REV. 998, 992 (2015).

[3] J. Story, II Commentaries on the Constitution of the United States, 3d ed, at 361 (Little, Brown & Co. 1858).

When the Constitution vests in Congress authority to "make Rules for the Government and Regulation of the land and naval Forces" (Art. I, sec. 8, cl. 14), Congress's plenary power to establish a complete military justice system for service members in "service-connected" capacities has been recognized: "[t]his Court 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 during its long history." *Parker v. Levy*, 417 U.S. 733, 743 (1974). *Parker* relied on a 1886 decision of this Court, 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 as scrupulous not to interfere with legitimate Army matters...." *Orloff* at 94. Its rationale was restated in 1983: "the special relationships that define military life have supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."

Chappell v. Wallace, 462 U.S. 296, 305 (1983) (internal quotation omitted). Thus, "[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment." *Id.* at 300.

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. "The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal."[4] *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....").

Senator Sam Nunn (D-GA), the longtime chairman of the Senate Armed Services Committee, spoke to the unique operational reality of military service: "Military personnel policy cannot be based upon what might work in the white collar setting of a stateside garrison."[5] He continued:

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[4] E. Warren, "The Bill of Rights and the Military," 37 N.Y.U. L. REV. 181, 186-87 (1962).

[5] S. Nunn, "The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases," 29 WAKE FOREST L. REV. 557, 563 (1994).

> The armed forces routinely restrict the opportunities for service on the basis of circumstances such as physical condition, age, sex, parental status, educational background, medical history, and mental aptitude. These restrictions primarily reflect professional military judgment as to **what categories of personnel contribute to overall combat effectiveness**.... [*Id*. at 559 (emphasis added).]

Then-Chairman of the Joint Chiefs of Staff General Colin Powell testified before the Senate Armed Services Committee that any threat to military cohesion, such as that being prevented by the Hegseth policy, threatens the lives of those in the military:

> [T]o 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.[6]

While the principle has been described as deference, courts are reluctant to accept any limitation on their own power. The better view is that the judiciary has no authority, no jurisdiction, to second-guess the Hegseth Doctrine affecting military readiness under equal protection rules designed and developed for the private sector. This view is strengthened by a review of Congress' powers in this area.

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[6] S. REP. NO. 112, 103d Cong., 1st Sess. 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).

B. Congress Has Delegated Its Power to the Secretary of Defense to Impose the Hegseth Policy.

Congress has broadly delegated its constitutional authority "[t]o make Rules for the Government and Regulation of the land and naval Forces" (Art. I, sec. 8, cl. 14) to Secretary Hegseth:

> The Secretary is the principal assistant to the President in all matters relating to the Department of Defense. Subject to the direction of the President and to this title and section 2 of the National Security Act of 1947 (50 U.S.C. 3002) he has authority, direction, and control over the Department of Defense. [10 U.S.C. § 113(b).]

Under previous legislation, this Court asserted: "**The power of the executive to establish rules and regulations for the government of the army, is undoubted**." The Court addressed the Secretary's powers:

> **The Secretary of War** is the regular constitutional organ of the President for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority. **Such regulations cannot be questioned or defied, because they may be thought unwise or mistaken**. [*United States v. Eliason*, 41 U.S. 291, 301, 302 (1842) (emphasis added).]

Secretary Hegseth, operating at the direction of the President, has authority to make the challenged determination unless expressly foreclosed by Congress. As this Court noted in *Rostker*, an "imposing number of cases from this Court" make clear that "judicial deference to such congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker* at 70. And this Court has properly recognized, "the military authorities

have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy." *Goldman* at 508.

Congress has delegated broad authority to the Secretary of Defense (and formerly the Secretary of War) since the first Congress. On March 4, 1789, Congress passed "An Act to establish an Executive Department, to be denominated the Department of War." The Act provided that:

> there shall be a principal officer therein, to be called the Secretary for the Department of War, who shall perform and execute such duties as shall from time to time be enjoined on, or entrusted to him by the President of the United States, agreeably to the Constitution, relative to military commissions, or to the land or naval forces, ships, or warlike stores of the United States, or to such other matters respecting military or naval affairs, as the President of the United States shall assign to the said department....[7]

Today, under its authority "to raise and support armies and make rules and regulations for their governance," Congress has expressly delegated to the Secretary of Defense under 10 U.S.C. § 113 the "authority, direction, and control over the Department of Defense." *Rostker* at 70. This includes the authority to determine which persons or classes of persons are eligible for enlistment and the terms of such enlistment. As administrations have changed over the past decade, the status of "transgender" troops has been back-and-forth. Until 2015, they could not participate in the military. In 2015-2016, President Obama's Defense Secretary Ashton Carter changed DoD policy to allow "transgender" troops, with some exceptions. During President Trump's first term, Secretary Mattis again prohibited

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[7] 1st Congress, Chapter VII, Sess. 1, 1 Stat. 49-50 (1789).

"transgender" troops, with some exceptions. President Biden's Defense Secretary, Lloyd Austin, pursuant to executive order, removed the prohibition outright. Now Secretary Hegseth has reinstated the prohibition, with limited exceptions. App. at 6-12.

At no point during a decade with five different policies did Congress ever step in to change the policy. At no point has Congress suggested that any of the five policies were outside the delegated discretion of the Secretary. Congress' inaction suggests strongly that none of the policies were outside the delegated authority of 10 U.S.C. § 113(b).

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 Congress ... and with the President." *Rostker* at 70-71. Here, both elected branches are in accord. Secretary Hegseth has exercised his delegated authority, as did his four immediate past successors, to determine under what conditions "transgender" troops could serve or not. This Court has quite properly never asserted authority to reverse any of those policies, and in fact has stayed two injunctions against President Trump's prior Mattis Policy. App. at 2. The decision here should be the same. This Court should stay the injunction below.

The district court's error would have devastating consequences if allowed to continue unchecked. Should this Court fail to stay this unconstitutional injunction, it will have obliterated the constitutional entrustment of military decisions to the

elected branches, leaving 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 infrequently defeat[ing] every energetic measure" the military might undertake. All "unity of plan, promptitude, activity, and decision" would be paralyzed by 400 decision-makers. One President and one Secretary of Defense would be replaced by 400-plus President/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 court, with no constitutional role, disagrees. This Court's responsibility is to issue a stay to end a usurpation of authority to make decisions constitutionally reserved to the other branches.

Indeed, this Court has recognized, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). 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 10-11 (emphasis added).]

As is often true, former Attorney General Edwin Meese best explains 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.[8]

III. THE DISTRICT COURT'S RULING IS NOT SUPPORTED BY SUPREME COURT PRECEDENT.

The district court was very selective with this Court's decisions in order to support its position. On one hand, it completely ignored this Court's grant of stays of injunctions with respect to the Mattis Policy in 2019, which the government adequately addresses in its Application. *See* Application for Stay at 24-26. The district court treated the Hegseth Policy differently than the Mattis Policy by arguing that the new policy was a "rushed decision" "with no new military study, evaluation, or evidence" — as if the Mattis policy never existed. *Shilling* at *46, 48.

The district court grounded its decision in this Court's decision in *Bostock*. *See Shilling* at *41-42. Regardless, as this Court stated in *Bostock*, and as multiple Courts of Appeals have concluded, *Bostock* does not apply in any way outside of the Title VII context. *Bostock* interpreted Title VII, which prohibits employers from making employment decisions "because of ... sex." 42 U.S.C. § 2000e-2. *Bostock*

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[8] E. Meese, "The Solemn Duty of Government and the Military," *Heritage Foundation* (Mar. 28, 2018).

determined that making an adverse employment decision against a homosexual or transgender-identifying person that would not be made against a person of the opposite sex discriminates "because of sex," because the person's sex would be a "but-for" cause of the employment action. *Bostock* at 657. Accordingly, for purposes of Title VII, the Court stated, "[a]n individual's homosexuality or transgender status is not relevant to employment decisions." *Id.* at 660. As one court noted, "the reasoning from *Bostock* does not automatically transfer to the Title IX context, nor does *Bostock* compel the changes to the Title IX regulations encompassed by the Final Rule." *Kansas v. U.S. Dep't of Educ.*, 739 F. Supp. 3d 902, 921 (D. Kan. 2024).

Bostock expressly made clear that its reasoning was not to be used outside the context of Title VII, and that even in that context, the Court was only addressing adverse employment actions, not single-sex accommodations for privacy purposes. "Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind." *Bostock* at 681. *Bostock* conceded that "[t]hose who adopted the Civil Rights Act might not have anticipated their work would lead to" covering classes such as homosexual and transgender when the drafters were thinking of biological sex. *Bostock* at 653. Still, "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another," Title VII must be applied as *Bostock* applied it. *Id.* These *amici* believe that the text and history of Title VII not only did not compel *Bostock*'s result, but also did not permit it. However, even under *Bostock*, it does not require a similar result here.

IV. THE DISTRICT COURT DISREGARDED THE PROBLEMS OF THOSE SUFFERING FROM GENDER DYSPHORIA.

The government's policy applies to persons with "Gender Dysphoria," a mental health disorder. EO, Section 2. The district court sought to minimize the problems suffered by such person shown by many studies:

One study found that "40% of transgender adults reported having made a suicide attempt. 92% of these individuals reported having attempted suicide before the age of 25."[9] Another study found that nearly two-thirds of transgender persons have been diagnosed as having at least one additional "DSM-IV Axis I" mental health disorder.[10] A European study had similar results, finding that 70 percent of transgenders had at least one additional mental disorder.[11] Those who identify as "transgender" also experience high levels of depression, abuse of alcohol and drugs (more than three times the rate of the general population[12]), rates of infection with sexually transmitted diseases such as AIDS (nine times the general population[13]),

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[9] "Preventing Suicide: Facts About Suicide," The Trevor Project, http://www.thetrevorproject.org/pages/facts-about-suicide.

[10] M. Meybodi, *et al.*, "Psychiatric Axis I Comorbidities among Patients with Gender Dysphoria," NCBI (Aug. 11, 2014) https://www.ncbi.nlm.nih.gov/pubmed/25180172? log$=activity.

[11] *See* G. Heylens, *et al.*, "Psychiatric characteristics in transsexual individuals: multicentre study in four European countries," The British Journal of Psychiatry (Feb. 2014).

[12] *See* https://www.americanprogress.org/issues/lgbt/reports/2012/03/09/11228/why-the-gay-and-transgender-population-experiences-higher-rates-of-substance-use/.

[13] *See* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5389214/.

homelessness, and unemployment. One study found that rates of autism among so-called "transgender" children and teens was 10 times the rate in the general population.[14] Finally, there are high levels of overlap between people who "identify" as "transgender," and those who claim to be "transabled" (wanting to mutilate perfectly good body parts to match how they "feel inside"), and those who believe they are "otherkin" ("identify[ing] as wizards, dragons, elves, trolls, potted plants, dogs, wolves," etc.).[15]

It does not require speculation to see the risk inherent in allowing those who suffer from serious mental health and other problems to serve in the military. For example, placing a population known for its sexual promiscuity[16] and its astronomical (and often undiagnosed) rates of HIV infection[17] into a close-quarters environment with other young men and women may not bode well for the overall health of the armed forces. Coupling a high attempted suicide rate with ready access to fully automatic firearms and other powerful weapons might not be the best of ideas. And placing a person with a serious mental illness in the cockpit of a

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[14] *See* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2904453/.

[15] *See* Brief Amicus Curiae of Public Advocate, *et. al.*, in *Gloucester County School Board v. G.G.*, U.S. Supreme Court Docket No. 16-273, Jan. 10, 2017, pp. 26-30.

[16] *See* http://bmjopen.bmj.com/content/5/Suppl_1/bmjopen-2015- forum2015 abstracts.100.

[17] *See* https://www.avert.org/professionals/hiv-social-issues/key-affected-populations/ transgender#footnote3_u67l5hy.

fighter aircraft or in a missile silo in North Dakota may jeopardize not just the military, but also the nation.

The fact that the district court disregarded these factors demonstrates why judges cannot be allowed to set military readiness policies.

CONCLUSION

For the foregoing reasons, this Court should grant the Application for Stay.

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