

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 17-5267

**In the United States Court of Appeals
for the District of Columbia Circuit**

JANE DOE 1, *ET AL.*,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *ET AL.*,
Defendants-Appellants.

On Appeal from the
United States District Court for the District of Columbia

**Motion for Leave to File Brief of
Public Advocate of the United States, Citizens United Foundation,
Citizens United, Conservative Legal Defense and Education Fund, and
Restoring Liberty Action Committee as
Amicus Curiae in Support of Defendants-Appellants**

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December 15, 2017

Pursuant to Rule 29(a)(3) of the Federal Rules of Appellate Procedure, these *amici*, hereby move for leave to file the attached *amicus curiae* brief in support of appellee's Emergency Motion for Administrative Stay and Partial Stay Pending Appeal.

Amici Public Advocate of the United States and Citizens United are nonprofit organizations exempt from federal income taxation under Internal Revenue Code ("IRC") section 501(c)(4). *Amici* Citizens United Foundation and Conservative Legal Defense and Education Fund are exempt from federal income taxation under IRC section 501(c)(3). Restoring Liberty Committee is an educational organization.

These *amici* have opposed the granting of special rights to so-called transgendered individuals, and oppose efforts to have the federal judiciary usurp the powers of the political branches to make public policy decisions for the nation. Most of these *amici* have participated in numerous *amicus curiae* briefs in other courts addressing such issues.

Counsel for *amici* have received the consent of counsel for plaintiffs-appellees to this filing, and counsel for the defendants-appellants has stated that they have no objection to the filing of this *amicus* brief.

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For these reasons, these *amici* respectfully request that they be granted leave to file the attached *amicus curiae* brief.

Respectfully submitted,

/s/ *Herbert W. Titus*

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**CERTIFICATE AS TO
PARTIES, RULINGS, AND RELATED CASES**

Parties and *Amici*

Except for the following, all parties, intervenors, and *amici curiae* appearing before the district court below and this Court are listed in the Briefs for the parties: *amici curiae* Public Advocate of the United States, Citizens United Foundation, Citizens United, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee.

Ruling under Review

References to the ruling at issue appear in the Appellants' Brief.

Related Cases

Counsel adopt and incorporate by reference parties' statements with respect to related cases.

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INTEREST OF *AMICI CURIAE*¹

Public Advocate of the United States, Citizens United Foundation, Citizens United, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Restoring Liberty Action Committee is an educational organization. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law.

ARGUMENT

I. The District Court Erred in Ruling that Plaintiffs Are Likely to Succeed on the Merits of Their Due Process Claim.

District Judge Kollar-Kotelly acknowledged that, in order to grant plaintiffs' motion for preliminary injunctive relief, they must make a "clear showing," justifying such "extraordinary" relief. Memo Op. at 29. The district court's finding on the likelihood of success on the merits is insupportable. Indeed, after 11 pages of discussion of the merits issue, the district judge could only lamely conclude that "taken together" her reasons are "**highly suggestive** of a constitutional violation." *Id.* at 68-69 (emphasis added). On its face, such a

¹ All parties have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

finding falls far short of the kind of “clear showing” that the judge conceded was necessary to support the grant of preliminary injunctive relief.

A. The District Court’s Ruling Is Not Supported by Precedent.

As she must, the district judge confessed that she was unaware of any “binding precedent” that “transgender” persons are among the class of persons deserving special equal protection under the Fifth Amendment due process clause. *Id.* at 61. Indeed, she was unable to produce a single appellate court opinion to support her conclusion that the Constitution required the Government’s action to have more than a rational basis. Although she took note “of the findings and conclusions of a number of other courts from across the country that have ... found that discrimination on the basis of someone’s transgender identity is a quasi-suspect form of classification that triggers heightened scrutiny” (*id.*) — she could find only three district court opinions upon which she could rely. *Id.* Even then, she did not quote language from any of the three cases, nor find any compelling reasoning in the three cases worthy of any discussion. Rather, she was content only to cite them with approval for having reached the same conclusion as she. The three cases cited were neither “binding” nor apparently were they independently persuasive.

The Government's Emergency Motion fails to point out this precedential weakness, omitting altogether any effort to show how such a novel claim could be the basis for a ruling that plaintiffs are likely to succeed on the merits. This is especially noteworthy because success on the merits largely depends upon the "degree" of judicial scrutiny employed, and the court's discretionary power to apply the chosen degree of scrutiny to the facts of the case. *See* Memo Op. at 59-68.

B. The District Court's Discussion of Plaintiffs' Quasi-Suspect Status Is Boilerplate.

Faced with the task of showing likelihood of success on a claim without any legal precedent, the district court quickly ruled that transgenders have suffered a long history of discrimination² and political powerlessness. *Id.* at 60-61. Relying primarily upon self-serving statements from the transgender community itself, the district court concluded that transgenders have "immutable³

² The district court's conclusion is inconsistent with the allegations in plaintiffs' complaint that others have been "supportive," Op. at 21 ("very supportive"), 22 ("received support"), 23 ("supported her decision '100%'"), 24 ("were supportive"), 25 ("very supportive"), and 26 ("very accepting and supportive"). The district court erred in making a factual finding in direct contravention of the plaintiff's complaint.

³ The district court inaccurately described transgender persons as having "**immutable** and distinguishing characteristics that make them a discernable

and distinguishing characteristics that make them a discernable class.” *Id.* at 60. Replete with generalities, the district court cited no specific discriminatory actions taken against them, such as criminal punishment for “cross-dressing,” much less discrimination in employment or education. Further, unlike race or sex, transgenders cannot be targets for discrimination unless they put their hidden identity on display.

As for the court’s finding that transgenders are “politically powerless,” the district court recognized that before President Trump was elected, the senior ranks of the military establishment in the Obama Administration, aided by the tendentious RAND report, was at the beck and call of the transgender lobby. *See* Memo Op. at 67. Judge Kollar-Kotelly cannot have it both ways, finding first that transgenders are politically powerless, justifying heightened scrutiny, and then employing that level of scrutiny to support her conclusion that the

class.” *Id.* at 60. To the contrary, mutability itself is the defining characteristic of this group. One’s self-proclaimed gender identity is the very nature of transgenderism: that one’s sexual identity is not fixed at birth, but changeable and variable. Of course, “sex changes” that plaintiffs describe, and that the court relied on, is a scientific impossibility. The simple, scientific fact is that every part of a human body, down to the cellular level, is stamped with the biological sex of the person, and that is one of the immutable characteristics of the entire human race. *See* “Every Cell Has a Sex,” National Academy of Sciences (2001), <https://www.ncbi.nlm.nih.gov/books/NBK222291/>.

Government has no good reason to exclude transgender persons based on President Obama's pro-transgender policies and a government-sponsored study. *See* Memo Op. at 67.

C. The Equal Protection Component to the Due Process Clause Undermines Impartiality, an Essential Principle of Due Process.

The district court decision on the merits is based solely on the Plaintiffs' claim that Government action excluding transgenders from the military violates the equal protection component of the Fifth Amendment Due Process Clause. Memo Op. at 58. Not only is there no constitutional textual basis for this "component," but it is also a historical fact that, in 1954, the U.S. Supreme Court added this "component" by judicial fiat, solely because it would be "unthinkable" for the Constitution to impose a lesser duty on the federal government than the states eliminate racially segregated public schools. *See Bolling v. Sharp*, 347 U.S. 497 (1954).

It was not long afterwards that the Court extended this equal protection guarantee to sex and other so-called immutable characteristics, to protect such classes of persons from discrimination. Ironically, each time a court finds that a particular class of persons has been sufficiently discriminated against to justify a higher level of judicial scrutiny, it cannibalizes the due process guarantee of

impartiality. See J. Nowak, R. Rotunda, and J. Young, Constitutional Law at 487 (West: 3d ed. 1986). And, if the additions keep coming, soon the original due process guarantee of impartiality will be gobbled up by “identity law,” a system of law that elevates one person above others in such a way that rights and liabilities will be adjudicated according to the identity of the party before the court, not according to standards of right and wrong applied impartially to what the parties have done. Holy Writ warns us: “Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honor the person of the mighty: but in righteousness shalt thou judge thy neighbour.” Leviticus 19:15.

II. The District Court Apparently Did Not Try Very Hard before It Concluded that It Could Not Find “Any Facts” to Support the President’s Order.

A. So-Called “Transgender” Persons Are, By Definition, Mentally Ill.

Transgender persons suffer from what is termed “Gender Dysphoria.” Even though the “Diagnostic and Statistical Manual of Mental Disorders” (DSM-5) recently renamed “Gender Identity Disorder” as “Gender Dysphoria,” the condition remains a mental health disorder. The American Psychiatric Association distinguishes “[g]ender dysphoria [from] gender nonconformity,”

because “[g]ender nonconformity is not a mental disorder.”⁴ Thus, by alleging that they are “transgender,” Plaintiffs have admitted that they suffer from a recognized mental illness.⁵

Additionally, people who are “transgender” commonly suffer from other serious mental health problems, including suicide at staggering rates. 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.”⁶ 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.⁷ A European study had similar results, finding that 70 percent of transgenders had at least one additional mental disorder.⁸ Those who identify as

⁴ See <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>.

⁵ See Memo Op. at 19, 21, 22, 23, 24, 25, 26, and 27.

⁶ “Preventing Suicide: Facts About Suicide,” The Trevor Project, <http://www.thetrevorproject.org/pages/facts-about-suicide>.

⁷ 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](https://www.ncbi.nlm.nih.gov/pubmed/25180172?log$=activity).

⁸ See G. Heylens, *et al.*, “[Psychiatric characteristics in transsexual individuals: multicentre study in four European countries](#),” *The British Journal of Psychiatry* (Feb. 2014).

“transgender” also experience high levels of depression, abuse of alcohol and drugs (more than three times the rate of the general population⁹), rates of infection with sexually transmitted diseases such as AIDS (nine times the general population¹⁰), 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.¹¹ 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.)¹²

⁹ See <https://www.americanprogress.org/issues/lgbt/reports/2012/03/09/11228/why-the-gay-and-transgender-population-experiences-higher-rates-of-substance-use/>.

¹⁰ See <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5389214/>.

¹¹ See <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2904453/>.

¹² 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.

B. Transgender Service Members Pose a Potentially Serious Risk if Permitted to Serve in the Military.

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 promiscuity¹³ and its astronomical (and often undiagnosed) rates of HIV infection¹⁴ 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 40 percent 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 fighter aircraft or in a missile silo in North Dakota may jeopardize not just the military, but also the nation.

To be sure, some of the serious problems suffered by so-called “transgenders” are independently disqualifying from military service, such as substance abuse, serious illness, etc.¹⁵ However, the question posed by the

¹³ See http://bmjopen.bmj.com/content/5/Suppl_1/bmjopen-2015-forum2015-abstracts.100.

¹⁴ See https://www.avert.org/professionals/hiv-social-issues/key-affected-populations/transgender#footnote3_u67l5hy.

¹⁵ See <https://www.military.com/join-armed-forces/disqualifiers-alcohol.html>; <https://www.military.com/join-armed-forces/disqualifiers>

district court below was not whether there are any other possible ways to weed out unsatisfactory candidates and members, but whether President Trump's ban on transgenders from military service is “substantially related to the achievement of ... important governmental objectives.” *Id.* at 64. It meets that test.

III. The District Court Failed to Properly Balance the Equities and Public Interest at Stake.

The district court's extraordinary injunction was predicated on the assumption that the balance of equities and public interest favored a few gender-confused movants over the national defense needs of the nation. In its cursory three-paragraph analysis, the lower court brushed aside any concerns about adverse impact on military readiness, asserting “there is absolutely no support for the claim that the ongoing service of transgender people would have *any* negative effective on the military at all.” Memo Op. at 74-75 (emphasis original). The judge's opinion elevated a report by a private military contractor selected by the former Obama Administration to support its policy change over the official position of the Department of Defense before the end of President

Obama's term as well as under President Trump.¹⁶ The judge's finding of no negative effects could not have been more wrong.

Although some retirees from the increasingly politically correct senior officers corps may disagree, service members themselves are overwhelmingly opposed to integration of transgender troops into their units. Recent polling of active-duty military personnel reported that 57 percent are opposed to policy changes allowing transgender troops to serve openly. Of that group, a majority stated that President Obama's policy change had a "very negative effect" on military morale. A mere 16 percent of service members viewed the change as positive.¹⁷ Notably, these opinions were voiced **after** adoption of the past administration's policy on transgender service, and likely did not reflect the depth of opposition to the new policy, as many active-duty troops are reticent in expressing disagreement with their Commander-in-Chief's orders. Apparently,

¹⁶ In issuing her injunction designed to continue the policies of President Barack Obama against changes implemented by President Trump, District Judge Kollar-Kotelly (appointed by President Clinton) acted in the dubious tradition of District Judge Derrick Watson (appointed by President Obama), who repeatedly enjoined President Trump's travel ban until his injunctions were stayed by the U.S. Supreme Court.

¹⁷ See L. Shane, "[Poll: Active-duty troops worry about military's transgender policies](#)," Military Times (July 27, 2017).

the district judge rejected concern about the view of those in the armed forces, because such opposition to social experimentation in the military could only be based on their “bias.” Memo Op. at 66, n.10. The Court’s imputation of “bias” is deeply regrettable. The reality that most service members oppose President Obama’s policy, and of those, most believe open transgender service has “a very negative effect on military morale” (*id.*), should concern even activist judges willing to use the vehicle of a lawsuit to usurp critical military policy choices as to how the nation should be defended.

Rather than assume the worst about those who volunteer to serve the nation, as the district court did, should the judiciary not even consider that there may be compelling reasons why most troops are opposed to transgender service? For anyone who has served — especially those in the combat arms — the problems are patently obvious. Having a woman in the foxhole with a man in combat has always been an issue. But that type of problem is expanded exponentially by forcing women who identify as men to shower with men (or vice-versa) in remote deployments and/or in high-intensity combat environments. Privacy concerns, sexuality, and other dynamics introduce — at best — distractions that are ill-suited to units attempting to protect vital national interests

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in a combat environment. To suggest that movants' intense desire to serve their nation somehow trumps these readiness concerns reflects a blind, politicized approach to this issue, not a proper weighing of the equities. Imposing a twisted social experiment on an unwilling military is not likely to enhance readiness; in fact, it will do just the opposite. Loss of morale and unit cohesion can only reduce the battlefield effectiveness of the force.

CONCLUSION

The motion to stay should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in Support of Defendants-Appellants complies with the type-volume limitation of Rule 29(a)(5), Federal Rules of Appellate Procedure, because this brief contains 2,580 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 18.0.0.200 in 14-point CG Times.

/s/ *Herbert W. Titus*

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Attorney for *Amici Curiae*

Dated: December 15, 2017

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in Support of Defendants-Appellants, was made, this 15th day of December 2017, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

/s/ Herbert W. Titus

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