[ORAL ARGUMENT SCHEDULED FOR DECEMBER 10, 2018]

No. 18-5257

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JANE DOE 2, et al.,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP,

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

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMICI CURIAE BRIEF OF THE NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, NATIONAL WOMEN'S LAW CENTER, CALIFORNIA WOMEN LAWYERS, THE CENTER FOR REPRODUCTIVE RIGHTS, COLUMBIA LAW SCHOOL SEXUALITY & GENDER LAW CLINIC, CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, EQUAL RIGHTS ADVOCATES, LEGAL VOICE, THE NATIONAL ASSOCIATION OF WOMEN LAWYERS, THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, AND THE WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA IN SUPPORT OF PLAINTIFFS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

The *amici curiae* represented in this brief are: National Organization for Women Foundation; National Women's Law Center; California Women Lawyers, the Center for Reproductive Rights; Columbia Law School Sexuality & Gender Law Clinic; Connecticut Women's Education and Legal Fund; Equal Rights Advocates; Legal Voice; National Association of Women Lawyers; the National Partnership for Women & Families, and the Women's Bar Association of the District of Columbia.

All other parties, intervenors, and *amici* appearing before the district court and in this Court appear in the Brief for Plaintiffs-Appellees, except for additional *amici* that have filed (or noticed the intent to file) briefs in support of the Plaintiffs-Appellees brief after the Plaintiffs-Appellees filed their brief on October 22, 2018.

B. Rulings Under Review

References to the ruling at issue appear in the Brief for Plaintiffs-Appellees.

C. Related Cases

Amici curiae adopt the statement of related cases presented in the Brief for Plaintiffs-Appellees.

CORPORATE DISCLOSURE, AUTHORSHIP, AND FINANCIAL CONTRIBUTION STATEMENTS

Pursuant to Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure, and consistent with D.C. Cir. Rule 26.1, *amici curiae* state that National Organization for Women Foundation; National Women's Law Center; California Women Lawyers, Center for Reproductive Rights; Columbia Law School Sexuality & Gender Law Clinic; Connecticut Women's Education and Legal Fund; Equal Rights Advocates; Legal Voice; National Association Of Women Lawyers; the National Partnership for Women & Families; and the Women's Bar Association of the District of Columbia are nonprofit, tax-exempt organizations with no parent corporations, and that no publicly held company has 10% or greater ownership in any of *amici curiae*.

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

CERTIFICATE OF COUNSEL REGARDING NECESSITY OF SEPARATE AMICI CURIAE BRIEF

Pursuant to D.C. Cir. R. 29(d), the undersigned counsel for *amici curiae* hereby certifies that a separate *amicus* brief is necessary to address the sex stereotyping embedded in the justifications advanced by the federal government for excluding transgender individuals from military service. The *amici curiae* are especially well-suited to address this issue, as nonprofit organizations that work in diverse ways to advance equal opportunities for women and to combat various forms of sex discrimination. Collectively, the amici have many decades of specialized expertise in addressing sex discrimination in all of its forms.

To the best knowledge of *amici curiae* and their counsel, no other *amicus* brief will include similar in-depth analysis of this issue.

/s/ Suzanne B. Goldberg
SUZANNE B. GOLDBERG

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INTEREST OF *AMICI CURIAE*[1]

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

Additional information about each of the *amici* is set forth in the addendum to this brief.

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than the amici curiae, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

SUMMARY OF ARGUMENT

The Supreme Court's constitutional jurisprudence for nearly a half century has prohibited governments from embedding overbroad assumptions about men and women into federal and state law and policy.

Yet the Mattis Report, which the United States government has offered as the foundation for its defense in this case, rests on five broad assertions about men and women as rationales for the government's ban on transgender service members:

a) "biological differences between the sexes";

b) a desire to protect women;

c) sweeping generalizations about the physical capacities of men and women;

d) the alleged preferences of men and women; and

e) "longstanding societal expectations" related to the roles of men and women.

Mattis Memorandum, February 22, 2018 (JA263-65), and attached *Report and Recommendations on Military Service by Transgender Persons* (JA268-312) (collectively, the "Mattis Report" or "Report") at JA298.

The fundamental, constitutional problem with these rationales is that "estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average

description." *United States v. Virginia*, 518 U.S. 515, 550 (1996) ("*VMI*") (emphasis in original). This is precisely the reason that the Supreme Court has applied heightened scrutiny to sex-based classifications in the past and that such scrutiny should be applied here

In this case, the transgender women and men who are serving or who seek to serve in the U.S. military may have life experiences and physical characteristics that "place[] them outside the average description" of women or men—yet, as *VMI* and decades of sex-discrimination case law hold, heightened scrutiny *mus*t apply and "fixed notions" about men and women *cannot be* the basis for government action, including denial of the opportunity for national service. *Id.* The government's effort to resuscitate these "fixed notions" about women and men as justifications for the ban, in a manner that closely parallels its earlier efforts to exclude women and gays and lesbians based on similar concerns, has no footing in the law.

ARGUMENT

The government's reliance on "biological sex differences"[2]—along with its assertions about unit cohesion, fairness, privacy and safety based on those

[2] *See* JA272-73 (requiring conformity with "biological sex" as an eligibility requirement for transgender individuals who serve or seek to serve in the military). The only exception to this requirement is for transgender individuals who are currently serving and relied on the Carter policy to initiate gender transition. *Id.* at JA273-74. All other transgender individuals are ineligible to serve.

differences—defies decades of constitutional sex-discrimination jurisprudence. This body of case law proscribes sex-based rules that rest on

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

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

I. The Mattis Report's Reliance on Impermissible Sex-based Stereotypes Runs Throughout its Discussion of the "Clear Line Between Men and Women."

The Mattis Report's assertion that including transgender service members is "incompatible with sex-based standards," Mattis Rep. at JA303, reflects two basic errors. First, it misses the point that current and aspiring transgender service members do not challenge the application or importance of these standards to military readiness; to the contrary, they seek to serve *within* these existing standards.[3] Second, when the existing standards are applied to transgender men and women, incompatibility arises only if the government is permitted to give legal effect to traditional views of men and women and, further, to the view that service

[3] *See* JA283 (explaining that service members would be held to "all . . . military standards congruent to the member's gender" as indicated in the Defense Enrollment Eligibility Reporting System (DEERS)).

members—especially women—need protection from other women who do not fit "fixed notions" of sex or those whose "talent and capacity place them outside the average description." *VMI*, 518 U.S. at 550.

When these errors are corrected, it becomes easier to see that the transgender litigants here do not take issue with the government's position that sex-differentiation in military policy may "promote[] good order and discipline, steady leadership, unit cohesion, and ultimately military effectiveness and lethality because it ensures fairness, equity, and safety," Mattis Rep. at JA303-304—and that the problem lies instead in the government's position that the presence of transgender men and women, all of whom would comply with sex-based requirements, renders existing practices unfair, inequitable and unsafe. That position is not sustainable under well-settled law discussed *supra* and *infra* because it depends on an interest in gender conformity that cannot be the basis for government action. Simply put, the Mattis Report's repeated references to military effectiveness and lethality serve as little more than a cover for sex stereotypes and protectionist inclinations that are well understood to harm women and have been repeatedly invalidated by courts for that reason.

Turning first to the interests in fairness, equity and safety, while these interests are surely important, they cannot explain why transgender men and women are barred from service. Reduced to its essence, the government's point seems to be that

women who are not transgender need protection from women who are, particularly in training and athletic competitions. In the government's words: "Biological females who may be required to compete against such transgender females in training and athletic competition would potentially be disadvantaged. Even more importantly, in physically violent training and competition, such as boxing and combatives, pitting biological females against biological males who identify as female, and vice versa, could present a serious safety risk as well." Mattis Rep. at JA304 (footnotes omitted).

There are two flaws here—first, the government seeks to distinguish among women based on how closely they fit to fixed notions of who women should be and presumes non-transgender women to be weak and inferior; this, as set out in *VMI* and in the cases discussed *infra*, is impermissible. Second, as a practical matter, there is significant variation among women, and among men, related to size, weight, and numerous other factors that affect safety and well-being in competition and combative practice such as boxing. Indeed, the military regularly takes account of this variation in organizing boxing and other combatives. *See, e.g.*, Maj. Alex Bedard, *et al.*, *Punching Through Barriers: Female Cadets Integrated Into Mandatory Boxing at West Point*, ARMY 40-42 (Dec. 2017) (describing boxing as valuable for "improv[ing] the Warrior Ethos, confidence and lethality" and "the combat readiness of the Army for all genders"; identifying "skill level, weight [],

gender and aggression" as factors relevant to assigning boxing partners; and stating that "[w]hen conducting partner drills . . . cadets can work with a cadet of the opposite gender"). Yet the Mattis Report singles out gender identity from among this variety of factors and argues that an interest in protecting women justifies the exclusion of all transgender women, and indeed all transgender individuals. In this light it becomes clear that the Report's concern with physical difference in this context embeds an impermissible protectionist rationale and also, more basically, lacks a rational, much less substantial, link to the sex-based line-drawing imposed by the government's ban.

This impermissible reasoning is also evident in the other reasons the Mattis Report provides for the ban: that it "satisfies reasonable expectations of privacy; reflects common practice in the society from which we recruit; and promotes core military values of dignity and respect between men and women." Mattis Rep. at JA303-304. Regarding privacy, the Report asserts that "[s]ervice members of the same biological sex are often required to live in extremely close proximity to one another" and adds that "[b]ecause of reasonable expectations of privacy, the military has long maintained separate berthing, bathroom, and shower facilities for men and women while in garrison" and in recruit training as required by Congress. *Id.* at JA305.

There is nothing about the presence of transgender men and women that is incompatible with this interest—unless the government seeks to insist that women fit "fixed notions" of sex and men do the same. Indeed, although the Mattis Report asserts a concern about risks posed by "[b]lurring the line that differentiates the standards and policies applicable to men and women," Mattis Rep. at JA306, the transgender men and women serving and seeking to serve do not challenge that line; they seek to serve consistent with their gender as recorded within DEERS. *See* JA276, JA283 (explaining the process for gender-marker change within DEERS and the requirement that service members meet the standards of their DEERS gender marker). Instead, it is the government that seeks to blur the troubling sex discrimination at issue here by using military-readiness references as cover for the traditional sex roles that are the foundation for the Mattis Report's rationales.

The same goes for the Mattis Report's assertion that the ban on service by transgender individuals can be justified by "the common practice in the society from which we recruit; and . . . core military values of dignity and respect between men and women." *Id.* at 36. To the extent that "the common practice" refers to societal pressure for certain types of gender conformity, we are long past the time when government can give effect to those demands. *See infra* Point II.D.

Likewise it is difficult to distill why an interest in ensuring dignity and respect between men and women would be served by banning transgender service members,

but it is clear from the decades of constitutional jurisprudence discussed in the next part that an interest in preserving sex stereotypes has the effect of harming women by reinforcing barriers, not enhancing dignity or respect. *Cf. Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (observing that sex discrimination was traditionally "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage.").

II. Federal Constitutional Jurisprudence Has Long Rejected Government Action Reflecting "Fixed Notions" About Men and Women of the Sort Relied on in the Mattis Report.

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

The reason for this concern, carried out via intermediate scrutiny of sex-based classifications under the Equal Protection Clause,[4] is well understood: "'[N]ew insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.'" *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)).

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

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

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

The ban on service by transgender individuals likewise directly contravenes well-settled jurisprudence forbidding the government from entrenching sex stereotypes in law. Further, by giving legal effect to sex stereotypes, as demonstrated

supra in Point I, the government's policy harms the women it purports to protect as well as all individuals, transgender and not, who seek to serve or are currently serving in our nation's armed forces.

A. Assumptions About the Significance of Physical Differences Between Men and Women Often Rest on Impermissible Stereotypes, as Do Those at Issue Here.

Laws that purport to rest on "biological," "physical," or "natural" differences between men and women are most often rooted *not* in biology or nature but instead in stereotypes and anachronistic views about gender roles that have been rejected by nearly a half-century of sex-discrimination jurisprudence. Yet earlier cases repeatedly made this error of misperceiving assumptions about women's and men's physical differences as factual justifications for legal restrictions, as the Mattis Report does here. *Cf. Bradwell v. Illinois*, 83 U.S. 130, 141-42 (1872) (Bradley, J., concurring) (accepting the "destiny and mission of woman" as wives and mothers as a valid rationale for the state's bar on women from practicing law).

Women's "physical structure" was, for example, accepted as the basis for statutory restrictions on hours that women could work in bakeries, restaurants, and laundries. *Muller v. State of Oregon*, 208 U.S. 412, 421 (1908). Confidently declaring the "reality" of differences in bodily structure and in physical strength as sufficient to justify the rules at issue, the Court found "[t]he two sexes differ . . . in the capacity for long continued labor, particularly when done standing" and in "the

self-reliance which enables one to assert full rights." *Id.* at 422; *see also Radice v. New York*, 264 U.S. 292, 295 (1924) (stating that "the physical differences between men and women must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account") (citation and internal punctuation omitted). Higher education was similarly once declared to be dangerous to women's physiological well-being. *VMI*, 518 U.S. at 536 n.9 (citing well-regarded contemporary medical sources that affirmed higher education's harms to women's strength and health).

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

For many decades now, it has been extremely rare that "physical differences between men and women" are judicially recognized as sufficient to sustain sex-based rules. Indeed, in *VMI*, the Court specifically *rejected* Virginia's reliance on "physical differences" to justify the exclusion of women from opportunities previously open only to men. *VMI*, 518 U.S. at 533. Notably, even when the Court upheld an immigration rule that distinguished between U.S. citizen mothers and

fathers as citizenship-sponsors for their foreign-born children, the Court stressed that the case did *not* turn on sex stereotypes but rather on the link between childbirth and parentage and "the uncontestable fact" that the father "need not be present at the birth" of his child. *Nguyen v. INS*, 533 U.S. 53, 62 (2001) (sustaining a rule that required unwed U.S. citizen fathers of children born abroad to establish their paternity before the child turned 18 while not imposing that requirement on U.S. citizen mothers). More recently, even that childbirth-based rationale for treating men and women differently did not satisfy equal protection review in a case involving a similar citizenship rule distinguishing between male and female parents based on how long they had lived in the United States prior to the child's birth: distinguishing between mothers and fathers in this way, the Court held, rested on "once habitual, but now untenable, assumptions" about the roles of men and women. *Morales-Santana*, 137 S. Ct. at 1690-91. As shown above, the Mattis Report similarly invokes physical differences between men and women as the basis for excluding transgender men and women from military service. Yet relying on "once habitual" assumptions about the significance of these differences is, as the Court has stated, impermissible as a basis for government action.

B. The Mattis Report's Presumption that All Women Are Similar to Each Other in Physical Capacity or Personal Interests, and its Parallel Presumption about Men, Also Rests on Impermissible Sex Stereotypes.

Sex discrimination jurisprudence has also long rejected policies that rest on claims that all women (or men) have similar desires, interests or physical capacities, yet these claims run throughout the Mattis Report, including in sex-based assertions about training, privacy and "common practice in the society from which [the armed forces] recruit." Mattis Rep. at JA303-304. For this reason, it is helpful to see the Mattis Report through the lens of these earlier decisions.

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

Two decades prior to *VMI*, the Court similarly rejected, on due process grounds, a school board rule that barred women from teaching after they were several months pregnant, recognizing that although the school board had a legitimate interest in safety that could be achieved through this rule, the variation among pregnant women rendered the rule impermissible. *Cleveland v. LaFleur*, 414 U.S. 632, 644 (1974): "Even assuming, *arguendo*, that there are some women who would

be physically unable to work past the particular cutoff dates . . . , it is evident that there are large numbers of teachers who are fully capable of continuing work for longer than the [] regulations will allow." *Id.* at 645-46. Lower courts have likewise rejected similarly broad presumptions about women in the military context on equal protection grounds. *See, e.g.*, *Crawford v. Cushman*, 531 F.2d 1114, 1122 (2d Cir. 1976) (rejecting Marine Corps policy that automatically discharged pregnant women in the interests of "military readiness" but "left all other temporary disabilities, which undeniably undermined the ability of all personnel to respond like quicksilver to duty's call, free from the mandatory discharge 'solution.'"); *see also Owens v. Brown*, 455 F. Supp. 291, 310 (D.D.C. 1978) (striking down on equal protection grounds the Navy's bar on women from serving on ships as an impermissibly "absolute and overbroad presumption" notwithstanding the government's assertion of military interests in readiness and efficiency).

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

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

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

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

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

The Supreme Court has reinforced this point that requiring all men or women to match their sex stereotype amounts to impermissible sex discrimination in the statutory context as well.[5] In *Price Waterhouse v. Hopkins*, for example, the Court echoed a point it has made numerous times in the constitutional context: "We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." 490 U.S. 228,

[5] Courts routinely look to cases examining Title VII and other federal sex-discrimination laws when examining discrimination claims under the Equal Protection Clause and vice versa because the same principles inform both. *See, e.g.*, *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 133 (1976) *superseded on other grounds by statute in Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) ("While there is no necessary inference that Congress . . . intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause . . . the similarities between the congressional language and some of those decisions surely indicate that the latter are a useful starting point in interpreting the former").

251 (1989). These kinds of acts, which impose gender-based "stereotypical notions . . . deprive persons of their individual dignity," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984), and "ratify and reinforce prejudicial views," *J.E.B.*, 511 U.S. at 140.

C. Courts Repeatedly Recognize that Discrimination Against Transgender People Rests on Impermissible Sex Stereotypes.

Numerous courts have similarly recognized that discrimination against transgender people is based on impermissible sex stereotypes. In *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000), for example, the Ninth Circuit applied the Supreme Court's *Price Waterhouse***Error! Bookmark not defined.** analysis and found that the transgender plaintiff whose "outward behavior and inward identity did not meet social definitions of masculinity" had stated a claim under the Gender Motivated Violence Act. The Sixth Circuit similarly held, in *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004), that "discrimination against a plaintiff who is [transgender] – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against [the plaintiff] in *Price Waterhouse*, who, in sex stereotypical terms, did not act like a woman.").

Likewise, in *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017), the Seventh Circuit observed that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth). *See also, e.g., Chavez v. Credit Nation Auto*

Sales, LLC, 641 Fed. App'x. 883, 884 (11th Cir. 2016) ("sex discrimination includes discrimination against a transgender person"); *Glenn v. Brumby*, 663 F.3d 1312, 1318-19 (11th Cir. 2011) (stating that the Equal Protection Clause protects "[a]ll persons, whether transgender or not . . . from discrimination on the basis of gender stereotype"); *Rosa v. Park W. Bank & Trust Co*., 214 F.3d 213, 215-16 (1st Cir. 2000) (holding that a transgender plaintiff had stated a claim under the Equal Credit Opportunity Act); *Roberts v. Clark Cnty. Sch. Dist*., 215 F. Supp. 3d 1001, 1013 (D. Nev. 2016) (sex discrimination "applies both to discrimination based on concepts of sex and discrimination based on other stereotypes about sex, including gender identity"); *Finkle v. Howard Cnty*., 12 F. Supp. 3d 780, 788 (D. Md. 2014) ("[p]laintiff's claim that she was discriminated against 'because of her obvious transgendered status' is a cognizable claim of sex discrimination"); *Rumble v. Fairview Health Servs*., No. 14 Civ. 2037, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015) ("discrimination based on an individual's transgender status constitutes discrimination based on gender stereotyping").

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

At one time, the Supreme Court treated popular views about sex roles as sufficient to justify government action. As the Court wrote in upholding Florida's exemption of women from jury service, even with "the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into

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

But this approach to sex roles, too, has long since been rejected. In *Craig v. Boren*, for example, the Court expressly disapproved the approach taken in *Goesaert*. 429 U.S. at 210 n.23. The Court explained: "[L]oose-fitting characterizations" of women were "incapable of supporting state statutory schemes that were premised upon their accuracy." *Id.* at 198-99 (citations omitted). Likewise, the Court sharply rejected reliance on earlier societal views, stating that "[i]f it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has since passed." *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975).

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

III. The Rationales Advanced in the Mattis Report Mimic Similar Arguments Once Used—and Since Disavowed—to Restrict Military Service Opportunities for Women, Gay People, and African-Americans.

By insisting that it is not fair, safe, or socially appropriate for transgender individuals to serve alongside others, the government's rationales resonate uncomfortably with those proffered to justify the separation of service members by race and the exclusion of both women and gay people from the military. *See generally* Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. Rev. 499 (1991) (reviewing commonality among rationales for restrictions on military service by African Americans, women and gays and lesbians); Mady Wechsler Segal, *The Argument for Female Combatants*, *Female Soldiers: Combatants or Noncombatants?* (Nancy Loring Goldman, ed. 1982) at 267 (examining concerns expressed in opposition to combat service by women).

As one lieutenant general wrote in 1941, arguing that racial integration would weaken the "efficiency" of the armed forces, "[t]here is no question in my mind of the inherent difference in races. This is not racism—it is common sense and understanding. Those who ignore these differences merely interfere with the combat effectiveness of battle units." Morris MacGregor, Jr., *Integration of the Armed Forces, 1940-65* (1981) at 441. By contrast, numerous reports analyzing the military's formal process of racial integration, which began in 1948, found that integration had proceeded far more effectively and smoothly than these types of

"common sense"-based predictions suggested. *See, e.g.*, MacGregor, *supra*; *cf.* Leo Bogart, ed., *Social Research and the Desegregation of the U.S. Army* (1969) (compiling reports prepared by consultants to the Army detailing the process and benefits of integration).[6]

Women have similarly faced doubts about their ability to serve in combat much like the skepticism toward women in other roles addressed by cases discussed *supra*. *See* Segal, *supra*, at 279 ("The concern that women in combat units will reduce unit cohesion is reminiscent of arguments that have been used in the past to justify excluding women from other occupations.").

Echoing the government's arguments here, the Presidential Commission on the Assignment of Women in the Armed Forces argued in favor of women's

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[6] Beyond the military context, concerns related to privacy, safety and "common practice" have also been advanced to justify segregation based on sex, sexual orientation and race in other spaces where people are in close physical proximity. *See, e.g.*, Jeff Wiltse, *Contested Waters: A Social History of Swimming Pools in America* (2007) (describing the history of separation based first on sex and later on race in public pools); *Lonesome v. Maxwell*, 123 F. Supp. 193, 202 (D. Md. 1954), *rev'd sub nom. Dawson v. Mayor & City Council of Baltimore City*, 220 F.2d 386 (4th Cir. 1955), *aff'd*, 350 U.S. 877 (1955) (citation omitted) (citing the high "degree of racial feeling or prejudice in this State at this time . . . with respect to bathing, swimming and dancing"); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 981 (N.D. Cal. 2010), *aff'd*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (quoting a 1966 letter from the Civil Service Commission chair justifying a ban on openly gay people in federal civil service jobs and citing the "apprehension" other employees would feel about sexual advances and assault and related concerns regarding "on-the-job use of the common toilet, shower and living facilities").

exclusion from combat citing concerns about unit cohesion related to the "lack of privacy on the battlefield," "sexual misconduct," and the possibility of pregnancy. Robert T. Herres, *et al*., Presidential Comm'n on the Assignment of Women in the Armed Forces, *Report to the President* (Nov. 15, 1992), available at https://babel.hathitrust.org/cgi/pt?id=umn.31951d00277676f;view=1up;seq=3 (last accessed October 29, 2018); *see also id.* (stating that "unit cohesion can be negatively affected by the introduction of any element that detracts from the need for such key ingredients as mutual confidence, commonality of experience, and equitable treatment"); Segal, *supra*, at 279 (discussing rationales for excluding women from combat linked in part to "women's supposed inability as individuals to perform the jobs adequately and partly on the potential disruption of men's interpersonal relations if women were included").

These arguments, when examined with the scrutiny required to ascertain whether they rest on "archaic and stereotypic notions," *MUW*, 458 U.S. at 725, are now understood to reflect assumptions, but not facts, about women's capacity. *See, e.g.*, Military Leadership Diversity Commission, Final Report, *From Representation to Inclusion: Diversity Leadership for the 21st Century Military* (Mar. 15, 2011) at 127 (concluding, from a non-partisan study by civilian and military leadership, that the combat exclusion of women should be ended and that the military should create a "level playing field for all qualified service members"); *see also* Major Shelly S.

McNulty, *Myth Busted: Women are Serving in Ground Combat Positions*, 68 A.F. L. Rev. 119, 156-61 (2012) (reviewing rationales for excluding women from combat, including arguments related to strength, ability, privacy and unit cohesion); Maia Goodell, *Physical-Strength Rationales for De Jure Exclusion of Women from Military Combat Positions*, 34 Seattle L. Rev. 17 (2010) (analyzing stereotyping and other factual and analytic shortcomings in the physical-strength rationales for excluding women from combat).

These same flawed rationales were also advanced in the debate over military service by openly lesbian, gay, and bisexual people. Concerns about privacy, safety, unit cohesion and related rationales were cited repeatedly by those seeking to exclude gay service members, first through a full ban on service and then through the "don't ask, don't tell" regime. *See generally* U.S. Dep't of Def., Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell" (2010), available at https://www.loc.gov/item/2011507489/ (last accessed October 29, 2018). And again, these rationales are understood to have reflected bias and stereotype rather than permissible grounds for differential treatment. *See, e.g.*, *id.* at 141 (stating that "[c]oncerns about showers and bathrooms are based on a stereotype —that gay men and lesbians will behave in an inappropriate or predatory manner in these situations" and that military commanders "already have the tools . .

. to deal with misbehavior . . . whether the person who engages in the misconduct is gay or straight").

* * *

Against this backdrop of similar efforts to segregate the military based on race or exclude capable service members based on sex stereotypes, the serious harm—to all service members—from the current ban becomes apparent. Not only does the government seek to ban some women and men from military service based on impermissible assumptions about sex but, in doing so, it seeks to resurrect rationales that have long been rejected for their reliance on impermissible sex stereotypes and fear of and discomfort with sex-role nonconformity. *Cf. Cleburne*, 473 U.S. at 448, 449 (rejecting "mere negative attitudes" and "vague, undifferentiated fear" as grounds for government action).

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

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

at JA296-99 (citing rationales related to fairness, safety, "reasonable expectations of privacy," and "longstanding societal expectations").

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

In this case, the Mattis Report is replete with the "stereotypic notions" that all women, and all men, are similar in their physical capacities and personal characteristics and that women's need to be "protect[ed] from injury" suffices to justify the exclusion here. *See supra* Point I and II.A.-B and Mattis Rep. at JA296-299 (discussing fairness, safety, and body-fat differences between men and women). The Report's assertions about "common practice in society," *id.* at JA296, and "longstanding societal expectations," *id.* at JA298, as rationales for government action likewise conflict with repeated judicial rejection of those practices and expectations as validation for discriminatory rules. *See supra* Point II.D.

Put simply, despite precedent that specifically disallows government reliance on these kinds of sex stereotypes and overbroad generalizations, the government seeks to sidestep decades of settled law and exclude transgender people from

military service. Again, the central issue here is not in the military having sex-based standards at all, but rather in relying on sex stereotypes to deny transgender men and women an equal opportunity to serve based on the same standards applied to other service members.[7] *Cf. Bauer v. Lynch*, 812 F.3d 340, 351 (4th Cir.), *cert. denied*, 137 S. Ct. 372 (2016) (recognizing the permissibility of sex-based fitness standards under Title VII so long as the standards were evidence-based and imposed an "equal burden of compliance on both men and women"). This it may not constitutionally do.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the district court's order declining to dissolve the preliminary injunction. The military's ban on service by transgender men and women requires heightened scrutiny for its sex-based classification. The policy, and the rationales set forth in the Mattis Report, would give legal effect to overbroad generalizations about men and women and sex

[7] As discussed *supra* in Point I, permitting transgender men and women to serve does not prevent the military from maintaining sex-based standards in the few areas where such standards exist or from requiring transgender men to meet the standards applied to other men and transgender women to meet the standards applied to other women. Indeed, this was the Department of Defense policy in 2016, referred to frequently as the "Carter policy." *See* Department of Defense Instruction 1300.28, *In-service Transition for Service Members Identifying as Transgender* (June 30, 2016), at 3-4.

stereotypes that have been thoroughly and repeatedly rejected in constitutional jurisprudence as a basis for government action.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 29(g) and 32(g)(1), this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains **6380 words** according to the word count of the word processing system used to prepare the brief (Microsoft Word 2016), excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

Dated: October 29, 2018

/s/ Suzanne B. Goldberg
SUZANNE B. GOLDBERG

COUNSEL FOR AMICI CURIAE

ADDENDUM

DESCRIPTIONS OF *AMICI CURIAE*

The **National Organization for Women Foundation** ("NOW Foundation") is a 501(c)(3) entity affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States with chapters in every state and the District of Columbia. NOW Foundation is committed to advancing equal opportunity, among other objectives, and works to assure that women and LGBTQIA persons are treated fairly and equally under the law. As an education and litigation organization, NOW Foundation is also dedicated to eradicating sex-based discrimination—which it believes pertains to discrimination against LGBTQIA persons.

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

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

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

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

Columbia Law School Sexuality & Gender Law Clinic, founded in 2006, is the first such clinical law program at an American law school. The Clinic has extensive expertise in the constitutional doctrine related to sexuality and gender law and has worked extensively on issues related to sex discrimination jurisprudence and its application to transgender individuals that are central to the argument here. For more than a decade, the Clinic has regularly submitted amicus briefs on sexuality and gender law matters to federal appellate courts, including this Court (*Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014)), and to other courts throughout the United States.

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

Equal Rights Advocates ("ERA") is a national civil rights advocacy organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. Since its founding in 1974, ERA has led efforts to combat sex discrimination and advance gender equality by litigating high-impact cases, engaging in policy reform and legislative advocacy campaigns, conducting community education and outreach, and providing free legal assistance to individuals experiencing unfair treatment at work and in school through our national Advice & Counseling program. ERA has filed hundreds of suits and appeared as amicus curiae in numerous cases to defend and enforce individuals' civil rights in state and federal courts, including before the United States Supreme Court. Promoting equal rights for the LGBT community through legal advocacy has been of great importance to the organization since its early years. ERA countered discrimination specifically directed at lesbians by creating the Lesbian Rights Project which later became the National Center for Lesbian Rights. ERA recognizes that women historically have been the targets of legally sanctioned discrimination and unequal treatment, which often have been justified by or based on stereotypes and biased assumptions about the roles that women (and men) can or should play in the public and private sphere. ERA views discrimination against transgender people—particularly exclusionary policies justified by the very sex stereotypes that have held women back in the workplace and elsewhere—as a pernicious and legally

impermissible form of sex discrimination which is harmful to the transgender community, to women, and to our society at large.

Legal Voice, founded in 1978 as the Northwest Women's Law Center, is a regional nonprofit public interest organization that works to advance the legal rights of women in the Northwest through litigation, legislation, and education. Since its founding, Legal Voice has worked to eliminate all forms of sex discrimination. Recognizing that discrimination based on gender identity or sexual orientation are forms of sex discrimination, Legal Voice has a long history of advocacy on behalf of lesbians, gay men, bisexuals, and transgender people, dating back to the 1980s. Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country, including prior participation as *amicus curiae* in the trial court in this case.

The mission of the **National Association of Women Lawyers ("NAWL")** is to provide leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law. Since 1899, NAWL has been empowering women in the legal profession, cultivating a diverse membership dedicated to equality, mutual support, and collective success. As part of its mission, NAWL promotes equal opportunity and full participation in society, regardless of gender, sexual orientation, or gender identity.

The National Partnership for Women & Families is a nonprofit, nonpartisan advocacy organization that uses public education and advocacy to promote fairness in the workplace, quality health care for all, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has been instrumental in many of the major legal changes that have improved the lives of women and their families. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious discrimination and has filed numerous briefs as Amicus Curiae in the U.S. Supreme Court and in the Federal Courts of Appeals to protect constitutional and legal rights.

Founded in 1917, the **Women's Bar Association of the District of Columbia** (WBA) is one of the oldest and largest voluntary bar associations in metropolitan Washington, DC. Today, as in 1917, we continue to pursue our mission of maintaining the honor and integrity of the profession; promoting the administration of justice; advancing and protecting the interests of women lawyers; promoting their mutual improvement; and encouraging a spirit of friendship among our members. The WBA believes that discrimination against transgender people constitutes unconstitutional discrimination on the basis of sex, and further, that reinforcing the notion that there are "biological differences" between men and women leads to disparate treatment based on outdated stereotypes of women.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on October 29, 2018, which will automatically serve all parties.

Dated: October 29, 2018

/s/ Suzanne B. Goldberg
SUZANNE B. GOLDBERG