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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.

Case No. 2:17-cv-01297-MJP

**AGREED MOTION OF LEGAL VOICE
AS AMICUS CURIAE FOR LEAVE TO
FILE AMICUS BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

**NOTED ON MOTION CALENDAR:
FEBRUARY 1, 2018**

Proposed amicus Legal Voice respectfully moves the Court for leave to file an amicus curiae brief in support of Plaintiffs' Motion for Summary Judgment (Dkt. No. 129). A copy of the brief is attached as Exhibit A to this motion. All parties consent to the filing of the amicus brief.

I. IDENTITY AND INTERESTS OF AMICUS CURIAE

Legal Voice, founded in 1978 as the Northwest Women's Law Center, is a regional non-profit public interest organization based in Seattle that works to advance the legal rights of women in the five Northwest states (Washington, Oregon, Idaho, Montana, and Alaska) through litigation, legislative advocacy, and education. Since its founding, Legal Voice has worked to eliminate all forms of sex discrimination and frequently appears as counsel and as *amicus curiae* in courts throughout the Northwest and the United States. Because discrimination based on

1 sexual orientation or gender identity is at minimum a form of sex discrimination, Legal Voice
2 has a long history of advocacy on behalf of lesbians, gay men, bisexuals, and transgender people.
3 Legal Voice has substantial expertise in constitutional issues related to equal protection of the
4 laws, including with respect to discrimination based on sex, sexual orientation, gender identity,
5 and gender stereotypes. Legal Voice's expertise bears directly on the issues before the Court in
6 this case. Legal Voice therefore requests that this Court grant its motion for leave to appear as
7 amicus curiae and accept for filing its brief.

8 **II. DISTRICT COURTS HAVE THE INHERENT AUTHORITY TO ACCEPT** 9 **AMICUS BRIEFS**

10 The Court has broad discretion to permit a non-party to participate in an action as amicus
11 curiae. *See Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds*
12 *by Sandin v. Connor*, 515 U.S. 472 (1995) (“The district court has broad discretion to appoint
13 amici curiae.”); *In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1249 n.34 (11th Cir.
14 2006) (“[D]istrict courts possess the inherent authority to appoint ‘friends of the court’ to assist
15 in their proceedings.”). “District courts may consider amicus briefs from non-parties ‘concerning
16 legal issues that have potential ramifications beyond the parties directly involved or if the amicus
17 has ‘unique information or perspective that can help the court beyond the help that the lawyers
18 for the parties are able to provide.’” *Skokomish Indian Tribe v. Goldmark*, No. C13-5071JLR,
19 2013 WL 5720053, at *1 (W.D. Wash. Oct. 21, 2013) (citation omitted). Participation as amicus
20 curiae is particularly appropriate when courts consider issues of public interest. *See Liberty Res.,*
21 *Inc. v. Phil. Hous. Auth.*, 395 F. Supp. 2d 206, 209 (E.D. Pa. 2005) (“Courts have found the
22 participation of an amicus especially proper . . . where an issue of general public interest is at
23 stake.”); *Russell v. Bd. of Plumbing Examiners of Cty. of Westchester*, 74 F. Supp. 2d 349, 351
24 (S.D.N.Y. 1999) (“The primary role of the *amicus* is to assist the Court in reaching the right
25 decision in a case affected with the interest of the general public.”).
26

1 **III. THE PROPOSED BRIEF PROVIDES SUPPLEMENTAL ANALYSIS OF**
2 **TRANSGENDER INDIVIDUALS' EQUAL PROTECTION RIGHTS**

3 Plaintiffs challenge the constitutionality of the policy excluding openly transgender
4 individuals from military service under the Fifth Amendment's Equal Protection Clause, the Due
5 Process clause, and the First Amendment. This Court's order, which granted Plaintiffs'
6 preliminary injunction, determined that the policy was subject to intermediate scrutiny because
7 the policy distinguishes on the basis of transgender status. (Dkt. No. 103.) The attached amicus
8 brief further explains why discrimination against transgender people is suspect, warranting strict
9 scrutiny, and why discrimination against transgender individuals is independently sex-based
10 discrimination requiring an "exceedingly persuasive justification" for the classification. *See*
11 *United States v. Virginia*, 518 U.S. 515, 524 (1996). Legal Voice's advocacy and litigation
12 experience regarding equal protection and sex discrimination issues offers a unique perspective
13 that can aid this Court. *See Skokomish Indian Tribe*, 2013 WL 5720053, at *2. And the question
14 of whether transgender individuals should be barred from military service solely based on their
15 transgender status is a significant issue of general public interest. *See Liberty Res.*, 395 F. Supp.
16 2d at 209.

17 No local rules govern when an amicus curiae must file a motion for leave to file a
18 proposed brief. As such, Legal Voice has adhered to the Federal Rules of Appellate Procedure in
19 this case by filing its motion and proposed amicus brief no later than seven days after Plaintiffs
20 filed their principal brief. *See Fed. R. App. 29(a)(6)*.

21 **IV. CONCLUSION**

22 Legal Voice respectfully requests that the Court grant this motion for leave to file the
23 attached amicus curiae brief.
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DATED: February 1, 2018

Respectfully submitted,

/s/ Amanda J. Beane

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**Pro Hac Vice Forthcoming*

Counsel for Amicus Curiae Legal Voice

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2018, I electronically filed the foregoing (1) Motion for Leave to File Amicus Brief (with the proposed Amicus Brief as an attached exhibit); and (2) Proposed Order Granting Leave to File Amicus Brief, with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all of the registered CM/ECF users for this case.

I hereby declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED this 1st day of February, 2018.

/s/ Lauren Watts Staniar
Lauren Watts Staniar, WSBA No. 48741

Exhibit A

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THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
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RYAN KARNOSKI, et al.,

Plaintiffs,

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DONALD J. TRUMP, et al.,

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Case No. 2:17-cv-01297-MJP

**BRIEF OF AMICUS CURIAE LEGAL
VOICE IN SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT**

1 In the summer of 2016, then-Secretary of Defense Ash Carter announced that the U.S.
2 military would lift its ban on openly transgender individuals joining and serving in the military.
3 Carter explained: “We’re talking about talented Americans who are serving with distinction or
4 who want the opportunity to serve. We can’t allow barriers unrelated to a person’s qualifications
5 prevent us from recruiting and retaining those who can best accomplish the mission.” Marina
6 Koren, *The U.S. Military’s Welcome for Transgender Troops*, The Atlantic (June 30, 2016),
7 <https://www.theatlantic.com/news/archive/2016/06/transgender-military/489584/>. A year later,
8 the Trump Administration swiftly reversed course in a series of tweets (followed by a
9 memorandum) and banned transgender people from military service solely based on their
10 transgender status.

11 In granting Plaintiffs’ motion for a preliminary injunction, this Court recognized that the
12 Transgender Military Ban is subject to heightened equal protection scrutiny because
13 “transgender status [is] a quasi-suspect classification.” (Dkt. 103, at 15.) In considering the
14 pending motion for summary judgment, amicus urge the Court to expand its analysis and hold
15 that discrimination against transgender people meets the criteria of a “suspect” classification,
16 which requires strict scrutiny. Although the Ban also fails under intermediate scrutiny because it
17 discriminates based on sex, this Court should hold that attacks like this are the worst form of
18 unconstitutional discrimination and subject such discrimination to the highest level of review.

19 **I. PRELIMINARY STATEMENT OF AMICUS CURIAE**

20 Legal Voice submits this brief as amicus curiae in support of Plaintiffs’ Motion for
21 Summary Judgment. Legal Voice is a non-profit public interest organization based in Seattle that
22 works to advance the legal rights of women through litigation, legislation, and education. Legal
23 Voice strives to eliminate all forms of sex discrimination, and has substantial expertise in
24 constitutional issues related to equal protection of the laws, including with respect to
25 discrimination based on sex, sexual orientation, gender identity, and gender stereotypes.

1 **II. THE COURT SHOULD APPLY STRICT SCRUTINY TO THE TRANSGENDER**
2 **MILITARY BAN BECAUSE DISCRIMINATION AGAINST PEOPLE WHO ARE**
3 **TRANSGENDER IS A SUSPECT CLASSIFICATION**

4 The Equal Protection Clause “commands that no State shall ‘deny to any person within
5 its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons
6 similarly situated should be treated alike.” *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473
7 U.S. 432, 439 (1985) (quotation omitted). When a statute draws distinctions based on certain
8 suspect classifications, such as race, and quasi-suspect classifications, such as gender, “the Court
9 must apply a heightened degree of scrutiny.” *Doe 1 v. Trump*, Case No. 17-cv-1597 (CKK), 2017
10 WL 4873042, at *27 (D.D.C. Oct. 30, 2017).

11 The Supreme Court considers four factors to decide whether a classification is suspect or
12 quasi-suspect: First, the Court considers whether the class has been historically “subjected to
13 discrimination.” *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). Second, it considers whether the
14 characteristic that defines the group “frequently bears [any] relation to [group members’] ability
15 to perform or contribute to society.” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)
16 (plurality opinion). Third, it considers whether the group is “politically powerless,” *Cleburne*,
17 473 U.S. at 445, most often by assessing legislative action on the groups’ behalf, *id.* at 443–45,
18 or the groups’ representation in “institutions of self-governance,” *SmithKline Beecham Corp. v.*
19 *Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014). Fourth, courts consider whether the class
20 exhibits “obvious, immutable, or distinguishing characteristics that define them as a discrete
21 group.” *Lyng*, 477 U.S. at 638. “[N]o one factor is dispositive.” *Pedersen v. OPM*, 881 F. Supp.
22 2d 294, 311 (D. Conn. 2012). Here, however, each factor militates in favor of recognizing
23 transgender status as a suspect classification.

24 **A. Transgender individuals have experienced a long history of discrimination.**

25 “The hostility and discrimination that transgender individuals face in our society today is
26 well-documented,” *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014), and includes
horrifying levels of violence. Respondents to the 2015 Report of the United States Transgender

1 Survey “reported high levels of mistreatment, harassment, and violence in every aspect of life,”
2 and that they were physically assaulted because of their identity. Sandy E. James, et al., *The*
3 *Report of the 2015 U.S. Transgender Survey* 4, 197 (Dec. 2016) (hereinafter “2015 Transgender
4 Survey Report”). Forty-eight percent “of all respondents in the sample reported being denied
5 equal treatment, verbally harassed, and/or physically attacked in the past year because of being
6 transgender,” and “[n]early half (47%) of respondents have been sexually assaulted at some point
7 in their lifetime.” *Id.* at 198. Since 2013, “[a]t least 74 transgender people were victims of fatal
8 violence,” and “it is generally estimated that transgender women face 4.3 times the risk of
9 becoming homicide victims than the general population.” Human Rights Campaign & Trans
10 People of Color Coalition, *A Matter of Life & Death: Fatal Violence Against Transgender*
11 *People in American 2016* 30 (2016) (emphasis in original).

12 This discrimination impacts transgender people at every turn—at home, in school, at the
13 work place, and when seeking housing or healthcare. One in ten respondents to the 2015
14 Transgender Survey who were out to their immediate family “reported that an immediate family
15 member was violent towards them because they were transgender,” and 15% “ran away from
16 home and/or were kicked out of the house because they were transgender.” 2015 Transgender
17 Survey Report at 65. Before the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct.
18 2584 (2015), courts routinely voided the marriages of transgender people based on their
19 transgender status. *See, e.g., In re Estate of Gardiner*, 42 P.3d 120, 137 (Kan. 2002) (voiding a
20 marriage between a transgender woman and her husband). And courts have publicly questioned
21 transgender people’s ability to parent children, in some cases stripping them of their parental
22 rights. *See, e.g., M.B. v. D.W.*, 236 S.W.3d 31, 36 (Ky. Ct. App. 2007) (terminating the parental
23 rights of a transgender parent based on alleged harm to children caused by failing to “adequately
24 prepare” them for parent’s gender transition).

25 At school, “[m]ore than three quarters (77%) of respondents who were out or perceived
26 as transgender in K–12 had one or more negative experiences, such as being verbally harassed,

1 prohibited from dressing according to their gender identity, or physically or sexually assaulted.”
2 2015 Transgender Survey Report at 131. At work, “[t]hirty percent (30%) of respondents who
3 had a job in the past year reported being fired, denied a promotion, or experiencing some other
4 form of mistreatment in the workplace related to their gender identity or expression, such as
5 being harassed or attacked.” *Id.* at 148. In housing and healthcare, “one in eight [respondents] . . .
6 experienced homelessness in the past year because of being transgender,” *id.* at 176, “[n]early
7 one-quarter (23%) of respondents experienced some form of housing discrimination in the past
8 year,” *id.*, and one-third of respondents “who had seen a health care provider in the past year
9 reported having at least one negative experience relating to being transgender,” *id.* at 93.

10 Courts consistently recognize that transgender individuals experience pervasive
11 discrimination. In *Adkins v. City of New York*, 143 F. Supp. 3d 134 (S.D.N.Y. 2015), the Court
12 recognized that “transgender people report high rates of discrimination in education,
13 employment, housing, and access to healthcare” before concluding that transgender people are a
14 quasi-suspect class. *Id.* at 139, 140; *see also Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 n.8
15 (N.D. Cal. 2015) (finding that transgender people “have experienced even greater levels of
16 societal discrimination and marginalization” than gay and lesbian people). According to the
17 Seventh Circuit, “[t]here is no denying that transgender individuals face discrimination,
18 harassment, and violence because of their gender identity.” *Whitaker ex rel. Whitaker v. Kenosha*
19 *Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (school district’s
20 requirement that transgender student use bathroom according to his birth certificate violated Title
21 IX); *see also Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp.
22 3d 850, 857 (S.D. Ohio 2016) (recounting the bullying a fourth grade transgender girl suffered at
23 the hands of teachers and other students). In *Brocksmith*, an assault case where the victim was
24 transgender, the Court discussed the victim’s disincentive to contact the police after the assault
25 “for fear of discrimination and exposure” based on her transgender status. 99 A.3d at 692; *see*
26

1 *also id.* at 698 (recognizing the “jury’s common-sense knowledge that transgender individuals
2 face hostility and discrimination in our society.”).

3 **B. There is no relationship between transgender status and the ability to**
4 **perform in society.**

5 “[T]here is obviously no relationship between transgender status and the ability to
6 contribute to society.” *Highland*, 208 F. Supp. 3d at 874; *see also Norsworthy*, 87 F. Supp. 3d at
7 1119 n.8 (“[Transgender] identity is . . . irrelevant to [a person’s] ability to contribute to
8 society.”); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017)
9 (“Plaintiffs [transgender students] are in all respects productive, engaged, contributing members
10 of the student body at the High School.”). As courts frequently recognize, no “data or argument
11 suggest[s] that a transgender person, simply by virtue of transgender status, is any less
12 productive than any other member of society.” *Adkins*, 143 F. Supp. 3d at 139. Because being
13 transgender is entirely irrelevant to one’s ability to contribute to society, laws that classify based
14 on transgender status “are deemed to reflect prejudice and antipathy—a view that those in the
15 burdened class are not as worthy or deserving of others,” and should be subject to strict scrutiny
16 review. *See Cleburne*, 473 U.S. at 440 (explaining why classifications based on race, alienage,
17 and national origin are subject to strict scrutiny).

18 **C. The transgender community is a politically powerless minority.**

19 The question for purposes of the equal protection analysis is not whether transgender
20 individuals have achieved political success; rather, “[t]he question is whether they have the
21 strength to politically protect themselves from wrongful discrimination.” *Windsor v. United*
22 *States*, 699 F.3d 169, 184 (2d Cir. 2012), *aff’d*, 570 U.S. 744 (2013). They do not. Fewer than
23 half of the fifty states have laws that explicitly prohibit discrimination against transgender people
24 even when, as explained, that discrimination is rampant. *See Am. Civil Liberties Union,*
25 *Transgender People & the Law* (last visited Jan. 31, 2018), [https://www.aclu.org/know-your-](https://www.aclu.org/know-your-rights/transgender-people-and-law)
26 [rights/transgender-people-and-law](https://www.aclu.org/know-your-rights/transgender-people-and-law). Federal law affords spotty explicit protections for

1 transgender individuals, and recent actions by the Trump Administration call those limited
2 protections into question. *See, e.g.*, Press Release, U.S. Dep’t of Health & Human Servs., *HHS*
3 *Announces New Conscience & Religious Freedom Division* (Jan. 18, 2018) (announcing division
4 that will permit discrimination against LGBT individuals by healthcare providers); Letter from
5 Sandra Battle, Acting Assistant Secretary for Civil Rights, U.S. Dep’t of Educ., and T.E.
6 Wheeler, II, Acting Assistant Attorney General for Civil Rights, U.S. Dep’t of Educ., to
7 Colleague (Feb. 22, 2017), [https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-](https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf)
8 [title-ix.pdf](https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf) (withdrawing Obama-era guidance providing for protection under Title IX for
9 transgender students in public schools); *see also* Lena H. Sun & Juliet Eilperin, *CDC gets list of*
10 *forbidden words: Fetus, transgender, diversity*, Wash. Post (Dec. 5, 2017),
11 [https://www.washingtonpost.com/national/health-science/cdc-gets-list-of-forbidden-words-fetus-](https://www.washingtonpost.com/national/health-science/cdc-gets-list-of-forbidden-words-fetus-transgender-diversity/2017/12/15/f503837a-e1cf-11e7-89e8-edec16379010_story.html?utm_)
12 [transgender-diversity/2017/12/15/f503837a-e1cf-11e7-89e8-edec16379010_story.html?utm_](https://www.washingtonpost.com/national/health-science/cdc-gets-list-of-forbidden-words-fetus-transgender-diversity/2017/12/15/f503837a-e1cf-11e7-89e8-edec16379010_story.html?utm_)
13 [term=.c37080b54956](https://www.washingtonpost.com/national/health-science/cdc-gets-list-of-forbidden-words-fetus-transgender-diversity/2017/12/15/f503837a-e1cf-11e7-89e8-edec16379010_story.html?utm_) (reporting that the Trump administration prohibits officials at the CDC
14 from using word ‘transgender’); National Ctr. for Transgender Equality, *The Discrimination*
15 *Administration* (last accessed Jan. 31, 2018), [https://transequality.org/the-discrimination-](https://transequality.org/the-discrimination-administration)
16 [administration](https://transequality.org/the-discrimination-administration) (documenting Trump Administration’s record of action against transgender
17 people). Across the country, bills have been introduced in state legislatures seeking to ban
18 transgender people from using the bathroom that is consistent with their gender identity. National
19 Conference of State Legislatures, *“Bathroom Bill” Legislative Tracking* (July 28, 2017),
20 <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>
21 (noting that seven state legislatures will consider “bathroom bills” in the 2018 session). “The
22 efforts of states to pass legislation requiring individuals to use sex-segregated bathrooms that
23 correspond with their birth sex are but one example of the relative political powerlessness of this
24 group.” *Highland*, 208 F. Supp. 3d at 874.

25 The group’s political powerlessness is also reflected in its underrepresentation in
26 “institutions of self-governance.” *SmithKline*, 740 F.3d at 484. There are no openly “transgender
BRIEF OF AMICUS CURIAE LEGAL VOICE – 6
No. 2:17-cv-01297-MJP

1 members of the United States Congress or the federal judiciary.” *Adkins*, 143 F. Supp. 3d at 140;
2 *see also* Courtney A. Powers, *Finding LGBT a Suspect Class: Assessing the Political Power of*
3 *LGBTs as a Basis for the Court’s Application of Heightened Scrutiny*, 17 Duke J. Gender L. &
4 Pol’y 385, 391–93 (2010) (LGBT individuals are politically powerless in part because of their
5 underrepresentation in federal political bodies). Only one out of more than 7,000 state legislators
6 is openly transgender, and there are fewer than ten transgender individuals openly serving in the
7 many thousands of local elected positions around the country. Marwa Eltagouri, *Transgender*
8 *people have been elected before. But they can finally let the voters know.*, Wash. Post. (Nov. 9,
9 2017), [https://www.washingtonpost.com/news/retropolis/wp/2017/11/08/transgender-people-](https://www.washingtonpost.com/news/retropolis/wp/2017/11/08/transgender-people-have-been-elected-before-but-they-can-finally-let-the-voters-know/?utm_term=.16fb12d31916)
10 [have-been-elected-before-but-they-can-finally-let-the-voters-know/?utm_term=.16fb12d31916](https://www.washingtonpost.com/news/retropolis/wp/2017/11/08/transgender-people-have-been-elected-before-but-they-can-finally-let-the-voters-know/?utm_term=.16fb12d31916);
11 *see generally Windsor*, 699 F.3d at 184 (minor political gain does not cure history of
12 underrepresentation).

13 **D. Being transgender is a core part of one’s identity.**

14 Immutability—in the sense of a characteristic unable to be hidden or changed—is not a
15 necessary element of the suspect class analysis. *See Cleburne*, 473 U.S. at 442 n.10 (“[T]here’s
16 not much left of the immutability theory, is there?”). “Classifications based on alienage,
17 illegitimacy, and national origin are all subject to heightened scrutiny, even though those
18 characteristics do not declare themselves, and often may be disclosed or suppressed as a matter
19 of preference.” *Windsor*, 699 F.3d at 183 (citations omitted). It is therefore “clear that by
20 ‘immutability’ the Court has never meant strict immutability At a minimum, then, the
21 Supreme Court is willing to treat a trait as effectively immutable if changing it would involve
22 great difficulty, such as requiring a major physical change or a traumatic change of identity.”
23 *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring).
24 Transgender people easily meet this standard. Transgender people’s gender identity is “inherent
25 in who they are as people.” *Evancho*, 237 F. Supp. 3d at 288. “A person is defined as transgender
26 precisely because of the perception that his or her behavior transgresses gender stereotypes.”

1 *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011). Transgender people thus “have
2 ‘immutable [and] distinguishing characteristics that define them as a discrete group.’” *Highland*,
3 208 F. Supp. 3d at 874 (alteration in original).

4 Although the Ninth Circuit has not considered whether being transgender is an immutable
5 characteristic in the context of an equal protection claim, it has held, in the immigration context,
6 that gender identity is immutable. See *Hernandez-Montiel v. Immigration & Naturalization*
7 *Serv.*, 225 F.3d 1084, 1087 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*,
8 409 F.3d 1177 (9th Cir. 2005) (en banc). The asylum petitioner in *Hernandez-Montiel* was a
9 transgender woman from Mexico. *Id.* at 1087. The Board of Immigration Appeals (“BIA”)
10 denied her asylum claim because she “failed to show that ‘[her] decision to dress as female was
11 an immutable characteristic,’” *id.* at 1090, and, as a consequence, that the persecution she
12 suffered was on account of her membership in a “particular social group,” 8 U.S.C.
13 § 1101(a)(42) (defining refugee); *Henrique-Rivas v. Holder*, 707 F.3d 1081, 1084 (9th Cir. 2013)
14 (en banc) (defining particular social group). The Ninth Circuit reversed. In granting petitioner’s
15 asylum claim, it held that “[s]exual orientation and sexual identity”—including one’s identity as
16 transgender—“are immutable; they are so fundamental to one’s identity that a person should not
17 be required to abandon them.” 225 F.3d at 1093. Whether as part of an asylum claim or an equal
18 protection case, one’s gender identity, is “inherent to one’s very identity as a person,” *id.*, and is
19 thus “immutable,” *Watkins*, 875 F.2d at 726.

20 **E. Other courts’ reasoning supports a suspect class determination.**

21 Applying these four factors, courts around the country have held that at a minimum,
22 transgender people meet the criteria for a quasi-suspect classification requiring heightened
23 scrutiny. See *Doe I*, 2017 WL 4873042, at *27–28 (in a parallel case challenging the
24 Transgender Military Ban, holding that transgender people appear “at least” to satisfy the criteria
25 of a quasi-suspect classification); *Evancho*, 237 F. Supp. 3d at 288 (against the backdrop set
26 forth in *Cleburne*, holding that “an intermediate standard of Equal Protection review applies in

1 this case” involving a school district’s classification of transgender students); *Highland*, 208 F.
2 Supp. 3d at 873 (“The Court agrees with the analysis of *Adkins* and largely incorporates it
3 here.”); *Adkins*, 143 F. Supp. 3d at 140 (“[T]he Court concludes that transgender people are a
4 quasi-suspect class.”). And in the context of discrimination based on sexual orientation, the
5 Ninth Circuit has held that the Supreme Court’s decision *United States v. Windsor*, 133 S. Ct.
6 2675 (2013), “requires that heightened scrutiny be applied to equal protection claims involving
7 sexual orientation.” *SmithKline*, 740 F.3d at 481; *see also id.* at 484 (“[T]here can no longer be
8 any question that gays and lesbians are no longer a ‘group or class of individuals normally
9 subject to ‘rational basis review.’”).

10 The analysis in these cases equally supports a determination that transgender status meets
11 the criteria for a suspect classification, which triggers strict scrutiny. The courts considering
12 whether laws that classify transgender people warrant heightened scrutiny reviewed the four
13 factors that apply to both suspect and quasi-suspect class analysis and found that all four factors
14 were satisfied. Although none of the courts reached the question of whether classifications based
15 on transgender status are suspect (rather than quasi-suspect), they plainly could have done so
16 based on their analysis. In particular, because whether someone is transgender is “so seldom
17 relevant to the achievement of any legitimate state interest that laws grounded in [this]
18 consideration are deemed to reflect prejudice and antipathy,” application of strict scrutiny rather
19 than intermediate scrutiny is appropriate. *See Cleburne*, 473 U.S. at 440; *see also* Erwin
20 Chemerinsky, *Constitutional Law Principles & Policies* 688–89 (4th ed. 2011) (explaining the
21 difference between suspect and quasi-suspect classifications). As a result, amicus urge the Court
22 to reach the issue and to hold that discrimination based on transgender status meets the criteria
23 for a suspect classification and requires strict scrutiny. This Court should not tolerate “the
24 imposition of a second-class status on [transgender people]” stemming from the government’s
25 “identification of such a class by the law for a separate and lesser public status that ‘makes them
26 unequal.’” *SmithKline*, 740 F.3d at 482 (quoting *Windsor*, 133 S. Ct. at 2694)).

BRIEF OF AMICUS CURIAE LEGAL VOICE – 9
No. 2:17-cv-01297-MJP

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1 III. THE BAN ALSO DISCRIMINATES BASED ON SEX

2 Independently, the Court may apply heightened scrutiny to the Ban because it
3 discriminates based on sex in two ways: the Ban is premised on perceived nonconformity to
4 gender stereotypes, and it treats individuals differently based on their gender identity and/or
5 transition.

6 First, the Ban targets transgender service members and aspiring service members because
7 they do not conform to the gender stereotypes associated with their assigned sex at birth. This is
8 sex discrimination: there is “a congruence” between discrimination against transgender
9 individuals and “discrimination on the basis of gender-based behavioral norms.” *Glenn*, 663 F.3d
10 at 1316. This is because “[a] person is defined as transgender precisely because of the perception
11 that his or her behavior transgresses gender stereotypes.” *Id.*; *see also Whitaker*, 858 F.3d at
12 1048 (“By definition, a transgender individual does not conform to the sex-based stereotypes of
13 the sex that he or she was assigned at birth.”); *Doe I*, 2017 WL 4873042, at *28 (“The defining
14 characteristic of a transgender individual is that their inward identity, behavior, and possibly
15 their physical characteristics, do not conform to stereotypes of how an individual of their
16 assigned sex should feel, act and look.”).

17 The Supreme Court, in holding that Title VII barred discrimination based on gender
18 stereotyping, explained that Title VII prohibits both discrimination based on the fact that the
19 plaintiff was a woman and discrimination based on the fact that she did not conform to socially-
20 constructed gender expectations. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“[W]e
21 are beyond the day when an employer could evaluate employees by assuming or insisting that
22 they matched the stereotype associated with their group.”) (plurality); *id.* at 258–61 (White, J.,
23 concurring); *id.* at 272–73 (O’Connor, J., concurring). In *Price Waterhouse*, the Court considered
24 a senior manager’s claim that she was denied partnership at a firm based on negative reactions to
25 her personality because she was a woman. *Id.* at 235. Some partners had described her as
26 “macho,” that she “overcompensated for being a woman,” and suggested she could improve her

1 chances for partnership if she would “walk more femininely, talk more femininely, dress more
2 femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.* The Court made clear that
3 discrimination based on a person’s failure to conform to socially prescribed gender stereotypes is
4 sex-based discrimination. *See id.* at 250–51.

5 Numerous appellate courts, applying *Price Waterhouse*, have held that discrimination
6 against transgender individuals based on a perceived failure to conform to gender stereotypes is
7 unlawful sex discrimination under various statutes and the Equal Protection Clause. *See, e.g.,*
8 *Glenn*, 663 F.3d at 1320 (“[A] government agent violates the Equal Protection Clause’s
9 prohibition of sex-based discrimination when he or she fires a transgender or transsexual
10 employee because of his or her gender non-conformity.”); *Smith v. City of Salem, Ohio*, 378 F.3d
11 566, 572 (6th Cir. 2004) (transgender plaintiff sufficiently pleaded Title VII and Equal
12 Protections claims premised on the “failure to conform to sex stereotypes by expressing less
13 masculine, and more feminine mannerisms and appearance”); *Schwenk v. Hartford*, 204 F.3d
14 1187, 1202 (9th Cir. 2004) (“[d]iscrimination because one fails to act in the way expected of a
15 man or a woman” is barred by Title VII, and encompasses instances in which “the perpetrator’s
16 actions stem from the fact that he believed that the victim was a man who ‘failed to act like’
17 one,” and applying this reasoning to the Gender Motivated Violence Act); *Rosa v. Park W. Bank*
18 *& Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000) (plaintiff adequately stated an Equal Credit
19 Opportunity Act claim where he alleged that a loan officer turned him away because his attire
20 “did not accord with his male gender”). District courts within this circuit are in accord. *See, e.g.,*
21 *Norsworthy*, 87 F. Supp. 3d at 1119; *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001,
22 1005 (D. Nev. 2016).

23 Likewise, the government may not exclude transgender service members and aspiring
24 service members from serving because “of [their] perceived gender-nonconformity.” *Glenn*, 663
25 F.3d at 1319. Heightened scrutiny under the Equal Protection Clause should be applied to the
26 Ban because discrimination based on gender stereotypes is a form of sex-based discrimination.

1 Second, the Ban discriminates against individuals based on gender identity and gender
2 transition, which are per se forms of sex discrimination. As the Ninth Circuit explained in
3 *Schwenk*, gender refers to “an individual’s sexual identity” or “socially-constructed
4 characteristics” and discrimination based on sex encompasses both sex and gender. *Schwenk*, 204
5 F.3d at 1201–02. Discrimination against a transgender person—whose gender identity does not
6 match the sex assigned at birth—is sex discrimination. See *Fabian v. Hosp. of Cent. Conn.*, 172
7 F. Supp. 3d 509, 525–26 (D. Conn. 2016); *Macy v. Holder*, No. 0120120821, 2012 WL 1435995,
8 at *11 (E.E.O.C. Apr. 20, 2012) (explaining that discrimination against a transgender individual
9 because that person is transgender is, by definition, discrimination based on sex). It also follows
10 that discrimination against an individual who intends to or has transitioned “legally, culturally,
11 and physically” from the sex that person was assigned at birth is also necessarily based on sex.
12 See *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008) (analogizing to a religious
13 convert, explaining that an employer who “harbors no bias toward either Christians or Jews but
14 only ‘converts’” still discriminates based on religion).

15 The Ban discriminates based on sex—triggering heightened review—because it
16 discriminates against transgender individuals based on (1) their perceived failure to conform to
17 gender stereotypes, and (2) their gender identity and gender transition, which necessarily are
18 components of sex.

19 **IV. CONCLUSION**

20 The Ban discriminates against service members and aspiring service members solely
21 because they are transgender. Because discrimination against transgender people meets the
22 criteria for a suspect classification, it should be subject to strict scrutiny. Independently, the Ban
23 plainly constitutes sex discrimination and is subject to intermediate scrutiny for that reason. At a
24 time when transgender people are facing discrimination at the highest level of government,
25 amicus urge the Court to hold that the Ban is subject to strict scrutiny and grant summary
26 judgment in favor of Plaintiffs.

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DATED: February 1, 2018

Respectfully submitted,

/s/ Amanda J. Beane

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2018, I electronically filed the foregoing (1) Motion for Leave to File Amicus Brief (with the proposed Amicus Brief as an attached exhibit); and (2) Proposed Order Granting Leave to File Amicus Brief, with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all of the registered CM/ECF users for this case.

I hereby declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED this 1st day of February, 2018.

/s/ Lauren Watts Staniar
Lauren Watts Staniar, WSBA No. 48741

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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.

Case No. 2:17-cv-1297

**[PROPOSED] ORDER GRANTING
LEGAL VOICE’S AGREED MOTION
FOR LEAVE TO FILE AMICUS
CURIAE BRIEF**

This matter comes before the Court on proposed amici Legal Voice’s Agreed Motion for Leave to File Amicus Curiae Brief. Having been fully informed, the Court GRANTS the motion.

IT IS SO ORDERED this _____ day of February, 2018.

Marsha J. Pechman
United States District Judge

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all of the registered CM/ECF users for this case.

DATED this 1st day of February, 2018.

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