

Exhibit A

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al,

Plaintiffs,

v.

DONALD TRUMP, et al,

Defendants.

STATE OF WASHINGTON,

Intervenor-Plaintiff,

v.

DONALD TRUMP, et al,

Intervenor-Defendants.

Case No: 2:17-cv-1297-MJP

BRIEF OF *AMICI* STATES
MASSACHUSETTS, CALIFORNIA,
CONNECTICUT, DELAWARE,
HAWAII, ILLINOIS, IOWA,
MARYLAND, NEW JERSEY,
NEW MEXICO, NEW YORK,
OREGON, PENNSYLVANIA,
RHODE ISLAND, VERMONT,
AND THE DISTRICT OF
COLUMBIA IN SUPPORT OF
PLAINTIFFS' AND INTERVENOR-
PLAINTIFF'S MOTIONS FOR
SUMMARY JUDGMENT

Note on Motion Calendar:
February 16, 2018

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ARGUMENT

I. A BAN ON TRANSGENDER PEOPLE OPENLY SERVING IN THE MILITARY IS IRRATIONAL AND UNCONSTITUTIONAL.

A. Transgender People Are a Vital Part of the *Amici* States' Communities, Yet Remain a Historically Marginalized Group.

Nationwide, nearly 1.5 million people identify as transgender.² They live in the *Amici* States (as well as every other State, American Samoa, Guam, and Puerto Rico)³ and contribute to our communities in countless ways – as parents, educators, students, firefighters, police officers, musicians, writers, nurses, and doctors, to name a few. Approximately 150,000 veterans, active-duty service members, and members of the National Guard or Reserves identify as transgender, and transgender individuals volunteer to serve and protect our country through the Armed Forces at approximately twice the rate of other adults in the general population.⁴ Nothing about being transgender inhibits a person's ability to serve in the military or otherwise contribute to society.⁵ To the contrary, the experience of the *Amici* States shows that transgender individuals are just as capable as their non-transgender counterparts and make a meaningful positive impact in our schools, workplaces, and communities.

Still, the transgender community has suffered “a history of persecution and discrimination” that persists into the present day. *Adkins v. City of New York*, 143 F. Supp. 3d

² Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, The Williams Inst., 3 (June 2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

³ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equality, 53, 244 (Dec. 2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

⁴ Gary J. Gates & Jody L. Herman, *Transgender Military Service in the United States*, The Williams Inst., 1 (May 2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Transgender-Military-Service-May-2014.pdf> (estimating 134,300 transgender veterans and 15,500 members in active service, the National Guard, or Reserves).

⁵ See Am. Psychol. Ass'n, *Answers to Your Questions about Transgender People, Gender Identity, and Gender Expression*, 3 (2014 update), <http://www.apa.org/topics/lgbt/transgender.pdf>; Am. Psychol. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychol. Ass'n 832, 834 (2015); see also Declaration of George R. Brown, ECF No. 143, ¶¶ 20-22.

1 134, 139 (S.D.N.Y. 2015). According to the 2015 United States Transgender Survey (“2015
 2 USTS”), transgender individuals face verbal harassment and physical violence at home, in
 3 school, and in their communities; grapple with mistreatment in the workplace and a higher rate
 4 of unemployment than the general United States population; confront homelessness and
 5 difficulty obtaining and maintaining housing; and endure myriad other forms of discrimination
 6 in education, employment, housing, and access to health care due to their gender identity.⁶
 7 Such discrimination and the associated stigma often cause severe emotional and psychological
 8 distress and lead to disproportionately high rates of depression and anxiety in the transgender
 9 population.⁷

10 To combat such discrimination, twenty States – including many of the *Amici* States –
 11 have enacted civil rights protections for transgender people in education, employment, health
 12 care, housing, and/or public accommodations.⁸ And about 225 local governments prohibit
 13 discrimination based on gender identity or expression by public and private employers in their
 14 jurisdictions.⁹ As the experiences of the *Amici* States and these other jurisdictions show,
 15 transgender-inclusive policies help to ease the stigma on transgender people, thereby

16 ⁶ 2015 USTS, *supra* note 3, at 8-16; *see* Walter O. Bockting et al., *Stigma, Mental Health, and*
 17 *Resilience in an Online Sample of the US Transgender Population*, 103(5) *Am. J. Public Health* 943,
 18 943 (2013) (“Transgender people face systematic oppression and devaluation as a result of social
 stigma attached to their gender nonconformity.”).

19 ⁷ *See* Bockting, *supra* note 6, at 949 (noting that these mental health outcomes “were not
 20 merely a manifestation of gender dysphoria” and were associated “with enacted and felt stigma”); *Am.*
 21 *Psychol. Ass’n, Answers to Your Questions about Transgender People*, *supra* note 5, at 3 (explaining
 that “lack of acceptance within society, direct or indirect experiences with discrimination, or assault . . .
 may lead many transgender people to suffer with anxiety, depression or related disorders at higher rates
 than nontransgender persons”); *Am. Psychol. Ass’n, Guidelines*, *supra* note 5, at 840.

22 ⁸ *See, e.g.*, Mass. Gen. Laws ch. 151B, § 4; Mass. Gen. Laws ch. 272, §§ 92A, 98; Cal. Civil
 23 Code § 51(b), (e)(5); Cal. Gov. Code § 12940(a); Cal. Gov. Code § 12955; Haw. Rev. Stat.
 24 § 368-1; Haw. Rev. Stat. § 378-2; Haw. Rev. Stat. § 489-3; Haw. Rev. Stat. § 515-16; N.M. Stat. Ann.
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25 ⁹ *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*,
 26 Human Rights Campaign (last updated Jan. 28, 2017), <https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender>.

1 mitigating the negative impact on their educational, work, and health outcomes. Such policies
2 also foster a more just and productive society for all our residents.

3 **B. The Military Lifted Historical Prohibitions on Service by Transgender**
4 **Individuals After a Lengthy, Deliberative Process.**

5 As in other aspects of society, transgender individuals who volunteered to fight for our
6 country were long met with discrimination and excluded from military service in the Armed
7 Forces through a patchwork of medical and administrative regulations.¹⁰ To join and advance
8 in the military, thousands of individuals were thus forced to conceal their gender identity or
9 risk discharge.¹¹ Many other transgender recruits were unable to enlist in the first place. This
10 was the reality for decades – unchanged by the adoption of “Don’t Ask, Don’t Tell” (“DADT”) in
11 the 1990s and the subsequent repeal of that policy in 2011 (which ushered in the era of open
12 service by gay, lesbian, and bisexual individuals).¹² After the DADT repeal, however, the
13 public and the military began to reexamine the categorical prohibition against transgender
14 individuals serving in the military, and determined that it was not only untenable, but
15 counterproductive.¹³

16 Ultimately, in July 2015, then-Secretary of Defense Ashton Carter publicly
17 acknowledged that Department of Defense regulations regarding transgender service members
18 were “outdated,” “contrary to our value of service and individual merit,” and harmful to

19 _____
20 ¹⁰ See e.g., Matthew F. Kerrigan, *Transgender Discrimination in the Military: The New Don’t Ask, Don’t Tell*, 18 Psychol. Pub. Pol’y & L. 500, 506-508 (2012).

21 ¹¹ *Id.* at 502; 2015 USTS, *supra* note 3, at 170-171; Statement by Secretary of Defense Ashton
22 Carter on DOD Transgender Policy, Release No. NR 272-15 (July 13, 2015) available at
23 <https://www.defense.gov/News/News-Releases/News-Release-View/Article/612778/> (“[T]ransgender
24 men and women in uniform have been there with us, even as they often had to serve in silence
25 alongside their fellow comrades in arms.”).

24 ¹² See Kerrigan, *supra* note 10, at 501, 503-504.

25 ¹³ See Joycelyn Elders & Alan M. Steinman, *Report of the Transgender Military Service*
26 *Commission*, The Palm Ctr., 3-5 (March 2014), <http://archive.palmcenter.org/files/Transgender%20Military%20Service%20Report.pdf>; Allison Ross, Note, *The Invisible Army: Why the Military Needs to Rescind Its Ban on Transgender Service Members*, 23 S. Cal. Interdisc. L. J. 185 (2014).

1 “transgender soldiers, sailors, airmen, and Marines – real, patriotic Americans.”¹⁴ Secretary
2 Carter established a working group to study “the policy and readiness implications of
3 welcoming transgender persons to serve openly” (the “DOD Working Group”).¹⁵ As the
4 Plaintiffs cogently explain (and their supporting declarations show), the DOD Working Group
5 executed its mission in a systematic and thoughtful manner: it sought to consider all issues that
6 might arise from including openly transgender individuals in the military (including those
7 related to readiness, operational effectiveness, and cost); consulted with experts, active
8 transgender service members, and military personnel from inside and outside of the United
9 States; and commissioned the RAND National Defense Research Institute (“RAND”) to
10 analyze the potential health care needs of transgender service members, the potential readiness
11 implications of allowing transgender individuals to serve openly, and the experience of foreign
12 militaries that permit open service by transgender individuals.¹⁶ See Pl. Motion, ECF No. 129,
13 at 2-4 (and declarations cited).

14 As a result of this year-long process, the DOD Working Group concluded that
15 excluding transgender people from military service undermined effectiveness and readiness, *id.*
16 at 4; and, on June 30, 2016, Secretary Carter declared an end to the ban.¹⁷ On the same day,
17 the Secretary laid out plans to implement the military’s new, inclusive policies, under which:
18 (i) otherwise qualified service members could no longer be involuntarily separated, discharged
19 or denied reenlistment or continuation of service, solely on the basis of gender identity;
20 (ii) current transgender service members were allowed to serve openly and have access to

21 ¹⁴ Statement by Secretary Carter, No. NR-272-15, *supra* note 11.

22 ¹⁵ *Id.*

23 ¹⁶ See Secretary Ashton Carter, United States Department of Defense, Remarks on Ending the
24 Ban on Transgender Service in the U.S. Military (June 30, 2016), *available at*
25 <https://www.defense.gov/News/Speeches/Speech-View/Article/821833/remarks-on-ending-the-ban-on-transgender-service-in-the-us-military/>; Agnes Gereben Schaefer et al., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, RAND Corp., xi-xii, 39-47 (2016), *available at*
26 https://www.rand.org/pubs/research_reports/RR1530.html (hereinafter “RAND Report”).

¹⁷ Remarks of Secretary Carter (June 30, 2016), *supra* note 16.

1 gender-related medical care; and (iii) within one year, the military would begin accessing
 2 transgender individuals who met all physical and fitness standards.¹⁸ Three months later, the
 3 Department of Defense issued a 71-page handbook to guide service members and commanders
 4 through these changes.¹⁹ Among other things, this handbook outlined a framework for
 5 bringing gender-related medical care into the Military Health System and specified that the
 6 open service policy extended to admission to accession programs, like the Reserve Officers
 7 Training Corps (“ROTC”).²⁰

8 By late 2016, each of the military branches had taken steps necessary to implement the
 9 new open service policy, and transgender service members, National Guard members, and
 10 ROTC cadets in the *Amici* States and across the country were finally freed to disclose – and
 11 many did disclose – their gender identity to their command and to their fellow service
 12 members.²¹ Although a comprehensive study of the policy’s first year has not yet been
 13 conducted, there is no evidence that it has disrupted military readiness, operational
 14 effectiveness, or morale. To the contrary, anecdotal accounts indicate that the military’s new
 15 inclusive policies were quickly beginning to have a positive effect, as capable and well-
 16 qualified individuals who were already serving finally were able to do so authentically.²²

17 ¹⁸ See Directive-Type Memorandum (DTM) 16-005, Military Service of Transgender Service
 18 Members, United States Secretary of Defense (June 30, 2016), *available at*
https://www.defense.gov/Portals/1/features/2016/0616_policy/DTM-16-005.pdf.

19 ¹⁹ *Transgender Service in the U.S. Military: An Implementation Handbook*, United States Dep’t
 20 of Defense (Sept. 30, 2016), https://www.defense.gov/Portals/1/features/2016/0616_policy/DoDTGHandbook_093016.pdf.

21 ²⁰ *Id.* at 18, 31, 40

22 ²¹ See, e.g., Pl. Motion, ECF No. 129, at 4-5; Declaration of Megan Winters (“Winters Decl.”),
 ECF No. 136, ¶¶ 11-17, 27; Declaration of Phillip Stephens (“Stephens Decl.”), ECF No. 135, ¶¶ 11-
 19; Declaration of Terece Lewis (“Lewis Decl.”), ECF No. 134, ¶¶ 11-15.

23 ²² See Declaration of Deborah Lee James, ECF No. 146, ¶¶ 35, 38-39; Declaration of Eric
 24 Fanning, ECF No. 145, ¶¶ 51-53, 55; Declaration of Raymond Edwin Mabus, Jr., ECF No. 144, ¶ 24,
 25 37, 43; Winters Decl., ECF No. 136, ¶¶ 16-18, 41-42; Stephens Decl., ECF No. 135, ¶¶ 18-20; Lewis
 26 Decl., ECF No. 134, ¶¶ 15, 18, 25; Declaration of Lindsey Muller, ECF No. 133, ¶¶ 19, 23-24;
 Declaration of Cathrine Schmid, ECF No. 131, ¶¶ 18-21; *see also* General John R. Allen et al.,
Statement of Fifty-Six Retired Generals and Admirals Warn That President Trump’s Anti-Transgender
Tweets, If Implemented, Would Degrade Military Readiness, The Palm Ctr. (August 1, 2017),

1 **C. President Trump’s Abrupt Reversal of the Military’s Open Service Policy**
 2 **Is Unsupported by Any Defensible Rationale.**

3 On July 26, 2017, President Trump abruptly changed course, announcing in a series of
 4 Twitter posts that “the United States Government will not accept or allow Transgender
 5 individuals to serve in any capacity in the U.S. Military. . . . Our military must be focused on
 6 decisive and overwhelming victory and cannot be burdened with the tremendous medical costs
 7 and disruption that transgender in the military would entail.” The President expanded on this
 8 announcement one month later in a memorandum directing the Secretaries of Defense and
 9 Homeland Security: (i) to indefinitely refrain from accessing transgender individuals into the
 10 military; (ii) to halt “all use of DOD or DHS resources to fund sex reassignment surgical
 11 procedures [as of March 22, 2018], except to the extent necessary to protect the health of an
 12 individual who has already begun a course of treatment to reassign his or her sex”; and (iii) to
 13 “return” to the pre-June 2016 practice of excluding and separating transgender service
 14 members from the military by March 23, 2018.²³ In an effort to justify this abrupt step
 15 backward – apparently announced without any consultation with top military leaders²⁴– the
 16 President has cited to the allegedly negative impact that open service by transgender

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18 <http://www.palmcenter.org/fifty-six-retired-generals-admirals-warn-president-trumps-anti-transgender-tweets-implemented-degrade-military-readiness> (hereinafter “Statement of Retired Military Leaders”) (“[T]ransgender troops have been serving honorably and openly for the past year, and have been widely praised by commanders.”).

19

20 ²³ Presidential Memorandum, 82 FR 41319 §§ 1, 2 (Aug. 25, 2017), *available at*
 21 <https://www.whitehouse.gov/the-press-office/2017/08/25/presidential-memorandum-secretary-defense-and-secretary-homeland>. The fact that the Department of Defense has issued interim guidance allowing
 22 current transgender service members to remain in their posts and to reenlist until the Defense Secretary issues “final guidance” in March 2018 is cold comfort to transgender service members whose service
 23 and personhood the President devalued in a series of tweets and who are, at best, left in a state of
 24 uncertainty or sidelined until the Secretary issues additional guidance. *See* Secretary of Defense,
 25 Military Service by Transgender Individuals – Interim Guidance (Sept. 14, 2017), *available at*
 26 <https://www.defense.gov/Portals/1/Documents/PDFs/Military-Service-By-Transgender-Individuals-Interim-Guidance.pdf>.

25 ²⁴ Barbara Starr et al., *US Joint Chiefs blindsided by Trump’s transgender ban*, CNN (July 27,
 26 2017), <http://www.cnn.com/2017/07/27/politics/trump-military-transgender-ban-joint-chiefs/index.html>.

1 individuals would have on the military’s budget and effectiveness and raised concerns about
 2 unit cohesion among the troops.²⁵ But each of these claims was discredited by the DOD
 3 Working Group, as well as by other researchers and scholars. They are also contradicted by
 4 the experience of the *Amici* States.

5 RAND and other researchers have already dispelled the myth that transition-related
 6 health care costs would strain military budgets.²⁶ To the contrary, they have concluded that –
 7 because only a small proportion of service members are statistically likely to seek transition-
 8 related treatment each year – the associated costs would “have little impact on and represent[]
 9 an exceedingly small proportion” of the military’s overall health care expenditures.²⁷ This
 10 conclusion comports with the experience of many *Amici* States in extending comprehensive
 11 health care coverage to transgender individuals, as several States have done so without
 12 incurring heightened financial costs or increased premiums.²⁸ In California, for example, the
 13 Insurance Commissioner conducted an extensive cost-benefit analysis of prohibiting private

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 15 ²⁵ See Presidential Memorandum, *supra* note 23, at § 3; Donald Trump (@realDonaldTrump),
 Twitter posts (July 26, 2017).

16 ²⁶ RAND Report, *supra* note 16, at xi-xii, 33-38, 70; Aaron Belkin, *Caring for Our*
 17 *Transgender Troops –The Negligible Cost of Transition-Related Care*, 373:12 New Eng. J. Med. 1089,
 1090-1091 (Sept. 17, 2015).

18 ²⁷ RAND Report, *supra* note 16, at xi-xii; *see id.* at 31-32, 70 (estimating that transition-related
 19 healthcare costs would increase military healthcare costs by \$2.4 million to \$8.4 million or – at most –
 0.13%); Belkin, *supra* note 26, at 1090 (estimating that transition-related care will cost the military \$5.6
 20 million annually and predicting that “under any plausible estimation method, the cost amounts to little
 more than a rounding error in the military’s \$47.8 billion annual health care budget”); Ross, *supra* note
 21 13, at 210-212 (arguing that cost objections to open military serve are “exaggerated” and “speculative”
 in light of the experience of other countries, the small percentage of transgender service members who
 would seek gender affirmation surgery, and the cost of such surgery relative to the cost of surgery for
 common military injuries).

22 ²⁸ See Katie Keith, *15 States and DC Now Prohibit Transgender Insurance Exclusions*,
 23 CHIRblog (Mar. 30, 2016), [http://chirblog.org/15-states-and-dc-now-prohibit-transgender-insurance-
 24 exclusions/](http://chirblog.org/15-states-and-dc-now-prohibit-transgender-insurance-exclusions/) (“[T]he removal of transgender exclusions [from health plans] does not impose significant
 costs.”); William V. Padula et al., *Societal Implications of Health Ins. Coverage for Medically
 25 Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, *Journal of
 General Internal Medicine* (April 16, 2016), available at [https://www.ncbi.nlm.nih.gov/
 26 pubmed/26481647](https://www.ncbi.nlm.nih.gov/pubmed/26481647) (“Health insurance coverage for the U.S. transgender population is affordable and
 cost-effective, and has a low budget impact on U.S. society.”).

1 insurers from denying coverage for transition-related services and found that such a prohibition
 2 would not only have an “immaterial” impact on premium costs, but would actually benefit
 3 individuals, employers, and insurance carriers because it would ultimately improve health
 4 outcomes for transgender individuals.²⁹

5 Likewise, RAND’s research for the DOD Working Group showed that allowing
 6 transgender people to serve openly would have no adverse impact on unit cohesion, operational
 7 effectiveness, or readiness.³⁰ As the RAND Report explained, transition-related constraints on
 8 the deployability of transgender service members would be “negligible” and have a “minimal
 9 impact on readiness.”³¹ Existing data also indicate that allowing transgender individuals to
 10 serve openly would have a minimal impact – if any – on unit cohesion, and may actually
 11 improve the bond among troops by removing stressors that decrease performance ability.³² For
 12 example, of the eighteen foreign nations – including Australia, Britain, Canada, Israel, and
 13 Sweden – that allow transgender individuals to serve openly, none has reported any ill
 14 effects.³³ Indeed, an extensive inquiry into Canada’s decision to open military service to
 15 transgender individuals revealed that “the increased diversity improved readiness by giving
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 18 ²⁹ Cal. Dep’t of Ins., *Economic Impact Assessment of Gender Nondiscrimination in Health*
 19 *Insurance* 1–2, Reg. File No. REG-2011-00023 (Apr. 13, 2012), available at
 20 [http://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-](http://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf)
 21 [Nondiscrimination-In-Health-Insurance.pdf](http://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf) (referencing data from the City and County of San
 22 Francisco, the University of California, and a study of Fortune 500 companies demonstrating that
 23 “extremely low utilization result[ed] from elimination of gender discrimination [in health care plans], as
 24 would be expected with such a small population”).

25 ³⁰ RAND Report, *supra* note 16, at xiii, 39-47.

26 ³¹ *Id.* at 46-47.

³² *Id.* at xii; Ross, *supra* note 13, at 204-206, 209-211.

³³ See Ross, *supra* note 13, at 206-208; Amanda Erickson, *Trump Said Transgender Troops*
 Cause ‘Disruption.’ *These 18 Militaries Show Otherwise*, Wash. Post (July 26, 2017)
[https://www.washingtonpost.com/news/worldviews/wp/2017/07/26/trump-said-transgender-troops-](https://www.washingtonpost.com/news/worldviews/wp/2017/07/26/trump-said-transgender-troops-cause-disruption-these-18-militaries-show-otherwise/?utm_term=.a04643d1b8b8)
 cause-disruption-these-18-militaries-show-otherwise/?utm_term=.a04643d1b8b8; Statement of Retired
 Military Leaders, *supra* note 22 (“Eighteen foreign nations, including the UK and Israel, allow
 transgender troops to serve, and none has reported any detriment to readiness.”).

1 units the tools to address a wider variety of situations and challenges.”³⁴ The historical
2 experience of the United States military bolsters this finding: each time our country has
3 diversified the Armed Forces – whether it be through racial integration, expanding combat
4 opportunities for women, or allowing openly gay, lesbian, and bisexual individuals to serve –
5 the military grappled with unit cohesion objections, rejected them, and grew stronger.³⁵

6 The experience of the *Amici* States contradicts the President’s stated rationale for
7 reinstating a ban on openly transgender service members on this point as well. For years,
8 transgender individuals have served in the National Guard and have done so with honor and
9 distinction. After the ban was lifted in 2016, some of these Guard members came out to their
10 superiors and peers, and the *Amici* States are unaware of any adverse consequences for the
11 Guard. Transgender cadets in ROTC programs supported by many of our colleges and
12 universities similarly disclosed their gender identities – also with no known adverse
13 consequences. In addition, three *Amici* States are proud to support maritime academies that are
14 designed to prepare students for military or civilian careers in maritime-related fields. These
15 academies – the Massachusetts Maritime Academy, the California Maritime Academy, and the
16 State University of New York Maritime College – welcome transgender students.³⁶ The *Amici*
17 States’ experience with the National Guard, ROTC programs, and maritime academies is
18 consistent with the broader lessons we have learned from implementing transgender-inclusive
19 laws and policies: welcoming transgender individuals to live and participate openly in society
20 not only improves their lives, but also makes our communities stronger as a whole.

21 _____
³⁴ RAND Report, *supra* note 16, at 45.

22 ³⁵ See Ross, *supra* note 13, at 205-206; Statement by Secretary Carter, No. NR-272-15, *supra*
23 note 11 (“Over the last fourteen years of conflict, the Department of Defense has proven itself to be a
24 learning organization. This is true . . . with respect to institutional activities, where we have learned
25 from how we repealed ‘Don’t Ask, Don’t Tell,’ from our efforts to eliminate sexual assault in the
26 military, and from our work to open up ground combat positions to women.”).

³⁶ See, e.g., *Trans Inclusion Policy*, Massachusetts Maritime Academy (last visited Jan. 31,
2018), <https://www.maritime.edu/trans-inclusion-policy>; *Safe Zone Program*, California Maritime
Academy (last visited Jan. 31, 2018), <https://www.csum.edu/web/diversity/home/safe-zone-program>.

1 In sum, the Trump Administration has made an affirmative, irrational decision to
 2 reverse recent progress and reinstitute formal discrimination against transgender individuals in
 3 the military. As this Court and others across the country have already recognized, the
 4 Administration’s purported justifications for reinstating the ban are contradicted by research,
 5 reason, and experience. *See* ECF No. 103 at 16-17; *Doe 1 v. Trump*, No. 17-1597, 2017 WL
 6 4873042, *30, 33 (D.D.C. Oct. 30, 2017); *Stone v. Trump*, No. 1:17-cv-2459, 2017 WL
 7 5589122, *16 (D. Md. Nov. 21, 2017); *Stockman v. Trump*, No. 5:17-cv-1799, at 20 (C.D. Cal.
 8 Dec. 22, 2017). It cannot withstand even minimal scrutiny. *See Romer v. Evans*, 517 U.S.
 9 620, 632 (1996) (where government action discriminates against a disadvantaged class, is
 10 “discontinuous with the reasons offered for it,” and “seems inexplicable by anything but
 11 animus toward the class it affects,” it cannot withstand even minimal scrutiny).

12 **II. REINSTATING A BAN ON MILITARY SERVICE BY TRANSGENDER**
 13 **PEOPLE WILL HARM THE AMICI STATES AND OUR RESIDENTS.**

14 National security and emergency and disaster management are not simply matters of
 15 federal concern. All States play important roles – both direct and indirect – in providing for
 16 our collective security and have an interest in ensuring the strongest, most inclusive military
 17 possible. We also share an interest in avoiding becoming entangled in discriminatory federal
 18 policies. The Administration’s decision to reinstitute a ban on open service by transgender
 19 individuals harms all of these interests. It also harms the *Amici* States’ veterans, active service
 20 members, and those who wish to serve, and our transgender communities more broadly.

21 **A. The Ban Will Entangle the *Amici* States in Invidious Discrimination**
 22 **Harmful to Our National Guard.**

23 Reinstating the ban will impede the *Amici* States’ administration and control of the
 24 National Guard and undermine the efficacy of those forces in protecting our communities. The
 25 National Guard is a reserve component of the United States Armed Forces, yet remains a
 26 “hybrid entity that carefully combines both federal and state characteristics.” *Ass’n of Civilian*
Technicians, Inc. v. United States, 603 F.3d 989, 992 (D.C. Cir. 2010) (quoting *Lipscomb v.*

1 *Fed. Labor Relations Auth.*, 333 F.3d 611, 614 (5th Cir. 2003)). While the National Guard is
2 primarily funded by the federal government and subject to federal requirements for service, the
3 state National Guards and their individual units generally operate under state control.³⁷ As a
4 result, state actors oversee recruitment efforts, exercise day-to-day command over service
5 members in training and most forms of active duty,³⁸ and deploy the Guard in response to
6 natural or man-made disasters in their own States and across the country.³⁹ Each of the *Amici*
7 States funds and supports its National Guard forces to ensure that its citizen-soldiers are highly
8 trained and ready to perform a range of critical state missions and to support national defense
9 operations as needed. For example, the California National Guard – which comprises over
10 18,000 members – receives approximately \$50 million in state funds annually and is regularly
11 deployed to assist with firefighting and law enforcement efforts, search and rescue missions,
12 disaster response, homeland defense, and cyber-defense and -security. Similarly, in 2015, the
13 New York National Guard, with over 15,000 members, received more than \$66 million in state
14 funds to cover salaries, supplies, facilities, and education.⁴⁰

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19 ³⁷ See Major General Timothy J. Lowenberg, *The Role of the National Guard in National*
20 *Defense and Homeland Security*, The National Guard Ass’n of the United States, 3 (last visited Jan. 31,
21 2018), <https://www.ngaus.org/sites/default/files/pdf/primer%20fin.pdf> (explaining that the National
Guard is only under the exclusive control of the federal government when it is activated under Title 10
to supplement the regular components of the federal ground and air forces).

22 ³⁸ *Ass’n of Civilian Technicians*, 603 F.3d at 993 (explaining that, under Title 32 of the United
States Code, whenever not called to “federal duty by the President . . . a state National Guard is under
the command of the state Governor and State Adjutant General, who is appointed by the Governor”).

23 ³⁹ See *NGAUS Fact Sheet: Understanding the Guard’s Duty Status*, The National Guard
24 Ass’n of the United States (last visited Jan. 31, 2018), [https://www.ngaus.org/sites/default/files/Guard](https://www.ngaus.org/sites/default/files/Guard%20Statues.pdf)
25 [%20Statues.pdf](https://www.ngaus.org/sites/default/files/Guard%20Statues.pdf); see, e.g., Mass. Gen. Laws ch. 33, § 41(a); Cal Mil. & Vet. Code § 146(a); N.Y. Mil.
Law § 6.

26 ⁴⁰ See *New York National Guard Economic Impact 2015*, New York State Division of Military
and Naval Affairs (Jan. 15, 2016), available at https://dmna.ny.gov/NYNG_Economic_Impact.pdf.

1 Over the years, transgender individuals have ably served the *Amici* States – and many
2 States across the country – through the National Guard.⁴¹ After the Department of Defense
3 lifted restrictions on service by transgender members, *see supra* Part I.B, the *Amici* States had
4 to act swiftly to comply with the Department’s new policies and ensure that these individuals
5 could serve openly, without fear of discharge.⁴² These efforts did not disrupt the operation of
6 the National Guard. To the contrary, by empowering our individual members and diversifying
7 our ranks, these initiatives further enhanced the capability and effectiveness of our state-sited
8 defense and security forces.

9 Because of the hybrid nature of the National Guard, however, the *Amici* States are
10 required to comply with any directive the Trump Administration issues with respect to
11 transgender service members, or risk losing much-needed funding for our National Guard
12 units. *See Ass’n of Civilian Technicians*, 603 F.3d at 993; 32 U.S.C. §§ 106-108. That would
13 mean, absent any court intervention, enforcing a prohibition on accepting openly transgender
14 recruits. If fully implemented, the ban also may require National Guard leadership in the
15 *Amici* States to renege on assurances made to existing transgender service members who came
16 out in reliance on the 2016 open service policy; to pass over qualified transgender individuals
17 for promotion; or to discharge them from service altogether.

18 In effect, the Administration’s policy reversal threatens to require the *Amici* States to
19 undo our efforts to provide an inclusive environment for current transgender service members,
20 and instead foist upon us the discriminatory policies of the past. It will entangle the *Amici*
21 States – once again – in a federal scheme that requires us to differentiate National Guard
22 recruits and service members based on a characteristic that has been demonstrated to have
23

24 ⁴¹ Gates & Herman, *supra* note 4, at 1 (estimating 15,500 members in active service, the
National Guard, or Reserves).

25 ⁴² *See* Tech. Sgt. Erich B. Smith et al., *Guard Members Ready For New DOD Transgender*
26 *Policy*, National Guard Bureau (June 15, 2017), [http://www.nationalguard.mil/News/Article/1215104/
guard-members-ready-for-new-dod-transgender-policy/](http://www.nationalguard.mil/News/Article/1215104/guard-members-ready-for-new-dod-transgender-policy/).

1 nothing to do with their ability to serve. Such discrimination is in direct conflict with the
 2 policies of the *Amici* States, including our prohibitions on discrimination based on gender
 3 identity in public or private employment and our laws extending civil rights protections to
 4 transgender residents in other aspects of civic life (such as housing and public
 5 accommodations). *See supra* note 8.

6 Equally important, excluding transgender individuals will diminish the effectiveness of
 7 the National Guard and thus hamper the *Amici* States' emergency and disaster response efforts.
 8 As described above, National Guard members are largely under state control and devoted to
 9 state-based missions, such as disaster relief and search and rescue operations. If forced to
 10 reinstate a complete ban on transgender service members, the *Amici* States could also lose the
 11 aggregate skills and knowledge of our many transgender service members and – with them –
 12 the value of the training and experience the *Amici* States provided through the Guard. Because
 13 the *Amici* States maintain and rely on the National Guard to assist us in times of emergency, a
 14 reduction in those forces inflicts a significant harm upon us.⁴³

15 **B. The Ban Will Entangle the *Amici* States in Harmful Discrimination**
 16 **Limiting Opportunities at Our Public Institutions of Higher Education.**

17 The harmful effects of banning open service by transgender individuals extend beyond
 18 the Armed Forces and National Guard to the *Amici* States' public colleges and universities that
 19 support ROTC programs and to state-run maritime academies.

20 ROTC programs are designed to train commissioned officers of the Armed Forces; they
 21 are located on and supported by college campuses but subject to federal entry requirements.⁴⁴

22 ⁴³ *See* Statement of Retired Military Leaders, *supra* note 22 (“The proposed ban, if
 23 implemented, would cause significant disruptions, deprive the military of mission-critical talent, and
 24 compromise the integrity of transgender troops who would be forced to live a lie, as well as non-
 25 transgender peers who would be forced to choose between reporting their comrades or disobeying
 26 policy. As a result, the proposed ban would degrade readiness even more than the failed ‘don’t ask,
 don’t tell policy.’”).

⁴⁴ *See* 10 U.S.C. § 2103. Similarly, many elementary and secondary schools in the *Amici* States
 host the Junior Reserve Officers' Training Corps (“JROTC”). JROTC is a program for high school and

1 Many public colleges and universities in the *Amici* States host ROTC programs, provide them
 2 with physical space, and, in some instances, financial support in the form of a budget or
 3 scholarship funds. For example, one public university in Massachusetts provides its Army and
 4 Air Force ROTC programs with a total annual budget of approximately \$30,000 and designates
 5 an additional \$200,000-\$300,000 per year for scholarships available only to ROTC cadets.
 6 Reinstating the ban on open service by transgender individuals will render these ROTC
 7 programs – together with the scholarship and career opportunities they provide – actually or
 8 effectively unavailable to transgender students, who will not be eligible to serve openly in the
 9 Armed Forces upon graduation. The ban will thus harm the *Amici* States’ public colleges and
 10 universities by limiting their ability to extend the same opportunities to all of their students, in
 11 direct contravention of many schools’ own transgender-inclusive policies and the *Amici* States’
 12 broader anti-discrimination laws.⁴⁵

13 The ban also works a distinct set of harms on one subset of state-run educational
 14 institutions: the specialized maritime academies operated by Massachusetts, California, and
 15 New York that serve as pathways for students interested in pursuing maritime professions or
 16 becoming commissioned officers in the Coast Guard or other branches of the Armed Forces.
 17 *See supra* at 10. In addition to the state-of-the-art training and curriculum they offer all
 18 students, maritime academies extend special benefits to those who intend to join the military,
 19 including funding conditioned on subsequent military service⁴⁶ and programs that enable
 20

21 middle school students that aims to “instill in students . . . the values of citizenship, service United
 22 States, and personal responsibility and a sense of accomplishment.” 10 U.S.C. § 2031(a)(2).

23 ⁴⁵ *See supra* note 8; *Statement of Inclusion*, University of Massachusetts Lowell (last visited
 24 Jan. 31, 2018), https://www.uml.edu/docs/Inclusion%20Statement_tcm18-167589.pdf. These public
 25 institutions also have no real recourse, as Congress has barred institutions of higher education that
 26 receive federal funding from preventing the Armed Forces from establishing or operating ROTC
 programs on campus. 10 U.S.C. § 983.

⁴⁶ The Student Incentive Payment (SIP) Program is offered for students of all the academies.
 Following graduation, SIP students must either enter the U.S. Armed Forces on active duty or must be
 in a reserve unit for at least six years, along with other requirements. *See* Maritime Administration,

1 students to obtain military commissions after graduation. For example, the maritime
 2 academies all offer a “Strategic Sealift Midshipman [or Officer] Program,” which allows
 3 students earning Coast Guard Licenses to be commissioned as officers in the Navy Reserve
 4 upon graduation and provides stipends to help pay for school.⁴⁷ As with the ROTC programs
 5 (and against these academies’ own anti-discrimination policies), reinstating a ban on
 6 transgender service members will effectively require these public institutions to offer different
 7 opportunities to their students based solely on their gender identity. That is, while non-
 8 transgender students will be eligible for the full range of services, scholarships, and programs
 9 at the academies, transgender students will be unable to take advantage of a number of benefits
 10 – those that depend on a future military career. In light of the more limited opportunities that
 11 will be available to transgender students after graduation, the overall education these
 12 academies provide will be of significantly lesser value. Both students and the maritime
 13 academies themselves will therefore be worse off as a result of the ban.

14 **C. The Ban Will Harm the *Amici* States’ Veterans, Active Service Members,
 15 and Those Who Wish to Serve.**

16 The Trump Administration’s irrational decision to reinstate the ban on openly
 17 transgender people from military service will also directly harm the residents of the *Amici*
 18 States: our veterans, active service members, and those who wish to serve.

19 The harm to the dignity of transgender veterans and soldiers alone is significant. The
 20 ban degrades the service of the 150,000 veterans, active-duty service members, and members
 21 of the National Guard and Reserves who identify as transgender, as well as the intentions of
 22 those who wish to serve. Reinstating the ban serves no purpose but to deny this particular
 23 group – deemed less worthy by the Administration – equal opportunity and equal treatment

24 United States Department of Transportation (last visited Jan. 31, 2018), <https://www.marad.dot.gov/education/maritime-academies/>.

25 ⁴⁷ See, e.g., *Strategic Midshipman Program*, Massachusetts Maritime Academy (last visited
 26 Jan, 31, 2018), <https://www.maritime.edu/strategic-sealift-midshipman-program>.

1 under the law. It relegates them to second-class status, sending the unmistakable message that
2 they are unfit to serve or that their service is not valued, simply due to their gender identity.

3 The ban also harms the many transgender residents of the *Amici* States who relied upon
4 the assurance of the federal government that they were welcome to serve openly. Many
5 service members in the National Guard and other branches of the military came out as
6 transgender to their command based upon that assurance, believing that they would not thereby
7 be deprived of their opportunity to serve (or their livelihoods). The Trump Administration has
8 broken that promise to the grave detriment of these individuals. Absent court intervention,
9 openly transgender service members may be targeted for discharge or other adverse action.
10 Even if current transgender service members are permitted to serve for the time being, the
11 Administration's intent – to ultimately bar all transgender individuals from serving by mid-
12 March 2018 – is clear. And in the meantime, these service members must continue their
13 service in limbo and with a shadow cast over them.⁴⁸

14 Similarly, transgender residents of the *Amici* States who took steps to prepare for
15 careers in the military, by joining ROTC or enrolling in maritime academies, for example, did
16 so in reliance on the promise that they would be able to serve openly. They too face losing the
17 opportunity to serve, and along with it the investment they have made in their careers thus far
18 and other opportunities foregone.

19 Finally, transgender service members who have not yet revealed their gender identities,
20 together with those who wish to pursue careers in the military, now face the Hobson's choice
21 of being honest about who they are and being discharged or denied accession outright, or
22 hiding their identities and serving in fear of being discovered.⁴⁹ Denying otherwise qualified

23 ⁴⁸ See Declaration of Mark J. Eitelberg, ECF No. 147, ¶¶ 6-17; Declaration of Ashley
24 Broadway, ECF No. 141, ¶¶ 7-10.

25 ⁴⁹ See Declaration of Jane Doe, ECF No. 138, ¶¶ 9-16; cf. *Log Cabin Republicans v. United*
26 *States*, No. CV 04-08425-VAP, 2010 U.S. Dist. LEXIS 93612, *29-65 (C.D. Cal. Sept. 9, 2010)
(recounting testimony of service members describing experience of serving under a “cloud of fear”
during Don't Ask Don't Tell).

1 transgender individuals the opportunity to serve denies them equal participation in a core civic
 2 activity. And forcing transgender individuals to hide their identities in order to enlist or
 3 continue serving is extremely harmful to their health and wellbeing⁵⁰ – a reality evidenced by
 4 the experiences of the thousands of gay, lesbian, and transgender service members who have
 5 served under previous discriminatory policies.⁵¹ Concealing core aspects of one’s identity has
 6 a negative impact on mental health.⁵² The need to hide their gender identity causes
 7 transgender service members to be less likely to seek necessary mental health and medical
 8 care; because there is limited confidentiality for communications with doctors and therapists in
 9 the military, these service members cannot be candid with their health care providers and are
 10 thus more likely to avoid treatment.⁵³

11 Further, prohibiting open service estranges transgender service members from their
 12 fellow troops, undermining the group’s ability to trust and bond.⁵⁴ “Concealment leads to . . .

14 ⁵⁰ See Elders & Steinman, *supra* note 13, at 4 (“We determined not only that there is no
 15 compelling medical reason for the ban, but also that the ban itself is an expensive, damaging and unfair
 16 barrier to health care access for the approximately 15,450 transgender personnel who serve currently in
 17 the active, Guard and reserve components. . . . Research shows that depriving transgender service
 18 members of medically necessary health care poses significant obstacles to their well-being.”)

19 ⁵¹ See, e.g., Declaration of Admiral Michael Mullen, ECF No. 148, ¶ 14 (“When I led our
 20 armed forces under [Don’t Ask Don’t Tell], I saw firsthand the harm to readiness and morale when we
 21 fail to treat all service members according to the same standards. There are thousands of transgender
 22 Americans currently serving and there is no reason to single them out[,] to exclude them[,] or deny
 23 them the medical care that they require.”).

24 ⁵² Ross, *supra* note 13, at 209 (citing Moradi, *infra* note 54, at 514).

25 ⁵³ See Kerrigan, *supra* note 10, at 513-14; Elders & Steinman, *supra* note 13, at 4 (“According
 26 to one recent study, ‘Mental health, medical and substance abuse services obtained outside the military
 are supposed to be communicated back to the military, so transgender people who seek these services
 elsewhere will risk exposure . . . This leads individuals to go without treatment, allowing symptoms to
 exacerbate, and causing some to treat symptoms with alcohol or drugs, which could lead to substance
 abuse or dependence.’”).

⁵⁴ See Ross, *supra* note 13, at 209; cf. Bonnie Moradi, *Sexual Orientation Disclosure, Concealment, Harassment, and Military Cohesion: Perceptions of LGBT Military Veterans*, 21 Mil. Psychol. 513 (2009) (studying the impact of concealment versus disclosure of sexual orientation in the military and finding that concealment relates negatively to unit social and task cohesion and conversely that disclosure positively impacts cohesion).

1 stress and isolation, which can lead to decreased performance ability.”⁵⁵ The negative
 2 repercussions of concealment are especially pertinent in the military, where “interpersonal
 3 connection, support, and trust among unit members are thought to be paramount to unit
 4 cohesion and effectiveness.”⁵⁶ Thus, depriving transgender service members of the trust and
 5 bonding with fellow service members that is so fundamental to the military experience not only
 6 harms them individually, it also undermines military readiness and effectiveness generally.

7 **D. The Ban Will Harm Our Transgender Communities More Broadly.**

8 The consequences of the Trump Administration’s reversal on transgender service
 9 members are not limited to the Armed Forces and may be felt across society at large. The
 10 military is among our country’s most integrated and diverse institutions. Historically, though
 11 progress has been slow and imperfect, when the military has accepted previously-excluded or
 12 marginalized groups into its ranks – African-Americans, women, immigrants, and gay and
 13 lesbian individuals – it has helped to lay the groundwork for broader social integration and
 14 acceptance.⁵⁷ So too here, at a time when – despite continued stigma, discrimination, and
 15 violence – acceptance of transgender individuals is on the rise, the military’s open service
 16 policy was an important step forward, both practically and symbolically. Now, worse than
 17 never having permitted them to serve openly in the first place, the Trump Administration has
 18 singled out transgender individuals for renewed exclusion, sending a message that threatens to

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 20 ⁵⁵ Ross, *supra* note 13, at 209.

21 ⁵⁶ *Id.*

22 ⁵⁷ See, e.g., Cornelius L. Bynum, *How a Stroke of the Pen Changed the Army Forever*, Wash.
 23 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/> (discussing the broader impact on the civil rights
 24 movement of President Harry Truman’s Executive Order 9981, which desegregated the military)
 25 (“Though the pace of full-scale change was slow, the executive order was one of the most significant
 26 steps toward equal justice since the Emancipation Proclamation in 1863 and the ratification of the 13th
 Amendment to the U.S. Constitution that abolished slavery in 1865. Indeed, when considered
 alongside other milestone civil rights achievements, E.O. 9981 is remarkable for its effectiveness and
 durability . . . Even the momentous civil rights actions that we collectively recognize as modern
 landmarks of racial progress fail to match the fundamental and lasting institutional change wrought by
 E.O. 9981.”).

1 slow recent progress and that will be heard and felt throughout our communities. Indeed, it
2 seems that may be the point.⁵⁸

3 The military has already concluded that allowing transgender individuals to serve
4 openly is in the nation's best interest. Reinstating the ban simply cannot be justified by
5 reference to costs, unit cohesion, or overall readiness. Rather, the Administration seeks to ban
6 otherwise qualified people from service simply because of who they are. In doing so, the
7 Administration would harm both the *Amici* States and our residents in profound ways. *See,*
8 *e.g., Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 609 (1982) (“This
9 Court has had too much experience with the political, social, and moral damage of
10 discrimination not to recognize that a State has a substantial interest in assuring its residents
11 that it will act to protect them from these evils.”). Reinstating the ban on open service would
12 be a step backward for transgender people, for civil rights, and for the country as a whole.

13 CONCLUSION

14 For the foregoing reasons, the *Amici* States join in asking the Court to grant the
15 Plaintiffs' and Washington's Motions for Summary Judgment.

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⁵⁸ *See, e.g.,* Memorandum from Attorney General to United States Attorneys Heads of
25 Department Components (Oct. 4, 2017), *available at* [https://thinkprogress.org/wp-](https://thinkprogress.org/wp-content/uploads/2017/10/20171005-doj-memo-title-vii.pdf)
26 [content/uploads/2017/10/20171005-doj-memo-title-vii.pdf](https://thinkprogress.org/wp-content/uploads/2017/10/20171005-doj-memo-title-vii.pdf) (reversing Department of Justice policy
interpreting Title VII to prohibit discrimination based on gender identity).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service of the foregoing will be accomplished by the CM/ECF system.

/s/ Kimberly A. Parr
Kimberly A. Parr

DATED: February 1, 2018

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