

**[ORAL ARGUMENT SCHEDULED FOR DECEMBER 10, 2018]
No. 18-5257**

**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 THE ORGANIZATION OF AMERICAN HISTORIANS
AND 47 HISTORIANS OF THE MILITARY,
NATIONAL SECURITY AND FOREIGN RELATIONS
AS *AMICI CURIAE* SUPPORTING PLAINTIFFS-APPELLEES**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

Except for the following *amici curiae* participating in this brief, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Defendants-Appellants and the Brief for Plaintiffs-Appellees. Participating in this brief are the Organization of American Historians and the individual historians of the military, national security, and foreign relations listed in Appendix A to this brief.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Defendants-Appellants and the Brief for Plaintiffs-Appellees.

C. Related Cases

This case was previously on appeal before this Court as *Doe I 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.).

s/ Douglas H. Hallward-Driemeier
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CERTIFICATE REGARDING SEPARATE BRIEF OF *AMICI CURIAE*

Pursuant to Circuit Rule 29(d), the undersigned counsel hereby certifies that this separate brief is necessary because it presents novel insights regarding the history of the United States military that other *amici*—who are not historical associations or historians of the military, national security, or foreign relations—are not addressing and do not have the professional expertise to address.

s/ Douglas H. Hallward-Driemeier
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CORPORATE DISCLOSURE STATEMENT

The Organization of American Historians (“OAH”) is a nonprofit organization whose purpose is to promote historical teaching and study. There are no parents, trusts, subsidiaries, and/or affiliates of the OAH that have issued shares or debt securities to the public. The OAH does not have a parent corporation or issue stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to the OAH’s participation as *amicus curiae*.

**AUTHORSHIP AND MONETARY CONTRIBUTION STATEMENT
PURSUANT TO RULE 29(a)(4)(E)**

1. No counsel for any party to this litigation authored this brief in whole or in part.
2. No party or counsel for any party to this litigation contributed money that was intended to fund, or did fund, the preparation of this brief.
3. No person, other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund, or did fund, the preparation or submission of this brief.

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INTEREST OF *AMICI CURIAE*

Amici are a historical association and individual historians of the military, national security, and foreign relations with an interest in ensuring that this Court is fully informed about the history and context of the United States military's past exclusion of entire categories of people and the reasons articulated for such past exclusions.

Founded in 1907, the Organization of American Historians ("OAH") is the largest professional society dedicated to the teaching and study of American history. Its mission is to promote excellence in the scholarship, teaching, and presentation of American history, and to encourage the wide discussion of historical questions and the equitable treatment of all practitioners of history. The OAH represents more than 7,500 historians working in the United States and abroad. Members include college and university professors, precollegiate teachers, archivists, museum curators, public historians, students and a variety of scholars employed in government and the public sector.

The OAH is joined by 47 individual scholars, listed in Appendix A hereto.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States military has a long history of excluding from its ranks entire categories of people, with military authorities justifying this discrimination

¹ The *amici* especially thank scholars Jennifer Mittelstadt and Ronit Stahl for their contributions to the drafting of this brief.

by referring to concerns over efficiency, effectiveness, unit cohesion, and readiness. Yet our Nation's military also has a long history of successfully integrating previously excluded categories of people. Indeed, the historical record consistently shows that, after the military has stopped a discriminatory recruitment practice, its leaders come to champion the formerly excluded groups and to cite their contributions to enhancing military readiness. This pattern has repeated itself for at least four different groups who sought to serve in the armed forces despite official resistance: African-Americans, persons deemed "foreign" in national origin, women, and gay and lesbian servicemembers.

Despite this history, the government now argues that this Court should apply a "highly deferential form of review" to military authorities' current judgment that "service by individuals with gender dysphoria . . . poses . . . significant risks to military readiness," and "would undermine . . . 'good order, discipline, steady leadership, unit cohesion, and ultimately military effectiveness and lethality.'" Appellant's Br. at 19, 24, 30. These purported justifications for discrimination are not new. The government's current position with respect to transgender servicemembers closely resembles positions that military leaders formerly advanced with respect to other historically marginalized groups. For instance, military leaders' judgment once held that integrating African Americans into naval combat roles would handicap "general ship efficiency" and that the enlistment of

women would adversely affect the Army's "combat readiness." *Cf.* Appellant's Br. at 24-29 (articulating "military readiness" rationale for excluding transgender servicemembers). Military leaders' judgment likewise once held that allowing homosexual individuals to serve would harm the armed forces' ability "to maintain discipline, good order, and morale," that desegregating the military would pose a "danger to efficiency, discipline, and morale." *Cf.* Appellant's Br. at 30-35 (articulating "unit cohesion and good order and discipline" rationale).

The proffered justifications for the exclusionary policy at issue here must be viewed against this historical pattern of discrimination followed by successful inclusion of the excluded group into our Nation's armed forces. Once forced by law or exigency to integrate formerly excluded groups, the military has consistently discovered that its leaders' former concerns about effectiveness and readiness were either unwarranted or mitigated by the benefits derived from greater inclusion. Today, the Department of Defense officially recognizes diversity and inclusion as "critical to mission readiness." The only difference between those historical episodes and the present is that the military itself has already debunked the proffered justifications. Less than three years ago, after a period of careful review, the then-Secretary of Defense and other military leaders concluded that increasing opportunities for transgender individuals to serve in the military would *not* pose an unacceptable threat to military readiness or unit cohesion. For the

leaders of the armed forces to so quickly turn back toward discrimination is sufficiently anomalous to warrant careful scrutiny.

While this Court should generally refrain from “interfer[ing] with the military’s exercise of its discretion over internal management matters,” neither is the military “exempted from constitutional provisions that protect the rights of individuals.” *Emory v. Sec’y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987). Here, the military’s well established history of advancing—and then admitting the error in—justifications for discrimination against historically marginalized groups based on “military effectiveness” (or their historical analogues and related terms such as effectiveness, readiness, or unit cohesion) should lead this Court to treat skeptically the government’s current request for deference to military leaders’ judgment. *See United States v. Windsor*, 570 U.S. 744, 770 (2013) (disparate treatment cannot be justified by a “desire to harm a politically unpopular group”); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (justification for discrimination “must be genuine, not hypothesized or invented *post hoc* in response to litigation”); *J.E.B. v. Alabama*, 511 U.S. 127, 139 n.11 (1994) (justification must not be based upon overbroad generalizations).

ARGUMENT

I. Historically, The U.S. Military Has Used Claims Of Military Effectiveness To Discriminate Against Various Groups Of Americans.

Uniformed and civilian military leadership in the United States has in the past barred, limited, and/or segregated the military service of various groups of Americans in the name of purported military effectiveness (including such terms, or their historical equivalents, as readiness, good order, efficiency, morale, unit cohesion, lethality). The experiences of four groups of Americans—African Americans, immigrants, women, and gay and lesbian men and women—demonstrate this history clearly.

Despite serving in every conflict in American history, African Americans faced longstanding discrimination justified by claims about their alleged negative effects on military effectiveness. Even after contributing to the success of state militias and the Continental Army during the American Revolution, “Negro exclusion had by the summer of 1776 become the policy,” albeit unevenly applied “on local, state, and continental levels.” Benjamin Quarles, *The Negro in the American Revolution* 18 (1961). In the period after the Civil War, a growing number of African American citizens wished to enter military service. Yet they were forced to serve in segregated units and limited from participation in military roles beyond unskilled labor and support battalions. In the late-nineteenth and early-twentieth centuries, the Navy moved from informal prejudice to overt

discrimination against African Americans on the grounds that it did “not consider negroes [sic] desirable persons” to train. Frederick S. Harrod, *Manning the New Navy: The Development of a Modern Naval Enlisted Force, 1899-1940* 57 (1978). Still, during World War I, almost 400,000 African American soldiers served, primarily in service and labor battalions. Chad Williams, *Torchbearers of Democracy: African American Soldiers in the World War I Era* 53 (2010). The military asserted that limiting black men to service billets was necessary “to meet the best interest of general ship efficiency” and to avoid a situation in which “team work, harmony, and ship efficiency are seriously handicapped” by integration of African Americans. Harrod, *supra* at 62.

This pattern of limited service, segregation, and discrimination persisted through World War II, when 1.1 million African Americans served in uniform. Military leaders justified inequity and exclusion by concluding that African Americans were inferior soldiers, lacking the skills to participate in technical and combat units. The Navy initially resisted allowing African Americans to serve at all, “arguing that Negroes were not as adaptable or efficient as whites.” President’s Committee on Equality of Treatment and Opportunity in the Armed Services, Report on “Freedom to Serve: Equality of Treatment and Opportunity in the Armed Services” 19 (1950), <https://www.trumanlibrary.org/civilrights>

/freeserv.htm. As announced in 1940, “[t]he policy of the War Department is not to intermingle colored and white enlisted personnel in the same regimental organizations...to make changes would produce situations destructive to morale and detrimental to the preparations for national defense.” *Id.* at 48. The day after Pearl Harbor, the military rebuffed requests to desegregate the services, claiming that military readiness would be irreparably harmed, citing “a danger to efficiency, discipline, and morale.” Col. E.R. Householder, Remarks at the Conference of Negro Newspaper Representatives, Dec. 8, 1941, *Blacks in the United States Armed Forces: Basic Documents, Vol. V: Black Soldiers in WWII* 146 (Morris J. MacGregor & Bernard C. Nalty eds., 1977).

The military has also used claims about military effectiveness to exclude certain groups of Americans based on national origin. World War I marked the end of the first “great wave” of immigration to the United States. When initiating the first nationwide draft, federal officials barred from military service men who were not naturalized or had not declared their intent to naturalize. The newly created Selective Service classified immigrants as “ineligible for induction into military service.” Selective Service Act of 1917, Pub. L. 65-12, 40 Stat. 76 (1917). This reflected military officials’ views of newcomers from Southern and Eastern Europe as inferior—less moral and more vulnerable to subversion. As the commandant of the Newport Naval Training Station asserted, for example, “we

want boys who have never seen, and do not know, any other flag than the American, who have good American backgrounds, and who have no Old World allegiances or affiliations.” Francis J. Higginson to Chief Buequip, Mar. 23, 1889 (RG 45), *reprinted in* Sherry Zane, “I Did It for the Uplift of Humanity and the Navy: Same-Sex Acts and the Origins of the National Security State, 1919-1921,” *New England Quarterly* XCI, no. 2 at 295-6 (June 2018).

During World War II, suspicion of disloyalty and entrenched racism against Japanese Americans led to bans on military service justified by claims about military effectiveness. Despite the dire need for manpower after Pearl Harbor, in early 1942 the military barred Japanese Americans from service. An Army Staff committee declared Japanese Americans to be “a distinctive class of individuals, so marked by racial appearance, characteristics and background, that they are particularly repulsive to the military establishment.” As a result of “the universal distrust in which they are held,” the committee rejected creating even a segregated Japanese American unit. Masayo Umezawa Duus, *Unlikely Liberators: The Men of the 100th and 442nd* 56 (Peter Duus trans., 1987). Despite this, the military later recognized the need for both more men and Japanese language skills. At that point, the military altered its policies to allow men of Japanese origin to serve primarily in units segregated by national origin, such as the 100th Infantry

Battalion of the 442nd Regimental Combat Team. James M. McCaffrey, *Going for Broke: Japanese American Soldiers in the War Against Nazi Germany* (2013).

The military has barred or severely restricted women's military service throughout its history, based on long-held beliefs about the inferiority of women's performance in wartime settings, the incompatibility of womanhood to military service, and the purported threat of femininity to unit cohesion. Joshua Goldstein, *War and Gender: How Gender Shapes the War System and Vice Versa* (2003).

World War I was the first conflict in which the military allowed women to enlist—in small numbers, to perform typically “feminine” roles. Secretary of War Newton Baker argued that allowing women in uniform was “unwise and highly undesirable,” but women were nevertheless allowed to serve in restricted ways. Elizabeth Cobbs, *The Hello Girls: America's First Women Soldiers* 81 (2017) (Newton Baker, Secretary of War to Chairman of the House Committee on Military Affairs, Dec. 26, 1917). The Army and Navy Nurse Corps mobilized nearly 20,000 American women in 1917 and 1918, though they served without rank or official military status. Likewise, although the Navy authorized the enlistment of over 10,000 women in the reserves as “yeomanettes” and “marinettes,” all were confined to clerical roles such as secretaries and telephone operators. Kimberly Jensen, *Mobilizing Minerva: American Women in the First World War* 14, 84, 96, 118 (2008). In response, many military officials protested

their presence, claiming that ““to place a small number of young women in the midst of a large population otherwise entirely of men will inevitably lead to complications that will produce a flood of adverse criticism.”” Cobbs *supra* at 66.

The mass mobilization necessary to fight World War II led many military leaders to accept the deployment of large numbers of women in uniform. But they had to convince remaining skeptics in the armed services and government. When approached about employing members of the Women’s Army Corps (“WAC”), for example, the Army Ground Forces leaders argued “it is anticipated that it would be extremely difficult to adapt them to military duties . . . there is no reasonable [need] for utilization of women in the military.” Mattie Treadwell, *The Women’s Army Corps* 133 (1954). Such vocal expression of opposition constrained women’s military service: women’s numbers were capped at a small percentage of total personnel and limited to appropriate “women’s jobs,” primarily clerical and support functions. The most evident discrimination was, of course, the decision to create segregated women’s auxiliaries—such as the WAC—for the duration of war (plus 6 months). War Department officials pressed for segregated auxiliaries “so that when [women’s participation] is forced upon us, as it undoubtedly will be, we shall be able to run it our way.” Jeanne Holm, *Women in the Military: An Unfinished Revolution* 22 (1992). Although the military allowed women to serve under this temporary, limited arrangement, it did not consider women equal, and

directed that women's units operate under separate command and with different standards of dress, comportment, and performance than men. Leisa Meyer, *Creating G.I. Jane: Sexuality and Power in the Women's Army Corps During World War II 19-20* (1998).

Despite these legislative obstacles, women's military service became imperative after the switch to the all-volunteer force in 1973; however, even as the end of conscription made a more robust recruitment of women necessary to fill the force, officials resisted equal service. The military lifted the cap on women's enlistment, and in the first six years of the all-volunteer force, the number of women in military service increased from 1.9 percent to nearly 9 percent of the total force. And in 1978, the military abolished the segregated auxiliary system and integrated women into the regular armed forces. Yet, in 1981, the Army announced plans to "level out the number of enlisted women" due to concern expressed by some commanders that "combat readiness is being affected." William D. Clark, "Women in the Army," Memorandum to Acting Assistant Secretary of Defense, Feb. 27, 1981, *I Want You! The Evolution of the All Volunteer Force* 565 (Bernard Rostker ed., 2006). The Department of Defense allowed this "woman pause," as it was called, and called for a review in which the services might "express and document concerns about the impact of women on mission capability." Robert A. Stone, "Women in the Armed Forces,"

memorandum to Assistant Secretaries of the Military Department, Mar. 25, 1981, *id.* at 566. In the following decades, and even though women died and were wounded in combat during the first Gulf War and in Iraq and Afghanistan, the military officially prohibited women from combat roles until 2015.

Military leaders barred gay men and lesbian women from service in various ways until 2012, and justified their exclusion with claims about the purportedly negative effect of gays and lesbians on morale, unit cohesion, discipline, and effectiveness.

Although “homosexuality” was not yet a recognized or officially designated category in the early 20th century, World War I military leaders discouraged the enlistment of men suspected of being what we would now call gay. Drawing on the emerging field of psychology, the military placed them in the category of “sexual perverts” whose behaviors—particularly suspected sodomy—were believed to be inimicable to effectiveness and good order. Margot Canaday, *The Straight State: Sexuality and Citizenship in Modern America* 55-90 (2011). One physician explained they were also poorly prepared for combat: “the homosexualist is not only dangerous, but an ineffective fighter.... It is imperative that homosexualists be recognized by military authorities” and prevented from entering the service. Albert Abrams, “Homosexuality: A Military Menace,” *Medical Review of Reviews* 24 at 528-29 (1918).

Indeed, military leadership's concerns about sexual deviance caused the World War II-era military to take the lead in creating medical screening and psychological categorizations that developed the identity and category of "homosexual." Allan Bérubé, *Coming Out Under Fire: The History of Gay Men and Women in World War II* 10-12, 137-148 (2010). At least 9,000 men and women were discharged from the services during World War II for "undesirable habits and traits," in an attempt to rid the military of "'true' perverts." *Id.* at 137-139, 147.

In the wake of World War II, a 1949 Department of Defense ("DOD") memo announced: "Homosexual personnel, irrespective of sex, should not be permitted to serve in any branch of the Armed Services in any capacity," and directed military leaders to investigate and discharge all gay or lesbian service members. *Id.* at 261. In 1953, amidst the "red" and "lavender" scares of the McCarthy era, the Defense Department fully systematized its discriminatory practices. President Dwight D. Eisenhower promulgated Executive Order 10,450, which mandated a purge of homosexuals—via the termination of anyone engaged in "sexual perversion"—from all federal employment, including both the military and civilian sectors. Exec. Order No. 10,450, 3 C.F.R. (1949-1953) (Apr. 27, 1953); David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* 139 (2004).

In 1982, the DOD re-codified its postwar ban on homosexuality, and augmented it with more fully articulated justifications of the ostensible harm to military effectiveness: “Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale.” Executive Summary, General Accounting Office “Summary of the Report on DOD’s Policy of Prohibiting Homosexuals in the Military,” 2 (Jun. 12, 1992), (quoting 1982 policy) (hereafter “GAO Report (1992)”).

Despite these policies of exclusion, gay and lesbian soldiers served throughout the twentieth century. By the 1980s and early 1990s, their continued presence—as evidenced, in part, by the discharge of approximately 17,000 soldiers and officers under the category of “homosexuality” in the 1980s—and activism prompted Congress, and later the Clinton Administration, to reconsider the ban. *Id.* at 4; H.R. 5208, 102nd Cong. (1991-1992).

What emerged in 1994 from this official reconsideration of homosexuality and military service was not an end to discrimination, but a modified re-articulation of it: the Don’t Ask, Don’t Tell (“DADT”) policy. The DOD restated

its long-held discriminatory policy, claiming that “homosexual behavior is incompatible with military service in that it interferes with maintaining good order, discipline, and morale” and insisted that recent studies supporting the full integration of gay men and lesbians, “did not address the issues of morale, discipline, and so on, and, therefore, its ‘analysis’ was flawed.” GAO Report (1992) at 27, 44. Faced with military leadership’s insistence on a military need for discrimination, in 1993, President William J. Clinton instructed the DOD to develop a new policy that neither discriminated on the basis of sexual orientation nor harmed “combat effectiveness and unit cohesion.” Office of the Secretary of Defense, Summary Report of the Military Working Group, “Recommended DOD Homosexual Policy Outline,” 4 (Oct. 4, 1993). The DADT policy acknowledged that gay and lesbian people could serve but if and only if their sexual orientation (whether acted upon or not) remained private. From 1993 through 2011, the military expelled nearly 13,000 who refused to remain closeted or were “outed” by the military. Jennifer Mcdermott, “Few Veterans Expelled Under ‘Don’t Ask’ Policy Seek Remedy,” *Military Times* (June 25, 2016), <https://www.military.com/daily-news/2016/06/25/few-veterans-expelled-dont-ask-policy-seek-remedy.html>.

II. The Military Has Over Time Rejected Discriminatory Practices And Championed The Inclusion Of Groups Previously Facing Discrimination, And Has Done So By Articulating Their Positive Contributions To Military Effectiveness.

In each of these historical cases, Congress, presidents, civilian defense leaders, and military service chiefs eventually decided to end discrimination. And when the discrimination ended, military leaders came to reject their earlier judgments about harm to military effectiveness. In fact, military leaders eventually championed the essential role that groups previously discriminated against played in enhancing military effectiveness.

In 1948, President Harry S. Truman issued an executive order instructing the military to racially desegregate, beginning the process of inclusion and recognition of African Americans' contributions to military effectiveness. Specifically, Truman declared "there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion, or national origin." Exec. Order No. 9,981, 13 Fed. Reg. 4,313 (July 26, 1948). In 1947, the Presidential Committee on Civil Rights cited the experience of ground combat troops in France in 1944-45 to "prove that where the artificial barriers which divide people and groups from one another are broken, tension and conflict begin to be replaced by cooperative effort and an environment in which civil rights can thrive." President's Committee on Civil Rights, "To Secure These Rights: The Report of the President's Committee on Civil Rights," 83 (1946),

<https://www.trumanlibrary.org/civilrights/srights1.htm>. When the military needed extra men to supplement white troops, the commander of the European Theater of Operations allowed African American soldiers to volunteer. Although many officers reported that they “expected trouble,” they also recognized “we haven't had a bit of trouble.” *Id.* at 85. Indeed, the committee noted that the Army—the largest service with the highest number of African Americans—never achieved its stated goals of “efficiency” under segregation: “If the historical records established anything, they proved conclusively that the Army had not received maximum efficient utilization from its segregated units and had experienced endless trouble.” President’s Committee on Equality, *supra* at 48. As the Navy shifted “to a policy of complete integration,” it came to defend the new policy by “cit[ing] the skills of its Negro manpower and ship efficiency.” *Id.* at 24. The Air Force similarly approached desegregation with “misgivings” but “without exception commanding officers reported that their fears had not been borne out by events.” *Id.* at 42. The military itself had pivoted from arguments based on racially prejudicial assumptions about integration’s damage to effectiveness to arguments based on empirical experience of integration and its benefits to efficiency.

Desegregation did not eliminate racism in the military, but the implementation of Truman’s order produced a growing institutional commitment to integration in order to reflect the values of democracy and inclusion that the US

sought to project abroad during the Cold War. Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* 79-81 (2011). African Americans played an increasingly vital role in the military beginning in the 1970s, with the advent of the all-volunteer force, where, for decades, African Americans comprised nearly one-third of all soldiers, and on average had higher education rates than their peers. Jennifer Mittelstadt, *The Rise of the Military Welfare State* 78 (2015). Reflecting on the role of African Americans in the Gulf War, the office of the Secretary of Defense noted, “The role and performance of minorities in the enlisted force is a huge success. This ought to be a source of enormous pride both to black Americans and the military services.” Nick Timenes, “Desert Storm Lessons Learned – A Second Opinion,” memorandum to Assistant Secretary of Defense, *I Want You!* 533 (Bernard Rostker ed., May 21, 1991). Today the Department of Defense’s Diversity and Inclusion Plan formally recognizes diversity as “a strategic imperative, critical to mission readiness and accomplishment, and a leadership requirement.” Department of Defense, “Diversity and Inclusion Strategic Plan,” 3 (2012), https://diversity.defense.gov/Portals/51/Documents/DoD_Diversity_Strategic_Plan_%20final_as%20of%2019%20Apr%2012%5B1%5D.pdf.

The military phased out national origin-based discrimination over time, as military leaders recognized the need for immigrant enlistees in meeting general

staffing needs and contributing vital language and cultural skills in intelligence and communications. During World War I, the Selective Service reversed its prohibition against non-naturalized and non-declared immigrants upon realizing this exclusion starved the military of much-needed manpower for the war in Europe. In 1918, officials re-categorized resident aliens who declared their intent to naturalize as eligible for military service, while maintaining the ban on service for non-declarant aliens and enemy aliens. At the same time, Congress also amended naturalization laws to make it easier for immigrant soldiers to become citizens, thus making military service more appealing. Nancy Gentile Ford, *Americans All!: Foreign-born Soldiers in World War I* 66 (2001). An Army officer lauded the foreign-born soldiers of “the army’s melting pot” for adding “thousands and thousands of virile efficient soldiers to our armies on the battle lines.” “The Army’s Melting Pot,” *The Army & Navy Register* 16, 70 (Nov. 30, 1918). Major General Enoch H. Crowder, the military administrator of the World War I draft, remarked that the contributions of foreign-born men “surpassed our own highest expectation,” a feat he considered “the great and inspiring revelation” of the war. 65 *Cong. Rec.* 5,668 (Apr. 5, 1924). Almost three decades later, in World War II, the military relied heavily on recently immigrated populations not only for manpower but also for the image of the military as an ethnically integrated force as part of its fight against fascism. Ronit Y. Stahl, *Enlisting Faith: How the*

Military Chaplaincy Shaped Religion and State in Modern America 108-117

(2017). Lewis Hershey, the administrator of the Selective Service during World War II, called the multi-ethnic draft “an excellent force for the solidification and unification of the nation.” George Q. Flynn, *Lewis B. Hershey, Mr. Selective Service* 103 (1985).

Although government officials only reluctantly considered the possibility of Japanese-American military service, they eventually extolled the virtues and contributions of Japanese Americans to the war effort. Shortly after the initial classification of all Japanese Americans as potential “enemy aliens,” Army officials recognized the inequity and inefficiency of this ban and urged it lifted. McCaffrey, *supra* at 36-42. A survey of commanding generals reported, “not only should the Nisei be used, but they should be used for combat in the European theater.” William Pettigrew, Memorandum for the War Department General Staff (G-2), “Documents dealing with Americans of Japanese Ancestry (hereafter referred to as Nisei),” 2 (Oct. 10, 1942). Without the service of Japanese Americans, the Army effectively would “write off an estimated 15,000 excellent military prospects.” *Id.* Japanese-American combat units were celebrated as early as 1944 for defeating the Germans in Italy: “The fortitude and intrepidity of officers and men of the 100th Infantry Battalion reflect the finest traditions of the Army of the United States.” US Army Center of Military History, Presidential

Unit Citations (Army) Awarded to the 100th Battalion and the 442 Regimental Combat Team, <https://history.army.mil/html/topics/apam/puc.html#100infbn>.

With the lessons of World War II in mind, the postwar military expanded its recruitment of new and recent immigrants, and the armed forces have recognized that foreign-born personnel and the children of immigrants play an increasingly vital role in military service. By the early 2000s, new immigrants represented 5 percent of the military population, only two-thirds of whom were naturalized citizens. Amy Lutz, “Who Joins the Military?: A Look at Race, Class, and Immigration Status,” *Journal of Political and Military Sociology* 36, no. 2, 174 (Winter 2008). By that same date, Latinos (both American and new immigrants) represented 9 percent of the military population, and by 2012 Asians made up nearly 4 percent of all enlisted personnel and nearly 4 percent of the military’s officer corps. David Segal & Mady Wechsler Segal, “America’s Military Population,” *Population Bulletin* 59, no. 4, 23 (Dec. 2004); Deepti Hajela, “Asian American soldier’s suicide called a ‘wake-up call’ for the military,” *Washington Post* (Feb. 21, 2012). A comprehensive study commissioned by the Navy reported that “[t]his diversity is particularly valuable as the United States faces the challenges of the Global War on Terrorism” and is essential for military readiness. Anita U. Hattiangadi, et al., *Non-Citizens in Today’s Military: Final Report 1* (2005).

The military's acceptance of women in service took well over one hundred years, but even as military leaders limited and circumscribed women's roles, they also acknowledged the significant contributions women made to military preparedness, efficiency, and readiness.

Military leaders of World War I first expressed limited approval of women in military service, acknowledging, "With careful supervision, women employees may be permitted in camps without moral injury either to themselves or to the soldiers." Treadwell, *supra* at 7. Subsequent recruitment methods tapped metaphors of women's strength and mettle. Marine posters asked women rhetorically if they "want to fight?" and others showed women astride horses, parading the American flag. "Women During World War I," <https://history.delaware.gov/exhibits/online/WWI/Women-roles-ww1.shtml>. In 1918, at the close of hostilities, military officials admitted women's effectiveness, acknowledging that had the war not ended they would have had "to make much more extended use of women... to replace men sent overseas or men shifted to heavy work." Treadwell, *supra* at 10.

The massive mobilization required for World War II occasioned a far greater recognition of women's military effectiveness. The hundreds of thousands of women who wore the uniform served in all combat theaters and worked in jobs at sea, in the air, and on land. Some were killed or captured by the enemy. Darlene

M. Iskra, *Women in the United States Armed Forces: A Guide to the Issues* 165 (2010). Looking back on the conflict, President Dwight Eisenhower recalled: “Like most old soldiers, I was violently against women soldiers. I thought a tremendous number of difficulties would occur not only of the administrative nature but others of more personal type that would get us in trouble. None of that occurred. In the disciplinary field, they were a model for the Army. More than this, their influence throughout the command was good.” *The Role of Women in the Military, Subcomm. Hearing on Priorities and Economy in Government of the Joint Economic Committee, 95th Cong. 12* (1978). Following World War II, Fleet Admiral Chester A. Nimitz, Chief of Naval Operations, argued: “We have learned that women can contribute to a more efficient Navy. Therefore, we would be remiss if we did not make every effort to utilize their abilities.” Holm, *supra* at 117.

With the 1973 end to conscription, women became vital to the very survival of the armed forces. Chief of Naval Operations Admiral Elmo Zumwalt, Jr. observed, “the imminence of an all-volunteer force has heightened the importance of women as a vital personnel resource.” Henry C. Dethloff & Gerald E. Shenk, *Citizen & Soldier: A Sourcebook on Military Service and National Defense* 145-147 (2010). As “womanpower” proved vital to meeting the nation’s military needs, political and military leaders formally articulated women’s superior quality

as recruits. In 1972, military leaders informed Congress, “the average woman recruit passed the average male recruit in terms of educational attainment and the standardized test and females...had a much lower attrition rate than men.” *The Role of Women in the Military, supra* at 22. Women were also vital to unit readiness, as Army Chief of Staff General Bernard Rodgers explained: “Women are an essential part of the force; they will deploy with their units and they will serve in the skills in which they have been trained.... Indeed, they are doing so now.” “Memo to All U.S. Army Reps and Activities: Women in the Army,” (Mar. 3, 1972). At the same time, the military began opening more military occupational specialties to women, from serving on non-combatant ships to flying logistical support missions.

As a result of their fuller and more equal integration into the military, women excelled in an array of military roles. By the early 1990s, women served in 86 to 98 percent of military occupations across the services. Segal & Segal, *supra* at 26. During Desert Shield and Desert Storm in 1991, Navy Vice Admiral Ronald Zlatoper reported to Congress, “Navy women performed superbly in a host of roles from seaman to commanding officer of a ship. Ships with women consistently have met and continue to meet the rigorous operational tempos that are comparable to any ship in the Navy.” *Women in Combat: Hearing Before House Committee on Armed Services, Military Forces and Personnel Subcommittee*, 103d Cong. 12

(1994). In 2015, in announcing that women would finally be allowed to serve in combat roles, Secretary of Defense Ashton Carter asserted that full and equal inclusion had produced the US military's unrivaled global power: "to succeed in our mission of national defense, we cannot afford to cut ourselves off from half the country's talents and skills.... The military has long prided itself on being a meritocracy, where those who serve are judged not based on who they are or where they come from, but rather what they have to offer to help defend this country." Ash Carter, "Moving Out on Women-in-Service" (Mar. 10, 2016), <https://medium.com/@SecDef/moving-out-on-women-in-service-b3f3c0d12bf2>.

The military has only recently fully recognized the value of gay and lesbian servicemembers, but here, too, military leaders subsequently affirmed the importance of inclusion in enhancing military effectiveness.

Even while the military formalized its bans on homosexuality during the twentieth century, some military and government leaders rejected claims that allowing gay and lesbian individuals to serve harmed efficiency. They instead insisted on the opposite: that gay and lesbian servicemembers could play a crucial role in promoting military effectiveness. For instance, then-Army General Eisenhower refused to dismiss lesbian personnel when he concluded that doing so "would mean losing some of the most competent members of his staff." Johnson, *supra* at 139. Marine Corps Major General Harold Snyder criticized the blanket

ban on homosexuals because few individuals caused problems and exclusion came with high manpower costs. *Id.* The Navy's 1957 Crittenden Report admitted that the government lacked evidence for the claim that gay men represented a security risk and underscored that many homosexual service members had honorably served in the military without harming morale. S.H. Crittenden, Jr., "Report of the board appointed to prepare and submit recommendations to the Secretary of the Navy for the revision of policies, procedures, and directives dealing with homosexuals" (1957). In 1988, the Defense Personnel Security Research Center also rejected the claim that homosexuality harmed military performance: "Studies of homosexual veterans make clear that having a same gender or an opposite-gender orientation is unrelated to job performance in the same way as is being left or right-handed." Theodore R. Sarbin & Kenneth E. Karols, "Nonconforming Sexual Orientations in the Military and Society," Report for the Defense Personnel Security and Research Center 33 (Dec. 1988). In 1992, a study by the General Accounting Office suggested that the homosexual ban was more costly to the military than effective and highlighted a significant number of cases in which "personnel with exemplary service records" were discharged." GAO Report (1992) at 16-17.

After nearly twenty years of the Don't Ask, Don't Tell policy, in 2011, military leadership finally rescinded the ban on gays and lesbians serving openly in

the military. In doing so, they determined that the ban had actually harmed rather than enhanced military effectiveness by hampering unit cohesion and by depriving the military of skilled personnel. Chairman of the Joint Chiefs of Staff Admiral Michael Mullen, for example, testified to Congress in 2010 about the problems for morale and military readiness arising from the DADT policy: “I cannot escape being troubled by the fact that we have in place a policy that forces young men and women to lie about who they are in order to defend their fellow citizens. For me, personally, it comes down to integrity... ours as an institution.” Admiral Michael Mullen, Testimony before the Senate Armed Services Committee (Feb. 2, 2010), <https://www.c-span.org/video/?291857-1/gaysandlesbians-military>. Five years after the end of DADT, Secretary of Defense Carter stated that, “[t]hroughout our history, brave LGBT soldiers, sailors, airmen, Coast Guardsmen, and Marines have served and fought for our nation. Their readiness and willingness to serve has made our military stronger and our nation safer.” Secretary of Defense Message, “LGBT Pridemonth Message” (June 7, 2016), <https://dod.defense.gov/News/Speeches/Speech-View/Article/793510/lgbt-pride-month-message>.

III. The Transgender Military Ban Represents An Unprecedented Departure From The Military’s Historical Trend Toward Diversity And Inclusion.

As described in further detail in the parties’ Joint Appendix and the principal briefs before this Court, DOD engaged in a lengthy review process by senior

civilian and uniformed military leaders before, in June 2016, adopting a policy permitting transgender people to serve in the military. A RAND Corporation study commissioned by the DOD in the course of this review specifically noted finding “no evidence that allowing transgender individuals to serve would have any effect on ‘unit cohesion,’ and concluded that any related costs or impacts on readiness would be ‘exceedingly small,’ ‘marginal’ or ‘negligible.’” The military leaders responsible for reviewing the issue concurred and further concluded that “banning service by openly transgender persons would harm the military by excluding qualified individuals based on a characteristic with no relevance to a person’s fitness to serve.”

Despite this, the government now asserts that allowing transgender individuals to serve openly would, except in exceedingly narrow circumstances, intolerably undermine military readiness and unit cohesion. This contradicts the considered judgment of the military’s leaders as recently as 2016. As demonstrated in the foregoing sections, while our Nation’s armed forces have historically excluded some minorities and other marginalized groups from service, the steady and long-term trend has been toward inclusion and diversity. And in each instance, after successful integration, the military has acknowledged the benefits of inclusion. Once a previously excluded group is officially welcomed into the service, the military has always found their service vital to military

effectiveness. In light of this historical context, the about-face reintroduction of a previously rejected discriminatory policy warrants more careful scrutiny than the Court might otherwise apply to questions implicating military readiness.

CONCLUSION

Throughout American history, the military has discriminated against groups by prohibiting or limiting their military service and then, over time, the military has championed the inclusion and lauded the contributions of those same groups. Allowing transgender Americans to serve and to be recruited by the military would represent a continuation of and comport with this historical pattern of inclusion of previously discriminated against groups.

Respectfully submitted,

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APPENDIX A

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Fed. R. App. P. 32(a)(7)(B). This brief is 6,342 words, as counted by my word-processing program, excluding the portions exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times Roman font.

/s/ Douglas H. Hallward-Driemeier
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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2018, I electronically filed the foregoing with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Douglas H. Hallward-Driemeier

Douglas H. Hallward-Driemeier