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, 2:17-cv-01297 (Pechman, J.)

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEES

SHERRILYN A. IFILL
Director-Counsel
SAMUEL SPITAL
JANAI S. NELSON
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200

DANIEL S. HARAWA
Counsel of Record
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
1444 I Street NW, 10th Floor
Washington, D.C. 20005
(202) 682-1300
dharawa@naacpldf.rog

Attorneys for Amicus Curiae

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae the NAACP Legal Defense and Educational Fund, Inc. (LDF) submits the following statement of disclosure: LDF is a nonprofit 501(c)(3) corporation. It is not a publicly held corporation that issues stock, nor does it have any parent companies, subsidiaries or affiliates that have issued shares to the public.

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INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit civil rights legal organization that, for over 75 years, has fought to enforce the guarantee of equal protection and due process in the United States Constitution on behalf of victims of discrimination.

LDF has participated as amicus curiae in cases across the nation that involve the rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, No. 16-111, 2018 WL 2465172 (U.S. June 4, 2018); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Romer v. Evans*, 517 U.S. 620 (1996); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Jackson v. Abercrombie*, 585 F. App'x 413 (9th Cir. 2014); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010); *Ingersoll v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017); *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Conaway v. Deane*,

[1] Amicus curiae the NAACP Legal Defense and Educational Fund, Inc. submits this brief without an accompanying motion for leave to file or leave of court because all parties have consented to its filing. *See* Fed. R. App. P. 29(a)(2). No counsel for a party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution intended to fund the preparation or submission of the brief. No one other than amicus or its counsel has made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

932 A.2d 571 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Gifford v. McCarthy*, 137 A.D.3d 30 (N.Y. App. Div. 2016).

Consistent with its opposition to all forms of discrimination, LDF has a strong interest in the federal policy at issue banning transgender individuals from serving in the United States military.

INTRODUCTION

From our Nation's founding until not too long ago, the United States military openly discriminated against African Americans. Black patriots were forced to serve in segregated units,[2] relegated to unskilled support roles,[3] and at times outright banned from enlisting.[4] The Government justified its discrimination by claiming that allowing Blacks to serve alongside whites "would produce situations destructive to morale and detrimental to the preparation for national defense."[5] But a comprehensive study commissioned by President Harry S. Truman proved these claims false,[6] and after a concerted push from the Black community,[7] President Truman signed an Order desegregating the military.[8]

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[2] F. Michael Higginbotham, *Soldiers for Justice: The Role of the Tuskegee Airmen in the Desegregation of the American Armed Forces*, 8 Wm. & Mary Bill Rts. J. 273, 277-78 (2000).

[3] *Id.* at 278.

[4] National Archives, Black Soldiers in the U.S. Military during the Civil War, https://www.archives.gov/education/lessons/blacks-civil-war (last visited June 15, 2018).

[5] J.S. Leonard, *Digest of War Department Policy Pertaining to Negro Military Personnel*, Records of the President's Committee on Equality of Treatment and Opportunity in the Armed Services (Jan. 1, 1944), https://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/documents/index.php?documentid=12-7&pagenumber=1.

[6] *See* Harry S. Truman, Presidential Library & Museum, *Records of the President's Committee on Civil Rights*, https://www.trumanlibrary.org/htspaper/pccr.htm.

[7] *See generally*, Rawn James, Jr., *The Double V: How Wars, Protest, and Harry Truman Desegregated America's Military* (2013).

[8] *See* Exec. Order No. 9981, 3 C.F.R. § 772 (1941-1948) (July 26, 1948), https://www.trumanlibrary.org/9981.htm.

Winston Churchill—a storied military strategist—once warned that "those that fail to learn from history are doomed to repeat it."[9] The Government apparently did not learn from its history of discrimination, so here we are. The Government is using the same rationalizations once weaponized against African Americans seeking to serve their country to justify banning transgender Americans from service.[10] The Government is on the wrong side of both history and the Constitution.

ARGUMENT

I. THE COUNTRY'S SHAMEFUL HISTORY OF DISCRIMINATING AGAINST AFRICAN AMERICANS IN THE MILITARY

In the United States, "citizenship and eligibility for military service have gone hand in hand."[11] Despite African Americans fighting in every war the U.S. has ever fought,[12] up until the mid-20th Century, the military openly discriminated against Black people seeking to serve their county. And while this discrimination has taken

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[9] Winston Churchill, http://www.memorablequotations.com/churchill.htm (last visited June 25, 2018).

[10] *See* U.S. Dep't of Defense, *Report and Recommendations on Military Service by Transgender Persons* (Feb. 22, 2018), https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/military-service-by-transgender-individuals.pdf.

[11] Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. Rev. 499, 500 (1991).

[12] *See* U.S. Army, *African Americans in the U.S. Army*, https://www.army.mil/africanamericans/timeline.html (last visited June 15, 2018); U.S. Army Center of Military History, *The Army and Diversity*, https://history.army.mil/html/faq/diversity.html (last visited June 15, 2018).

many forms, it was all part and parcel of the country's sordid history of denying Black Americans equal citizenship.

Before the Civil War, African Americans were not allowed to serve in the military. There was a fear that "military service would allow [Black people] to be seen as men, as citizens."[13] This fear intensified as the Civil War loomed. Almost two years into the war, with no end in sight and the number of white enlistees dwindling, the Union needed soldiers, so Congress passed the Militia Act of July 17, 1862.[14] This Act authorized President Lincoln "to employ as many persons of African descent as he may deem necessary and proper for the suppression of this rebellion in such manner as he may judge best for the public welfare."[15] Hundreds of thousands of Black people served during the Civil War.[16] And while they were at first "used almost entirely in support functions that mainly involved manual labor," by the end of the war, Black soldiers regularly engaged in combat and comprised ten percent of the Union Army.[17] By the end of the Civil War, more than 37,000 Black

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[13] Karst, *supra* note 11 at 512. For example, many believed that if Black people "put on uniform . . . it would be hard to deny them the vote." *Id.*

[14] *See* 12 Stat. 597 (July 17, 1862).

[15] History.com, *Black Civil War Soldiers*, https://www.history.com/topics/american-civil-war/black-civil-war-soldiers (last visited June 26, 2018) (quotation marks and ellipsis omitted).

[16] Karst, *supra* note 11 at 512.

[17] *Id.* at 513; Elsie Freeman et al., *The Fight for Equal Rights: A Recruiting Poster for Black Soldiers in the Civil War*, 56 Soc. Educ. 2, 118-120 (Feb. 1992), https://www.archives.gov/education/lessons/blacks-civil-war.

troops—many of whom started the war as slaves—had sacrificed their lives.[18]

After the Civil War, African Americans believed that the "wartime sacrifices of black men vindicated the claims of black people to full citizenship."[19] As W.E.B. DuBois reflected about the war: "Nothing else made Negro citizenship conceivable, but the record of the Negro solider as a fighter."[20] The passage of the Reconstruction Amendments[21] and a law giving Black people a limited right to serve in the Army,[22] seemed to cement this truth.[23] Yet even with these legal victories, African Americans still had a long way to go before the military would treat them equally.

The military's discrimination against African Americans persisted during Jim Crow and World Wars I and II. Black people were made to serve in segregated units, shutout from leadership and skilled service roles, and excluded altogether from some branches of the military.[24] The Government's "military and civilian leaders firmly believed that because black people were inferior to whites, black soldiers and sailors

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[18] Karst, *supra* note 11 at 513.
[19] *Id.*
[20] *Id.* (quoting. W.E.B. DuBois, *Black Reconstructionist in America* 104 (1935)).
[21] *See* U.S. Const. amends. XIII, XIV, XV.
[22] *See* 14 Stat. 332, 39 Cong. Ch. 299 (July 28, 1866). Under this law, Black people still had to serve in segregated battalions. *Id.* Even with this limitation the law faced tremendous opposition. "Senior army officials lobbied against the bill, contending that black men were not intelligent enough to work in artillery units." James, *supra* note 7 at 15.
[23] *See id.*; *The Army and Diversity*, *supra* note 23.
[24] Higginbotham, *supra* note 2 at 278.

were likewise inferior."[25]

The Government began to justify its discrimination against Black soldiers by claiming it was beneficial for military operations. As one scholar recounted, as the push for the integration of the military intensified during the 1930s and 40s, Government officials asserted "that if units were integrated, the racial strife generated would not only affect morale but also readiness and efficiency."[26] For example, in 1940, Assistant Secretary of War Robert Patterson wrote a memorandum to President Franklin Roosevelt asserting that the country had a "satisfactory" policy "not to intermingle colored and white enlisted personnel" and that to integrate the military "would produce situations destructive to morale and detrimental to the preparation for national defense."[27] In 1948, General (soon-to-be President) Dwight D. Eisenhower reported to a Senate committee that segregation "was necessary to preserve the internal stability of the Army [because] [p]rejudice was a condition of American society."[28]

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[25] James, *supra* note 7 at 4.
[26] John L. Newby, *The Fight for the Right to Fight and the Forgotten Negro Protest Movement: The History of Executive Order 9981 and its Effect Upon Brown v. Board of Education and Beyond*, 10 Tex. J. on C.L. & C.R. 83, 88 (2004).
[27] James, *supra* note 7 at 92.
[28] Morris J. MacGregor, Jr., *Integration of the Armed Forces 1940-1945* 227 (1981), https://history.army.mil/html/books/050/50-1-1/cmhPub_50-1-1.pdf (quotation marks omitted).

As one Army historian summarized, the military defended its policy of segregation by providing these rationales:

> (1) segregation was necessary for internal stability of the Army;
>
> (2) segregation was an efficient way to isolate poorly educated and undertrained black soldiers; [and]
>
> (3) segments of American society opposed integration [and thus] the military should not be too far ahead of the rest of the country in protecting the civil rights of blacks.[29]

All told, by World War II, despite more than 2.5 million African Americans registering for the draft,[30] and one million African Americans in active service,[31] the Government continued to refuse to allow Black people to serve as equals to their white counterparts.

African Americans served honorably during World War II,[32] only to endure "the hypocrisy of asking black men to serve and die in a foreign country only to return to a segregated homeland."[33] "The lack of equal treatment, and the demeaning

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[29] Higginbotham, *supra* note 2 at 278. The military also claimed that segregation had a benevolent purpose—it was "the only way to provide equal treatment an opportunity for black troops." *Id.* (citing MacGregor, *supra* note 28, at 227-29).
[30] *See* National Museum of the Pacific War, *African Americans in WWII*, http://www.pacificwarmuseum.org/your-visit/African Americans-in-wwii/ (last visited June 18, 2018).
[31] Higginbotham, *supra* note 2 at 284.
[32] The Tuskegee Airmen are perhaps the most famous. *See* Major Karen S. White, *The Tuskegee Airmen: The Men Who Changed A Nation*, 169 Mil. L. Rev. 180 (2001).
[33] Higginbotham, *supra* note 2 at 285.

personal discrimination that blacks suffered at the hands of whites led many black Americans to view supporters of racial segregation and supporters of Aryan supremacy as one in the same."[34] A well-known illustration of this hypocrisy occurred when Black soldiers in the South "were refused service in a restaurant that willingly served Nazi prisoners of war."[35] And racial violence that was the hallmark of Jim Crow, including lynching and police brutalization, found its way onto U.S. military bases.[36]

Sick of this treatment, the African American community mobilized. Perhaps the most prominent figure in the fight for racial equality in the military was A. Phillip Randolph, founder of the Brotherhood of Sleeping Car Porters.[37] Randolph formed the Committee Against Jim Crow in Military Service and Training, which placed unceasing pressure on the Government to integrate the military.[38] African American newspapers were also critical to the fight for military integration. One of the most popular, the Pittsburgh Courier, started the "Double V" campaign.[39] The campaign borrowed from the famous World War II slogan "V for Victory," and urged Black

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[34] *Id.* at 289.
[35] *Id.* at 290.
[36] For example, a Black soldier was lynched at Fort Benning, Georgia, and another was shot to death in Fayetteville, North Carolina, after being brutalized by police. *See* Newby, *supra* note 26 at 94.
[37] *See* National Park Service, *A. Phillip Randolph*, https://www.nps.gov/people/a-phillip-randolph.htm (last visited June 26, 2018).
[38] Newby, *supra* note 26 at 96-97.
[39] Higginbotham, *supra* note 2 at 285.

Americans to "fight for victory simultaneously at home and abroad."[40] The campaign came to be supported by "nearly every newspaper and pulpit," and promoted the message that Black troops "would be less than men if, while . . . giving up [their] property and sacrificing [their] lives, [they] do not agitate, contend, and demand those rights guaranteed to all freemen."[41] The call was clear: "The first V [is] for victory over our enemies from without, the second V [is] for victory over our enemies from within. For surely those who perpetuate these ugly prejudices here are seeking to destroy our democratic form of Government just as surely as the Axis forces."[42]

With groundswell pressure to integrate the military,[43] the burgeoning battle for integration led by Thurgood Marshall and the NAACP Legal Defense Fund,[44] and the worry that the United States may go to war with the Soviet Union,[45] President Truman formed the President's Committee on Civil Rights to study desegregating

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[40] Neil Wynn, *The Afro-American and the Second World War* 100 (1975).
[41] *Id.*
[42] James, *supra* note 7 at 142.
[43] Cornelius L. Bynum, *How a Stroke of the Pen Changed the Army Forever*, Wash. Post (July 26, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/07/26/how-a-stroke-of-the-pen-changed-the-army-forever/?noredirect=on&utm_term=.d77b0b3c9259.
[44] *See* James, *supra* note 7 at 214.
[45] *See* Patrick Feng, *Executive Order 9981: Integration of the Armed Forces*, National Museum of the United States Army (Jan. 25, 2015), https://armyhistory.org/executive-order-9981-integration-of-the-armed-forces/; Maria Höhn & Martin Klimke, *The Military at a Crossroads Again*, History News Network (Dec. 16, 2010), https://historynewsnetwork.org/article/134654.

the military.[46] After several meetings, multiple hearings, and a thorough examination of the available data, the Committee issued a damning assessment: the military's exclusion of African Americans was "indefensible" and had "cost[] lives and money in the inefficient use of human resources."[47] The study found that the military had "weaken[ed] our defense" by "preventing entire groups from making their maximum contribution to the national defense."[48] The Committee's report therefore called for an immediate end to segregation based on "race, color, creed, or national origin, in the organization and activities of all branches of the Armed Services."[49]

Armed with this information, on July 26, 1948, President Truman signed Executive Order 9981.[50] The Order "hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin."[51] Simultaneously, President Truman created the Committee on Equality of Treatment and Opportunity in the Armed Forces to assess how best to implement the Order.[52]

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[46] *See* Harry S. Truman, Presidential Library and Museum, *Records of the President's Committee on Civil Rights, supra* note 6.
[47] President's Comm. on Civil Rights, *To Secure These Rights* (1947), https://www.trumanlibrary.org/civilrights/srights1.htm.
[48] *Id.* at 46-47.
[49] *Id.* at 163.
[50] *See* Exec. Order No. 9981, 3 C.F.R. 772, *supra* note 8.
[51] *Id.*
[52] *Id.* President Truman charged the Committee with examining the "rules, procedures and practices of the armed services in order to determine in what respect

The Committee issued its report two years later.[53] And like the previous study, it eviscerated the military's segregationist policies. Although the Government had claimed integration would hurt military readiness, the Committee found the opposite—that the "inequality had contributed to inefficiency."[54] Thus, after examining "the rules, procedures, and practices of the armed services, both past and present," the Committee was "convinced that a policy of equality of treatment and opportunity will make for a better Army, Navy, and Air Force."[55] The Committee concluded that equal treatment of Black and white servicemembers was "right and just,' and would "strengthen the nation."[56] This was "consistent[]" with "[t]he integrity of the individual, his equal worth in the sight of God, his equal protection under law, his equal rights and obligations of citizenship and his equal opportunity to make just and constructive use of his endowment"—"the very foundation of the American system of values."[57]

Thus began the Government's efforts to integrate the military. "The military,

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such rules, procedures and practices may be altered or improved with a view to carrying out the policy of this order." *Id.*

[53] Comm. on Equality of Treatment and Opportunity in the Armed Services, *Freedom to Serve* (Mar. 27, 1950), https://www.trumanlibrary.org/civilrights/freeserv.

[54] *Id.* at 67.

[55] *Id.*

[56] *Id.*

[57] *Id.*

with its clear hierarchy and commitment to discipline,"[58] "made a significant commitment to fixing its race problem."[59] It did so by creating "race-conscious structural mechanisms to ensure equality."[60] Indeed, in many ways, the military has become the model of successful integration.[61] And looking back 70 years later, it's clear that the military's reasons for discriminating against African Americans were wrong. Since its integration, African Americans have successfully served at the military's highest levels and have received its highest honors.[62] As President Clinton declared, "The model used by the military, the army in particular . . . that model has been especially successful because it emphasizes education and training, ensuring that it has a wide pool of qualified candidates for every level of promotion."[63] President Clinton concluded that "[t]hat approach has given us the most racially

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[58] Bynum, *supra* note 43.

[59] Mario L. Barnes, *"But Some Of [Them] Are Brave": Identity Performance, the Military, and the Dangers of an Integration Success Story*, 14 Duke J. Gender L. & Pol'y 693, 702 (2007).

[60] *Id.*

[61] *Id.*

[62] For example, in 1975, General Roscoe Robinson, Jr. became the first Black four-star General. In 1977, Clifford Alexander, Jr. became the first Secretary of the Army. In 1989, General Colin Powell became the first Black Chairman of the Joint Chiefs of Staff. And last year, Cadet Simone Askew became the first Black woman to receive the highest position in the cadet chain of command. *See* U.S. Army, *African Americans in the U.S. Army*, *supra* note 12.

[63] President William Clinton, *Mend It Don't End It*, Address at the National Archives on Affirmative Actions Programs (July 1995), http://web.utk.edu/~mfitzge1/docs/374/MDE1995.pdf).

diverse and the best qualified military in our history."[64]

II. THE MILITARY'S BAN AGAINST TRANSGENDER INDIVIDUALS BORROWS FROM THE SAME PLAYBOOK ONCE USED AGAINST AFRICAN AMERICANS.

The military's history of racial discrimination is important to understanding the ban precluding openly transgender people from service. It is alarming that the Government is recycling from a decades-old playbook that was rooted in racism to justify discriminating against transgender Americans.

For decades, the military banned openly transgender people from service.[65] Despite this, transgender Americans still honorably served—it is estimated that there are more than 130,000 transgender veterans.[66] At first, the military justified the ban "based on incorrect and outdated medical rationale" [67]; the purported "concern was that a person's gender dysphoria" could "interfere with someone's ability to serve."[68]

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[64] *Id.*

[65] Human Rights Campaign, *Transgender Military Service*, https://www.hrc.org/resources/transgender-military-service (last visited June 19, 2018).

[66] Gary J. Gates & Jody L. Herman, *Transgender Military Service in the United States*, Williams Institute UCLA School of Law (May 2014), https://williamsinstitute.law.ucla.edu/research/military-related/us-transgender-military-service/.

[67] German Lopez, *Trump's Ban on Transgender Troops, Explained,* Vox (Mar. 24, 2018), https://www.vox.com/identities/2017/7/26/16034366/trump-transgender-military-ban; *see also* Jocelyn Elders & Alan Steinman, *Report of the Transgender Military Service Commission* (Mar. 2014), http://archive.palmcenter.org/files/Transgender%20Military%20Service%20Report.pdf.

[68] *Id.*

But following the 2011 repeal of the military's "Don't Ask, Don't Tell" policy[69]—which allowed openly lesbian, gay, and bisexual Americans to serve in the military—there was a growing call for the military to rethink its ban on transgender Americans.[70] This call was heard by President Barack Obama's Administration. In 2014, then-Secretary of Defense Chuck Hagel expressed his belief that the military should "review its prohibition on transgender people in the armed forces" because "[e]very qualified American who wants to serve our country should have an opportunity if they fit the qualifications and can do it."[71] In 2015, Secretary Hagel's successor, Ashton Carter, heeded Hagel's call and eliminated "the categorical ban on open service by transgender persons."[72] Secretary Carter then ordered the Undersecretary of Defense to "chair a working group . . . to formulate policy options for the [Department of Defense] regarding the military service of transgender

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[69] *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *3 (W.D. Wash. Apr. 13, 2018).

[70] *See* Sandhya Somashekhar & Craig Whitlock, *Military to Allow Transgender Members to Serve Openly*, Wash. Post (July 13, 2015), https://www.washingtonpost.com/politics/pentagon-to-allow-transgender-members-to-serve-openly/2015/07/13/fe9b054a-298d-11e5-a5ea-cf74396e59ec_story.html?utm_term=.878fcecac884.

[71] Jonah Engel Bromwich, *How U.S. Military Policy on Transgender Personnel Changed Under Obama*, N.Y. Times (July 26, 2017), https://www.nytimes.com/2017/07/26/us/politics/trans-military-trump-timeline.html.

[72] *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 178-79 (D.D.C. 2017) (quotation marks omitted).

Service members."[73] The working group "considered a broad range of information provided by senior military personnel, various types of experts, health insurance companies, civilian employers, transgender service members themselves, and representatives from the militaries of other nations."[74] The group also commissioned a detailed report.[75]

The conclusions reached by the report were much like those reached by the report assessing the would-be effect of integrating the military. The report "found no evidence that allowing transgender individuals to serve would have any effect on 'unit cohesion.'"[76] Moreover, "any related costs or impacts on readiness would be 'exceedingly small,' 'marginal,' or 'negligible.'"[77] The report made clear that, after studying "foreign militaries" that allow openly transgender individuals to serve, there was "no case" in which there was "evidence of an effect on the operational effectiveness, operational readiness, or cohesion of the force."[78] Thus, the working group "unanimously concluded that transgender people should be allowed to serve openly in the military."[79] Not only that. It found, like the committee that studied

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[73] *Id.*
[74] *Id.*
[75] RAND Corp., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly* (2016) (*see* Mabus Decl. Ex. B, *Karnoski v. Trump*, No. 12-cv-1297 (W.D. Wash. Jan. 25, 2018), Doc. 144-2).
[76] *Doe I*, 275 F. Supp. 3d at 179 (quotation marks omitted).
[77] *Id.* (quotation marks omitted).
[78] *Id.* (quotation marks omitted).
[79] *Id.*

racially integrating the military, "that *prohibiting* transgender people from serving undermines military effectiveness and readiness because it excludes qualified individuals on a basis that has no relevance to one's fitness to serve."[80]

After receiving the recommendations from the working group, Secretary Carter issued a directive in June 2016 formally ending the military's prohibition against transgender servicemembers.[81] It was now the military's policy that, "consistent with military readiness and with strength through diversity," "transgender individuals should be allowed to serve" in the military.[82]

The overwhelming evidence supporting Secretary Carter's directive has not changed. Yet President Trump summarily reversed course when he announced on Twitter last summer "that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military."[83] President Trump followed his tweet with a memorandum "directing the Secretaries of Defense and Homeland Security to 'return' to the military's policy of authorizing the discharge of openly transgender service members; to prohibit the accession of openly transgender individuals; and to prohibit the funding of certain surgical procedures for transgender service members."[84] Following the President's directive,

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[80] *Id.* (emphasis in original).
[81] *Id.* at 180.
[82] *Id.* (quotation marks omitted).
[83] *Karnoski*, 2018 WL 1784464, at *2 (ellipsis omitted).
[84] *Id.* (explanatory parentheticals omitted).

Secretary of Defense James Mattis issued interim guidance in September 2017, which banned openly transgender individuals from joining the military and authorized military leaders to discharge openly transgender troops.[85] President Trump then issued a supplemental memorandum in March of this year, which similarly prohibits transgender people from serving "unless they are willing and able to adhere to all standards associated with their biological sex."[86]

In its brief, the Government provided three reasons why the Administration reinstated the ban against openly transgender people serving in the military. The Government first claims that openly transgender troops would pose "significant risks to military readiness."[87] It next asserts that allowing openly transgender individuals to serve "would inevitably undermine . . . good order, discipline, steady leadership, unit cohesion, and ultimately military effectiveness and lethality."[88] The Government finally justifies the ban by arguing that the previous policy permitting openly transgender Americans to serve in the military was "proving to be disproportionality costly on a per capita basis."[89]

Not only are these the same justifications that the previous administration found baseless just two years ago, they are almost identical to the justifications the

[85] *Id.* at *6. (quotation marks omitted).
[86] *Id.*
[87] Appellant's Br. at 25.
[88] *Id.* at 31-32 (quotation marks omitted).
[89] *Id.* at 36.

military used to discriminate against Black soldiers more than half a century ago. The Government once claimed that allowing Black people to serve equally alongside whites would be "detrimental to the preparation for national defense,"[90] hurting "military readiness." The Government also said that integration would hurt "unit cohesion" and would be "destructive to morale."[91] And the Government once provided a cost-related reason for discriminating against Black servicemembers: it would be too costly to provide "poorly educated" Black troops the training necessary to allow them to serve equally alongside whites.[92] In short, the Government is recycling the kind of justifications once used to discriminate against African Americans, which were proven false, to justify discriminating against transgender people.

When African Americans were prohibited from serving, they were denied full citizenship. Should this ban go into effect, the same will be true for thousands of transgender Americans currently serving[93]—like Plaintiff Jane Doe.[94] It will be true for transgender Americans who have already sacrificed—like Sergeant Shane

[90] *See* Leonard, *supra* note 5.
[91] *See id.*
[92] *See* Higginbotham, *supra* note 2 at 278.
[93] It is estimated that over 15,000 transgender individuals are either on active duty or are serving in the Guard or Reserve forces. Gates & Herman, *supra* note 66.
[94] *See* Compl. at 3.

Ortega, who served in both Iraq and Afghanistan.[95] And it will be true for the countless other transgender Americans who seek to serve—like Plaintiffs Ryan Karnoski and D.L.[96] Like the patriotic African Americans decades before, by banning openly transgender people from serving, the Government is denying patriotic Americans the ability to be fully enfolded into the American citizenry.

For the 100-plus years it was occurring, the courts did little to stop the military from openly discriminating against African Americans.[97] Only one court of appeals decision from 1944 directly addressed the military's segregationist practices, *United States ex rel. Lynn v. Downer*.[98] That case involved a challenge under the Selective Service Act to the Army's racially segregated quota system for the draft.[99] The court of appeals affirmed the district court's decision dismissing the claim, holding that "separate quotas in the requisitions based on relative racial proportions of the men subject to call do not constitute prohibited discrimination."[100] In approving the racially segregated quota system, the court relied on one of the most condemned

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[95] Sergeant Ortega served "two tours in Iraq and one in Afghanistan. Two as a Marine and one in the Army. Two as a woman and one as a man." Juliet Eilperin, *Transgender in the Military: A Pentagon in Transition Weighs Its Policy*, Wash. Post (Apr. 9, 2015), https://www.washingtonpost.com/politics/transgender-in-the-military-a-pentagon-in-transition-weighs-its-policy/2015/04/09/ee0ca39e-cf0d-11e4-8c54-ffb5ba6f2f69_story.html?utm_term=.a3a43e7b2ea3.

[96] *See* Compl. at 3.

[97] *See* Newby, *supra* note 26 at 94.

[98] 140 F.2d 397, 400 (2d Cir. 1944).

[99] *Id.* at 399.

[100] *Id.* (quotation marks omitted).

Supreme Court decisions of all time: *Plessy v. Ferguson*.[101, 102] Given that the Supreme Court repudiated *Plessy*,[103] the case would almost certainly come out differently if decided today.

Because the courts did not intervene, it took the Executive Branch correcting its own practices to end the military's discrimination against Black people. Here, while the Executive once corrected its history of discriminating against transgender Americans, it has now doubled-back. This Court should step in. There is little doubt that if any of the military policies that once discriminated against African Americans were to come before a court today, they would be found unconstitutional. As Judge Norris opined: "Today, it is unthinkable that the judiciary would defer to the Army's prior 'professional' judgment that black and white soldiers had to be segregated to avoid interracial tensions."[104] "Indeed," Judge Norris continued, "the Supreme Court has decisively rejected the notion that private prejudice against minorities can ever justify official discrimination, even when those private prejudices create real life and

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[101] *See id.* (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)).
[102] *See* Corinna B. Lain, *Three Supreme Court "Failures" and a Story of Supreme Court Success*, 69 Vand. L. Rev. 1019, 1020 (2016) (identifying *Plessy v. Ferguson*, *Buck v. Bell*, and *Korematsu v. United States* as three "particularly strong examples of the Supreme Court's failure to protect"); *accord* Erwin Chemerinsky, *The Case Against the Supreme Court* 37 (2014) ("*Plessy v. Ferguson* is remembered together with *Dred Scott* as being among the most tragically misguided Supreme Court decisions in American history.").
[103] *See Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 495 (1954).
[104] *Watkins v. U. S. Army*, 875 F.2d 699, 729 (9th Cir. 1989) (en banc) (Norris, J., concurring).

legitimate problems."[105]

The Supreme Court has repeatedly found that discriminatory classifications by the federal Government violate the Constitution.[106] And the Court has consistently held that governmental actions based on unsupported and prejudiced rationales offend the Constitution.[107] Distilled to its essence, that's what we have here—a policy not founded in fact but based in unconstitutional bigotry.

* * *

In 2008, Secretary of Defense Robert Gates gave an address commemorating the anniversary of President Truman's signing the Executive Order that integrated the military. In his remarks, Secretary Gates proclaimed that "[n]o aspect of black Americans' quest for justice and equality under the law has been nobler than what has been called, 'the fight for the right to fight.'"[108]

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[105] *Id.*

[106] *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (federal law allowing only male servicemembers the automatic dependency allowance violates due process); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (racial segregation in District of Columbia public schools violates due process).

[107] *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (for a "classification" to be "legitimate" it cannot be based on "prejudice or stereotype"); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (a justification for a classification must be "genuine, not hypothesized or invented post hoc in response to litigation"); *Palmore v. Sidoti*, 458 U.S. 429, 433 (1984) (finding unconstitutional a court order granting a father custody after the mother remarried a Black man because the ruling was based on "racial and ethnic" prejudices).

[108] Gerry J. Gilmore, *Truman's Military Desegregation Order Reflects American Values, Gates Says*, American Forces Press Service (July 23, 2008), http://archive.defense.gov/news/NewsArticle.aspx?ID=50583.

Secretary Gates' remarks apply with equal force here. Transgender Americans are fighting "for the right to fight." This Court should grant them the justice and equality they deserve, guaranteed to them by the Constitution.

CONCLUSION

For these reasons, amicus curiae the NAACP Legal Defense & Educational Fund, Inc. respectfully asks this Court to affirm the district court's decision enjoining the ban against openly transgender people serving in the armed forces.

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Respectfully submitted,

/s/ Daniel S. Harawa
SHERRILYN IFILL
JANAI S. NELSON
SAMUEL SPITAL
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200

DANIEL S. HARAWA
Counsel of Record
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
1444 I Street NW, 10th Floor
Washington, D.C. 20005
(202) 682-1300
dharawa@naacpldf.org

Attorneys for Amicus Curiae NAACP Legal Defense and Educational Fund, Inc.

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/s/ Daniel S. Harawa
DANIEL S. HARAWA
Counsel of Record
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
1444 I Street NW, 10th Floor
Washington, D.C. 20005
(202) 682-1300
dharawa@naacpldf.org

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2018, I electronically filed the foregoing BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEES with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will send electronic notification to all Counsel of Record.

/s/ Daniel S. Harawa
DANIEL S. HARAWA
Counsel of Record
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
1444 I Street NW, 10th Floor
Washington, D.C. 20005
(202) 682-1300
dharawa@naacpldf.org