No. 18-35347

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RYAN KARNOSKI, et al.,

Plaintiffs-Appellees,

STATE OF WASHINGTON,

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 U.S. District Court for the Western District of Washington, Case No. 2:17-cv-01297 before the Hon. Marsha J. Pechman

Brief of *Amici Curiae* Vice Admiral Donald C. Arthur, USN (Ret.), former Surgeon General of the U.S. Navy; Major General Gale Pollock, USA (Ret.), former Acting Surgeon General of the U.S. Army; and Rear Admiral Alan M. Steinman, USPHS/USCG (Ret.), Former Director of Health and Safety of the U.S. Coast Guard in Support of Plaintiffs-Appellees and Intervenor-Plaintiff Appellee

(Filed With the Consent of All Parties)

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INTEREST OF *AMICI* SURGEONS GENERAL

Pursuant to Federal Rule of Appellate Procedure 29, and with the consent of all parties, Vice Admiral Donald C. Arthur, U.S. Navy (Ret.), a former Surgeon General of the U.S. Navy, Major General Gale Pollock, U.S. Army (Ret.), a former Acting Surgeon General of the U.S. Army, and Rear Admiral Alan M. Steinman, U.S. Public Health Service/U.S. Coast Guard (Ret.), a former Director of Health and Safety of the U.S. Coast Guard (a position equivalent to Surgeon General) respectfully submit this *amicus curiae* brief in support of the Appellee Plaintiffs and Intervenor-Plaintiff-Appellee State of Washington (collectively, "Appellees").

Amici are health care professionals who each served as the highest-ranking medical officer of their respective military branch with responsibility for leading all aspects of the military health care system. *Amici* share a strong interest in the mission and effectiveness of the United States military, and in health services that support the entire force so as to enable readiness and maximize military effectiveness.

SUMMARY OF ARGUMENT

The recommendations of the "Department of Defense Report and Recommendations on Military Service by Transgender Persons" ("DoD Report")[1] would, if enacted into policy, exclude transgender individuals from military service.

[1] Department of Defense, "Department of Defense Report and Recommendations on Military Service by Transgender Persons" (Feb. 2018).

The DoD Report recommends excluding transgender people from military service based on the Report's conclusions that "accommodating gender transition could [1] impair unit readiness; [2] undermine unit cohesion, as well as good order and discipline, by blurring the clear lines that demarcate male and female standards and policies where they exist; and [3] lead to disproportionate costs." DoD Rpt. at 5.

The *Amici* Surgeons General have undertaken a careful review of the DoD Report, the evidence it cites, and the reasoning it employs.[2] *Amici* conclude that the DoD Report's stated reasons for reinstating the transgender ban are premised on double-standards, and that the rules it would apply to transgender service members, but not to any other members, are not logically supported by the medical and other evidence upon which the DoD Report relies. Because of these serious flaws, the DoD Report fails to show that banning transgender people from military service is rationally, much less substantially, related to the government's asserted interests in military readiness, unit cohesion, or cost savings.

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[2] *Amici*'s full analysis of the DoD Report is contained in their April 2018 report "DoD's Rationale for Reinstating the Transgender Ban Is Contradicted by Evidence." *See* Vice Adm. Donald C. Arthur, et al., *DoD's Rationale for Reinstating the Transgender Ban Is Contradicted by Evidence*, PALM CENTER (Apr. 2018) (hereinafter, "SG Rpt."), *available at* https://www.palmcenter.org/publication/dods-rationale-for-reinstating-the-transgender-ban-is-contradicted-by-evidence/. *Amici* prepared their April 2018 report in cooperation with the Palm Center, an independent research institute committed to sponsoring state-of-the-art scholarship to enhance the quality of public dialogue about critical and controversial issues of the day. *See generally* www.palmcenter.org.

First, the DoD Report fails to show this required connection because it creates a set of separate standards that target transgender troops, and transgender troops alone, rather than simply requiring transgender service members to meet the same general medical, fitness, and deployability standards applied to all other members. These separate standards define transgender troops as inherently unfit for service, even when they meet the same fitness standards applied to others. As such, these separate standards are not a justification for the ban, but rather the means by which it is enforced. Because these separate standards single out a single group of service members for disparate treatment without regard to individual fitness as measured by generally-applicable standards, the DoD Report fails to establish any reasoned connection between the new double standard and military readiness or any other asserted government interest.

Second, on its face, the DoD report fails to show the required connection between its recommended policy and military readiness because its own description of the medical literature and research does not support its conclusion that transgender troops are unfit. The DoD Report does not offer any evidence that the presence of transgender personnel has significantly affected, or is likely to significantly affect, troop readiness, or compare any impact to that of other medical conditions. In particular, the DoD Report recognizes the consensus view of the medical profession that transition-related care is effective, but rejects that consensus based on standards

that it does not apply to other medical issues. As *amici* show, the literature upon which the DoD Report relies is consistent with the current inclusive policy, not the proposed ban.

Third, the DoD Report's arguments that permitting transgender troops to serve openly would undermine unit cohesion echo discredited rationales for similar historical prohibitions against African Americans, women, and lesbian, gay, and bisexual people. The DoD Report does not offer any evidence that the inclusive policy presently in place has compromised or is likely to compromise cohesion, privacy, fairness, and safety, and the assertions and hypothetical scenarios offered in support of these concerns are implausible and insufficient justifications for the ban.

Finally, in suggesting that transition-related care is unreasonably expensive, the DoD Report fails to place those costs in their proper context or compare them to the kinds of medical costs that DoD regularly incurs for non-transgender troops.

Because the DoD Report does not and cannot show that barring transgender people from serving in the armed forces is substantially, or even rationally, related to the government's asserted interests, Plaintiffs are likely to succeed on the merits, and *amici* respectfully suggest that this Court affirm the district court's denial of Defendants' motion to dissolve the preliminary injunction.

ARGUMENT

I. THE TRANSGENDER BAN WOULD CREATE SEPARATE, DISCRIMINATORY STANDARDS FOR TRANSGENDER PERSONNEL WITHOUT JUSTIFICATION.

The current, inclusive DoD regulations hold transgender personnel to the same medical, fitness, and deployability standards as all other personnel:

> [Current DoD] policies are premised on the conclusion that open service by transgender persons who are subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming standards, deployability, and retention, is consistent with military service and readiness.[3]

There are no exceptions for transgender personnel or for gender transition.[4] For example, all troops, transgender and otherwise, are subject to administrative or disability separation if they are "non-deployable for more than 12 consecutive months, for any reason."[5] Similarly, all troops, transgender and otherwise, are

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[3] Dept. of Defense Instruction 1300.28, In-Service Transition for Transgender Service Members ¶ 1.2(a) (Oct. 1, 2016) ("DoDI 1300.28").

[4] *Id*.; *see also id* at ¶ 1.2(e) ("Any determination that a transgender Service member is non-deployable at any time will be consistent with established Military Department and Service standards, as applied to other Service members whose deployability is similarly affected in comparable circumstances unrelated to gender transition.").

[5] *See* Memorandum from Robert Wilkie, Under Secretary of Defense for Personnel and Readiness, Department of Defense to the Secretaries of the Military Departments, et al. (Feb. 14, 2018) *available at* https://www.defense.gov/Portals/1/Documents/pubs/DoD-Universal-Retention-Policy.PDF.

subject to DoD disability evaluation regulations that require assessment if the individual has a medical condition that prevents the service member from "reasonably performing" their duties for more than one year after diagnosis, represents a medical risk to health and safety, or "imposes unreasonable requirements on the military to maintain or protect the Service member."[6] And the primary regulation governing gender transition specifically directs that the deployability of transgender service members "will be consistent with established Military Department and Service standards, as applied to other Service members"—just as *all* military standards are equally applied to transgender troops.[7]

The DoD Report's recommended ban, in contrast, would impose double standards on transgender troops by applying unique deployability standards and exceptions for them that DoD does not apply to any other members. And having created a set of separate standards for a single class of people, the DoD Report justifies the ban by determining that transgender people *as a class* are not able to meet those unique standards. Thus, under the guise of maintaining standards, the DoD Report would establish new, separate standards that target transgender people alone.

Notably, the DoD Report misstates certain accession standards and incorrectly

[6] *See* Dept. of Defense Instruction 1332.18, Disability Evaluation System at 30 (May 17, 2018).
[7] *See* DoDI 1300.28 ¶ 1.2(a).

suggests that they cannot be met by transgender people. For example, while the DoD Report states that chest surgery is disqualifying, in fact chest surgery is disqualifying only for six months after the procedure.[8] This and other generally-applicable standards do not automatically disqualify transgender persons from military service. Naturally, not all transgender people qualify for military service, just as not all non-transgender people qualify for military service.[9] But under the standards that apply equally to all service members, there is nothing about being transgender that is necessarily disqualifying; only the new DoD Report standard would do that.

DoD has two years of experience and data with which to evaluate whether transgender troops have met the generally-applicable requirements for military service. Notably, DoD does not, and cannot, suggest that all—or even substantial numbers of—transgender troops have failed to meet the generally-applicable medical, fitness, and deployability requirements that apply to the entire force.

Instead, the DoD Report recommends a "standard" that uniquely targets and excludes transgender people: transgender persons may serve only if they "have not transitioned to another gender," "do not have a history or current diagnosis of gender dysphoria," and "satisfy all standards and are capable of adhering to the standards associated with their biological sex." DoD Rpt. at 4. A standard that requires

[8] *Compare* DoD Rpt. at 10 *with* Dept. of Defense Instruction 6130.03 at 17.

[9] *See* DoD Rpt. at 7 (stating that 71% of Americans ages 18-24 are ineligible to join the military without a waiver).

transgender people to "serve, like everyone else, in their biological sex," is nothing more than a different way to describe the exclusion of transgender troops.[10] None of the DoD Report's proffered reasons for banning transgender people justify imposition of this separate and unequal standard.

II. THE DOD REPORT'S RATIONALES FOR BARRING TRANSGENDER PEOPLE FROM MILITARY SERVICE ARE SPECULATIVE AND UNSUPPORTED.

The DoD Report does not connect the imposition of the proposed double standard to the advancement of a legitimate public policy, much less show that the ban is substantially related to the government's asserted interests.[11] The DoD Report speculates at length about harms that "could" result from the presence of transgender troops, *see, e.g.*, DoD Rpt. at 5, 23, 30, 33, 35, 36, 37, but misconstrues or takes out of context much of the evidence upon which it relies, and selectively disregards other available evidence. Even giving the DoD Report the benefit of every doubt, it fails to show that the current inclusive policy has impaired force readiness, undermined

[10] As the district court correctly noted in this case, "Requiring transgender people to serve in their 'biological sex'… would force transgender service members to suppress the very characteristic that defines them as transgender in the first place." *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *6, *12 (W.D. Wash. Apr. 13, 2018), appeal docketed No. 18-35347 (9th Cir.).

[11] *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (to survive intermediate scrutiny, the government "must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives" and the proffered justification "must be genuine, not hypothesized or invented *post hoc*") (internal quotation omitted, alteration in the original).

unit cohesion, or created burdensome costs, or that the ban will further the government's interest in readiness, unit cohesion or cost savings.

A. The DoD Report Does Not Show that Military Service by Transgender People Impairs Unit Readiness.

1. Scholars and experts agree that transition-related care is reliable, safe, and effective.

As the DoD Report acknowledges, an established body of scholarly and expert research concludes that transition-related care for transgender people is reliable, safe and effective.[12] The American Medical Association ("AMA"), for example, has determined that "an established body of medical research demonstrates the effectiveness and medical necessity of mental health care, hormone therapy and sex reassignment surgery as forms of therapeutic treatment" for those with gender dysphoria.[13] Similarly, the American Psychological Association ("APA") has stated

[12] *See* DoD Rpt. at 24 ("The prevailing judgment of mental health practitioners is that gender dysphoria can be treated with the transition-related care described above.").

[13] *See* American Medical Association, *Removing Financial Barriers to Care for Transgender Patients H-185.950* (Resolution 122) (2008 *modified* 2016); *see also* Letter from James L. Madara, MD, American Medical Association, to Hon. James N. Mattis, Secretary, Department of Defense (Apr. 3, 2018) ("We believe there is no medically valid reason—including a diagnosis of gender dysphoria—to exclude transgender individuals from military service. . . . We share the concerns recently expressed by former Surgeons General M. Joycelyn Elders and David Satcher that the Defense Department's February 22, 2018, Memorandum for the President mischaracterized and rejected the wide body of peer-reviewed research on the effectiveness of transgender medical care. This research, demonstrating that medical care for gender dysphoria is effective, was the rationale for the AMA's adoption of policy by our House of Delegates in 2015, that there is no medically valid reason to

that "[s]ubstantial psychological research shows that gender dysphoria is a treatable condition, and does not, by itself, limit the ability of individuals to function well and excel in their work, including in military service. The science is clear that individuals who are adequately treated for gender dysphoria should not be considered mentally unstable."[14]

Six former Surgeons General of the United States have also concluded "that transgender troops are as medically fit as their non-transgender peers and that there is no medically valid reason—including a diagnosis of gender dysphoria—to exclude them from military service."[15] Indeed, the widely accepted scientific consensus is precisely why DoD previously concluded, after extensive research and analysis, that open service by transgender individuals in the military would have no

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exclude transgender individuals from military service."), *available at* https://searchlf.ama-assn.org/undefined/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2F2018-4-3-Letter-to-Mattis-re-Transgender-Policy.pdf.

[14] *See* American Psychological Association, APA Statement Regarding Transgender Individuals Serving in Military (Press Release) (Mar. 26, 2018) (also stating: "The American Psychological Association is alarmed by the administration's misuse of psychological science to stigmatize transgender Americans and justify limiting their ability to serve in uniform and access medically necessary health care."), *available at* http://www.apa.org/news/press/releases/2018/03/transgender-military.aspx.

[15] *Six Former Surgeons General Rebut Pentagon Assertions About Medical Fitness of Transgender Troops*, PALM CENTER (Apr. 25, 2018), *available at* https://www.palmcenter.org/six-former-surgeons-general-%E2%80%8Brebut-pentagon-assertions-about-medical-fitness-of-transgender-troops/ (emphasis added).

negative effect.[16]

DoD dismisses the international scientific and medical consensus affirming the efficacy of transition-related care by applying standards of evidence it does not apply to other medical issues. The DoD Report's chief criticism of the science is that efficacy studies are not randomized controlled trials. *See* DoD Rpt. at 26. That alone does not render the studies unreliable. The scientific community recognizes many criteria for assessing the quality of clinical research and there are numerous acceptable study designs. For example, the U.S. Centers for Medicare and Medicaid Services ("CMS") study that DoD relies upon discusses numerous study designs, and notes that while "randomized controlled studies have been typically assigned the greatest strength . . . a well-designed and conducted observational study with a large sample size may provide stronger evidence than a poorly designed and conducted randomized controlled trial."[17] CMS concludes that "Methodological strength is . . . a multidimensional concept that relates to the design, implementation,

[16] *See generally* Agnes G. Shaefer, et al., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, RAND CORPORATION, (2016) (hereinafter "RAND Report").

[17] Tamara Syrek Jensen, et al., *Final Decision Memorandum on Gender Reassignment Surgery for Medicare Beneficiaries with Gender Dysphoria*, CENTERS FOR MEDICARE AND MEDICAID SERVICES (hereinafter, "CMS study") at Appx. B (Aug. 30, 2016), *available at* https://www.cms.gov/medicare-coverage-database/details/nca-decision-memo.aspx?NCAId=282.

and analysis of a clinical study."[18]

In addition, the DoD Report repeatedly states that transition-related care does not "fully remedy" the symptoms of gender dysphoria. *See* DoD Rpt. at 14, 24, 32 & 35. But that is not a standard by which the military or public health entities evaluate the efficacy of medical treatment. As several former U.S. Surgeons General explained in response to the DoD Report, "An expectation of certainty is an unrealistic and counterproductive standard of evidence for health policy—whether civilian or military—because even the most well-established medical treatments could not satisfy that standard. Indeed, setting certainty as a standard suggests an inability to refute the research."[19] Many medical conditions are not categorically disqualifying for accession or retention, and none come with a guarantee that available treatments always "fully remedy" them. The DoD Report makes no effort to show why this double standard should apply to transition-related care.

The DoD Report sets aside decades of relevant peer-reviewed research, and instead selectively relies on four studies that it contends show that treatments for

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[18] *Id*.; *see also* CMS 100-08, Medicare Program Integrity Manual (2000), 13.7.1 ("randomized clinical trials or other definitive studies" can support Medicare policy, as can "scientific data or research studies published in peer-reviewed journals" and the "[c]onsensus of expert medical opinion"), *available at* https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/pim83c13.pdf.

[19] *Former Surgeons General Debunk Pentagon Assertions about Medical Fitness of Transgender Troops*, PALM CENTER (Mar. 28, 2018), *available at* https://www.palmcenter.org/former-surgeons-general-debunk-pentagon-assertions-about-medical-fitness-of-transgender-troops/.

gender dysphoria have questionable efficacy: the 2016 CMS study,[20] and three studies by private entities.[21, 22, 23] DoD Rpt. at 23-27. But the DoD Report fails to note that these studies found that transition-related care can and does mitigate symptoms of gender dysphoria.[24]

DoD relies especially heavily on the CMS literature review, which evaluated

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[20] CMS Study, supra n.17.

[21] Cecilia Dhejne, et al., *Long-Term Follow-up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, PLOS ONE 6(2) E: 16885 (2011), *available at* http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0016885. The study's author has conducted more recent studies (not addressed by the DoD Report) finding that transgender individuals who obtain adequate care can be just as healthy as their peers, and also has acknowledged that anti-transgender advocates consistently misuse the 2011 study to support their political agenda. *See* Cecilia Dhejne, et al., *Mental Health and Gender Dysphoria: A Review of the Literature*, INT'L REV. OF PSYCHIATRY 28(1), 44–57 (July 2015), *abstract available at* https://www.ncbi.nlm.nih.gov/pubmed/26835611.

[22] Hayes Inc., *Sex Reassignment Surgery for the Treatment of Gender Dysphoria*, MEDICAL TECHNOLOGY DIRECTORY (May 15, 2014). Notably, Hayes Inc. is not a scholarly organization, and the Hayes Reports have not been published in peer-reviewed journals. *See generally* SG Rpt. at 10-12 (discussing numerous inaccuracies and misstatements in Hayes reports).

[23] Mohammad Hassan Murad, et al., *Hormonal therapy and sex reassignment: a systematic review and metaanalysis of quality of life and psychosocial outcomes* CLINICAL ENDOCRINOLOGY, Vol. 72:2 at 214-231 (2010), *abstract available at* https://mayoclinic.pure.elsevier.com/en/publications/hormonal-therapy-and-sex-reassignment-a-systematic-review-and-met.

[24] *See, e.g.*, CMS Study, *supra* n.17, at § IX (Medicare Administrative Contractors "will make the determination on whether or not to cover gender reassignment surgery based on whether gender reassignment surgery is reasonable and necessary for the individual beneficiary after considering the individual's specific circumstances."); Dhejne, *supra* n.21, at 7 ("surgery and hormonal therapy alleviates gender dysphoria"); Murad, *supra* n.23, at abstract.

whether the evidence warranted a determination that every Medicare beneficiary with gender dysphoria would automatically be entitled to surgery without the need for an individualized evaluation. The CMS review does not in any way suggest that an inclusive military policy is inappropriate, or that there is insufficient evidence for the general efficacy of transition-related medical care. In fact, it found the opposite. The CMS review found sufficient evidence of the efficacy of gender reassignment surgery that the need of Medicare beneficiaries for gender reassignment surgery should be evaluated on a case-by-case basis—the general standard applied to most medical care.[25] CMS's recommendation that transition-related care be evaluated on a case-by-case basis is entirely consistent with the current inclusive policy, and the opposite of what the proposed ban would do. In response to the DoD Report, Andrew M. Slavitt, the CMS Acting Administrator at the time of the study, stated:

> It is dangerous and discriminatory to fire transgender service members and deny them the medical care they need. It is particularly disingenuous to justify it by a purposeful misreading of an unrelated 2016 CMS decision. Both the 2014 Board review and the 2016 CMS review closely align Medicare policy with DoD's inclusive policy established by former Secretary Carter. Under both Medicare and military policy, treatment for gender dysphoria is determined on a case-by-case basis after consultation between doctor and patient. [26]

[25] *See, e.g.,* CMS Study, *supra* n.17, at § IX (also noting that findings are limited to the Medicare population); *see also* SG Rpt. at 8-10.

[26] *See* SG Rpt. at 10.

2. Evidence of successful deployment to combat zones.

The DoD Report does not consider some of the most relevant information available: DoD's own data concerning deployment by transgender service members. Out of 994 service members diagnosed with gender dysphoria in FY2016 and the first half of 2017, 393 (40%) deployed in support of Operation Enduring Freedom, Operation Iraqi Freedom, or Operation New Dawn.[27] Of these, just *one* of these service members was unable to complete the deployment for mental health reasons after June 30, 2016, when the inclusive policy no longer permitted separation based on gender dysphoria alone. The DoD Report does not acknowledge, much less consider, this evidence of deployment. Nor does the DoD Report assess transgender service members' promotion rates, time-in-service, or commendations in gauging the "risks" their service has on troop readiness. And the DoD Report does not assess how troop readiness is affected by transgender troops as compared to troops with other medical conditions.

Instead, the DoD Report asserts that "limited data" makes "it difficult to predict with any precision the impact on readiness of allowing gender transition." DoD Rpt. at 33. But the data is "limited" only because the historical transgender

[27] *See* Department of Defense, Health Data on Active Duty Service Members with Gender Dysphoria: Comparison Health Care Data with Statistical Analysis, Deployment, Treatment Plan, Surgical Recovery Times, Separation Data and Cost Data (Dec. 13, 2017) (hereinafter "DoD Health Data on Active Duty Service Members with Gender Dysphoria") at 10–12.

military service ban has only recently been lifted. And the DoD Report's failure to consider the available evidence of successful deployment by transgender troops underscores DoD's selective use of its own data.

Instead of evaluating actual deployments by transgender troops, the DoD Report refers to the average number of days transitioning Army and Air Force personnel were assigned to limited duty. DoD Rpt. at 33. First, and contrary to the DoD Report's implication, limited duty data does not indicate a failure to meet any deployment obligation. Second, the DoD Report failed to note that the Army and Air Force *require* transitioning personnel to be on limited duty status.[28] And, as noted by the same report DoD cites, the Navy does not automatically assign transitioning personnel to limited-duty status without justification, and has a much smaller percentage of such troops on limited duty.[29] The DoD Report does not discuss the Navy data, or acknowledge how separate standards of fitness targeted at transgender service members can create the incorrect impression that transgender personnel are less medically fit and deployable than other troops.

3. Hormone treatment.

The DoD Report's discussion of hormone treatment and deployability is another example of the report's double-standards and selective use of evidence.

[28] *Id.* at 17.
[29] *Id.*

Service members routinely deploy with medication requirements, including prescribed hormone therapies, but the DoD Report addresses the use of hormones by transgender troops in a unique way. The DoD Report asserts that transgender service members undergoing hormone therapy pose "risks for readiness," based on an assumption that hormone therapy requires laboratory monitoring during the first year of treatment." DoD Rpt. at 33. Although the DoD Report cites Endocrine Society guidelines for this assertion, it does not acknowledge that Dr. Wylie C. Hembree, author of the Endocrine Society's standards of care, informed DoD in writing that monitoring hormone levels for three months prior to deployment, not twelve, was easily sufficient.[30] In October 2015, Dr. Hembree wrote to the Pentagon's transgender policy group stating:

> There is no reason to designate individuals as non-deployable after the commencement of hormone replacement therapy. While individuals might be placed on limited duty (office work) until the initial monitoring at the 2-3 month mark, they can perform their jobs overseas in a wide range of deployed settings both before and after the initial monitoring.[31]

Dr. Hembree went on to explain that the Endocrine Society guidelines were "intended to cover a diverse, civilian population, including older, unreliable and/or unhealthy individuals who are not characteristic of the population of service

[30] *See* SG Rpt. at 21 (quoting Hembree Oct. 25, 2015 letter).
[31] *Id*.

members."[32] Notably, Dr. Hembree's letter was provided directly to a Pentagon official who played a prominent role in both the working group created by former Defense Secretary Carter, and in Secretary Mattis's Panel of Experts. The DoD Report nevertheless ignores Dr. Hembree's letter and his conclusion that there is no need to forego deployment after the initial 2- to 3-month period of monitoring. And the DoD Report does not suggest that the taking of hormones for other reasons be considered a readiness risk.

4. Over-prescription of mental health services.

The DoD Report creates a misimpression of unfitness by observing that "Service members with gender dysphoria are nine times more likely to have mental health encounters than the Service member population as a whole (28.1 average encounters per Service member versus 2.7 average encounters per Service member)." DoD Rpt. at 24. This statistic merely reflects the systematic over-prescription of appointments for administrative rather than medical reasons. Based on *amici*'s research, this over-prescription of appointments results from two considerations. The first is the medicalization of administrative matters, as aspects of care that would normally be handled administratively have been assigned to medical providers. For transgender service members, the military requires mental health visits for changes in uniforms, grooming standards, facilities use, and the like,

[32] *Id.*

thus resulting in a dozen or more mental health appointments regardless of the individual's actual mental health status and without regard to stability, fitness, or need for care.[33]

The second consideration is lack of experience leading to over-prescription of mental health visits. In the two years transgender people have been serving openly, well-intentioned medical providers who are inexperienced in transition-related care have been overly cautious in documenting gender stability, resulting in monthly and sometimes weekly obligatory check-ins.[34] As just one example, the Palm Center assessed the experiences of ten active duty transgender troops who transitioned or started to transition over the past two years. They reported a total of 81 total mental health visits, 97.5% of which were classified as obligatory.[35]

As shown by these findings, any increased logging of mental health visits for service members with gender dysphoria is significantly based not on medical need, but rather on how the military treats transgender service members differently by requiring more engagement with mental health providers. This conclusion is further bolstered by analyzing how transgender individuals utilize mental health care in

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[33] *See, e.g.,* DoDI 1300.28 ¶ 3.2(b)(1) (medical providers must justify medical judgments "for submission to the commander") & ¶ 3.2(c)(2) (commanders must coordinate with the medical provider regarding all medical issues relating to transition).

[34] *See generally* SG Rpt. at 26–27.

[35] *Id*. at 27.

other contexts. An analysis by the Veterans Health Administration shows transgender patients averaging between 2.3 and 4.4 mental health encounters per year as compared to slightly lower utilization among non-transgender patients diagnosed with depression.[36] The authors of a 2018 study of California civilians "concluded that transgender individuals are *less* likely to utilize healthcare services than the overall population."[37]

5. Suicide is a military problem, not a transgender problem.

Finally, no credence should be given to the DoD Report's statements about transgender suicidality. The DoD Report mischaracterizes and selectively relies on data that, when accurately presented, demonstrate that the rate of suicidal ideation among transgender and non-transgender service members is roughly equivalent. The DoD Report claims "[s]ervice members with gender dysphoria are eight times more likely to attempt suicide than Service members as a whole (12% versus 1.5%)." DoD Rpt. at 21. This is incorrect. DoD data do not show that service members with gender dysphoria were eight times more likely to *attempt* suicide than other service members during the study period, but rather to *contemplate* suicide. The DoD Report misconstrues this important distinction. When the Defense Department used more

[36] *Id*. at 27–28.

[37] *See* Jesse M. Ehrenfeld, et al., *Healthcare Utilization Among Transgender Individuals in California*, JOURNAL OF MEDICAL SYSTEMS, 42(5), 77 (Mar. 16, 2018) (emphasis added).

sophisticated methods to determine rates of suicidality among service members not being treated for behavioral health problems, military researchers determined that 14% of service members have had suicidal thoughts at some time in their lives, 11% had suicidal thoughts at some point during their military careers, and 6% had suicidal thoughts during the past year, findings roughly consistent with the data miscited by the DoD Report.[38]

B. The DoD Report Does Not Offer Any Evidence That Military Service By Transgender People Has Compromised, Or Is Likely To Compromise, Unit Cohesion, Good Order And Discipline.

The DoD Report deems the presence of transgender service personnel to be a specific threat to unit cohesion, privacy, fairness and safety, particularly where those individuals retain some physiological characteristics of their birth sex. *See, e.g.*, DoD Rpt. at 30-31. But the DoD Report does not offer any evidence that the presence of transgender troops has in fact undermined good order, discipline, unit cohesion, or any other legitimate military value. DoD's speculative fears are not based on evidence, and the assertions and hypothetical scenarios offered in support of its concerns are implausible, already fully-addressable under current military guidance,

[38] *See* Department of Defense, Defense Suicide Prevention Office, Military Suicide Data Surveillance: Baseline Results from Non-Clinical Populations on Proximal Outcomes for Suicide Prevention at 5 (July 25, 2017), *available at* http://www.dspo.mil/Portals/113/Documents/2017%20Conference/Presentations/Military%20Suicide%20Data%20Surveillance%20Baseline%20Results%20from%20Nonclinical%20Populations%20on%20Proximal%20Outcomes%20for%20Suicide%20Prevention.pptx?ver=2017-08-10-132549-437.

or both.

The DoD Report offers two hypothetical situations. The first considers the fairness and safety of sports competitions such as boxing between transgender and non-transgender women, and the second contemplates a "female to male transgender Service member who has fully transitioned, but did not undergo a surgical change" wanting to wear a male swimsuit with no top during "the semi-annual swim test." *See* DoD Rpt. at 38. As an initial matter, there is no evidence that either of these scenarios—the latter of which is implausible—has occurred, and if they did, the military already possesses adequate policies to safeguard unit cohesion.

Contrary to the DoD Report's assumption that "biologically-based standards will be applied uniformly to all Service members of the same biological sex," *id*. at 31, current military practice is to adjust certain gender-based presumptions based on circumstances. For example, as to boxing specifically, West Point already allows men and women to box during training, and more broadly Commanders weigh other factors in the safety calculus (such as skill level, aggression, weight, training, etc.).[39] As for the DoD's far-fetched swimming hypothetical, the Commander's Handbook affords officers the discretion and flexibility to forge courteous and respectful

[39] *See* Alex Bedard, Robert Peterson, and Ray Barone, *Punching through Barriers: Female Cadets Integrated into Mandatory Boxing at West Point*, ASSOCIATION OF THE UNITED STATES ARMY (Nov. 16, 2017), available at https://www.ausa.org/articles/punching-through-barriers-female-cadets-boxing-west-point.

compromises in these scenarios.[40]

The only non-hypothetical the DoD Report describes is a situation where non-transgender women and a transgender woman filed opposing equal opportunity complaints related to the transgender woman's use of shower facilities, and their commander's handling of the situation. DoD Rpt. at 37. Here too, the Commander's Handbook already provides guidance that should have been sufficient to resolve the matter, including specific guidance on reasonable accommodations to respect privacy interests.[41] Notably, the DoD Report does not address the long-term effect on the good order or cohesion of the unit from which the single example was drawn, much less suggest that effectiveness and lethality were affected.

In the absence of evidence, the DoD Report instead suggests that unit cohesion "cannot be easily quantified" and "[n]ot all standards . . . are capable of scientific

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[40] *See* Department of Defense, TRANSGENDER SERVICE IN THE U.S. MILITARY: AN IMPLEMENTATION HANDBOOK at 63 (Sept. 30, 2016) (hereinafter "Commander's Handbook") (addressing the same scenario), *available at* https://www.defense.gov/Portals/1/features/2016/0616_policy/DoDTGHandbook_093016.pdf.

[41] *See* Commander's Handbook, *supra* n.41, at 29 (Commanders "may employ reasonable accommodations, such as installing shower curtains and placing towel and clothing hooks inside individual shower stalls, to respect the privacy interests of Service members. In cases where accommodations are not practicable, [commanders] may authorize alternative measures to respect personal privacy, such as adjustments to timing of the use of shower or changing facilities.") & 65 (Commanders empowered to provide "reasonable accommodation to respect the privacy interest of Service members"); *see also id*. at 22 (Commanders are instructed to counsel transgender service members "to consider both your own privacy needs and the privacy needs of others. This includes, but is not limited to, maintaining personal privacy in locker rooms, showers, and living quarters.").

validation or quantification." DoD Rpt. at 3. But unit cohesion can be, and is, measured through multiple metrics such as surveys, interviews, field observations, and longitudinal analysis, among others. Reliable scientific data has been compiled relating to unit cohesion, including, for example, evidence specifically gathered following the repeal of "don't ask, don't tell" to assess aspects of unit cohesion.[42] And three weeks after publication of the DoD Report, Army Chief of Staff General Mark Milley testified before Congress that unit cohesion "is monitored very closely because I am concerned about that" and that he had "received precisely zero reports of issues of cohesion, discipline, morale and all those sorts of things."[43] U.S. Coast Guard Commandant Vice Admiral Karl Schultz similarly testified, "I am not aware of any disciplinary or unit cohesion issues resulting from the opening of the Coast Guard to transgender individuals."[44] The Chief of Naval Operations, Air Force Chief

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[42] *See* Aaron Belkin, et al., *Readiness and DADT Repeal: Has the New Policy of Open Service Undermined the Military*, ARMED FORCES AND SOCIETY, 39(4), 587–601 (2013) (Service Academy professors' analysis of effect of "don't ask, don't tell" repeal on readiness, including unit cohesion and morale, published in a leading peer-reviewed military studies journal), *available at* http://aaronbelkin.org/pdfs/articles/Readiness%20&%20DADT%20Repeal.pdf; *see also generally* James Griffith, *Measurement of Group Cohesion in U.S. Army Units*, BASIC AND APPLIED SOCIAL PSYCHOLOGY, 9(2), 149–71 (1988) (measuring unit cohesion).

[43] *See also* Claudia Grisales, *Defense Chief Says He Is 'Prepared to Defend' New Transgender Military Policy*, STARS AND STRIPES (Apr. 12, 2018), *available at* https://www.stripes.com/news/defense-chief-says-he-is-prepared-to-defend-new-transgender-military-policy-1.521833.

[44] *Military Chiefs of Staff Unanimous: Transgender Inclusion Has Not Harmed Unit Cohesion*, PALM CENTER (Apr. 25, 2018) (quoting Congressional testimony),

of Staff, and Marine Corps Commandant each also have confirmed that the current inclusive policy has not compromised unit cohesion.[45]

C. The DoD Report's Conclusion That Military Service by Transgender Persons "Could" Lead to "Disproportionate Costs" Is Based on a Selective Presentation of Financial Data That Inaccurately Suggests That Transition-Related Care Is Expensive.

The cost of medical treatment for transgender service members is the third justification for the ban identified by the DoD Report. The DoD Report's discussion of the financial impact of an inclusive policy relies on data that is taken out of context and reported in a way that is likely to mislead. For example, the DoD Report accurately notes that in the time transgender persons have been allowed to serve openly, the medical costs for service members with gender dysphoria has been three times that for service members without gender dysphoria. DoD Rpt. at 41. While this may be correct, it is also true that selecting a population *for the presence of a specific health condition* will necessarily mean that the population so selected will have higher average per-person health care costs than the population of service

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available at https://www.palmcenter.org/military-chiefs-of-staff-unanimous-transgender-inclusion-has-not-harmed-unit-cohesion/.

[45] *See also* Geoff Ziezulewicz, *No Reports of Transgender Troops Affecting Unit Cohesion, Marine Corps and Navy Leaders Say*, MILITARY TIMES, Apr. 19, 2018, *available at* https://www.militarytimes.com/news/your-navy/2018/04/19/no-reports-of-transgender-troops-affecting-unit-cohesion-marine-corps-and-navy-leaders-say/; Rebecca Kheel, *Air Force Chief Not Aware of Cohesion, Morale Issues Due to Transgender Troops*, The Hill, (Apr. 24, 2018), *available at* http://thehill.com/policy/defense/384595-air-force-chief-not-aware-of-cohesion-morale-issues-from-transgender-troops.

members as a whole. *See also supra* at 18-20 (describing high levels of required medical visits for transgender troops, regardless of individualized need).[46]

Higher than average medical costs for service members with gender dysphoria relative to service members as a whole *does not* mean that the cost of medical care for transgender troops is burdensome. It is not. DoD's annual health care budget for the Active Component regularly exceeds $6 billion.[47] The DoD Report fails to note that the total cost for transition-related care in fiscal year 2017 was $2.2 million—less than one tenth of one percent of DoD's total annual Active Component health care budget.[48] Spread across the population of approximately 14,700 transgender service members, that cost is just $12.47 per service member per month[49]; spread across the entire 2.1 million person force, the cost is only $0.09 per service member

[46] The DoD Report does not acknowledge or address the direct financial costs of the proposed ban. Based on DoD data, the cost of treating a transgender service member diagnosed with gender dysphoria was approximately $18,000 in 2017, while the cost of recruiting and training one service member was $75,000. Providing medical care to those who need it is a fraction of the cost of replacing experienced service members. *See* ACCESSION MEDICAL STANDARDS ANALYSIS & RESEARCH ACTIVITY, http://www.amsara.amedd.army.mil/Default.aspx, last modified date Apr. 1, 2015, accessed July 3, 2018.

[47] RAND Report 37.

[48] DoD Health Data on Active Duty Service Members with Gender Dysphoria, *supra* n.27 at 31.

[49] $2.2 million / 14,700 transgender service members / 12 months = $12.47 per transgender service member per month.

per month.[50]

This is consistent with former Navy Secretary Mabus's observation that the budgetary impact of medical care for transgender service members is "budget dust" that is less significant than a rounding error.[51] The DoD Report describes health care costs for service members with gender dysphoria as a multiple of the cost of health care for other members without also noting that the overall costs are low. In omitting this relevant context—which is readily available from DoD's own data—the DoD Report risks misleading readers into concluding that transition-related health care is expensive when, in fact, it is not.

[50] $2.2 million / 2.1 million service members / 12 months = 9 cents per service member per month.

[51] Declaration of Raymond Edwin Mabus, Jr. at ¶ 41, *Doe v. Trump*, No. 17-cv-01597 (D.D.C. filed Aug. 9, 2017), ECF No. 13-9; *see also* RAND Report at xi; Declaration of Brad R. Carson at ¶ 16, *Doe v. Trump*, No. 17-cv-01597 (D.D.C. filed Aug. 9, 2017), ECF No. 13-3; Christopher Ingraham, *The military spends five times as much on Viagra as it would on transgender troops' medical care*, WASH. POST (July 26, 2017), *available at* https://www.washingtonpost.com/news/wonk/wp/2017/07/26/the-military-spends-five-times-as-much-on-viagra-as-it-would-on-transgender-troops-medical-care/?utm_term=.538c740d7ed9.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the district court's denial of Defendants' motion to dissolve the preliminary injunction.

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FED. R. APP. PRO. 29 AND 32 CERTIFICATIONS

I certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a 14-point proportionally spaced serif font.

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,568 words excluding the parts of the brief exempted under Rule 32(f).

In compliance with Federal Rules of Appellate Procedure 29(a)(4)(E), I further certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than amicus curiae or their counsel contributed money that was intended to fund preparing or submitting this brief.

s/ Susan Baker Manning
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CERTIFICATE OF SERVICE

I hereby certify that, on July 3, 2018, I caused the foregoing document to be electronically filed with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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