

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, 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

**BRIEF FOR *AMICI CURIAE* ASIAN AMERICAN LEGAL
DEFENSE AND EDUCATION FUND, FRED T.
KOREMATSU CENTER FOR LAW AND EQUALITY,
LATINOJUSTICE PRLDEF, AND THE LEADERSHIP
CONFERENCE ON CIVIL AND HUMAN RIGHTS IN
SUPPORT OF PLAINTIFFS-APPELLEES**

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(A)(1), *amici* state the following:

A. Parties and Amici. Except as described below, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Briefs for Appellants Donald J. Trump et al. and Appellees Jane Doe 2 et al. In addition to the Asian American Legal Defense and Education Fund, the Fred T. Korematsu Center for Law and Equality, LatinoJustice PRLDEF, and the Leadership Conference on Civil and Human Rights, the following *amici* have also filed briefs in this Court in support of Plaintiffs-Appellees:

- **Retired Military Officers and Former National Security Officials:** Brigadier General (Ret.) Ricardo Aponte, Vice Admiral (Ret.) Donald Arthur, former Deputy Assistant Secretary of Defense for Russia Michael R. Carpenter, Brigadier General (Ret.) Stephen A. Cheney, former Assistant Secretary of Defense for International Security Affairs Derek Chollet, Rear Admiral (Ret.) Jay A. DeLoach, Major General (Ret.) Paul D. Eaton, Brigadier General (Ret.) Evelyn “Pat” Foote, Vice Admiral (Ret.) Kevin P. Green, General (Ret.)

Michael Hayden, former Secretary of Defense Chuck Hagel, former Principal Deputy Under Secretary of Policy Kathleen Hicks, Brigadier General (Ret.) David R. Irvine, Lieutenant General (Ret.) Arlen D. Jameson, Brigadier General (Ret.) John H. Johns, former Deputy Assistant to the President and National Security Advisor to the Vice President Colin H. Kahl, Lieutenant General (Ret.) Claudia Kennedy, Major General (Ret.) Dennis Laich, Major General (Ret.) Randy Manner, Brigadier General (Ret.) Carlos E. Martinez, General (Ret.) Stanley A. McChrystal, former Principal Deputy Assistant Secretary of Defense for Asian and Pacific Security Affairs Kelly E. Magsamen, former Secretary of Defense Leon E. Panetta, Major General (Ret.) Gale S. Pollock, Rear Admiral (Ret.) Harold Robinson, Brigadier General (Ret.) John M. Schuster, Rear Admiral (Ret.) Michael E. Smith, Brigadier General (Ret.) Paul Gregory Smith, former Deputy National Security Advisor to the Vice President Julianne Smith, Admiral (Ret.) James Stavridis, Brigadier General (Ret.) Marianne Watson, former Deputy Assistant Secretary for Special

Operations and Combating Terrorism William Wechsler, and former Under Secretary of Defense for Policy Christine E.

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- **Veterans Organizations:** American Veterans Alliance, American Veterans for Equal Rights, Jewish War Veterans of the USA, Minority Veterans of America, Swords to Plowshares, Transgender American Veterans Association, the Truman Center for National Policy, US & Latin Veterans' Support Embassy, and VoteVets.org;
- **Veterans Advocacy Groups:** The Service Women's Action Network, High Ground Veterans Advocacy, Iraq and Afghanistan Veterans of America, National Law School Veterans Clinic Consortium, National Veterans Legal Services Program, New York City Veterans Alliance, and Protect Our Defenders;
- **Health Care Organizations:** American Medical Association, American College of Physicians, American Academy of Nursing, American Medical Women's Association, American Nurses

- Association, Endocrine Society, GLMA: Health Professionals Advancing LGBT Equality, and Mental Health America;
- **States:** California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and the District of Columbia;
 - **Advocacy Organizations:** National Center for Transgender Equality, FORGE, Inc., Gender Spectrum, the National LGBTQ Task Force, Southern Arizona Gender Alliance, Trans People of Color Coalition, Transcend Legal, Transgender Allies Group, Transgender Legal Defense and Education Fund, and Transgender Resource Center of New Mexico;
 - The NAACP Legal Defense and Educational Fund, Inc.;
 - The Trevor Project, and
 - The Constitutional Accountability Center.

B. Ruling Under Review. An accurate reference to the ruling at issue appears in the Brief for Appellants Donald J. Trump et al.

C. Related Cases. An accurate statement regarding related cases appears in the Brief for Appellants Donald J. Trump et al.

/s/ Eamon P. Joyce

Eamon P. Joyce

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, *amici curiae* submit the following corporate disclosure statements:

The Asian American Legal Defense and Education Fund is a not-for-profit organization with no parents, subsidiaries, or affiliates. It does not issue stock, and thus, no publicly held corporation can own 10 or more percent of its stock.

The Fred T. Korematsu Center for Law and Equality is a research and advocacy organization based at Seattle University, a non-profit educational institution under Section 501(c)(3) of the Internal Revenue Code. The Korematsu Center does not have any parent corporation or issue stock and consequently there exists no publicly held corporation which owns 10 percent or more of its stock.

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The Leadership Conference on Civil and Human Rights is a 501(c)(4) organization that engages in legislative advocacy. It has no

parent corporation and does not issue stock, and thus, no publicly held corporation can own 10 or more percent of its stock.

/s/ Eamon P. Joyce

Eamon P. Joyce

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Plaintiffs-Appellees consent, and Defendants-Appellants do not object, to the filing of this brief.*

Pursuant to Circuit Rule 29(d), *amici* certify that a separate brief is necessary. To the best of *amici*'s knowledge, no other *amicus* brief will focus on the constitutional right to equal citizenship, the close relationship between citizenship and military service, and the history of once-disfavored groups securing full citizenship through military service. This information is critical to understanding how antithetical the Trump Administration's ban on transgender individuals serving openly in the military is to the Constitution and American values. As a result, filing a joint brief is not practicable.

/s/ Eamon P. Joyce

Eamon P. Joyce

* No party or its counsel authored this brief in whole or in part, and no person other than *amici curiae* and their counsel contributed money intended to fund the preparation and submission of this brief. See Fed. R. App. P. 29(a)(4)(E).

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GLOSSARY

AGIF

American G.I. Forum

WACs

Servicemembers in the
Women's Air Corps

WAVES

Servicemembers in the
Navy's Women Accepted for
Volunteer Emergency
Service

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in
the Brief for Defendants-Appellants.

INTEREST OF *AMICI CURIAE*

Amici are a diverse group of non-profit organizations devoted to protecting civil rights and ensuring a fairer, more just society.

Discrimination against transgender individuals undermines the rights of all Americans and, thus, the mission of *amici*. Full descriptions of *amici* appear in the Appendix.

INTRODUCTION

Since colonial days, American law has recognized that because citizens have “a right to be protected in the enjoyment of life, liberty, and property,” all are “bound to contribute [their] proportion toward the expense of that protection, and yield [their] personal service when necessary.” Pa. Const. art. VIII (1776); *see also, e.g.*, 8 U.S.C. § 337(a) (oath requiring citizens to “bear arms” and “serv[e] in the Armed Forces”). Formal legal status, however, has not always conveyed the rights of citizenship to all persons. Indeed, for historically disfavored groups—including people of color, women, and gays and lesbians—it has been their honorable military service that has made the promise of equal citizenship real. From the black soldiers charging Fort Wagner’s parapets to the women serving on battlefields at home and abroad to

the sacrifice of Japanese Americans in the 442nd Infantry Regimental Combat Team, they proved that whoever “fights the battles of America may claim America as his [or her] country—and have that claim respected.” Douglass, *Why Should a Colored Man Enlist?*, in *Frederick Douglass: Selected Speeches and Writings* 530 (Foner ed., Taylor abr. & adapted by, 1999).

The ban on transgender servicemembers stands athwart this history, especially given such individuals’ honorable service to date. In doing so, the ban gravely threatens the promise of dignity and full participation in public life that is the right of every American. The ban creates separate classes of citizens and stigmatizes transgender individuals as less than fully American, while at the same time undermining military efficacy. This prejudicial policy cannot be squared with the protections of our basic charter that all citizens—whether by birth or choice—have a duty to defend and vindicate.

ARGUMENT

I. The Constitutional Right Of Equal Citizenship Guarantees Dignity And Full Participation In Public Life.

At the most basic level, “citizenship” signifies legal status—that a person is a member of a particular political community. But citizenship

in this country—as in the classical world—has another, more profound meaning. See Smith, *Citizenship and the Fourteenth Amendment*, 34 San Diego L. Rev. 681, 748 (1997). It affords individuals certain rights within—and imposes obligations to—the broader community, including dignity and equal participation. See Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 3-4 (1977).

In theory, the Founders considered all Americans to “possess alike [the] immunities of citizenship” and to “owe[] ... [their] personal services to the defence of [the Nation].” Letter from George Washington to the Hebrew Congregation at Newport, Rhode Island (Aug. 18, 1790); Washington’s Sentiments on a Peace Establishment (May 1, 1783).¹ Their own words and deeds, however, demonstrate that only white men had full citizenship. See, e.g., Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816) (“qualified citizens” capable of participating in

¹ Available, respectively, at: <https://founders.archives.gov/documents/Washington/05-06-02-0135>; <https://founders.archives.gov/documents/Washington/99-01-02-11202>.

public affairs did not include “infants,” “women,” and “slaves”)²; Second Militia Act § 1, 1 Stat. 271 (1792) (requiring “every free able-bodied white male citizen” to “enroll[] in the militia”). Indeed, the Supreme Court endorsed this reality and more when it held that African Americans were “an inferior class”—essentially, nonpersons—and, thus, could never be citizens. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 412 (1857); *see id.* at 422 (“[w]omen and minors,” while “part of the political family,” could “exercise[] no share of the political power”).

The 14th Amendment fundamentally re-envisioned citizenship. It made clear that States could not abridge the “privileges or immunities of citizens”—“[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof.” U.S. Const. amend. XIV, § 1. It thus overruled *Dred Scott*’s myopic view of who the People of the United States are. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1872). But the Reconstruction Congress did not stop there. The 14th Amendment also granted to *all persons* “due process” and “equal protection of the laws.” U.S. Const. amend. XIV, § 1.

² Available at <https://founders.archives.gov/documents/Jefferson/03-10-02-0255>.

These provisions were meant, on one level, to place the Civil Rights Act on sound constitutional footing. *See, e.g., Zietlow, Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 Akron L. Rev. 717, 733-38 (2003). To that end, the 14th Amendment explicitly gave Congress authority to enact legislation that extended “the same right ... to full and equal benefit of all laws ... as is enjoyed by white citizens.” Civil Rights Act § 1, 14 Stat. 27 (1866). By using flexible language in Section 1, however, the amendment’s architects also constitutionalized a broader principle of equal citizenship “capable of growth.” Karst, 91 Harv. L. Rev. at 14-17; *see Foner, Reconstruction 257* (Harper Perennial Modern Classics 2014) (1988) (The 14th Amendment was a “broad statement[] of principle, giving constitutional form to the resolution of national crisis, and permanently altering American nationality.”).

Equal citizenship has at least two key elements: the right to dignity and the right to participate fully in public life. The dignity right requires “organized society [to] treat each individual as a person, one who is worthy of respect, one who ‘belongs,’” and “forbids the organized society to treat an individual either as a member of an inferior or

dependent caste or as a nonparticipant.” Karst, 91 Harv. L. Rev. at 6. The equal-participation right recognizes that citizens are “member[s] of a moral community who count[] for something in the community’s decisionmaking processes” and “who owe[] obligations to [their] fellow members.” *Id.* at 8. Accordingly, society cannot refuse to allow a person to share in the burdens of citizenship and thus foster a sense of dependency. See Eskridge, *The Relationship between Obligations and Rights of Citizens*, 69 Fordham L. Rev. 1721, 1736 (2001) (“The complete exclusion of [people] from an undeniable responsibility of citizenship is an affront to [them] as citizens, a bow to their continued (symbolic) infantilization.”).

The Supreme Court has frequently applied the dignity principle to eradicate stigma-imposing laws. For instance, in *Brown v. Board of Education*, the Court overturned segregation laws because separating black children “from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community.” 347 U.S. 483, 494 (1954). The Court has similarly struck down laws treating women differently when “rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women,

not on a pedestal, but in a cage.” *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality op.). More recently, the Court has recognized same-sex couples’ right to marry because “laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). In these cases, and others, the policies at issue failed to treat citizens as full human beings capable of exercising the same rights and responsibilities as others, preferring instead to traffic in stereotype.

The participation principle likewise has a long pedigree. In *Strauder v. West Virginia*, the Court held that African Americans could not be excluded, on account of race, from jury service, emphasizing that “[t]he very fact that colored people are singled out and expressly denied ... all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them [and] an assertion of their inferiority.” 100 U.S. 303, 308 (1879); see *Hernandez v. Texas*, 347 U.S. 475, 477-82 (1954) (extending *Strauder* to Latino/as); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 141-42 (1994) (excluding women jurors “denigrates the dignity of the excluded juror [and]

reinvokes a history of exclusion from political participation”); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 485 (9th Cir. 2014) (excluding jurors based on sexual orientation continues the “deplorable tradition of treating gays and lesbians as undeserving of participation in our nation’s most cherished rites and rituals.”). In short, no “government acts compatibly with the equal protection principle when a ... policy denies to [people], simply because they are [members of a particular group], full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.” *United States v. Virginia*, 518 U.S. 515, 532 (1996).

II. Military Service Has Historically Been An Avenue For Obtaining Full Citizenship.

Despite the 14th Amendment, the promise of equal citizenship has never been self-fulfilling. People of color, women, and members of the LGBTQ community have been denied dignity and the right to participate fully in American life through Jim Crow, internment, glass ceilings, outright violence, and discriminatory policies. However slowly and nonlinear in fashion, progress toward a society of respect and full participation has nonetheless been made.

The largest advancements have often taken place in times of war when members of these once-disfavored groups were permitted to serve in uniform. See Klarman, *From Jim Crow to Civil Rights* 174 (2004) (recognizing “egalitarian consequences” of American wars). After all, since ancient Greece, full citizenship has been linked to military service, see Katz, *Free a Man to Fight: The Exclusion of Women from Combat Positions in the Armed Forces*, 10 *Law & Ineq.* 1, 48 (1991), and by serving bravely alongside straight white men, previously excluded individuals have demonstrated their claim to equal citizenship. As Frederick Douglass recognized: “Once let the black man get upon his person the brass letter, U.S.; let him get an eagle on his button, and a musket on his shoulder and bullets in his pocket, and there is no power on earth which can deny that he has earned the right of citizenship.” McPherson, *Battle Cry of Freedom* 564 (1988).

People of color, women, and LGBTQ Americans have fought in every war since the revolution, and through their service and sacrifice, they have shown themselves deserving of respect. By extension, these servicemembers have changed how society views others like them for the better.

A. African Americans

1. Prior to the Civil War, Northern and Southern whites were hostile toward equal citizenship for African Americans. *See Foner, The Fiery Trial* 118-23 (2011). Stereotypes persisted that African Americans were somehow both brutes and cowards, *id.* at 202, and partially as a result, they were permitted to serve only as noncombatants, *see Karst, The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. Rev. 499, 513 (1991). When the North faced military disaster in 1862, however, Congress passed the Militia Act, granting the President authority to enlist “persons of African descent” for “any military or naval service for which they may be found competent.” 12 Stat. 597, § 12 (1862).

Two-hundred thousand black men ultimately served in these segregated regiments, *see Karst*, 38 UCLA L. Rev. at 512, and they rapidly disproved the rotten stereotypes. At Milliken’s Bend, two regiments of untrained, outnumbered, and poorly-armed black troops held off a surprise attack and rescued white soldiers. *See McPherson, supra*, at 634; Foner, *Fiery Trial*, at 251. Assistant Secretary of War Dana noted that “[t]he bravery of the blacks completely revolutionized

the sentiment of the army with regard to the employment of negro troops,” making “prominent officers,” including General Grant, “heartily in favor of it.” McPherson, *supra*, at 634. Shortly thereafter, the 54th Massachusetts Infantry led the assault against Fort Wagner, suffering heavy losses while proving themselves “among the bravest of the brave in fighting for the Union.” Foner, *Fiery Trial*, at 251 (quoting Secretary of War Stanton).

These servicemembers’ gallantry showed Northern leadership that African Americans deserved to be treated as full citizens. In his last public speech, Lincoln stated that he “prefer[red] that [the elective franchise] were now conferred on the very intelligent [African Americans], and on those who serve our cause as soldiers.” 2 ABRAHAM LINCOLN, *Speech on Reconstruction, in Speeches and Writings: 1859-1865* 699 (1989). Grant spoke openly of “put[ting] the ballot in [their] hand[s] and mak[ing] [them] citizens,” a position to which he held fast as President. Chernow, *Grant* 229 (2017). Congress passed the 13th, 14th, and 15th Amendments—actions not “conceivable,” according to W.E.B. DuBois, without “the record of the Negro soldier as a fighter.” Karst, 38 UCLA L. Rev. at 513 & n.55.

2. With the rise of Jim Crow, the promise of equal citizenship was cruelly deferred. Nevertheless, at World War I's beginning, DuBois encouraged African Americans, "while th[e] war lasts," to "forget [their] special grievances and close [their] ranks shoulder to shoulder with [their] white fellow citizens." DuBois, *Close in Ranks*, in *W.E.B. DuBois: A Reader* 697 (Lewis ed., 1995). Over 200,000 African Americans ultimately served in France, with approximately 40,000 joining two black combat divisions. Williams, *African Americans and World War I*, <http://exhibitions.nypl.org/africanaage/essay-world-war-i.html>. Again, these soldiers demonstrated bravery; two of the Harlem Hellfighters even became the first Americans to win the French *Croix de Guerre*. *Id.*

After the war, these servicemembers "return[ed] fighting," Williams, *supra* (quoting DuBois), and "were treated as heroes in the black community"; they "spoke to NAACP branches about their experiences, and demanded voting rights," creating the "background conditions that facilitated civil rights protest," Klarman, *supra*, at 105. But while "front-line military service by blacks undercut the claims of racial superiority," black veterans were targeted for special violence,

precisely because their service engendered calls for equal citizenship. Baker, *The Tragic, Forgotten History of Black Military Veterans*, *The New Yorker* (Nov. 27, 2016), <https://www.newyorker.com/news/news-desk/the-tragic-forgotten-history-of-black-military-veterans>. This white backlash stifled large-scale advancement; however, the targeting of black soldiers demonstrated the potency of military service in demanding equal dignity and participation.

3. World War II proved different. At the outset, most black male servicemembers were again confined to “manual labor positions.” Higginbotham, *Soldiers for Justice: The Role of the Tuskegee Airmen in the Desegregation of the American Armed Forces*, 8 *Wm. & Mary Bill Rts. J.* 273, 279 (2000). Black women were limited to assignments as “cleaners, laundry workers, and kitchen help.” Newby, *The Fight for the Right to Fight and the Forgotten Negro Protest Movement*, 10 *Tex. J. on C.L. & C.R.* 83, 92 (2004). Nearly all were commanded by white officers, and many of those officers, including the Army’s Chief of Staff, considered “the level of intelligence and occupational skill of the Negro population [to be] considerably below that of the white.” Karst, 38 *UCLA L. Rev.* at 519.

But because African Americans were a key part of President Roosevelt's electoral coalition, A. Philip Randolph convinced Roosevelt to allow a significant number of African Americans to enlist, to serve in each branch of the military, and to attend Officer Candidate and flight schools, and to ban exclusion of blacks from war industries.

Higginbotham, *supra*, at 287-88.

In 1944, after white units suffered heavy losses, the army committed black troops in Europe. *Id.* at 283. Before the Battle of the Bulge, just one-third of white soldiers approved of sending black soldiers into combat. *Id.* at 284 n.53. However, after black and white troops fought side-by-side and “over 7,000 medals [were] awarded to black troops,” that number rose to more than three-quarters. *Id.*

The Tuskegee Airmen—the “Redtail Angels” to white bomber crews—performed in similar exemplary fashion, receiving hundreds of medals. *Id.* at 275 n.9 & 284 n.57. Moreover, at significant personal cost, these airmen repeatedly attempted to integrate base facilities, frequently through protest. *See id.* at 306. Ultimately, these efforts led to the President's Committee on Civil Rights report recognizing “[t]he injustice of calling men to fight for freedom while subjecting them to

humiliating discrimination within the fighting forces.” Newby, *supra*, at 105; *see also* Brief of NAACP LDF at 9-11, *Karnoski v. Trump*, No. 18-35347 (9th Cir. July 3, 2018). President Truman adopted it and issued Executive Order 9981 in 1948, directing the military to integrate.

This Executive Order was not the only consequence of the service of black soldiers, sailors, and airmen during World War II. These servicemembers’ claims for dignity and equal participation foreshadowed Thurgood Marshall’s arguments in *Brown*, and various *amici* drew the explicit parallel. *See* Newby, *supra*, at 108-09. Further, when these servicemembers returned home, they “refused to quietly resume traditional racial patterns.” Klarman, *supra*, at 181, 445. Veterans such as Hosea Williams and Medgar Evers became the early leaders of the Civil Rights Movement. *See* Baker, *supra*; Klarman, *supra*, at 248. In doing so, they sought to ensure that society provided African Americans with respect and allowed for their full participation as citizens.

B. Asian Americans, Latino/as, and Immigrants

For obvious reasons, the African-American experience in the United States is unique, but other historically disfavored groups have also leveraged military service into more equal citizenship. Asian Americans and Latino/as have long joined the military in wartime, despite sometimes appalling mistreatment, and have served with distinction. Through their bravery, they have obtained greater social respect and opportunities to participate in public life.

1. This country's treatment of Asian immigrants has often been dreadful. *See, e.g.*, Chinese Exclusion Act, 22 Stat. 58 (1882); Immigration Act of 1924, 43 Stat. 153; *Ozawa v. United States*, 260 U.S. 178 (1922). Nonetheless, Asian Americans have served in the armed forces since the early 19th Century. Naval History & Heritage Command, *Asian Americans in the U.S. Military* (Nov. 20, 2017), <https://www.history.navy.mil/browse-by-topic/diversity/asian-americans-pacific-islanders-in-the-navy/asian-americans-us-military.html>. With each passing war, they laid claim to more equal citizenship, notwithstanding persistent discrimination.

For example, after Pearl Harbor, Japanese Americans were deemed IV-C—“enemy aliens”—and precluded from enlisting, and most of the 6,000 already in uniform were expelled. Yamamoto et al., *Race, Rights and Reparation* 214 (1st ed. 2001). In February 1942, Roosevelt signed Executive Order 9066, permitting internment of even American-born citizens of Japanese descent. 7 Fed. Reg. 1407. However, by early 1943, the military reversed course and called for 1,500 volunteers from the internment camps. See *Fighting for Democracy: Japanese Americans*, PBS, https://www.pbs.org/thewar/at_war_democracy_japanese_american.htm. Ten thousand showed up at the recruiting stations. *Id.*

Many of these volunteers formed the 442nd Infantry Regimental Combat Team, *id.*, which made up the most decorated unit in the entire war, by earning “21 Medals of Honor, 4,000 Purple Hearts, 29 Distinguished Service Crosses, 588 Silver Stars and more than 4,000 Bronze Stars.” Yam, *Most Decorated Unit in U.S. History Fought for a Country that Didn’t Accept Them* (Nov. 10, 2017), https://www.huffingtonpost.com/entry/442-regimental-combat-team_us_5a06209fe4b05673aa593f8f. According to General Marshall,

“[t]hey showed rare courage and tremendous fighting spirit. Everybody wanted them [under their command].” PBS, *supra*.

Their service and sacrifice were not lost on those at home. Presenting the 442nd with a Distinguished Unit Citation, Truman observed that “you fought, not only the enemy but you fought prejudice, and you won.” Remarks Upon Presenting a Citation to a Nisei Regiment, 2 Pub. Papers 347 (July 15, 1946). Fellow veterans attacked lingering prejudice against Japanese Americans, writing in the *Des Moines Register*, for example: “When you have seen these boys blown to bits, going through shellfire that others refused to go through, that is the time to voice your opinion, not before.” Remarks on Presenting the Congressional Medal of Honor to Asian-American Heroes of World War II, 36 Weekly Comp. Pres. Doc. 1418, 1420 (June 21, 2000).³ In 1948, Congress passed the Japanese-American Claims Act, permitting reimbursement for some damages caused by internment, *see* 62 Stat. 1231, and in 1988, President Reagan apologized for internment and signed the Civil Liberties Act of 1988, providing reparations, 102 Stat.

³ Among those earning the Medal of Honor was Daniel Inouye, who served in the United State Senate for almost 50 years. *See id.*

904. Without the valiant service of the 442nd and their demonstration of loyalty, none of this would have been possible.

2. Latino/as have also suffered discrimination throughout United States history. For instance, while the Treaty of Guadalupe Hidalgo made nearly 77,000 Mexicans U.S. citizens, “No Dogs/No Mexicans” signs were commonly found well into the 20th Century. Sinisi, *Hispanic Vet Recalls Bias, Says Civil Rights Still Lag*, Denver Post, at B4 (June 1, 1996). Still, Latino/as have served in the military and won more equal citizenship through their service and efforts as veterans.

In World War II alone, approximately 500,000 Mexican Americans served with distinction. See Nat’l Park Serv., Dep’t of the Interior, *Latinos in World War II: Fighting on Two Fronts*, <https://www.nps.gov/articles/latinoww2.htm/>. At least 11 soldiers earned the Medal of Honor. See Glenn, *Medal of Honor Recipient Wasn’t Always Celebrated*, Houston Chronicle (Aug. 9, 2016), <https://www.chron.com/local/history/houston-legends/article/Medal-of-Honor-winner-wasn-t-always-celebrated-9130301.php>. But perhaps nothing exemplifies the impact of military service on equal citizenship

for Latino/as than the treatment of Private Felix Longoria.⁴ Longoria was killed in the Philippines at the end of the war, and in 1949, his remains returned home. *See* Hart, *WWII Dispute Again Divides Town*, L.A. Times (May 31, 2004). The town's only funeral home refused to allow his family to use the chapel "because the 'whites would not like it.'" Olivas, *The 'Trial of the Century' that Never Was*, 83 Ind. L.J. 1391, 1398 (2008). In response, Dr. Hector Garcia organized the American G.I. Forum (AGIF) to protest "this action and other examples of disrespect accorded veterans." *Id.* The publicity of such discriminatory treatment toward a fallen warrior caused then-Senator Lyndon Johnson to arrange for Longoria's burial at Arlington. *Id.* at 1399. Going forward, AGIF and other organizations played prominent roles in the movement to obtain fully equal citizenship for Latino/as.

Puerto Ricans also enlisted in large numbers for World War II (as with prior wars), but they were largely withheld from combat. *See* Nat'l

⁴ Military service has long been an avenue for immigrants to obtain citizenship. *See, e.g.,* Hemmer, *It's Always Been Hard to Say No to Citizenship Requests From Soldiers. Trump's Doing It.*, Vox (July 9, 2018), <https://www.vox.com/the-big-idea/2018/7/9/17549402/citizenship-military-mavni-immigration-service-naturalization-discharge-history-mavni>.

Park Serv., *supra*. Yet when North Korea invaded the South, the all-Puerto Rican 65th Infantry Regiment was rushed to the front lines and the heaviest fighting. Collins, *Congress Honors Puerto Rican Regiment for Heroic Korean War Service*, DoD News (Oct. 11, 2016),

https://www.army.mil/article/176494/congress_honors_puerto

[rican regiment for heroic korean war service](https://www.army.mil/article/176494/congress_honors_puerto). They were the first unit to reenter Seoul and the last in Army history to engage in a battalion-sized bayonet charge. *Id.* Their actions caused General MacArthur to write: “The Puerto Ricans ... of the gallant 65th Infantry give daily proof ... of their courage, determination and resolute will to victory, their invincible loyalty to the United States and their fervent devotion to those immutable principles of human relations which the Americans of the continent and Puerto Rico have in common.” *Id.*

When they returned home, like other veterans of color, they used their veteran status to push for civil rights. *See Nat’l Park Serv., supra.*

C. Women

Traditionally, the military has been a male-dominated space. But women have participated in it since our country’s origins. Katz, *supra*, at 4. As with other previously excluded groups, women have made

strides toward equal citizenship as a result of their military service, which helped redefine the scope of “women’s work” and pave the way for women to participate in other aspects of society, including medicine, education, and politics.

1. During the Revolutionary and Civil Wars, some women disguised themselves as men and fought on the battlefield, or served as spies and couriers. Hughes, *A Woman’s Struggle for Equality*, 39 DttP 33, 33 (2011). More frequently, women served in the medical field. *See, e.g.,* McPherson, *supra*, at 477-83. Dr. Elizabeth Blackwell—the first female doctor in the country—helped found the United States Sanitary Commission, which trained nurses. *Id.* at 480. At first, Lincoln saw this organization as a “fifth wheel to the coach,” but these nurses’ service improved medical care and impressed the Surgeon General such that he “issued an order in 1862 requiring at least one-third of the army nurses in general hospitals to be women.” *Id.* at 483. Clara Barton, Mary Ann Bickerdyke, and others transformed “nursing from a menial service to a genuine profession.” *Id.* at 484. Dr. Mary Walker even served as a Union physician, despite the army’s refusal to pay her, and earned the Medal of Honor. Murnane, *Legal Impediments to Service:*

Women in the Military and the Rule of Law, 14 Duke J. of Gender L. & Pol'y 1061, 1062-63 (2008). Together, Dr. Walker and the nurses “chipped away at the weaker-sex image.” McPherson, *supra*, at 484.

2. The world wars presented further opportunities for women through military service. In 1942, Congress established the Women's Army Corps and the Navy's Women Accepted for Volunteer Emergency Service. See Murnane, *supra*, at 1065. As WACs and WAVES, women served in military intelligence and as drivers and pilots. Katz, *supra*, at 5. Their service expanded society's conception of women's role in the world. This changing perception informed the Women's Armed Service Integration Act of 1948, 62 Stat. 356, which authorized women's enlistment and commissioning in the uniformed services. Although women were limited to 2% of total force strength and could not serve in combat, the abolishment of women's-specific military units signified that women were gaining more equal citizenship. Murnane, *supra*, at 1066-67. Despite these restrictions, at least 7,000 women served in Vietnam and tens of thousands in Desert Storm. See, e.g., Nat'l Ctr. for Veterans Analysis & Statistics, Dep't of Veterans Affairs, *America's*

Women Veterans (Nov. 23, 2011), https://www.va.gov/vetdata/docs/specialreports/final_womens_report_3_2_12_v_7.pdf.

3. Barriers to women's full participation in military service were finally eradicated throughout the 1990s and early 2000s. Acknowledgement that equal citizenship required equal opportunity to serve in the military was central to doing so. In 1992, Les Aspin, then-Chairman of the House Armed Services Committee, likened the exclusion of women from combat positions to "unequal citizenship" and "asked whether combat exclusions made women 'second-class citizens,' fostering an attitude in the military that 'it is fair game to treat them with discrimination.'" Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 Minn. L. Rev. 96, 139-40 (2008).

In 2013, Defense Secretary Panetta rescinded the Direct Ground Combat Definition and Assignment Rule, which had "exclud[ed] women from assignment to units and positions whose primary mission is to engage in direct combat on the ground." Sec'y of Defense, Memorandum for Secretaries of the Military Departments Acting Under Secretary of Defense for Personnel and Readiness, Chiefs of the Military Services

(Jan. 24, 2013). Two years later, the Defense Department opened the remaining ten percent of military positions to women, including the Army Rangers and Navy SEALs. *See* Sec’y of Defense, Memorandum for Secretaries of the Military Departments Acting Under Secretary of Defense for Personnel and Readiness, Chiefs of the Military Services, Commander, U.S. Special Operations Command (Dec. 3, 2015).

The combat-exclusion policy and others hindered women’s ability to participate at all levels of civic society. By participating in military service, women have won respect in other aspects of civil life. Women and their male counterparts in these environments learn that “women can do the job ... be leaders ... speak with the voice of authority.”

Karst, 38 UCLA L. Rev. at 528. They are not confined “solely [to] the home and the rearing of the family” while men enter “the marketplace and the world of ideas.” *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975).

D. Gays and Lesbians

Despite outright bans and Don’t Ask Don’t Tell, gays and lesbians have served with honor in the armed forces, as far back as Baron von Steuben. *See, e.g.,* Shilts, *Conduct Unbecoming: Gays & Lesbians in the U.S. Military* 7-11 (1994). Their personal bravery and devoted

patriotism have often gone unappreciated, especially contemporaneous with their service. Nevertheless, their distinguished service has helped obtain more equal citizenship for all gays and lesbians.

For example, Leonard Matlovich provided “twelve years of excellent service” in the Air Force. *Matlovich v. Sec’y of the Air Force*, 591 F.2d 852, 853 (D.C. Cir. 1978). He “volunteered for assignment to Viet Nam,” “was awarded the Bronze Star,” “engaged in hazardous duty on a volunteer basis,” “revolunteered,” “excelled in the Service as a training officer” and “as a counselling officer,” and “at all times,” was “rated at the highest possible ratings by his superiors in all aspects of his performance.” *Id.* at 854 n.4. This outstanding record notwithstanding, when Matlovich came out as gay on the cover of *Time*, he was discharged by the Air Force. *See id.* at 854. He challenged his discharge in federal court, and Matlovich’s case received unprecedented public attention. *See Shilts, supra*, at 227. Ultimately, the case settled. But, for perhaps the first time, the general public became widely aware of gay and lesbian servicemembers’ honorable efforts in uniform, expanding the possibilities of equal citizenship for gays and lesbians more generally.

Margarethe Cammermeyer furthered this effort. She entered the Army Student Nurse Corps in 1961 and, with the exception of a four-year period, served in the Army until 1986, when she transferred to the National Guard. *See Cammermeyer v. Aspin*, 850 F. Supp. 910, 912 (W.D. Wash. 1994). Cammermeyer's service record, which included the Bronze Star for distinguished service in Vietnam, was praised by a federal court as "remarkable." *Id.* She was nonetheless discharged as a result of responding truthfully in the affirmative when asked if she was a lesbian. This absurd outcome did not escape the responsible military authorities, who praised Cammermeyer's "superb leadership" and termed her discharge "a significant loss" and "senseless." *See id.* at 912-13. Nor did it escape the public, a majority of whom supported allowing gays and lesbians to serve in the military for the first time. *See Egan, Dismissed From Army as Lesbian, Colonel Will Fight Homosexual Ban*, N.Y. Times (May 31, 1992). After enduring years of investigation, separation from the service, and litigation, Cammermeyer was eventually reinstated. *See Cammermeyer v. Perry*, 97 F.3d 1235 (9th Cir. 1996).

Matlovich and Cammermeyer were merely two among approximately 114,000 servicemembers discharged from the armed forces because of their sexual orientation between World War II and the repeal of DADT. See, e.g., Burke, *Bill Would Upgrade Records of Those Discharged Under DADT*, Stars and Stripes, June 21, 2013. But the honorable service of gay and lesbian warriors, and growing public awareness of cases such as Matlovich's and Cammermeyer's, helped turn public opinion firmly in favor of allowing gays and lesbians to serve openly in the military. See, e.g., McCabe, *Public Opinion on 'Don't Ask, Don't Tell'*, FiveThirtyEight (Nov. 30, 2010), <https://fivethirtyeight.com/features/public-opinion-on-dont-ask-dont-tell/> (noting changes in public opinion); Shilts, *supra*, at 227 (noting the importance of Matlovich's case in shaping public opinion).

Most recently, the record of gay and lesbian servicemembers helped win recognition of same-sex marriage in *Obergefell*. See, e.g., *Obergefell*, 135 S. Ct. at 2595 (plaintiffs included a sergeant in the Army Reserve “who served this Nation to preserve the freedom the Constitution protects”); *id.* at 2596 (argument that the military's ban on gays and lesbians conflicts with the “just claim to dignity” of gays and

lesbians); *id.* at 2605 (noting that the military had devoted substantial attention to same-sex marriage).

The path of these pioneers has not been easy, and progress has come at great cost. But gallant military service has been a springboard for many historically marginalized groups—as it always has been for straight white men—to achieve acceptance and success in many walks of American life, including by running for political office and making contributions to national security at the highest levels. We underscore that these groups’ service and sacrifice have created opportunities, not only for themselves and their fellow servicemembers, but also for all people because these servicemembers showed society that its stereotypes were faulty and inaccurate. As a result, a black man has been Chairman of the Joint Chiefs of Staff. An openly gay man has led the Army. And women have been our chief diplomat, Attorney General, and Secretary of the Air Force. Today, members of these once-disfavored groups fill the halls of Congress and Governor’s mansions, corporate boardrooms, and the federal bench. Without these groups’

military service—and the increased standing that comes with it—little of this would have been possible, and our society would be poorer for it.

III. The Trump Administration’s Transgender Ban Is Inconsistent With Equal Citizenship And Military Readiness.

A. The Ban Attacks Transgender Individuals’ Dignity And Right To Participate.

In the United States, “citizenship and eligibility for military service have gone hand in hand.” Karst, 38 UCLA L. Rev. at 500. By banning qualified transgender individuals from military service, the Administration’s ban signifies that transgender individuals are not entitled to equal citizenship, and inflicts psychological and tangible injuries on them in several ways.

First, the Administration’s ban assails the personal dignity of transgender individuals by telling them they are unworthy to fight and die for their country. The opportunity to serve in the military is a key aspect of citizenship, and blocking one group from such a central institution in American life deems that group unfit to shoulder their responsibilities and necessarily “generates a feeling of inferiority as to their status in the community.” *Brown*, 347 U.S. at 494; *see* Karst, 91 Harv. L. Rev. at 6-7 (describing the damage that inequality inflicts on

the primary good of self-respect). It “disparage[s] their choice[]” to serve, “diminish[es] their personhood,” and degrades their self-worth by rendering them dependent or, at least, nonparticipants. *Obergefell*, 135 S. Ct. at 2602. As with the marriage bans, these “[d]ignitary wounds” cannot easily be healed. *Id.* at 2606. For that reason, “stigma and injury of th[is] kind [are] prohibited by our basic charter.” *Id.* at 2602.

Second, the Administration’s ban has a pernicious effect on society’s views of transgender individuals. Precluding a single class of qualified individuals from military service brands them as “inferior” and “stimul[ates] prejudice,” which has long been recognized as “an impediment to securing to individuals of [protected classes] that equal justice which the law aims to secure to all others.” *Strauder*, 100 U.S. at 308. It further propagates stereotypes of transgender individuals as deviant, weak, or dependent, just as prior bans on service have for people of color, women, and gays and lesbians. *See* Part II, *supra*; *cf.* *Obergefell*, 135 S. Ct. at 2606 (“put[ting] the imprimatur of the State itself on an exclusion ... soon demeans or stigmatizes those whose own liberty is then denied”). Laws and policies that deny to classes of people “full citizenship stature,” “simply because they are women,” or black, or

transgender, also fail constitutional scrutiny. *Virginia*, 518 U.S. at 532; *see, e.g., Obergefell*, 135 S. Ct. at 2604-05; *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017).

Third, consistent with the historical precedents discussed above, the Administration's ban will prevent transgender individuals from winning respect and other badges of equal citizenship through honorable service. Eligibility for military service is not merely an incident of equal citizenship, but has also been, as detailed above, a force on behalf of equal citizenship for marginalized groups in American society. As DuBois explained, black military service, more than any other factor, made equality of citizenship possible for African Americans:

It had been a commonplace thing in the North to declare that Negroes would not fight. ... But when he rose and fought and killed, the whole nation with one voice proclaimed him a man and a brother.

DuBois, *Black Reconstruction in America* 104 (1935). The link between service and citizenship is not confined to the 1860s or to African Americans. *See Part II, supra*. And it is true today for transgender individuals, for whom honorable military service offers not only personal dignity but also civic progress for a whole community.

The Administration's ban is particularly grotesque given transgender individuals' history of honorable military service. As scholars have documented, transgender individuals have served this nation with distinction in all branches of the armed forces. *See* pp.34-35, *infra*. The suits filed against the Administration's ban detail the valorous records of numerous servicemembers. *See, e.g.*, JA191-96, ¶¶ 12-40 (plaintiffs include a servicemembers who had been deployed to Afghanistan, who served two tours in Iraq, and others); Amended Complaint, ECF No. 30 ¶¶ 7-18, 38-39, *Karnoski v. Trump*, No. 2:17-cv-01297-MJP (W.D. Wash. Sept. 14, 2017) (plaintiffs include a staff sergeant in the Army, a chief warrant officer in the Army since 2000 with service in Iraq, Operation Enduring Freedom, and Korea, and others).

There is no legitimate basis for denying such otherwise qualified individuals the right to serve in the military and, by extension, full participation in public life. The Administration's purported reasons for the ban recycle stale and discredited arguments previously deployed against the service of people of color, women, gays and lesbians. *See, e.g., Phillips v. Perry*, 106 F.3d 1420, 1439 (9th Cir. 1997) (Fletcher, J.,

dissenting) (“[T]he ‘unit cohesion’ rationale... is disturbingly similar to the arguments used by the military to justify the exclusion from and segregation of African Americans in military service.”)⁵; NAACP LDF Br., *supra*, at 14-22. Although the records of transgender servicemembers demonstrate the worth of their service, the example of other previously marginalized groups further shows that transgender warriors’ service will be valuable and inspiring. *See, e.g.*, Lanning, *The African-American Soldier* (2004). There is no reason to deny transgender individuals the same opportunity to demonstrate that they are equal citizens, deserving of the full protection of the law and their fellow citizens’ respect.

B. The Ban Will Be Deleterious Now And In The Future.

Today, there are between 10,790 and 15,500 transgender servicemembers. *See, e.g.*, Schaefer et al., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, RAND Corp., at 16 (2016); Gates & Herman, *Transgender Military Service in the United*

⁵ Moreover, “[e]xisting data also suggest a minimal impact on unit cohesion as a result of allowing transgender personnel to serve openly.” Schaefer et al., RAND Corp., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, at xii, 44-46 (2016).

States 1 (Williams Inst. 2014). Indeed, transgender individuals are more likely than average to serve in the military. *See* Gates & Herman, *supra*, at 4-5.

Arbitrarily banning talented and qualified transgender individuals from serving their country would be detrimental to military strength, as the military itself has recognized. In lifting the ban on transgender servicemembers in 2016, the Secretary of Defense explained that “the Defense Department and the military need to avail ourselves of all talent possible ... to remain what we are now, the finest fighting force the world has ever known.” *See* Carter, Sec’y of Defense, Department of Defense Press Briefing on Transgender Service Policies (June 30, 2016), <https://dod.defense.gov/News/Transcripts/Transcript-View/Article/822347/department-of-defense-press-briefing-by-secretary-carter-on-transgender-service/> (“[w]e have to have access to 100 percent of America’s population for our all-volunteer force to be able to recruit from among them the most highly qualified and to retain them”). The Administration’s ban is thus both an assault on the equal citizenship of transgender individuals *and* counterproductive.

CONCLUSION

For these reasons, *amici curiae* request that the Court affirm the district court's decision enjoining the Administration's ban on transgender individuals serving openly in the military.

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Respectfully submitted,

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APPENDIX

The Asian American Legal Defense and Education Fund

(AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all.

The Fred T. Korematsu Center for Law and Equality is a non-profit organization based at the Seattle University School of Law. Inspired by the legacy of Fred Korematsu, who defied military orders during World War II that ultimately led to the unlawful incarceration of over 120,000 Japanese Americans, the Korematsu Center works to advance social justice for all. It has a special interest in ensuring that transgender individuals have the opportunity to participate fully without restriction in U.S. institutions, as discrimination tolerated against some diminishes us all. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

LatinoJustice PRLDEF, formerly known as the Puerto Rican Legal Defense & Education Fund, is a national non-profit civil rights legal defense fund that has advocated for and defended the constitutional rights of all Latinos to ensure their equal protection under the law since 1972. LatinoJustice has engaged in and supported law reform litigation across the country combatting discriminatory policies and practices in areas such as criminal justice, education, employment, fair housing, immigrants' rights, language rights, redistricting, telecommunications, and voting rights.

The Leadership Conference on Civil and Human Rights (“The Leadership Conference”) is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States. It is the nation’s largest and most diverse civil and human rights coalition. For more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference works to build an America that is inclusive and as good as its ideals. Towards that end, we have participated as an amicus party in cases of great public importance that will affect many individuals other than the parties before the court and, in particular, the interests of constituencies in The Leadership Conference coalition.

CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 32(a) and Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies that the accompanying brief has been prepared using 14-point Century Schoolbook typeface, and is double-spaced (except for headings and footnotes).

The undersigned further certifies that the brief is proportionally spaced and contains 6,489 words exclusive of the certificate required by Circuit Rule 28(a)(1), table of contents, table of authorities, signature lines, and certificates of service and compliance. There are no more than 6,500 words in the Brief of *Amici Curiae* Asian American Legal Defense and Education Fund, Fred T. Korematsu Center for Law and Equality, LatinoJustice PRLDEF, and Leadership Conference on Civil and Human Rights Supporting Plaintiffs-Appellees, as mandated by Fed. R. App. P. 29(a)(5) and 32(a)(7)(B). The undersigned used Microsoft Word 2016 to compute the count.

/s/ Eamon P. Joyce
Eamon P. Joyce

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2018, I electronically filed the foregoing Brief of *Amici Curiae* Asian American Legal Defense and Education Fund, Fred T. Korematsu Center for Law and Equality, LatinoJustice PRLDEF, and Leadership Conference on Civil and Human Rights Supporting Plaintiffs-Appellees with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ Eamon P. Joyce

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