Nos. 23-235, 23-236

In the Supreme Court of the United States

U.S. FOOD AND DRUG ADMINISTRATION, ET AL.,
Petitioners,

v.

ALLIANCE FOR HIPPOCRATIC MEDICINE, ET AL.,
Respondents.

DANCO LABORATORIES, L.L.C.,
Petitioner,

v.

ALLIANCE FOR HIPPOCRATIC MEDICINE, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF FORMER MILITARY OFFICIALS, CIVILIAN NATIONAL SECURITY LEADERS, AND VET VOICE FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are United States military veterans, a non-profit organization that represents their interests, and civilian national security leaders. They are former high-ranking officials with knowledge about military recruitment, readiness, medical care, and personnel. They submit this brief to present, based on their professional and personal experiences, a unique perspective on how restricting access to mifepristone would negatively impact military readiness and national security.

The Honorable Louis Caldera is the Former Secretary of the Army and the Former Director of the White House Military Office. He graduated from the U.S. Military Academy and began his military career as an Army officer. In his time as Secretary of the Army, he implemented changes to develop a more versatile and deployable force and led a reversal of recruiting shortfalls.

The Honorable Ray Mabus is the Former Secretary of the Navy, and the longest serving leader of the Navy and Marine Corps since World War I. He is also the Former Governor of Mississippi and the Former Ambassador to Saudi Arabia. As Secretary of the Navy, he revolutionized the Navy and Marine Corps, opening all jobs to women, aggressively moving to alternative energy as a warfighting measure, building

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

more than twice as many ships during his term than in the preceding eight years, and developing the Gulf Coast Restoration Plan after the Deepwater Horizon oil spill.

The Honorable Deborah James is the Former Secretary of the Air Force and the Former Assistant Secretary of Defense for Reserve Affairs. As Secretary of the Air Force, she led efforts to increase percentages of women and diverse candidates in applicant pools, to open more Air Force roles to women, and to extend the Post-Pregnancy Deployment Deferment from six to twelve months.

Lieutenant General (Ret) Claudia Kennedy is the First Female 3-Star General in the Army and the Former Chairwoman of the Defense Advisory Committee on Women in the Services. First commissioned in 1969, Lieutenant General Kennedy served for 31 years in a variety of assignments including commanding a Recruiting Battalion and Military Intelligence Brigade, and as Deputy Chief of Staff for Intelligence of the Army. In her role as Chair of Defense Department Advisory Committee on Women in the Services, she provided recommendations to the Secretary of Defense on how best to serve women in the military.

Major General (Ret) Tammy Smith is the Former Deputy Commanding General for Sustainment, Eighth U.S. Army, Korea, and the Former Special Assistant to the Assistant Secretary of the Army - Manpower and Reserve Affairs. In the latter role, and throughout her career, General Smith handled personnel policy, including readiness and family issues.

Major General (Ret) Paul Eaton is the Former Commanding General, Army Infantry Center and School. He gave 33 years of service to the military, including as the Commanding General of the command charged with reestablishing Iraqi Security Forces from 2003-2004.

Rear Admiral (LH) (Ret) Michael S. Baker, M.D., F.A.C.S. is a semi-retired general and trauma surgeon who served in the Medical Corps, U.S. Navy. In his role as a Navy officer, he held roles in operational medicine, combat deployments, medical intelligence, and strategic planning.

Brigadier General (Ret) Robin B. Umberg is the former Chief, Health Care Professionals, 3rd Medical Command in the U.S. Army, Nurse Corps. She served in a variety of staff and command assignments during the course of her 36 years of service, including in roles that had responsibility for battlefield readiness, training, and career management for more than 27,000 medical personnel.

Brigadier General (Ret) Steven M. Anderson is the Former Director, Operations and Logistics Readiness for the U.S. Army. In that role, he led a staff responsible for all Army logistics readiness reporting and ran the Army's Logistics Operations Center.

Sergeant Major (Ret) Marshall Williams is the Former Acting Assistant Secretary & Principal Deputy Secretary of the Army for Manpower and Reserve Affairs. In that role, which he held from 2018 to 2021, he developed and implemented recruitment and retention strategies to increase readiness levels and

streamlined recruitment methods, cutting $2 billion in costs and increasing talent recruitment 8% year over year.

David Calloway, M.D. is a former Lieutenant Commander of the U.S. Navy and an emergency room physician. He has extensive civilian and military experience, and now serves as the Chief Medical Officer for Team Rubicon, a veteran-led disaster response organization, and as a Professor of Emergency Medicine at Carolinas Medical Center.

Vet Voice Foundation is a Washington, D.C.-based non-profit, non-partisan organization that organizes and empowers veterans to become civic leaders and policy advocates. Vet Voice's interest in this appeal arises from the great importance that maintaining the strength of the military and caring for current and former servicemembers holds to the organization's membership.

INTRODUCTION & SUMMARY OF ARGUMENT

"The U.S. military is the strongest fighting force on Earth, in large part, because we can draw on an unmatched strategic resource: the talents of the American people," Secretary of Defense Lloyd J. Austin told Congress earlier this year. L. Austin Letter to J. Reed, July 18, 2023.[2] The decision below threatens the ability of the military to draw on that strategic resource by restricting access to important reproductive healthcare for women servicemembers and veterans. That restriction in turn impairs the ability of the military to recruit and retain women and to maintain ready troops.

In Part I of this brief, *amici* explain that military readiness—the capacity of our military forces to be ready to deploy globally, fight, and fulfill their combat and other missions—is a critical element of national security. The ability to maintain that readiness is currently in danger, however, as the military faces a recruiting crisis driven largely by a dearth of Americans, especially men, who are interested in joining the military and meet its rigorous enlistment qualification standards. The Department of Defense ("DOD") has addressed this crisis in part by undertaking efforts to increase the recruitment and retention of female servicemembers. These female servicemembers volunteer to serve their country in uniform and willingly take on the military's arduous training, frequent assignments and deployments, and risk, including that they may be

[2] https://www.armed-services.senate.gov/imo/media/doc/dod_briefing_on_non-covered_reproductive_healthcare_policies.pdf.

sent into harm's way. The military encourages women to join by presenting them the opportunity to serve their country, develop themselves mentally and physically, and gain life and professional experience. But it can only be successful in that effort if the life and professional experience it offers is one that is attractive to female recruits.

In Part II, *amici* explain that the availability of reproductive healthcare, including abortion care, is critical to encouraging female servicemembers to join and remain in the military, and in turn, critical to military readiness. Women are unlikely to select a career that may deny them bodily autonomy or access to healthcare during or after their service. DOD and the Department of Veterans Affairs ("VA") have acknowledged this, as have numerous lawmakers and members of the military. DOD and VA policy reflects this recognition: both agencies have taken steps to facilitate access to abortion care for active-duty servicemembers and for veterans, recognizing that doing so furthers their ability to recruit and retain women and to maintain deployable units. Yet abortion care remains elusive for many members of the military. The accounts shared in this brief elucidate the barriers that confront military women seeking to access this care.

Upholding the decision below would only make matters worse. Mifepristone has provided military women and veterans a safe, effective, and more accessible means of obtaining abortion care. Returning to the pre-2016 conditions for accessing mifepristone would eliminate this critical alternative pathway to abortion care, thus eroding the military's ability to

ensure women access to comprehensive healthcare during and after their service. That threatens the military's ability to recruit and retain women and, in turn, military readiness. Put simply, lack of access to reproductive healthcare, including abortion care, and the real prospect of being forced to take unwanted or unsafe pregnancies to term, only makes the military less attractive to today's recruitment-age females.

These threats to military readiness—and, consequently, to national security—are clearly relevant to the "public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 26 (2008) (vacating preliminary injunction that jeopardized Navy's ability to adequately train forces). This Court should evaluate the impacts to the military that upholding the decisions below would have and conclude that the stay of the FDA's actions is not warranted. The order below should be reversed.

ARGUMENT

Respondents ask the Court to restrict access to medication abortion by rolling back FDA actions that, among other things, eliminated a medically unnecessary in-person visit, J.A. 300-02, 456-59, and allowed non-physicians to become certified prescribers of mifepristone, J.A. 309-10, 461-62.

Doing so would restrict access to a method of abortion care that is particularly critical to members of the military and their families. Mifepristone offers a less expensive, more convenient method of abortion care for servicemembers stationed in remote locations and to whom the military cannot provide care directly. Access to mifepristone without in-person dispensing

therefore reduces barriers to care that can make military service less appealing to women, and it allows women to make decisions about their bodies that fulfill their own objectives, including to continue to serve in uniform. Restricting this important method of care would undermine the military's ability to recruit, retain, and care for female servicemembers, and thus undermine military readiness and America's national security.

I. MILITARY READINESS IS THREATENED, AND WOMEN ARE KEY TO ADDRESSING THE THREAT

A. Readiness is an Essential Element of National Security

The United States military cannot protect America's national security unless it is prepared and equipped to confront global conflicts as they arise. Accordingly, the military must maintain what the defense community terms "readiness"—that is, "[t]he ability of military forces to fight and meet the demands of assigned missions," JCS, *Joint Publication 1, Doctrine for the Armed Forces of the United States*, incorporating change 1, July 12, 2017, at p. GL-10.[3] Maintaining readiness is a statutory responsibility, *see* Cong. Rsch. Serv., *The Fundamentals of Military Readiness* at 8–9 (Oct. 2, 2020)[4]; the target of billions of dollars in funding each year, *id.* at 33-35; and a "crucial component of America's national security," Eric Edelman et al., *Providing for the Common Defense:*

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[3] https:// www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp1_ch1. pdf?ver=2019-02-11-174350-967.

[4] https://sgp.fas.org/crs/natsec/R46559.pdf.

The Assessment and Recommendations of the National Defense Strategy Commission, at xi (Nov. 13, 2018).[5]

Because it is a crucial component of national security, changes in readiness have broader security implications. In particular, reductions in readiness (1) render the military less prepared for unanticipated conflicts, and (2) increase the risk of conflict, as adversaries take note of the United States' compromised preparedness. Leon Panetta et al., Bipartisan Pol'y Ctr., *The Building Blocks of a Ready Military: People, Funding, Tempo*, at 19 (Jan. 2017).[6] Such reductions can be caused by threats to any of the elements of readiness, including personnel, equipment, and training.

As relevant here, threats to military personnel pose uniquely severe risks to readiness. After all, trained and ready people are the heart of readiness; the two are "inextricably linked." Panetta et al., *supra* at 5. Without "highly capable people," the military is deprived of "[t]he foremost recourse required to produce a highly capable military." Edelman et al., *supra*, at xi. That is because people—both new recruits and retained servicemembers—are an essential input to the "requisite supply of ready forces." Laura J. Junor, Inst. For Nat'l Strategic Stud., Nat'l Def. Univ., *Managing Military Readiness*, at 5 (Feb. 2017).[7] A supply of ready forces is an essential piece of the military's

[5] https://www.usip.org/publications/2018/11/providing-common-defense.

[6] https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/03/BPC-Defense-Military-Readiness.pdf.

[7] https://inss.ndu.edu/Portals/68/Documents/stratperspective/inss/Strategic-Perspectives-23.pdf?ver=2017-02-07-160518-893.

ability to "generate and deploy ready military forces," a "basic element of national security." *Id.* at 1.

B. Readiness is Threatened by a Recruiting Crisis

The military's ability to maintain a supply of ready forces is currently endangered by a "recruiting crisis." Jim Garamone*, Chiefs Discuss Military Recruiting Challenges at Committee Hearing*, DOD News (Dec. 7, 2023) (hereinafter, "Garamone I").[8] That crisis is driven in part by declining numbers of Americans "with both the fitness and propensity to serve." Edelman, *supra*, at xi. In particular, "[f]ewer [young Americans] . . . are interested in serving. And that's something that we are working very hard to change," General Randy A. George, the Army's vice chief of staff, told the House Armed Services Subcommittee on Readiness in April of last year. Jim Garamone, *Vice Chiefs Talk Recruiting Shortfalls, Readiness Issues*, DOD News (Apr. 20, 2023).[9]

General George's acknowledgement of the urgent need to increase interest in military careers reflects the dire state of affairs. Faced with fewer interested Americans, the Army, Navy, and Air Force all failed to meet recruiting goals last fiscal year. Garamone I*, supra*. As a result, "[t]he all-volunteer force faces one of its greatest challenges since inception," the acting undersecretary for personnel and readiness, Ashish Vazirani, testified in December 2023. David Vergun,

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[8] https:// www.defense.gov/News/News-Stories/Article/Article/3610846/chiefs-discuss-military-recruiting-challenges-at-committee-hearing/.

[9] https://www.defense.gov/News/News-Stories/Article/article/3369472/vice-chiefs-talk-recruiting-shortfalls-readiness-issues/.

DOD Addresses Recruiting Shortfall Challenges, DOD News (Dec. 13, 2023).[10] "I've been studying the recruiting market for about 15 years, and we've never seen a condition quite like this," said another senior Defense Department official. Ben Kesling, *The Military Recruiting Crisis: Even Veterans Don't Want Their Families to Join*, Wall St. J. (June 30, 2023, 12:01 a.m.).[11]

Recruiting shortfalls undermine the military's ability to "balance the supply and demand of deployable forces around the world," which DOD carefully manages to address global conflicts and security priorities. *Department of Defense Fact Sheet: Sequestration's Impact to Regaining Readiness*, at 1 (last visited Jan. 29, 2024).[12] "For decades, the United States has enjoyed unchallenged or dominant military advantage . . . [because it] could generally deploy forces when it wanted, assemble them where it wanted, and operate how it wanted." Statement of Diana Maurer, Director, Defense Capabilities and Management, *Testimony Before the Subcommittee on Readiness and Management Support, Committee on Armed Services, U.S. Senate: Military Readiness: Improvement in Some Areas, but Sustainment and Other Challenges Persist*, at 1, U.S. Gov't Accountability Off. (May 2, 2023).[13] Without that ability, the United States' dominance may be jeopardized. Moreover, "U.S. recruiting shortfalls

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[10] https://www.defense.gov/News/News-Stories/Article/Article/3616786/dod-addresses-recruiting-shortfall-challenges/.

[11] https://www.wsj.com/articles/military-recruiting-crisis-veterans-dont-want-their-children-to-join-510e1a25.

[12] https://dod.defense.gov/Portals/1/Documents/pubs/DoD_Readiness_Fact_Sheet_FINAL.pdf.

[13] https://www.gao.gov/assets/gao-23-106673.pdf.

represent a long-term problem that, if not resolved, would compel the military to reduce its force size." Kesling, *supra*. In a moment of increased global instability, "that problem has become more serious." *Id.*

C. Recruiting and Retaining Women is Necessary to Maintain Readiness

Reflecting these concerns, "recruiting and retaining female servicemembers" has been recognized as important to "maintain[ing] and improv[ing] mission readiness," U.S. Gov't Accountability Off., *Female Active-Duty Personnel: Guidance and Plans Needed for Recruitment and Retention Efforts*, at 1–2 (May 2020).[14] Women "represent a higher percentage of the recruitable population than their male counterparts," Kyleanne M. Hunter et al., *How the* Dobbs *Decision Could Affect U.S. National Security*, RAND Corp., at 1 (Sept. 2022),[15] and offer a particularly promising target for increased recruiting efforts.

But recruiting and retaining female servicemembers is a priority for reasons beyond increasing numbers. More women are needed "to more accurately reflect the nation's population [and] ensure the strongest possible military leadership." GAO, *Female Active-Duty Personnel*, *supra*, at 1–2. Furthermore, as Pentagon spokesman Jonathan Rath Hoffman explained in June 2020, "[b]y recognizing the diverse roles women play across the spectrum of conflict—and by incorporating their perspectives throughout plans and operations—DOD is better equipped to promote our security, confront near-peer competitors, and defeat our

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[14] https://www.gao.gov/assets/gao-20-61.pdf.
[15] https://www.rand.org/pubs/perspectives/PEA2227-1.html.

adversaries," Jim Garamone, *DOD Unveils Women, Peace, Security Strategy*, DOD News (June 11, 2020).[16]

Thanks in part to recruitment policies that acknowledge the importance of female servicemembers, women's contributions in the military have grown significantly since the passage of the Women's Armed Services Integration Act of 1948. Douglas Yeung et al., *Recruiting Policies and Practices for Women in the Military: Views from the Field*, RAND Corp. (2017).[17] Women have long filled critical roles in healthcare, operational, and administrative functions, *see* Hunter et al., *supra*, at 2. Their roles have expanded since 2013, when then-Secretary of Defense Leon E. Panetta ended the ban on women serving in direct ground combat roles. Yeung et al., *supra*, at 1. Secretary Panetta did so in a January 2013 memorandum that rescinded the 1994 rule excluding women from assignment to combat roles. It recognized this change as a step to "remov[e] as many barriers as possible to joining, advancing, and succeeding in the U.S. Armed Forces," and as reflective of the fact that "women . . . are indispensable to the national security mission." Martin E. Dempsey and Leon E. Panetta, *Memorandum: Elimination of the 1994 Direct Ground Combat Definition and Assignment Rule* (Jan. 24, 2013).[18] The move also recognized that gender-based restrictions on qualified servicemembers performing certain roles made little sense in an environment

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[16] https://www.defense.gov/News/News-Stories/Article/Article/2217438/dod-unveils-women-peace-security-strategy/.
[17] https://www.rand.org/pubs/research_reports/RR1538.html.
[18] https://dod.defense.gov/Portals/1/Documents/WISRJointMemo.pdf.

where, even then, the military was struggling to meet its recruitment goals. Tom Vanden Brook, *Just 10 years ago, women were banned from combat. Now, they're on the front lines, climbing the ranks.*, USA Today (Apr. 18, 2023, 11:02 a.m.).[19]

Following that shift, women have been fully integrated into the services as a matter of policy since January 1, 2016. Yeung et al., *supra*, at 1. Women now comprise approximately 17.5% of the military's active-duty force and 21.6% of the selected reserves. U.S. Dep't of Defense, 2022 Demographics Profile of the Military Community, at iii, iv (2022) (hereinafter, "2022 Demographics").[20] Those numbers represent increases of approximately 2.9 and 4.4 percent, respectively, since 2005. U.S. Dep't of Defense, *Defense Department Report Shows Decline in Armed Forces Population While Percentage of Military Women Rises Slightly* (Nov. 6, 2023).[21] Yet women are 28% more likely to leave the military than men, driven in part by difficulties with family planning. *See* GAO, *Female Active-Duty Personnel,* supra, at 18, 29-30. Reducing that attrition rate—combined with recruiting more women to join—is essential to maintaining the readiness of America's military and to protecting our national security.

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[19] https://www.usatoday.com/story/news/politics/2023/04/16/women-in-combat-military-progress/11548931002/.

[20] https://download.militaryonesource.mil/12038/MOS/Reports/2022-demographics-report.pdf.

[21] https://www.defense.gov/News/Releases/Release/Article/3580676/defense-department-report-shows-decline-in-armed-forces-population-while-percen/#:~:text=Over%20the%20same%20period%2C%20the,reserve%20has%20risen%20by%204.4%25.

II. ENSURING ACCESS TO ABORTION CARE IS ESSENTIAL TO READINESS

A key element of the military's ability to better maintain readiness is ensuring access to a full range of reproductive healthcare services, including abortion care, without which the military cannot recruit and retain sufficient women to combat its recruiting crisis. Access to abortion care has upstream effects: the knowledge that they will be able to access reproductive healthcare—for themselves or their partners—factors into potential recruits' decisions about whether to join or remain in the military. It also affects the physical readiness of individuals and their units by allowing servicemembers to make individualized family planning decisions that support their own mental and physical health—including the decision to terminate unsafe, nonviable, unintended, or unwanted pregnancies. Abortion thus impacts recruitment, retention, physical preparedness, and unit cohesion—in other words, military readiness.

A. Access to Reproductive Healthcare—Including Abortion Care—is Essential To Readiness

The military cannot convince women to join or to stay if it cannot offer healthcare access that supports their training, service, career progression, and personal choices, including after their military service ends. Its ability to offer full reproductive healthcare impacts the effectiveness of its efforts to recruit and retain men, too; men care that their partners will have access to care that they need, and that the institution they serve treats all their fellow soldiers equally.

Military leaders, lawmakers, and servicemembers have all recognized this.

Military leaders, faced with the prospect of new restrictions on abortion care, voiced fears about the impact decreased access would have on the service. In the wake of *Dobbs*, for example, Gilbert R. Cisneros, Jr., the Pentagon's Undersecretary of Defense for Personnel and Readiness, expressed "concerns that some service members may choose to leave the military altogether because they may be stationed in states with restrictive reproductive health laws." Alex Horton and Rachel Roubein, *Abortion ruling will worsen military personnel crisis, Pentagon says*, Wash. Post (July 29, 2022, 5:17 p.m.).[22] Moreover, Cisneros said, abortion restrictions raise "concerns about recruitment." *Id.*

Members of Congress and White House personnel have echoed these concerns. In a 2022 Congressional hearing, Representative Jackie Speier (D-Cal.) noted that restrictions on abortion care "creat[e] a real incentive for women not to serve." *Hearing: Military Personnel on Reproductive Health and Readiness Before the House Armed Services Committee Readiness Subcommittee*, 117th Cong. (July 29, 2022). And National Security Council spokesperson John Kirby reported that active-duty servicemembers "told him that restrictive abortion laws in many states are impacting their willingness to continue to serve in the military." Trevor Hunnicutt, *Restrictive abortion laws hurting US military, White House says*, Reuters (July 17, 2023,

[22] https://www.washingtonpost.com/national-security/2022/07/29/military-abortion-recruiting/.

6:23 p.m.).[23] Kirby cautioned, "if you don't think there's going to be a retention and morale issue, think again, because it's already having that effect." *Id.*

Active-duty servicemembers, too, have worried about how lack of access to abortion care could impact them, their colleagues, and the military as a whole. As one female servicemember testified before the U.S. House of Representatives:

> I'm worried that these barriers to accessing reproductive care are going to discourage new recruits from joining the military. I'm also worried that current members would leave the military depending on what duty station they are, because that would mean that they're going to risk their access to reproductive care. . . . [I]t affects the whole family, and it affects all of us male and female, and it affects the military at large.

Testimony of Theresa Mozzillo, Active-Duty Servicemember, *Hearing: Military Personnel on Reproductive Health and Readiness Before the House Armed Services Committee Readiness Subcommittee*, 117th Cong. (July 29, 2022). Referring to the effect of restricting abortion access, another servicemember testified, "I think overall, it degrades morale, it affects retention." *Id.,* Testimony of Sharon Arana, Active-Duty Servicemember.

Barriers to abortion affect elements of readiness other than recruiting and retention—namely, unit deployability. When women must take extended leave

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[23] https://www.reuters.com/world/us/restrictive-abortion-laws-hurting-morale-retention-us-military-w-house-2023-07-17/.

and travel several hours or even states away from base to access abortion care, their units are deprived of full staffing. Moreover, delays in accessing abortion care can increase health risks—for patients facing threats to their health or life, waiting until the last minute substantially increases the risk of detrimental effects on the health of the woman. *See, e.g.*, Stephania Taladrid, *In the Post-*Roe *Era, Letting Pregnant Patients Get Sicker—By Design*, New Yorker (May 6, 2023).[24] When servicemembers experience significant health consequences due to delayed care, their units are deprived of full staffing for planning, training, maintenance, and other purposes during any recovery period. And when women are denied their choice of abortion care entirely, and must leave the military as a result, their units are deprived of full staffing, sometimes for "up to two years." Statement of Dr. Jacqueline Lamme, *Hearing: Military Personnel on Reproductive Health and Readiness Before the House Armed Services Committee Readiness Subcommittee*, 117th Cong. (July 29, 2022).[25] Furthermore, single military parents who are unable to demonstrate that they have reliable day-to-day caregiving plans that support training and unpredictable work hours, as well as someone who will accept legal custody of their child if they are deployed, are forced to leave the military, depriving it of trained and experienced soldiers, sailors, airmen and marines. Military units without full staffing "aren't ready to respond quickly." Kesling, *supra*. Moreover, "units with fill-in soldiers don't have the

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[24] https://www.newyorker.com/news/dispatch/in-the-post-roe-era-letting-pregnant-patients-get-sicker-by-design.

[25] https://docs.house.gov/meetings/AS/AS02/20220729/115074/HHRG-117-AS02-Wstate-LammeJ-20220729.pdf.

same effectiveness as a unit whose members trained together for months or years." *Id.* Forced unavailability thus harms not only the women denied the care they need; it also restricts the deployability of their units and curtails the military's readiness overall.

B. DOD and the VA Have Tried to Make Abortion Care Accessible

Recognizing that ensuring access to abortion care is essential to recruiting, retaining, and properly serving female servicemembers, military policymakers have taken steps to facilitate abortion access. Recent policy changes reflect these efforts.

In October 2022, the Secretary of Defense issued a memorandum on "Ensuring Access to Reproductive Health Care." Secretary of Defense, *Ensuring Access to Reproductive Health Care* at 1 (Oct. 20, 2022) (hereinafter, the "Oct. 2022 Memorandum").[26] The memorandum directed DOD to, among other things, create a policy "that allows for appropriate administrative absence consistent with applicable federal law for non-covered reproductive health care," and to "[e]stablish travel and transportation allowances for Service members and their dependents . . . to facilitate official travel to access non-covered reproductive health care that is unavailable within the local area of a Service member's permanent duty station." *Id.* at 2. This direction accounted for the reality that "Service members and their families are often required to travel or move to meet our staffing, operational, and training requirements" in a way that limits their access to

[26] https://www.health.mil/Reference-Center/Policies/2022/10/20/Ensuring-Access-to-Reproductive-Health-Care.

reproductive healthcare, and that the hardship of attempting to access such care when restricted "will interfere with [DOD's] ability to recruit, retain, and maintain the readiness of a highly qualified force." *Id.*

Following the Secretary's directive, DOD enacted a policy providing that active-duty Service members, including Reserve or National Guard members on active-duty orders for 30 or more consecutive days, could "request an administrative absence from their normal duty station for non-covered reproductive health care without loss of pay or being charged leave." Gilbert R. Cisneros, Jr., Under Secretary of Defense, *Administrative Absence for Non-Covered Reproductive Health Care* (Feb. 16, 2023) (hereinafter, "Feb. 16, 2023 Memo re: Leave").[27] It also established policies and procedures for "authorized travel and transportation allowances for Service members and dependents who must travel to access lawfully available non-covered reproductive health care" in furtherance of its commitment to "taking care of our people and ensuring that the entire Force remains ready and resilient." Jeffrey R. Register, Director, Defense Human Resources Activity, *Military Advisory Panel Item 86-22(R), Paragraph 033013 'Travel for Non-Covered Reproductive Health Care Services'"* (Feb. 16, 2023) (hereinafter, "Feb. 16, 2023 Memo Re: Travel Allowances").[28]

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[27] https:// media.defense.gov/2023/Feb/16/2003163307/-1/-1/1/MEMORANDUM-ADMINISTRATIVE-ABSENCE-FOR-NON-COVERED-REPRODUCTIVE-HEALTH-CARE.PDF.
[28] https://media.defense.gov/2023/Feb/16/2003163300/-1/-1/1/MEMORANDUM-TRAVEL-FOR-NON-COVERED-REPRODUCTIVE-HEALTH-CARE-SERVICES.PDF.

The VA, too, has recognized that providing access to reproductive healthcare, including abortions, serves its commitments and furthers the military's recruiting and retention goals.[29] In 2022, the VA enacted an Interim Final Rule ("IFR") that expanded access to abortion services for military veterans. *Reproductive Health Services*, 87 Fed. Reg. 55287 (Sept. 9, 2022) (to be codified at 38 C.F.R. 17). While veterans were historically unable to access any abortion care through the federal government, the IFR allows pregnant veterans to access abortion services through the VA "when the life or health of the pregnant Veteran would be endangered if the pregnancy were carried to term, or when the pregnancy is the result of rape or incest." *Women Veterans Health Care: Abortion Services*, U.S. Dep't of Veterans Affairs (last visited Jan. 29, 2024).[30] This policy was necessary, the VA determined, "to protect the lives and health of veterans" and "to avert imminent and future harm to the veterans . . . whose interests Congress entrusted VA to serve." 87 Fed. Reg. 55288.

C. There Are Limits on the Military's Ability to Make Abortion Care Accessible, and Alternative Options Are Limited Post-*Dobbs*

Despite these policy changes, abortion care remains elusive for many members of the military. That

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[29] The promise of access to comprehensive healthcare benefits—both during and after service—is one of the reasons many recruits opt to join the military. Offering a full range of healthcare benefits to veterans, then, is an element of recruitment much like the care offered to active-duty servicemembers.

[30] https://www.womenshealth.va.gov/topics/abortion-services.asp.

is because DOD's and the VA's ability to facilitate access to comprehensive abortion care is limited. Federal law prohibits DOD from performing or paying for the performance of abortions unless the life of the mother would be endangered if the fetus were carried to term, or when the pregnancy results from rape or incest (collectively known as "covered abortions").[31] *See* 10 U.S.C. § 1093.

Even before this Court's decision in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), female servicemembers relied on their own funds and local, non-military healthcare providers for abortions in any non-covered circumstance. That remains true post-*Dobbs*, but servicemembers now face the added complication that many states—25 as of the time of writing—restrict access to abortions. *See Interactive Map: US Abortion Policies and Access After Roe*, Guttmacher Institute (Jan. 24, 2024).[32,33] That, as the Secretary of Defense recognized in the wake of *Dobbs*,

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[31] All abortions other than those the federal government may perform or pay for the performance of are referred as "non-covered abortions."

[32] https://states.guttmacher.org/policies/.

[33] The Guttmacher Institute assigns states to one of seven policy categories based on a review of abortion "policies currently in effect and the cumulative impact of those policies on abortion rights and access." *Methodology and Sources*, Guttmacher Institute (last visited Jan. 29, 2024), https://states.guttmacher.org/policies/methodology.html. Those categories are: "Most restrictive," "Very restrictive," "Restrictive," "Some restrictions/protections," "Protective," "Very protective," and "Most protective." *Id.* For the purposes of assessing how many states restrict access to abortion, this brief considers states categorized as "Restrictive," "Very restrictive," and "Most restrictive" to be states that restrict access to abortion.

has "readiness, recruiting, and retention implications for the Force." Oct. 2022 Memorandum at 1.

Servicemembers have no control over where they live, which means they may find themselves stationed in a state that denies access to abortion. *See* Oct. 2022 Memorandum at 2. Indeed, many of the states that have restricted access to abortion since *Dobbs* have a large military presence, including Texas, Georgia, Florida, Oklahoma, South Carolina, Arizona, and North Carolina. *See* Guttmacher, *supra*; Hunter et al., *supra*, at 3. As a result, it was estimated that in 2022, approximately 40 percent of active-duty female servicemembers stationed in the United States "w[ould] have no or severely restricted access to abortion services where they are stationed." Hunter et al., *supra*, at 3. The vast majority—around 95 percent—of those women are of reproductive age. *Id.*

This lack of access causes great hardship to female and male servicemembers alike. One active-duty servicemember who was a Major in the Army at the time of her pregnancy recounted the despair and abandonment she felt when she was denied an abortion for a nonviable pregnancy, and one that posed a serious risk to her health, all because her life was not imminently threatened:

> I got married, got pregnant, and wanted the pregnancy. Everything was fine, but, because I was 37, I was offered genetic testing. The testing revealed a fatal diagnosis: Trisomy 18. The pregnancy had no chance. The 12-week ultrasound showed that I, too, was at risk—of stroke, future fertility, preeclampsia. My life was in danger. But because it wasn't in

> *immediate* danger, Tricare wouldn't cover the termination or any subsequent follow-on care.
>
> I'd experienced loss in combat, but this was worse because I was alone. We have a support system in place for combat loss. There was no one there for me. This was the first time in my career where I was completely alone: "Figure this out on your own; if something goes catastrophically wrong, you're on your own." I have never felt of so little value. After twenty years of service, being told I'm not worth anything until my life was in danger. It was completely dehumanizing.

Email received Jan. 17, 2024.

The momentous mental toll of having to find care on one's own is exacerbated by the logistical burdens many women face. Testifying before the U.S. House of Representatives, the same active-duty servicemember who worried about the impact of abortion restrictions on morale and retention described the challenge of attempting to access care from her station in Alabama:

> [My then-boyfriend/now-husband] and I were stationed in Alabama and access to abortion was restricted. So, the weekend before we graduated training, we drove 3.5 hours to Atlanta. The morning of my appointment, I learned that Georgia had a three-day "cooling off" period, which meant that the first day was only to confirm the pregnancy. The same pregnancy that I had already confirmed in that gas station bathroom. I was expected to return to the clinic in three days for the

> abortion. But, since I was in training, I needed to return to Alabama to finish my course in order to commission later that week.

Testimony of Sharon Arana, active-duty servicemember, *Hearing: Military Personnel on Reproductive Health and Readiness Before the House Armed Services Committee Readiness Subcommittee*, 117th Cong. (July 29, 2022). She ultimately obtained an abortion in New York and had to use her leave time to recover. *Id.*

In the same hearing, another active-duty servicemember whose testimony is also discussed above recounted how she had to travel from Missouri to Illinois and seek a Saturday appointment to avoid having to formally request time-off from a commander with whom she viewed discussing her reproductive healthcare decisions as "out of the question." *Id.*, Testimony of Theresa Mozzillo.

These challenges are not limited to active-duty servicemembers. Abortion access is also restricted for veterans who do not benefit from travel allowances or administrative leave to seek non-covered abortion care. That remains true even though veterans are typically older, on average, when they experience pregnancy, Lisa S. Callegari, MD, MPH, and Sonya Borrero, MD, MS, *Abortion Care for Veterans—A Historic Step Forward*, JAMA Health Forum (Nov. 1, 2022)[34]; face high risk of chronic conditions as a result of their military service, *id.*; Jonathan G. Shaw et al., *Post-traumatic Stress Disorder and Antepartum Complications: a*

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[34] https:// jamanetwork.com/journals/jama-health-forum/fullarticle/2798138.

Novel Risk Factor for Gestational Diabetes and Preeclampsia, 31 Pediatric & Perinatal Epidemiology 185 (2017)[35]; and experience high rates of mental health conditions and homelessness, Eleanor Bimla Schwarz et al., *Induced Abortion among Women Veterans: Data from the ECUUN Study*, 97 Contraception 41 (2018)[36]—factors that increase the risk of an unsafe pregnancy and that may exacerbate the negative mental and economic effects of being denied access to abortion care.

For recruits considering joining the military or servicemembers weighing whether to stay, the knowledge that they, too, might face steep challenges in accessing abortion care serves as a deterrent to military service. And, as we discuss next, access to safe medication abortion has for years served as a way to overcome some of these obstacles and allow women to more freely and comfortably enter and remain in military service.

D. Access to Mifepristone Alleviates Some of the Challenges of Accessing Abortion Care, Mitigating Restrictions' Effects on Readiness

Mifepristone—as available under current regulations—offers a way to address roadblocks military women face in accessing abortion care. Under current regulations, servicemembers can obtain safe and effective medication abortions without having to visit a doctor's office. They can be prescribed the medication

[35] https:// doi.org/10.1111/ppe.12349.

[36] https:// www. ncbi. nlm.nih.gov/pmc/artcles/PMC5732058/ pdf/nihms915509.pdf.

through, among other avenues, telehealth appointments, and they can receive it through the mail where legally available. Servicemembers can take the medication and terminate the pregnancy on their own time, and in their own home.

Such remote access to medication abortions reduces the burden of seeking abortion care on servicemembers stationed in remote locations or in some areas where procedural abortion services are unavailable. That holds true even accounting for recent changes to military policy that provide administrative-leave and travel allowances for non-covered abortions. *See* Feb. 16, 2023 Memo Re: Leave; Feb. 16, 2023 Memo Re: Travel Allowances. Although those policies mitigate some burdens and support female servicemembers' reproductive choices, servicemembers who make use of them must still travel and take time—often significant distances and days, and potentially for multiple appointments. Those days away can be detrimental to unit training and readiness, whether in garrison or deployed. Requiring these days away, furthermore, harms female servicemembers' sense of well-being by forcing them to do something that violates their ethos not to leave their duty stations or the combat buddies who rely on them. And they cause female servicemembers to fear they will be regarded by their superior officers, a majority of whom are men, as less reliable and worthy of promotion and advancement. Accessing mifepristone remotely allows servicemembers to reduce burdens on their time and time away from their units.

Moreover, the remote accessibility of mifepristone can be especially valuable to veterans, who are denied

the travel- and administrative-leave allowances that active-duty servicemembers have. The logistical burdens associated with traveling for procedural abortions weigh more heavily on this population, and so remote medication abortion's ability to alleviate those burdens is even more powerful than for active-duty servicemembers.

Mifepristone preserves access to abortion care in another way, too: by offering an alternative to a surgical procedure at an in-person clinics where servicemembers may face hostile protesters. For example, a female servicemember who sought to end an unsafe pregnancy reported that a medication abortion "saved me from having to wait for a surgical procedure, or worse, having to go back to that clinic" where she feared facing protestors. Email received Jan. 17, 2024. "My mental health was awful, I was suicidal," she recounted, and "I don't know if I could have gone back to that clinic, experienced protestors, [double airlock doors], all of it—for a wanted pregnancy." *Id.*

In sum, the availability of mifepristone under current regulations has provided a more easily accessible pathway for servicewomen and veterans to obtain a full range of safe reproductive healthcare, thus mitigating impacts on recruiting, retention, and readiness that stem from limited reproductive healthcare options.

E. Upholding the Decision Below Threatens an Important Pathway to Safe Abortion Care

Respondents ask this Court to put those vital mitigating effects at risk. Upholding the Fifth Circuit's

decision would essentially nullify many of the benefits of access to mifepristone for servicemembers and veterans. That is because, under the Fifth Circuit's regime, servicemembers would be required to obtain mifepristone in person. *See All. for Hippocratic Med. v. Food & Drug Admin.*, 78 F.4th 210, 256 (5th Cir. 2023) (upholding stay of 2016 amendments and 2021 Non-Enforcement Decision). Some servicemembers have found that to be no less—and perhaps even more—burdensome than traveling for procedural abortions in the past. *See, e.g.*, Karen Grindlay et al, *Abortion Knowledge and Experiences Among U.S. Servicewomen: A Qualitative Study*, 49 Perspectives on Sexual and Reproductive Health 191, (Dec. 11, 2017) (recounting story of servicemember who opted for procedural abortion because of follow-up-visit requirement for medication abortion).[37]

A return to the pre-2016 conditions for mifepristone would thus eliminate a key means of reducing barriers to abortion for military women. In doing so, it would erect significant new barriers to the military's efforts to recruit, retain, and care for female servicemembers at a time when they are needed in the ranks more than ever.

F. Upholding the Decision Below is Against the Public Interest

Undoing the actions that have allowed remote access to mifepristone would put servicemembers in an even worse position than they faced in 2016; then, they at least had the constitutional protection of *Roe*. It would exacerbate the recruitment, retention, and

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[37] https://onlinelibrary.wiley.com/doi/10.1363/psrh.12044.

deployment challenges that the military faces, and which have already been aggravated by increased restrictions following *Dobbs*. It would make it harder for the military to combat its recruiting crisis and strengthen its forces. And it would make it harder for the military to maintain trained and ready troops.

Those impacts are clearly relevant to an evaluation of the "public interest." *Winter*, 555 U.S. at 26. This Court should acknowledge these impacts and follow its own assessment that, where the requested relief risks leaving the military with inadequately equipped forces, "the proper determination of where the public interest lies . . . [is not] a close question." *Id.* at 25-26. Here, as in *Winter*, there is "no basis for jeopardizing national security, as the present [stay] does." *Id.* at 33.

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Those who defend America's freedom should not have less access to reproductive healthcare than those they defend. That is more than a matter of principle. It's a matter of national security.

CONCLUSION

The Court should reverse the order below.

Respectfully submitted,

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