No. 18-35347

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RYAN KARNOSKI, et al.,

Plaintiffs-Appellees,

STATE OF WASHINGTON,
Attorney General's Office Civil Rights Unit,
Intervenor Plaintiff-Appellee,

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

AMICI CURIAE BRIEF OF THE SERVICE WOMEN'S ACTION NETWORK, CALIFORNIA WOMEN LAWYERS, CENTER FOR REPRODUCTIVE RIGHTS, COLUMBIA LAW SCHOOL SEXUALITY AND GENDER LAW CLINIC, CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, EQUAL RIGHTS ADVOCATES, LEGAL VOICE, MICHIGAN ASSOCIATION FOR JUSTICE, NATIONAL WOMEN'S LAW CENTER, AND THE WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA IN SUPPORT OF PLAINTIFFS-APPELLEES AND INTERVENOR PLAINTIFF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici curiae, listed below, are organizations that work in diverse ways to advance equal opportunity for women and to combat various forms of sex discrimination. Collectively, the *amici curiae* have many decades of experience of providing expertise and addressing sex discrimination in a variety of settings. *Amici curiae* are thus well-suited to address the sex stereotyping embedded in the justifications advanced by the federal government to exclude transgender individuals from military service. *Amici* offer the following analysis, which complements but does not duplicate the parties' briefing, to assist the Court in addressing this question as informed by *amici*'s expertise related to discrimination based on sex and sex stereotyping.

The *amici curiae* organizations are:

The Service Women's Action Network ("SWAN") is an independent nonprofit organization that aids servicewomen by, among other activities, securing equal opportunity and freedom to serve without discrimination, harassment, or assault. One avenue through which SWAN pursues these missions is participating either directly or as *amicus curiae*, in federal litigation relation to such issues.

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

California Women Lawyers ("CWL") is a non-profit organization that was chartered in 1974. CWL is the only statewide bar association for women in California and maintains a primary focus on advancing women in the legal profession. Since its founding, CWL has worked to improve the administration of justice, to better the position of women in society, to eliminate all inequities based on sex, and to provide an organization for collective action and expression related to those purposes. CWL participates as amicus curiae in a wide range of cases to secure the equal treatment of women and other classes of persons under the law.

The Center for Reproductive Rights (the "Center") is a global advocacy organization that uses the power of law to advance reproductive rights as fundamental human rights around the world. In the United States, the Center's work focuses on ensuring that all people have access to a full range of high-quality reproductive health care. As a rights-based organization, the Center has a vital interest in ensuring that all people can participate with dignity as equal members of society, regardless of gender-based stereotypes.

The Columbia Law School Sexuality and Gender Law Clinic, founded in 2006, is the first such clinical law program at an American law school. The Clinic has extensive expertise in the constitutional doctrine related to sexuality and gender law and has worked extensively on issues related to sex discrimination jurisprudence and its application to transgender individuals that are central to the

argument here. For more than a decade, the Clinic has regularly submitted amicus briefs on sexuality and gender law matters to federal appellate courts, including this Court (*Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014)), and to other courts throughout the United States.

The Connecticut Women's Education and Legal Fund ("CWEALF") is a nonprofit organization that advocates and empower women and girls in Connecticut, especially those who are underserved or marginalized. CWEALF works to create an equitable society where women and girls thrive. CWEALF protects the rights of individuals in the legal system, workplaces and in their private lives. Since its founding in 1973, CWEALF has provided legal information and conducted public policy and advocacy to advance women's and LGBTQ rights. Throughout its history, CWEALF has advocated for equal rights for the LGBTQ community. In 2011, this included the expansion of Connecticut's nondiscrimination law to include "gender identity or expression" in Connecticut's list of protected classes.

Equal Rights Advocates ("ERA") is a national civil rights advocacy organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. Since its founding in 1974, ERA has led efforts to combat sex discrimination and advance gender equality by litigating high-impact cases, engaging in policy reform and legislative advocacy campaigns,

conducting community education and outreach, and providing free legal assistance to individuals experiencing unfair treatment at work and in school through our national Advice & Counseling program. ERA has filed hundreds of suits and appeared as amicus curiae in numerous cases to defend and enforce individuals' civil rights in state and federal courts, including before the United States Supreme Court. Promoting equal rights for the LGBT community through legal advocacy has been of great importance to the organization since its early years. ERA countered discrimination specifically directed at lesbians by creating the Lesbian Rights Project which later became the National Center for Lesbian Rights. ERA recognizes that women historically have been the targets of legally sanctioned discrimination and unequal treatment, which often have been justified by or based on stereotypes and biased assumptions about the roles that women (and men) can or should play in the public and private sphere. ERA views discrimination against transgender people – particularly exclusionary policies justified by the very sex stereotypes that have held women back in the workplace and elsewhere – as a pernicious and legally impermissible form of sex discrimination which is harmful to the transgender community, to women, and to our society at large.

Legal Voice, founded in 1978 as the Northwest Women's Law Center, is a regional nonprofit public interest organization that works to advance the legal rights of women in the Northwest through litigation, legislation, and education.

Since its founding, Legal Voice has worked to eliminate all forms of sex discrimination. Recognizing that discrimination based on gender identity or sexual orientation are forms of sex discrimination, Legal Voice has a long history of advocacy on behalf of lesbians, gay men, bisexuals, and transgender people, dating back to the 1980s. Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country, including prior participation as *amicus curiae* in the trial court in this case.

Michigan Association for Justice ("MAJ") is a trade association of plaintiff's attorneys, paralegals, law clerks, law students, and judges that promotes and protects a fair and effective civil justice system. MAJ supports the work of attorneys in their efforts to ensure that any person who is injured by the misconduct or negligence of others can obtain justice in Michigan courtrooms.

The National Women's Law Center ("NWLC") is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and the rights of all people to be free from sex discrimination. Since its founding in 1972, NWLC has focused on issues of key importance to women and girls, including economic security, employment, education, and health, with special attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination. NWLC has participated as counsel or amicus curiae in a range of cases before the Supreme Court and the federal Courts

of Appeals to secure equal treatment and opportunity in all aspects of society through enforcement of the Constitution and laws prohibiting discrimination. NWLC has long sought to ensure that rights and opportunities are not restricted on the basis of gender stereotypes and that all individuals enjoy the full protection against sex discrimination promised by federal law.

Women's Bar Association of the District of Columbia ("WBA"). Founded in 1917, the WBA is one of the oldest and largest voluntary bar associations in metropolitan Washington, DC. Today, as in 1917, we continue to pursue our mission of maintaining the honor and integrity of the profession; promoting the administration of justice; advancing and protecting the interests of women lawyers; promoting their mutual improvement; and encouraging a spirit of friendship among our members. We believe that the administration of justice includes the right to be free from discrimination based on gender or sex.

SUMMARY OF ARGUMENT

The Supreme Court's constitutional jurisprudence for nearly a half century has refused to permit governments to embed overbroad assumptions about men and women into federal and state law and policy. Yet the government here relies on just these types of assumptions to justify banning transgender people from military service.

In particular, the government's invocation of "biological differences between the sexes," and concerns about the purported need to protect women as the rationale for its policy mischaracterizes and misunderstands well-settled law. The same is true for the government's dependence on sweeping generalizations about the physical capacities of men and women, the alleged preferences of men and women, and "longstanding societal expectations." Mattis Memorandum, February 22, 2018 (ER160-162) and attached *Report and Recommendations on Military Service by Transgender Persons* (ER163-207) (collectively, the "Implementation Plan") at ER193. As the case law discussed *infra* makes clear, "estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *United States v. Virginia*, 518 U.S. 515, 550 (1996) ("VMI") (emphasis in original).

That transgender women and men serving or seeking to serve in the military may have life experiences and physical characteristics that "place[] them outside the average description" of women or men does not justify denial of this opportunity for national service. *Id.* "Fixed notions" about men and women were rejected as a basis for government action more than 35 years ago; the government's effort to resuscitate them here, in a manner that closely parallels its earlier efforts to exclude women and gays and lesbians based on similar concerns, has no footing in the law.

ARGUMENT

The military policy at issue here relies on "biological differences between the sexes," claiming that open service by transgender men and women would harm unit cohesion by purportedly undermining the military's sex-based standards.[2] Yet this invocation of "biological sex differences" along with arguments regarding fairness, privacy and safety based on those differences defy decades of constitutional jurisprudence rejecting laws and policies that restrict opportunities for men and women based on sex.

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[2] *See* Implementation Plan at ER161-62 (requiring conformity with "biological sex" as an eligibility requirement for transgender individuals who serve or seek to serve in the military). The only exception to this requirement is for transgender individuals who are currently serving and relied on the Carter policy to initiate gender transition. *Id.* at 2. All other transgender individuals are ineligible to serve.

This body of case law highlights three constitutionally impermissible justifications for sex-based rules:

- improper assumptions about the significance of physical differences between men and women;
- overbroad generalizations about the similarities among women or among men; and
- reliance on traditional views of men and women.

Each of these flawed rationales is found in the military policy at issue here.

I. Federal Constitutional Jurisprudence Has Long Rejected Government Action Reflecting "Fixed Notions" About Men and Women

Since the 1970s, federal courts have exercised great care when reviewing governmental reliance on "fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) ("MUW").

The reason for this concern, carried out via intermediate scrutiny of sex-based classifications under the Equal Protection Clause,[3] is well understood: "[N]ew insights and societal understandings can reveal unjustified inequality . . .

[3] Intermediate scrutiny has been described by the Court as requiring an "exceedingly persuasive" and "important" government interest and that the line-drawing at issue is "substantially related to the achievement" of that objective. *See MUW*, 458 U.S. at 724 (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

that once passed unnoticed and unchallenged.'" *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)).

Indeed, sex discrimination jurisprudence is defined largely by the recognition that government action based on expectations of men and women that had once seemed "natural" in fact reflected impermissible sex-based stereotypes and assumptions. As the Supreme Court put the point last year, "[f]or close to a half century, this Court has viewed with suspicion laws that rely on 'overbroad generalizations about the talents, capacities, or preferences of males and females.'" *Id.* at 1692.

Consequently, courts have struck down myriad rules that allocated opportunities based on assumptions about men and women's capabilities or preferences – from handling a child's estate to providing primary financial support for a household to succeeding in a specialized type of higher education. *See, e.g.*, *Reed v. Reed*, 404 U.S. 71 (1971) (estate administration); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (access to military benefits); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (eligibility for surviving parent benefits); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (eligibility for surviving spouse benefits); *MUW*, 458 U.S. 718 (nursing school admissions); *VMI*, 518 U.S. 515 (military institute admissions).

The ban on service by transgender individuals likewise directly contravenes well-settled jurisprudence forbidding the government from entrenching sex stereotypes in law. Further, by giving legal effect to sex stereotypes widely recognized as improper and injurious grounds for government action, the government's policy harms both women and men, transgender and not, who seek to serve or are currently serving in our nation's armed forces.

A. Assumptions About the Significance of Physical Differences Between Men and Women Most Often Rest on Impermissible Stereotypes

Laws that purport to rest on "biological," "physical," or "natural" differences between men and women are most often rooted *not* in biology or nature but instead in stereotypes and tradition. This point, iconically illustrated by Justice Bradley's reliance on the "destiny and mission of woman" as wives and mothers to justify Myra Bradwell's exclusion from the Illinois Bar in *Bradwell v. Illinois*, 83 U.S. 130, 141-42 (1872), characterizes much of the long history of sex-based distinctions once accepted by courts – until its fundamental flaw was recognized in the Supreme Court's sex discrimination jurisprudence of the 1970s.

Women's "physical structure" and the limitations that structure allegedly imposed were likewise deemed sufficient to restrict hours that women could work in bakeries, restaurants, and laundries. *Muller v. State of Oregon*, 208 U.S. 412, 421 (1908). Confidently declaring the "reality" of differences in bodily structure

and in physical strength as sufficient to justify the rules at issue, the Court found "[t]he two sexes differ . . . in the capacity for long continued labor, particularly when done standing" and in "the self-reliance which enables one to assert full rights." *Id.* at 422; *see also Radice v. New York*, 264 U.S. 292, 295 (1924) (stating that "the physical differences between men and women must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account") (citation and internal punctuation omitted). Higher education was similarly once thought dangerous to women's physiological well-being. *VMI*, 518 U.S. at 536 n.9 (citing well-regarded contemporary medical sources that affirmed higher education's harms to women's strength and health).

In these and other cases, the Court historically did not recognize what is obvious to courts now: the significance accorded to physical differences between men and women is most often shaped by social expectations, not science. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985) (differential treatment of the sexes "very likely reflected outmoded notions of the relative capabilities of men and women").

As a result, the Court has rarely found "physical differences between men and women" to be legally sufficient to sustain sex-based rules. Even in *Nguyen v. INS*, 533 U.S. 53 (2001), which accepted a rule that distinguished between U.S. citizen mothers and fathers seeking to sponsor their foreign-born children for citizenship,

the Court stressed that the case did not involve stereotypes about sex roles but rather the link between childbirth and parentage and "the uncontestable fact" that the father "need not be present at the birth" of his child. *Id.* at 62; *see also id.* at 68 (stating that the challenged law "addresses an undeniable difference in the circumstance of the parents at the time a child is born"). And, more recently, the Court rejected a citizenship rule that distinguished between mothers and fathers because it rested on "once habitual, but now untenable, assumptions" about the roles of men and women. See *Morales-Santana*, 137 S. Ct. at 1690-91. Indeed, in *VMI* itself, the Court *rejected* Virginia's reliance on "physical differences" to justify the exclusion of women from opportunities previously open only to men. *VMI*, 518 U.S. at 533. Likewise, invocation of physical differences is similarly insufficient to justify the exclusion of transgender men and women from military service here.

B. The Presumption that All Women (or All Men) Are Similar in Physical Capacity or Personal Interests Also Rests on Impermissible Sex Stereotypes.

Sex discrimination jurisprudence also rejects justifications for discriminatory policies based on claims that all women or men have the same desires, interests or physical capacities.

Early on, in *Cleveland v. LaFleur*, the Court addressed school board rules that, in part for safety reasons, barred women from teaching after they were several

months pregnant. The rules at issue "surely operate to insulate the classroom from the presence of potentially incapacitated teachers," the Court observed. 414 U.S. 632, 644 (1974). But it invalidated the rules nonetheless, recognizing the variation among pregnant women: "Even assuming, *arguendo*, that there are some women who would be physically unable to work past the particular cutoff dates . . ., it is evident that there are large numbers of teachers who are fully capable of continuing work for longer than the [] regulations will allow." *Id.* at 645-46.

More recently, in *VMI*, the Court held that the equal protection guarantee does not permit the government to act based on assumptions that all women or all men are the same. 518 U.S. at 542. Thus, even assuming arguendo that "most women would not choose VMI's adversative method," the Court held that the government could not constitutionally deny the specialized training and related opportunities "to women who have the will and capacity." *Id.*

The Court has made clear that policies based on such overbroad generalizations are impermissible even if there is some empirical basis for them. *See Weinberger*, 420 U.S. at 645 (rejecting sex-based rule while stating that "[o]bviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support"); *J.E.B. v. Alabama ex rel.*, 511 U.S. 127, 139, n.11 (1994) ("We have made abundantly clear in past cases that gender classifications that rest on

impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization"); *Craig v. Boren*, 429 U.S. 190, 201 (1976) (striking down sex-based classification where evidence supporting the different experiences of young women and men with alcohol was "not trivial in a statistical sense").

As the Court has recognized, even where such empirical support exists, it often reflects sex-based expectations and stereotypes that should not be permitted to limit individuals' opportunities based on their sex. In *MUW*, for example, the Court observed that most nurses were women and that nursing had long been seen as a women's profession. 458 U.S. at 729, 730 ("MUW's admissions policy lends credibility to the old view that women, not men, should become nurses."). In striking down that policy at the behest of a male nurse, the Court reiterated the importance of avoiding "traditional, often inaccurate, assumptions about the proper roles of men and women" in carrying out constitutional review. *Id.* at 726.

Similarly, in *Frontiero*, the Court invalidated different military benefits rules for male and female service members based on "the assumption . . . that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not." *Schlesinger v. Ballard*, 419 U.S. 498, 507 (1975) (describing *Frontiero*, 411 U.S. 677).

In *Weinberger,* the Court rejected "a virtually identical 'archaic and overbroad' generalization" embedded in a social security death benefits rule: "the fact that a man is working while there is a wife at home does not mean that he would, or should be required to, continue to work if his wife dies." 420 U.S. at 651-52; *see also Morales-Santana,* 137 S. Ct. 1678, 1695 (2017) (rejecting as a basis for government action "the long-held view that unwed fathers care little about, indeed are strangers to, their children" and holding that "[l]ump characterization of that kind, however, no longer passes equal protection inspection").

The Court's interpretations of statutory prohibitions against sex discrimination are fully consistent with these repeated rejections of sex stereotypes as a sufficient justification for discrimination.[4] In *Price Waterhouse v. Hopkins*,

[4] Courts routinely look to cases examining Title VII and other federal sex-discrimination laws when examining discrimination claims under the Equal Protection Clause and vice-versa because the same principles inform both. *See, e.g., Gen. Elec. Co. v. Gilbert,* 429 U.S. 125, 133 (1976) *superseded on other grounds by statute in Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) ("[w]hile there is no necessary inference that Congress . . . intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause . . . the similarities between the congressional language and some of those decisions surely indicate that the latter are a useful starting point in interpreting the former"); *Latta v. Otter*, 771 F.3d 456, 481 (9th Cir. 2014) (Reinhardt, J., concurring) (relying on Title VII case law in an equal protection case to determine whether a classification was sex-based).

for example, the Court echoed a point it has made numerous times in the constitutional context: "We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." 490 U.S. 228, 251 (1989). These kinds of acts, which impose gender-based "stereotypical notions . . . deprive persons of their individual dignity," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984), and "ratify and reinforce prejudicial views," *J.E.B.*, 511 U.S. at 140.

This Court and numerous other courts have similarly recognized that discrimination against transgender people is based on impermissible sex stereotypes. *See, e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (applying *Price Waterhouse* analysis and finding that transgender plaintiff whose "outward behavior and inward identity did not meet social definitions of masculinity" had stated a claim under the Gender Motivated Violence Act); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017) (observing that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth); *Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed. App'x. 883, 884 (11th Cir. 2016) ("sex discrimination includes discrimination against a transgender person"); *Glenn v. Brumby*, 663 F.3d 1312, 1318-19 (11th Cir. 2011) (stating that the Equal Protection Clause protects "[a]ll persons, whether transgender or not . . .

from discrimination on the basis of gender stereotype"); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (holding that "discrimination against a plaintiff who is [transgender] – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against [the plaintiff] in *Price Waterhouse*, who, in sex stereotypical terms, did not act like a woman"); *Rosa v. Park W. Bank & Trust Co*., 214 F.3d 213, 215-16 (1st Cir. 2000) (holding that transgender plaintiff had stated a claim under the Equal Credit Opportunity Act); *Roberts v. Clark Cnty. Sch. Dist*., 215 F. Supp. 3d 1001, 1013 (D. Nev. 2016) (sex discrimination "applies both to discrimination based on concepts of sex and discrimination based on other stereotypes about sex, including gender identity"); *Finkle v. Howard Cnty*., 12 F. Supp. 3d 780, 788 (D. Md. 2014) ("[p]laintiff's claim that she was discriminated against 'because of her obvious transgendered status' is a cognizable claim of sex discrimination"); *Rumble v. Fairview Health Servs*., No. 14 Civ. 2037, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015) ("discrimination based on an individual's transgender status constitutes discrimination based on gender stereotyping").

C. Reliance on Traditional Views of Men and Women Cannot Validate Sex-Based Classifications.

At one time, the Court treated popular views about sex roles as sufficient to justify government action. As the Court wrote in upholding Florida's automatic exemption of women from jury service, even with "the enlightened emancipation

of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life." *Hoyt v. State of Fla*., 368 U.S. 57, 61-62 (1961); *see also Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (upholding restrictions on the ground that "bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which [the legislature] may devise preventive measures").

But this approach to sex roles, too, has long since been rejected. In *Craig v. Boren*, for example, the Court expressly disapproved the approach taken in *Goesaert*. 429 U.S. at 210 n.23. Reviewing the more recent cases on sex roles, the Court explained that "increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas' were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy." *Id.* at 198-99 (citations omitted). Likewise, the Court sharply rejected its earlier approach in *Hoyt*, including calling into question the reliance on earlier societal views and stating that "[i]f it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed." *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975).

In short, assumptions that men must be one way and women another, even when rooted in traditional views and practices, are not sufficient grounds for governmental denial of opportunities to men and women who do not conform to those assumptions but are otherwise qualified and prepared to meet all relevant requirements.

II. Fairness, Safety, Privacy and "Common Practice in Society" Rationales Advanced by the Government to Justify the Ban on Transgender Service Members Reflect and Reinforce Impermissible Sex Stereotypes

Rationales related to fairness, safety, "reasonable expectations of privacy," and "longstanding societal expectations," as advanced by the government here, *see* Implementation Plan at ER191-94, rest on impermissible sex stereotypes. Indeed, these arguments are difficult to distinguish from similar arguments once relied on – and since fully disavowed – by the government to restrict service opportunities for women and gays and lesbians and to justify racial segregation of service members. Permitting the government to entrench sex stereotypes in military policy as it seeks to do here thus has negative consequences for all women, and men as well, in the U.S. armed forces.

In the abstract, a government interest in fairness, safety, and privacy could be perfectly legitimate, much like the Cleveland school board's interest in keeping physically unfit teachers out of the classroom or Idaho's interest in having a capable person handle state administration.

At issue in this case, however, is not whether these kinds of interests are legitimate or important in the abstract. Instead, the question is whether they reflect "stereotypic notions," *MUW*, 458 U.S at 725, when presented as a justification for excluding transgender people from military service.

That is, "the mere recitation of a benign, compensatory purpose is not an automatic shield" against careful review. *Weinberger*, 420 U.S. at 648. Instead, as the Court has explained numerous times, "[t]he same searching analysis must be made, regardless of whether the State's objective is to eliminate family controversy, to achieve administrative efficiency, or to balance the burdens borne by males and females." *MUW*, 458 U.S. at 728 (internal citations omitted).

In this case, the government's ban on military service by transgender individuals rests on the "stereotypic notions" that all women, and all men, are similar in their physical capacities and personal characteristics and that women's need for protection suffices to justify the exclusion here. *See supra* Point I.A.-B. These improper and protectionist themes run throughout the Implementation Plan's discussion of sex-based standards, *see* Implementation Plan at ER191-94, which repeatedly links the male and female physical fitness and body fat standards to "protection from injury," *id.* at ER192, and avoiding "compromise [of] safety," *id.* at ER194. The Report's invocation of "common practice in society," *id.* at ER191, and "longstanding societal expectations," *id.* at ER193, likewise conflict directly

with the Court's rejection of those practices and expectations as validation for discriminatory rules. *See supra* Point I.C.

The Court's sex discrimination jurisprudence specifically forecloses reliance on these kinds of sex stereotypes and overbroad generalizations as justifications for excluding individuals from workplaces, schools, residential military education and numerous other settings. Yet that is what the government seeks to do through excluding transgender people from military service.[5]

By insisting that it is not fair, safe, or socially appropriate to let transgender individuals serve alongside others, the government's rationales resonate uncomfortably with those made to justify the separation of service members by race and the exclusion of both women and gay people from the military. *See generally* Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. Rev. 499 (1991) (reviewing commonality among rationales for restrictions on military service by African Americans, women and

[5] To be clear, permitting transgender men and women to serve does not prevent the military from maintaining sex-based standards in the few areas where such standards exist or from requiring transgender men to meet the standards applied to other men and transgender women to meet the standards applied to other women. Indeed, this was the Department of Defense policy in 2016, referred to frequently as the "Carter policy." *See* Department of Defense Instruction 1300.28, *In-service Transition for Service Members Identifying as Transgender* (June 30, 2016), at 3-4. The error in the policy at issue here is not in having sex-based standards of fitness but rather in relying on sex stereotypes to deny transgender men and women an equal opportunity to serve based on the same standards applied to other service members.

gays and lesbians); Mady Wechsler Segal, *The Argument for Female Combatants*, *Female Soldiers: Combatants or Noncombatants?* (Nancy Loring Goldman, ed. 1982) at 267 (examining concerns expressed in opposition to combat service by women).

As one lieutenant general wrote in 1941, arguing that racial integration would weaken the "efficiency" of the armed forces, "[t]here is no question in my mind of the inherent difference in races. This is not racism – it is common sense and understanding. Those who ignore these differences merely interfere with the combat effectiveness of battle units." Morris MacGregor, Jr., *Integration of the Armed Forces, 1940-65* (1981) at 441. By contrast, numerous reports analyzing the racial integration process that took place after President Truman's order desegregating the armed forces, Exec. Order 9981 (1948), found that integration had proceeded far more effectively and smoothly than the military's leaders had expected. *See, e.g.*, MacGregor, *supra*; *cf.* Leo Bogart, ed., *Social Research and the Desegregation of the U.S. Army* (1969) (compiling reports prepared by consultants to the Army solicited by the Army detailing the process and benefits of integration).

Women have similarly faced doubts about their ability to serve in combat much like the skepticism about their ability to serve in other roles as in the cases discussed *supra*. *See* Segal, *supra*, at 279 ("The concern that women in combat

units will reduce unit cohesion is reminiscent of arguments that have been used in the past to justify excluding women from other occupations.").

Echoing the government's arguments here, the Presidential Commission on the Assignment of Women in the Armed Forces argued in favor of women's exclusion from combat based on concerns for unit cohesion related to the "lack of privacy on the battlefield," "sexual misconduct," and the possibility of "pregnancy." Robert T. Herres et al., Presidential Comm'n on the Assignment of Women in the Armed Forces, *Report to the President* 25 (1992), https://babel.hathitrust.org/cgi/pt?id=umn.31951d00277676f;view=1up;seq=3 (last accessed July 3, 2018); see also *id.* (stating that "unit cohesion can be negatively affected by the introduction of any element that detracts from the need for such key ingredients as mutual confidence, commonality of experience, and equitable treatment"); Segal, *supra*, at 279 (discussing rationales for excluding women from combat linked in part to "women's supposed inability as individuals to perform the jobs adequately and partly on the potential disruption of men's interpersonal relations if women were included").

Again, these arguments, when examined with the care needed to ascertain whether they rest on "archaic and stereotypic notions," *MUW*, 458 U.S. at 725, are now understood to reflect assumptions, but not facts, about women's capacity. *See, e.g.*, Military Leadership Diversity Commission, Final Report, *From*

Representation to Inclusion: Diversity Leadership for the 21st Century Military (Mar. 15, 2011) at 127 (concluding, through a non-partisan study by civilian and military leadership, that the combat exclusion of women should be ended and that the military should create a "level playing field for all qualified service members"); *see also* Major Shelly S. McNulty, *Myth Busted: Women are Serving in Ground Combat Positions*, 68 A.F. L. Rev. 119, 156-61 (2012) (reviewing rationales for excluding women from combat, including arguments related to strength, ability, privacy and unit cohesion); Maia Goodell, *Physical-Strength Rationales for De Jure Exclusion of Women from Military Combat Positions*, 34 Seattle L. Rev. 17 (2010) (analyzing stereotyping and other problems associated with physical-strength rationales for excluding women from combat).

The most recent resurfacing of these types of rationales prior to this current effort occurred in connection with debates about military service by openly lesbian, gay, and bisexual people. Strongly expressed concerns about privacy, safety, unit cohesion and related rationales were advanced repeatedly by those seeking to maintain a full ban on service and then, later, the "don't ask, don't tell" regime. *See generally* U.S. Dep't of Def., Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell" (2010), available at

https://www.loc.gov/item/2011507489/ (last accessed July 3, 2018).[6] These rationales, too, have since been understood to have reflected bias and stereotype rather than permissible grounds for differential treatment. *See, e.g.*, *id.* at 141 (stating that "[c]oncerns about showers and bathrooms are based on a stereotype — that gay men and lesbians will behave in an inappropriate or predatory manner in these situations" and that military commanders "already have the tools . . . to deal with misbehavior . . . whether the person who engages in the misconduct is gay or straight").

It is clear, as the district court found below, that the exclusion of transgender men and women causes serious harm to transgender individuals who seek to serve

[6] Beyond the military context, arguments related to privacy and safety are also familiar from efforts to justify segregation based on sex, sexual orientation and race in other spaces where people are in close physical proximity. *See*, *e.g.*, Jeff Wiltse, *Contested Waters: A Social History of Swimming Pools in America* (2007) (describing the history of separation based first on sex and later on race in public pools); *Lonesome v. Maxwell*, 123 F. Supp. 193, 202 (D. Md. 1954), *rev'd sub nom. Dawson v. Mayor & City Council of Baltimore City*, 220 F.2d 386 (4th Cir. 1955), *aff'd*, 350 U.S. 877 (1955) (citation omitted) (stating that the "degree of racial feeling or prejudice in this State at this time is probably higher with respect to bathing, swimming and dancing than with any other interpersonal relations except direct sexual relations."); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 981 (N.D. Cal. 2010), *aff'd*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (quoting a letter from the Civil Service Commission chair justifying a ban on openly gay people in federal civil service jobs and citing the "apprehension" other employees would feel about sexual advances and assault and related concerns regarding "on-the-job use of the common toilet, shower and living facilities").

our nation's military. When viewed against the backdrop of similar efforts to segregate based on race or exclude based on stereotypes about sex and sex roles, the broader nature of the harm also becomes apparent. With this policy, the government bans some individuals from military service based on impermissible assumptions about sex and, at the same time, seeks improperly to resurrect rationales that have long since been rejected for their reliance on impermissible sex stereotypes and fear of and discomfort with sex-role nonconformity. *Cf. Cleburne*, 473 U.S. at 448, 449 (rejecting "mere negative attitudes" and "vague, undifferentiated fear" as grounds for government action).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the district court's denial of Defendants' motion to dissolve the preliminary injunction. The military's ban on service by transgender men and women constitutes impermissible sex discrimination, as set out above. This policy, and the rationales proffered for it, would give legal effect to overbroad generalizations about men and women and sex stereotypes that have been thoroughly and repeatedly rejected in constitutional jurisprudence as a basis for government action.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 29(g) and 32(g)(1), this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because:

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Dated: July 3, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 3, 2018, which will automatically serve all parties.

Dated: July 3, 2018

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