

[ORAL ARGUMENT SCHEDULED FOR DECEMBER 10, 2018]

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, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**BRIEF OF THE SERVICE WOMEN'S ACTION NETWORK
AND OTHER VETERANS SERVICE ORGANIZATIONS AND
VETERANS ADVOCACY GROUPS[†]
AS *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. *Parties and Amici.* Counsel for *amici curiae* adopts plaintiffs-appellees' statement of parties and *amici*, with the addition of the following *amici*:

1. The Service Women's Action Network ("SWAN")
2. High Ground Veterans Advocacy ("HGVA")
3. Iraq and Afghanistan Veterans of America ("IAVA")
4. National Law School Veterans Clinic Consortium ("NLSVCC")
5. National Veterans Legal Services Program ("NVLSP")
6. New York City ("NYC") Veterans Alliance
7. Protect Our Defenders ("POD")

B. *Rulings Under Review.* Appellants seek review of the opinion and orders of the Honorable Colleen Kollar-Kotelly in *Doe 2 v. Trump*, Civ. No. 17-1597, including the opinion and accompanying order of August 6, 2018 (Dkt. Nos. 156 and 157). The opinion is available at 315 F. Supp. 3d 474.

C. *Related Cases.* This case was previously on appeal before this Court as *Doe 1 v. Trump*, No. 17-5267, but the appeal was voluntarily dismissed. There is an appeal and mandamus petition involving similar issues pending in *Karnoski v. Trump*, No. 18-35347 (9th Cir.), and *In re Trump*, No. 18-72159 (9th Cir.), respectively. Cases raising

similar issues are proceeding in the district court in *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash.), *Stone v. Trump*, No. 17-cv-2459 (D. Md.), and *Stockman v. Trump*, No. 17-cv-1799 (C.D. Cal.).

**STATEMENT REGARDING CONSENT TO FILE, AUTHORSHIP,
MONETARY CONTRIBUTIONS, AND SEPARATE BRIEFING**

Pursuant to Federal Rule of Appellate Procedure 29(a), *amici curiae* certify that all parties in this case have consented to the filing of this brief. Counsel for *amici* sought and received consent from counsel for plaintiffs-appellees on October 19, 2018, and received notice from counsel for defendants-appellants that the U.S. Government does not object to *amici*'s participation on October 24, 2018.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici curiae* certify that no party or party's counsel authored this brief in whole or in part, that no party or party's counsel provided any money that was intended to fund the preparation or submission of this brief, and no party or person—other than the *amici*, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief.

Pursuant to D.C. Circuit Rule 29(d), counsel certifies that this separate *amicus curiae* brief is necessary. *Amici* are Veterans Service Organizations and veterans advocacy groups that work in diverse ways to support both active duty and retired military service members. As such, they have a unique perspective on the practical effects of the government's ban on service by transgender individuals (the "Transgender Ban") at issue in this case, and its impact on the public interest in a strong and effective military force. This brief explains why the Transgender Ban, far from strengthening the military as the government contends, would make it more

difficult for the military to meet its own ambitious recruitment and retention goals, by arbitrarily excluding individuals who are fit and willing to serve. We are aware of no other *amicus curiae* brief that addresses this important concern of veterans and their representatives.

Finally, *amici* support the arguments advanced by both the plaintiffs-appellees and the other *amici* supporting the plaintiffs-appellees in this case, and have avoided repeating such arguments in this brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* hereby state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

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GLOSSARY OF ABBREVIATIONS

DADT	Don't Ask, Don't Tell
FY	Fiscal Year
LGB	Lesbian, Gay, and Bisexual
RAND	Research and Development Corporation
SWAN	Service Women's Action Network

INTEREST OF THE *AMICI CURIAE*

Amici curiae, listed below, are Veterans Service Organizations and veterans advocacy groups that work in diverse ways to support our troops – both active duty and retired. Collectively, *amici* have decades of experience representing those serving and who have served in our nation’s armed forces. *Amici* oppose the government’s ban on service by transgender individuals for two main reasons: (1) it unfairly discriminates against patriotic, qualified individuals who wish to serve our country based on a characteristic that has no relevance to their fitness to serve; and (2) it deprives the military of the services of highly qualified individuals who can capably and effectively support the military’s mission and goals. The first point is amply addressed in the briefs of the plaintiffs-appellees and others, which *amici* support. This brief focuses on the second point, which is of great concern to currently serving and veteran service members.

Amici curiae organizations:

The **Service Women’s Action Network (“SWAN”)** is the leading national organization dedicated to service women and women veterans of the military. Of the more than 40,000 organizations serving the needs of service members, SWAN is the only one solely focused on the needs of service women, women veterans, and other marginalized populations in the U.S. military.

High Ground Veterans Advocacy (“HGVA”) trains service members and veterans to become effective advocates so that they may serve as leaders both on the local and national levels.

Iraq and Afghanistan Veterans of America (“IAVA”) is the leading national organization dedicated to serving post-9/11 veterans and currently serving military, representing more than 425,000 members nationwide. As a next-generation veterans empowerment organization, IAVA has a long-standing record of advocating for LGBTQ brothers and sisters in arms, in recognition that diversity is a force multiplier for the armed forces as well as for the country. IAVA has promoted for years in its annual Policy Agenda that equality and inclusion are good for national security and American values.

The **National Law School Veterans Clinic Consortium (“NLSVCC”)** is a collaborative effort of the nation’s law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis. The NLSVCC’s mission is, working with like-minded stakeholders, to gain support and advance common interests with the U.S. Department of Veterans Affairs, Congress, state and local veterans service organizations, court systems, educators, and all other entities for the benefit of veterans throughout the country.

The **National Veterans Legal Services Program (“NVLSP”)** is an independent nonprofit organization that has worked since 1980 to ensure our nation’s 22 million veterans and active duty personnel receive the federal benefits they have

earned through service to our nation. NVLSP advocates before federal agencies, courts, and Congress to protect service members and veterans.

The **New York City (“NYC”) Veterans Alliance** is a member-driven, grassroots policy, advocacy, and community-building organization that advances veterans and their family members as civic leaders. The NYC Veterans Alliance advocates for the more than 220,000 veterans and service members based in NYC. It works to achieve community wellness and access to services for all veterans in NYC and beyond, regardless of service era or discharge status. Last year, NYC Veterans Alliance was part of a NYC-based coalition of organizations serving veterans that spoke out in support of the equal contributions of transgender service members and veterans.

Protect Our Defenders (“POD”) is the only national organization solely dedicated to ending the epidemic of rape and sexual assault in the military and to combating a culture of pervasive misogyny, sexual harassment, and retribution against victims. We honor, support, and give voice to survivors of military sexual assault and sexual harassment – including service members, veterans, and civilians assaulted by members of the military. We seek reform to ensure all survivors and service members are provided a safe, respectful work environment and have access to a fair, impartially administered system of justice.

INTRODUCTION

SWAN and the other *amici* supporting this brief have a strong and consistent interest in the effectiveness and performance of the U.S. military in its mission of safeguarding our nation's security and protecting our freedom and way of life. History shows that these goals are advanced when the military eliminates arbitrary exclusions that bar service by the widest range of Americans who – as individuals – meet the high standards of military service. As one example, the opening of military service to women – and particularly the more recent lifting of the ban on women serving in ground combat roles – represents a significant contribution, not merely to the goal of fair and equal treatment of all Americans, but also to the greater effectiveness and performance of the military that serves and protects our country.

The government's ban on service by transgender individuals (the "Transgender Ban") is unfair and harmful to the military for the same reasons as past identity-based exclusions. The constitutional infirmities of the Transgender Ban are addressed elsewhere, and this brief will not repeat those arguments. Instead, *amici* here will focus on an equally important defect in the Transgender Ban that directly impacts the public interest: if implemented, the Transgender Ban will hamper the effectiveness and performance of the military itself, in much the same way as previous, now-rejected categorical limits on service based on race, gender, and sexual orientation did in the past.

ARGUMENT

I. **The Effectiveness of the Military Depends On Its Ability to Recruit and Retain Service Members Who Meet Its High Standards and Can Further Its Critical Mission.**

As our military aims to increase its enlistment goals, it struggles to recruit and retain qualified service members. As discussed below, had the military not ended its longstanding prohibitions and restrictions on allowing African Americans, women, and lesbian, gay, and bisexual (“LGB”) individuals to serve, the military’s enlistment and retention goals today would be extremely difficult to attain. The Transgender Ban – just like the bans and limits on previously disfavored groups – reduces our military’s effectiveness by excluding persons who are willing, capable, and qualified to serve.

A. The military today seeks to grow its ranks in the face of serious recruiting and retention challenges.

One of President Trump’s key campaign pledges was to increase the size of the armed forces.¹ Military leaders have echoed the President’s comments. Army Chief of Staff Gen. Mark Milley said that he has believed “for quite some time” that the Army needs to add more soldiers: “We need to grow in order to meet the demands

¹ See Donald Trump, *Address on national security in Philadelphia, PA*, THE HILL (Sep. 7, 2016, 1:17 PM EST), <https://thehill.com/blogs/pundits-blog/campaign/294817-transcript-of-donald-trumps-speech-on-national-security-in> (“We will build an active Army of around 540,000.”).

that the nation expects at the readiness levels it expects[.]”² And Air Force Secretary Heather Wilson has said that the Air Force is “too small for what’s being asked of us.”³

To that end and after several years of approving declining end strength (i.e., the goal number of personnel in the military), Congress passed the John S. McCain National Defense Authorization Act for Fiscal Year (“FY”) 2019, which mandates the following end strength for each branch of the military:

1. Army – 487,500 Up 4,000 from FY 2018
2. Navy – 335,400 Up 7,500 from FY 2018
3. Marine Corps – 186,100 Up 100 from FY 2018
4. Air Force – 329,100 Up 4,000 from FY 2018.⁴

These new goals must be met through a combination of recruiting additional qualified young people to fill these slots and greater retention of qualified, current service members.

The challenge of meeting these objectives is highlighted by the military’s struggle to attain even its previous, lower end strength goals. For example, a 2017 Army study revealed that 71 percent of 33 million Americans between the ages of 17

² Christopher Woody, *The US Military is Facing a ‘Real War for Talent’ – But Some Valuable Recruits Could be Scared Away*, BUSINESS INSIDER (Mar. 14, 2018), <https://www.businessinsider.com/us-military-war-for-talent-struggle-to-attract-immigrants-2018-3>.

³ *Id.*

⁴ Compare H.R. 5515, 115th Cong. § 401 (2018) (enacted) with H.R. 2810, 115th Cong. § 401 (2017) (enacted).

and 24 do not meet the minimum standards for service in the military due to physical fitness, weight, medical issues, misconduct (e.g., criminal convictions), substance abuse, and mental health issues.⁵ Those factors alone reduce the available pool of potential recruits from 33 million to 9.7 million.⁶ And of those 9.7 million, the 4 million individuals currently enrolled in college are generally regarded as unavailable for recruitment.⁷ Of the remaining 5.7 million, 4 million who meet the minimum standards for service do not meet the military's demanding quality standards.⁸

In fact, in FY 2018, the Army had to offer shortened enlistment contracts (two years) in most occupational specialties to attract sufficient new recruits.⁹ The Army also offered bonuses of up to \$40,000 per person for longer-term enlistments – totaling \$115 million.¹⁰ Even with these extraordinary measures, the Army failed its recruitment goal for FY 2018, missing its end strength target by 7,500 soldiers.¹¹

⁵ See Meghann Myers, *Top Recruiter: Just 136,000 Out of 33 Million Young Americans Would Join the Army*, ARMY TIMES (Oct. 12, 2017), <https://www.armytimes.com/news/your-army/2017/10/12/top-recruiter-just-136000-out-of-33-million-young-americans-would-join-the-army/>.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Meghann Myers, *The Army is Supposed to be Growing, But This Year, It Didn't at All*, ARMY TIMES (Sep. 21, 2018), <https://www.armytimes.com/news/your-army/2018/09/21/the-army-is-supposed-to-be-growing-but-this-year-it-didnt-at-all/> (hereinafter *The Army is Supposed to be Growing*).

¹⁰ *Id.*; Lolita C. Baldor, *Army Using Drug Waivers, Bonuses to Fill Ranks*, ASSOCIATED PRESS (Aug. 1, 2018), <https://www.armytimes.com/news/your-army/2018/08/01/army-using-drug-waivers-bonuses-to-fill-ranks/>.

¹¹ *The Army is Supposed to be Growing*, *supra* note 9.

Filling the higher FY 2019 end strength goals will be an even greater struggle. The Army is expected to continue offering up to \$40,000 in bonuses and other enlistment incentives,¹² costs that will far exceed the estimated \$8.4 million annual expense of providing medical care for transgender troops.¹³

The military faces major retention challenges as well. Before a House Armed Services military personnel subcommittee hearing in April 2018, Marine Corps Lt. Gen. Michael A. Rocco noted the struggle he faces with retaining high-quality service members in the Marine Corps: “There’s a continuous challenge to keep high-quality Marines, especially in the current economy and increasingly competitive civilian job market.”¹⁴ Navy Vice Adm. Robert P. Burke echoed Lt. Gen. Rocco’s remarks, noting the propensity to serve is declining and that each of the services and the civilian sector are vying for the same limited talent pool.¹⁵ With this in mind, the Air Force recently added three occupational specialties to its growing list of professions that are so short-staffed that it is offering currently-serving members lump-sum

¹² *Id.*

¹³ See Agnes Gereben Schaefer, et al., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, RAND CORPORATION at 36 (2016), https://www.rand.org/pubs/research_reports/RR1530.html (hereinafter “RAND CORP.”).

¹⁴ Lisa Ferdinando, *Military Leaders Highlight Efforts, Challenges in Recruiting, Retention*, U.S. DEP’T OF DEF. (Apr. 13, 2018), <https://dod.defense.gov/News/Article/Article/1493328/military-leaders-highlight-efforts-challenges-in-recruiting-retention/>.

¹⁵ *Id.*

payments worth up to \$90,000 to stay in their jobs.¹⁶ The payments are generally only offered when the Air Force believes it has “critical personnel shortages” in particular fields, or when training new service members is unusually expensive.¹⁷ The May 2018 update to the Selective Retention Bonus Program also increased inducements for four other specialties that were already on the list, and none of the existing specialties were removed, “suggesting the Air Force is continuing to face retention challenges in some of the areas that had already been eligible for the bonuses.”¹⁸

In short, the military currently faces a critical force strength shortage on both the recruitment and retention fronts. With one report estimating that 12,800 transgender troops were actively serving as of 2015¹⁹ (not to mention the thousands more potentially eligible and willing to serve), the proposed Transgender Ban will only make it harder for the military to meet its goal of recruiting and retaining an additional 15,600 service members in FY 2019.

¹⁶ Jared Serbu, *To Solve Retention Challenges, Air Force Expands Retention Bonuses Worth Up to \$90,000*, FEDERAL NEWS NETWORK (May 31, 2018), <https://federalnewsnetwork.com/air-force/2018/05/to-solve-retention-challenges-air-force-expands-retention-bonuses-worth-up-to-90000/>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Aaron Belkin, *Caring for Our Transgender Troops – The Negligible Cost of Transition-Related Care*, 373 NEW ENG. J. OF MED. 1089-1092 (2015), available at <https://www.nejm.org/doi/pdf/10.1056/NEJMp1509230>.

- B. The military would not be meeting its recruiting and retention goals today if it had not eradicated categorical bans and limits on service by previously excluded groups, such as African Americans, women, and LGB individuals.

Today, the military is made up of a highly diverse population of service members, many of whom would not have been permitted to serve in past periods (or could have done so only with restrictions that no longer exist). These include African Americans, women, and LGB individuals. Considerations of fairness and equity, as well as constitutional protections, played a major role in the elimination of those past discriminatory restrictions. But it also was recognized that permitting individuals in these groups to serve – openly and honorably – could assist the military in meeting its commitment to field a force sufficient to safeguard our nation’s security.

For example, in calling for the end of racial segregation in the military, President Truman’s Committee on Civil Rights concluded that the exclusion of African Americans from serving had “weaken[ed] our defense” by “preventing entire groups from making their maximum contribution to the national defense”²⁰ Since the military’s racial integration in 1948, the percentage of African Americans serving has increased significantly. In 1948, approximately 11 percent of active-duty Army troops were black.²¹ More recently, of the 1.3 million active duty members in

²⁰ *To Secure These Rights*, PRESIDENT’S COMM. ON CIVIL RIGHTS at 162 (1947), <https://www.trumanlibrary.org/civilrights/srights1.htm>.

²¹ See *Executive Order 9981: Desegregation of the Armed Forces (1948)*, OurDocuments.gov, <https://www.ourdocuments.gov/doc.php?flash=false&doc=84> (last visited Oct. 26, 2018), (“African Americans, who constituted approximately 11 per cent of all

the military in FY 2016 (the latest year in which data is publicly available), African Americans made up 18.85 percent of active-duty non-prior service enlisted accessions.²²

Women, similarly, make up a growing share of our nation's military. From 1973 to 2010, the overall number of active service members fell by about 738,000, but over that same period, the number of active duty enlisted women in the military grew from 42,000 to 167,000.²³ In 2015, the ban on women serving in combat roles was lifted, and today women make up a “small but important share” of the combat arms population.²⁴

registrants liable for service, furnished approximately this proportion of the inductees in all branches of the service except the Marine Corps.”).

²² *Population Representation in the Military Services*, Table B-10, Non-Prior Service (NPS) Active Component Enlisted Accessions, FY16: by Service, Gender, Race, and Ethnicity with Civilian Comparison Group, https://www.cna.org/pop-rep/2016/appendixb/b_10.html (last visited Oct. 26, 2018).

²³ Eileen Patten & Kim Parker, *Women in the U.S. Military: Growing Share, Distinctive Profile*, PEW RESEARCH CENTER (Dec. 22, 2011), <http://www.pewsocialtrends.org/2011/12/22/women-in-the-u-s-military-growing-share-distinctive-profile/>.

²⁴ Andrew Swick & Emma Moore, *The (Mostly) Good News on Women in Combat*, CENT. FOR A NEW AM. SEC. (Apr. 19, 2018), <https://www.cnas.org/publications/reports/an-update-on-the-status-of-women-in-combat>. This compares to the period prior to the lifting of the ban, when military commanders in Iraq and Afghanistan were forced to engage in “bureaucratic trickery” so that women could serve in crucial combat roles to aid the war effort in those countries. Lizette Alvarez, *G.I. Jane Breaks the Combat Barrier*, N.Y. TIMES (Aug. 15, 2009), <https://www.nytimes.com/2009/08/16/us/16women.html>. A retired lieutenant colonel at the time noted that “it is only a matter of time before regulations that have restricted women’s participation in war will be adjusted to meet the reality forged” since 9/11. *Id.*

During an April 2018 House Armed Services military personnel subcommittee hearing, leaders from the four branches of the Armed Forces were asked about efforts to recruit women as the number of young people eligible to serve in the military has declined because of health, weight, conduct, and aptitude issues. Navy Vice Adm. Robert P. Burke testified, “It’s an operational imperative for the Navy to increase our numbers of women. So we are, frankly, targeting them in our recruiting efforts and our messaging, because that’s where the talent is.”²⁵ Army Lt. Gen. Thomas Seamands also testified about the result of opening up all specialties in the Army to women:

We just had our last -- most recent two Ranger School graduates, last week, graduate from a very difficult course at Fort Benning. I think, as we see those role models come out and successfully lead . . . you’ll see increased females across the formations. [We are v]ery excited about what the females are doing in the Army, and I think there’s no limit to what they can do in the future. We’re very excited.²⁶

Finally, military leaders have noted that, while it was in effect, the military’s Don’t Ask, Don’t Tell (“DADT”) policy forced them to reject or discharge qualified individuals who would otherwise have been retained in the military.²⁷ By contrast,

²⁵ *Military Personnel Posture: FY 2019: Hearing Before the Subcomm. on Military Personnel of the H. Comm. on Armed Services*, 118th Cong. 17 (2018) [transcript on file].

²⁶ *Id.* at 18.

²⁷ See *The Report of the Department of Defense Working Group That Conducted a Comprehensive Review of the Issues Associated with a Repeal of Section 654 of Title 10, U.S.C., “Policy Concerning Homosexuality in the Armed Forces Before the S. Comm. on Armed Forces,”* 111th Cong. 899 (2010), <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg65073/html/CHRG-111shrg65073.htm> (military leaders acknowledging that

while there is no official government data on the number of LGB individuals currently serving in the military, a 2016 health survey by the Research and Development Corporation (“RAND”) found that 5.8 percent of people in the military self-identified as LGB,²⁸ providing a substantial boost to the military’s retention and enlistment goals.

Clearly, if the restrictions on service in any of these categories had not been lifted already, the military would be even further from meeting its force strength goals today, at the expense of national security and military effectiveness.

II. If Upheld, the Transgender Ban Would Harm Military Effectiveness by Depriving the Military of Service Members Who Can Perform Aably Under the Military’s Own Rigorous Standards.

Just like the bans and limits in the past, the Transgender Ban is based on stereotypes and generalizations not rooted in fact. While not every transgender person can meet the military’s high standards of service (just as is true of more than 70 percent of the overall military age population), many can. As a result, under the Transgender Ban, the military is denying itself access to a pool of qualified, capable service members, and is thereby undermining its aspiration to field the most capable, qualified, and effective military force possible.

“the current law and policy have required the Services to separate, or to deny entry, to otherwise qualified individuals”).

²⁸ Sarah Meadows, et al., *2015 Department of Defense Health Related Behaviors Survey (HRBS)*, RAND CORPORATION at 212 (2016), https://www.rand.org/pubs/research_reports/RR1695.html.

- A. A major defect of the Transgender Ban – just as with prior categorical bans and restrictions on service by socially marginalized groups – is that it rests on broad stereotypes and generalizations about the group in question.
1. *Transgender persons are capable of meeting the high standards for military service.*

The government does not claim – nor could it – that all transgender persons are incapable of meeting the high standards for military service merely because they are transgender.²⁹ Under the policy adopted in 2016 (the “Carter Policy”), transgender individuals were allowed to serve openly, subject to meeting the same standards that apply to all service members.³⁰ A significant number of transgender service members – recently estimated at 937 – are currently serving openly under that policy.³¹ Many of those persons will continue to serve even if the proposed Transgender Ban is implemented, because they will qualify for the exception relating

²⁹ See *APA Statement Regarding Transgender Individuals Serving in Military*, AM. PSYCHOLOGICAL ASS’N (Mar. 26, 2018), <https://www.apa.org/news/press/releases/2018/03/transgender-military.aspx> (“No scientific evidence has shown that allowing transgender people to serve in the armed forces has an adverse impact on readiness or unit cohesion. What research does show is that discrimination and stigma undermine morale and readiness by creating a significant source of stress for sexual minorities that can harm their health and well-being.”).

³⁰ Mem. for Sec’y of the Military Dep’t, *Military Service of Transgender Service Members*, U.S. Dep’t of Def., DTM 16-005 at 4 (June 30, 2016), https://dod.defense.gov/Portals/1/features/2016/0616_policy/DTM-16-005.pdf.

³¹ Mem. for the President, *Military Service by Transgender Persons*, U.S. Dep’t of Def. at 10 fn. 7 (Feb. 22, 2018), <https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF>.

to those who relied on the Carter Policy to seek a gender transition.³² Yet surely the military would not allow them to serve if they were not willing, capable, and qualified in all respects, irrespective of their transgender status.

Although the government hypothesizes various issues with permitting transgender individuals to serve openly, the actual evidence of any such issues is scant to non-existent.³³ Indeed, when given the opportunity to identify any such issues, the Joint Chiefs of Staff told Congress they were not aware of any.³⁴ As Chief of Naval Operations Adm. John Richardson explained: “By virtue of being a Navy sailor, we treat every one of those Navy sailors, regardless, with dignity and respect. That is

³² See Br. for Appellants at 11, *Doe 2 v. Trump*, No. 18-5257 (D.C. Cir. 2018) (“[S]ervicemembers ‘who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy, but before the effective date of any new policy, may continue to receive all medically necessary treatment’ as well as ‘serve in their preferred gender, even after the new policy commences.’”).

³³ See Vice Adm. Donald C. Arthur, USN (Ret.), et al., *DoD’s Rationale for Reinstating the Transgender Ban is Contradicted by Evidence*, PALM CENTER at 1 (Apr. 2018), <https://www.palmcenter.org/wp-content/uploads/2018/04/Transgender-troops-are-medically-fit-1.pdf> (hereinafter “PALM CENTER”) (concluding that the government’s case for reinstating the transgender ban “is contradicted by ample evidence clearly demonstrating that transition-related care is effective, that transgender personnel diagnosed with gender dysphoria are deployable and medically fit, that inclusive policy has not compromised cohesion and instead promotes readiness, and that the financial costs of inclusion are not high”).

³⁴ Geoff Ziezulewicz, *No Reports of Transgender Troops Affecting Unit Cohesion, Marine Corps and Navy Leaders Say*, MILITARY TIMES (Apr. 19, 2018), <https://www.militarytimes.com/news/your-navy/2018/04/19/no-reports-of-transgender-troops-affecting-unit-cohesion-marine-corps-and-navy-leaders-say/>.

warranted by wearing the uniform of the United States Navy. By virtue of that approach, I am not aware of any issues.”³⁵

The government’s own data confirms that transgender personnel are deployable and fit to serve. The Department of Defense’s health data on active duty service members shows that 40 percent of service members diagnosed with gender dysphoria in FY 2016 and the first half of 2017 were deployed to the Middle East in support of Operation Enduring Freedom, Operation Iraqi Freedom, or Operation New Dawn, and only one individual could not complete deployment for mental health reasons since the Carter Policy was established in 2016.³⁶ And in April 2018 – nearly two years after transgender individuals were allowed to serve openly in the military – Army Chief of Staff Gen. Mark Milley reported to Congress that he has “received precisely zero reports of issues of cohesion, discipline, morale and all those sorts of things.”³⁷

³⁵ *Id.*

³⁶ See PALM CENTER, *supra* note 33, at 19 & n.60 (citing to a Department of Defense internal report titled “Health Data on Active Duty Service Members with Gender Dysphoria: Comparison Health Care Data with Statistical Analysis, Deployment, Treatment Plan, Surgical Recovery Times, Separation Data and Cost Data”).

³⁷ *Army Chief of Staff Testimony Contradicts Pentagon Report on Transgender Troops*, PALM CENTER (Apr. 12, 2018), <https://www.palmcenter.org/army-chief-of-staff-testimony-contradicts-pentagon-report-on-transgender-troops/>. Notably, a 1987 report from the USAF School of Aerospace Medicine confirms that, despite the historic ban on transgender military service, at least one Air Force civilian pilot was permitted to transition from male to female in the early 1980s. That individual continued flying with no “episodes of questioned judgment or episodes of psychologic dysfunction.” See T.I. Clements & R.E. Wicks, *Transsexualism and Flight Safety*, USAF SCHOOL OF

Foreign militaries that have successfully integrated transgender service members into their ranks also have not reported such issues. According to a RAND report, 18 countries allow open service for transgender persons, including: Australia, Austria, Belgium, Bolivia, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Israel, Netherlands, New Zealand, Norway, Spain, Sweden, and the United Kingdom.³⁸ Of those countries surveyed that allow transgender personnel to serve openly, none reported any “significant effect on cohesion, operational effectiveness, or readiness.”³⁹ Rather, “[t]ransgender personnel in these militaries report[ed] feeling supported and accommodated throughout their gender transition, and there has been no evidence of any effect on operational effectiveness.”⁴⁰ In fact, the increase in diversity has led some commanders to report “increases in readiness and performance.”⁴¹ Canadian commanders, in particular, noted the “increased diversity improved readiness by giving units the tools to address a wider variety of situations and challenges. . . . They also found no evidence of any effect on unit or overall cohesion.”⁴²

While the government contends that foreign military forces face different circumstances than the U.S. military, it is notable that U.S. forces regularly hold joint

AEROSPACE MEDICINE (May 8, 1987),
<http://www.dtic.mil/dtic/tr/fulltext/u2/a229995.pdf>.

³⁸ RAND CORP. at 50.

³⁹ *Id.* at 60.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 61.

exercises with these foreign countries and otherwise interact with allied military forces. They may even be called upon to support these allied forces in times of war. There is a distinct irony for our government to suggest that foreign forces are better able to manage the integration of openly serving transgender service members than the U.S. military, which has a long history of integrating previously socially marginalized groups into its ranks.⁴³

At a minimum, it is evident that there are many transgender individuals who are willing, able, and qualified to serve consistent with all of the military's high standards, so long as they are not barred by the proposed Transgender Ban.

2. *The government's arguments against open service by transgender individuals are unsupported by actual evidence.*

The government's arguments against service by transgender individuals are unpersuasive. Arguments about "unit cohesion" and the like have no basis in fact,⁴⁴ and there have been no significant issues reported to date with integrating openly transgender personnel into the military under the existing Carter Policy. Likewise, medical issues related to transition-related care are virtually indistinguishable from comparable medical issues that arise for other service members and do not

⁴³ See, e.g., *Don't Ask, Don't Tell Review: Hearing Before the Subcomm. on Military Personnel of the H. Comm. on Armed Services*, 110th Cong. 21-22 (2008), <https://www.gpo.gov/fdsys/pkg/CHRG-110hhr44634/pdf/CHRG-110hhr44634.pdf> (colloquy between Rep. Patrick Murphy (D-PA) and Elaine Donnelly, President of the Center for Military Readiness).

⁴⁴ See PALM CENTER, *supra* note 33, at 30 (stating that "the [Implementation] Report does not include any evidence to support its contention that inclusive policy has had these [compromising] effects" on unit cohesion).

significantly affect deployability. For example, the Air Force makes individualized decisions on whether to retain and deploy service members with brain injuries, the determinative factor being whether the soldier can perform his or her duties successfully.⁴⁵ The same individualized decisions can be made with respect to transgender personnel, instead of automatically deeming them categorically unfit to serve.⁴⁶

One telling indicator that the government's arguments are merely pretexts for a general hostility to transgender service members is the government's refusal to permit enlistment by individuals who have already successfully transitioned. Under the Transgender Ban, such individuals would be categorically barred from service even if they have been stable (and even high-performing) in their post-transition gender identity. This is the case even though such individuals do not pose even a hypothetical risk of non-deployability for any period of time relating to their gender transition, which by definition has already occurred.

⁴⁵ See USAF Medical Standards Directory, § L27, *Neurologic Disqualifying Conditions* (Approved May 29, 2017), <http://specialtactics.com/Uploads/MSD%2020170529.pdf> (recognizing the individualized nature of brain injuries and whether medical treatment would be effective).

⁴⁶ See generally *Arbitrary and Capricious: Six Inconsistencies Distinguishing Military Medical Policies for Transgender and Non-Transgender Personnel*, PALM CENTER (Oct. 2014), <https://www.palmcenter.org/wp-content/uploads/2014/10/Arbitrary-and-Capricious-1.pdf> (finding that “medical regulations affecting transgender personnel are inconsistent with the regulation of medical conditions in general”).

Like any other potential or serving members of the armed forces, transgender individuals are subject to individual evaluation of their suitability to serve on any number of criteria, including their current mental and physical health. There is simply no need for an additional screen based solely on the fact that the individual in question seeks to serve in a gender other than the one assigned at birth.

3. *The military is denying itself access to a pool of qualified, capable military service members at the very time it is facing a profound challenge in filling the personnel needs the military has itself established.*

The Transgender Ban, if upheld, would deny the military access to a pool of qualified, capable military service members at the very time it is facing a profound challenge in filling the personnel needs the military has itself established (with the approval of Congress). The Transgender Ban will foreclose the recruiting of transgender individuals who have transitioned or who require a transition to the gender with which they identify.

Equally important, it can lead to the discharge of transgender individuals who could successfully transition without issue, requiring the military to incur unnecessary costs for recruiting and training replacements. One report suggests that implementing the Transgender Ban would cost \$960 million – multiplying the estimated number of transgender service members (12,800) by the average per-person cost of recruiting

and training a replacement for each service member discharged (\$75,000).⁴⁷ This estimate, moreover, does not account for the added costs of training for specialty posts. For example, it costs about \$250,000 and nearly two years of training for a soldier to qualify as a cryptologic linguist,⁴⁸ and approximately \$11 million per year to train a new fighter pilot.⁴⁹ Those substantial costs are not even addressed in the memoranda proffered by the government to support the Transgender Ban.

- B. The Transgender Ban undermines the military's aspiration to field the most capable, qualified, and effective military force possible.

To the extent the military turns aside recruits and discharges current service members based on generalizations and stereotypes, it is virtually certain that it is sacrificing the service of individuals who would be entirely capable of exemplary service if given the opportunity to do so. By definition, these are volunteers who want to serve their country, and who are prepared to go in harm's way – even if it means risking their lives out of patriotic devotion to this country and its ideals. To reject the offer these brave individuals make to serve in the military, like any other qualified American, not only devalues them as individuals, but deprives our nation of service members the military needs to protect this nation.

⁴⁷ Aaron Belkin, et al., *Discharging Transgender Troops Would Cost \$960 Million*, PALM CENTER at 1 (Aug. 2017), <https://www.palmcenter.org/wp-content/uploads/2017/08/cost-of-firing-trans-troops-3.pdf>.

⁴⁸ Jim Tice, *400 Linguists Face Threat of Job Loss*, ARMY TIMES at 19 (May 13, 2013).

⁴⁹ Stephen Losey, *The Air Force is Thinking About Paying Pilots Up to \$455,000 to Stay in Uniform*, AIR FORCE TIMES (Mar. 29, 2017), <https://www.airforcetimes.com/news/your-air-force/2017/03/29/the-air-force-is-thinking-about-paying-pilots-up-to-455000-to-stay-in-uniform/>.

SWAN and the other *amici* are not seeking to weaken our military (as the government's arguments may suggest), but rather want to *strengthen* it, by eliminating arbitrary categorical bans and other barriers that stand in the way of fielding the most effective military force possible.

Consider where our military would be today if past categorical bans and limits on service had not been lifted. We would likely have seen no Gen. Colin Powell, the first African American chairman of the Joint Chiefs of Staff. We would likely have seen no Lt. Gen. Susan Helms, the first female Air Force officer to venture into space as part of the crew of the space shuttle Endeavor. We would likely have seen no Brig. Gen. Tammy Smith, the first openly LGB general in U.S. Army history. And if the Transgender Ban is allowed to stand, we will likely never know what future heroes our country has passed over, including potentially the very plaintiffs in this case.

Like countless Americans before them, many transgender individuals are willing, capable, and qualified to serve. They should be allowed to do so honorably. They should not be excluded solely due to a categorical ban that judges them based on stereotypes and not on individual merit.

CONCLUSION

For the foregoing reasons, SWAN and the other *amici* urge this Court to affirm the district court's denial of defendants-appellants' motion to dissolve the preliminary injunction, and, in so doing, assure that our military's effectiveness is not

subordinated to a ban that will deny our military access to qualified and capable service members it needs to fulfill its critical mission.

Dated: October 29, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. Pursuant to Fed. R. App. P. 29(g) and 32(g)(1), this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 4,741 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

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CERTIFICATE OF SERVICE

I, Steven Reed, hereby certify that on October 29, 2018, the foregoing document was filed and served through the CM/ECF system.

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