

No. 18-676

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

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DONALD J. TRUMP,  
PRESIDENT OF THE UNITED STATES, ET AL.,  
*Petitioners,*

v.

RYAN KARNOSKI, ET AL.,  
*Respondents.*

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**On Petition for Writ of Certiorari Before Judgment  
To the United States Court of Appeals  
For the Ninth Circuit**

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**MOTION FOR LEAVE TO FILE AND BRIEF OF  
AMICUS CURIAE FOUNDATION FOR MORAL LAW  
IN SUPPORT OF PETITIONERS**

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**MOTION OF FOUNDATION FOR MORAL LAW  
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF  
IN SUPPORT OF PETITIONERS**

Pursuant to this Court's Rule 37.3(b), *amicus* Foundation for Moral Law requests leave of the Court to file this brief *amicus curiae* in support of Petitioners. The Foundation has provided timely notice to all parties and has requested consent from all parties. Some of the parties have consented, none has refused consent, but some have not responded.

On this 21st day of December, 2018.

Respectfully submitted,

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**STATEMENT OF IDENTITY AND INTERESTS  
OF *AMICUS CURIAE*<sup>1</sup>**

*Amicus Curiae* Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers.

The Foundation has an interest in this case because it believes a strong military is necessary to preserve American freedom. The founder of the Foundation is a West Point graduate and a Vietnam veteran. The senior counsel and author of this brief is a retired Air Force Judge Advocate. The Foundation believes transgender experimentation could endanger military discipline and cohesion.

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<sup>1</sup> Pursuant to this Court's Rule 37, amicus has provided timely notice to all parties of amicus's intent to file this brief. Some but not all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici curiae* states that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

## SUMMARY OF ARGUMENT

Believing that the Constitution should be interpreted strictly according to its plain meaning as understood by its Framers, Amicus fully endorses the legal and constitutional arguments of Appellant Administration. Amicus agrees that the Constitution is silent on the issue of transgender identification and does not confer upon transgender persons a right to enter the armed forces of the United States.

However, rather than restating the legal arguments of Appellant, Amicus will focus instead upon the practical effects, short-term and long-term, of adopting the policy ordered by the previous Administration. Amicus contends that the research on transgender issues is new and incomplete, especially concerning its short-term and long-term effects upon individuals and society and upon the fitness, cohesion, and discipline of the military. This is not the time for the district and circuit courts to force the military to undergo radical transformation.

Congress through legislation, and this Court through its rules, have wisely provided a remedy when quick action is needed – a grant of certiorari prior to judgment. This is a circumstance in which such action is clearly warranted.

## ARGUMENT

### **I. This Court is authorized to grant certiorari in this case.**

This petition for writ of certiorari is not, as Lambda Legal attorney Peter Renn claims, a "wildly premature and inappropriate" attempt to "flout established norms and procedures" and "short-circuit established practice."<sup>2</sup>

Rather, 28 U.S.C. § 1254(1) specifically authorizes this Court to grant petitions for writs of certiorari "before or after rendition of judgment or decree," and 28 U.S.C. § 2101(e) provides that "An application ... for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment." Congress clearly recognized that circumstances arise in which an expedited decision by this Court could be necessary. The petition does not ask this Court to "flout" the law; rather it asks the Court to apply the law as written and to grant the relief the law provides.

Supreme Court Rule 11 provides that this Court will grant certiorari before judgment "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court."

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<sup>2</sup> Adam Liptak, *Trump Asks Supreme Court for Fast Appeal on Transgender Military Ban*, The New York Times (Nov. 23, 2018), available at <https://goo.gl/cGycpy>.

This Court has granted certiorari before judgment in several cases: *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1962) (“Deeming it best that the issues raised be promptly decided by this Court, we granted certiorari on May 3 and set the case for argument on May 12.”); *United States v. Nixon*, 418 U.S. 654, 686-687 (1974) (“We granted both the United States’ petition for certiorari before judgment... and also the President’s cross-petition for certiorari before judgment....”); and *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (“Because the issues presented here are of great significance and demand prompt resolution, we granted the petition for the writ....”).

The Foundation believes this case is of "imperative public importance" and "require[s] immediate determination in this Court" for several reasons:

1. The Administration's military transgender policy has been challenged in various lawsuits in the Western District of Washington, the Central District of California, the District of the District of Columbia, and the District Court of Maryland.<sup>3</sup> The District Court in *Stone v. Trump* issued a nationwide preliminary injunction requiring the military to maintain and implement transgender retention and

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<sup>3</sup> *Karnoski v. Trump*, No. 2:2017-cv-01297 (W.D. Wash. Apr. 13, 2018); *Stockman v. Trump*, No. 5:2017-cv-01799 (C.D. Cal. Dec. 22, 2017); *Doe v. Trump*, No. 1:2017-cv-01597 (D.D.C. Oct. 30, 2017); *Stone v. Trump*, No. 1:2017-cv-02459 (D. Md. Nov. 21, 2017).

accession standards, as did the District Court of the Western District of Washington in *Karnoski*.

2. These lower courts have resisted efforts to expedite the cases. In March 2018 the Administration moved to dissolve the *Stone* injunction; the District Court has not ruled on that motion. Likewise, the Administration's motions for partial stays of these injunctions have been denied in the D.C. Circuit and the Fourth Circuit.<sup>4</sup> Similarly, the Administration's request for expedited rulings have been, after long delays, denied.<sup>5</sup> The Administration has exhausted every possible way of obtaining a speedy disposition through the lower courts, leaving this Court as its last resort.

3. Although Appellees claim they are seeking to preserve the status quo, they are actually seeking to delay the proceedings in order to effect radical transformation of the military. The policy of the military has traditionally been to exclude transgender persons from military service.<sup>6</sup> But late in President Obama's second term of office, then-Secretary of Defense Ashton Carter created a working group to formulate a new transgender policy (hereinafter the "Carter policy").<sup>7</sup> In June 2016 Secretary Carter ordered the armed forces to adopt new standards by July 1, 2017, that would admit

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<sup>4</sup> *Doe v. Trump*, No. 17-5267 (D.C. Cir. Dec. 22, 2017) (per curiam); *Stone v. Trump*, No. 17-2398 (4th Cir. Dec. 21, 2017).

<sup>5</sup> See Pet. 13-14.

<sup>6</sup> Pet. 2-3.

<sup>7</sup> See Pet. App'x G.

transgendered persons under some circumstances.<sup>8</sup> The day before the Carter policy was to go into effect, Secretary of Defense James Mattis delayed the implementation of the Carter policy until January 1, 2018, because the military needed more time to evaluate the Carter policy's effect on military readiness and lethality.<sup>9</sup> The injunctions sought by Appellees and issued by the district courts prohibit Secretary Mattis from delaying implementation of the Carter policy. Thus, they force Secretary Mattis and the armed forces to implement a transgender policy that will radically change the armed forces, potentially with disastrous and irreversible results. In reality, it is the Administration that seeks to preserve the status quo.

4. With at least four cases pending in four district courts and three circuits, coupled with the strong emotions and convictions on all sides of the issue, it is inevitable that whatever the circuit courts decide, those decisions will be appealed to this Court. The interest of judicial economy is therefore best served by granting this petition now.

5. With the delays and foot-dragging by the lower courts, there is no way of knowing how long it will take the circuit courts to reach decisions on these cases. In the meantime, as the policy goes into effect, there could be a massive influx of transgendered persons into the military, many seeking surgery and other medical treatment at military expense. Once this takes place, it will be very difficult to undo the

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<sup>8</sup> Pet. App'x H.

<sup>9</sup> Pet. App'x I.

policy. As Aaron Belkin of the Palm Center said concerning this litigation, "It is a little harder to put the toothpaste back in the tube with each day that goes by."<sup>10</sup> And as Shannon Minter, Legal Director for the National Center for Lesbian Rights, stated, "It's so incredibly stressful and nerve-wracking for the transgender people who are serving right now."<sup>11</sup> It would therefore be in everyone's best interest, including transgender persons in the armed forces or interested in joining the armed forces, to have this issue settled promptly by this Court. The lower courts should not be allowed to drag out these proceedings to enable the Carter policy to become so entrenched that it cannot be reversed.

6. Implementation of the Carter policy could have disastrous consequences for the military, as we will demonstrate below.

## **II. This Court has never recognized a constitutional right to change one's gender.**

Even though this Court purported to establish a right to engage in homosexual acts in *Lawrence v. Texas*, 539 U.S. 558 (2003), and to enter a same-sex marriage in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), this Court has never recognized a right to change one's sex or to have others recognize one's sex as different from that which was determined at birth. Accordingly, the military is not infringing any

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<sup>10</sup> Samantha Allen, *Trump's Desperate Gamble on Asking SCOTUS to Rule on Transgender Troop Ban*, Daily Beast (Nov. 27, 2018), available at <https://goo.gl/ME596P>.

<sup>11</sup> *Id.*

constitutional right by not allowing transgender persons to enlist in the armed forces. The district court's conclusion in *Karnoski* that transgender status is a "quasi-suspect classification, and therefore subject to intermediate scrutiny,"<sup>12</sup> *Karnoski* at 19a, has no foundation in any decision of this Court.

### **III. The District Court's finding of content-based discrimination is unfounded.**

Building one questionable doctrine upon another, the district court concluded that because transgender status is a quasi-suspect classification, the Mattis policy is impermissible "content-based restriction" that "penalizes transgender service members ... for disclosing their gender identity."<sup>13</sup>

But if the district court's premise that transgender status is a quasi-suspect classification is wrong, its conclusion that the Mattis policy is an impermissible content-based restriction also fails, because the military has broad authority to exclude categories of people who, in general, are not fit for military service or who could cause problems in highly stressful military missions.

It is not an impermissible content-based restriction to exclude people who say "I am a convicted felon," "I am a drug user," "I am a terrorist," "I am suicidal," "I have a personality disorder," "I am an alcoholic," "I will not obey orders,"

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<sup>12</sup> *Karnoski v. Trump*, No. 2:2017-cv-01297, slip op. at 19 (W.D. Wash. Dec. 11, 2017).

<sup>13</sup> *Id.*, slip op. at 24.

or a host of other categories. And it is not an impermissible content-based restriction to exclude people who say "I am transgender" if the military has at least a rational basis for excluding transgendered persons.

Does the military have a rational basis for excluding transgendered persons? We will examine the evidence in the next section of this brief.

#### **IV. Substantial evidence exists that transgendered persons could cause problems for the armed forces.**

In deciding a case, this Court must take into account the practical consequences of its decision as well as the practical effects of the policies which are impacted by the Court's decision. If this Court decides that transgender persons are entitled to enlist in the armed forces, the practical effects could be substantial, and they could be disastrous.

We therefore must ask: What are the effects of transgender identification? We ask these questions and present this information, not because of animus toward transgender persons, but because the military, the Administration, and the Congress need to consider and evaluate this information in formulating a transgender policy, and because the courts need this information in determining whether that policy is constitutional.

After examining the controversy, Sara Reardon concludes,

The debate is so heated -- and evidence so sparse -- that the authors of the American Psychiatric Association's 2013 *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* were unable to reach a consensus. "People are making declarations of knowledge that are their belief systems, that aren't also backed up by empirical research," says Jack Drescher, a psychiatrist at the William Alanson White Institute in New York City.<sup>14</sup>

Dr. Alice Domurat Dreger, former Professor of Clinical Medical Humanities and Bioethics at the Feinberg School of Medicine, Northwestern University, is a strong transgender advocate. But in a detailed article which appeared in *Archives of Sexual Behavior*, Dr. Dreger examined the controversy surrounding psychologist and Northwestern University Professor J. Michael Bailey and his book *The Man Who Would Be Queen: The Science of Gender-Bending and Transsexualism* (National Academies Press, 2003). In that book Dr. Bailey argued that some male transexuals are homosexuals who have reservations about homosexuality but who believe (consciously or subconsciously) that their attraction to men would be acceptable if they transitioned to female. Other male transexuals, he said, were autogynephiliac, meaning

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<sup>14</sup> Sara Reardon, *Largest Ever Study of Transgender Teenagers Set to Kick Off*, Nature: International Weekly Journal of Science (Mar. 29, 2016), available at <https://goo.gl/fi6qLD>.

they were sexually aroused by thinking of themselves as female. Contrary to her earlier expectations, and without agreeing with all of Dr. Bailey's conclusions, Dr. Dreger describes him as "apparently intelligent, open-minded, scientifically careful, and non-homophobic." Nevertheless, she says, the transsexual activist community was so enraged by Dr. Bailey's book that they conducted a campaign to discredit him professionally, remove him from the university, and even attacked his home and children. Dr. Dreger's article is as much a commentary on the antics and mindset of radical transgender advocates as it is upon Dr. Bailey and his book.<sup>15</sup>

Radical transgender advocates don't want to acknowledge that some who undergo transition later have regrets or unpleasant results. They often cite a Swedish study that found that only 2.2 percent of transgender persons suffered from sex change regret.<sup>16</sup> Other studies, however, show that the percentage who experience regret is much higher. The *Guardian* reviewed one hundred studies of transgender persons and concluded that twenty percent (20%) of transgender persons regretted changing genders, and that many transgendered persons remain severely distressed and even suicidal.<sup>17</sup> As early as 1979 Dr. Charles Ihlenfeld,

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<sup>15</sup> Alice Domurat Dreger, *The Controversy Surrounding The Man Who Would Be Queen: A Case History of the Politics of Science, Identity, and Sex in the Internet Age*, 37 *Archives of Sexual Behavior*, 366-421 (2008).

<sup>16</sup> See Walter Heyer, *Transgender Regret Is Real Even If the Media Tell You Otherwise*, *The Federalist* (Aug. 19, 2015), available at <https://goo.gl/gK1yYp>.

<sup>17</sup> *Id.*

who had administered hormone therapy to about 500 transgendered persons, said simply: "There is too much unhappiness among people who have had the surgery. Too many of them end as suicides."<sup>18</sup>

When accepting an ESPY Award in 2015, Caitlyn Jenner, aka Bruce Jenner, told his audience that 41 percent of transgender persons attempt suicide.<sup>19</sup>

Consider other evidence:

A 2009 study conducted by the Case Western Reserve University Department of Psychiatry concluded that "90 percent of these diverse [transgendered] patients had at least one other significant form of psychopathology."<sup>20</sup>

A 2003 Dutch survey of board-certified Dutch psychiatrists concluded that, of 359 patients treated for cross-gender identification, 61 percent of these patients had other psychiatric disorders and illnesses, notably personality, mood, dissociative, and psychotic disorders.<sup>21</sup>

In 2013 the University of Louisville, KY conducted a study of 351 transgender individuals and found that the rates of depression and anxiety among those

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<sup>18</sup> *Id.*

<sup>19</sup> Cecilia Dhejne et al., *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, PLOS/ONE (Feb. 22, 2011), available at <https://goo.gl/tr4ibw>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

individuals "far surpass the rates of those for the general population."<sup>22</sup>

The 2015 Report of the U.S. Transgender Survey, cited earlier, revealed "disturbing patterns of mistreatment and discrimination and startling disparities between transgender people in the survey and the U.S. population when it comes to the most basic elements of life, such as finding a job, having a place to live, accessing medical care, and enjoying the support of family and community. Survey respondents also experienced harassment and violence at alarmingly high rates."<sup>23</sup> Survey respondents reported that 10 percent experienced family violence because of their transsexuality, 54 percent were verbally harassed in school, 24 percent were physically attacked in school, 13 percent were sexually assaulted in school, and 17 percent left school because of this treatment. Thirty percent reported having been fired, denied a promotion, or experienced other mistreatment at work because of their gender identity. Twenty-nine percent were living in poverty, compared to 14 percent of the general population. Fifteen percent were unemployed, compared with 5 percent of the general population. Thirty percent have experienced homelessness, 39 percent experienced serious psychological distress during the previous month compared to 5 percent of the population, and 40 percent have attempted suicide during their lifetime,

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<sup>22</sup> *Id.*

<sup>23</sup> Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 4, National Center for Transgender Equality (2016), available at <https://goo.gl/maUQmq>.

nearly nine times the attempted suicide rate in the general population (4.6 percent). 1.4 percent reported living with HIV, compared with only 0.3 percent of the general population.<sup>24</sup> Twenty percent have participated in the "underground economy" for income at some time, including "sex work, drug sales, and other currently criminalized work," nine percent during the past year.<sup>25</sup>

The 2015 U.S. Transgender Survey results should be approached with some degree of caution. Although the number of respondents (27,715) is impressive, one may question whether those who volunteer to participate in an online survey are representative of the nation's transgender population as a whole. The fact that transgender persons experience violence, suicide, and other problems on a level disproportionate to the general population does not mean their transgender status is the reason they experience these problems. Theoretically, it is possible that these persons would have experienced these problems regardless of whether they were transgender. And the survey seems to reflect the belief of many of its participants, that society's attitudes toward transgenderism, rather than their own transgender status, is the cause of the problem.

Nevertheless, the fact remains: The transgender lifestyle is accompanied by many undesirable aspects. Courts and other governmental agencies should carefully consider this when deciding whether to recognize, and give encouragement to a lifestyle that

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<sup>24</sup> *Id.* at 4-6.

<sup>25</sup> *Id.* at 158.

has no constitutional sanction and could result in tragic consequences for many.

And of the twenty percent who regret their transgender change, most are intimidated into silence, but some speak out. Walt Heyer, who underwent a male-to-female sex-change operation at age 42, became known as Laura Jensen for eight years, and then transitioned back to male. He has a website titled SexChangeRegret.com, speaks regularly, and has authored several books including *Gender, Lies and Suicide, Paper Genders, Perfected with Love*, and *A Transgender's Faith*.<sup>26</sup> Coming from a different perspective, ten women who stopped their transition from female to male joined to tell their stories in *Blood and Visions: Womyn Reconciling with Being Female*, published in 2015 by Autonomous Womyn's Press.<sup>27</sup>

Because this field of study is so new, very little is known about the consequences and effects, especially the long-term consequences and effects, of the transgender lifestyle. This is true for society in general, but it is especially true for the military which must of necessity require its personnel to perform vital missions under extreme stress. It is therefore dangerous to force the military to adopt a policy that could have disastrous consequences for

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<sup>26</sup> Walter Heyer, *Bookstore*, SexChangeRegret.com, <http://www.sexchangeregret.com/bookstore> (last visited Dec. 19, 2018).

<sup>27</sup> *Blood and Visions: Womyn Reconciling with Being Female*, Autonomous Womyn's Press (2015), <https://goo.gl/uYgWiY> (last visited Dec. 19, 2018).

the nation, for the military, for all military personnel, and for transgender persons themselves. "Act in haste, repent at leisure."

**V. The Courts should substantially defer to the military on matters of military discipline.**

Unlike President Obama's Secretary Defense Ashton Carter who never served in the military, current Secretary of Defense James N. Mattis served more than 40 years in the military, first as an enlisted man in 1969 at age 18 and retiring as a four-star general in 2013, also commanding the United States Joint Forces Command and NATO's Supreme Allied Commander and serving as an Annenberg Distinguished Visiting Fellow at the Hoover Institution.<sup>28</sup> He, not Carter, is the current Secretary of Defense, and his professional military judgment (arrived at after extensive consultation with a distinguished panel of experts, both military and civilian) that general admission of transgender persons would not be conducive to the good order and discipline of the military is fully entitled to the deference of this Court, although transgender persons currently on active duty may continue to serve provided they do so according to their sex as determined at birth and persons with a history of gender dysphoria may join the military if they have not undergone gender transition, are willing and able

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<sup>28</sup> *James N. Mattis: Secretary of Defense*, U.S. Department of Defense, <https://dod.defense.gov/About/Biographies/Biography-View/article/1055835/james-mattis> (last visited Dec. 19, 2018).

to serve in their biological sex as determined at birth, and can show 36 months of stability before joining.<sup>29</sup>

So many questions concerning transgender persons in the military are unanswered at this time. One of these, at a time of tight budgets, is the cost the Carter policy would impose upon the military. The Administration says the cost could be enormous. Two Obama-era studies discounted the financial cost of transgender persons in the military. One titled *Caring for Our Transgender Troops -- The Negligible Cost of Transition-Related Care* is authored by Aaron Belkin,<sup>30</sup> Ph.D., late San Francisco State University political science professor and leading transgender advocate. But rather than comparing the cost of admitting transgender persons into the military against the savings of not admitting them, Dr. Belkin's article basically compared the cost of treating transgender persons versus the cost of admitting gender-dysphoric persons and not treating them. He also failed to adequately consider the possibility that the Carter policy would bring an influx of transgender or dysphoric persons into them military. Another study by the RAND Corporation, *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*.<sup>31</sup> This study is riddled with assumptions that may or may not prove to be

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<sup>29</sup> Pet. 7.

<sup>30</sup>Aaron Belkin, *Caring for Our Transgender Troops -- The Negligible Cost of Transition-Related Care*, New England Journal of Medicine (Sep. 17, 2015), available at <https://goo.gl/cuwVYC>.

<sup>31</sup> Agnes Gereben Schaefer et al., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, RAND Corporation (2016), available at <https://goo.gl/MXb5Wt>.

correct and considers only the number of transgender persons presently serving (even there, the numbers vary widely; the RAND study suggests the number is between 1,320 and 6,630 on active duty and 830 to 4,160 in the Guard and Reserves;<sup>32</sup> Belkin estimated 12,800<sup>33</sup>) and the percentage of those who would likely seek transgender surgery and/or other treatment. The study does not consider whether, if the Carter policy goes into effect, there will be an influx of transgender persons or would-be transgender persons into the military, some with the goal of getting the military to pay for their treatment. The cost could be significant, and the Administration has the right and the duty to consider the cost in determining transgender policy.

Another question concerns the effect of the Carter transgender policy on combat bonding and unit cohesion. Will other soldiers be willing and able to bond and work effectively with transgender soldiers? Will the policy cause friction among soldiers and hinder their ability to function together as a team, especially in combat? The RAND Study says this has not been a significant problem in other nations that have admitted transgender persons into their armed forces,<sup>34</sup> but the people in those nations may have very different values and norms from those in the United States. The RAND Study notes that "According to recent research on the U.S. general

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<sup>32</sup> *Id.* at x-xi.

<sup>33</sup> Belkin, *supra* note 30.

<sup>34</sup> *See generally* Schaeffer, *supra* note 31. Note that if about 20 nations have allowed transgender persons into their armed forces, that means about 175 nations have not done so.

population, attitudes toward transgender individuals are significantly more negative than attitudes toward other sexual minorities."<sup>35</sup> The RAND Study therefore recommends that "The most effective way to educate the force on matters related to transgender personnel is to integrate training on these matters into the diversity and harassment training already given to the entire force."<sup>36</sup> This would involve changing the basic moral and religious values of those military personnel who hold more traditional views, and there is no assurance it would be effective. The conflict between the LGBT agenda and traditional religious and moral values was acknowledged in *Obergefell*.<sup>37</sup>

Still another question concerns transgender persons in combat. While all career fields including combat roles are now theoretically open to women, women have a choice as to whether to go into combat; men can be ordered into combat whether they want to or not. Could a male soldier avoid combat by transgendering to female?<sup>38</sup> Would many of them do so?

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<sup>35</sup> *Id.* at 44.

<sup>36</sup> *Id.* at 61.

<sup>37</sup> See *Obergefell*, 135 U.S. at 2607 (acknowledging the clash between religious doctrine and same-sex marriage); *id.* at 2642-43 (Alito, J., dissenting) ("I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.").

<sup>38</sup> The same issue may arise concerning the Selective Service. Most males are required to register for the draft; females can volunteer for military service but are exempt from

Would transgender soldiers disproportionately suffer from the emotional and psychological problems described in Section IV of this brief? There is no reason to believe transgender soldiers would be exempt from the problems that are so widespread in the American transgender community.

Because there are no clear answers to these and a host of other questions, the courts should not force this policy upon the United States military over the strong opposition of the Commander-in-Chief and the Secretary of Defense.

In *Goldman v. Weinberger*, 475 U.S. 503 (1986), this Court upheld an Air Force regulation that required service cap over the objection of a Jewish officer who claimed that the regulation infringed his free exercise of religion by denying him the right to wear a yarmulke. The Court majority reasoned that the military needs to foster instinctive obedience, unity, commitment, and esprit de corps, and that substantial deference should be given to the Air Force's determination that allowing Captain Goldman to wear a yarmulke would detract from military discipline. Congress responded by adopting a provision in the National Defense Authorization Act of 1988 permitting members to wear religious apparel while wearing the uniform. This was entirely appropriate. The United States Constitution, Article I, Section 8 gives Congress the power to "make Rules for the Government and

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the draft. Could a male avoid the draft by transgendering to female?

Regulation of the land and naval Forces" and to "provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States....," and Article II, Section 2 provides that the "President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States...." The courts do not necessarily have expertise on questions of military discipline and therefore the Court wisely deferred to Congress, the President, and military authorities. If judicial restraint was appropriate on a matter that concerned First Amendment religious liberty, it is even more appropriate on questions like transgenderism on which the Constitution is silent, on which the nation is sharply divided, and on which so much uncertainty exists.

## CONCLUSION

Transgender issues are new to the public consciousness, and the medical and scientific research is even newer. The physical, psychological, and emotional effects of transgender, short-term and especially long-term, are as yet unknown, as are the short-term and long-term effects on military fitness, military cohesion, and military discipline. This is not the time to force radical social experimentation and transformation on the military.

Implementation of the Carter policy, which was ordered by the previous Administration but scheduled to begin under the present Administration,

could trigger a massive influx of transgenders and would-be transgenders expecting surgery and other services at military expense. If the military is forced to implement this policy while waiting for the circuit courts – and then, ultimately, this Court – to resolve it, the Carter transgender policy could become so entrenched that it would be difficult to reverse.

Clearly, this case is of "imperative public importance" and "require[s] immediate determination in this Court." The Foundation urges this Court to grant the Administration's petition for writ of certiorari.

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