

No. 18-35347

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RYAN KARNOSKI, ET AL.,
Plaintiffs-Appellees,

STATE OF WASHINGTON,
Intervenor-Plaintiff-Appellee,

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 Western District of Washington

**BRIEF OF MASSACHUSETTS, CALIFORNIA, CONNECTICUT,
DELAWARE, HAWAII, ILLINOIS, IOWA, MAINE, MARYLAND,
NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON,
PENNSYLVANIA, RHODE ISLAND, VIRGINIA, VERMONT, AND THE DISTRICT
OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF APPELLEES**

MAURA HEALEY
Attorney General of Massachusetts

Genevieve C. Nadeau, Bar No. 222398
Kimberly A. Parr
Sara A. Colb
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
Telephone: (617) 963-2121
Email: genevieve.nadeau@state.ma.us
Attorneys for Amicus Curiae
Commonwealth of Massachusetts

(Additional counsel listed on signature page)

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INTERESTS OF AMICI STATES

Pursuant to Fed. R. App. P. 29, the Commonwealth of Massachusetts, with California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Virginia, Vermont, and the District of Columbia (the “*Amici States*”), respectfully submit this *amicus curiae* brief in support of the Appellee Plaintiffs and Intervenor-Plaintiff State of Washington (“Appellees”).

The *Amici States* share a strong interest in the readiness and effectiveness of our national defense, including an interest in ensuring that our Armed Forces and related institutions recruit, train, retain, and promote qualified service members. The *Amici States* also strongly support the rights of transgender people to live with dignity, to be free from discrimination, and to participate fully and equally in all aspects of civic life. These interests are all best served by allowing transgender people to serve openly in the military.

Many of the *Amici States* have enacted and enforce explicit civil rights protections for transgender people in areas such as employment, housing, health care, education, and public accommodations. We also command National Guard units, support Reserve Officers’ Training Corps (“ROTC”) programs, and run maritime academies that embrace principles of nondiscrimination and equality. Our collective experience demonstrates that the full inclusion of transgender

people strengthens our communities, our state and federal institutions, and our nation as a whole. Discriminatory prohibitions on participation in civic life, on the other hand, impose significant harms on the *Amici* States and our residents. The *Amici* States therefore have a strong interest in ensuring that our Armed Forces move forward, not backward, and continue to allow transgender people to serve openly in all branches.

For these reasons, the *Amici* States join the Appellees in urging this Court to affirm the District Court's preliminary injunction enjoining the Trump Administration from reinstating an unconstitutional ban on open service by transgender individuals.

ARGUMENT

I. Banning Transgender People from Serving Openly in the Military Is Irrational and Unconstitutional.

A. Transgender People Are a Vital Part of the *Amici* States' Communities, Yet Remain a Historically Marginalized Group.

Nationwide, nearly 1.5 million people identify as transgender.¹ They live in the *Amici* States (as well as every other State and American Territories)² and

¹ Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, The Williams Inst., 3 (June 2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

² Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equality, 53, 244 (Dec. 2016),

contribute to our communities in countless ways – as parents, educators, students, firefighters, police officers, musicians, writers, nurses, and doctors, to name a few. Approximately 150,000 veterans, active-duty service members, and members of the National Guard or Reserves identify as transgender, and transgender individuals volunteer to serve and protect our country through the Armed Forces at approximately twice the rate of other adults in the general population.³ Nothing about being transgender inhibits a person’s ability to serve in the military or otherwise contribute to society.⁴ To the contrary, the experience of the *Amici* States shows that transgender individuals are just as capable as their non-transgender counterparts and make a meaningful positive impact in our schools, workplaces, and communities.

<https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

³ Gary J. Gates & Jody L. Herman, *Transgender Military Service in the United States*, The Williams Inst., 1 (May 2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Transgender-Military-Service-May-2014.pdf> (estimating 134,300 transgender veterans and 15,500 members in active service, the National Guard, or Reserves).

⁴ See Am. Psychol. Ass’n, *Answers to Your Questions about Transgender People, Gender Identity, and Gender Expression*, 3 (2014 update), <http://www.apa.org/topics/lgbt/transgender.pdf>; Am. Psychol. Ass’n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 *Am. Psychologist* 832, 834-35 (2015); Plaintiffs-Appellees’ Supplemental Excerpts of Record (“SER”) 249-250 (Declaration of George R. Brown ¶¶ 20-24).

Still, the transgender community has suffered “a history of persecution and discrimination” that persists into the present day. *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015). According to the 2015 United States Transgender Survey (“2015 USTS”), transgender individuals face verbal harassment and physical violence at home, in school, and in their communities; grapple with mistreatment in the workplace and unemployment; confront homelessness and difficulty obtaining and maintaining housing; and endure myriad other forms of discrimination in education, employment, housing, and access to health care due to their gender identity.⁵ To combat such discrimination, twenty States – including many of the *Amici* States – have enacted civil rights protections for transgender people in education, employment, health care, housing, and/or public accommodations.⁶ And about 225 local governments prohibit discrimination based on gender identity or expression by public and private

⁵ 2015 USTS, *supra* note 2, at 8-16; *see* Walter O. Bockting et al., *Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population*, 103(5) *Am. J. Public Health* 943, 943 (2013) (“Transgender people face systematic oppression and devaluation as a result of social stigma attached to their gender nonconformity.”).

⁶ *See, e.g.*, Mass. Gen. Laws ch. 151B, § 4; Mass. Gen. Laws ch. 272, §§ 92A, 98; Cal. Civil Code § 51(b), (e)(5); Cal. Gov’t Code § 12940(a); Cal. Gov’t Code § 12955; Haw. Rev. Stat. § 368-1; Haw. Rev. Stat. § 378-2; Haw. Rev. Stat. § 489-3; Haw. Rev. Stat. § 515-16; N.M. Stat. Ann. § 28-1-7; N.Y. Comp. Codes R. & Regs. tit. 9, § 466.13 (interpreting N.Y. Exec. Law § 296 (Human Rights Law) definition of “sex” to include gender identity); Vt. Stat. Ann. tit. 9, §§ 4500 et seq.; Vt. Stat. Ann. tit. 16, § 11(26)(B)(iii); Vt. Stat. Ann. tit. 21, § 495.

employers in their jurisdictions.⁷ In the experience of the *Amici* States, policies requiring equal treatment of transgender people are essential to easing the stigma on transgender people and fostering a more just and productive society for all our residents.

B. The Military Lifted Historical Prohibitions on Service by Transgender Individuals After a Lengthy, Deliberative, and Neutral Process.

As in other aspects of society, transgender individuals who volunteered to fight for our country were long met with discrimination and excluded from military service in the Armed Forces through a patchwork of medical and administrative regulations. To join and advance in the military, thousands of individuals were thus forced to conceal their gender identity or risk discharge.⁸ Many other transgender recruits were unable to enlist in the first place. This was the reality for decades – unchanged by the adoption of “Don’t Ask, Don’t Tell” in

⁷ *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, Human Rights Campaign (last updated Jan. 28, 2017), <https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender>.

⁸ See Matthew F. Kerrigan, *Transgender Discrimination in the Military: The New Don’t Ask, Don’t Tell*, 18 Psychol. Pub. Pol’y, & L. 500, 502, 506-508 (2012); 2015 USTS, *supra* note 2, at 170-171; ER 433 (Statement by Secretary of Defense Ash Carter on DOD Transgender Policy, Release No. NR-272-15) (July 13, 2015) (“[T]ransgender men and women in uniform have been there with us, even as they often had to serve in silence alongside their fellow comrades in arms.”).

the 1990s and the subsequent repeal of that policy in 2011, which ushered in the era of open service by gay, lesbian, and bisexual individuals.⁹ After the repeal, however, the public and the military began to reexamine the categorical prohibition against transgender individuals serving in the military and determined that it was not only untenable, but counterproductive.¹⁰

Ultimately, in July 2015, then-Secretary of Defense Ashton Carter publicly acknowledged that Department of Defense (“DOD”) regulations regarding transgender service members were “outdated,” “contrary to our value of service and individual merit,” and harmful to “transgender soldiers, sailors, airmen, and Marines – real, patriotic Americans.” Excerpts of the Record (“ER”) 433. Secretary Carter established a working group to study “the policy and readiness implications of welcoming transgender persons to serve openly” (the “DOD Working Group”). *Id.* The DOD Working Group executed its mission in a systematic and thoughtful manner: it sought to consider all issues that might arise

⁹ See Kerrigan, *supra* note 8, at 501, 503-504.

¹⁰ See Joycelyn Elders & Alan M. Steinman, *Report of the Transgender Military Service Commission*, The Palm Ctr., 3-5 (Mar. 2014), <http://archive.palmcenter.org/files/Transgender%20Military%20Service%20Report.pdf>; Allison Ross, Note, *The Invisible Army: Why the Military Needs to Rescind Its Ban on Transgender Service Members*, 23 S. Cal. Interdisc. L. J. 185 (2014).

from including openly transgender individuals in the military; consulted with experts, active transgender service members, and military personnel from inside and outside of the United States; and commissioned the non-partisan RAND National Defense Research Institute to analyze the potential health care needs of transgender service members, the potential readiness implications of allowing transgender individuals to serve openly, and the experience of foreign militaries that permit open service by transgender individuals.¹¹

After this year-long process, the DOD Working Group concluded that excluding transgender people from military service undermined effectiveness and readiness; and, on June 30, 2016, Secretary Carter declared an end to the ban.¹² That same day, he laid out plans to implement the military's new, inclusive policies, under which: (i) otherwise qualified service members could no longer be involuntarily separated, discharged, or denied reenlistment or continuation of

¹¹ Secretary Ashton Carter, United States Department of Defense, Remarks on Ending the Ban on Transgender Service in the U.S. Military (June 30, 2016), available at <https://www.defense.gov/News/Speeches/Speech-View/Article/821833/remarks-on-ending-the-ban-on-transgender-service-in-the-us-military/>; Agnes Gereben Schaefer et al., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, RAND Corp., xi-xii, 39-47 (2016), available at https://www.rand.org/pubs/research_reports/RR1530.html (hereinafter "RAND Report").

¹² Remarks of Secretary Carter (June 30, 2016), *supra* note 11.

service, solely on the basis of gender identity; (ii) current transgender service members were allowed to serve openly and have access to gender-related medical care; and (iii) within one year, the military would begin accepting transgender individuals who met all physical and fitness standards. ER 314-319.

By late 2016, each of the military branches had taken steps to implement the open service policy, and transgender service members, National Guard members, and ROTC cadets in the *Amici* States and across the country were finally freed to disclose – and many did disclose – their gender identity to their command and to their fellow service members. Accounts indicate that, within its first year, the military’s inclusive policy was quickly beginning to have a positive effect, as capable and well-qualified transgender service members were finally able to serve authentically.¹³

¹³ See, e.g., General John R. Allen et al., *Fifty-Six Retired Generals and Admirals Warn That President Trump’s Anti-Transgender Tweets, If Implemented, Would Degrade Military Readiness*, The Palm Ctr. (August 1, 2017), <https://www.palmcenter.org/fifty-six-retired-generals-admirals-warn-president-trumps-anti-transgender-tweets-implemented-degrade-military-readiness/> (hereinafter “Statement of Retired Military Leaders”) (“[T]ransgender troops have been serving honorably and openly for the past year, and have been widely praised by commanders.”).

C. President Trump Abruptly Reversed the Military’s Open Service Policy for Transgender Individuals.

On July 26, 2017, President Trump abruptly changed course, announcing in a series of Twitter posts that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. . . .” ER 216. One month later, he issued a memorandum directing his Secretaries of Defense and Homeland Security: (i) to indefinitely bar accession of transgender individuals into the military; (ii) to halt “all use of DOD or DHS resources to fund sex reassignment surgical procedures [by March 23, 2018], except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex”; and (iii) to “return” to the pre-June 2016 practice of excluding and separating transgender service members from the military by March 23, 2018. ER 214-215, §§ 1, 2 (the “2017 Memorandum”). The 2017 Memorandum further ordered Defense Secretary James Mattis to provide the President with a plan “for implementing both [its] general policy . . . [and] its specific directives” by February 21, 2018. *Id.* at § 3.

Secretary Mattis publicly committed to carrying out the President’s directives and, to that end, convened a panel “to provide advice and recommendation on the implementation of the [P]resident’s direction.” ER 212-

213. In February 2018, that panel produced a “Report and Recommendations on Military Service by Transgender People,” which – in accordance with President Trump’s 2017 Memorandum – recommended: (i) barring accession into military service by transgender individuals “who require or have undergone gender transition”; (ii) requiring transgender individuals to serve consistent with their “biological sex,” regardless of whether doing so comports with their gender identity; and (iii) prohibiting use of military resources for transition-related medical care. ER 163-207 (the “Panel Report”).¹⁴

On February 22, 2018, Secretary Mattis submitted the Panel Report recommendations to President Trump. ER 160-162. On March 23, 2018 – the deadline he had previously set for reinstating the ban – the President issued a second memorandum, accepting and ratifying those recommendations, and purporting to “revoke” the 2017 Memorandum. ER 158-159 (the “2018 Memorandum”). In reality, however, nothing in the “new” recommendations or

¹⁴ The Administration’s attempt to cast the ban as targeting only “the medical condition of gender dysphoria, not transgender status” is unconvincing. Appellants’ Opening Brief (“Appellants Br.”) at 9-10. Without question, the intent and effect of the Panel Report and recommendations are to effectuate the President’s goal (articulated in his July 2017 tweets) of keeping *all* “Transgender individuals” out of the Armed Services.

the 2018 Memorandum substantively “revoked” or changed President Trump’s initial directive. Instead, as the Appellees cogently argue and the District Court so found, those actions merely executed the President’s initial decision to ban transgender individuals from serving in the military – and thus “threaten the very same [constitutional] violations that caused [the District Court] and other courts to enjoin the Ban in the first place.” ER 12.

D. President Trump’s Ban on Transgender Individuals Serving in the Military Lacks Any Defensible Rationale.

When President Trump first announced his intention to reinstate a ban on open military service in 2017, he did so without consulting top military leaders, yet claimed to be acting out of concern for military readiness, unit cohesion, and costs. ER 29, 214-215, 216. Seven months later, DOD finalized the ban and, through the Panel Report, attempted to legitimize – and expand upon – those purported justifications. Even if the Court were to consider those post-hoc rationales (which it should not),¹⁵ the Trump Administration’s decision to reverse recent progress and reinstitute formal discrimination against transgender individuals in the military cannot withstand even minimal scrutiny. *See Romer v. Evans*, 517 U.S. 620, 632

¹⁵ *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (justification for gender-based classification “must be genuine, not hypothesized or invented post hoc in response to litigation”).

(1996) (where government action discriminates against a disadvantaged class, is “discontinuous with the reasons offered for it,” and “seems inexplicable by anything but animus toward the class it affects,” it cannot withstand even minimal scrutiny).¹⁶

To begin with, RAND and other researchers have dispelled the myth – perpetuated in the Panel Report – that transition-related health care costs would unduly strain military budgets.¹⁷ To the contrary, researchers have concluded that the associated costs would “have little impact on and represent[] an exceedingly small proportion” of the military’s overall health care expenditures.¹⁸ This

¹⁶ Nothing in *Trump v. Hawaii*, No. 17-965, 585 U.S. ___, 2018 WL 3116337 (June 26, 2018), is to the contrary. The ban at issue here is easily distinguished from the presidential proclamation on immigration considered in that case because, among other things, the open service ban is not neutral on its face given its stated intention to reverse a policy specifically applicable to transgender individuals; the President’s discriminatory statements about reinstating the ban on transgender military service were made while in office; and the ban is both permanent and categorical, notwithstanding the so-called “reliance exception.” See note 31.

¹⁷ RAND Report, *supra* note 11, at xi-xii, 33-38, 70; Aaron Belkin, *Caring for Our Transgender Troops –The Negligible Cost of Transition-Related Care*, 373 *New Eng. J. Med.* 1089, 1090-1091 (Sept. 17, 2015).

¹⁸ RAND Report, *supra* note 11, at xi-xii; *see id.* at 31-32, 70 (estimating that transition-related healthcare costs would increase military healthcare costs by \$2.4 million to \$8.4 million or – at most – 0.13%); Belkin, *supra* note 17, at 1090; Ross, *supra* note 10, at 210-212. The Panel Report, which indicates that “the medical costs for Service members with gender dysphoria have increased nearly three times – or 300% – compared to Service members without gender dysphoria,” does not

conclusion comports with the experience of many *Amici* States in extending comprehensive health care coverage to transgender individuals, as several States have done so without incurring heightened financial costs or increased premiums.¹⁹

In California, for example, the Insurance Commissioner conducted an extensive cost-benefit analysis of prohibiting private insurers from denying coverage for transition-related services and found that such a prohibition not only would have an “immaterial” impact on premium costs, but also would actually benefit individuals, employers, and insurance carriers by improving health outcomes for transgender individuals.²⁰

prove otherwise, as it focuses on relative percentages between groups, and not overall costs.

¹⁹ See Katie Keith, *15 States and DC Now Prohibit Transgender Insurance Exclusions*, CHIRblog (Mar. 30, 2016), <http://chirblog.org/15-states-and-dc-now-prohibit-transgender-insurance-exclusions/> (“[T]he removal of transgender exclusions [from health plans] does not impose significant costs.”); William V. Padula et al., *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, 31 J. of Gen. Internal Med. 394, 394 (2016), available at <https://www.ncbi.nlm.nih.gov/pubmed/26481647> (“Health insurance coverage for the U.S. transgender population is affordable and cost-effective, and has a low budget impact on U.S. society.”).

²⁰ Cal. Dep’t of Ins., *Economic Impact Assessment: Gender Nondiscrimination in Health Insurance* 1–2, Reg. File No. REG-2011-00023 (Apr. 13, 2012), available at <http://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf>.

Likewise, RAND’s research showed that allowing transgender people to serve openly would have no adverse impact on unit cohesion, operational effectiveness, or readiness.²¹ Top military leaders recently confirmed this finding, testifying before the Senate Armed Services Committee that the open service policy had yielded “precisely zero” reports of problems related to unit cohesion, discipline, and morale, and that “[i]t’s steady as she goes.” SER 95-97, 100-104.

The military’s reportedly positive experience with the open service policy has historical antecedents, as each time our country has diversified the Armed Forces – whether through racial integration, expanding combat opportunities for women, or allowing openly gay, lesbian, and bisexual individuals to serve – the military grappled with unit cohesion objections, overcame them, and grew stronger.²² It also aligns with the experience of the *Amici* States. For years, transgender individuals have served in the National Guard and have done so with honor and distinction. After the ban was lifted in 2016, some of these Guard

²¹ RAND Report, *supra* note 11, at xiii, 39-47.

²² See Ross, *supra* note 10, at 205-206; ER 433 (Statement by Secretary Carter, No. NR-272-15) (“Over the last fourteen years of conflict, the Department of Defense has proven itself to be a learning organization. This is true . . . with respect to institutional activities, where we have learned from how we repealed ‘Don’t Ask, Don’t Tell,’ from our efforts to eliminate sexual assault in the military, and from our work to open up ground combat positions to women.”).

members came out to their superiors and peers, and the *Amici* States are unaware of any adverse consequences for the Guard. Transgender cadets in ROTC programs supported by many of our colleges and universities similarly disclosed their gender identities – also with no known adverse consequences. In addition, three *Amici* States are proud to support maritime academies that are designed to prepare students for military or civilian careers in maritime-related fields. These academies – the Massachusetts Maritime Academy, the California Maritime Academy, and the State University of New York Maritime College – also welcome transgender students.²³ The *Amici* States’ experience with the National Guard, ROTC programs, and maritime academies is consistent with the broader lessons we have learned from implementing transgender-inclusive laws and policies: welcoming transgender individuals to live and participate openly in society not only improves their lives, but also makes our communities stronger as a whole.²⁴

²³ See, e.g., *Trans Inclusion Policy*, Massachusetts Maritime Academy, <https://www.maritime.edu/trans-inclusion-policy>; *Safe Zone Program*, California Maritime Academy, <https://www.csum.edu/web/diversity/home/safe-zone-program>.

²⁴ This holds true outside of the United States, as well. Of the eighteen foreign nations (including Britain and Canada) that allow transgender individuals to serve, none has reported any ill effects. Amanda Erickson, *Trump Said Transgender Troops Cause ‘Disruption.’ These 18 Militaries Show Otherwise*, Wash. Post (July 26, 2017), <https://www.washingtonpost.com/news/worldviews/wp/2017/07/26/trump-said-transgender-troops-cause-disruption-these-18->

The Appellants’ remaining concerns about the psychological fitness and deployability of transgender service members, as well as their claims that an open service policy could foster “perceptions of unfairness,” “safety risks,” and “irreconcilable privacy demands” among service members, simply do not stand up to the experience of the *Amici* States. *See* Appellants’ Br. at 10-11. They also ignore the fact that *all* service members are subject to the same accession, deployability, and retention standards. *See, e.g.*, SER 13-14, 123-124 (Brown Declaration ¶ 22). If any one transgender individual cannot meet those standards, they will be screened out or separated from military service – without the need for a categorical ban.²⁵ Thus, the Administration’s purported rationales – including its focus on maintaining “sex-based standards” – reflect nothing more than anti-

[militaries-show-otherwise/?utm_term=.a04643d1b8b8](#); Statement of Retired Military Leaders, *supra* note 13.

²⁵ The Appellants’ purported medical and mental health concerns further contradict the opinions of medical experts. *See, e.g.*, Vice Admiral Donald C. Arthur et al., *DOD’s Rationale for Reinstating the Transgender Ban Is Contradicted by Evidence*, The Palm Ctr. (Apr. 2018), <https://www.palmcenter.org/wp-content/uploads/2018/04/Transgender-troops-are-medically-fit-1.pdf> (affirming that “[s]cholars and experts agree that transition-related care is reliable, safe, and effective” and that “[s]cholarly research and DOD’s own data confirm that transgender personnel, even those with diagnoses of gender dysphoria, are deployable and mentally fit”). And, as discussed further below, forcing service members to conceal their gender identities actually has a negative impact on health outcomes and unit cohesion. *See infra* at 25-26.

transgender biases and impermissible gender stereotyping. The Court should reject such efforts to perpetuate discrimination for its own sake.

II. Reinstating a Ban on Transgender People Serving in the Military Will Harm the *Amici* States and Our Residents.

National security and emergency and disaster management are not matters of solely federal concern. All States play important roles – both direct and indirect – in providing for our collective security and have an interest in ensuring the strongest, most inclusive military possible. We also share an interest in avoiding becoming entangled in discriminatory federal policies. The Administration’s decision to reinstitute a ban on service by transgender individuals harms all of these interests. It also harms the *Amici* States’ veterans, active service members, and those who wish to serve, as well as our transgender communities more broadly.

A. The Ban Will Entangle the *Amici* States in Invidious Discrimination Harmful to Our National Guard.

Reinstating the ban will impede the *Amici* States’ administration and control of the National Guard and undermine the efficacy of those forces in protecting our communities. The National Guard is a reserve component of the United States Armed Forces, yet remains a “hybrid entity that carefully combines both federal and state characteristics.” *Ass’n of Civilian Technicians, Inc. v. United States*, 603 F.3d 989, 992 (D.C. Cir. 2010) (citation omitted). While the

National Guard is primarily funded by the federal government and subject to federal requirements for service, its individual units generally operate under state control.²⁶ As a result, state actors oversee recruitment efforts, exercise day-to-day command over service members in training and most forms of active duty, and deploy the Guard in response to natural or man-made disasters in their own States and across the country.²⁷ Each of the *Amici* States funds and supports its National Guard forces to ensure that its citizen-soldiers are highly trained and ready to perform a range of critical state missions and support national defense operations as needed. For example, the California National Guard – which comprises over 18,000 members – receives approximately \$50 million in state funds annually and is regularly deployed to assist with firefighting and law enforcement efforts, search and rescue missions, disaster response, homeland defense, and cyber-defense and -security. Similarly, in 2016, the New York National Guard, with over

²⁶ See Major General Timothy J. Lowenberg, *The Role of the National Guard in National Defense and Homeland Security*, The Nat'l Guard Ass'n of the U.S., 3, <https://www.ngaus.org/sites/default/files/pdf/primer%20fin.pdf>.

²⁷ See *Ass'n of Civilian Technicians*, 603 F.3d at 993; *NGAUS Fact Sheet: Understanding the Guard's Duty Status*, The Nat'l Guard Ass'n of the U.S., <https://www.ngaus.org/sites/default/files/Guard%20Statues.pdf>.

16,000 members, received more than \$85 million in state funds to cover salaries, supplies, facilities, and education.²⁸

Over the years, transgender individuals have ably served the *Amici* States – and many other States across the country – through the National Guard.²⁹ After DOD lifted restrictions on service by transgender individuals in 2016, the *Amici* States acted swiftly to comply with the Department’s new policies and ensure that these individuals could serve openly, without fear of discharge.³⁰ These efforts did not disrupt the operation of the National Guard. To the contrary, by empowering our individual members and diversifying our ranks, these initiatives further enhanced the capability and effectiveness of our state-sited defense and security forces.

Because of the hybrid nature of the National Guard, however, the *Amici* States are required to comply with any directive the Trump Administration issues with respect to transgender service members, or risk losing much-needed funding

²⁸ *New York National Guard Economic Impact 2016*, N.Y. State Div. of Mil. and Naval Aff. (Jan. 15, 2017), available at https://dmna.ny.gov/NYNG_Economic_Impact.pdf.

²⁹ Gates & Herman, *supra* note 3, at 1 (estimating 15,500 transgender members in active service, the National Guard, or Reserves).

³⁰ See Tech. Sgt. Erich B. Smith & Sgt. 1st Class Jon Soucy, *Guard Members Ready for New DOD Transgender Policy*, National Guard Bureau (June 15, 2017), <http://www.nationalguard.mil/News/Article/1215104/guard-members-ready-for-new-dod-transgender-policy/>.

for our National Guard units. *See Ass’n of Civilian Technicians*, 603 F.3d at 993; 32 U.S.C. §§ 106-108. That would mean, absent court intervention, enforcing a prohibition on accepting openly transgender recruits. If fully implemented, the ban also may require National Guard leadership in the *Amici* States to renege on assurances made to existing transgender service members who came out in reliance on the 2016 open service policy; to pass over qualified transgender individuals for promotion; or to discharge them from service altogether.³¹

In effect, the Administration’s policy reversal threatens to require the *Amici* States to undo our efforts to provide an inclusive environment for current transgender service members, and instead foists upon us the discriminatory policies of the past. It will entangle the *Amici* States – once again – in a federal scheme that requires us to differentiate National Guard recruits and service members based on a characteristic that has been demonstrated to have nothing to do with their ability to serve. Such discrimination is in direct conflict with the policies of the *Amici* States, including our prohibitions on discrimination based on gender identity

³¹ The inclusion of a so-called “reliance exception” to the ban – which would permit transgender service members who were diagnosed with gender dysphoria after June 30, 2016 (i.e., the date Secretary Carter announced the open service policy) to remain in the military – does not alter this analysis because that “exception” is meant to be severed if it is “used by a court as a basis for invalidating the entire policy.” ER 206. Thus, it provides no meaningful assurance to openly transgender service members. Moreover, as the Administration essentially concedes, the exception undermines its own justifications for reinstating the ban in the first place.

in public or private employment and our laws extending civil rights protections to transgender residents in other aspects of civic life (such as housing and public accommodations). *See supra* note 6.

Equally important, excluding transgender individuals will diminish the effectiveness of the National Guard and thus hamper the *Amici* States' emergency and disaster response efforts. As described above, National Guard members are largely under state control and devoted to state-based missions, such as disaster relief and search and rescue operations. If forced to reinstate the ban, the *Amici* States could also lose the aggregate skills and knowledge of our many transgender service members and – with them – the value of the training and experience the *Amici* States provided through the Guard. Because the *Amici* States maintain and rely on the National Guard to assist us in times of emergency, a reduction in those forces inflicts a significant harm upon us.³²

³² *See* Statement of Retired Military Leaders, *supra* note 13 (“The proposed ban, if implemented, would cause significant disruptions, deprive the military of mission-critical talent, and compromise the integrity of transgender troops who would be forced to live a lie, as well as non-transgender peers who would be forced to choose between reporting their comrades or disobeying policy. As a result, the proposed ban would degrade readiness even more than the failed ‘don’t ask, don’t tell’ policy.”).

B. The Ban Will Entangle the *Amici* States in Discrimination at Our Public Institutions of Higher Education.

The harmful effects of banning open service by transgender individuals extend beyond the Armed Forces and National Guard to the *Amici* States' public colleges and universities that support ROTC programs and to state-run maritime academies.

ROTC programs, which are designed to train commissioned officers of the Armed Forces, are located on and supported by college campuses but subject to federal entry requirements.³³ Many public colleges and universities in the *Amici* States host ROTC programs, provide them with physical space, and, in some instances, provide financial support in the form of a budget or scholarship funds. For example, one public university in Massachusetts provides its Army and Air Force ROTC programs with a total annual budget of approximately \$30,000 and designates an additional \$200,000-\$300,000 per year for scholarships available only to ROTC cadets. Reinstating the ban will render these ROTC programs – together with the scholarship and career opportunities they provide – actually or effectively unavailable to transgender students, who will not be eligible to serve openly in the Armed Forces upon graduation. The ban will thus harm the *Amici*

³³ See 10 U.S.C. § 2103. Similarly, many elementary and secondary schools in the *Amici* States host the Junior Reserve Officers' Training Corps, which aims to “instill in students . . . the values of citizenship, service to the United States, and personal responsibility and a sense of accomplishment.” 10 U.S.C. § 2031(a)(2).

States' public colleges and universities by limiting their ability to extend the same opportunities to all of their students, in direct contravention of many schools' own transgender-inclusive policies and the *Amici* States' broader anti-discrimination laws.³⁴

The ban also works a distinct set of harms on the specialized maritime academies operated by Massachusetts, California, and New York that serve as pathways for students interested in pursuing maritime professions or becoming commissioned officers in the Coast Guard or other branches of the Armed Forces. *See supra* at 15. In addition to the state-of-the-art training and curriculum they offer all students, maritime academies extend special benefits to those who intend to join the military, including funding conditioned on subsequent military service and programs that enable students to obtain military commissions after graduation.³⁵ For example, the maritime academies all offer a "Strategic Sealift Midshipman [or Officer] Program," which allows students earning Coast Guard

³⁴ *See supra* note 6; *Statement of Inclusion*, University of Massachusetts Lowell (Spring 2011), https://www.uml.edu/docs/Inclusion%20Statement_tcm18-167589.pdf. These public institutions also have no real recourse, as Congress has barred institutions of higher education that receive federal funding from preventing the Armed Forces from establishing or operating ROTC programs on campus. 10 U.S.C. § 983.

³⁵ *See* Maritime Administration, *Maritime Academies*, U.S. Dep't of Transp., <https://www.marad.dot.gov/education/maritime-academies/> (explaining the Student Incentive Payment Program).

Licenses to be commissioned as officers in the Navy Reserve upon graduation and provides stipends to help pay for school.³⁶ As with the ROTC programs (and against the academies' own anti-discrimination policies), reinstating a ban on transgender service members will effectively require these public institutions to offer different opportunities to their students based solely on their gender identity. That is, while non-transgender students will be eligible for the full range of services, scholarships, and programs at the academies, transgender students will be unable to take advantage of a number of benefits – those that depend on a future military career. In light of the more limited opportunities that will be available to transgender students after graduation, the overall education these academies provide will be of significantly lesser value. Both students and the maritime academies themselves will therefore be worse off as a result of the ban.

C. The Ban Will Harm the *Amici* States' Veterans, Active Service Members, and Those Who Wish to Serve.

The Trump Administration's irrational decision to reinstate the ban on open military service will also directly harm the residents of the *Amici* States, including our veterans, active service members, and those who wish to serve.

³⁶ See, e.g., *Strategic Sealift Midshipman Program*, Massachusetts Maritime Academy (updated Feb. 27, 2018), <https://www.maritime.edu/strategic-sealift-midshipman-program>.

The harm to the dignity of transgender veterans and soldiers alone is significant. The ban degrades the service of the 150,000 veterans, active-duty service members, and members of the National Guard and Reserves who identify as transgender, as well as the intentions of those who wish to serve. Reinstating the ban serves no purpose but to deny this particular group – deemed less worthy by the Administration – equal opportunity and equal treatment under the law. It relegates them to second-class status, sending the unmistakable message that they are unfit to serve or that their service is not valued, simply due to their gender identity.

This second-class status inflicts a particular harm on current transgender service members – including residents of the *Amici* States serving in our National Guard units and ROTC programs – who came out to their command when the ban was lifted in 2016. Indeed, even if openly transgender service members are allowed to remain in their posts under the so-called “reliance exception,” they will be serving on unequal terms, as the Administration clearly deems them inferior to their non-transgender counterparts and only permits them to serve on sufferance, with the looming threat of discharge contingent on the outcome of this litigation. *See* ER 16; *supra* note 31.

Finally, transgender service members who have not yet revealed their gender identities, together with those who wish to pursue careers in the military, now face

the Hobson's choice of being honest about who they are and being discharged or denied accession outright, or hiding their identities and serving in fear of being discovered.³⁷ Denying otherwise qualified transgender individuals the opportunity to serve denies them equal participation in a core civic activity. And forcing transgender individuals to conceal their identities in order to enlist or continue serving is extremely harmful to their health and wellbeing³⁸ – a reality evidenced by the thousands of gay, lesbian, and transgender service members who served under previous discriminatory policies.³⁹ It also can have a deleterious effect on

³⁷ See Declaration of Jane Doe, ECF No. 138, ¶¶ 9-16; cf. *Log Cabin Republicans v. United States*, No. CV 04-08425-VAP, 2010 U.S. Dist. LEXIS 93612, *29-65 (C.D. Cal. Oct. 12, 2010) (recounting testimony of service members describing experience of serving under a “cloud of fear” during Don’t Ask, Don’t Tell).

³⁸ See Elders & Steinman, *supra* note 10, at 4 (“We determined not only that there is no compelling medical reason for the ban, but also that the ban itself is an expensive, damaging and unfair barrier to health care access for the approximately 15,450 transgender personnel who serve currently in the active, Guard and reserve components. . . . Research shows that depriving transgender service members of medically necessary health care poses significant obstacles to their well-being.”)

³⁹ See, e.g., SER 142 (Declaration of Admiral Michael Mullen ¶ 14) (“When I led our armed forces under [Don’t Ask, Don’t Tell], I saw firsthand the harm to readiness and morale when we fail to treat all service members according to the same standards. There are thousands of transgender Americans currently serving and there is no reason to single them out[,] to exclude them[,] or deny them the medical care that they require.”); cf. Bonnie Moradi, *Sexual Orientation Disclosure, Concealment, Harassment, and Military Cohesion: Perceptions of LGBT Military Veterans*, 21 *Mil. Psychol.* 513, 521-22 (2009) (finding that concealment of sexual orientation in the military relates negatively to unit social and task cohesion, and that disclosure positively impacts cohesion).

the military itself, as “interpersonal connection, support, and trust among unit members are thought to be paramount to unit cohesion and effectiveness.”⁴⁰ Thus, depriving transgender service members the opportunity to serve openly not only harms them individually, but also undermines military readiness and effectiveness generally.

D. The Ban Will Harm Our Transgender Communities More Broadly.

The consequences of the Trump Administration’s reversal on open military service are not limited to the Armed Forces and may be felt across society at large. The military is among our country’s most integrated and diverse institutions. Historically, though progress has been slow and imperfect, when the military has accepted previously-excluded or marginalized groups into its ranks – African-Americans, women, immigrants, and gay and lesbian individuals – it has helped to lay the groundwork for broader social integration and acceptance.⁴¹ So too here, at a time when – despite continued stigma, discrimination, and violence – acceptance of transgender individuals is on the rise, the military’s open service policy was an

⁴⁰ Ross, *supra* note 10, at 209.

⁴¹ See, e.g., Cornelius L. Bynum, *How a Stroke of the Pen Changed the Army Forever*, Wash. Post (July 26, 2017), <https://www.washingtonpost.com/news/made-by-history/wp/2017/07/26/how-a-stroke-of-the-pen-changed-the-army-forever/> (discussing the broader impact on the civil rights movement of President Harry Truman’s Executive Order 9981, which desegregated the military).

important step forward, both practically and symbolically. Now, worse than never having permitted them to serve openly in the first place, the Trump Administration has singled out transgender individuals for renewed exclusion, sending a message that threatens to slow recent progress and that will be heard and felt throughout our communities. Indeed, it seems that may be the point.

The military has already concluded that allowing transgender individuals to serve openly is in the nation's best interest. Notwithstanding that assessment, the Trump Administration seeks to reinstate a ban on such service – a decision that cannot be justified by reference to costs, unit cohesion, or overall readiness, and is instead motivated by a desire to bar qualified people from service simply because of who they are. In doing so, the Administration would harm both the *Amici* States and our residents in profound ways. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 609 (1982) (“This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils.”). Reinstating the ban would be a step backward for transgender people, for civil rights, and for the country as a whole.

CONCLUSION

For these reasons, the *Amici* States join in asking the Court to affirm the District Court's decision.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS,

MAURA HEALEY
ATTORNEY GENERAL

/s/ Genevieve Nadeau
Genevieve C. Nadeau, Bar No. 222398
Kimberly A. Parr
Sara A. Colb
Assistant Attorneys General
Office of the Massachusetts Attorney General
One Ashburton Place
Boston, MA 02108
Telephone: (617) 963-2121
Fax: (617) 727-5762
Email: Genevieve.Nadeau@state.ma.us

Date: July 2, 2018

(Additional Counsel Listed on Next Page)

ADDITIONAL COUNSEL

XAVIER BECERRA
Attorney General of California
1300 I St.
Sacramento, CA 95814

GURBIR S. GREWAL
Attorney General of New Jersey
25 Market Street
Trenton, NJ 08625

GEORGE JEPSEN
Attorney General of Connecticut
55 Elm Street
Hartford, CT 06106

HECTOR BALDERAS
Attorney General of New Mexico
408 Galisteo St.
Santa Fe, NM 87501

MATTHEW P. DENN
Attorney General of Delaware
Carvel State Building, 6th Floor
820 North French Street
Wilmington, DE 19801

BARBARA D. UNDERWOOD
Attorney General of New York
120 Broadway
New York, NY 10271

KARL A. RACINE
Attorney General of the District of Columbia
441 4th Street, N.W.
Washington, D.C 20001

JOSHUA H. STEIN
Attorney General of North Carolina
114 W. Edenton Street
Raleigh, NC 27603

RUSSELL A. SUZUKI
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

ELLEN F. ROSENBLUM
Attorney General of Oregon
1162 Court Street N.E.
Salem, OR 97301

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street, 12th Floor
Chicago, IL 60601

JOSH SHAPIRO
Attorney General of Pennsylvania
16th Fl., Strawberry Sq.
Harrisburg, PA 17120

TOM MILLER
Attorney General of Iowa
1305 E. Walnut Street
Des Moines, Iowa 50319

PETER F. KILMARTIN
Attorney General of Rhode Island
150 S. Main Street
Providence, RI 02903

JANET T. MILLS
Attorney General of Maine
6 State House Station
Augusta, ME 04333-0006

MARK R. HERRING
Attorney General of Virginia
202 North Ninth Street
Richmond, VA 23219

BRIAN E. FROSH
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202

THOMAS J. DONOVAN, JR.
Attorney General of Vermont
109 State Street
Montpelier, Vermont 05609

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/s/ Genevieve C. Nadeau
Genevieve C. Nadeau
Assistant Attorney General

Dated: July 2, 2018

CERTIFICATE OF SERVICE

I certify that on July 2, 2018, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Genevieve C. Nadeau
Genevieve C. Nadeau
Assistant Attorney General

Dated: July 2, 2018

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