[ORAL ARGUMENT SCHEDULED FOR DECEMBER 10, 2018]

Case No. 18-5257

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JANE DOE 2, et al.,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, et al.
Defendants-Appellants

On Appeal from the United States District Court
for the District of Columbia, No. 1:17-cv-01597-CKK
The Honorable Colleen Kollar-Kotelly

BRIEF OF RETIRED MILITARY OFFICERS AND FORMER NATIONAL SECURITY OFFICIALS AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

Phillip Spector
MESSING & SPECTOR LLP
1200 Steuart Street
Number 2112
Baltimore, MD 21230
(202) 277-8173
ps@messingspector.com

Harold Hongju Koh
RULE OF LAW CLINIC
Yale Law School
127 Wall Street, P.O. Box 208215
New Haven, CT 06520-8215
(203) 432-4932
harold.koh@ylsclinics.org

Counsel for Amici Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(A)(1)

A. Parties and Amici. All parties, intervenors, and amici appearing before the district court and in this Court (except for the amici filing this brief) are listed in the Brief for Plaintiffs-Appellees.

B. Ruling Under Review. An accurate reference to the ruling at issue appears in the Briefs for Plaintiffs-Appellees.

C. Related Cases. An accurate statement regarding related cases appears in the Brief for Plaintiffs-Appellees.

/s/ Harold Hongju Koh
Harold Hongju Koh
RULE OF LAW CLINIC
Yale Law School
127 Wall Street, P.O. Box 208215
New Haven, CT 06520-8215
(203) 432-4932
harold.koh@ylsclinics.org
Counsel for Amici Curiae

CERTIFICATE REGARDING CONSENT TO FILE AND SEPARATE BRIEFING[1]

Plaintiffs-appellees consented to the filing of this brief. Defendants-appellants did not oppose the filing of the brief so long as the brief was timely filed and otherwise complied with the rules.

Pursuant to Circuit Rule 29(d), counsel certifies that a separate brief is necessary to provide the perspective of the retired military officers and former national security officials that counsel represent. This perspective is unique, formed through countless decades committed to strengthening U.S. security interests and supervising and participating in policy process involving military readiness and personnel at the senior-most levels of the U.S. government. This extensive body of experience allow them to offer the court singular insight into the nature of the review in this case, how it compares to those in the past, and the government's insistence that the present order is deserving of deference from this Court.

[1] No counsel for any party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than amici or its counsel contributed money that was intended to fund preparing or submitting this brief.

/s/ Harold Hongju Koh
Harold Hongju Koh
RULE OF LAW CLINIC
Yale Law School
127 Wall Street, P.O. Box 208215
New Haven, CT 06520-8215
(203) 432-4932
harold.koh@ylsclinics.org
Counsel for Amici Curiae

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GLOSSARY

DOD	Department of Defense
NATO	North Atlantic Treaty Organization
RAND	RAND Corporation National Defense Research Institute

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All applicable statutes, etc., are contained in the Brief for Defendants-Appellants.

INTEREST OF *AMICI CURIAE*

Amici are retired military officers and former national security officials who have collectively devoted countless decades to safeguarding the security of the United States. They have been responsible for the readiness of the service members under their command in times of hostilities and peace, and they have led and participated in policy-making processes regarding military personnel at the senior-most levels of the U.S. government. As a result of their decades of service in positions of national security leadership, amici offer a unique perspective on the many security issues implicated by these cases.

Amici deeply appreciate the importance of military expertise, and of the judiciary deferring to that expertise when the circumstances merit. They submit this brief to explain their view is not such a case, because the order does not reflect the sort of considered military judgment that merits this Court's deference, and represents a sharp departure from decades of precedent regarding how the U.S. military approaches major personnel policy changes. Further, amici write to share their perspective that the categorical exclusion of transgender individuals on the basis of group characteristics rather than individual fitness to serve is inimical to the national security interests of the United States.

SUMMARY OF ARGUMENT

On the morning of July 26, 2017, President Donald Trump issued three tweets that announced a ban on transgender service members serving in the military. The tweets did not emerge from a policy review of any kind; his senior-most military officials were not consulted, and were unaware that he planned to make this decision. Less than a month later, on August 25, 2017, President Trump issued a Presidential Memorandum that formalized the tweets. Once again, that document did not identify any policy-making process, or consultations with senior military officials. JA406. Nor did it point to a single piece of evidence demonstrating that the ban was necessary for reasons of military necessity, national security, or any other legitimate national interest.

In February 2018, the Secretary of Defense sent a memorandum to the President implementing the August 2017 Presidential Memorandum. JA268. This document was unambiguously meant to be an *implementation memorandum*, executing the previously made presidential decision. The Presidential memorandum called for such an implementation of its directives, and multiple internal documents make clear that that this is precisely what this memorandum and the study it adopted were intended to be. Even so, Defendants try to shield this execution of the President's directives from judicial review, asserting throughout

their papers that the President is owed the "great deference" that is due "the professional judgment of military authorities."[2]

But the President's tweets and Memorandum involved no professional judgment of military authorities. By the time the military authorities exercised their professional judgment, the decision was foreordained. Indeed, what transpired here is far removed from those cases where courts have deferred to the genuine "considered" or "professional judgment" of military officials.[3] The President and his aides did not seek their judgment then, and should not be allowed to hide behind their judgment now. A predetermined, constitutionally defective order that is based on no evidence or consultations cannot be saved by a process that is designed only to implement that order.

Defendants cannot point to a single case where a court has afforded deference to a President regarding military affairs when that President ordered the abrogation of an existing without considered review, any consultations with military officials, and any evidence to support his decision. Moreover, these actions reflect a remarkable departure from decades of practice across multiple administrations regarding the proper approach to major policy changes regarding

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[2] Appellants' Opening Br. ("Br.") at 24 (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008)) (citations omitted), 36 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 508-09 (1986)); *see also id.* at 17-22, 31-32.

[3] *Winter*, 555 U.S. at 24 (quotations and citations omitted); *Goldman*, 475 U.S. at 508-09.

personnel issues within the U.S. military. Further, they reflect an abrupt change in a policy established merely 18 months earlier, without any basis in new evidence or interceding events that could plausibly justify such a sudden change in position. It should come as no surprise that the policies that emerged from such a predetermined and defective process are themselves deeply flawed, and will do serious harm to our military's readiness and unit cohesion.

While the President's policies in this case *affect* national security, they did not emerge from the sort of national security *judgment* that deserves—much less compels—judicial deference. Amici well understand the critical importance of considered military expertise to the security of our nation, and the need for the judiciary to defer to that expertise in the appropriate circumstances. But the President should not be allowed to hide behind a cloak of deference a capricious and discriminatory order that will grievously harm not only the service members immediately affected, but also the national security and foreign policy of the United States.

ARGUMENT

I. The President's actions departed sharply from decades of practice involving similar military policy changes.

Throughout its history, the U.S. military has exercised great care and deliberation in the selection, training, and retention of qualified personnel as an integral aspect of military readiness. This practice reflects an appreciation for the

gravity of decisions made for the security of our nation and the lives of the service members, and the ways in which even incremental changes in military policy can deeply affect our Armed Forces' overall readiness to protect our country.

A. African-American Service Members

The paradigmatic case of a major U.S. military personnel change is President Truman's decision seven decades ago to integrate African Americans into the Armed Forces. Although African Americans had served in the United States military since the Revolutionary War,[4] many had served in segregated units due to perceived concerns about unit cohesion and morale.[5] Spurred by growing concern about racial inequality and unrest in the United States, on December 5, 1946 President Truman issued an Executive Order appointing the President's Committee on Civil Rights, a presidential commission comprised of senior defense officials, religious leaders, and civil rights activists to study, *inter alia*, the question of whether finally to desegregate the military.[6] Over nearly a year, the Committee deliberated across ten meetings, undertook multiple studies, heard from numerous witnesses in public and private hearings, received hundreds of communications

[4] Michael Lee Lanning, *African Americans in the Revolutionary War* 73 (2000).
[5] Martin Binkin & Mark J. Eitelberg, *Blacks and the Military* 25-26 (1982).
[6] Exec. Order No. 9,808, 11 Fed. Reg. 14,153 (Dec. 5, 1946); Harry S. Truman Library and Museum, *Records of the President's Committee on Civil Rights* (2000).

from private organizations and individuals, and was assisted in its work by twenty-five agencies across the federal government. [7]

In December 1947, the Committee issued its final report. The report found that the practices of the military services in excluding African-Americans was "indefensible," concluding that that practice had "cost[] lives and money in the inefficient use of human resources," "weaken[ed] our defense" by "preventing entire groups from making their maximum contribution to the national defense," and "impose[d] heavier burdens on the remainder of the population."[8] As a result, the Committee called for an immediate end to discrimination and segregation based on "race, color, creed, or national origin, in the organization and activities of all branches of the Armed Services."[9] Several months later, President Truman issued an executive order declaring that it would be the policy of the United States to require equality of treatment and opportunity for all persons in the U.S. Armed Services without regard to race.[10]

B. LGB Service Members

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[7] President's Comm. on Civil Rights, *To Secure These Rights* XI (1947); Harry S. Truman Library and Museum, *supra* note 6.
[8] President's Comm. On Civil Rights, *supra* note 7, at 46-47, 162-63.
[9] *Id.* at 163.
[10] Harry S. Truman Library and Museum, *Records of the President's Committee on Equality of Treatment and Opportunity in the Armed Services*; Exec. Order No. 9,981, 13 Fed. Reg. 4313 (July 28, 1948).

The Obama Administration's repeal of the Don't Ask, Don't Tell directive, which allowed gay, lesbian or bisexual people to serve openly in the military, followed a similarly searching process. In March 2010, Secretary of Defense Robert Gates convened a working group co-chaired by General Counsel Jeh Johnson of the Department of Defense and General Carter F. Ham of the U.S. Army, and comprised of senior civilian and military leaders from across the Armed Services, to undertake a comprehensive review of the impact of any repeal.[11] For nine months, members of the working group conducted 95 "information exchange forums" at 51 bases and installations around the world, conducted 140 focus groups, solicited input from nearly 400,000 active duty and reserve service members, engaged the RAND Corporation National Defense Research Institute ("RAND") to update an earlier 1993 study on the topic, studied foreign militaries' integration of gays and lesbians, and conducted a thorough legal review.[12]

On November 30, 2010, the working group issued a 256-page report finding that allowing gays to serve openly in the military would not result in long-lasting and detrimental effects on unit cohesion or the ability of units to conduct military missions.[13] Shortly thereafter, Secretary Gates and Chairman of the Joint Chiefs

[11] U.S. Dep't of Def., *Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell,"* Nov. 30, 2010.
[12] *Id.* at 33-39.
[13] *Id.* at 119.

Admiral Michael Mullen called on Congress to immediately repeal the Don't Ask, Don't Tell law. Congress proceed to pass just such a statute, which President Obama signed into law. Seven months later, President Obama, newly confirmed Secretary of Defense Leon Panetta, and Admiral Mullen formally certified under the new statute that the American military was ready to repeal the old policy.[14]

C. Female Service Members in Combat Roles

The decision to include female service members in combat roles likewise emerged from a careful, evidence-based process—this time, a policy and legal review mandated by Congress of the policies and regulations that had officially barred women from serving in combat positions. The review was undertaken by the Secretary of Defense, in consultation with the Military Department Secretaries, and involved an extensive study of the policies and laws governing the assignment of women in the Armed Forces and the feasibility of opening to women military occupational specialties that were then closed to them. Following that review, the Department of Defense wrote a February 2012 report concluding that "there is no compelling reason" to preclude "female service members from being assigned to . . . direct ground combat units," and declaring an intent to rescind the "co-location rule" that had prevented female Service members from being assigned to

[14] Jody Feder, *"Don't Ask, Don't Tell": A Legal Analysis,* CRS Rep. R40795, Aug. 6, 2013.

units that were doctrinally required to physically co-locate with direct ground combat units.[15]

Following nine months of additional study, the Joint Chiefs of Staff unanimously recommended to Secretary Panetta that he also do away with the other remaining policy barriers to service for women. Secretary Panetta then announced that the Department would rescind the "Direct Combat Exclusion Rule" on women serving in previously restricted occupations, [16] and called on each of the services to undertake their own separate "women in the service" reviews of how to move forward with the integration of women into previously closed positions, and identify any recommended exemptions for particular positions.[17] This process led to more than thirty additional studies over the next three years.[18] After the Secretaries of each of the services completed their reviews and submitted their final recommendations, Secretary of Defense Ashton Carter ordered the military to open all combat jobs to women who meet the validated occupational standards.[19]

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[15] U.S. Dep't of Def., *Report to Congress on the Review of Laws, Policies, and Regulations Restricting the Service of Female Members in the U.S. Armed Forces*, Feb. 2012; Fact Sheet: Women in Service Review (WISR) Implementation [hereinafter "Fact Sheet"].
[16] Kristy N. Kamarck, *Women in Combat: Issues for Congress*, Cong. Res. Serv. R42075, Dec. 13, 2016.
[17] U.S. Dep't of Def., *Statement on Secretary Carter's Approval of Women in Service Review Implementation Plans*, March 10, 2016.
[18] Fact Sheet, *supra* note 15.
[19] Kamarck, *supra* note 16.

D. Transgender Service Members

Finally, the very opening of military service to transgender personnel that President Trump now is seeking summarily to reverse emerged from a rigorous, policymaking process. In July 2015, Secretary Carter created a formal working group to explore the "policy and readiness implications of welcoming transgender persons to serve openly" in the military.[20] Over the following year, the working group engaged in a "detailed, deliberative, carefully run process" and undertook a "comprehensive review of relevant evidence."[21] It created sub-groups to investigate specific issues, consulted with medical, personnel, and readiness experts, spoke with health insurance companies and commanders of transgender service members, and reached out to representatives from the Armed Services of other nations.[22] At the end of this process, the working group unanimously concluded that transgender individuals should be permitted to serve openly.[23]

Meanwhile, the Department had commissioned a separate, independent study from RAND. This study focused on seven broad research questions, among them the cost of providing medical coverage to transgender individuals, the readiness implications of the proposed policy, and any applicable lessons from the

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[20] JA710-11.
[21] Decl. of Raymond Edwin Mabus, Jr. at 3-4, *Karnoski v. Trump*, No. 2:17-cv-1297 (W.D. Wash. 28 Aug. 2017) [hereinafter Mabus Decl.].
[22] *Id.* at 3-7.
[23] *Id*.

eighteen foreign militaries that already allowed open transgender service. JA597. RAND laid out its findings in a 71-page report, which found that allowing transgender people to serve openly would place an "exceedingly small" burden on health care expenditures and have a "minimal impact" on readiness. JA607, 668, 663. Based on the review carried out by these two independent and thorough processes, Secretary Carter announced the policy change in June 2016.

For more than a year after that change, transgender individuals currently in the military were able to serve openly alongside their fellow service members. The Department released a 71-page handbook carefully describing implementation protocols, JA508, and issued guidelines for both in-service medical transition procedures and treatment of gender dysphoria, JA490, 580. But for President Trump's abrupt about-face, this studied, measured, and incremental process would have concluded on January 1, 2018 with the accession of openly transgender individuals into the U.S. military.

Each of the above personnel decisions was the product of a rigorous and considered policy review involving senior military officials and an evidence-based examination of the likely impact of the proposed change. In sharp contrast, on the morning of July 26, 2017, President Trump suddenly announced a ban on transgender persons serving in the military. In a series of three tweets, the President (speaking as @realDonaldTrump) declared:

> "[T]he United States Government will not accept or allow . . . [t]ransgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming . . . victory and cannot be burdened with the tremendous medical costs and disruption that transgender [sic] in the military would entail. Thank you[.]"

No effort was made—nor evidence presented—to show that this pronouncement resulted from any analysis of the cost or disruption allegedly caused by allowing transgender individuals to serve openly in the military. The Joint Chiefs of Staff were surprised by the decision, and not consulted before the President issued the tweet.[24] Secretary of Defense James N. Mattis, who was on vacation at the time, was given only a single day's notice that the decision was coming.[25] The announcement came so abruptly that White House and Pentagon officials were unable to explain even the most basic details about how it would be carried out.[26]

About four weeks later, on August 25, 2017, President Trump followed the tweets with a Presidential Memorandum entitled "Military Service by Transgender Individuals," directed to the Secretary of Defense and the Secretary of Homeland Security. JA406. This Memorandum instructed the Secretaries to return to the earlier policy of discrimination against transgender service members (in section

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[24] *See* Barbara Starr et al., *US Joint Chiefs blindsided by Trump's transgender ban*, CNN (July 27, 2017); Dominic Holden, *Newly Obtained Emails Show the Top General's Surprise at Trump's Transgender Military Ban*, Feb. 20, 2018.
[25] *See* Julie Hirschfeld Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*, N.Y. Times (July 26, 2017).
[26] *Id.*

1(b)), and to maintain the bar on accession of transgender individuals into the military and halt the use of all resources to fund new sex reassignment surgical procedures (in section 2). Once again, this Memorandum pointed to no policy process that led to the decision, did not point to any consultations with any military officers, and did not identify a single piece of evidence to support its change in policy.

The Presidential Memorandum also instructed the Secretary of Defense, in consultation with the Secretary of Homeland Security, to "submit to me a plan for *implementing* both the general policy set forth in section 1(b) of this memorandum and the specific directives set forth in section 2 of this memorandum" by February 21, 2018. JA406. On September 14, 2017, the Secretary of Defense wrote a memorandum to senior Pentagon officials explaining that he had received the Presidential Memorandum and would "present the President with a plan to *implement* the policy and directives in the Presidential Memorandum." JA401. The Secretary nowhere suggested in this memorandum that he had any discretion or intention to reconsider the original policy decision made by presidential tweet.

In fact, in a separate memorandum issued the same day, Secretary of Defense Mattis "direct[ed] the Deputy Secretary of Defense and the Vice Chairman of the Joint Chiefs of Staff to lead the Department of Defense (DOD) in developing an *Implementation Plan* on military service by transgender individuals,

to effect the policy and directives in Presidential Memorandum, Military Service by Transgender Individuals, dated August 25, 2017." JA403. The memorandum ordered the creation of a Panel of civilian and uniformed military leaders and combat veterans, and instructed that their work would be "planned and executed to inform the *Implementation Plan*." JA403-04.

That memorandum addressed the question of "how", not "whether". It simply ordered implementation. It did not invite the Panel to reconsider or make any recommendation regarding whether to allow the accession of transgender individuals into the U.S. military. In fact, just the opposite is true. For example, the memorandum once again explained in clear terms that "[t]he Presidential Memorandum directs DoD to maintain the policy currently in effect, which generally prohibits the accession of transgender individuals into military service" and that the "Panel will recommend updated accession policy guidelines to reflect currently accepted medical terminology." JA404. In February 2018, the Secretary of Defense, with the agreement of the Secretary of Homeland Security, sent the President a memorandum adopting the results of the panel, and a 44-page report reflecting the panel's work. JA263, 268. The President adopted this implementation plan in a March 23, 2018 Presidential Memorandum. JA261.

The government now seeks to shield this sequence of events from judicial scrutiny by invoking "the highly deferential form of review" that it says is due

"professional military judgments."[27] The Supreme Court in fact has given "great deference to the professional judgment of military authorities," *Winter*, 555 U.S. at 7 (citations omitted), or the "considered professional judgment" of "appropriate military officials," *Weinberger*, 475 U.S. at 508-09. However, no such considered judgment is visible here.

For three reasons, the policy reversal that resulted from this sequence of events does not deserve the deference of this Court.

First, the President issued the order to ban transgender individuals from the military on his own, without seeking the "considered professional judgment of military authorities." *Winter*, 555 U.S. at 7. Those senior military authorities were not consulted in advance of the President's decision, were unaware that it was about to happen, were surprised when it did happen, and after they "implemented" the decision (as is their duty in the chain of command), testified when asked in congressional hearings that they had not seen any evidence of the very rationales (e.g., an impact on readiness and cohesion) that had been used as the basis for the decision. Whatever else might be said of this sequence of events, it reflects no reliance whatsoever on the "considered professional judgment of military authorities." The President did not seek those authorities' considered judgment

[27] Br. at 19; *see also, e.g.*, *id*. at 37, 43.

then, and should not be allowed to claim deference that is premised on that considered judgment now.

A survey of earlier cases involving military personnel policies illustrates the sort of considered professional judgment courts have sought before affording deference in this area. In *Rostker v. Goldman*, 453 U.S. 57 (1981), the Supreme Court upheld the constitutionality of legislative provisions that authorized the President to require men, but not women, to register for the draft. The Court deferred to Congress' "studied choice of one alternative in preference to another," emphasizing that "[t]his case is quite different from several of the gender-based discrimination cases we have considered in that . . . Congress did not act 'unthinkingly' or 'reflexively and not for any considered reason.'" *Id.* at 72, 83 (quoting Br. for Appellees) (emphasis omitted). The Court relied on the fact that the question had been "extensively considered by Congress in hearings, floor debate, and in committee" before reaching a decision on which of the available policy options it would select. *Id.* at 72; *see also, e.g.*, *id.* at 63, 79.

Likewise, in *Thomasson v. Perry*, the Fourth Circuit rested its decision upholding the constitutionality of the Don't Ask, Don't Tell policy on a discussion of the policy deliberations that took place before the enactment of the directive. 80 F.3d 915, 921-23 (4th Cir. 1996). The Fourth Circuit observed at length that the directive emerged from an "exhaustive review" and "extensive deliberation" by the

executive branch and Congress, one in which they "considered a wide range of experiences " and "received a broad variety of views" and "discussed and rejected" alternatives. *Id.* at 922-27 (internal quotations omitted). Only then did the Fourth Circuit go on to defer to what it described as the "considered judgment" of the coordinate branches of government.

And, in *Owens v. Brown*, the U.S. District Court for the District of Columbia found unconstitutional a statutory provision barring the assignment of female personnel to duty on Navy vessels other than hospital ships and transports. 455 F. Supp. 291 (D.D.C. 1978). The court acknowledged that "a high degree of deference is owed to the political branches of government in the area of military affairs," in part because "oversight of military operations typically involves complex, subtle, and professional judgments that are best left to those steeped in the pertinent learning." *Id.* at 299 (quotations and citations omitted). But the court observed that the language in that case had been "added casually, over the military's objections and without significant deliberation," and the court found compelling "the results of the experiment conducted by the Navy on the USS Sanctuary . . . that assigning women to noncombat duty on vessels will pose no insurmountable obstacles." *Id.* at 305, 309.

President Trump's tweets and August 2017 Memorandum ordering a ban on transgender service members show no signs of the considered judgment that

traditionally have given rise to deference in the military sphere. If anything, they showed a contempt for past considered judgments about precisely the same issues that had been made only recently by military experts. The President's tweet and August 2017 Memorandum certainly were not driven by the "professional judgment" of "appropriate military officials," *Weinberger*, 475 U.S. at 508-09, did not result from an "exhaustive review", *Thomasson*, 80 F.3d at 927, and showed no evidence of reflecting a "studied choice of one alternative in preference to another," *Rostker,* 453 U.S. at 72. Rather, the President's actions here far more closely resemble those cases where the decision was made "reflexively and not for any considered reason," *Rostker*, 453 U.S. at 72, or "casually," *Owens,* 455 F. Supp. at 305.

And it is no answer for the government to suggest that the recent Pentagon "review" introduced military judgment into the process. As the President plainly directed—and as the Secretary of Defense confirmed—it was not a review at all, in the sense of revisiting and reaffirming the reasons underlying a decision previously made. Instead, it was an execution order, meant to "implement[]" the President's order in his August 2017 Memorandum.[28] The military's role here was only to follow orders, not to reconsider the question of including transgender individuals or otherwise revisit any aspect of the initial presidential judgment. Inevitably, the

[28] *See supra* at pages 22 to 24.

policy that resulted—a sequence of rules that collectively bar transgender individuals from serving consistent with their gender identity—achieved precisely what the President's tweets and August 2017 Memorandum originally commanded.

The government seeks refuge in the Supreme Court's decision in *Hawaii v. Trump*, 138 S.Ct. 2392 (2018), which overturned a preliminary injunction on the President's proclamation banning entry of nationals from six countries for violating the Establishment Clause. The government tries to read into the opinion a rule that when the President issues a "previous executive order[]" setting out a policy, and then an agency later implements or acts pursuant to that order, a court should remove the order from its inquiry in considering the constitutionality of the policy.[29]

Hawaii v. Trump said nothing of the sort. In the passage relied on by the government, the *Hawaii* Court was actually considering a very different question: not whether a court should look to a President's previous executive order that led to a policy, but whether it should look to previous "extrinsic statements—many of which were made before the President took the oath of office."[30] Even as to the extrinsic statements, the Court held squarely that courts "may consider plaintiffs'

[29] Br. at 57.
[30] *Hawaii,* 138 S.Ct. at 2418.

extrinsic evidence."[31] And the court nowhere suggested that it meant to authorize subordinates to ignore an executive order that directly leads to agency action, or that such an order is irrelevant to the constitutional inquiry into that action.

In fact, the Court in *Hawaii v. Trump* held precisely the opposite. *Hawaii v. Trump* signaled that, at least in claims of unconstitutional animus involving "the admission and exclusion of foreign nationals," a court should look in the first instance to the four corners of an executive order or proclamation, and apply deferential review only if the order is "facially neutral." [32] The Court emphasized time and again in *Hawaii v. Trump* that the presidential directive in that case was "facially neutral" or "neutral on its face."[33] *Here, by contrast, every one of the operative orders and policy documents—the Presidential memoranda*, *the Department of Defense memoranda, the Panel report—discriminates on its face*. Each calls out calls out transgender individuals for differential treatment. The government does not—and cannot—argue otherwise in their papers to this Court.

Second, the process in this case sharply departed from precedent for significant military personal decisions. The Supreme Court has emphasized that "[d]epartures from the normal procedural sequence . . . might afford evidence that improper purposes are playing a role" in government action. *Vill. of Arlington*

[31] Id. at 2420.
[32] *Id.* at 2417-20.
[33] *Id.* at 2418, 2420, 2423

Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977). And the process in this case was highly aberrant. The President's failure to consult military experts in his initial tweet and Presidential Memorandum, his failure to ground that decision in any evidence or facts, and his failure to undertake any considered review apart from the after-in-fact implementation of a major personnel decision he had already made, represents such a break from the precedents discussed *supra* that it can only call the true basis for that decision into question.

Third, the new policy and the panel report represented an abrupt reversal of a position adopted only eighteen months earlier. We know of no precedent for a sudden switch of this sort in a major policy in the modern history of the armed services.[34] And although the report asserts at one point that its analysis "was informed by the Department's own data and experience obtained since the Carter policy took effect," the report nowhere explains why this data or experience demands an abrupt about-face in findings or policy.[35] In fact, overwhelmingly, the report rests on the same body of evidence and arguments that were before the Working Group and the RAND Report.[36] The report does not find that *new*

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[34] *See also, e.g.*, Aug. 25, 2017 Mabus Decl. ("It is also unprecedented to reverse policy in such an abrupt manner. I cannot recall another instance in United States military history of such a stark and unfounded reversal of policy. . . .").
[35] JA264.
[36] The principal exceptions appear to be two paragraphs across the 44-page report. The first describes "preliminary data" on whether service members with gender dysphoria are likely to have suicidal intentions or mental health encounters. JA289.

evidence has shown that the Open Policy has led to *actual harm* to military readiness, cohesion or the other factors that both it and the 2016 review considered. Rather, it looks at almost entirely the *same evidence* and oppositely concludes that there is "uncertain[]" *future harm*.[37]

Of course, the government is allowed to change its positions. But in a number of other settings, courts have held that the government *loses its claim to deference* when it *abruptly changes* a prior position and *cannot provide a reasoned explanation* of the need for the change.[38] This should be equally true with regard to

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As has been demonstrated elsewhere, this data is flawed and misleading. *See* Br. of Amici Curiae Vice Admiral Donald C. Arthur et al. in Supp. of Pls.'-Apps., at 20, *Karnoski v. Trump*, No. 18-35347 (9th Cir. July 3, 2018). The second argues that medical care has cost more for service-members with gender dysphoria than those without gender dysphoria. But, unlike the 2016 review, the Panel report does not undertake any analysis of the central issue, which is the total cost in light of the small number of those who need care. JA649-53. In either case, the report does not explain why these data warrant an abrupt reversal in military policy.

[37] JA273, 274, 282, 295, 300, 312.

[38] *FCC v. Fox Television Studios*, 556 U.S. 502, 505, 521 (2009) (holding an agency's judgment "merits deference" under the APA, and an "agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate[,]" but "[s]ometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy"); *Smiley v. Citibank (South Dakota)*, 517 U.S. 735, 742 (1996) (explaining that "[t]he mere fact that an agency interpretation contradicts a prior agency position is not fatal," but "[s]udden and unexplained change . . . may be arbitrary, capricious or an abuse of discretion" (quotations omitted)); *Mobil Oil Corp. v. EPA*, 871 F.2d 149, 152 (D.C. Cir. 1989) (holding in *Chevron* deference discussion that "an agency's reinterpretation of statutory language is entitled to deference, so long as the agency acknowledges and explains the departure from its prior views" (emphasis in original)); *St. Lawrence Seaway Pilots Assoc. v. U.S. Coast Guard*, 85 F.Supp.3d 197, 207 (D.D.C. 2015) (declining to find *Auer*

the deference the government is claiming here, premised as it is on an assertion of the Department of Defense's "judgment" and "consideration of [the] evidence."[39] This sudden reversal in position, and the failure to point to interceding events or new facts that plausibly justify it, once again suggest that the decision was the result of White House-driven politics, rather than an evidence-based judgment of the need for reform. That concern is only heightened further by the fact that the panel review was completed so much more rapidly than the first,[40] that it chose not to seek an external, independent analysis similar to the first, and that, as others have pointed out, it contains multiple methodological and evidentiary errors.[41]

The government asks this Court to stretch the doctrine of national security deference beyond recognition. The government would license the president to order his military leaders to comply with a discriminatory personnel action without consulting their judgment at all, and then shield those actions from meaningful review by invoking the "deference" that is due the judgment of military leaders. In

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deference, because "[w]hen an agency departs from its prior policies or practices, it must acknowledge and explain the departure"); *see also S. Telecom Assoc. v. FCC*, 825 F.3d 674, 745 (D.C. Cir. 2016) (Williams, J., dissenting) ("To the extent [an agency's reversal] rests on new facts, *Fox* requires us to examine whether there is really anything new.").

[39] Br. at 9.

[40] The original review was a nearly year-long process that started in July 2015 and culminated in June 2016. JA591, 709. The more recent review took from mid-September 2017 to February 2018, and the panel itself met for only 90 days. JA286.

[41] *See, e.g.*, Br. of Amici Curiae, *supra* note 36.

our view, a deference this reflexive serves no plausible national security objective. In fact, it can only weaken our security, by affording the president far too great a latitude to abuse his power over service members, without regard for military judgment or exigency. Over time, these acts will only corrode the order, readiness and morale of the military services, as will the message they convey to our service members that the President is above the law. Such expansive—indeed, unbounded—deference is nowhere required by the Constitution, precedent, or our nation's security.

II. The President's actions will harm the national security and foreign policy interests of the United States.

The implementation plan effectively bars transgender individuals from serving consistent with their gender identity. Such blanket discrimination gravely harms the readiness and cohesion of our military and undermines the national security and foreign policy interests of the United States. More fundamentally, the sweeping exclusion of all transgender individuals based on group characteristics, rather than individual fitness, violates the core norm that we judge individuals based on the content of their character.

On its face, this policy harms *military readiness* by categorically excluding individuals based on their gender identity, rather than the only relevant category: their fitness to serve. The U.S. military has in place objective physical and psychological standards tied to individual performance and competency that all

members must meet. There is every indication that these standards can effectively screen transgender individuals who are unable to serve, without the need to return to sweeping exclusions based on a suspect class. Under the Open Policy, the U.S. military put out detailed implementation guides to explain how these standards would apply to transgender individuals.[42] By the Department of Defense review's own admission, transgender individuals under the Open Policy were disqualified on the basis of these standards, for reasons such as depression, just as other service members were.[43]

Further, President Trump has proposed expanding the number of active duty Army and Marine Corps service members by almost 70,000 personnel. But to accomplish such an ambitious goal without degrading the effectiveness of our troops, the U.S. military will need to recruit all qualified individuals—not exclude entire groups from military service based on generalizations and prejudice, without regard for individuals' particular capacity to serve.[44]

The prohibitions at issue in this case also negatively affect *unit cohesion*. Time and again, history has taught that when service members don a uniform, individual differences melt away, and that it is actually variables such as policy,

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[42] JA458, 508.
[43] JA275.
[44] K.K. Rebecca Lai et al., *Is America's Military Big Enough?*, N.Y. Times, Mar. 22, 2017.

leadership and training that are the true influences on the cohesion of military units. The government's claim in this case that the military must discriminate against transgender individuals in order to preserve cohesion was the same casual rationale used to prevent African-Americans, women and gay individuals from serving in the military over the decades. Countless studies have confirmed that in each of those cases, the claims proved false.[45]

The present policy forces transgender service members to live a lie, inhibits them from seeking access to counseling and other mental health services, authorizes discriminatory behavior among fellow service members, and places troops in the unconscionable position of having "to choose between reporting their comrades or disobeying policy."[46] Transgender service members have long been allowed to serve openly in the militaries of such close United States allies as Israel and the United Kingdom without any evidence of harm to unit cohesion, and these transgender service members have already served alongside U.S. troops in NATO units without any demonstrated adverse effect on unit cohesion. And when asked in congressional hearings earlier this year, all four Service Chiefs testified that they

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[45] *See, e.g.*, *Black Soldier, White Army: The 24th Infantry Regiment in Korea* at 26 (1996); Margaret C. Harrell & Laura L. Miller, *New Opportunities for Military Women* (1997); Palm Center Research Portal, *available at* http://www.unfriendlyfire.org/research/q1.htm.

[46] Palm Center, *Fifty-Six Retired Generals and Admirals Warn That President Trump's Anti-Transgender Tweets, If Implemented, Would Degrade Military Readiness* 1 (Aug. 1, 2017).

had seen no evidence that transgender personnel serving openly had presented a problem for unit cohesion or military readiness.[47]

Finally, such a transparently discriminatory set of restrictions will send a *troubling message to those abroad*, showing both allies and adversaries that the United States military is willing to distort its justly admired personnel polices to serve prejudice and political expediency. The President's tweets and Memorandum convey to the world that able and patriotic Americans, eager and qualified to serve their country's military, can nevertheless be denied equal rights and opportunity based on illusory stereotypes. That message undermines our government's efforts to advance human rights and principles of non-discrimination and equality throughout the world, as a longstanding central tenet of our foreign policy, and a critical means of promoting peace and security and avoiding humanitarian crises around the globe.

As public servants, amici took as an article of faith that our government would judge individuals based solely on the content of their character, not on group characteristics that bear no relation to their actual ability to do their jobs. To abandon that principle based on such a transparently discriminatory façade is unworthy of the deference that the Constitution and the courts have historically

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[47] *See* Tara Copp, *All 4 service chiefs on record: No harm to units from transgender service*, Military Times (Apr. 24, 2018).

afforded to genuine and thoughtful exercises of national security and military judgment.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Dated October 29, 2018

Respectfully submitted,

/s/ Harold Hongju Koh

Phillip Spector
MESSING & SPECTOR LLP
1200 Steuart Street
Number 2112
Baltimore, MD 21230
(202) 277-8173
ps@messingspector.com

Harold Hongju Koh
RULE OF LAW CLINIC
Yale Law School
127 Wall Street, P.O. Box 208215
New Haven, CT 06520-8215
(203) 432-4932
harold.koh@ylsclinics.org

Counsel for Amici Curiae

APPENDIX

LIST OF AMICI

1. Brigadier General Ricardo Aponte, USAF (Ret.)

2. Vice Admiral Donald Arthur, USN (Ret.)

3. Michael R. Carpenter served as Deputy Assistant Secretary of Defense for Russia, Ukraine, Eurasia from 2015 to 2017.

4. Brigadier General Stephen A. Cheney, USMC (Ret.)

5. Derek Chollet served as Assistant Secretary of Defense for International Security Affairs from 2012 to 2015.

6. Rear Admiral Jay A. DeLoach, USN (Ret.)

7. Major General (Ret.) Paul D. Eaton, USA

8. Brigadier General (Ret.) Evelyn "Pat" Foote, USA

9. Vice Admiral Kevin P. Green, USN (Ret.)

10. General Michael Hayden, USAF (Ret.), served as Director of the Central Intelligence Agency from 2006 to 2009, and Director of the National Security Agency from 1995 to 2005.

11. Chuck Hagel served as Secretary of Defense from 2013 to 2015. From 1997 to 2009, he served as U.S. Senator for Nebraska.

12. Kathleen Hicks served as Principal Deputy Under Secretary of Policy from 2012 to 2013.

13. Brigadier General (Ret.) David R. Irvine, USA

14. Lieutenant General Arlen D. Jameson (USAF) (Ret.), served as the Deputy Commander of U.S. Strategic Command.

15. Brigadier General (Ret.) John H. Johns, USA

16. Colin H. Kahl served as Deputy Assistant to the President and National Security Advisor to the Vice President. Previously, he served as Deputy Assistant Secretary of Defense for the Middle East from 2009 to 2011.

17. Lieutenant General (Ret.) Claudia Kennedy, USA

18. Major General (Ret.) Dennis Laich, USA

19. Major General (Ret.) Randy Manner, USA

20. Brigadier General (Ret.) Carlos E. Martinez, USAF (Ret.)

21. General (Ret.) Stanley A. McChrystal, USA, served as Commander of Joint Special Operations Command from 2003 to 2008, and Commander of the International Security Assistance Force and Commander, U.S. Forces Afghanistan from 2009 to 2010.

22. Kelly E. Magsamen served as Principal Deputy Assistant Secretary of Defense for Asian and Pacific Security Affairs from 2014 to 2017.

23. Leon E. Panetta served as Secretary of Defense from 2011 to 2013. From 2009 to 2011, he served as Director of the Central Intelligence Agency.

24. Major General (Ret.) Gale S. Pollock, CRNA, FACHE, FAAN.

25. Rear Admiral Harold Robinson, USN (Ret.)

26. Brigadier General (Ret.) John M. Schuster, USA

27. Rear Admiral Michael E. Smith, USN (Ret.)

28. Brigadier General (Ret.) Paul Gregory Smith, USA

29. Julianne Smith served as Deputy National Security Advisor to the Vice President of the United States from 2012 to 2013. Previously, she served as the Principal Director for European and NATO Policy in the Office of the Secretary of Defense in the Pentagon.

30. Admiral James Stavridis, USN (Ret.), served as the 16th Supreme Allied Commander at NATO.

31. Brigadier General (Ret.) Marianne Watson, USA

32. William Wechsler served as Deputy Assistant Secretary for Special Operations and Combating Terrorism at the U.S. Department of Defense from 2012 to 2015.

33. Christine E. Wormuth served as Under Secretary of Defense for Policy from 2014 to 2016.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5), 32(a)(7) and Circuit Rule 32(e), because it contains 6454 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), because it was prepared in Microsoft Word using double-spaced 14-point Times New Roman, a proportionally spaced typeface.

Respectfully Submitted,

/s/ Harold Hongju Koh
Harold Hongju Koh
RULE OF LAW CLINIC
Yale Law School
127 Wall Street, P.O. Box 208215
New Haven, CT 06520-8215
(203) 432-4932
harold.koh@ylsclinics.org
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I, Harold Hongju Koh, hereby certify that on October 29, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully Submitted,

/s/ Harold Hongju Koh
Harold Hongju Koh
RULE OF LAW CLINIC
Yale Law School
127 Wall Street, P.O. Box 208215
New Haven, CT 06520-8215
(203) 432-4932
harold.koh@ylsclinics.org
Counsel for Amici Curiae