

THE HONORABLE MARSHA J. PECHMAN

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-01297-MJP

AGREED MOTION FOR LEAVE TO FILE
BRIEF OF *AMICUS CURIAE*
CONSTITUTIONAL ACCOUNTABILITY
CENTER IN SUPPORT OF PLAINTIFFS’
MOTIONS FOR SUMMARY JUDGMENT

**NOTED FOR HEARING: January 31,
2018**

Amicus curiae Constitutional Accountability Center respectfully moves the Court for leave to file the attached *amicus curiae* brief in support of Plaintiffs’ Motions for Summary Judgment (Dkt. Nos. 129 and 150). All parties have consented to the filing of this *amicus* brief. A copy of the proposed *amicus curiae* brief is appended as an exhibit to this motion.

I. IDENTITY AND INTEREST OF *AMICUS*

Amicus Constitutional Accountability Center 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.

1 **II. REASONS WHY MOTION SHOULD BE GRANTED**

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3 District courts have “broad discretion” to appoint *amici curiae*. *Skokomish Indian Tribe*
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5 *v. Goldmark*, No. C13-5071JLR, 2013 WL 5720053, at *1 (W.D. Wash. Oct. 21, 2013) (quoting
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7 *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982)). District courts may consider briefs from
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9 non-parties “concerning legal issues that have potential ramifications beyond the parties directly
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11 involved or if the amicus has ‘unique information or perspective that can help the court beyond
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13 the help that the lawyers for the parties are able to provide.’” *Id.* (quoting *NGV Gaming, Ltd. v.*
14
15 *Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005)). The “classic role”
16
17 of *amici curiae* is to “assist[] in a case of general public interest, supplement[] the efforts of
18
19 counsel, and draw[] the court’s attention to law that escaped consideration.” *Miller-Wohl Co. v.*
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21 *Comm’r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982).
22
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24
25 The Court should exercise its discretion to permit *amicus* to file the attached *amicus*
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27 *curiae* brief. As described above, *amicus* has a strong interest in this case given its advocacy in
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29 federal courts in favor of fulfilling the progressive promise of our Constitution’s text and history.
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31 Counsel for *amicus* are familiar with the scope of the arguments presented by plaintiffs in their
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33 motions for summary judgment and will not unduly repeat those arguments. Instead, the
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35 proposed *amicus curiae* brief explains how the text of the Due Process Clause broadly protects
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37 all “person[s],” including transgender people. It then describes in detail the parallels between the
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39 ban on transgender service members at issue in this case and prior military personnel policies
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41 that discriminated on the basis of race, gender, and sexual orientation. In each of those cases,
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43 opponents of ending the military’s discriminatory policies cited concerns about unit cohesion and
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45 military effectiveness, but the policies were repealed without any negative effects on cohesion or
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47 effectiveness. Indeed, military experts now agree that ending those discriminatory policies and
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1 ensuring diversity in the military's ranks actually strengthened the military and its effectiveness.
2
3 The proposed *amicus curiae* brief argues that just as concerns about unit cohesion and military
4 effectiveness did not provide a rational basis for treating some classes of military service
5 members in a discriminatory manner then, they do not do so now, and therefore the ban violates
6 the Fifth Amendment's Due Process Clause.
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12 **III. TIMELINESS**

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14 The Federal Rules of Civil Procedure and this Court's local rules are silent with respect
15 to the filing of *amicus* briefs. For that reason, this Court has looked to the Federal Rules of
16 Appellate Procedure for guidance on procedural matters relating to such briefs. *See, e.g.,*
17 *Skokomish Indian Tribe*, 2013 WL 5720053, at *2 (adhering to the Federal Rules of Appellate
18 Procedure with respect to timing for filing an *amicus* brief because "there are no particular local
19 rules governing when an *amicus curiae* must file its brief"). The Rules advise that "[a]n *amicus*
20 *curiae* must file its brief, accompanied by a motion for filing when necessary, no later than 7
21 days after the principal brief of the party being supported is filed." Fed. R. App. P. 29(a)(6).
22 Proposed *amicus*'s brief supports Plaintiffs' Motions for Summary Judgment, Dkt. Nos. 129 and
23 150, which were filed on January 25, 2018. Accordingly, in filing this motion and the attached
24 *amicus* brief on January 30, 2018, this submission is timely.
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33 **IV. CONCLUSION**

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35 Proposed *amicus* Constitutional Accountability Center respectfully requests permission to
36 file the attached *amicus curiae* brief in support of Plaintiffs' Motions for Summary Judgment.
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DATED this 31st day of January, 2018.

Respectfully submitted,

Constitutional Accountability Center

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on January 31, 2018, I electronically filed the foregoing AGREED MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PLAINTIFFS’ MOTIONS FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorneys of record.

DATED this 31st day of January, 2018

/s/ Erin J. Weinkauff
Erin J. Weinkauff
Legal Secretary

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BRIEF OF *AMICUS CURIAE*
CONSTITUTIONAL ACCOUNTABILITY
CENTER IN SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT

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INTEREST OF *AMICUS CURIAE*¹

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 issued a statement via Twitter, categorically barring transgender persons from serving openly in the U.S. military: “the United States government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military.” Dkt. No. 103 at 3. These tweets were subsequently formalized in a presidential memorandum, which directed 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). This categorical ban on open service in the military by transgender individuals violates the

¹ *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* made a monetary contribution to the brief’s preparation or submission. Counsel for all parties have consented to the filing of this brief.

1 constitutional guarantee of equal protection, and the plaintiffs’ motion for summary judgment
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3 should therefore be granted.
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5 The Due Process Clause of the Fifth Amendment provides that no “person” shall “be
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7 deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V. By
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9 broadly protecting all “person[s],” the Amendment guarantees to all, regardless of race, sex,
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11 sexual orientation, or gender identity, dignity and equality under the law, “withdraw[ing] from
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13 Government the power to degrade or demean,” *United States v. Windsor*, 133 S. Ct. 2675, 2695
14
15 (2013). ““At the heart of the Constitution’s guarantee of equal protection lies the simple
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17 command that the Government must treat citizens as individuals, not as simply components of a
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19 racial [or] sexual . . . class.”” *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152–53 (1994)
20
21 (Kennedy, J., concurring) (alteration in original) (quoting *Metro Broad., Inc. v. FCC*, 497 U.S.
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23 547, 602 (1990) (O’Connor, J., dissenting)). To effectuate that guarantee, the Constitution
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25 requires policies that single out a class of people for disparate treatment to have—at the very
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27 least—“a rational relationship between the disparity of treatment and some legitimate
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29 governmental purpose.” *Heller v. Doe*, 509 U.S. 312, 320 (1993).² The government’s ban on
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31 military service by transgender persons fails that test.
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37 The government insists that the ban is justified by concerns about transgender service
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39 members’ impact on unit cohesion and military effectiveness. But these purported concerns are
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41 the very same concerns cited, time and again, by opponents of greater integration of our
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43 military—and they are the same concerns that, time and again, have proven to be lacking in any
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48 ² In its order granting in part and denying in part the defendants’ motion to dismiss and
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50 granting plaintiffs’ motion for a preliminary injunction, this court applied intermediate scrutiny
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to the ban on transgender service members. Dkt. No. 103 at 15. *Amicus* takes no position on
what level of review should apply because it believes the ban cannot withstand judicial scrutiny
under even the most deferential standard of review.

1 factual basis. When the military was racially segregated, proponents of that policy claimed it
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3 was necessary for unit cohesion and military effectiveness; when gay and lesbian individuals
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5 were prohibited from serving openly, proponents of that policy claimed it was necessary for unit
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7 cohesion and military effectiveness; and when women were forbidden from serving in combat
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9 roles, proponents of that policy claimed it was necessary for unit cohesion and military
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11 effectiveness. Yet the military is now integrated, gay men and lesbians are allowed to serve
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13 openly, and women are allowed to serve in combat roles—and there have been no negative
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15 effects on the cohesion of units specifically or on the effectiveness of the military as a whole. To
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17 the contrary, military experts agree that ending those discriminatory policies and ensuring
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19 diversity in the military’s ranks actually strengthened the military and its effectiveness. In short,
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21 concerns about unit cohesion and military effectiveness did not provide a rational basis for
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23 treating some classes of military service members in a discriminatory manner then, and they do
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25 not do so now.
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31 For the past year, transgender individuals have been serving openly in the military with
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33 no deleterious effects. And this is no surprise: a military-commissioned study released before
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35 transgender people were allowed to serve openly concluded that open service would not
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37 negatively affect military effectiveness or unit cohesion. President Trump’s decision to change
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39 the open service policy was not based on new evidence about the effects of transgender
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41 individuals serving in the military. In fact, President Trump failed to consult with the Pentagon
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43 or other military experts before announcing this policy change. *See* Julie Hirschfeld Davis &
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45 Helene Cooper, *Trump Surprises Military With a Transgender Ban*, N.Y. Times, July 27, 2017,
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47 at A1.
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1 In sum, the government’s singling out of transgender people for exclusion from military
 2 service bears no rational relationship to any legitimate government interest. Instead, it
 3 impermissibly rests purely on “negative attitudes,” “fear,” and “irrational prejudice[s]” about
 4 transgender people. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 450 (1985).
 5
 6 Given that, President Trump’s ban serves no purpose other than to “disrespect and subordinate”
 7 transgender service members by “lock[ing] them out of a central institution of the Nation’s
 8 society,” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604, 2602 (2015)—military service. This ban
 9 cannot be squared with the Fifth Amendment’s guarantee of equal protection for all people, and
 10 the plaintiffs’ motion for summary judgment should therefore be granted.
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21 **ARGUMENT**

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24 **I. THE CONSTITUTION GUARANTEES EQUAL PROTECTION FOR ALL AND**
25 **FORBIDS THE FEDERAL GOVERNMENT FROM ENACTING POLICIES**
26 **SINGLING OUT A CLASS OF INDIVIDUALS FOR DISFAVORED LEGAL**
27 **STATUS.**
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29 The Due Process Clause of the Fifth Amendment, which provides that no “person” shall
 30 “be deprived of life, liberty, or property, without due process of law,” U.S. Const. amend. V,
 31 guarantees all persons dignity and equality under the law. While the text of the Fifth
 32 Amendment “is not as explicit a guarantee of equal treatment as the Fourteenth Amendment,”
 33 the Supreme Court has consistently held that “the Constitution imposes upon federal, state, and
 34 local government actors the same obligation to respect the personal right to equal protection of
 35 the laws.” *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213, 231-32 (1995); *see Lyng v.*
 36 *Castillo*, 477 U.S. 635, 636 n.2 (1986) (“The concept of equal justice under law is served by the
 37 Fifth Amendment’s guarantee of due process, as well as by the Equal Protection Clause of the
 38 Fourteenth Amendment.” (quoting *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976)));
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1 *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (“This Court’s approach to Fifth
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3 Amendment equal protection claims has always been precisely the same as to equal protection
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5 claims under the Fourteenth Amendment.”); *Windsor*, 133 S. Ct. at 2695 (“the equal protection
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7 guarantee of the Fourteenth Amendment makes that Fifth Amendment [due process] right all the
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9 more specific and all the better understood and preserved”). These repeated holdings reflect that
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11 at both the federal and state levels, “equality of citizenship is of the essence in our Republic.”
12
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14 *Zobel v. Williams*, 457 U.S. 55, 70 (1982) (Brennan, J., concurring).
15
16

17 The Constitution’s profound commitment to equal protection is reflected in the Fifth
18
19 Amendment’s broad language, protecting “any person.” See *Adarand*, 515 U.S. at 227 (“[t]he
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21 Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*”); *J.E.B.*, 511
22
23 U.S. at 152 (Kennedy, J., concurring) (noting “constitutional tradition” that “an individual
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25 possesses rights that are protected against lawless action by the government”). As a personal
26
27 right that belongs to all individuals, the right of equal protection secures equality to all persons,
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29 regardless of race, sex, sexual orientation, or gender identity. “At the heart of the Constitution’s
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31 guarantee of equal protection lies the simple command that the Government must treat citizens as
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33 individuals, not as simply components of a racial [or] sexual . . . class.” *Id.* at 152-53 (Kennedy,
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35 J., concurring) (alteration in original) (quoting *Metro Broad., Inc.*, 497 U.S. at 602 (O’Connor,
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37 J., dissenting)); see *The Civil Rights Cases*, 109 U.S. 3, 24 (1883) (Constitution prohibits any
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39 policy “which has the effect of denying to any race or class, *or to any individual*, the equal
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41 protection of the laws” (emphasis added)). Thus, the Constitution prohibits “‘indiscriminate
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43 imposition of inequalities’ . . . born of animosity toward the class of persons affected.” *Romer v.*
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45 *Evans*, 517 U.S. 620, 633, 634 (1996) (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950)).
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1 In giving effect to the constitutional requirement of equal protection, the Supreme Court
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3 has insisted that when policies single out a particular class of people for disparate treatment,
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5 there must be “a rational relationship between the disparity of treatment and some legitimate
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7 governmental purpose.” *Heller*, 509 U.S. at 320. To be sure, rational-basis review affords some
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9 deference to the Executive’s policy judgments, but the Supreme Court has long recognized that
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11 courts have a constitutional obligation to “ensure that classifications are not drawn for the
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13 purpose of disadvantaging the group burdened by the law,” *Romer*, 517 U.S. at 633; *see Nat’l*
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15 *Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012) (explaining that “deference in matters
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17 of policy cannot . . . become abdication in matters of law”); *Clinton v. City of New York*, 524
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19 U.S. 417, 452 (1998) (Kennedy, J., concurring) (“[a]bdication of responsibility is not part of the
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21 constitutional design”).
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26 For example, in *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the
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28 Supreme Court struck down a federal statutory provision that denied federal food stamp benefits
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30 to a household composed of unrelated individuals living together as a violation of the equal
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32 protection guarantee. Concluding that the provision had been designed to deny food stamps to
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34 “hippies” and served no conceivable purpose other than to discriminate, this Court held that the
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36 statute was inconsistent with the constitutional guarantee of equality under the law. “[I]f the
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38 constitutional conception of ‘equal protection of the laws’ means anything, it must at the very
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40 least mean that a bare congressional desire to harm a politically unpopular group cannot
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42 constitute a legitimate governmental interest.” *Id.* at 534. Similarly, in *City of Cleburne*, the
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44 Supreme Court held unconstitutional a municipal zoning ordinance that required a special-use
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46 permit for homes for mentally disabled persons, but not for other group homes. The Court
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48 concluded that the discriminatory permit requirement rested on “negative attitudes,” “fear,” and
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1 “irrational prejudice,” 473 U.S. at 448, 450, and held that “the City [could] not avoid the
2 strictures of th[e Equal Protection] Clause by deferring to the wishes or objections of some
3 fraction of the body politic,” *id.* at 448.
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8 The Court also applied rational-basis review in *Romer v. Evans* and nonetheless held
9 unconstitutional a state constitutional amendment that prohibited state or local government
10 action that protected gay men and lesbians from discrimination. Stressing that the government
11 had “impos[ed] a broad and undifferentiated disability on a single named group,” the Court noted
12 that “laws of the kind now before us raise the inevitable inference that the disadvantage imposed
13 is born of animosity toward the class of persons affected.” *Romer*, 517 U.S. at 632, 634-35. For
14 that reason, Colorado’s “status-based enactment” was unconstitutional because it denied equal
15 rights to gay men and lesbians not “to further a proper legislative end but to make them unequal
16 to everyone else.” *Id.* at 635.
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28 Likewise, in *Windsor*, the Court held that a federal law that prohibited same-sex married
29 couples from obtaining the same federal benefits enjoyed by married opposite-sex couples
30 “violates basic due process and equal protection principles applicable to the Federal
31 Government.” 133 S. Ct. at 2693. The Court focused on the “avowed purpose and practical
32 effect of the law . . . to impose a disadvantage, a separate status, and so a stigma upon all who
33 enter into same-sex marriages,” *id.*, and concluded that “[t]he federal statute [was] invalid, for no
34 legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the
35 State [of New York], by its marriage laws, sought to protect in personhood and dignity,” *id.* at
36 2696. The federal government could not, consistent with the constitutional guarantee of equal
37 protection, treat same-sex couples as “less respected than others.” *Id.*
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1 As all of these cases recognize, rational basis scrutiny, while deferential, does not require
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 3 a reviewing court to abdicate its constitutional responsibility to enforce the guarantee of equal
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 5 protection for all persons. To the contrary, as all of these cases also make clear, the government
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 7 may not subject any group of persons to adverse treatment “born of animosity toward the class of
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 9 persons affected.” *Romer*, 517 U.S. at 634; *Windsor*, 133 S. Ct. at 2693 (“The Constitution’s
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 11 guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a
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 13 politically unpopular group cannot’ justify disparate treatment of that group.” (quoting *Moreno*,
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 15 413 U.S. at 534-35)). For that reason, this Court has been “especially vigilant in evaluating the
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 17 rationality of any classification involving a group that has been subjected to a ‘tradition of
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 19 disfavor’” in order to prevent the use of a “stereotyped reaction [that] may have no rational
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 21 relationship—other than pure prejudicial discrimination—to the stated purpose for which the
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 23 classification is being made.” *Cleburne*, 473 U.S. at 453 n.6 (Stevens, J., concurring) (quoting
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 25 *Matthews v. Lucas*, 427 U.S. 495, 520-21 (1976) (Stevens, J., dissenting)). The transgender
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 27 military ban at issue here is totally lacking in any rational basis, as the remainder of this brief
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 32 explains.

35 **II. THE GOVERNMENT’S JUSTIFICATIONS FOR THE BAN ON OPEN SERVICE**
 36 **BY TRANSGENDER SERVICE MEMBERS ARE SIMILAR TO THOSE THAT**
 37 **WERE OFFERED TO JUSTIFY PAST DISCRIMINATION ON THE BASIS OF**
 38 **RACE, SEXUAL ORIENTATION, AND GENDER.**
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41 The government justifies its decision to ban transgender people from serving openly in
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 43 the military by arguing that allowing open service would “hinder military readiness and
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 45 lethality” and “disrupt unit cohesion.” Dkt. No. 69 at 28 (quoting Presidential Memorandum).
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 47 These supposed justifications are strikingly similar to justifications offered in the past to support
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 49 racial segregation in the military, the military’s “Don’t Ask, Don’t Tell” policy preventing gay
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1 men and lesbians from serving openly, and the military’s prohibition on women serving in
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3 combat roles. Yet the military has since abandoned all of those policies, recognizing that
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5 military effectiveness is best served by allowing all who are able to serve to do so. Thus, these
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7 historical analogues suggest that the government’s proffered justifications should be treated with
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9 great skepticism as legitimate reasons for discriminating against transgender service members.
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12 *First*, those opposed to racial integration in the military in the first half of the twentieth
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14 century justified their position with misguided fears about unit cohesion and military
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16 effectiveness. Bernard Rostker et al., RAND Nat’l Def. Research Inst., *Sexual Orientation and*
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18 *U.S. Military Personnel Policy: Options and Assessment* 171-72 (1993) (“1993 RAND Study”),
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20 https://www.rand.org/pubs/monograph_reports/MR323.html (opponents of integration argued
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22 that “[r]acial mixing . . . would undermine unit cohesion among the troops and thereby impair
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24 their morale, readiness, and ability to perform as a unified combat force.”); *see Philips v. Perry*,
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26 106 F.3d 1420, 1439 (9th Cir. 1997) (Fletcher, J., dissenting) (“[T]he ‘unit cohesion’ rationale
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28 . . . is disturbingly similar to the arguments used by the military to justify the exclusion from
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30 and segregation of African Americans in military service.”).
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35 For instance, in 1935, Rear Admiral Adolphus Andrews, Chief of the Navy Bureau of
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37 Navigation, argued that if black service members were enlisted as seamen, “team work,
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39 harmony, and ship efficiency [would be] seriously handicapped.” 1993 RAND Study at 172.
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41 Likewise, General Henry Arnold, commander of the Army Air Corp, wrote in 1940 that “Negro
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43 pilots cannot be used in our present Air Force since this would result in having Negro officers
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45 serving over white enlisted men. This would create an impossible social problem.”
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47 Memorandum from Henry Arnold, Commander of the Army Air Corp, *Employment of Negro*
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49 *Personnel in Air Corps Units* (May 31, 1940), *quoted in* J. Todd Moye, *Freedom Flyers: The*
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1 *Tuskegee Airmen of World War II* 14 (2010). And during “World War II both the Army chief of
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3 staff and the Secretary of the Navy justified racial segregation in the ranks as necessary to
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5 maintain efficiency, discipline, and morale.” *Watkins v. U.S. Army*, 875 F.2d 699, 729 (9th Cir.
6
7 1989) (Norris, J., concurring in the judgment).
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10 Though the reluctance to integrate was presented as a concern about unit cohesion and
11
12 military effectiveness, the trepidation was in truth based upon racism and stereotypes about black
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14 Americans. For instance, in 1946, Major General Idwal Edwards, the Army’s Assistant Chief of
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16 Staff for Organization and Training, acknowledged that his preference for racial segregation was
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18 related to his views about the “ineptitude and limited capacity of the Negro soldier.” U.S. Dep’t
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20 of Def., *Report of the Comprehensive Review of the Issues Associated with a Repeal of “Don’t*
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22 *Ask, Don’t Tell”* 82 (Nov. 30, 2010), <http://www.washingtonpost.com/wp->
23
24 [srv/special/politics/dont-ask-dont-tell/DADTReport_FINAL.pdf](http://www.washingtonpost.com/wp-srv/special/politics/dont-ask-dont-tell/DADTReport_FINAL.pdf). Similarly, “[m]any white
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26 Americans (especially Southerners) responded with visceral revulsion to the idea of close
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28 physical contact with blacks.” 1993 RAND Study at 160.
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33 Despite these attitudes, on July 26, 1948, President Harry Truman issued an Executive
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35 Order requiring “equality of treatment and opportunity for all persons in the armed services
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37 without regard to race, color, religion or national origin.” Exec. Order No. 9981, 13 Fed. Reg.
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39 4313 (July 26, 1948). And “[b]y the late 1950s, the Army, like the Navy and the Air Force
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41 before it, had come to accept . . . the view that racial integration actually benefited the military”
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43 because “[o]nce blacks and whites began to share the risks, rewards, and responsibilities of
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45 military life more equitably, morale problems diminished.” 1993 RAND Study at 178, 180. In
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47 short, the warnings that racial integration would affect military readiness and unit cohesion
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49 proved to be unfounded. Indeed, integration of the armed forces has actually strengthened the
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1 military's effectiveness. *See Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (“[A] ‘highly
2 qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its
3 principle mission to provide national security.’” (quoting Brief for Julius W. Becton, Jr., et al.
4 as *Amici Curiae* at 5)).
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10 *Second*, essentially the same arguments that played out over racial integration in the first
11 half of the twentieth century played out over the open service of gay men and lesbians in the
12 second half of the century. Just like the opponents of racial integration before them, those who
13 supported the military’s “Don’t Ask, Don’t Tell” policy argued that allowing gay men and
14 lesbians to serve openly in the military would negatively affect military effectiveness and unit
15 cohesion. For instance, General Colin Powell testified before Congress that “[t]o win wars, we
16 create cohesive teams of warriors who will bond so tightly that they are prepared to go into battle
17 and give their lives if necessary for the accomplishment of the mission and for the cohesion of
18 the group and for their individual buddies. . . . [T]he presence of open homosexuality would have
19 an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of
20 the armed forces.” S. REP. NO. 103-112, at 275, 278 (1993). Likewise, General H. Norman
21 Schwarzkopf testified that “the introduction of an open homosexual into a small unit
22 immediately polarizes that unit and destroys the very bonding that is so important for the unit’s
23 survival in time of war.” *Id.* at 280. And Lieutenant General Calvin Waller testified that
24 allowing gay men and lesbians “total openness in our Armed forces would cause less ready units
25 or units that would not nearly be as effective as the units we currently have.” *Id.*
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47 For that reason, Congress itself concluded in 1993 that “[i]n view of the unique
48 conditions that characterize military life, there is broad agreement that lifting the restrictions on
49 the service of gay men and lesbians would be detrimental to the best interests of the armed
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1 forces.” *Id.* at 278. Indeed, in the statutory provision that codified the “Don’t Ask, Don’t Tell”
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3 policy, Congress specifically stated that “[t]he presence in the armed forces of persons who
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5 demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable
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7 risk to the high standards of morale, good order and discipline, and unit cohesion that are the
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9 essence of military capability.” 10 U.S.C. § 654(a)(15).
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12 Again, however, experience ultimately showed that such fears were unfounded, and that
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14 there was no rational basis for concluding that open service in the military by gay men and
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16 lesbians would harm military effectiveness and unit cohesion. As the Department of Defense
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18 explained when Congress was considering repealing “Don’t Ask, Don’t Tell” in 2010, “aside
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20 from the moral and religious objections to homosexuality, much of the concern about ‘open’
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22 service [was] driven by misperceptions and stereotypes about what it would mean if gay Service
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24 members were allowed to be ‘open’ about their sexual orientation.” U.S. Dep’t of Def., *supra*, at
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26 5. The conclusions of this study mirrored the views of then-Chairman of the Joint Chiefs of Staff
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28 Admiral Mike Mullen, who testified to the Senate Armed Services Committee that the policy
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30 should be repealed, and noted that he had “served with homosexuals since 1968” without issue
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32 and that “[e]verybody in the military ha[d].” Elisabeth Bumiller, *Top Defense Officials Seek To*
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34 *End ‘Don’t Ask, Don’t Tell’*, N.Y. Times, Feb. 3, 2010, at A1. Even General Powell, whose
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36 opposition to open service by gay soldiers contributed to the adoption of the “Don’t Ask, Don’t
37
38 Tell” policy, ultimately changed his view and supported an end to that policy. *See* Karen
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40 DeYoung, *Colin Powell Now Says Gays Should Be Able To Serve Openly in Military*, Wash. Post
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42 (Feb. 4, 2010), [http://www.washingtonpost.com/wp-](http://www.washingtonpost.com/wp-dyn/content/article/2010/02/03/AR2010020302292.html)
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1 Members of Congress from across the political spectrum also realized that the important
2 interests of unit cohesion and military effectiveness could not justify the “Don’t Ask, Don’t Tell”
3 policy. For example, Senator Susan Collins noted in debate that “[a]t least 28 countries,
4 including Great Britain, Australia, Canada, the Netherlands, and Israel allow open service by
5 lesbian and gay troops,” and “[n]one of these countries—not one—report[ed] morale or
6 recruitment problems.” 156 CONG. REC. S7234 (daily ed. Sept. 21, 2010) (statement of Sen.
7 Collins). Furthermore, she argued that the “Don’t Ask, Don’t Tell” policy actually reduced
8 military effectiveness, noting that “8 percent of the servicemembers let go under [the policy]
9 held critical occupations . . . such as interpreters.” *Id.* Similarly, Senator Joseph Lieberman
10 noted that “[m]ore than 14,000 members of the military ha[d] been put out of the services since
11 1993 . . . , not because they weren’t good soldiers, sailors, marines or airmen, not because they
12 violated any military code of conduct but only because of their private sexual orientation.” 156
13 Cong. Rec. S7244 (daily ed. Sept. 21, 2010). This, he noted, cost taxpayers more than \$600
14 million. *Id.* Likewise, Senator Carl Levin rejected the argument that “allowing gays and
15 lesbians to serve openly would damage unit cohesion and morale,” arguing instead that “there is
16 no evidence that the presence of gay and lesbian colleagues would damage our military’s ability
17 to fight.” *Authorization for Appropriations for Fiscal Year 2011: Hearing on S. 3454 Before the*
18 *S. Comm. on Armed Servs.*, 111th Cong. (2010). Following careful deliberation, Congress in
19 December 2010 repealed the “Don’t Ask, Don’t Tell” policy and formally permitted gay men
20 and lesbians to serve openly. *See Don’t Ask Don’t Tell Repeal Act of 2010*, Pub. L. No. 111-
21 321, 124 Stat. 3515 (Dec. 22, 2010).

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Since that time, study after study has shown that repeal of the “Don’t Ask, Don’t Tell”
policy had no impact on unit cohesion or military effectiveness. One prominent report released a

1 year after the policy’s repeal found “no overall negative impact on military readiness or its
2
3 component dimensions, including cohesion, recruitment, retention, assaults, harassment or
4
5 morale.” Aaron Belkin et al., Palm Ctr., *One Year Out: An Assessment of DADT Repeal’s*
6
7 *Impact on Military Readiness* 4 (2012),
8
9 http://archive.palmcenter.org/files/One%20Year%20Out_0.pdf. By 2013, the Congressional
10
11 Research Service had noted that the “repeal [of “Don’t Ask, Don’t Tell”] appears to have
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13 proceeded smoothly.” Jody Feder, Cong. Research Serv., “*Don’t Ask, Don’t Tell*: A Legal
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15 *Analysis* 3 (2013); see Lawrence Kapp, Cong. Research Serv., *Recruiting and Retention: An*
16
17 *Overview of FY2011 and FY2012 Results for Active and Reserve Component Enlisted Personnel*
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19 (2013) (noting that recruitment and retention remained strong in fiscal years 2011 and 2012). In
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21 fact, Defense Secretary Chuck Hagel remarked in 2013 that allowing gay men and lesbians to
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23 serve openly has “ma[de] our military and our nation stronger, much stronger.” Chuck Hagel,
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25 Sec’y of Def., Remarks at the Lesbian, Gay, Bisexual, Transgender Pride Month Event in the
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27 Pentagon Auditorium (June 25, 2013),
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29 <http://archive.defense.gov/transcripts/transcript.aspx?transcriptid=5262>. In short, as with
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31 opposition to racial integration of the military, the justifications offered by the opponents of open
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33 service by gay men and lesbians turned out to have no basis in fact: gay and lesbian service
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35 members have been serving openly for the last six years with no reported decline in military
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37 effectiveness or unit cohesion.
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45 *Third*, opponents of women’s equal participation in combat also claimed that treating
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47 women equally would harm military effectiveness and unit cohesion. For instance, a 1992 report
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49 by the Presidential Commission on the Assignment of Women in the Armed Forces—which
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51 recommended that women be excluded from combat roles—opined that “unit cohesion can be

1 negatively affected by the introduction of any element that detracts from the need for such key
2 ingredients as mutual confidence, commonality of experience, and equitable treatment.” Robert
3 T. Herres et al., Presidential Comm’n on the Assignment of Women in the Armed Forces, *Report*
4 *to the President* 25 (1992),
5 <https://babel.hathitrust.org/cgi/pt?id=umn.31951d00277676f;view=1up;seq=3>. The commission
6
7 believed that women would degrade these values because of, among other things, the “lack of
8 privacy on the battlefield,” “traditional Western values where men feel a responsibility to protect
9 women,” “sexual misconduct,” and the possibility of “pregnancy.” *Id.* Similarly, General
10 Robert Barrow of the Marine Corps stated in congressional testimony that the decision not to
11 allow women to serve in combat roles is about “combat effectiveness, combat readiness,” and
12 “national security.” *War and the Second Sex*, Newsweek (Aug. 4, 1991),
13
14 <http://www.newsweek.com/war-and-second-sex-202970>. Another commentator suggested that
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16 “[t]he presence of women inhibits male bonding, corrupts allegiance to the hierarchy, and
17 diminishes the desire of men to compete for anything but the attentions of women.” Brian
18 Mitchell, *Women in the Military: Flirting with Disaster* 175 (1997); see Richard Halloran,
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20 *Fighting Women*, N.Y. Times (Sept. 3, 1989),
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22 <http://www.nytimes.com/1989/09/03/books/fighting-women.html> (same).
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40 Again, however, subsequent experience has shown that these fears were unfounded,
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42 lacking any rational basis in fact. Indeed, even before women were allowed to serve in combat
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44 roles, a 1997 RAND National Defense Research Institute study concluded that “gender
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46 integration is perceived to have a relatively small effect on readiness, cohesion, and morale in the
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48 units . . . studied,” and that “gender integration . . . [had] a positive effect, raising the level of
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50 professional standards.” Margaret C. Harrell & Laura L. Miller, RAND Nat’l Def. Research
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1 Inst., *New Opportunities for Military Women: Effects Upon Readiness, Cohesion, and Morale*
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3 xvii, xviii (1997), https://www.rand.org/pubs/monograph_reports/MR896.html. Indeed, during
4
5 the wars in Afghanistan and Iraq, Army commanders skirted the official prohibition on women
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7 in combat roles when they needed more soldiers for crucial jobs, and women serving in these
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9 positions “repeatedly proved their mettle in combat.” Lizette Alvarez, *G.I. Jane Breaks the*
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11 *Combat Barrier*, N.Y. Times, Aug. 16, 2009, at A1.
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15 Moreover, as more and more members of the military concluded that “[a]ssertions
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17 that women do not possess the leadership capability or that they will destroy unit cohesion are
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19 overbroad generalizations, and are disproved by the actual successful combat performance of
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21 mixed-gender combat support units,” Maj. Jeffrey S. Dietz, *Breaking the Ground Barrier: Equal*
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23 *Protection Analysis of the U.S. Military’s Direct Ground Combat Exclusion of Women*, 207 Mil.
24
25 L. Rev. 86, 113 (2011), the military ultimately changed its position, first rescinding the rule that
26
27 restricted women from serving in combat units in 2013, and then officially opening all combat
28
29 roles to women by late 2015, see Matthew Rosenberg & Dave Phillips, *Pentagon Opens All*
30
31 *Combat Roles to Women: ‘No Exceptions’*, N.Y. Times, Dec. 4, 2015, at A1. In the short time
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33 since that policy change took effect, there have been no reports of any negative impact on the
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35 military’s effectiveness or unit cohesion.
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40 In sum, the government’s claim that allowing transgender people to serve openly will
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42 cause a disruption to unit cohesion and military effectiveness is nothing new. Time and again,
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44 these arguments have been trotted out to justify treating other groups of service members
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46 unequally, whether racial minorities, gay men and lesbians, or women, and each time the
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48 purported fears have proven to be unfounded, based on some combination of misunderstanding,
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1 prejudice, or stereotypes. As the next section shows, there is no more basis for these claims now
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3 than there was in the past.
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5 **III. LIKE PRIOR DISCRIMINATION BY THE MILITARY, A BAN ON OPEN**
6 **SERVICE BY TRANSGENDER SERVICE MEMBERS IS NOT RATIONALLY**
7 **RELATED TO ANY LEGITIMATE GOVERNMENT INTEREST.**
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10 Even under “the most deferential of standards,” *Romer*, 517 U.S. at 632, there must be “a
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12 rational relationship between the disparity of treatment and some legitimate governmental
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14 purpose,” *Heller*, 509 U.S. at 320. The government’s ban on transgender service members fails
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16 this test.
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19 To start, as this court previously noted, “all of the reasons proffered by the President for
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21 excluding transgender individuals from the military [are] not merely unsupported, but [are]
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23 actually *contradicted* by the studies, conclusions, and judgment of the military itself.” Dkt. No.
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25 103 at 16 (quoting *Doe I v. Trump*, No. 17-1597, 2017 WL 4873042, at *30 (D.D.C. Oct. 30,
26
27 2017) (alterations in original)). Indeed, the results of the military-commissioned RAND study
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29 released in 2016 put to rest any notion that allowing open service by transgender people would
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31 affect unit cohesion or military effectiveness. *See* Agnes Gereben Schaefer et al., RAND Nat’l
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33 Def. Research Inst., *Assessing the Implications of Allowing Transgender Personnel To Serve*
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35 *Openly* (2016). With regard to unit cohesion, the study considered the experiences of foreign
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37 militaries that allowed transgender people to serve openly, and concluded that in those countries,
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39 “there [was] no significant effect of openly serving transgender service members on cohesion,
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41 operational effectiveness, or readiness.” *Id.* at 44. For instance, in the United Kingdom,
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43 commanders “found no effect on cohesion.” *Id.* at 45. Likewise, in Canada, an extensive review
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45 “found no evidence of any effect on operational effectiveness or readiness” and “no evidence of
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47 any effect on unit or overall cohesion.” *Id.* Though these foreign militaries noted that some
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1 service members harbored prejudices and hostility toward transgender people, “this resistance
2 was apparently short-lived.” *Id.*

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5 With regard to readiness and ability to deploy, the RAND study predicted that between
6 29 and 129 active component service members would seek gender transition-related treatment
7 each year. *Id.* at 69. The study analyzed relevant data and determined that the treatment and
8 recovery time for these service members would “represent[] 0.0015 percent of available
9 deployable labor-years across the [active component] and [selected reserve].” *Id.* at 42. Thus,
10 the study concluded that “a service member’s care would have a substantial overall impact on
11 readiness *only* if that service member worked in an especially unique military occupation, if that
12 occupation was in demand at the time of transition, and if the service member needed to be
13 available for frequent, unpredicted mobilizations.” *Id.* at 43 (emphasis added). The experience
14 of foreign militaries confirmed these findings. For instance, Israeli military commanders
15 “reported that transgender personnel perform their military duties and contribute effectively to
16 their units.” *Id.* at 45. Commanders in the United Kingdom “reported that increases in diversity
17 had led to *increases* in readiness and performance.” *Id.* at 60 (emphasis added). Moreover, the
18 study noted that continuing to prohibit transgender people from serving had its own deleterious
19 effects: “worsening mental health status, declining productivity, and other negative outcomes
20 due to lack of treatment for gender identity-related issues.” *Id.* at 46; *see* Dkt. No. 103 at 16
21 (noting that the RAND study “concluded that *prohibiting* open service would have negative
22 impacts including loss of qualified personnel, erosion of unit cohesion, and erosion of trust in
23 command”).

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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*

1 *Service Commission* (2014). That study concluded that “[w]ith few exceptions, transgender
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3 service members are deployable and medically ready. . . . [C]ross-sex hormone treatment and
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5 mental health considerations do not, in general, impede the deployability of transgender service
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7 members, and the public record includes instances in which transgender individuals deployed [as
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9 civilians] after having undergone transition.” *Id.* at 16. In short, even before the U.S. military
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11 allowed transgender persons to serve openly, there was a wealth of uncontroverted evidence that
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13 allowing transgender people to serve openly in the military would have no negative impact on
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15 unit cohesion or military effectiveness.
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19 Moreover, by the time President Trump announced that he would ban transgender people
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21 from serving, transgender service members had *already* been serving openly in the military for
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23 about a year. And experiences during that period confirmed the military’s prior conclusions:
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25 transgender people can serve openly in the military without negatively affecting the military’s
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27 performance, readiness, or cohesion. In sum, based on all of the available evidence, there is
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29 simply no “relation between the classification [President Trump] adopted and the object to be
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31 attained.” *Romer*, 517 U.S. at 632.
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35 Ignoring the RAND study’s meticulously researched conclusion that transgender
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37 individuals could serve openly without negatively affecting unit cohesion or military
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39 effectiveness, as well as the U.S. military’s experiences over the past year, the government
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41 argues that it is “reasonable for the President to have concluded that maintaining the [ban] could
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43 rationally further unit cohesion.” Dkt. No. 69 at 35. But, as this court noted, “[w]hile
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45 Defendants identify important governmental interests including military effectiveness, unit
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47 cohesion, and preservation of military resources, they fail to show that the policy prohibiting
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49 transgender individuals from serving openly is related to the achievement of those interests.”
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1 Dkt. No. 103 at 16. Indeed, the only support the government offers for this proposition are two
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3 cherry-picked sentences from the 91-page RAND study that explain the bounds of the data the
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5 authors considered—in particular, that they did not have some survey data from the U.S. military
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7 and that the evidence from foreign militaries was based on a low number of openly serving
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9 transgender people. Dkt. No. 69 at 35. However, the fact that there were some limits to the
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11 authors’ data does not mean that the overall conclusions of the study—based on reams of other
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13 evidence—are unsound. And although the government tries to quibble around the edges of the
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15 military-commissioned RAND study, it fails to offer any *affirmative* evidence to support its
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17 conclusion that transgender service members would affect unit cohesion. *See Doe I*, 2017 WL
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19 4873042, at *29 (noting the “absence of any prior studies or evaluations supporting the
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21 [government’s] proffered justifications”). Even in the realm of military policy, the President’s
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23 decisions cannot be based on no evidence at all.

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28 Tellingly, President Trump made the decision to ban transgender service members
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30 without consulting the Pentagon or any relevant experts. *See* Dkt. No. 103 at 18 (noting that the
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32 ban was announced “abruptly and without any evidence of considered reason or deliberation”);
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34 *Doe I*, 2017 WL 4873042, at *30 (noting that the President acted “without any of the formality
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36 or deliberative processes that generally accompany the development and announcement of major
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38 policy changes that will gravely affect the lives of many Americans”). Defense Secretary Mattis
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40 was on vacation and was given one day’s notice before the President announced the military’s
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42 new policy via Twitter. *See* Julie Hirschfeld Davis & Helene Cooper, *supra*. Moreover, the
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44 White House and Department of Defense lawyers who did have some knowledge of the
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46 impending policy change reportedly warned the President of “the ramifications of the policy”
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48 and “how military officials would respond.” Josh Dawsey, *John Kelly’s Big Challenge:*
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1 *Controlling the Tweeter in Chief*, Politico (Aug. 4, 2017),

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3 <https://www.politico.com/story/2017/08/04/trump-john-kelly-challenge-twitter-241343>.

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5 In sum, President Trump’s ban “impos[es] a broad and undifferentiated disability on a
6 single named group,” *Romer*, 517 U.S. at 632—transgender service members—and no legitimate
7 government interests support that policy decision. The Due Process Clause of the Fifth
8 Amendment does not permit this sort of unsupported discrimination. The Constitution requires
9 the government to provide at least some reasonable “link between classification and objective” to
10 “give[] substance to the . . . Clause,” *id.*, and the government has failed to do that here. For that
11 reason, the ban cannot stand.
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21 **CONCLUSION**

22 For the foregoing reasons, the plaintiffs’ motions for summary judgment should be
23 granted.
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3 DATED this 31st day of January, 2018.
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6 Respectfully submitted,
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10 **Constitutional Accountability Center**

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13 By: s/ David H. Gans

14 By: s/ Ashwin Phatak

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17 Brianne J. Gorod (*pro hac vice application pending)

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on January 31, 2018, I electronically filed the foregoing BRIEF OF *AMICUS CURIAE* CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorneys of record.

DATED this 31st day of January, 2018

/s/ Erin J. Weinkauf

Erin J. Weinkauf
Legal Secretary

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THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-01297-MJP

[PROPOSED] ORDER GRANTING
AGREED MOTION FOR LEAVE TO FILE
BRIEF OF *AMICUS CURIAE*
CONSTITUTIONAL ACCOUNTABILITY
CENTER IN SUPPORT OF PLAINTIFFS'
MOTIONS FOR SUMMARY JUDGMENT

**NOTED FOR HEARING: January 31,
2018**

THIS MATTER came before the Court on the Agreed Motion for Leave to File Brief of *Amicus curiae* Constitutional Accountability Center's in Support of Plaintiffs' Motions for Summary Judgment. Having considered the Motion, and all relevant evidence and authorities, it is hereby:

ORDERED that the motion is GRANTED.

ENTERED this _____ day of _____, 2018.

The Honorable Marsha J. Pechman
United States District Court Judge

1
2 Presented by:
3
4

5
6 **Constitutional Accountability Center**

7 By: s/ Elizabeth B. Wydra

8 By: s/ Brianne J. Gorod

9 By: s/ David H. Gans

10 By: s/ Ashwin Phatak

11 Elizabeth B. Wydra (*pro hac vice application pending)

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on January 31, 2018, I electronically filed the foregoing [PROPOSED] ORDER GRANTING AGREED MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorneys of record.

DATED this 31st day of January, 2018

/s/ Erin J. Weinkauf

Erin J. Weinkauf
Legal Secretary

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