[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
(No. 1:17-cv-01597-CKK) (Hon. Colleen Kollar-Kotelly)

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amicus curiae* Constitutional Accountability Center (CAC) represents that counsel for all parties has been sent notice of the filing of this brief and have consented to the filing.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amicus curiae* certifies that a separate brief is necessary. *Amicus* is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to ensure that all Americans enjoy the civil rights protected by the Constitution. CAC is accordingly well situated to discuss the history of past military policies that have discriminated against certain classes of Americans. In particular, the brief explains that many of the justifications offered by the government in defense of its policy regarding transgender service members—concerns about unit cohesion and military effectiveness—are the same concerns that purportedly motivated past discriminatory military policies, and that these concerns proved to be unfounded. In the same way, the brief concludes that the government's policy regarding transgender servicemembers is

[1] Pursuant to Fed. R. App. P. 29(c), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

unconstitutional because the government's justifications for it are not rationally related to a legitimate government interest.

CORPORATE DISCLOSURE STATEMENT

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

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

Except for *amicus* Constitutional Accountability Center and any other *amici* who had not yet entered an appearance in this case as of the filing of Appellees' brief, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellees.

II. RULINGS UNDER REVIEW

Reference to the ruling under review appears in the Brief for Appellees.

III. RELATED CASES

Reference to any related cases pending before this Court appears in the Brief for Appellees.

Dated: October 29, 2018 By: /s/ Elizabeth B. Wydra
Counsel for Amicus Curiae

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GLOSSARY

DoD ..... Department of Defense

RAND ..... RAND National Defense Research Institute

INTEREST OF *AMICUS CURIAE*

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees. CAC accordingly has a strong interest in this case and in the scope of the Fifth Amendment's protections for liberty and equality.

INTRODUCTION

The Constitution's guarantee of equal protection implicit in the Fifth Amendment requires that the federal government respect fundamental rights central to individual dignity and autonomy for all persons, including transgender persons. Yet on July 26, 2017, President Donald Trump announced via Twitter that he would categorically bar transgender persons from serving openly in the U.S. military. JA48. The next month, President Trump formalized the ban by directing the "Secretary of Defense[] and the Secretary of Homeland Security . . . to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 [which prohibited open service by transgender individuals]." Memorandum from President Donald Trump to the Sec'y of Def. and Sec'y of Homeland Sec. § 1(b) (Aug. 25, 2017) ("Presidential Memorandum"). The

Memorandum also directed the Secretary of Defense to "submit . . . a plan for implementing" this policy by February 21, 2018. *Id.* § 3.

On February 22, 2018, Secretary Mattis submitted his plan to the President. Under the Mattis plan, "[t]ransgender persons who require or have undergone gender transition are disqualified from military service," JA264, and "[t]ransgender persons with a history or diagnosis of gender dysphoria," are ineligible to serve unless they have been "stable" in their "biological sex" for 36 months prior to accession, they are already in service and "do not require a change of gender," or they happened to be "diagnosed with gender dysphoria" between the prior Administration's policy of accepting transgender servicemembers and the implementation of the Mattis plan, *id*. By continuing to bar service by transgender individuals who "require or have undergone gender transition," *id.*, and requiring any transgender person who serves to "adhere to all standards associated with their biological sex," *id.* at 273, the Mattis plan targets for exclusion transgender individuals as a class and violates the constitutional guarantee of equal protection.

The Due Process Clause of the Fifth Amendment provides that no "person" shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. By broadly protecting all "person[s]," the Amendment guarantees to all, regardless of race, sex, sexual orientation, or gender identity, dignity and equality under the law, "withdraw[ing] from Government the power to degrade or

demean," *United States v. Windsor*, 570 U.S. 744, 774 (2013). "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152-53 (1994) (Kennedy, J., concurring) (alteration in original) (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)). To effectuate that guarantee, the Constitution requires policies that single out a class of people for disparate treatment to have—at the very least—"a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993).[2] The government's ban on military service by transgender persons fails that test.

At bottom, the government's justification for the Mattis plan is essentially the same as it was for the original Trump directive: it is justified by concerns about transgender service members' impact on "[m]ilitary [r]eadiness," "[u]nit [c]ohesion," and "[g]ood [o]rder and [d]iscipline." Appellants' Br. 24, 30. But these purported concerns are the very same concerns cited, time and again, by opponents of greater integration of our military—and they are the same concerns that, time and again, have proven to be rooted in unsupported stereotypes and misplaced fears.

[2] The district court correctly held that plaintiffs are likely to prevail on their claim that the ban cannot withstand heightened scrutiny, JA169, and *amicus* believes the ban cannot withstand judicial scrutiny under even rational basis review.

When the military was racially segregated, proponents of that policy claimed it was necessary for unit cohesion and military effectiveness; when gay and lesbian individuals were prohibited from serving openly, proponents of that policy claimed it was necessary for unit cohesion and military effectiveness; and when women were forbidden from serving in combat roles, proponents of that policy claimed it was necessary for unit cohesion and military effectiveness. Yet the military is now integrated, gay men and lesbians are allowed to serve openly, and women are allowed to serve in combat roles—and there have been no negative effects on the cohesion of units specifically or on the effectiveness of the military as a whole. To the contrary, military experts agree that ending those discriminatory policies and ensuring diversity in the military's ranks actually strengthened the military and its effectiveness. In short, concerns about unit cohesion and military effectiveness did not provide a rational basis for treating some classes of military service members in a discriminatory manner then, and they do not do so now.

Prior to this Administration's change in policy, transgender individuals had been serving openly in the military with no deleterious effects. And this result came as no surprise: a military-commissioned study released before transgender people were allowed to serve openly concluded that open service would not negatively affect military effectiveness or unit cohesion. Moreover, although the Administration suggests that its policy is based on the views of military experts, President Trump

failed to consult with the Pentagon or other military experts before he initially announced this policy change via Twitter. *See* Julie Hirschfeld Davis & Helene Cooper, *Trump Surprises Military With a Transgender Ban*, N.Y. Times, July 27, 2017, at A1. And the subsequent review by the military had a foregone conclusion: Secretary Mattis "establish[ed] a panel of experts . . . to provide *advice and recommendations on the implementation of the [P]resident's direction*." JA405 (press release issued by Sec'y Mattis) (emphasis added).

In sum, the government's singling out of transgender people for exclusion from military service bears no rational relationship to any legitimate government interest. Instead, it impermissibly rests purely on "negative attitudes," "fear," and "irrational prejudice[s]" about transgender people. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 450 (1985). Given that, this ban serves no purpose other than to "disrespect and subordinate" transgender service members by "lock[ing] them out of a central institution of the Nation's society," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604, 2602 (2015)—military service. This ban cannot be squared with the Fifth Amendment's guarantee of equal protection for all people, and this Court should affirm the judgment of the district court.

ARGUMENT

I. THE CONSTITUTION GUARANTEES EQUAL PROTECTION FOR ALL AND FORBIDS THE FEDERAL GOVERNMENT FROM ENACTING POLICIES SINGLING OUT A CLASS OF INDIVIDUALS FOR DISFAVORED LEGAL STATUS.

The Due Process Clause of the Fifth Amendment, which provides that no "person" shall "be deprived of life, liberty, or property, without due process of law," U.S. Const. amend. V, guarantees all persons dignity and equality under the law. While the text of the Fifth Amendment "is not as explicit a guarantee of equal treatment as the Fourteenth Amendment," the Supreme Court has consistently held that "the Constitution imposes upon federal, state, and local government actors the same obligation to respect the personal right to equal protection of the laws." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213, 231-32 (1995); *see Lyng v. Castillo*, 477 U.S. 635, 636 n.2 (1986) ("The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment." (quoting *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976))); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."); *Windsor*, 570 U.S. at 774 ("the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment [due process] right all the more specific and all the better understood and preserved"). These repeated holdings reflect that

at both the federal and state levels, "equality of citizenship is of the essence in our Republic." *Zobel v. Williams*, 457 U.S. 55, 70 (1982) (Brennan, J., concurring).

The Constitution's profound commitment to equal protection is reflected in the Fifth Amendment's broad language, protecting "any person." *See Adarand*, 515 U.S. at 227 ("[t]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*"); *J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring) (noting "constitutional tradition" that "an individual possesses rights that are protected against lawless action by the government"). As a personal right that belongs to all individuals, the right of equal protection secures equality to all persons, regardless of race, sex, sexual orientation, or gender identity. "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class." *Id.* at 152-53 (Kennedy, J., concurring) (alteration in original) (quoting *Metro Broad., Inc.*, 497 U.S. at 602 (O'Connor, J., dissenting)); *see The Civil Rights Cases*, 109 U.S. 3, 24 (1883) (Constitution prohibits any policy "which has the effect of denying to any race or class, *or to any individual*, the equal protection of the laws" (emphasis added)). Thus, the Constitution prohibits "'indiscriminate imposition of inequalities'" "born of animosity toward the class of persons affected." *Romer v. Evans*, 517 U.S. 620, 633, 634 (1996) (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950)).

In giving effect to the constitutional requirement of equal protection, the Supreme Court has insisted that when policies single out a particular class of people for disparate treatment, there must, at the very least, be "a rational relationship between the disparity of treatment and some legitimate government purpose." *Heller*, 509 U.S. at 320. And even under rational-basis review, the Supreme Court has long recognized that courts have a constitutional obligation to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633; *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012) (explaining that "deference in matters of policy cannot . . . become abdication in matters of law"); *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("[a]bdication of responsibility is not part of the constitutional design").

For example, in *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Supreme Court struck down a federal statutory provision that denied federal food stamp benefits to a household composed of unrelated individuals living together as a violation of the equal protection guarantee. Concluding that the provision had been designed to deny food stamps to "hippies" and served no conceivable purpose other than to discriminate, the Supreme Court held that the statute was inconsistent with the constitutional guarantee of equality under the law. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at

the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id.* at 534. Similarly, in *City of Cleburne*, the Supreme Court held unconstitutional a municipal zoning ordinance that required a special-use permit for homes for mentally disabled persons, but not for other group homes. The Court concluded that the discriminatory permit requirement rested on "negative attitudes," "fear," and "irrational prejudice," 473 U.S. at 448, 450, and held that "the City [could] not avoid the strictures of th[e Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic," *id.* at 448.

The Court also applied rational-basis review in *Romer v. Evans* and nonetheless held unconstitutional a state constitutional amendment that prohibited state or local government action that protected gay men and lesbians from discrimination. Stressing that the government had "impos[ed] a broad and undifferentiated disability on a single named group," the Court noted that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 632, 634-35. For that reason, Colorado's "status-based enactment" was unconstitutional because it denied equal rights to gay men and lesbians not "to further a proper legislative end but to make them unequal to everyone else." *Id.* at 635.

As all of these cases recognize, rational basis scrutiny, while deferential, does not require a reviewing court to abdicate its constitutional responsibility to enforce the guarantee of equal protection for all persons. To the contrary, the government may not subject any group of persons to adverse treatment "born of animosity toward the class of persons affected." *Id.* at 634; *Windsor*, 570 U.S. at 770 ("The Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." (quoting *Moreno*, 413 U.S. at 534-35)). For that reason, the Supreme Court has been "especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a 'tradition of disfavor'" in order to prevent the use of a "stereotyped reaction [that] may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made." *Cleburne*, 473 U.S. at 453 n.6 (Stevens, J., concurring) (quoting *Matthews v. Lucas*, 427 U.S. 495, 520-21 (1976) (Stevens, J., dissenting)). The transgender military ban at issue here is totally lacking in any rational basis, as the remainder of this brief explains.

II. THE GOVERNMENT'S JUSTIFICATIONS FOR THE BAN ON OPEN SERVICE BY TRANSGENDER SERVICE MEMBERS ARE SIMILAR TO THOSE THAT WERE OFFERED TO JUSTIFY PAST DISCRIMINATION ON THE BASIS OF RACE, SEXUAL ORIENTATION, AND GENDER.

The government justifies its decision to exclude from service transgender individuals who do not live as their birth sex or wish to transition by arguing that allowing open service would "undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." JA264 (Mattis Memorandum); *see* Appellants' Br. 24-35. These supposed justifications are strikingly similar to justifications offered in the past to support racial segregation in the military, the military's "Don't Ask, Don't Tell" policy preventing gay men and lesbians from serving openly, and the military's prohibition on women serving in combat roles. Yet the military has since abandoned all of those policies, recognizing that military effectiveness is furthered by allowing all who are able to serve to do so. Thus, these historical analogues suggest that the government's proffered justifications should be treated with great skepticism as legitimate reasons for discriminating against transgender service members.

First, those opposed to racial integration in the military in the first half of the twentieth century justified their position with misguided fears about unit cohesion and military effectiveness. Bernard Rostker et al., RAND Nat'l Def. Research Inst., *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment*

171-72 (1993) ("1993 RAND Study"), https://www.rand.org/pubs/monograph_reports/MR323.html (opponents of integration argued that "[r]acial mixing . . . would undermine unit cohesion among the troops and thereby impair their morale, readiness, and ability to perform as a unified combat force"); *see Philips 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.").

For instance, in 1935, Rear Admiral Adolphus Andrews, Chief of the Navy Bureau of Navigation, argued that if black service members were enlisted as seamen, "team work, harmony, and ship efficiency [would be] seriously handicapped." 1993 RAND Study 172. Likewise, General Henry Arnold, commander of the Army Air Corp, wrote in 1940 that "Negro pilots cannot be used in our present Air Force since this would result in having Negro officers serving over white enlisted men. This would create an impossible social problem." Memorandum from Henry Arnold, Commander of the Army Air Corp, *Employment of Negro Personnel in Air Corps Units* (May 31, 1940), *quoted in* J. Todd Moye, *Freedom Flyers: The Tuskegee Airmen of World War II* 14 (2010). And during "World War II both the Army chief of staff and the Secretary of the Navy justified racial segregation in the ranks as necessary to maintain efficiency, discipline, and morale." *Watkins v. U.S. Army*, 875 F.2d 699, 729 (9th Cir. 1989) (Norris, J., concurring in the judgment).

Though the reluctance to integrate was presented as a concern about unit cohesion and military effectiveness, the trepidation was in truth based upon racism and stereotypes about black Americans. For instance, in 1946, Major General Idwal Edwards, the Army's Assistant Chief of Staff for Organization and Training, acknowledged that his preference for racial segregation was related to his views about the "ineptitude and limited capacity of the Negro soldier." U.S. Dep't of Def., *Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell"* 82 (Nov. 30, 2010), http://www.washingtonpost.com/wp-srv/special/politics/dont-ask-dont-tell/DADTReport_FINAL.pdf. Similarly, "[m]any white Americans (especially Southerners) responded with visceral revulsion to the idea of close physical contact with blacks." 1993 RAND Study 160.

Despite these attitudes, on July 26, 1948, President Harry Truman issued an Executive Order requiring "equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin." Exec. Order 9981, §1, 13 Fed. Reg. 4313 (July 26, 1948). And "[b]y the late 1950s, the Army, like the Navy and the Air Force before it, had come to accept . . . the view that racial integration actually benefited the military" because "[o]nce blacks and whites began to share the risks, rewards, and responsibilities of military life more equitably, morale problems diminished." 1993 RAND Study 178, 180. In short, the warnings that racial integration would affect military readiness and unit cohesion

proved to be unfounded. Indeed, integration of the armed forces has actually strengthened the military's effectiveness. *See Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) ("[A] 'highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security.'" (quoting Br. for Julius W. Becton, Jr., et al. as *Amici Curiae* at 5)).

Second, essentially the same arguments that played out over racial integration in the first half of the twentieth century played out over the open service of gay men and lesbians in the second half of the century. Just like the opponents of racial integration before them, those who supported the military's "Don't Ask, Don't Tell" policy argued that allowing gay men and lesbians to serve openly in the military would negatively affect military effectiveness and unit cohesion. For instance, General Colin Powell testified before Congress that "[t]o win wars, we create cohesive teams of warriors who will bond so tightly that they are prepared to go into battle and give their lives if necessary for the accomplishment of the mission and for the cohesion of the group and for their individual buddies. . . . [T]he presence of open homosexuality would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of the armed forces." S. Rep. No. 103-112, at 275, 278 (1993). Likewise, General H. Norman Schwarzkopf testified that "the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war." *Id.* at

280. And Lieutenant General Calvin Waller testified that allowing gay men and lesbians "total openness in our Armed forces would cause less ready units or units that would not nearly be as effective as the units we currently have." *Id.*

For that reason, Congress itself concluded in 1993 that "[i]n view of the unique conditions that characterize military life, there is broad agreement that lifting the restrictions on the service of gay men and lesbians would be detrimental to the best interests of the armed forces." *Id.* at 278. Indeed, in the statutory provision that codified the "Don't Ask, Don't Tell" policy, Congress specifically stated that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. § 654(a)(15).

Again, however, experience ultimately showed that such fears were unfounded, and that there was no rational basis for concluding that open service in the military by gay men and lesbians would harm military effectiveness and unit cohesion. As the Department of Defense explained when Congress was considering repealing "Don't Ask, Don't Tell" in 2010, "aside from the moral and religious objections to homosexuality, much of the concern about 'open' service [was] driven by misperceptions and stereotypes about what it would mean if gay Service members were allowed to be 'open' about their sexual orientation." U.S. Dep't of Def., *supra*,

at 5. The conclusions of this study mirrored the views of then-Chairman of the Joint Chiefs of Staff Admiral Mike Mullen, who testified to the Senate Armed Services Committee that the policy should be repealed, and noted that he had "served with homosexuals since 1968" without issue and that "[e]verybody in the military ha[d]." Elisabeth Bumiller, *Top Defense Officials Seek To End 'Don't Ask, Don't Tell'*, N.Y. Times, Feb. 3, 2010, at A1. Even General Powell, whose opposition to open service by gay soldiers contributed to the adoption of the "Don't Ask, Don't Tell" policy, ultimately changed his view and supported an end to that policy. *See* Karen DeYoung, *Colin Powell Now Says Gays Should Be Able To Serve Openly in Military*, Wash. Post (Feb. 4, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/02/03/AR2010020302292.html.

Members of Congress from across the political spectrum also realized that the important interests of unit cohesion and military effectiveness could not justify the "Don't Ask, Don't Tell" policy. For example, Senator Susan Collins noted in debate that "[a]t least 28 countries, including Great Britain, Australia, Canada, the Netherlands, and Israel allow open service by lesbian and gay troops," and "[n]one of these countries—not one—report[ed] morale or recruitment problems." 156 Cong. Rec. S7234 (daily ed. Sept. 21, 2010) (statement of Sen. Collins). Furthermore, she argued that the "Don't Ask, Don't Tell" policy actually reduced military effectiveness, noting that "8 percent of the servicemembers let go under [the policy] held critical

occupations . . . such as interpreters." *Id.* Similarly, Senator Joseph Lieberman noted that "[m]ore than 14,000 members of the military ha[d] been put out of the services since 1993 . . . , not because they weren't good soldiers, sailors, marines or airmen, not because they violated any military code of conduct but only because of their private sexual orientation." 156 Cong. Rec. S7244 (daily ed. Sept. 21, 2010). This, he noted, cost taxpayers more than $600 million. *Id.* Likewise, Senator Carl Levin rejected the argument that "allowing gays and lesbians to serve openly would damage unit cohesion and morale," arguing instead that "there is no evidence that the presence of gay and lesbian colleagues would damage our military's ability to fight." *Authorization for Appropriations for Fiscal Year 2011: Hearing on S. 3454 Before the S. Comm. on Armed Servs.*, 111th Cong. (2010). Following careful deliberation, Congress in December 2010 repealed the "Don't Ask, Don't Tell" policy and formally permitted gay men and lesbians to serve openly. *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (Dec. 22, 2010).

Since that time, study after study has shown that the repeal of the "Don't Ask, Don't Tell" policy had no negative impact on unit cohesion or military effectiveness. One prominent report released a year after the policy's repeal found "no overall negative impact on military readiness or its component dimensions, including cohesion, recruitment, retention, assaults, harassment or morale." Aaron Belkin et al., Palm Ctr., *One Year Out: An Assessment of DADT Repeal's Impact on Military Readiness*

4 (2012), http://www.dtic.mil/dtic/tr/fulltext/u2/a567893.pdf. By 2013, the Congressional Research Service had noted that the "repeal [of "Don't Ask, Don't Tell"] appears to have proceeded smoothly." Jody Feder, Cong. Research Serv., *"Don't Ask, Don't Tell": A Legal Analysis* 3 (2013); *see* Lawrence Kapp, Cong. Research Serv., *Recruiting and Retention: An Overview of FY2011 and FY2012 Results for Active and Reserve Component Enlisted Personnel* (2013) (noting that recruitment and retention remained strong in fiscal years 2011 and 2012). In fact, then-Defense Secretary Chuck Hagel remarked in 2013 that allowing gay men and lesbians to serve openly has "ma[de] our military and our nation stronger, much stronger." Chuck Hagel, Sec'y of Def., Remarks at the Lesbian, Gay, Bisexual, Transgender Pride Month Event in the Pentagon Auditorium (June 25, 2013), http://archive.defense.gov/transcripts/transcript.aspx?transcriptid=5262. In short, as with opposition to racial integration of the military, the justifications offered by the opponents of open service by gay men and lesbians turned out to have no basis in fact: gay and lesbian service members have been serving openly for the last six years with no reported decline in military effectiveness or unit cohesion.

Third, opponents of women's equal participation in combat also claimed that treating women equally would harm military effectiveness and unit cohesion. For instance, a 1992 report by the Presidential Commission on the Assignment of Women in the Armed Forces—which recommended that women be excluded from

combat roles—opined that "unit cohesion can be negatively affected by the introduction of any element that detracts from the need for such key ingredients as mutual confidence, commonality of experience, and equitable treatment." Robert T. Herres et al., Presidential Comm'n on the Assignment of Women in the Armed Forces, *Report to the President* 25 (1992), https://babel.hathitrust.org/cgi/pt?id=umn.31951d00277676f;view=1up;seq=3. The commission believed that women would degrade these values because of, among other things, the "lack of privacy on the battlefield," "traditional Western values where men feel a responsibility to protect women," "sexual misconduct," and the possibility of "pregnancy." *Id.* Similarly, General Robert Barrow of the Marine Corps stated in congressional testimony that the decision not to allow women to serve in combat roles is about "combat effectiveness, combat readiness," and "national security." *War and the Second Sex*, Newsweek (Aug. 4, 1991), http://www.newsweek.com/war-and-second-sex-202970. Another commentator suggested that "[t]he presence of women inhibits male bonding, corrupts allegiance to the hierarchy, and diminishes the desire of men to compete for anything but the attentions of women." Brian Mitchell, *Women in the Military: Flirting with Disaster* 175 (1997); *see* Richard Halloran, *Fighting Women*, N.Y. Times (Sept. 3, 1989), http://www.nytimes.com/1989/09/03/books/fighting-women.html (same).

Again, however, subsequent experience has shown that these fears were unfounded, lacking any rational basis. Indeed, even before women were allowed to serve in combat roles, a 1997 RAND National Defense Research Institute study concluded that "gender integration is perceived to have a relatively small effect on readiness, cohesion, and morale in the units . . . studied," and that "gender integration . . . [had] a positive effect, raising the level of professional standards." Margaret C. Harrell & Laura L. Miller, RAND Nat'l Def. Research Inst., *New Opportunities for Military Women: Effects Upon Readiness, Cohesion, and Morale* xvii, xviii (1997), https://www.rand.org/pubs/monograph_reports/MR896.html. Indeed, during the wars in Afghanistan and Iraq, Army commanders skirted the official prohibition on women in combat roles when they needed more soldiers for crucial jobs, and women serving in these positions "repeatedly proved their mettle in combat." Lizette Alvarez, *G.I. Jane Breaks the Combat Barrier*, N.Y. Times, Aug. 16, 2009, at A1.

Moreover, as more and more members of the military concluded that "[a]ssertions that women do not possess the leadership capability or that they will destroy unit cohesion are overbroad generalizations, and are disproved by the actual successful combat performance of mixed-gender combat support units," Maj. Jeffrey S. Dietz, *Breaking the Ground Barrier: Equal Protection Analysis of the U.S. Military's Direct Ground Combat Exclusion of Women*, 207 Mil. L. Rev. 86, 113 (2011), the military ultimately changed its position, first rescinding the rule that restricted

women from serving in combat units in 2013, and then officially opening all combat roles to women by late 2015, *see* Matthew Rosenberg & Dave Phillips, *Pentagon Opens All Combat Roles to Women: 'No Exceptions'*, N.Y. Times, Dec. 4, 2015, at A1. In the short time since that policy change took effect, there have been no reports of any negative impact on the military's effectiveness or unit cohesion.

In sum, the government's claim that allowing transgender people to serve openly will cause disruption to unit cohesion and military effectiveness is nothing new. Time and again, these arguments have been trotted out to justify treating other groups of service members unequally, whether racial minorities, gay men and lesbians, or women, and each time the purported fears have proven to be unfounded, based on some combination of misunderstanding, prejudice, and stereotypes. As the next section shows, there is no more basis for these claims now than there was in the past.

III. LIKE PRIOR DISCRIMINATION BY THE MILITARY, A BAN ON OPEN SERVICE BY TRANSGENDER SERVICE MEMBERS IS NOT RATIONALLY RELATED TO ANY LEGITIMATE GOVERNMENT INTEREST.

To survive rational basis review, there must be "a rational relationship between the disparity of treatment and some legitimate governmental purpose," *Heller*, 509 U.S. at 320. The government's ban on transgender service members fails this test.

To start, the reasons the government has offered for excluding from the military transgender individuals who do not live as their birth sex are contradicted by the judgment the military itself had made prior to President Trump's Tweets. Indeed, the results of the military-commissioned RAND study released in 2016 put to rest any notion that allowing open service by transgender people would materially affect unit cohesion or military effectiveness. *See* Agnes Gereben Schaefer et al., RAND Nat'l Def. Research Inst., *Assessing the Implications of Allowing Transgender Personnel To Serve Openly* (2016), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/RAND_RR1530.pdf. With regard to unit cohesion, the study considered the experiences of foreign militaries that allowed transgender people to serve openly, and concluded that in those countries, "there [was] no significant effect of openly serving transgender service members on cohesion, operational effectiveness, or readiness." *Id.* at 44. For instance, in the United Kingdom, commanders "found no effect on cohesion." *Id.* at 45. Likewise, in Canada, an extensive review "found no evidence of any effect on operational effectiveness or readiness" and "no evidence of any effect on unit or overall cohesion." *Id.* Though these foreign militaries noted that some service members harbored prejudices and hostility toward transgender people, "this resistance was apparently short-lived." *Id.*

With regard to readiness and ability to deploy, the RAND study analyzed relevant data and predicted that the treatment and recovery time for service members seeking gender transition-related treatment each year would "represent[] 0.0015 percent of available deployable labor-years across the [active component] and [selected reserve]." *Id.* at 42. Thus, the study concluded that "a service member's care would have a substantial overall impact on readiness *only* if that service member worked in an especially unique military occupation, if that occupation was in demand at the time of transition, and if the service member needed to be available for frequent, unpredicted mobilizations." *Id.* at 43 (emphasis added). The experience of foreign militaries confirmed these findings. For instance, Israeli military commanders "reported that transgender personnel perform their military duties and contribute effectively to their units." *Id.* at 45. Commanders in the United Kingdom "reported that increases in diversity had led to *increases* in readiness and performance." *Id.* at 60 (emphasis added). Moreover, the study noted that continuing to prohibit transgender people from serving had its own deleterious effects: "worsening mental health status, declining productivity, and other negative outcomes due to lack of treatment for gender identity-related issues." *Id.* at 46.

These results echoed a 2014 Report of the Transgender Military Service Commission at the Palm Center. *See* Joycelyn Elders, MD, et al., Palm Ctr., *Report of the Transgender Military Service Commission* (2014). That study concluded that

"[w]ith few exceptions, transgender service members are deployable and medically ready. . . . [C]ross-sex hormone treatment and mental health considerations do not, in general, impede the deployability of transgender service members, and the public record includes instances in which transgender individuals deployed [as civilians] after having undergone transition." *Id.* at 16. In short, even before the U.S. military allowed transgender persons to serve openly in 2016, there was a wealth of uncontroverted evidence that allowing transgender people to serve openly in the military would have no negative impact on unit cohesion or military effectiveness.

On top of that, by the time President Trump announced that he would ban transgender people from serving, transgender service members had *already* been serving openly in the military for about a year. And experiences during that period confirmed the military's prior conclusions: transgender people can serve openly in the military without negatively affecting the military's performance, readiness, or cohesion. *See, e.g.*, *Hearing To Receive Testimony on the Posture of the Dep't of the Army in Review of the Def. Authorization Request for Fiscal Year 2019 and the Future Years Def. Program Before the S. Comm. on Armed Servs.*, 115th Cong. 98-100 (2018) (testimony of Dr. Mark Esper, Sec'y of the Army, & Gen. Mark Milley, Chief of Staff of the Army). Notably, the military experts on which Secretary Mattis purported to rely failed to provide any evidence that the open service policy in effect before the President's Tweets resulted in any of the negative consequences they

hypothesize in their report. JA301-302. Indeed, the government does not assert that there have been any problems with open service for the period it has been in effect in the United States.

The Administration argues that the Mattis plan can be justified based on concerns about "subjecting those with gender dysphoria to the unique stresses of military life," Appellants' Br. 24, or that some transitioning service members could be non-deployable for a significant amount of time, *id.* at 27. However, all military service members must meet strict physical and mental health requirements for accession, retention, or deployment, *see, e.g.*, DoD Instruction 6130.03 (Mar. 30, 2018) (Medical Standards for Appointment, Enlistment, or Induction into the Military Service), and the government never claims that all or even many transgender individuals who have transitioned or are transitioning would fail to meet these requirements. Thus, the government's categorical and sweeping exclusion from military service of all transgender people sweeps far more broadly than any legitimate policy aimed at improving military effectiveness. Further, the so-called "grandfather clause" in the Mattis plan—permitting open service by transgender service members who happened to transition or began that process while the open service policy was in effect—underscores the policy's irrationality. If some transgender service members can serve openly without affecting the military's effectiveness, then other transgender service members should be permitted to do the same.

Finally, the circumstances surrounding the ban's announcement and implementation provide additional reason to question the justifications for the ban that the government now offers. All available evidence suggests that President Trump made the initial decision to ban transgender service members without consulting the Pentagon or any relevant experts. *See* JA178 ("[T]he President abruptly announced, via Twitter—without any of the formality or deliberative processes that generally accompany the development and announcement of major policy changes that will gravely affect the lives of many Americans—that all transgender individuals would be precluded from participating in the military in any capacity."). Defense Secretary Mattis was on vacation and was given one day's notice before the President announced the military's new policy via Twitter. *See* Julie Hirschfeld Davis & Helene Cooper, *supra*. Moreover, the White House and Department of Defense lawyers who did have some knowledge of the impending policy change reportedly warned the President of "the ramifications of the policy" and "how military officials would respond." Josh Dawsey, *John Kelly's Big Challenge: Controlling the Tweeter in Chief*, Politico (Aug. 4, 2017), https://www.politico.com/story/2017/08/04/trump-john-kelly-challenge-twitter-241343.[3]

[3] The government attempts to distance the Mattis plan from the President's Tweets by noting that Secretary Mattis ordered a study of the open service policy a month before the President's July Tweets. Appellants' Br. 7. Although military review of the open service policy began in June 2017, there is no evidence the President relied on that review in formulating his Tweets, and Secretary Mattis'

Moreover, the outcome of the military's review and Secretary Mattis' recommendation appear to have been dictated by the President's initial Memorandum, rather than the result of an independent and unbiased process. The Memorandum asked Secretary Mattis to submit "a plan for implementing" the President's ban on open service by transgender individuals by February 21, 2018. Presidential Memorandum § 3. Secretary Mattis then issued a press release explaining that he would "develop a study and implementation plan" and "establish a panel of experts . . . to provide advice and recommendations *on the implementation of the [P]resident's direction*." JA405 (emphasis added). These facts suggest that the policy was driven not by careful analysis by experts but by an abrupt and uninformed decision by the President alone.

In sum, President Trump's ban "impos[es] a broad and undifferentiated disability on a single named group," *Romer*, 517 U.S. at 632—transgender service members—and "degrade[s]" and "demean[s] them" by denying them the opportunity to serve our nation, *Windsor*, 570 U.S. at 774. As explained above, no legitimate government interests support that policy decision. The Due Process Clause of the Fifth Amendment does not permit this sort of discrimination. For that reason, the ban cannot stand.

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subsequent announcements make clear that after the President's Tweets and formal directive the purpose of the military's review was to develop a "plan for implementing" the President's directive. *Id.* at 7-8.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 6,373 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 29th day of October, 2018.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2018, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: October 29, 2018

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra