

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

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JANE DOE 2, et al.,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia, No. 1:17-cv-01597-CKK
Before the Honorable Colleen Kollar-Kotelly

**BRIEF FOR *AMICI CURIAE* NATIONAL CENTER FOR TRANSGENDER
EQUALITY AND OTHER ADVOCACY ORGANIZATIONS IN SUPPORT
OF PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for *amici curiae* certify as follows:

A. Parties and *Amici*

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

B. Rulings Under Review

References to the rulings under review appear in the Brief for Plaintiffs-Appellees.

C. Related Cases

References to related cases appear in the Brief for Plaintiffs-Appellees.

INTERESTS OF *AMICI CURIAE*

The **National Center for Transgender Equality** (“NCTE”) is a national social justice organization founded in 2003 and devoted to advancing justice, opportunity, and well-being for transgender people through education and advocacy on national issues. NCTE works with policymakers and communities around the country to develop fair and effective public policy.

FORGE, Inc. is a progressive organization whose mission is to support, educate and advocate for the rights and lives of transgender individuals and significant others, friends, family, and allies. Founded in 1994 in Milwaukee, Wisconsin, FORGE, Inc. now runs many national programs and provides technical assistance on these issues across the country.

Gender Spectrum is a national organization whose mission is to create a gender-inclusive world for all children and youth. To accomplish that, Gender Spectrum provides resources, education and training to help families, professionals, corporations and institutions understand and address matters related to gender.

The **National LGBTQ Task Force** (“Task Force”) is the nation’s oldest LGBTQ advocacy group. The Task Force works to achieve full freedom, justice, and equity for lesbian, gay, bisexual, transgender, and queer people and their

families. The Task Force trains and mobilizes activists across the Nation to combat discrimination against LGBTQ people in every aspect of their lives.

The **Southern Arizona Gender Alliance** (“SAGA”) is a grass-roots organization of transgender activists based in Tucson, Arizona. For two decades, SAGA has helped create a welcoming and supportive community for transgender and other gender nonconforming people in Southern Arizona through advocacy, community education, resource referral, and peer support.

The **Trans People of Color Coalition** (“TPOCC”) was founded in 2010 to connect people and resources on the local, state and national level to make sure that transgender and gender non-conforming people of color voices were visible, respected and at the table. TPOCC envisions a world where gender people of color can live and work in safety, where health and economic equity are basic rights, and we are celebrated for our visibility and leadership in our workplaces, homes, and communities.

Transcend Legal is a non-profit legal organization that cultivates equitable social, medical and legal recognition of transgender people by offering culturally competent, transgender-led legal representation, public policy advocacy, community empowerment, and public education. Transcend Legal focuses on ensuring that all transgender people have access to transgender-related health care.

The **Transgender Allies Group** (“TAG”) has been providing education about and advocacy for transgender citizens in Nevada since 2012. One of its efforts led to the drafting and implementation in 2015 of Washoe County School District’s Transgender and Gender Non-Conforming inclusionary policy, the first of its kind in Nevada and an example that has been shared as a model across the country. TAG has seen students thrive with acceptance and inclusion, looking forward to work and school opportunities after graduation.

The **Transgender Legal Defense & Education Fund** (“TLDEF”) is a non-profit legal organization that represents and advocates for the transgender community. TLDEF is committed to ending discrimination against transgender people, and to achieving equality for transgender people through impact litigation and education. TLDEF’s clients include transgender people of all ages, who come from diverse racial, ethnic, socio-economic, and faith backgrounds.

The **Transgender Resource Center of New Mexico** provides transgender cultural competency education all over New Mexico, individual and policy-level advocacy, and direct services for transgender individuals. Many of the people the organization serves are current or former service people who have been willing to sacrifice everything to serve the United States.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amici curiae* state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

**STATEMENT REGARDING CONSENT TO FILE AND
SEPARATE BRIEFING**

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amici curiae* represent that Plaintiffs-Appellees consented to the filing of this brief. Defendants-Appellants did not oppose the filing of the brief so long as the brief was timely filed and otherwise complied with the rules.¹

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici curiae* certify that a separate brief is necessary. This brief provides a unique presentation of the relevant authorities that should inform the level of constitutional scrutiny that should be applied when the government classifies individuals for discrimination based on transgender status. To the best of counsel's knowledge, no other brief covers the precise subject matter discussed in this brief.

¹ No party or party's counsel authored this brief in whole or in part or financially supported this brief, and no one other than *amici*, their members, or their counsel contributed money intended to fund preparing or submitting this brief. *See* FED. R. APP. P. 29. A version of this brief was previously submitted in *Quine v. Kernan*, Nos. 17-16148, 17-16212, Doc. 29 (9th Cir.), on behalf of multiple organizations, one of whom is also representing Plaintiffs-Appellees here.

TABLE OF CONTENTS

	Page
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES	i
INTERESTS OF <i>AMICI CURIAE</i>	ii
CORPORATE DISCLOSURE STATEMENT	v
STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING	vi
TABLE OF CONTENTS	vii
TABLE OF AUTHORITIES	ix
SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
I. CLASSIFICATIONS BASED ON TRANSGENDER STATUS WARRANT HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE.....	3
1. Transgender People Have Suffered a Long History of Discrimination.....	4
2. Being Transgender Has No Bearing on One’s Ability To Perform in or Contribute to Society.....	10
3. Being Transgender Is an Immutable or Distinguishing Characteristic and an Integral Part of Identity That Defines a Discrete Group.....	11
4. Transgender People Are a Small and Politically Vulnerable Minority.....	13
II. CLASSIFICATIONS BASED ON TRANSGENDER STATUS WARRANT AT LEAST INTERMEDIATE SCRUTINY BECAUSE THEY ARE SEX-BASED.....	14

CONCLUSION.....22
CERTIFICATE OF COMPLIANCE.....23
CERTIFICATE OF SERVICE24

TABLE OF AUTHORITIES

Page

CASES

<i>Adams v. Sch. Bd. of St. Johns Cty., Fla.</i> , 318 F. Supp. 3d 1293 (M.D. Fla. 2018).....	17
<i>Adkins v. City of New York</i> , 143 F. Supp. 3d 134 (S.D.N.Y. 2015)	5, 11, 13, 14
<i>Barnes v. City of Cincinnati</i> , 401 F.3d 729 (6th Cir. 2005)	16, 18
<i>Bd. of Educ. of Highland v. U.S. Dept. of Educ.</i> , 208 F. Supp. 3d 850 (S.D. Oh. 2016)	5, 10, 11, 14, 17, 20
<i>Brocksmith v. United States</i> , 99 A.3d 690 (D.C. 2014)	5
<i>Carcaño v. McCrory</i> , 203 F. Supp. 3d 615 (M.D.N.C. 2016)	8, 13, 17
<i>City of Cleburne v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985).....	3, 4
<i>Daly v. Daly</i> , 715 P.2d 56 (Nev. 1986).....	7
<i>Doe I v. Trump</i> , 275 F.Supp.3d 167 (D.D.C. 2017).....	5, 10, 11, 13, 17, 18
<i>EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.</i> , 884 F.3d 560 (6th Cir. 2018)	20
<i>Etsitty v. Utah Transit Auth.</i> , 502 F.3d 1215 (10th Cir. 2008)	19
<i>Evancho v. Pine-Richland</i> , 237 F. Supp. 3d 267 (W.D. Pa. 2017).....	5, 10, 11, 14, 17, 21,

<i>Fabian v. Hosp. of Cent. Conn.</i> , 172 F. Supp. 3d 509 (D. Conn. 2016).....	20, 21
<i>Farmer v. Brennan</i> , 511 U.S. 825 (1994).....	6
<i>Flack v. Wis. Dept. of Health Servs.</i> , No. 18-CV-309-WMC, 2018 WL 3574875 (W.D. Wis. July 25, 2018).....	5, 14, 20, 21
<i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973).....	3
<i>F.V. v. Barron</i> , 286 F. Supp. 3d 1131 (D. Idaho 2018)	14, 17, 21
<i>Glenn v. Brumby</i> , 663 F.3d 1312 (11th Cir. 2011)	16, 18, 19
<i>Grimm v. Gloucester Cty. Sch. Bd.</i> , 302 F. Supp. 3d 730 (E.D. Va. 2018)	4, 10, 17
<i>Hernandez-Montiel v. I.N.S.</i> , 225 F.3d 1084 (9th Cir. 2000)	11
<i>Hopkins v. Price Waterhouse</i> , 825 F.2d 458 (D.C. Cir. 1987).....	15
<i>In re Estate of Gardiner</i> , 42 P.3d 120 (Kan. 2002).....	7
<i>In re Marriage of Simmons</i> , 825 N.E.2d 303 (Ill. App. Ct. 2005)	7
<i>Karnoski v. Trump</i> , No. C17-1297-MJP, 2018 WL 1784464 (W.D. Wash. Apr. 13, 2018).....	12, 18
<i>Kantaros v. Kantaras</i> , 884 So. 2d 155 (Fla. Ct. App. 2004).....	7

<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003).....	1
<i>Littleton v. Prange</i> , 9 S.W.3d 223 (Tex. App. 1999).....	7
<i>Love v. Johnson</i> , 146 F. Supp. 3d 848 (E.D. Mich. 2015).....	21
<i>Lyng v. Castillo</i> , 477 U.S. 635 (1986).....	4
<i>M.A.B. v. Bd. of Educ. of Talbot Cty.</i> , 286 F. Supp. 3d 704 (D. Md. 2018).....	6, 10, 12, 17
<i>M.B. v. D.W.</i> , 236 S.W.3d 31 (Ky. Ct. App. 2007)	7
<i>Mass. Bd. of Retirees v. Murgia</i> , 427 U.S. 307 (1976).....	3
<i>Norsworthy v. Beard</i> , 87 F. Supp. 3d 1104 (N.D. Cal. 2015).....	5, 10, 11, 13, 21
<i>Nyquist v. Mauclet</i> , 432 U.S. 1 (1977).....	4
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015).....	6
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982).....	4
<i>Prescott v. Rady Children’s Hosp.-San Diego</i> , 265 F. Supp. 3d 1090 (S.D. Cal. 2017).....	13
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989).....	15, 16, 19

<i>Roberts v. Clark Cty Sch. Dist.</i> , 215 F. Supp. 3d 1001 (D. Nev. 2016).....	21
<i>Rosa v. Park W. Bank Trust Co.</i> , 214 F.3d 213 (1st Cir. 2000).....	16
<i>Schroer v. Billington</i> , 577 F. Supp. 2d 293 (D.D.C. 2008).....	16, 18, 20
<i>Schuette v. BAMN</i> , 572 U.S. 291 (2014).....	1
<i>Schwenk v Hartford</i> , 204 F.3d 1187 (9th Cir. 2000)	16, 21
<i>Smith v. Avanti</i> , 249 F. Supp. 3d. 1194 (D. Colo. 2017).....	13
<i>Smith v. City of Salem</i> , 378 F.3d 566 (6th Cir. 2004)	13
<i>Stockman v. Trump</i> , No. 17-CV-1799, 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017).....	18
<i>Tipsword v. Tipsword</i> , No. 1 CA-CV 12-0066, 2013 WL 1320444 (Ariz. Ct. App. 2013).....	7
<i>United States v. Virginia</i> , 518 U.S. 515 (1996).....	1, 15
<i>United States v. Windsor</i> , 570 U.S. 744 (2013).....	13
<i>Whitaker v. Kenosha Unified Sch. Dist. No. 1</i> , 858 F.3d 1034 (7th Cir. 2017)	4, 6, 13, 16
<i>Windsor v. United States</i> , 699 F.3d 169 (2d Cir. 2012).....	13

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Miss. Laws 2016, HB 1523 § 2 (eff. July 1, 2016),
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Mental Health Services Administration, *Ending Conversion Therapy:
Supporting and Affirming LGBTQ Youth*, at 51 (Oct. 2015),
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SUMMARY OF THE ARGUMENT

“A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded.” *United States v. Virginia*, 518 U.S. 515, 557 (1996). Although many Americans once considered it natural to discriminate based on race, sex, religion, and other grounds, we have since come to recognize the injustice of treating groups differently based on characteristics that have no relationship to their capabilities. This evolution is itself part of the Framers’ design: they knew that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.” *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

Courts play an important role in that process, and that role is particularly critical in cases involving “the right of the individual not to be injured by the unlawful exercise of governmental power.” *Schuette v. BAMN*, 572 U.S. 291, 311 (2014) (plurality). Accordingly, when new insight reveals that official acts targeting a particular group are inconsistent with the Constitution’s guarantee of equal protection, courts must carefully guard against discrimination. This is often achieved by requiring the government to provide adequately-tailored reasons whenever it seeks to assign benefits or burdens based on a personal trait.

Under settled Supreme Court precedent, that requirement should also apply to classifications based on transgender status. In recent years, an increasing number of Americans have come to recognize the dignity and equality of their transgender neighbors. Against that background, many courts have held that discrimination against transgender people is presumptively suspect. Those courts have recognized that the hallmarks of heightened scrutiny analysis warrant its application here: (1) this group has suffered a long history of discrimination; (2) its defining characteristic is irrelevant to social productivity; (3) transgender status is a distinct and immutable characteristic; and (4) transgender people cannot fully protect themselves through the political process alone. *See* Section I, *infra*. At a minimum, discrimination against transgender people must be subject to intermediate scrutiny as impermissible sex discrimination, as numerous courts have held. *See* Section II, *infra*.

These decisions stand for a simple but profound proposition: transgender status should almost never be relevant to lawmaking. The application of heightened scrutiny provides clear notice to officials at all levels of government that they should proceed with extreme caution before classifying on this basis. That message could not arrive at a more crucial time, since the ban on open military service by courageous transgender Americans who want to serve their

country is only one of the latest steps the federal government has taken to target transgender people for discrimination.

ARGUMENT

I. CLASSIFICATIONS BASED ON TRANSGENDER STATUS WARRANT HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE.

The Fourteenth Amendment’s equal protection guarantee “is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Certain governmental classifications are inherently suspect because they are more likely to reflect historical patterns of discrimination than to serve a legitimate governmental purpose. *Id.* at 440-41; *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312-13 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). The Supreme Court consistently has applied heightened scrutiny where the classified group has suffered a history of discrimination, and the classification has no bearing on a person’s ability to perform in society. *See, e.g., Murgia*, 427 U.S. at 313 (heightened scrutiny is warranted where a classified group has “experienced a ‘history of purposeful unequal treatment’ or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities”).

In addition, the Supreme Court has sometimes considered whether the group is a minority or relatively politically powerless, and whether there is an “obvious,

immutable, or distinguishing characteristics that define them as a discrete group.”
See, e.g., Lyng v. Castillo, 477 U.S. 635, 638 (1986). When considering immutability, courts have recognized that the purpose of this consideration is to identify characteristics that individuals either cannot change or should not be required to change in order to avoid official discrimination. *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977).

No single factor is dispositive, and each standing alone can serve as a warning sign that a particular classification “provides no sensible ground for differential treatment,” *Cleburne*, 473 U.S. at 440, or is “more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective,” *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). Nonetheless, transgender status readily satisfies all of these hallmarks. Policies that discriminate against transgender people, including the military policy here, warrant heightened scrutiny.

1. Transgender People Have Suffered a Long History of Discrimination.

Courts across the country have recognized that transgender people have long “face[d] discrimination, harassment, and violence because of their gender identity.” *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1051 (7th Cir. 2017); *see also Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 749 (E.D. Va. 2018) (finding “no doubt” that transgender people experience “high rates

of violence and discrimination in education, employment, housing, and healthcare access”). As the Court below found, “[a]s a class, transgender individuals have suffered, and continue to suffer, severe persecution and discrimination.” *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 208-209 (D.D.C. 2017); *see also Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 n.8 (N.D. Cal. 2015) (finding that transgender people “have experienced even greater levels of societal discrimination and marginalization” than gay and lesbian people); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (finding that transgender people “have suffered a history of persecution and discrimination,” in virtually every aspect of society); *Evancho v. Pine-Richland*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (same); *Bd. of Educ. of Highland v. U.S. Dept. of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Oh. 2016) (same).

“The hostility and discrimination that transgender individuals face in our society today is well-documented.” *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014). In particular, transgender people experience pervasive discrimination in schools, workplaces, and prisons. *See Flack v. Wis. Dept. of Health Servs.*, No. 18-CV-309-WMC, 2018 WL 3574875, at *1 (W.D. Wis. July 25, 2018) (“As a group, transgender individuals have been subjected to harassment and discrimination in virtually every aspect of their lives, including in housing, employment, education, and health care.”). “78% of students who identify as

transgender or as gender non-conform[ing] report being harassed while in grades K-12 . . . with 35% reporting physical assault and 12% reporting sexual assault.” *Whitaker*, 858 F.3d at 1051 (citation omitted); *see also M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 721 (D. Md. 2018) (emphasizing “very high rates of violence” against transgender people).

Transgender people are twice as likely to live in poverty and three times more likely to be unemployed, and nearly half (47%) of transgender people have experienced sexual assault at some point in their lifetime.² Incarcerated transgender people are particularly vulnerable, frequently experiencing “harassment, isolation, forced sex, and physical assault, both by prison personnel and other inmates.”³ Before the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), courts routinely voided the marriages of

² Sandy E. James, *et al.*, *The Report of the 2015 U.S. Transgender Survey*, Nat’l Ctr. for Transgender Equal. (Dec. 2016), at 5-6, <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

³ Am. Psychological Ass’n, *Guidelines for Psychological Practice With Transgender and Gender Nonconforming People*, at 839 (Dec. 2015), <http://www.apa.org/practice/guidelines/transgender.pdf>; *see also Farmer v. Brennan*, 511 U.S. 825, 831 (1994) (recognizing that transgender women are “particularly vulnerable to sexual attack by . . . inmates”); James, *et al.*, *supra* n.2, at 191 (noting that transgender inmates are nearly six times as likely to experience sexual assault by facility staff or other inmates); Allen J. Beck, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12*, U.S. Dept. of Justice, Bureau of Justice Statistics (Dec. 2014), *available at*: https://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf (providing statistics on the prevalence of sexual victimization among transgender inmates).

transgender people, based solely on their transgender status. *See, e.g., In re Estate of Gardiner*, 42 P.3d 120, 137 (Kan. 2002) (voiding a marriage between a transgender woman and her husband); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999) (same); *Kantaros v. Kantaras*, 884 So. 2d 155 (Fla. Ct. App. 2004) (voiding a marriage between a transgender man and his wife); *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. Ct. 2005) (same).

Historically, transgender parents were often cut off from their children and in some cases stripped of their parental rights. *See, e.g., Daly v. Daly*, 715 P.2d 56, 60 (Nev. 1986) (terminating the parental rights of a transgender person after she underwent a gender transition); *In re Marriage of Simmons*, 825 N.E.2d at 312 (holding that a transgender man who had raised his son from the child’s birth was not a legal father and had no right to maintain any relationship with the child). Even today, many transgender parents face discrimination in child custody and child welfare cases.⁴

In recent years, transgender people have been targeted by an unprecedented wave of state legislative attempts to deny transgender people access to public

⁴ *See, e.g., Tip sword v. Tip sword*, No. 1 CA-CV 12-0066, 2013 WL 1320444, at *3 (Ariz. Ct. App. 2013) (denying custody to a transgender parent); *M.B. v. D.W.*, 236 S.W.3d 31, 36 (Ky. Ct. App. 2007) (terminating the parental rights of a transgender parent based on alleged harm to children caused by failing to “adequately prepare[]” them for their parent’s gender transition).

accommodations, restrict the ability of counties and municipalities to pass non-discrimination ordinances protecting transgender people, and exclude transgender students from protections at school.⁵ In 2016, North Carolina enacted HB2, which eliminated existing local nondiscrimination protections for transgender people and sought to exclude transgender people from equal access to facilities. *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 627 (M.D.N.C. 2016). That same year, Mississippi enacted HB 1523, which creates a broad exemption, applicable to many areas of state law, for persons who believe that the terms man or woman “refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.”⁶ These laws stigmatize transgender people and expose them to a heightened risk of discrimination and violence.

Transgender people also have been stripped of many previously existing federal protections.⁷ In recent days, public reporting has revealed that the Department of Health and Human Services hopes to establish a definition of sex

⁵ See, e.g., Nat’l Conference of State Legislatures, *2017 State Legislation*, <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking-635951130.aspx> (listing dozens of anti-transgender bills being actively considered by state legislatures).

⁶ *Protecting Freedom of Conscience from Government Discrimination Act*, Miss. Laws 2016, HB 1523 § 2 (eff. July 1, 2016), <http://billstatus.ls.state.ms.us/documents/2016/html/HB/1500-1599/HB1523SG.htm>.

⁷ See Nat’l Ctr. for Transgender Equal., *The Discrimination Administration: Trump’s Record of Action Against Transgender People*, <http://www.transequality.org/the-discrimination-administration>.

that would recognize only birth-assigned sex, erasing policies and legal interpretations that protect transgender people in healthcare and education.⁸ In December 2017, the Centers for Disease Control & Prevention were instructed not to use the word “transgender” in official documents.⁹ In February 2017, the U.S. Department of Justice and the U.S. Department of Education rescinded Title IX guidance protecting transgender students. *See id.* In March 2017, the U.S. Census Bureau, acting on direction from the Department of Justice, halted an ongoing process to add questions on sexual orientation and gender identity to the American Community Survey. *See id.* In April 2017, the Department of Justice abandoned its lawsuit challenging a North Carolina anti-transgender law. *See id.* In August 2017, President Trump directed the U.S. Department of Defense to ban military service by transgender people, giving rise to this litigation. *See id.* And in October 2017, the Department of Justice rescinded its prior position interpreting Title VII to protect transgender workers from discrimination based on gender identity. *See id.*

⁸ Erica L. Green, et al., “*Transgender*” *Could Be Defined Out of Existence Under Trump Administration*, N.Y. Times (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

⁹ Lena H. Sun & Julia Eilperin, *CDC Gets List of Forbidden Words: Fetus, Transgender, Diversity*, The Wash. Post (Dec. 15, 2017), 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.

2. Being Transgender Has No Bearing on One’s Ability to Perform in or Contribute to Society.

As myriad courts have recognized, there is simply “no relationship between transgender status and the ability to contribute to society.” *Highland*, 208 F. Supp. 3d at 874. Indeed, the court below observed that, “Plaintiffs are current and aspiring service members who are transgender . . . [and] have and continue to serve with distinction.” *Doe I*, 275 F. Supp. 3d at 175-76; *see also Evancho*, 237 F. Supp. 3d at 288 (recognizing that “the Plaintiffs are in all respects productive, engaged, contributing members of” society). This conclusion is supported by ample empirical evidence. The American Psychiatric Association, for example, has concluded that being transgender “implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.”¹⁰

Accordingly, there is “no argument or evidence suggesting that being transgender in any way limits one’s ability to contribute to society.” *Doe I*, 275 F. Supp. 3d at 209; *see also Norsworthy*, 87 F. Supp. 3d at 1119 n.8 (“[Transgender] identity is . . . irrelevant to their ability to contribute to society”); *Grimm*, 302 F. Supp. 3d at 749 (citing *M.A.B.*, 286 F.Supp.3d at 720); *Highland*, 208 F. Supp. 3d

¹⁰ Am. Psychiatric Ass’n, *Position Statement on Discrimination Against Transgender and Gender Diverse Individuals* (July 2018), <https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2018-Discrimination-Against-Transgender-and-Gender-Diverse-Individuals.pdf>.

at 874; *Adkins*, 143 F. Supp. 3d at 139.

3. Being Transgender Is an Immutable or Distinguishing Characteristic and an Integral Part of Identity That Defines a Discrete Group.

Being transgender is an innate characteristic that cannot be voluntarily altered or be expected to change as a condition of equal treatment, because it is “fundamental” to a person’s identity. *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000). Like sexual orientation, it is a “basic component of a person’s core identity.” *Id.* at 1094 (internal citations omitted). Transgender people thus “exhibit immutable or distinguishing characteristics that define them as a discrete group.” *Evancho*, 237 F. Supp. 3d at 288; *Doe I*, 275 F. Supp. 3d at 208; *see Highland*, 208 F. Supp. 3d at 874; *Norsworthy*, 87 F. Supp. 3d at 1119 n.8. In other words, transgender people’s gender identities are immutable because they are “inherent in who they are as people.” *Evancho*, 237 F. Supp. 3d at 288. Gender identity is a “deeply ingrained” characteristic that is not susceptible to voluntary change. *Id.* at 289.

In fact, a medical consensus recognizes that efforts to attempt forcibly change an individual’s transgender status, through so-called “conversion therapy,” can be profoundly damaging and are unethical. For example, the U.S. Department of Health and Human Services’ Substance Abuse and Mental Health Services Administration has previously recognized the overwhelming consensus of medical

and mental health organizations that “efforts to change a child’s or adolescent’s gender identity, gender expression, or sexual orientation are not an appropriate therapeutic intervention” and that “[n]o evidence supports the efficacy of such interventions to change sexual orientation or gender identity, and such interventions are potentially harmful.” U.S. Department of Health and Human Services’ Substance Abuse and Mental Health Services Administration, *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth*, at 51 (Oct. 2015), <http://store.samhsa.gov/shin/content//SMA15-4928/SMA15-4928.pdf>. See also *Karnoski v. Trump*, No. C17-1297, 2017 WL 6311305, at *10 (W.D. Wash. Dec. 11, 2017) (“Experts agree that gender identity has a biological component, and there is a medical consensus that gender identity is deep-seated, set early in life, and impervious to external influences.”) (quotation marks and emphasis omitted); Denise Grady, *Anatomy Does Not Determine Gender, Experts Say*, N.Y. Times, Oct. 22, 2018, <https://www.nytimes.com/2018/10/22/health/transgender-trump-biology.html>.

Additionally, there can be no question that transgender people have “distinguishing characteristics—mainly, their gender identity does not align with the gender they were assigned at birth.” *M.A.B.*, 286 F. Supp. 3d at 721. That transgender people constitute a discrete group is apparent from the fact that the discrimination they face directly results from revelations about their transgender

status. *See Adkins*, 143 F. Supp. 3d at 139 (explaining that “[w]hat seems to matter [for this hallmark] is whether the characteristic of the class calls down discrimination when it is manifest” (quoting *Windsor v. U.S.*, 699 F.3d 169, 183 (2d Cir. 2012), *aff’d*, 570 U.S. 744 (2013))). Transgender people “often face backlash in everyday life when their status is discovered,” such as when there is a mismatch between their gender identity and the gender marker on their identity documents. *See Adkins*, 143 F. Supp. 3d at 139-40. And this discrimination touches all aspects of society—from schools, workplaces, and public accommodations to housing, health benefits, and correctional facilities. *See, e.g., Whitaker*, 858 F.3d at 1038-39 (schools); *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004) (workplaces); *Carcaño*, 203 F. Supp. 3d at 625-26 (public accommodations); *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1197-98 (D. Colo. 2017) (housing); *Prescott v. Rady Children’s Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1097 (S.D. Cal. 2017) (health care); *Norsworthy*, 87 F. Supp. 3d at 1109-10 (corrections).

4. Transgender People Are a Small and Politically Vulnerable Minority.

“[T]ransgender people as a group represent a very small subset of society lacking the sort of political power other groups might harness to protect themselves from discrimination.” *Doe I*, 275 F. Supp. 3d at 209. “[R]ecent estimates suggest that transgender individuals make up approximately 0.6 percent” of the American

population. *Id.*; see also *Evancho*, 237 F. Supp. 3d at 288. “[A]s a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings,” transgender people lack the strength to politically protect themselves from wrongful discrimination. *Highland*, 208 F. Supp. 3d at 874; *Adkins*, 143 F. Supp. 3d at 140 (noting “there is no indication that there have ever been any transgender members of the United States Congress or the federal judiciary”). Indeed, “[t]he efforts of states to pass legislation requiring individuals to use sex-segregated bathrooms that correspond with their birth sex are but one example of the relative political powerlessness of this group.” *Highland*, 208 F. Supp. 3d at 874. In sum, “transgender people are unarguably a politically vulnerable minority.” *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018).

Given historical and current mistreatment, transgender people are “deserving of the application of heightened scrutiny when singled out for adverse treatment.” *Flack*, 2018 WL 3574875, at *16. Accordingly, discrimination based on transgender status meets all of the Supreme Court’s hallmarks for heightened scrutiny under the Equal Protection Clause.

II. CLASSIFICATIONS BASED ON TRANSGENDER STATUS WARRANT AT LEAST INTERMEDIATE SCRUTINY BECAUSE THEY ARE SEX-BASED.

Discrimination against transgender people also warrants heightened scrutiny

because it is sex discrimination. Under that standard, the government must demonstrate “an exceedingly persuasive” justification for the ban. *Virginia*, 518 U.S. at 531. “The burden of justification is demanding and rests entirely on” the government. *Id.* at 533. “The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation,” and “it must not rely on overbroad generalizations.” *Id.*

The ban on military service by transgender people constitutes impermissible sex discrimination for at least three reasons. First, discrimination against transgender people inherently relies on sex stereotypes. Nearly thirty years ago, the Supreme Court explained that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). The plaintiff in *Price Waterhouse* had been denied partnership at an accounting firm because of her failure to conform to sex stereotypes. One partner viewed her as “macho,” while another advised that she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.* at 235. Agreeing with this Court’s ruling in relevant part, *Hopkins v. Price Waterhouse*, 825 F.2d 458, 465-68 (D.C. Cir. 1987), the Supreme Court recognized that an adverse employment decision motivated by such sex stereotypes constitutes impermissible sex discrimination

under Title VII. *Price Waterhouse*, 490 U.S. at 240.

This prohibition against discrimination based on sex stereotypes necessarily protects transgender people. “By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.” *Whitaker*, 858 F.3d at 1048. As the Eleventh Circuit explained,

A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior. There is thus a congruence between discriminating against transgender . . . individuals and discrimination on the basis of gender-based behavioral norms.

Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (citations omitted). A wall of precedent supports this analysis.

Five different Circuits have confirmed that discrimination against transgender people constitutes impermissible sex stereotyping across a range of antidiscrimination guarantees. *See Whitaker*, 858 F.3d at 1051 (Title IX); *Rosa v. Park W. Bank Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (Equal Credit Opportunity Act); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (Title VII); *Schwenk v Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (Gender Motivated Violence Act); *Glenn*, 663 F.3d at 1316 (Equal Protection Clause). District courts within and beyond this Circuit agree. *See Schroer v. Billington*, 577

F. Supp. 2d 293, 305 (D.D.C. 2008).¹¹ Classifications based on transgender status are “inextricably intertwined with gender classifications” because they “inherently discriminate[]” based on a person’s “failure to conform to gender stereotypes.” *Doe 1*, 275 F. Supp. 3d at 209-210.

These authorities illustrate that discrimination against transgender people is necessarily based on sex—regardless of the specific statute or constitutional provision at issue. The guarantees of the Constitution are not more tolerant of sex stereotypes than are federal statutes prohibiting sex discrimination. See *J.E.B. v. Alabama*, 511 U.S. 127, 138 (1994) (declaring unconstitutional a government attorney’s use of peremptory juror strikes based on the presumption that potential jurors’ views would correspond to their sexes).

Any government policy that facially discriminates against transgender people must therefore minimally be evaluated under the heightened standard applied to any form of sex-based discrimination. Like the district court here, every

¹¹ See also *F.V.*, 286 F. Supp. 3d at 1143 (“discrimination against transgender people is a form of sex discrimination subject to intermediate scrutiny review”); *Adams v. Sch. Bd. of St. Johns Cty., Fla.*, 318 F. Supp. 3d 1293, 1312 (M.D. Fla. 2018) (applying intermediate scrutiny to transgender student’s claim); *M.A.B.*, 286 F. Supp. 3d at 718-19 (same); *Grimm*, 302 F. Supp. 3d at 750 (same); *Evancho*, 237 F. Supp. 3d at 288 (same); *Highland*, 208 F. Supp. at 872–74 (S.D. Ohio 2016) (finding that “transgender individuals are a quasi-suspect class [under the Equal Protection Clause] because discrimination against them is discrimination on the basis of sex”); *Carcaño*, 203 F. Supp. at 640 (applying intermediate scrutiny to law regulating transgender people’s access to bathroom facilities).

other court to preliminarily enjoin the military ban here agreed that, at a minimum, it would need to be tested under heightened review. *See Doe I*, 275 F. Supp. at 209-10; *Stockman v. Trump*, No. 17-CV-1799, 2017 WL 9732572, at *15 (C.D. Cal. Dec. 22, 2017); *Karnoski*, 2017 WL 6311305, at *7; *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017).

The government contends that its policy does not discriminate based on transgender status because transgender individuals may serve if they do so in a manner consistent with their birth-assigned sex; but that merely confirms that the heart of the government's objection to transgender service members is their nonconformity to sex stereotypes. Just as the government employers in *Glenn*, *Barnes*, and *Schroer* could not have defended their discrimination by arguing that they would have permitted the plaintiffs to come to work in a manner consistent with their birth-assigned sex, neither can the government do so here. In all of these cases, it was precisely the employers' adverse actions because of the plaintiffs' gender identity *and expression* that triggered liability. *See Glenn*, 663 F.3d at 1320 (employer discharged transgender woman based on discomfort with her wearing typical female attire); *Barnes*, 401 F.3d at 737 (adverse action based on transgender employee's nonconformity with gender-based expectations of how one "should look and behave"); *Schroer*, 577 F. Supp. 2d at 305 (job offer rescinded after employer saw photographs of transgender woman in typical female attire).

Here, as well, transgender people may only serve if they do so by expressing the gender that the government prefers for them.¹²

With no explanation, the government nakedly asserts that classifications based on transgender status do not trigger heightened scrutiny. Defs.’ Br. at 23 n.2 (citing *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007)).¹³ To the extent that the government contends that individuals are only protected from sex discrimination where they experience discrimination based on their “biological sex,” that is plainly not the law. In *Price Waterhouse*, for instance, there was no suggestion that the firm was unwilling to promote a woman to partnership; the issue was whether the plaintiff fit a particular stereotype of how women should look and conduct themselves. 490 U.S. at 251 (explaining that Title VII bars the

¹² Indeed, the government affirmatively relies upon the imagined negative reactions of those serving with openly transgender service members to justify the policy. The government asserts that its “point is not that the Department deems the needs or views of certain servicemembers to take priority over those of others,” Defs.’ Br. at 34, but that is the inescapable conclusion if the government excludes transgender service members based on the imagined objections of their peers.

¹³ *Etsitty* also did not hold that transgender people are excluded from protections against sex stereotyping, nor could it have done so. There is no carve-out for transgender people from the universal protection against sex stereotypes. *Glenn*, 663 F.3d at 1316 (“Because these protections are afforded to everyone, they cannot be denied to a transgender individual.”). Indeed, *Etsitty* assumed that transgender people were entitled to such sex stereotyping protections but found, based on the facts of the case, that the plaintiff had failed to rebut the legitimate, nondiscriminatory reason for termination offered by the employer. 502 F.3d at 1224.

“entire spectrum” of discrimination based on sex, including gender-based expectations of how individuals should act).

Second, discrimination based on gender transition is also necessarily based on sex. Discrimination because of a change in religion provides an apt analogy: firing an employee because she converts from Christianity to Judaism “would be a clear case of discrimination ‘because of religion.’” *Schroer*, 577 F. Supp. 2d at 306. Even if the employer “harbors no bias toward either Christian or Jews but only ‘converts[,]’ . . . [n]o court would take seriously the notion that ‘converts’ are not [protected].” *Id.*

“By the same token, discrimination ‘because of sex’ inherently includes discrimination against employees because of a change in their sex.” *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 575 (6th Cir. 2018), *petition for cert. filed*, No. 18-107 (U.S. Jul. 20, 2018); *see also Flack*, 2018 WL 3574875, at *16 (adopting religious analogy to gender transition); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016) (same); *Highland*, 208 F. Supp. 3d at 868 n.8 (same).

Here, it is difficult to imagine a starker example of a penalty imposed for gender transition: the military policy expressly excludes those who have transitioned, as well as those who need to transition, from military service. As one court explained, “discriminating on the basis that an individual was going to

[transition], [or] had [done so] . . . is *still* discrimination based on sex.” *Flack*, 2018 WL 3574875, at *13.

Third, classifications based on transgender status are inherently sex-based because being transgender can only be understood with regard to a person’s sex. *See, e.g., Love v. Johnson*, 146 F. Supp. 3d 848, 850-51 (E.D. Mich. 2015). The definition of being transgender rests on there being a difference between a person’s gender identity and the sex assigned to them at birth. *Id.* Since both these characteristics are sex-related, differential treatment of transgender people requires consideration of a sex-related characteristic of the individual. *See Schwenk*, 204 F.3d at 1201 (explaining that “sex” encompasses one’s “gender . . . identity”); *F.V.*, 286 F. Supp. 3d at 1144 (holding that “discrimination based on gender identity or transsexual status” is necessarily “discrimination based on sex” under equal protection); *Evancho*, 237 F. Supp. 3d at 288-89 (finding that “gender identity is entirely akin to ‘sex’ as that term has been customarily used in the Equal Protection analysis”); *Fabian*, 172 F. Supp. 3d at 527 (explaining why discrimination based on sex necessarily includes “discrimination on the basis of gender identity”); *Roberts v. Clark Cty Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016); *Norsworthy*, 87 F. Supp. 3d at 1119.

In sum, this Court should affirm that classifications based on transgender status warrant, at a minimum, intermediate scrutiny because they are inherently sex-based.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to conclude that discrimination based on transgender status is subject to heightened scrutiny under the equal protection guarantee of the Constitution.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g), I certify that:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because this brief contains 5,685 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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