

## THE TRANSGENDER MILITARY BAN: PRESERVATION OF DISCRIMINATION THROUGH TRANSFORMATION

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**ABSTRACT**—This Essay contends that the Trump Administration’s ban on transgender individuals serving in the military is based on prejudice and bias, lacking any legitimate justification. As such, the transgender military ban cannot be justified on legal grounds. Nor can it be justified based on health and safety. Engaging a robust empirical record, the authors show that the ban cannot be justified based on matters of efficiency, preparedness, or combat readiness—arguments used by the Trump Administration to justify the ban. Despite transgender individuals serving openly in the military in recent years, the Trump Administration has not been able to offer in reports or court documents proof of its claims that transgender service members undermine combat readiness and thus pose a risk to the military.

Given this, the authors argue, the Supreme Court’s intervention to lift the preliminary injunctions bodes poorly for how the Court will address this issue and other LGBTQ rights issues to come. The Essay identifies several problems with the Trump Administration’s policy to ban transgender individuals from serving in the U.S. military. First, the policy is unjustifiably discriminatory on the basis of gender identity. Second, it perpetuates harmful stereotypes and stigmas that have serious consequences in society generally, and specifically, for transgender service members and their families. Third, the policy singles out transgender members of the military through what ultimately can be understood as coercion and shaming, forcing trans military service members to obtain a psychological diagnosis of gender dysphoria and to do so rather abruptly in order to continue in their military employment. The Essay shows how the transgender military ban perpetuates historical patterns of discrimination in the military, which reach back to race- and sex-based discrimination. The authors conclude that promoting equality in the military will only occur when those who wish to, and are qualified to, serve are permitted to do so with dignity and respect.

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INTRODUCTION

Without any explanation, on January 22, 2019, the United States Supreme Court, in a 5–4 ruling split along ideological lines, allowed President Trump’s ban on military service by transgender individuals to go into effect.<sup>1</sup> In a highly unusual procedural move, the Court’s conservative

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<sup>1</sup> Justices Ginsburg, Breyer, Sotomayor, and Kagan “would deny the application[s],” but they were in the minority. *Trump v. Karnoski*, 139 S. Ct. 950, 950 (2019) (mem.); see *Trump v. Stockman*, 139 S. Ct. 950, 950 (2019) (mem.) (“[The] [a]pplication for stay presented to Justice Kagan and by her referred to the Court [is] granted, and the District Court’s December 22, 2017 order granting a preliminary injunction is stayed pending disposition of the Government’s appeal in the United States Court of Appeals

majority, Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh, granted applications to stay district court orders blocking implementation of the ban, even though the district court decisions did not conflict with any prior rulings of the Supreme Court or courts of appeals. The Supreme Court usually denies review of interlocutory orders while it “await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction.”<sup>2</sup>

The Court’s ruling was also unusual because the government had not presented any evidence that allowing transgender individuals to serve in the military harms military effectiveness, readiness, or lethality.<sup>3</sup> In fact, transgender military members have served openly since an Obama Administration policy was implemented in 2016.<sup>4</sup> Rather, President Trump’s policy was part of a series of attacks on LGBTQ rights launched shortly after his taking office.<sup>5</sup> Barring transgender individuals from serving in the U.S. military is chief among them, although it is not the only sphere in which the Trump Administration has sought to limit or fully eradicate civil rights protections for LGBTQ persons.<sup>6</sup>

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for the Ninth Circuit and disposition of the Government’s petition for a writ of certiorari, if such writ is sought.”).

<sup>2</sup> *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari) (citations omitted).

<sup>3</sup> See Brief in Opposition at 18, *Trump v. Doe 2*, 139 S. Ct. 946 (2019) (mem.) (No. 18-677) (“Nor is there any pressing need for the extraordinary disposition the government requests. . . . But there is no harm—much less immediate harm—to the military from allowing the service of transgender individuals who satisfy the demanding standards to which all servicemembers are subject. The preliminary injunction maintains the status quo that existed prior to the 2017 Presidential Memorandum and that requires transgender servicemembers to meet the same fitness, readiness, and deployability standards as all other servicemembers. Although transgender men and women have been serving openly in the military under the Carter Policy for more than two years, the government has presented no evidence that their doing so harms military readiness, effectiveness, or lethality.”).

<sup>4</sup> Memorandum from Ash Carter, Sec’y of Def., to Sec’y of the Military Dep’ts et al., *Military Service of Transgender Service Members* (June 30, 2016), [https://dod.defense.gov/Portals/1/features/2016/0616\\_policy/DTM-16-005.pdf](https://dod.defense.gov/Portals/1/features/2016/0616_policy/DTM-16-005.pdf) [<https://perma.cc/C5HT-EKKM>].

<sup>5</sup> The open service policy under the Obama administration in and of itself does not prove a lack of military harms (although reports relied on by that administration support this conclusion). Rather it highlights that the Trump administration had the opportunity to gather evidence showing why the ban is justified but did not find such evidence to justify its discriminatory policy.

<sup>6</sup> As of the writing of this Essay, the Trump Administration has formally proposed undoing various safeguards implemented during the Obama Administration. These protections and civil rights “banned discrimination against transgender medical patients and health insurance customers.” Abby Goodnough et al., *Trump Administration Proposes Rollback of Transgender Protections*, N.Y. TIMES (May 24, 2019), <https://www.nytimes.com/2019/05/24/us/politics/donald-trump-transgender-protections.html> [<https://perma.cc/K5TB-4MNG>]; see also Establishment of a White House Faith and Opportunity Initiative, Exec. Order No. 13831, 83 Fed. Reg. 20715 (May 8, 2018) (amending Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, to loosen restrictions on the ability of religious charities receiving federal funds to preach to those whom they serve); see also Brief for the Federal Respondent Supporting Reversal, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*,

The ban, originally conveyed through a series of tweets in July 2017, claimed transgender military service members constrained the armed forces, causing economic hardships that burdened defense efforts. President Trump tweeted, “Our military must be focused on decisive and overwhelming . . . victory and cannot be burdened with the tremendous medical costs and disruption that transgender [sic] in the military would entail.”<sup>7</sup>

At the time of these tweets, the President claimed to have consulted with “[g]enerals and military experts”<sup>8</sup> in reaching the decision that the United States “will not accept or allow” “[t]ransgender individuals to serve in any capacity in the U.S. [m]ilitary.”<sup>9</sup> Whether the President had actually consulted with experts in 2017, and what they might have actually conveyed, is unclear and unknown. However, in the months that followed, memoranda issued by the Deputy Secretary of Defense,<sup>10</sup> as well as a Department of Defense Report and Recommendation on Military Service by Transgender Persons issued by General James Mattis,<sup>11</sup> furthered the Trump Administration’s policy on transgender service members.

Within eighteen months of President Trump’s tweets, a forceful Directive-type Memorandum (DTM) was issued for the Chairman of the Joint Chiefs of Staff, the Under Secretaries of Defense, the Chief of the National Guard Bureau, the Inspector General of the Department of Defense, and the directors of the Defense Agencies, among others, further articulating the Trump Administration’s policy related to transgender service members. The directive emphasizes that “transgender Service members or applicants for accession to the Military Services must be subject to the same standards as all other persons.”<sup>12</sup> Sadly, historically in the U.S. military, the “standard

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No. 18-107 (argued Oct. 9, 2018) (a recent Supreme Court case in which the Trump Administration argued against an interpretation of Title VII that would protect against gender identity-based discrimination).

<sup>7</sup> Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), <https://twitter.com/realdonaldtrump/status/890196164313833472> [<https://perma.cc/CJ25-4Z8D>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:08 AM), <https://twitter.com/realdonaldtrump/status/890197095151546369> [<https://perma.cc/6467-F4DQ>].

<sup>8</sup> Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), <https://twitter.com/realdonaldtrump/status/890193981585444864> [<https://perma.cc/8RHU-C2Y4>].

<sup>9</sup> *Id.*; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), <https://twitter.com/realdonaldtrump/status/890196164313833472> [<https://perma.cc/SHW9-4HW6>].

<sup>10</sup> *See, e.g.*, Interim Guidance on Military Service by Transgender Individuals, Office of the Sec’y of Def. (Sept. 14, 2017); Memorandum from David L. Norquist, Performing the Duties of the Deputy Sec’y of Def., to Chief Mgmt. Officer of the Dep’t of Def. et al., Military Service by Transgender Persons and Persons with Gender Dysphoria (Mar. 12, 2019), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dtm/DTM-19-004.pdf?ver=2019-03-13-103259-670> [<https://perma.cc/AG48-E85N>].

<sup>11</sup> U.S. DEP’T OF DEF., REPORT AND RECOMMENDATIONS ON MILITARY SERVICE BY TRANSGENDER PERSONS 19 (Feb. 22, 2018) [hereinafter MATTIS POLICY].

<sup>12</sup> Norquist, *supra* note 10, at 2.

service member” excluded people of color, women, and LGBTQ persons, and discriminatory policies against those communities were justified in similar ways.

As we articulate in this Essay, the Supreme Court’s decision to lift the district court injunctions allows unjustified discrimination against transgender individuals and likely signals a significant shift in the Court’s position on LGBTQ issues. For many LGBTQ advocates, the Supreme Court’s decision was a stunning defeat, particularly in light of a line of Court decisions advancing same-sex equality. Yet, the constitutional gains related to sex equality (between men and women) and LGBTQ equality, particularly as evidenced through Supreme Court victories, may obscure an increase in discrimination yet to come with a divided Court that splits along ideological lines. We predict that, rather than building upon Justice Anthony Kennedy’s legacy in articulating and advancing rights for LGBTQ persons, the Court’s decision may signal a new era marked by the preservation of discrimination.

Given this, we warn that recent Supreme Court victories advancing marriage equality may obscure the Supreme Court’s preservation of discrimination through transformation. That is, while the Supreme Court has rejected one form of LGBTQ discrimination in recent years, most notably marriage inequality, another aspect—the transgender military ban—becomes legitimized by the Court.<sup>13</sup> Indeed, while LGBTQ advocates heralded the Supreme Court’s rulings in *United States v. Windsor*<sup>14</sup> and *Obergefell v. Hodges*<sup>15</sup> as throwing off the vestiges and badges of homophobia, discrimination against those attracted to the same gender, and the stereotyping of sexual minorities, it appears their celebration was sadly premature. This, of course, is the result of the election of Donald Trump and the subsequent shift in the composition of the Supreme Court.

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<sup>13</sup> We recognize, of course, that discrimination against transgender individuals might be distinguished by the Court from discrimination against gays and lesbians. Yet, we are skeptical that the Court will do this. The sitting Justices who were in the majority on marriage equality (Justices Ginsburg, Breyer, Sotomayor, and Kagan) dissented from the lifting of the preliminary injunction of the Trump transgender ban. Compare *Obergefell v. Hodges*, 135 S. Ct. 2584, 2591 (2015), with *Trump v. Karnoski*, 139 S. Ct. 950 (2019) (mem.). The Justices who dissented on marriage equality (Justices Roberts, Thomas, and Alito) were the majority (joined by Justices Gorsuch and Kavanaugh). Compare *Obergefell*, 135 S. Ct. at 2611 (Roberts, J., dissenting), with *Karnoski*, 139 S. Ct. at 950.

<sup>14</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013).

<sup>15</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). It is also worth noting that alongside those who understood these decisions as marking a new day for LGBTQ equality, there were scholars who voiced nuanced skepticism and doubt. See e.g., Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1208 (2016) (expressing concerns that *Obergefell*’s “veneration of marriage” could act to diminish and marginalize the constitutional protections of those families that choose to live outside of the traditional marriage framework).

This dynamic is what Professor Reva Siegel describes as “preservation-through-transformation”<sup>16</sup>—a framework for evaluating status regulation that she applied to equal protection law. This Essay borrows that framework, not to evaluate the Fourteenth Amendment’s Equal Protection Clause, as she does in relation to the regulation of reproductive rights or to study racial discrimination,<sup>17</sup> but rather as a means to analyze and understand the fluidity, transformation, and endurance of LGBTQ discrimination.

In this Essay, we address the preservation of LGBTQ discrimination through very recent transformation via the targeting of transgender military members. For example, a 2016 study by the RAND Corporation, commissioned by the Office of the Under Secretary of Defense for Personnel and Readiness and conducted within its Forces and Resources Policy Center’s National Defense Research Institute, concluded that allowing transgender individuals to serve in the military would have “minimal impact on readiness.”<sup>18</sup> The study, funded by the Office of the Secretary of Defense, estimated that out of more than 1.3 million military personnel, there are roughly between 2,150 and 11,000 transgender individuals in military service.<sup>19</sup>

According to the study’s authors, by allowing trans-inclusive medical care, active-component health care costs increase “spending by only 0.038–0.054 percent.”<sup>20</sup> Using “baseline estimates,” they project that “health care costs will increase by between \$2.4 million and \$8.4 million” annually.<sup>21</sup> The RAND Corporation study made clear that there is no reason for excluding transgender individuals from military service. We share this conclusion.

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<sup>16</sup> Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997); see *id.* at 1119–20 (“White Americans who emphatically opposed slavery regularly disagreed about what it would mean to emancipate African-Americans. Some defined freedom from slavery as equality in civil rights; others insisted that emancipating African-Americans from slavery entailed equality in civil *and* political rights; but most white Americans who opposed slavery did not think its abolition required giving African-Americans equality in ‘social rights.’”).

<sup>17</sup> *Id.* at 1113–14.

<sup>18</sup> See AGNES GEREBEN SCHAEFER ET AL., RAND CORP., ASSESSING THE IMPLICATIONS OF ALLOWING TRANSGENDER PERSONNEL TO SERVE OPENLY 47 (2016).

<sup>19</sup> *Id.* at 14–17. Actual numbers are not known but rather gleaned from various studies, including a 2014 report published by the Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy. That study estimated that over 15,000 transgender individuals were in the reserve forces, serving in the National Guard, or on active duty. See GARY J. GATES & JODY L. HERMAN, WILLIAMS INST., TRANSGENDER MILITARY SERVICE IN THE UNITED STATES 4 (2014), <https://escholarship.org/uc/item/1t24j53h> [<https://perma.cc/56VD-XK27>] (“The estimates also suggest that there are more than 134,000 transgender individuals in the US who are veterans or have retired from Guard or Reserve service.”).

<sup>20</sup> See SCHAEFER ET AL., *supra* note 18, at 70.

<sup>21</sup> *Id.*

We find several glaring problems with the Trump Administration's policy to ban transgender individuals from serving in the U.S. military. First, the policy is unjustifiably discriminatory on the basis of gender identity. Second, it perpetuates harmful stereotypes and stigmas that have serious consequences in society generally, and specifically, for transgender service members and their families. Indeed, the policy singles out transgender members of the military through what ultimately can be understood as coercion and shaming, forcing trans military service members to obtain a psychological diagnosis of gender dysphoria and to do so rather abruptly in order to continue in their military employment.

Yet, the policy not only imposes a distressing ultimatum on transgender military service members and excludes transgender Americans from serving in the military but also reifies a social construction of LGBTQ persons being mentally ill or diseased. That is, in order for military members to comply with the policy, they must also be subjected to medical diagnoses that continue to pathologize LGBTQ persons.<sup>22</sup>

For example, a diagnosis of gender dysphoria, which the military now associates with transgender service members, is effectively a finding of mental illness or a personality disorder.<sup>23</sup> The military has declared that gender dysphoria, gender transition treatment, and sex reassignment surgery are equally disqualifying.<sup>24</sup>

The *Diagnostic and Statistical Manual of Mental Disorders (DSM)*, which is used by clinicians and psychiatrists to diagnose mental illnesses, describes a person diagnosed with this condition as associated with having problems functioning or living under "significant distress."<sup>25</sup>

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<sup>22</sup> The government's brief further exposes this stigmatization:

Consistent with the inclusion of "transsexualism" in the *DSM*, the military's accession standards—the "standards that govern induction into the Armed Forces"—had for decades disqualified individuals with a history of "transsexualism" from joining the military. And although the military's retention standards—the "standards that govern the retention and separation of persons already serving in the Armed Forces"—did not "require" separating "transsexual[]" servicemembers from service, "transsexualism" was a "permissible basis" for doing so.

Petition for a Writ of Certiorari Before Judgment at 3, *Trump v. Doe 2*, 139 S. Ct. 946 (2019) (mem.) (No. 18-677) (citations omitted).

<sup>23</sup> See Ranna Parekh, *What Is Gender Dysphoria*, AM. PSYCHIATRIC ASS'N (Feb. 2016), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/A3XY-78TS>] (explaining the DSM fifth edition criteria for gender dysphoria).

<sup>24</sup> See Interim Guidance on Military Service by Transgender Individuals, *supra* note 10; Norquist, *supra* note 10, at 2, 7–8. Thus, the government appears to wield the gender dysphoria diagnosis as a means of rooting out transgender persons who have not medically transitioned.

<sup>25</sup> See AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 452–53 (5th ed. 2013).

Our concern, and one that is shared by many LGBTQ advocates, is the equating of a transgender identity with mental disability, or, specifically, the characterization of transgender individuals as having a mental disorder. In this way, the government can disguise its animus toward transgender individuals as a legitimate military health care concern. For some service members, this language, and viewing the diagnosis as pathologizing, will be a significant “disincentive in deciding whether to get the diagnosis [because] the idea of having such a medical designation in the employment file is painful.”<sup>26</sup> In this case, the military preserves its broader history or legacy of discrimination against vulnerable communities.<sup>27</sup> And more specifically, it introduces new forms of discrimination against the LGBTQ community by deploying harmful stereotypes and outdated tropes to prohibit service by transgender individuals.

This Essay contends that the Trump Administration’s ban on transgender individuals serving in the military is based on prejudice and bias, lacking any legitimate justification. Unfortunately, the Supreme Court’s intervention to lift the preliminary injunctions bodes poorly for how the Court will deal with this issue and other LGBTQ rights issues to come. In this Essay, while our attention turns specifically addressing transgender discrimination, we also speak to the collective concerns of LGBTQ communities. In doing so, we point out that the justifications for discrimination against LGBTQ people have historically been tightly interwoven around stereotypic perceptions of sex identity.

Our intention is not to conflate the social or legal status(es) of LGBTQ communities, especially as they are not a monolith. Rather, discrimination against gay men and women has typically extended to bisexuals and

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<sup>26</sup> Lauren Hodges & Ailsa Chang, *How the Trump Administration’s Transgender Troop Ban Is Affecting One Military Family*, NPR (Apr. 11, 2019, 4:49 PM), <https://www.npr.org/2019/04/11/711229419/how-the-trump-administrations-transgender-troop-ban-is-affecting-one-military-fa> [<https://perma.cc/WQ5U-RSYB>].

<sup>27</sup> Historically, the United States military has discriminated against African Americans by imposing quotas, forced segregation, unequal benefits and later imposed quotas on women in military services. The institutionalized racism spread beyond the combat field to the defense industries in the United States, which redlined African Americans out of military-related jobs in factories where military equipment was manufactured and tanks built. See generally BERRY, *infra* note 28; HOPE, *infra* note 28; PATTON, *infra* note 28. See also LISHA B. PENN, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, RECORDS OF MILITARY AGENCIES RELATING TO AFRICAN AMERICANS FROM THE POST-WORLD WAR I PERIOD TO THE KOREAN WAR (2006) (providing an empirical account of the discriminatory practices adopted by the United States Armed Forces to deny Black Americans the opportunity and right to serve in the military). It was Franklin D. Roosevelt’s Executive Order 8802, known as the Fair Employment Act, issued on June 25, 1941, that sought to further dismantle the institutionalized racism within the military and the broader defense industries. Exec. Order No. 8802, 3 C.F.R. 234 (1941 Supp.). However, these patterns of discrimination were followed by discrimination against LGBTQ women and men in the military. See *infra*, Part I.

transgender persons. We predict, the Trump Administration's discrimination against transgender individuals will not be isolated to them nor contained to military service. We interpret the Trump Administration's transgender military ban as also signaling that gays and lesbians will not be spared from the harmful retrenchment of their recent political and legal gains.

Part I of this Essay situates the transgender military ban as continuing the history of military discrimination against LGBTQ individuals. Part II argues that the transgender military ban is unjustified by any legitimate purpose, as compellingly articulated by the district courts and as demonstrated by empirical evidence. Part III then turns to the Supreme Court, and articulates why the Court's unusual lifting of the district courts' injunctions was unjustified, particularly as the Court acted before decisions from courts of appeals. Finally, Part IV forecasts the Court's lifting of the injunctions as signaling a major shift in the Court's jurisprudence on LGBTQ issues. Without Justice Kennedy, it contends, the progress made toward LGBTQ equality may be vulnerable.

## I. THE LONG ARC OF LGBTQ DISCRIMINATION IN THE MILITARY

Sadly, discrimination in the United States military is nothing new.<sup>28</sup> In fact, race<sup>29</sup> and sex<sup>30</sup> discrimination in the military have been the subject of scholarly attention, as well as significant social debate,<sup>31</sup> and still more attention is needed on those issues.<sup>32</sup> The cyclical horrors between racially

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<sup>28</sup> See generally, e.g., MARY FRANCES BERRY, *MILITARY NECESSITY AND CIVIL RIGHTS POLICY: BLACK CITIZENSHIP AND THE CONSTITUTION, 1861–1868* (1977) (describing the role of Blacks in the military as a means to citizenship); RICHARD O. HOPE, *RACIAL STRIFE IN THE U.S. MILITARY: TOWARD THE ELIMINATION OF DISCRIMINATION* 11–15 (1979); GERALD W. PATTON, *WAR AND RACE: THE BLACK OFFICER IN THE AMERICAN MILITARY, 1915–1941* (1981); see also PENN, *supra* note 27, at 8 (“The [Air Force] resisted previous efforts to enlist black airmen with the claim that there were no black pilots in the United States. Within the War Department and the AAF in general, the belief prevailed that black males lacked the aptitude to be military pilots. It was not until the passage of the Selective Training and Service Act of 1940 (and pressure exerted from the black community) that the [Air Force] along with other military services was required to enlist black males in proportion to their total population (about 10 percent).”)

<sup>29</sup> See generally KRISTY N. KAMARCK, CONG. RESEARCH SERV., *DIVERSITY, INCLUSION, AND EQUAL OPPORTUNITY IN THE ARMED SERVICES: BACKGROUND AND ISSUES FOR CONGRESS* 12 (2019) (documenting a history of racial segregation and discrimination in the United States military, including that “[d]uring the Civil War, approximately 186,000 black Americans served in the Union Army as part of sixteen segregated combat regiments, and some 30,000 served in the Union Navy”); James Burk & Evelyn Espinoza, *Race Relations Within the US Military*, 38 ANN. REV. SOC. 401 (2012) (finding persistent patterns of racial disparities in the military that disadvantage racial minorities); Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court’s Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945) (describing the more lax judicial review over military authorities’ discriminatory actions in respect to the Japanese ancestry program during World War II); Mary C. Griffin, Note, *Making the Army Safe for Diversity: A Title VII Remedy for Discrimination in the Military*, 96 YALE L.J. 2082 (1987) (arguing that courts should apply Title VII discrimination protections to the military).

<sup>30</sup> Tim Bakken, *A Woman Soldier’s Right to Combat: Equal Protection in the Military*, 20 WM. & MARY J. WOMEN & L. 271, 271 (2014) (“Through federal policy and its own rules and culture, the U.S. military has been, and to some extent remains, especially in regard to women, the last government institution accepting of de jure discrimination. . . . Most prominently, the military prohibited all women from serving in combat units.”); Robin Rogers, *A Proposal for Combatting Sexual Discrimination in the Military: Amendment of Title VII*, 78 CALIF. L. REV. 165 (1990).

<sup>31</sup> Theodore R. Johnson, *Presidents, Race and the Military, in the 1940s and Now*, N.Y. TIMES (July 26, 2018), <https://www.nytimes.com/2018/07/26/magazine/military-desegregation-trump-truman.html> [<https://perma.cc/8NHE-MQ3Q>] (relaying the return home of Tech. Sgt. Isaac Woodard, Jr., who upon returning home in uniform was literally “blinded” after a mob of white police officers inflicted such a brutal beating upon him with their batons that he suffered a loss of sight; the officers dumped his broken body at a nearby veteran’s hospital); see also Nikole Hannah-Jones, *Our Democracy’s Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html> [<https://perma.cc/7LB2-DHJZ>] (In this autobiographical account, reflecting on the patriotic reasons why her African American father joined a segregated military and also the cruel lessons learned, “The Army did not end up being his way out. He was passed over for opportunities, his ambition stunted. He would be discharged under murky circumstances and then labor in a series of service jobs for the rest of his life.”).

<sup>32</sup> Safia Samee Ali, *Black Troops More Likely to Face Military Punishment Than Whites*, *New Report Says*, NBC NEWS (June 7, 2017), <https://www.nbcnews.com/news/nbcblk/black-troops-more-likely-face-military-punishment-whites-new-report-n769411> [<https://perma.cc/8Q53-VPQ3>] (reporting on a

segregated military service and the sometimes brutal return to civilian life that confronted Black service members are recorded by the Equal Justice Initiative (EJI):

Between the end of Reconstruction and the years following World War II, thousands of black veterans were accosted, assaulted, and attacked, and many were lynched. Black veterans died at the hands of mobs and persons acting under the color of official authority; many survived near-lynchings; and countless others suffered severe assaults and social humiliation. . . . As veteran and later civil rights leader Hosea Williams said, “I had fought in World War II, and I once was captured by the German army, and I want to tell you the Germans never were as inhumane as the state troopers of Alabama.”<sup>33</sup>

Even while the racial discrimination Black enlisted service members experienced at home may have surpassed the barrage of assaults that they experienced in barracks, mess houses, and on military bases, nevertheless, those conditions within the Army and other military branches were horrifyingly discriminatory.<sup>34</sup>

Race discrimination has beset myriad aspects of U.S. military operations, policies, and practices, from racial segregation of troops to a ten percent ceiling on the recruitment of African American soldiers,<sup>35</sup> to racial discrimination in the distribution of benefits.<sup>36</sup> The United States military

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disturbing new study, which spanned nearly ten years of data, finding “Black service members are significantly more likely to face military punishment than their white colleagues, according to a new report that alleges rampant racial bias in the military”); Leo Shane III, *White Nationalism Remains a Problem for the Military, Poll Suggests*, MILITARY TIMES (Feb. 28, 2019), <https://www.militarytimes.com/news/pentagon-congress/2019/02/28/white-nationalism-remains-a-problem-for-the-military-poll-shows/> [<https://perma.cc/PJ7W-ZLYC>] (“After a year of military officials publicly emphasizing the dangers of white nationalism in the ranks, a poll of Military Times readers found little change in the prevalence of those racist views among troops. . . . About 22 percent of service members who participated in the survey last fall said they have seen signs of white nationalism or racist ideology within the armed forces.”).

<sup>33</sup> EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: TARGETING BLACK VETERANS 7, 24 (2017) <https://eji.org/reports/online/lynching-in-america-targeting-black-veterans> [<https://perma.cc/9R48-UTKD>] (“Returning African American veterans were met with a familiar ‘tenacious and violent white supremacy,’ and their status as veterans made them special targets for white aggression.”)

<sup>34</sup> *Id.* at 7 (For these reasons and more, “[d]ocumenting these atrocities is vital to understanding the incongruity of our country’s professed ideals of freedom and democracy while tolerating ongoing violence against people of color within our own borders.”).

<sup>35</sup> See KAMARCK, *supra* note 29, at 12–15; see also Ted Gregory, *Forgotten War Nurses Keep Their Story Alive*, CHI. TRIB. (May 28, 2001), <https://www.chicagotribune.com/news/ct-xpm-2001-05-28-0105280153-story.html> [<https://perma.cc/2SKV-9FEU>] (“Army leaders set a quota of 48 [black] nurses, who were segregated from white nurses and white soldiers for much of [World War II]. . . . They were nearly invisible in the estimated 52,000-member Army Nurse Corps.”).

<sup>36</sup> See generally DONALD R. SHAFFER, AFTER THE GLORY: THE STRUGGLES OF BLACK CIVIL WAR VETERANS (2004) (examining the obstacles black veterans faced in their attempts to secure equality in the post-Civil War Era); Sven E. Wilson, *Prejudice & Policy: Racial Discrimination in the Union Army*

segregated Asians as well as African Americans.<sup>37</sup> By the time of President Truman's Executive Order to end racial discrimination in the military,<sup>38</sup> "Asian-Americans were no longer serving in segregated units; however, black units were still segregated."<sup>39</sup> Senior military officials reluctant to the change made arguments similar to those used now to ban transgender individuals from serving; they claimed that integrating African Americans in the military would undermine military efficiency and effectiveness.<sup>40</sup> A racially integrated military, albeit with strict quotas, interrupted the ubiquity of Jim Crow white supremacy practices and with it undeniable power asymmetries that unjustifiably subordinated Blacks and privileged whites.

Nor have women been spared discrimination and harmful practices within the United States military, which has historically restricted their military service and employment.<sup>41</sup> And, sadly, racial discrimination persisted within the context of sex discrimination, with quotas imposed on the number of Black women who could serve in the military as nurses.<sup>42</sup> In this regard, the military imposed compounding, onerous, discriminatory conditions on Black women based on their sex and race.<sup>43</sup> Ironically, racism was used as a proxy or explanation for *sexism* in denying Black nurses to serve in the military. Army Medical Corps Colonel C.R. Darnell, claimed that the difficulty in making sure that Black women would remain segregated made it impracticable for them to serve, stating, in a letter to a member of congress, the "difficulty if not impossibility of arranging proper quarters and messing facilities for them[,] their employment has been found impracticable in time of peace. You may rest assured that when military conditions make it practicable . . . to utilize colored nurses they will not be overlooked."<sup>44</sup>

In 1948, the Women's Armed Services Integration Act set a policy limiting the number of women allowed to serve in each branch of the armed

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*Disability Pension System, 1865–1906*, 100 AM. J. PUB. HEALTH S56 (2010) (highlighting the difficulties black soldiers had in receiving military pensions).

<sup>37</sup> See KAMARCK, *supra* note 29, at 14.

<sup>38</sup> Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

<sup>39</sup> KAMARCK, *supra* note 29, at 14.

<sup>40</sup> *Id.* at 14–15.

<sup>41</sup> Bakken, *supra* note 30, at 271 ("[N]either Congress nor the Supreme Court has acted to ensure that women have the right to hold all jobs in the military for which they are qualified.").

<sup>42</sup> Kathryn Sheldon, *Brief History of Black Women in the Military*, THE WOMEN'S MEMORIAL, <https://www.womensmemorial.org/history-of-black-women> [<https://perma.cc/V3XD-C9RA>] (also noting, "[e]nlisted women served in segregated units, participated in segregated training, lived in separate quarters, ate at separate tables in mess halls, and used segregated recreation facilities. Officers received their officer candidate training in integrated units, but lived under segregated conditions.")

<sup>43</sup> *See id.*

<sup>44</sup> *See id.*

services.<sup>45</sup> The ceiling was set at two percent.<sup>46</sup> Compounding this, historically, military policies were slow to remedy the discrimination experienced by its personnel.<sup>47</sup> And Congress has been equally plodding in remedying the patterns, practices, and effects of discrimination in the military.<sup>48</sup> Indeed, even after the military lifted its “blanket exclusion of women from combat,” it nonetheless “reserved for its commanders the continued right to exclude women from combat if the commanders could assert a particular military necessity as a justification.”<sup>49</sup> There are striking parallels between the justifications for race and sex discrimination in the past and discrimination against transgender individuals under the Trump policy.

#### A. *History of LGBTQ Discrimination in Government and the Military*

We highlight the military’s history of discrimination and what some would argue as its continuing challenges not to blunt its current discrimination against LGBTQ service members by suggesting that the military is simply an organization that discriminates. Rather, as scholars have joined in bringing attention to race and sex discrimination in the military to redress historic wrongs, their articulations regarding those concerns have in turn further legitimized the fundamental equality interests of people of color and women serving or wishing to serve in the military. Similarly, casting attention on transgender discrimination in the military, serves not only to highlight its illegitimacy and unconstitutionality, but also give meaning to the Court’s evolving jurisprudence advancing equality.

As well, there are meaningful lessons to be learned from the racial integration of the military. According to a RAND Research Brief for the National Defense Research Institute commissioned by the Secretary of Defense in 1993:

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<sup>45</sup> Women’s Armed Services Integration Act of 1948, Pub. L. No. 80-625, § 102, 62 Stat. 356, 357 (1948) (repealed 1967).

<sup>46</sup> *Id.*

<sup>47</sup> Griffin, *supra* note 29, at 2082 (“Discrimination remains a serious problem in the United States military. As the law stands, however, when an enlistee dons a military uniform, she sheds her right to a judicial remedy for employment discrimination.”); *see also* Chappell v. Wallace, 462 U.S. 296, 305 (1983) (“We hold that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations.”).

<sup>48</sup> In 1967, Congress finally lifted the restrictions capping the percentage of women who could serve. Act of Nov. 8, 1967, Pub. L. No. 90-130, 81 Stat. 374 (1967). In 2013, the military lifted its ban on women serving in combat. *See* Memorandum from Martin E. Dempsey, Chairman of the Joint Chiefs of Staff & Leon E. Panetta, Sec’y of Def., to Sec’ys of the Military Dep’ts et al. (Jan. 24, 2013), <https://dod.defense.gov/Portals/1/Documents/WISRJointMemo.pdf> [<https://perma.cc/YJ73-CFN5>].

<sup>49</sup> Bakken, *supra* note 30, at 272 (citing Dempsey & Panetta, *supra* note 48).

While a decision to integrate homosexuals into the force is not directly comparable to the integration of blacks into the military, the experience of racial integration provides insights into the military's ability to adapt to change. That experience shows that it is possible to change how troops behave toward previously excluded (and despised) minority groups, even if underlying attitudes toward those groups change very little.<sup>50</sup>

This observation is particularly relevant because “[w]hen integration was mandated in the late 1940s,” many government officials believed it was “inconsistent with prevailing societal norms and likely to create tensions and disruptions in military units and to impair combat effectiveness.”<sup>51</sup> To place this in context, Conrad Crane, the director of the U.S. Army Military History Institute, suggests that very few, if any, politicians or military officials supported President Truman's plans for military integration.<sup>52</sup> And, to be clear, Truman did not come to this decision on his own; Black civil rights leaders like A. Philip Randolph pressured the President into action.<sup>53</sup> A report published by *The New Republic* in 1952 chronicling that period described that, “[f]our years ago the entire concept of integrating whites and Negroes in our armed forces was roundly denounced by many politicians and top military brass among them the Republican Presidential nominee, Gen. Dwight D. Eisenhower.”<sup>54</sup>

Nevertheless, as the RAND Research Brief points out, “in the final years of World War II and especially during the Korean War, integrated Army units were able to function effectively even in the most demanding battlefield situations.”<sup>55</sup> This demonstrates that despite what government officials may believe and prevailing social attitudes, integration of marginalized groups in the military has historically been successful.

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<sup>50</sup> RAND CORP., CHANGING THE POLICY TOWARD HOMOSEXUALS IN THE U.S. MILITARY (2000), [https://www.rand.org/pubs/research\\_briefs/RB7537/index1.html](https://www.rand.org/pubs/research_briefs/RB7537/index1.html) [<https://perma.cc/F3LM-RCNV>].

<sup>51</sup> *Id.*; see PENN, *supra* note 27, at 74 (Army Col. E.R. Householder infamously claimed that the scourge of racism in society was not a problem for the military to solve, observing that the military was not a laboratory for fixing social problems).

<sup>52</sup> Jim Garamone, *Historian Charts Six Decades of Racial Integration in U.S. Military*, DOD NEWS (July 23, 2008), <https://archive.defense.gov/news/newsarticle.aspx?id=50560> [<https://perma.cc/Y8EJ-9PNC>].

<sup>53</sup> Theo Lippman Jr., *For Truman, Desegregation Order Was a Political Move*, BALTIMORE SUN (Aug. 9, 1998), <https://www.baltimoresun.com/news/bs-xpm-1998-08-09-1998221064-story.html> [<https://perma.cc/M3Z3-A6RA>] (“A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters, was insistent in pressing for equal opportunity in enlistments, schooling, promotions, assignments and retention—and especially in integrating units. In early 1948 he told the president that he would advise young blacks not to register for the draft if the Army remained segregated.”).

<sup>54</sup> Harry Conn, *Military Civil Rights: A Report*, THE NEW REPUBLIC (Oct. 18, 1952), <https://newrepublic.com/article/78402/military-integration-civil-rights-report> [<https://perma.cc/FF87-2MYR>].

<sup>55</sup> RAND CORP., *supra* note 50.

Finally, we recognize the value of scholarship that similarly addresses unjustified discrimination against LGBTQ members of our society who wish to serve in the military, and more specifically transgender individuals currently barred from military service. As one commentator has expressed, “Just as women and African Americans eventually earned their status as equal members of society and proved their worthiness to serve in the military, homosexuals are now trying to achieve the same.”<sup>56</sup>

Even after the U.S. military began the process of addressing segregation and racial discrimination within its ranks through a 1948 executive order issued by President Harry Truman,<sup>57</sup> the federal government and military continued to tolerate and perpetuate discrimination against gay service members. In fact, within only a few short years of Truman’s policy to advance the civil rights of Black service members and abolish discrimination on the basis of national origin, religion, color, and race in the military,<sup>58</sup> President Dwight Eisenhower signed an executive order explicitly discriminating against gay men and women.<sup>59</sup> The executive order conflated homosexuality with “sexual perversion” and barred gays from federal employment, bringing about what became known as the “lavender scare.”<sup>60</sup> According to Professor David K. Johnson, the Eisenhower Security Program sought to intimidate and ferret out gay and lesbian employees.<sup>61</sup>

This chapter in history has largely been forgotten or overlooked in public conscience because “[t]he Lavender Scare happened in private.”<sup>62</sup>

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<sup>56</sup> G. Dean Sinclair, *Homosexuality and the Military: A Review of the Literature*, 56 J. HOMOSEXUALITY 701 (2009).

<sup>57</sup> Exec. Order No. 9981, *supra* note 38.

<sup>58</sup> *Id.*

<sup>59</sup> Exec. Order No. 10450 § 8(a)(1)(iii), 18 Fed. Reg. 2489 (Apr. 27, 1953); *see also The Lavender Scare: How the Federal Government Purged Gay Employees*, CBS NEWS (June 9, 2019, 9:08 AM), <https://www.cbsnews.com/news/the-lavender-scare-how-the-federal-government-purged-gay-employees> [<https://perma.cc/8ABY-NKGW>].

<sup>60</sup> Exec. Order No. 10450, *supra* note 59, § 8(a)(1)(iii) (“The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to . . . [a]ny criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.”); *The Lavender Scare*, *supra* note 59.

<sup>61</sup> *See* DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* 120–21 (2006). “The term ‘Lavender Scare’ draws from ‘lavender lads’—the pejorative phrase used by former Sen. Everett Dirksen and other lawmakers to refer to gay men.” Robbie Gramer, *Congress Wants State Department to Reckon with the ‘Lavender Scare,’* FOREIGN POL’Y (May 2, 2019, 3:59 PM), <https://foreignpolicy.com/2019/05/02/congress-wants-state-department-to-reckon-with-lavender-scare> [<https://perma.cc/RB54-RPKV>].

<sup>62</sup> *The Lavender Scare*, *supra* note 59. *But see* Ann Gearan, *John F. Kerry Apologizes for State Department’s Past Discrimination Against Gay Employees*, WASH. POST (Jan. 9, 2017),

This period is also overlooked because gay men and women were traumatized into silence given the horrific cruelties carried out by the government against them, including interrogations by law enforcement and threats to expose their sexuality to family members.<sup>63</sup> The patterns of discrimination were so thick with malice and coercion that some LGBTQ persons who worked in government or the military took their own lives.<sup>64</sup>

Gay service members were court martialed, dishonorably discharged, and imprisoned when and if their status was revealed.<sup>65</sup> The military adopted its very own scarlet letter, known as the “blue discharge,” which came to be associated with the removal of gay service members from military service.<sup>66</sup> Generally, there were no exceptions nor protections—except when military enrollment of gay men served to increase the ranks of service members during times of war.<sup>67</sup> Gay men and women were “subjected to constant discrimination and stigma while trying to do what most heterosexual individuals take for granted, serving their country.”<sup>68</sup>

The strategic platform to remove homosexuals from federal employment resulted in a wide and tragic “purge of gay employees” who were deemed to be a threat to national security.<sup>69</sup> Senator Joseph McCarthy led the campaign. He claimed that communists “had infested the federal government” and with them, homosexuals who “must not be handling top-

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[https://www.washingtonpost.com/world/national-security/john-f-kerry-apologizes-for-state-departments-past-discrimination-against-gay-employees/2017/01/09/19eb5434-d6a9-11e6-b8b2-cb5164beba6b\\_story.html](https://www.washingtonpost.com/world/national-security/john-f-kerry-apologizes-for-state-departments-past-discrimination-against-gay-employees/2017/01/09/19eb5434-d6a9-11e6-b8b2-cb5164beba6b_story.html) [https://perma.cc/77NW-LFDE].

<sup>63</sup> *The Lavender Scare*, *supra* note 59 (“Even in private homes, gay people were not safe from investigators. . . . [Professor] Johnson estimates that between 5,000 to 10,000 people were fired or resigned, and we’ll never know how many didn’t pursue their dreams for fear of exposure.”).

<sup>64</sup> *Id.* (“Drew Ference, the son of immigrants, spoke five languages and was serving in the U.S. Embassy in Paris when investigators confronted him with evidence that he was gay. Shortly after confessing, he killed himself. He wasn’t the only one.”).

<sup>65</sup> *See* Sinclair, *supra* note 56, at 701.

<sup>66</sup> It is unclear how many gays and lesbians were discharged during the era of the blue letter; however, one estimate is that nearly a hundred thousand servicemembers were affected between 1941 and the late 1980s. *See* ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* 276 (1990). Nor were gays alone in experiencing blue letter discharges, African Americans were also the targets of these discharges. *See* Melanie Burney, *WWII Vet Wants Army to Upgrade Discriminatory Discharge to “Honorable,” Nearly 75 Years After Expelling Him*, PHILA. INQUIRER (May 3, 2019), <https://www.inquirer.com/news/pennsylvania/nelson-henry-army-blue-discharge-military-discharge-petition-20190503.html> [https://perma.cc/6T5E-PDWA].

<sup>67</sup> Sinclair, *supra* note 56, at 702 (“Barring and discharging homosexuals from the military has been sporadic and determinate upon the need for personnel. During World War II, the screening and exclusion of homosexuals from military service was loosened, but once the demand for personnel diminished the standards for enlistment tightened.” (citation omitted)).

<sup>68</sup> *Id.* at 701.

<sup>69</sup> *The Lavender Scare*, *supra* note 59.

secret material.”<sup>70</sup> According to McCarthy, “the pervert is easy prey to the blackmailer.”<sup>71</sup>

As a result of President Eisenhower’s executive order and the efforts to root out gay federal employees, individuals were stalked by investigators, relentlessly questioned, pressured to inform on others who might be suspected of being gay, spied upon, even in their homes, and ultimately fired from their jobs—with little or no recourse.<sup>72</sup> As Joshua Howard, a filmmaker of a documentary about the lavender scare, explains, “[P]eople who were being fired didn’t want to tell their closest friends and relatives why they had been fired, because they wanted to stay in the closet” because of the grave social costs of being outed as gay.<sup>73</sup> According to Howard, “[i]f you were found out to be gay in those years, your life was essentially over,” because “[y]ou were shunned by society [and] . . . in the workplace.”<sup>74</sup>

The panic against LGBTQ employees extended far beyond McCarthy’s tenure, shaping the culture in the government.<sup>75</sup> The irrational fears about gay, lesbian, and bisexual service members in government service and the military resulted in military discharges. In the case of Bob Cantillion, a Navy serviceman, he was discharged after being told to report to a police station, which he did. It was near Christmas, and somehow law enforcement was alerted that a few gay men were hosting a Christmas party. After admitting to being homosexual, police pressured him to provide five names of other gay individuals; he complied, offering names of individuals he believed “would be least hurt.”<sup>76</sup> They were all discharged without the aid of lawyers or any meaningful due process.

It is unknown how many LGBTQ persons were purged from the government during the height of the Lavender Scare; however, Professor Johnson estimates between 5,000 to 10,000 government employees were either forced or coerced into resigning or terminated from their employment.<sup>77</sup> In 1950, a subcommittee chaired by Senator Clyde Hoey, known for being a staunch racial segregationist, published a report titled *Employment of Homosexuals and Other Sex Perverts in Government*,

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<sup>70</sup> *Id.* (quoting Joseph McCarthy, U.S. Senator, Remarks to the Ohio County Republican Women’s Club (Feb. 9, 1952), [https://www.marquette.edu/library/archives/DC/JRM/JRM\\_1952\\_Wheeling\\_excerpt.pdf](https://www.marquette.edu/library/archives/DC/JRM/JRM_1952_Wheeling_excerpt.pdf) [<https://perma.cc/D66U-JTTP>])).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

claiming thousands of “sex perverts” were in federal jobs and needed to be purged.<sup>78</sup> According to the report, Senator Hoey claimed that “[o]ne homosexual can pollute a Government office.”<sup>79</sup> Rarely did anyone attempt to fight their discriminatory discharge as they were threatened and coerced with being “outed” to their families. Senator Hoey is credited to some degree with paving the way for the executive order issued by President Eisenhower, which not only banned gay employees from work in the federal government, but also the military.<sup>80</sup>

Importantly, this culture of fear contributed to two other phenomena. First, it led federal employees and members of the military to silence and hide their identities.<sup>81</sup> In some sense, this created a social forerunner to the “Don’t Ask, Don’t Tell, Don’t Pursue” congressional policy, because there were absolutely no incentives and every disincentive to reveal one’s homosexual status in the military.

Second, and even more tragically, the campaign to rid the government and military of LGBTQ persons resulted in suicides.<sup>82</sup> Being abroad did not spare gay service members or federal employees from being detained and questioned about their LGBTQ status. Andrew Ference, an administrative assistant at the American Embassy in Paris, committed suicide after being detained by State Department security officers who suspected him of being gay.<sup>83</sup> Mr. Ference was questioned for two days, during which he “admitted homosexual activities” and was made to resign.<sup>84</sup> Four days later he killed himself.<sup>85</sup>

The shameful past of this type of discrimination is far more recent than some may think. Until 1969, “congressional appropriations committees required the State Department to report the number of gay employees fired each year,” not in an effort to combat discrimination, but as a means to

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<sup>78</sup> S. SUBCOMM. ON INVESTIGATIONS, EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT, S. DOC. NO. 241 (2d Sess. 1950); JOHNSON, *supra* note 61, at 101–03, 114–18.

<sup>79</sup> JOHNSON, *supra* note 61, at 116 (citing S. DOC. NO. 241, *supra* note 78, at 4).

<sup>80</sup> *See id.* at 123.

<sup>81</sup> *See The Lavender Scare*, *supra* note 59.

<sup>82</sup> JOHNSON, *supra* note 61, at 158–59 (“Though clear documentation of only a handful of suicides exist, the quiet handling of many of the gay interrogations and resignations suggests the possibility of many more. Washington newspapers from the period contain numerous stories of single male government workers, often State Department employees, who committed suicide for no known reason.”); *see also* Gramer, *supra* note 61 (“Gay employees were hounded from office in a dark episode of State Department history from the 1950s and ‘60s, and many committed suicide.”).

<sup>83</sup> JOHNSON, *supra* note 61, at 159.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

further it.<sup>86</sup> That is, the goal was to purge gay individuals from government service and not to protect them from discrimination. Known instances of individuals purged from government employment were not followed with advocacy on their behalf. Rather, these purges were perceived as a success. Moreover, “[a]s recently as the early 1990s, the State Department’s diplomatic security services investigated employees based on their sexual orientation,” which was deemed a security risk.<sup>87</sup>

In recent years, greater social pressure on the government and military has resulted in a slow chip away of laws and policies that silenced or outright banned military service among LGBTQ individuals. Specifically, in 1994, the Clinton Administration issued a policy on military service of gays, bisexuals, and lesbians known as “Don’t Ask, Don’t Tell” (DADT).<sup>88</sup> The policy was seen as a compromise and important response to decades of discrimination against gay military service members.

On one hand, the DADT policy created room for gays and lesbians in the military, albeit under deeply constrained circumstances. The compromise was that closeted gay individuals would be able to serve in the military without fear of harassment and abuse because the policy barred discrimination against closeted gay service members or applicants. While this meant gay service members were expected to suppress their identities and “refrain from any homosexual behavior,” the law was hailed by some gay rights advocates as a victory.<sup>89</sup>

However, the DADT law also explicitly discriminated against gay, lesbian and bisexual service members. For instance, it stated, “[t]he prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.”<sup>90</sup> The policy thus barred openly gay individuals from enlisting in the military and serving.<sup>91</sup> It also banned persons who “demonstrate a propensity or intent to engage in homosexual acts,” based on the unsupported claim that these *out* homosexuals “would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”<sup>92</sup>

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<sup>86</sup> Gramer, *supra* note 61.

<sup>87</sup> *Id.*

<sup>88</sup> Department of Defense Directive 1304.26, Qualification Standards for Enlistment, Appointment, and Induction 9–11 (Dec. 21, 1993); Don’t Ask, Don’t Tell, 10 U.S.C. § 654 (1994) (repealed 2010).

<sup>89</sup> Sinclair, *supra* note 56, at 707–08.

<sup>90</sup> 10 U.S.C. § 654(a)(13).

<sup>91</sup> *Id.* § 654(a)(15).

<sup>92</sup> *Id.*

The DADT policy further imposed a gag rule prohibiting gay, lesbian, and bisexual military service members from speaking about domestic partnerships, marriage, family status, or other information that might convey their sexual identity and/or status. Violation of the policy resulted in discharge.<sup>93</sup>

Unlike prior military policies, DADT also barred military superiors from initiating investigations into their subordinates.<sup>94</sup> It was a painful middle ground for some. The DADT policy finally relieved gay service members from being vulnerable to dishonorable discharge simply for being gay. Yet, it came at the cost of further stigmatization.

Eventually, during the Obama Administration, Congress repealed the policy.<sup>95</sup> As such, gay and lesbian individuals can now openly serve in the U.S. military without risk of being discharged for being gay.<sup>96</sup> Gay members of the armed services may also marry—a protection secured in 2013 when the Supreme Court struck down the Defense of Marriage Act.<sup>97</sup>

*B. The Justifications for the Transgender Military Ban Are Identical to Those Used for Excluding Gays and Lesbians*

The justifications for banning transgender individuals from military service are grounded in stereotypes and stigmas. In this Section, we outline several reasons why the transgender military ban not only imposes unjustified discriminatory constraints on transgender individuals who wish to serve in the military, but also fails to achieve the government's purported objectives. The bans are unlikely to make the military more secure or effective, just as discriminating against African Americans in the military did not produce a stronger, more effective segregated army. To the contrary, the addition of African Americans to the military helped to secure the

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<sup>93</sup> See *id.* § 654(b)(2).

<sup>94</sup> Review of the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military, U.S. Dep't of Def., Office of the Assistant Sec'y of Def. (Personnel and Readiness), Report to the Sec'y of Def., (Apr. 2, 1998) <https://apps.dtic.mil/dtic/tr/fulltext/u2/a353107.pdf> [<https://perma.cc/56J3-4FLZ>] (“[T]he services may not initiate investigations solely to determine a member's sexual orientation. Commanders may initiate an investigation only upon receipt of credible information that a service member has engaged in homosexual conduct.”).

<sup>95</sup> Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111–321, 124 Stat. 3515 (2010).

<sup>96</sup> While the official language of the Don't Ask, Don't Tell policy may say “gay and lesbian,” bisexual individuals suffered similarly to gay and lesbian service members. 10 U.S.C. §654 (1994) (repealed 2010); DEP'T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF “DON'T ASK, DON'T TELL” 39 (2010), [https://archive.defense.gov/home/features/2010/0610\\_dadt/DADTReport\\_FINAL\\_20101130\(secure-hires\).pdf](https://archive.defense.gov/home/features/2010/0610_dadt/DADTReport_FINAL_20101130(secure-hires).pdf). [<https://perma.cc/VG2V-JKNR>]. Of course, categorizing individuals as gay and lesbian, as opposed to heterosexual, is imprecise as there are individuals who are bisexual, pansexual, or otherwise.

<sup>97</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013) (finding Section 3 of the Defense of Marriage Act to be a due process violation and therefore unconstitutional).

military domestically during the Civil War and abroad in all wars since. Notions to the contrary were rooted in irrational stereotypes and racial prejudice, which are identical to those used to discriminate against transgender individuals today.

*1. New Military, Same Old Discrimination*

The argument that the military is “weakened” or somehow less “lethal” by being inclusive is a ruse that has been used to perpetuate discrimination for a very long time. First, the transgender military ban stems from the same type of ungrounded, discriminatory rationales put forth decades ago to ban African Americans, women, and homosexuals from military service. The military unjustifiably imposed constraints on groups that were marginalized or legally disenfranchised in society. As such, the military engaged in perpetuating wrongs and singling out African Americans, women, and homosexuals of all backgrounds for discriminatory treatment.<sup>98</sup> These harms were not foisted on white, heterosexual men.

The arguments made against racially integrating the military were exactly like those made by the Trump Administration for excluding transgender individuals. The arguments made decades ago to justify racial exclusion and discrimination related to inefficiency, weakening preparedness, and stereotypes. In his disapproval of President Truman’s executive order racially desegregating the nation’s armed forces, Army Lieutenant General Edward M. Almond expressed:

I do not agree that integration improves military efficiency; I believe it weakens it. I believe that integration was and is a political solution for the composition of our military forces because those responsible for the procedures . . . do not understand the characteristics of the two human elements concerned . . . This is not racism—it is common sense and understanding. Those who ignore these differences merely interfere with the combat effectiveness of combat units.<sup>99</sup>

He was not alone. Other senior military officials resisted President Truman’s efforts to desegregate the military. The President’s Committee on Equality of Treatment and Opportunity in the Armed Forces documented military leaders “advocat[ing] for maintaining the status quo due to concerns about inefficiencies that might arise from impaired morale in mixed units.”<sup>100</sup>

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<sup>98</sup> See *supra* notes 28–49.

<sup>99</sup> KAMARCK, *supra* note 29, at 15 (citation omitted).

<sup>100</sup> *Id.* at 14; see also THE PRESIDENT’S COMM. ON EQUAL. OF TREATMENT & OPPORTUNITY IN THE ARMED FORCES, FREEDOM TO SERVE: EQUALITY OF TREATMENT AND OPPORTUNITY IN THE ARMED SERVICES 15 (1950) [hereinafter FREEDOM TO SERVE].

However, as the Commission chaired by Charles Fahy found, “existing segregation policies were contributing to inefficiencies through unfilled billets, training backlogs, and less capable units.”<sup>101</sup>

Nevertheless, then as well as now, the discrimination perpetuated, cloaked in the cloth of “military efficiency” and readiness. Senior military officials claimed that racially integrating the military would interfere with “combat effectiveness,” despite evidence to the contrary.<sup>102</sup>

For all the civil rights advancements within the military, it has continued its discriminatory practices. True, the more explicit forms of discrimination have given way; for instance, there are no longer ceilings or caps on the percentage of women who may serve. Yet, military discrimination against vulnerable groups persists. It has simply transformed. This dynamic of “preservation-through-transformation”<sup>103</sup> produces the perception of civil rights advancement, while discrimination persists. While marriage equality helped to further one specific civil right for gay individuals, there remains great debate within other aspects of government as to whether the abolition of some impediments to LGBTQ equality should necessarily confer additional civil, political, and social rights.

In particular, the military’s evolving principles on equality and civil rights involving gay service members are undermined by the organization’s continued discrimination against transgender service members and transgender individuals who wish to enroll. Thus, while discrimination against gay and lesbian service members in the military is abolished through the repeal of DADT, the underlying animus persists and shifts to transgender individuals. This is not a new problem; it is one that persists, though affecting a different vulnerable class.

In the context of the transgender ban, we note that the government has failed to produce evidence that the military’s readiness or lethality will be impaired by the addition of transgender service members.<sup>104</sup> Further, the government has failed to show military vulnerability during the past three years, despite transgender individuals who have openly served in the military under Obama-era policies. What remains then, are unjustified stereotypes

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<sup>101</sup> KAMARCK, *supra* note 29, at 14; *see also* FREEDOM TO SERVE, *supra* note 100, at 67.

<sup>102</sup> KAMARCK, *supra* note 29, at 14–15.

<sup>103</sup> *See* Siegel, *supra* note 16, at 1119.

<sup>104</sup> Neither the President’s tweets nor the ensuing memorandum issued by his office included specific statistics showing the supposed costs of transgender service members. *See* Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security on Military Service by Transgender Individuals (Aug. 25, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security> [<https://perma.cc/UE6K-EDMU>]. Not until the Mattis policy did the government begin to attempt to justify the ban. *See* MATTIS POLICY, *supra* note 11.

and biases, which violate the rights of transgender individuals and ultimately undermine a stronger and more cohesive military.

## 2. *Discriminatory Military Policies Undermine Morale and Harm Military Interests*

Rarely has the military acknowledged that its own policies, which encompass historically entrenched segregation, isolation, and social hierarchies, are a significant factor in causing and perpetuating the decline in mental health well-being in the armed services.<sup>105</sup> Various commissions to study the military's allegations that integration—in terms of race, sex, or homosexuality—would lead to problematic results *for the military* have exposed the falsity, speciousness, and unreliability of the military's claims.<sup>106</sup> To the contrary, what these studies, other data, and accounts from service members have exposed is that patterns of historic discrimination in the military undermine the advancement of the military's purported goals.<sup>107</sup> In other words, military culture and systemic patterns of discrimination within the military undermine the armed services preparedness by discriminating against qualified members who wish to serve.

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<sup>105</sup> See generally Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. HEALTH & SOC. BEHAV. 38 (1995) (explaining that, in a society that favors heterosexuals and projects stigmas and stereotypes on homosexuals and other minority groups, gay people experience added stress).

<sup>106</sup> See FREEDOM TO SERVE, *supra* note 100, at 67 (“As a result of its examination into the rules, procedures, and practices of the armed services, both past and present, the Committee is convinced that a policy of equality of treatment and opportunity will make for a better Army, Navy, and Air Force. It is right and just. It will strengthen the nation.”); U.S. DEP’T OF DEF., OFFICE OF DIVERSITY MGMT. & EQUAL OPPORTUNITY, DOD DIVERSITY AND INCLUSION 2013 SUMMARY REPORT 5 (2013) (urging the use of “strategic communications” in order to express “the importance of a diverse workforce to leaders within DOD to ensure everyone in the Department ha[s] challenging and fulfilling career opportunities that allow[] them to advance and move up the ranks”), <https://diversity.defense.gov/Portals/51/Documents/ODMEO%20Diversity%20and%20Inclusion%20Summary%20Report%20FINAL.pdf> [<https://perma.cc/99HS-2Q29>]; THE PRESIDENTIAL COMM’N ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES, REPORT TO THE PRESIDENT (Nov. 15, 1992) (conducting polls on the roles of women in the U.S. armed services, engaging surveys, conducting longitudinal studies and, among other things, concluding that many gender-neutral assignment policies, rather than prior policies, which actually hindered combat readiness, should be adopted). In 1962, President John F. Kennedy authorized the President’s Committee on Equal Opportunity in the Armed Forces. This committee “found that while armed services *policies* were not discriminatory as written, there was a need for the military to improve recruitment, assignment, and promotion *practices* to achieve equal treatment of black servicemembers.” KAMARCK, *supra* note 29, at 15–16 (citing THE PRESIDENT’S COMM. ON EQUAL OPPORTUNITY IN THE ARMED FORCES, INITIAL REPORT: EQUALITY OF TREATMENT AND OPPORTUNITY FOR NEGRO MILITARY PERSONNEL STATIONED WITHIN THE UNITED STATES (1963)).

<sup>107</sup> See KAMARCK, *supra* note 29, at 1; MILITARY LEADERSHIP DIVERSITY COMM’N, FROM REPRESENTATION TO INCLUSION: DIVERSITY LEADERSHIP FOR THE 21ST-CENTURY MILITARY, FINAL REPORT, at xiii (2011), <https://www.hsdil.org/?view&did=11390> [<https://perma.cc/E8FR-BCXS>] (“The Armed Forces have not yet succeeded in developing a continuing stream of leaders who are as demographically diverse as the Nation they serve.”).

Over fifty years ago, President Truman's Committee on Equality of Treatment and Opportunity in the Armed Forces concluded not only that the inclusion of African Americans in the military did *not* undermine military efficiency and readiness but also that the military, through its racially discriminatory policies, practices, and culture, had created deeply problematic norms that harmed morale and the very functioning of the military. In the Committee's final report, it expressed serious misgivings about senior military officials' claims that permitting more African Americans into the military and removing the ban on integration would harm morale and lead to military inefficiencies.<sup>108</sup>

More recently, Professor Ilan Meyer's research further bears this out and grounds our concern.<sup>109</sup> He explains that prejudice, stigma, and discrimination "create a stressful social environment that can lead to mental health problems in people who belong to stigmatized minority groups."<sup>110</sup> This is not a controversial point. However, it is lost in the military's historic objections to gays, women, and people of color, and we find it relevant in thinking about transgender service members.

As Professor Meyer further explains, "[i]f prejudice and discrimination are legal and widely practiced, they are likely to affect many or all members of a minority group."<sup>111</sup> Even after experiencing and enduring discrimination in the military, minority group members are "motivated to ignore evidence of discrimination through a wish to avoid false alarms that can disrupt social relations and undermine life satisfaction."<sup>112</sup> What this means is that, even while experiencing the military's explicit and implicit discriminatory policies, "minority groups" may tend to "maximize perceptions of personal control and minimize recognition of discrimination."<sup>113</sup> In other words, the

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<sup>108</sup> See e.g., FREEDOM TO SERVE, *supra* note 100, at 67; KAMARCK, *supra* note 29, at 14 ("The Fahy Committee's final report, released in 1950, expressed serious doubts about military officials' claims that integration would negatively affect morale and efficiency, finding instead evidence that existing segregation policies were contributing to inefficiencies through unfilled billets, training backlogs, and less capable units."); see also JON E. TAYLOR, FREEDOM TO SERVE: TRUMAN, CIVIL RIGHTS, AND EXECUTIVE ORDER 9981, at 104 (2012).

<sup>109</sup> Meyer, *supra* note 105; see also Ilan H. Meyer, *Prejudice as Stress: Conceptual and Measurement Problems*, 93 AM. J. PUB. HEALTH 262 (2003) [hereinafter Meyer, *Prejudice as Stress*] (explaining the difficulties of isolating and quantifying the stressful effect of prejudice from among other stressors); Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOL. BULL. 674 (2003) [hereinafter Meyer, *Prejudice, Social Stress, and Mental Health*] (conducting a meta-analysis before proposing the use of a minority stress model to explain the prevalence of mental disorders in LGB populations).

<sup>110</sup> Meyer, *Prejudice, Social Stress, and Mental Health*, *supra* note 109, at 674–75.

<sup>111</sup> Meyer, *Prejudice as Stress*, *supra* note 109, at 262.

<sup>112</sup> *Id.* at 263.

<sup>113</sup> *Id.*

prejudice experienced by minority groups in the military may be far more intensified than even what people of color, women, or gays have historically reported.

### 3. *Mental Health Discrimination as Proxy for Status Discrimination*

Historically, military officials have turned to “mental health concerns” as proxies for unjustified status discrimination embedded in official policies.<sup>114</sup> As such the military has disguised its animus-based discrimination with seemingly plausible justifications framed in medicine and promoting mental health. In regard to the transgender service ban, the government has stated that under the Mattis policy, “transgender persons should not be disqualified from service solely on account of their transgender status.”<sup>115</sup> So why, we ask, are transgender individuals now barred from enlisting in military service?

The Department of Defense (DoD) claims that the RAND Report failed to seriously analyze the mental health impacts of transgender individuals serving in the military. In a report to President Trump, the DoD wrote:

Because of the RAND report’s macro focus, however, it failed to analyze the impact at the micro level of allowing gender transition by individuals with gender dysphoria. For example, as discussed in more detail later, the report did not examine the potential impact on unit readiness, perceptions of fairness and equity, personnel safety, and reasonable expectations of privacy at the unit and sub-unit levels, all of which are

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<sup>114</sup> Sinclair, *supra* note 56, at 702 (“During the 1940s, the military used psychiatry’s determination of homosexuality as a mental illness to justify discharging gay soldiers; in the 1950s, homosexuals were determined to be particularly vulnerable to blackmail . . . . When President Clinton proposed lifting the military’s ban on homosexuals in 1993, Congress and military leaders emphasized the threat of undermining unit cohesion.” (citations omitted)); *see also* Norman Q. Brill, *Hospitalization and Disposition*, in 1 *NEUROPSYCHIATRY IN WORLD WAR II* 236–37 (Med. Dep’t, U.S. Army ed. 1966) (“A man on his own initiative or because of noticeable difficulty in adjusting might visit or be sent to a psychiatrist for consultation. When it was ascertained that the basis of the maladjustment was homosexuality and this was reported to the individual’s commanding officer, the subject usually received a ‘blue’ discharge. Objections to this harsh practice were raised by many homosexuals whose attempts to receive help from a medical officer resulted in their being discharged ‘without honor.’ Further, confidence in medical officers was undermined by the Army requirement that these officers report even those confidential statements given in a professional consultation. The homosexual was being singled out as a result of irrational prejudices, even though he was no more responsible for his aberration than the mental defective was responsible for his central nervous system pathology. World War II data indicate that some 5,500 persons were admitted to hospitals with a diagnosis of ‘pathological sexuality,’ primarily ‘homosexuality.’”).

<sup>115</sup> General Mattis became secretary after President Trump announced the transgender ban policy. The policy articulated in Mattis’s 2018 memorandum to the president is more detailed than the president’s tweets and outright ban. “Mattis policy” is also a shorthand that publications have used to distinguish from the “Carter policy,” which was the open service policy of the Obama administration. *See e.g.*, MATTIS POLICY, *supra* note 11, at 19.

critical to unit cohesion. Nor did the report meaningfully address the significant mental health problems that accompany gender dysphoria—from high rates of comorbidities and psychiatric hospitalizations to high rates of suicide ideation and suicidality—and the scope of the scientific uncertainty regarding whether gender transition treatment fully remedies those problems.<sup>116</sup>

In the early 1940s, the military relied on similar mental health proxies in the practice of purging gay men from the military and subjecting them to shameful retribution based on their status, including solitary confinement and court martial.<sup>117</sup> Medical interests served as proxies for unchecked and brazen homophobia. Sadly, the psychiatric community was complicit in pathologizing homosexuality as a mental health disorder.<sup>118</sup>

Because the military concluded that homosexuality was a mental illness that would undermine military readiness and cohesion, “the Army and Navy developed new policies for the discharge of homosexual servicemembers who were not engaged in prohibited behavior.”<sup>119</sup> It is important to note that the military curated an image of gay men as “psychopathic” with “disorders.”<sup>120</sup> After all, gay men in the military did not define themselves or conduct themselves in such a way. Nor was this consistent with any documented history of gay men in the military.

In other words, these were not evidence-based assessments presented by the military. To the contrary, the Crittenden Report, produced by the U.S. Navy in 1957, refuted the notion that the presence of gay service members would be disruptive to the armed forces.<sup>121</sup> In the report, which was kept

<sup>116</sup> *Id.* at 14.

<sup>117</sup> KAMARCK, *supra* note 29, at 33–34.

<sup>118</sup> *Id.* at 34 (“In 1952, the American Psychiatric Association (APA) established homosexuality as a ‘sociopathic personality disturbance’ in the first edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-I).” (quoting AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 320.6 (1st ed. 1952))). This designation was changed to be a “sexual deviation” in the 1968 edition and removed entirely in 1973 from the manual. KAMARCK, *supra* note 29, at 34 n.165 (citation omitted); *see also* AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 302 (2d ed. 1968).

<sup>119</sup> KAMARCK, *supra* note 29, at 34.

<sup>120</sup> *Id.*

<sup>121</sup> Shauna Miller, *50 Years of Pentagon Studies Support Gay Soldiers*, ATLANTIC (Oct. 20, 2009), <https://www.theatlantic.com/politics/archive/2009/10/50-years-of-pentagon-studies-support-gay-soldiers/28711> [<https://perma.cc/J5U6-QD25>] (“The DoD has funded studies on the impact of gay servicemembers as far back as 1957, when the Navy’s Crittenden Report found ‘no factual data’ to support the idea that they posed a greater security risk than heterosexual personnel.” (quoting THE CRITTENDEN REPORT: REPORT OF THE BOARD APPOINTED TO PREPARE AND SUBMIT RECOMMENDATIONS TO THE SECRETARY OF THE NAVY FOR THE REVISION OF POLICIES, PROCEDURES AND DIRECTIVES DEALING WITH HOMOSEXUALS 8 (Mar. 15, 1957))).

secret until its declassification in 1989, military and government officials state, “[a] third concept which persists without sound basis in fact is the idea that homosexuals necessarily pose a security risk.”<sup>122</sup> Indeed, according to a government report, there is no historic military record of gay enlisted men behaving in “sociopathic” ways that caused “disturbances” in the military. Nevertheless, gay men who did not engage in “prohibited behavior” received “undesirable discharges.” This was in lieu of “prosecution for sexual acts.”<sup>123</sup> According to the report, “[d]ischarge paperwork often indicated the reason for discharge as . . . sexual psychopath.”<sup>124</sup>

We see the Trump Administration’s effort to ban transgender individuals from military service as rooted in the same old, harmful status-based justifications that ultimately led to the exclusion of homosexuals. The mental health justifications for rejecting transgender individuals from serving are nearly identical to the concerns raised about gay service members. These justifications suggested that homosexuals—and now transgender individuals—are inherently mentally unstable and as such they pose a credible threat to the military, which needs to be ready, effective, cohesive, and lethal. Interestingly, similar justifications were deployed by senior military officials who desired all-white and all-male armies that excluded people of color and women.

The Trump Administration’s rationales for excluding transgender service members are cut from the same cloth and borrow the same logic. In its brief to the Court, the government states: “Given the unique mental and emotional stresses of military service, a history of [m]ost mental health conditions and disorders is automatically disqualifying.”<sup>125</sup> The government then refers to an outdated, 1980 edition of the DSM to state that “transsexualism” is “listed[] among other disorders.”<sup>126</sup> The government claims, consistent with the DSM identifying “transsexualism” as a disorder, that it has based its military accession standards on this information and as a result has “for decades disqualified individuals with a history of ‘transsexualism’ from joining the military.”<sup>127</sup> In this way, the Trump

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<sup>122</sup> U.S. GEN. ACCOUNTING OFFICE, DEFENSE FORCE MANAGEMENT: DOD’S POLICY ON HOMOSEXUALITY 5 (June 1992), <https://www.gao.gov/assets/160/151963.pdf> [<https://perma.cc/9YD4-VFXX>] (quoting THE CRITTENDEN REPORT, *supra* note 121, at 8).

<sup>123</sup> KAMARCK, *supra* note 29, at 33–34.

<sup>124</sup> *Id.* at 34 (emphasis omitted).

<sup>125</sup> Petition for a Writ of Certiorari, *supra* note 22, at 2 (internal quotations and citation omitted).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 3. The term “transsexualism” is no longer used because of its imprecision and its failure to focus on gender identity. It is a term that was used by medical communities at a time in which LGBTQ individuals were pathologized by medical providers. See *Media Reference Guide—Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> [<https://perma.cc/E25U-6EWC>].

Administration not only reifies outmoded terminologies, but also discriminatory practices.

Instead, we read the government's discriminatory policy as being rooted in stereotypes and animus toward transgender persons, rather than a response to a credible threat to military interests. This is much like past presumptions and stereotypes made about individuals attracted to those of the same gender, who were equally and unjustifiably maligned by being defined as mentally unstable.

## II. THE TRANSGENDER MILITARY BAN IS UNJUSTIFIED BY ANY LEGITIMATE PURPOSE

Leave no doubt, this is a discriminatory policy, which sadly fits a broader pattern of government-sanctioned discrimination against LGBTQ individuals, particularly within the military. In addition to its animus-based discrimination, the transgender military ban is not justified by any legitimate purpose.

According to the policy, matters related to medical fitness for duty, bathrooms, shower facilities, physical fitness, and uniform and grooming standards “will be subject to the standard, requirement, or policy associated with their biological sex.”<sup>128</sup> Further, the policy provides practically no consolation for transgender service members already in the military. Simply put, they may keep their jobs and will not be fired outright. For example, military service members who “received a diagnosis of gender dysphoria from, or had such diagnosis confirmed by, a military medical provider” prior to the DTM will be permitted to continue serving in the military.<sup>129</sup> But, as we explain below, the content and context of this policy will make military service enormously problematic for these individuals.

At first glance, the policy may seem innocuous. It states: “Service in the Military Services is open to all persons who can meet the high standards for military service and readiness without special accommodations” and that “[a]ll Service members and applicants for accession to the Military Services must be treated with dignity and respect.”<sup>130</sup> The policy even stipulates that no person will be denied service in the military or subjected to adverse actions or mistreatment based on that person's “gender identity.”<sup>131</sup>

Yet, a closer reading of the DTM makes clear the intent of this policy is not to promote or advance principles of dignity and equality within the

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<sup>128</sup> Norquist, *supra* note 10, at 2.

<sup>129</sup> *Id.* at 2–3.

<sup>130</sup> *Id.* at 2.

<sup>131</sup> *Id.*

military or advance military readiness. Nor does the DTM reflect an intent to advance the safety and security of LGBTQ members of the military. Rather, the policy codifies the tweets issued by President Trump in 2017, effectively banning transgender individuals from joining the military and providing thin protections for those who already serve.<sup>132</sup> Indeed, current transgender service members were essentially presented with an ultimatum: confirm their transgender status through a licensed mental health provider's diagnosis of "gender dysphoria" by April 2019 or leave the military.

Part II first challenges the government's stance that enlisting transgender service members will adversely affect the military because of required trans-specific health care. It then rebuts the government's argument that allowing transgender individuals to serve will impact military readiness and cohesion. Next, we further explain why the Trump Administration's transgender military ban is unjustified. In Section A, we explain that it creates a health care cost double standard. Section B debunks the notion that transgender individuals undermine military readiness. In Section C, we canvas lessons from abroad. We conclude by articulating why the transgender military ban violates constitutional rights.

#### *A. Health Care Costs and Double Standards*

The government claims that given the significant distress and "impairment[s]" associated with being transgender, service members that identify as such might need or seek treatments that involve "psychotherapy," sex-reassignment surgery, or cross-sex hormone therapy.<sup>133</sup> We acknowledge the government's interest in forging a ready, cohesive, and effective military as well as the armed forces' interest in establishing a demanding standard. However, the Trump Administration has not shown evidence that these principles are undermined by enlisting transgender persons in the military or by transgender persons utilizing health care while in the military. Nor has a persuasive, empirically based argument been made to support the claim that by permitting transgender individuals to serve the military, the armed forces will suffer significant economic constraints. Thus, we find the government's claims to be ungrounded and lacking legitimate justification.

First, of the 1.3 million active component service members in the military, likely around 6,600 are transgender active service members.<sup>134</sup>

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<sup>132</sup> See Donald J. Trump, *supra* note 7.

<sup>133</sup> Petition for a Writ of Certiorari, *supra* note 22, at 3–4; see also Donald J. Trump, *supra* note 7.

<sup>134</sup> RAND CORP., ASSESSING THE IMPLICATIONS OF ALLOWING TRANSGENDER PERSONNEL TO SERVE OPENLY, KEY FINDINGS (2016), [https://www.rand.org/pubs/research\\_reports/RR1530.html](https://www.rand.org/pubs/research_reports/RR1530.html) [<https://perma.cc/SD5M-R5KD>].

Second, only a subset of these transgender service members will seek related treatment. Accordingly, the RAND Report indicates that each year as few as 29 and at most “129 service members in the active component will seek transition-related care that could disrupt their ability to deploy.”<sup>135</sup>

Furthermore, the DoD health care budget for fiscal year 2018 was \$53.6 billion,<sup>136</sup> while the relative expenditures related to treatments for transgender service members are miniscule in comparison. Services for transgender service members totaled under \$8 million from July 1, 2016 (when the Obama Administration lifted the ban) to February 1, 2019.<sup>137</sup> This spending accounted for coverage related to hormone prescriptions, psychotherapy, and surgeries. Psychotherapy accounted for nearly \$6 million of the total spending, while surgery accounted for nearly \$2 million.<sup>138</sup>

Moreover, that transgender enlistees might seek medical or psychological services while in the military is no more disqualifying than heterosexuals seeking services to address their physical, mental, and sexual health. Health is a private matter. Transgender service members should no more be singled out for discriminatory treatment because of their use of available military health services than women who use birth control, heterosexual men who experience impotence, combat officers who seek psychological services, or amputees who receive prostheses. The military cannot and should not single out one category of service members for the denial of benefits while providing a range of related services to others. And certainly, military readiness cannot legitimately serve as a justification for this discrimination.

According to the RAND Report, even if all transgender service members utilize the health care benefits they would be entitled to, the costs related to their care would be “[r]elatively [l]ow.”<sup>139</sup> The costs of extending gender transition-related health care coverage to transgender personnel are estimated to “increase by between \$2.4 million and \$8.4 million annually, representing a 0.04- to 0.13-percent increase in active-component health care

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<sup>135</sup> *Id.*

<sup>136</sup> U.S. DEP’T OF DEF., EVALUATION OF THE TRICARE PROGRAM: FISCAL YEAR 2018 REPORT TO CONGRESS: ACCESS, COST, AND QUALITY DATA THROUGH FISCAL YEAR 2017, at 6 (2018).

<sup>137</sup> Tom Vanden Brook, *Exclusive: Pentagon Spent Nearly \$8 Million to Treat 1,500 Transgender Troops Since 2016*, USA TODAY (Feb. 27, 2019, 12:00 AM, updated 4:01 PM), <https://www.usatoday.com/story/news/politics/2019/02/27/exclusive-report-shows-8-million-spent-more-than-1-500-transgender-troops-pentagon-dysphoria/2991706002> [<https://perma.cc/HSSF-QYJN>].

<sup>138</sup> *Id.*

<sup>139</sup> RAND CORP., *supra* note 135.

expenditures.”<sup>140</sup> Finally, as the 2016 RAND study reports, “[o]nly a subset” of transgender service members “will seek gender transition-related treatment.”<sup>141</sup> Even though estimates derive from survey data and private health insurance claims, that data shows that annually, as few as 29 and as many as 129 service members in active duty will even seek transition-related health care which might disrupt their ability to deploy.<sup>142</sup> Notably, the military is not opposed to expending significant financial resources to address medical conditions related to sex, sexual health, or sexual identity so long—it seems—as its resources relate to heterosexual males.

Our research finds the sexual health related costs associated with heterosexuals who seek and receive services while in the military to address erectile dysfunction further illumines this point.<sup>143</sup> The military places significant value on its response to this issue by spending over \$70 million dollars per year to address it. According to the Mayo Clinic, this condition may “cause stress, affect . . . self-confidence and contribute to relationship problems.”<sup>144</sup> It is also associated with risk factors such as anxiety, depression, and other mental health conditions.<sup>145</sup> The Mayo Clinic states that erectile dysfunction “can also be a sign of an underlying health condition that needs treatment and a risk factor for heart disease.”<sup>146</sup>

The military’s spending on erectile dysfunction medical care for heterosexual men demonstrates that the military has the capacity, is willing to, and does pay for sex-related healthcare. This is not a surprise nor is it necessarily an unjustified use of military spending, especially given the enormous value each service member brings to the military. However, it is relevant, in light of the military’s purported justifications for denying enlistment to transgender servicemembers based on medical care cost arguments—specifically grounded in sexual healthcare—that the military spends tens of millions of dollars each year addressing other sexual health concerns. In other words, arguments articulated by the military that it would be inappropriate or too costly to pay for sex-related healthcare services, seem

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> SCHAEFER ET AL., *supra* note 18, at xi–xii (finding that “even at upper-bound estimates, less than 0.1 percent of the total force would seek transition-related care that could disrupt their ability to deploy”).

<sup>143</sup> The discourse on the transgender ban does not really center on individual costs so much as gross costs to the military. This is partially because the military is very opaque when it comes to individualized costs for any form of medical treatment. The erectile dysfunction illustration serves to demonstrate the military’s wealth and willingness to spend on the select health problems that it considers to be important.

<sup>144</sup> *Erectile Dysfunction*, MAYO CLINIC (Mar. 9, 2018), <https://www.mayoclinic.org/diseases-conditions/erectile-dysfunction/symptoms-causes/syc-20355776> [<https://perma.cc/GX24-YGC6>].

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

disingenuous at best. In reality, the military is carving out a special discriminatory exception: so long as those seeking the care are transgender, no funds are available.

Our point is not to trivialize the conditions for which erectile dysfunction medications are sought. Rather, it is to demonstrate that the military does have the resources to spend money on sexual health. Interestingly, the military spends over \$84 million dollars each year to address erectile dysfunction in its male service members.<sup>147</sup> In fact, data from the Defense Health Agency shows that the DoD spent \$84.24 million on erectile dysfunction medications in 2014, including \$41.6 million for Viagra, \$22.82 million for Cialis, and \$2.24 million for Revatio.<sup>148</sup> These expenses predated transgender individuals being able to openly enlist and were only imposed shortly after the repeal of DADT. Further, from 2011 to 2014, the DoD spent a total of \$294 million on erectile dysfunction medications.<sup>149</sup>

If anything, the military's new ban on transgender personnel likely pushed some service members who are transgender to begin utilizing services that they may not all have wanted or may not have wanted at the time and as such may have actually added to the costs that the Trump Administration purports to want to avoid.<sup>150</sup> As Lieutenant Colonel Bree Fram explained to a reporter, "It just didn't feel great to have to do it on someone else's timeline other than my own."<sup>151</sup> In some instances, the Administration's policy may have pushed military service members or their families to make choices they simply were not ready for on an arbitrary timeline. Lieutenant Colonel Fram's wife put it this way: "It's accelerated everything so quickly . . . all of a sudden, we're being forced to make this choice that I don't think we were quite at yet."<sup>152</sup>

Likely, Lieutenant Colonel Fram and their family are not alone. The policy effectively pushed all transgender service members to be diagnosed with gender dysphoria, abandon military service, or hide their identity, effectively forcing some military service members back into the closet by

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<sup>147</sup> Patricia Kime, *DoD Spends \$84M a Year on Viagra, Similar Meds*, MILITARY TIMES (Feb. 13, 2015), <https://www.militarytimes.com/pay-benefits/military-benefits/health-care/2015/02/13/dod-spends-84m-a-year-on-viagra-similar-meds> [https://perma.cc/PL68-DBQ4]

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* ("[S]ince 2011, the tab for drugs like Viagra, Cialis and Levitra totals \$294 million—the equivalent of nearly four U.S. Air Force F-35 Joint Strike Fighters.")

<sup>150</sup> The exact figures are difficult to know. Our point, however, is not about mass numbers. The military need not discriminate against multitudes in order for their discrimination to be impermissible and unconstitutional. Even if the military discriminates against only one individual based on sex, race, or sexual status, that is impermissible, unconstitutional discrimination.

<sup>151</sup> Hodges & Chang, *supra* note 26.

<sup>152</sup> *Id.*

muting their identities.<sup>153</sup> Some military members have, for many years, hidden the fact that they are transgender. Suddenly being forced out can be unnecessarily disruptive. And the diagnosis of being “gender dysphoric” may be unwelcome even for individuals comfortable and “out” with their transgender identity.<sup>154</sup>

### *B. Military Readiness and Cohesion*

The Trump Administration has articulated that military readiness, unit cohesion, and health costs are important considerations in banning transgender persons from the armed forces. However, the government’s ban on transgender accession and service memberships is unjustified because including transgender personnel in the military will likely have minimal impact on readiness. In Section A, we addressed the government’s weak and unsubstantiated claims that transgender personnel and potential service members pose a risk to the military due to their mental health. Here, we address the government’s other purported justifications.

According to research conducted by the RAND Corporation in 1993, “[t]he main argument that military leaders use against lifting the ban” is that it would “significantly disrupt unit cohesion.”<sup>155</sup> However, the research team “found no scientific evidence on the effects” purported by the military.<sup>156</sup> A critical review of available data resulted in a simple and valuable finding: “[I]t is not necessary to like someone to work with him or her, *so long as members share a commitment to the group’s objectives*. This conclusion was also borne out in the review of racial integration.”<sup>157</sup> That is, unit

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<sup>153</sup> Cf. Kenji Yoshino, *The Pressure to Cover*, N.Y. TIMES MAG. (Jan. 15, 2006), <https://www.nytimes.com/2006/01/15/magazine/the-pressure-to-cover.html> [<https://perma.cc/9BVT-GPXC>] (explaining the pressure and psychological burdens to be closeted or “covering”).

When I began teaching at Yale Law School in 1998, a friend spoke to me frankly. “You’ll have a better chance at tenure,” he said, “if you’re a homosexual professional than if you’re a professional homosexual.” Out of the closet for six years at the time, I knew what he meant. To be a “homosexual professional” was to be a professor of constitutional law who “happened” to be gay. To be a “professional homosexual” was to be a gay professor who made gay rights his work. Others echoed the sentiment in less elegant formulations.

*Id.*

<sup>154</sup> The military policy also fails to account for individuals who are nonbinary with regard to gender or do not identify with a particular gender.

<sup>155</sup> RAND CORP., *supra* note 50; *see also* SCHAEFER ET AL., *supra* note 18, at 44.

<sup>156</sup> RAND CORP., *supra* note 50; *see also* SCHAEFER ET AL., *supra* note 18, at 45.

<sup>157</sup> RAND CORP., *supra* note 50 (“‘Cohesion’ is a term that is generally used in the military to refer to the forces that bind individuals together as a group. It is helpful to think of it in two ways: (1) social cohesion, which refers to the nature and quality of the emotional bonds of friendship, caring, and closeness among group members; and (2) task cohesion, which refers to the shared commitment among members to achieve a goal that requires the collective efforts of the group.”).

performance is associated with task cohesion—not necessarily social cohesion, which relates to individuals’ friendships and family relationships.

We find the Trump Administration’s claims that transgender service members would undermine unit readiness, cohesion, and effectiveness to contradict empirical evidence, including data from its own military, the RAND Report, a study commissioned by the military, and other government studies. For example, the 2016 RAND Report found “no evidence . . . that allowing transgender personnel to serve openly has had any negative effect on unit or overall cohesion.”<sup>158</sup> This is not surprising considering government studies and various reports following the 2010 repeal of DADT demonstrate that the “armed forces also had valuable and highly skilled transgender members.”<sup>159</sup>

The district court in *Stockman v. Trump*<sup>160</sup> emphasized this point. In refusing to grant the Trump Administration’s motion to lift its injunction, the court noted that the government’s argument that transgender service members would disrupt “unit cohesion” mirrored similarly specious claims related to DADT and the government’s ban on gay and lesbian service members openly serving in the armed forces.<sup>161</sup> The court noted that contrary to the military’s unsubstantiated claims that the enlistment of transgender personnel would disrupt unit cohesion, “the military ha[s] repeatedly proven its capacity to adapt and grow stronger specifically by the inclusion” of the groups it previously sought to ban, including “blacks, women, and gays.”<sup>162</sup>

In its reasoning, the court cited its earlier decision in *Log Cabin Republicans v. U.S.*, which found that the military’s DADT policy violated the First Amendment.<sup>163</sup> In striking the ban, the court noted that “‘the loss of unit cohesion’ has been consistently weaponized against open service by a new minority group” throughout history.<sup>164</sup>

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<sup>158</sup> See Brief in Opposition, *supra* note 3, at 5 n.2; SCHAEFER ET AL., *supra* note 18.

<sup>159</sup> See Brief in Opposition, *supra* note 3, at 3.

<sup>160</sup> *Stockman v. Trump*, 331 F. Supp. 3d 990, 1003–04 (C.D. Cal. 2018), *appeal docketed*, No. 18-56539 (9th Cir. Nov. 16, 2018). The Supreme Court stayed the district court order granting the preliminary injunction pending the Trump Administration’s appeal in the Ninth Circuit. *Trump v. Stockman*, 139 S. Ct. 950 (Jan. 22, 2019) (mem.).

<sup>161</sup> *Stockman*, 331 F. Supp. 3d at 1003–04.

<sup>162</sup> *Id.* at 1004.

<sup>163</sup> *Id.* (“The court made this determination despite the government’s argument that DADT ‘is necessary to protect unit cohesion and heterosexual service members’ privacy.’ In finding DADT ‘is not necessary to protect the privacy of service [] members,’ the court relied upon testimony given by various officers in the military who attested there was no nexus between DADT and a loss of unit cohesion.” (citing *Log Cabin Republicans v. U.S.*, 716 F. Supp. 2d 884, 920–23 (C.D. Cal. 2010))).

<sup>164</sup> *Id.* at 1004.

Nor are transgender military personnel new to the military. They have already served without causing or triggering a lack of cohesion within the armed services. Former Army Secretary Eric Fanning stated that “[p]articularly among commanders in the field, there was an increasing awareness that there were already capable, experienced transgender service members in every branch.”<sup>165</sup> These observations are consistent with the findings from the Working Group convened by Secretary of Defense Ashton Carter in 2015 to examine military policy in relation to transgender service members as well as the Directive-type Memorandum, “Military Service of Transgender Service Members.”<sup>166</sup>

The Working Group conducted a comprehensive study of available and relevant evidence to determine the impacts on transgender individuals serving openly in the U.S. military.<sup>167</sup> In the subsequent policy implementation fact sheet, the DoD found, “open service by transgender Service members, while being subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability, and retention, is consistent with military readiness.”<sup>168</sup>

Secretary Carter urged that the “most important qualification for service members should be whether they’re able and willing to do their job.”<sup>169</sup> Subsequently, the DoD concluded that transgender personnel, subject to the same “rigorous standards” as other military personnel, were fit for readiness.<sup>170</sup> In addition, the DoD found including transgender personnel to serve would strengthen the military and not detract from it, because it would strengthen military diversity.<sup>171</sup>

Finally, Secretary Carter acknowledged that the military’s policy banning transgender members actually hurt the military’s interests. Among

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<sup>165</sup> Declaration of Eric K. Fanning in Support of Plaintiffs’ Motion for Preliminary Injunction at 5, *Doe 1 v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017) (No. 17-CV-01597), *vacated sub nom*, *Doe 2 v. Shanahan*, 755 F. App’x 19 (D.C. Cir. 2019).

<sup>166</sup> Carter, *supra* note 4.

<sup>167</sup> *Working Group to Study Implications of Transgender Service*, U.S. DEP’T OF DEF. NEWSROOM, (July 13, 2015), <https://www.defense.gov/Newsroom/News/Article/Article/612640/> [<https://perma.cc/2T2V-W5PL>].

<sup>168</sup> U.S. DEP’T OF DEF., *TRANSGENDER SERVICE MEMBER POLICY IMPLEMENTATION FACT SHEET 1* (2016), [https://dod.defense.gov/Portals/1/features/2016/0616\\_policy/Transgender-Implementation-Fact-Sheet.pdf](https://dod.defense.gov/Portals/1/features/2016/0616_policy/Transgender-Implementation-Fact-Sheet.pdf) [<https://perma.cc/97U3-QLRT>].

<sup>169</sup> Press Release, U.S. Dep’t of Def., *Statement by Secretary of Defense Ash Carter on DOD Transgender Policy* (July 13, 2015), <https://dod.defense.gov/News/News-Releases/News-Release-View/Article/612778> [<https://perma.cc/B3VP-QQFQ>].

<sup>170</sup> Carter, *supra* note 166, at 2.

<sup>171</sup> *Id.*

the reasons he offered was that the military ban was distracting.<sup>172</sup> A distracted military is by definition less ready. In a press statement, he said that it caused “uncertainty” in the military. This uncertainty and distraction undermined the goals of the DoD because the policy was confusing and “contrary” to the military’s “value of service and individual merit.”<sup>173</sup>

In fact, the Working Group’s research contributed to the policy adopted by the Obama Administration to permit transgender service members to serve openly. According to the DoD, the “policy was crafted through a comprehensive and inclusive process that included the leadership of the Armed Services, medical and personnel experts across the [DoD], transgender Service members, outside medical experts, advocacy groups, and the RAND Corporation.”<sup>174</sup>

### C. *Lessons from Abroad: Liberalizing U.S. Policy to Meet a Changing World*

During the Obama Administration, the Working Group established by Secretary Carter, as well as research conducted by the RAND Corporation, concluded that military readiness would not be undermined by permitting transgender service members to serve openly. After extensive study and research, including visiting other nations and their militaries, they concluded that “close allies” have successfully incorporated transgender individuals into their militaries.<sup>175</sup>

In other words, models already exist for permitting a more inclusive military. In a press statement, Secretary Carter explained, “It’s worth noting that at least 18 countries already allow transgender personnel to serve openly in their militaries.”<sup>176</sup> Secretary Carter explained that a rigorous review and analysis of allied militaries further confirmed that “there would be ‘minimal readiness impacts from allowing transgender service members to serve openly.’”<sup>177</sup>

Researchers visited France, Germany, Canada, the United Kingdom, the Netherlands, Norway, and Israel. These nations have a broad spectrum

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<sup>172</sup> Press Release, U.S. Dep’t of Def., *supra* note 169.

<sup>173</sup> *Id.*

<sup>174</sup> See *Transgender Policy*, U.S. DEP’T OF DEF., [https://dod.defense.gov/News/Special-Reports/0616\\_transgender-policy-archive](https://dod.defense.gov/News/Special-Reports/0616_transgender-policy-archive) [<https://perma.cc/W66Q-ZDC7>].

<sup>175</sup> Ashton Carter, *DoD Transgender Policy Changes: New Policy Will End Ban on Transgender Americans in the United States Military*, MEDIUM (June 30, 2016), <https://medium.com/@SecDef/dod-transgender-policy-changes-4f473b21b416> [<https://perma.cc/4ZAD-FNDT>].

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

of policies related to LGBTQ personnel in the military. Of the nations visited, none maintained an absolute ban on LGBTQ personnel serving in the military.<sup>178</sup>

Researchers found that “both research and the experience of foreign militaries and domestic organizations,” including highly successful Fortune 500 companies, “suggest that a number of factors can minimize social disruption.”<sup>179</sup> They pointed out:

First, leaders play a key role in promoting and maintaining unit cohesion. Second, military roles, regulations, and norms all enhance the likelihood that heterosexuals will work cooperatively with homosexuals. Third, external threats enhance cohesion, provided that the group members are mutually threatened and there is the possibility that cooperative group action can eliminate the danger.<sup>180</sup>

A review of foreign militaries that permit LGBTQ personnel to openly serve indicates a minimum likely impact on unit cohesion and force readiness. According to the RAND Corporation, based on its analysis of foreign military policies, there will be “little or no impact on unit cohesion, operational effectiveness, or readiness.”<sup>181</sup> Rather, leaders in foreign militaries noted that their LGBTQ policies for military service members “had benefits for all service members by creating a more inclusive and diverse force.”<sup>182</sup>

#### *D. The Transgender Military Ban Violates the Constitutional Rights of Transgender Individuals*

The ban on transgender individuals serving in the military is discrimination based on gender identity and serves no legitimate, let alone important or compelling, interest. It thus violates the Constitution’s requirement for equal protection of the laws. A number of factors support enjoining the President’s ban on constitutional grounds. The unusual circumstances that brought about the ban, commencing with tweets by President Trump, reflect that it is based on animus and not any legitimate policy justification.<sup>183</sup>

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<sup>178</sup> RAND CORP., *supra* note 50. The United Kingdom policy that once banned gays, lesbians, and transgender persons, has been lifted.

<sup>179</sup> *Id.*; Carter, *supra* note 175 (“Today, over a third of Fortune 500 companies—including companies like Boeing, CVS, and Ford—offer employee health insurance plans with transgender-inclusive coverage.”).

<sup>180</sup> RAND CORP., *supra* note 50.

<sup>181</sup> SCHAEFER ET AL., *supra* note 18.

<sup>182</sup> *Id.*

<sup>183</sup> See generally Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012).

The policy is overbroad and far reaching, subjecting an entire class to blatant, unwarranted, and unjustified discrimination by the military. As discussed earlier, the ban lacks legitimate justification and has not been supported by evidence to bolster the government's claims that inclusion of transgender personnel in the military will result in unreadiness, a lack of cohesion, and ineffectiveness. Even if we assume, as the government claims, that the policy is not derived from the President's tweets, but instead from an independent, deliberative process undertaken by former Secretary of Defense James Mattis, we still find the policy flawed.<sup>184</sup> That is, even if the military's new policy is not merely an implementation of the president's tweets or post hoc process, the substance of the policy remains constitutionally unsound because there is no reason to believe that transgender individuals serving in the military will harm its operation in any way.

Ultimately, the government has a long and established history of weaponizing its "cohesion in units" argument to serve as a trump card when promoting unjustified discrimination within the armed forces.<sup>185</sup> In this case, the government claims that if it does not succeed in barring transgender persons from serving in the military, this will "pose[] a threat to . . . sound leadership."<sup>186</sup>

We have seen exactly this playbook before with the government's ban on LGBTQ people in the military, the integration of African Americans in the military, and the lifting of the ceiling on women's service in the armed forces. All of these factors give rise not only to justifying a permanent defeat of the President's transgender ban, but also help to explain why the district courts issued preliminary injunctions.

In this Essay, we do not dispute the government's arguments that lethality, maximizing military effectiveness, and unit cohesion are

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<sup>184</sup> See Appellant's Opening Brief at 17, *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019) (No. 18-35347), 2018 WL 2981765 ("Rather than address the Department's 2018 policy on its own terms, the district court brushed it aside as the mere implementation of the President's memorandum that it had already enjoined. But even a cursory comparison of the President's policy and the one proposed by the Secretary of Defense reveals that the two are markedly different in both process and substance. The President ordered a return to a longstanding policy that generally disqualified individuals from service on the basis of transgender status while the military further studied the issue. By contrast, the Department's 2018 policy, the product of a comprehensive review by high-ranking military officials exercising their considered judgment, presumptively disqualifies only certain individuals on the basis of a medical condition and its treatment."); *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at \*6 (W.D. Wash. Apr. 13, 2018), *vacated and remanded*, 926 F.3d 1180 (9th Cir. 2019) ("The Court finds that the 2018 Memorandum and the Implementation Plan do not substantively rescind or revoke the Ban [as articulated by President Trump's tweets], but instead threaten the very same violations that caused it and other courts to enjoin the Ban in the first place.")

<sup>185</sup> See *supra* notes 116, 157 and accompanying text.

<sup>186</sup> Petition for a Writ of Certiorari, *supra* note 22, at 14.

reasonable goals. Neither did the plaintiffs in the litigation challenging the ban. What we find wanting is the government's ability to demonstrate that banning transgender individuals from military service furthers those interests. Based on our extensive review of the plaintiffs' and defendant's briefs, RAND Report, DoD memoranda, the Mattis policy, and other related reports and documents, the government's claims cannot satisfy the burden of demonstrating that its discrimination against transgender individuals substantially relates to achieving its objectives.

In other words, we found no evidence that inclusion of transgender service members in the armed forces will impair its cohesion, readiness, and lethality. Further, we found no evidence that the military's budget would be substantially burdened by the inclusion of transgender individuals in the armed forces. Perhaps most importantly, the government fails to provide evidence to support the scope of its claims. In fact, the government's claims are so overbroad that they challenge reason and logic. The government tells us transgender individuals, some whom were already serving in the military for many years, will suddenly suffer such extreme mental health disorders related to their transgender identity that will render them undeployable, make the military unready, and interrupt the military's cohesion. Is the U.S. military, which boasts being the greatest in the world, truly so weakened by the integration of a minority group? We think—and the evidence demonstrates—it is not. Instead, we argue, the government's claims are fundamentally grounded in bias and stereotype.

Our conclusion is that the government has no proof that transgender service members will disrupt core military objectives. At best, then, the policy is based on hypotheticals and, at worse, on discriminatory animus—the type that we have seen before from the military when it harassed and banned gays as well as when it resisted integrating African Americans, despite the fact that so many gave their lives to defend the United States throughout its history.

Challenges to the military's policy banning transgender personnel from service in the armed forces culminated in four cases filed in district court, all of which resulted in preliminary injunctions against the transgender ban: *Stone v. Trump*<sup>187</sup> in the District of Maryland, *Doe 1 v. Trump*<sup>188</sup> in the District

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<sup>187</sup> *Stone v. Trump*, 356 F. Supp. 3d 505, 5188 (D. Md. 2018).

<sup>188</sup> *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 217 (D.D.C. 2017), *vacated sub nom*, *Doe 2 v. Shanahan*, 755 F. App'x 19 (D.C. Cir. 2019) (granting in part the plaintiffs' motion for preliminary injunction against the transgender ban).

of Columbia, *Karnoski v. Trump*<sup>189</sup> in the Western District of Washington, and *Stockman v. Trump*<sup>190</sup> in the Central District of California.

The four cases are substantively quite similar. All were brought on behalf of transgender persons either currently enlisted in or attempting to join the military. All petitioners leveled equal protection and substantive due process claims against the Trump Administration's policy for the "accession" (admittance policy), "retention" (discharge/separation policy), and sex transition surgery provisions of the transgender ban. All four cases succeeded on their initial motions for preliminary injunctions in 2017, when the ban had only been articulated in tweets and a two-page presidential memorandum<sup>191</sup> lacking any expert testimony or evidentiary support. In a highly unusual move, two of the stays, *Karnoski* and *Stockman*, were later lifted by the Supreme Court.<sup>192</sup> We briefly turn to those cases to emphasize the ban's constitutional impermissibility.

In both cases, the plaintiffs' claims that the transgender ban fails to serve any legitimate purpose, and violates their constitutional rights were persuasive, especially to the district courts that issued the injunctions. The courts do not, of course, question the importance of military readiness and cohesion but conclude that there is no basis for believing that the transgender military ban serves these goals in any way. For example, in *Karnoski*, the plaintiffs alleged that the ban, "[d]ripping with animus," violated substantive due process and the Equal Protection Clause.<sup>193</sup> The plaintiffs claimed that "[t]he purpose and effect of the Ban and current accessions bar are to chill constitutionally protected First Amendment activity."<sup>194</sup> They claimed that the military's policy, "on its face demonstrates that it is directed at suppressing the gender expression and related expressive conduct of

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<sup>189</sup> *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305, at \*10 (W.D. Wash. Dec. 11, 2017), *appeal dismissed*, No. 17-36009, 2017 WL 8229552 (9th Cir. Dec. 30, 2017) (granting plaintiffs' motion for preliminary injunction against the transgender ban).

<sup>190</sup> *Stockman v. Trump*, No. EDCV 17-1799 JGB (KKx), 2017 WL 9732572, at \*166 (C.D. Cal. Dec. 22, 2017) (granting the plaintiffs' motion for a preliminary injunction against the transgender ban).

<sup>191</sup> Presidential Memorandum for the Secretary of Defense, *supra* note 104.

<sup>192</sup> *Trump v. Karnoski*, 139 S. Ct. 950 (2019) (mem.); *Trump v. Stockman*, 139 S. Ct. 950 (2019) (mem.).

<sup>193</sup> Complaint at 3, *Karnoski v. Trump*, 328 F. Supp. 3d 1156 (W.D. Wash. 2018) (No. C17-1297-MJP), 2017 WL 3730600 ("Dripping with animus, the Ban and the current accessions bar violate the equal protection and due process guarantees of the Fifth Amendment and the free speech guarantee of the First Amendment. They are unsupported by any compelling, important, or even rational justification.").

<sup>194</sup> *Id.* at 27.

transgender individuals.”<sup>195</sup> The court agreed that the policy impermissibly burdened the speech of the plaintiffs.<sup>196</sup>

In determining the likelihood of success on the equal protection claim, the *Karnoski* court applied a similar reasoning to the District Court of Maryland in *Stone*, concluding that transgender status constituted a “quasi-suspect classification”<sup>197</sup> akin to what might be called the traditional gender discrimination canon of cases such as *United States v. Virginia*, and was accordingly entitled to intermediate scrutiny.<sup>198</sup> Relying on *Obergefell v. Hodges*,<sup>199</sup> the district court determined that, first, plaintiffs were likely to succeed on the merits of their substantive due process claim and, second, transgender status constituted a quasi-suspect classification. The court found a fundamental right to express one’s gender identity,<sup>200</sup> and in a later proceeding wrote:

Today, the Court concludes that transgender people constitute a suspect class. Transgender people have long been forced to live in silence, or to come out and face the threat of overwhelming discrimination. Therefore, the Court GRANTS summary judgment in Plaintiffs’ and Washington’s favor as to the applicable level of scrutiny. The Ban specifically targets

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<sup>195</sup> *Id.*

<sup>196</sup> *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305, at \*9 (W.D. Wash. Dec. 11, 2017), *appeal dismissed*, No. 17-36009, 2017 WL 8229552 (9th Cir. Dec. 30, 2017) (“The policy penalizes transgender service members—but not others—for disclosing their gender identity, and is therefore a content-based restriction. Even giving the government the benefit of a more deferential standard of review under [*Brown v. Glines*, 444 U.S. 348, 355 (1980)], the policy does not survive. As discussed in the context of Plaintiffs’ equal protection challenge, . . . Defendants have not demonstrated that the intrusion upon protected expression furthers an important government interest.”).

<sup>197</sup> *Id.* at \*7. The Supreme Court, of course, has articulated three levels of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis review. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) (first drawing a distinction between categories with a presumption of constitutionality and those “subjected to more exacting judicial scrutiny”); *see also Craig v. Boren*, 429 U.S. 190, 197 (1976) (finding gender-based classifications subject to intermediate scrutiny). The Court, though, in its recent cases on marriage equality did not specify the level of scrutiny to be used for sexual orientation discrimination. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>198</sup> *Karnoski*, 2017 WL 6311305, at \*7; *see also United States v. Virginia*, 518 U.S. 515 (1996).

<sup>199</sup> *Obergefell*, 135 S. Ct. at 2589 (“The fundamental liberties protected by the Fourteenth Amendment’s Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs.”).

<sup>200</sup> *Karnoski*, 2017 WL 6311305, at \*8 (“The policy directly interferes with Plaintiffs’ ability to define and express their gender identity, and penalizes Plaintiffs for exercising their fundamental right to do so openly by depriving them of employment and career opportunities.”).

one of the most vulnerable groups in our society, and must satisfy strict scrutiny if it is to survive.<sup>201</sup>

Finally, the court found that the policy lacked sufficient evidence to be entitled to the deference normally afforded military policymaking under *Rostker v. Goldberg*, where the underlying policy in question was enacted after extensive review.<sup>202</sup> In the instant case, the court found, “the prohibition on military service by transgender individuals was announced by President Trump on Twitter, abruptly and without any evidence of considered reason or deliberation.”<sup>203</sup> Therefore, the court concluded the policy was not entitled to *Rostker* deference.<sup>204</sup>

Likewise, in *Stockman*,<sup>205</sup> the plaintiffs, three prospective enlistees,<sup>206</sup> four transgender service members,<sup>207</sup> and an organizational client,<sup>208</sup> alleged that the transgender military ban violated their equal protection, First Amendment, and substantive due process rights.<sup>209</sup> The district court granted the plaintiffs’ motion for a preliminary injunction based on the likelihood of success on the merits of the equal protection claim.<sup>210</sup>

Then, in 2018, following the filing of the Mattis policy, the Trump Administration moved to dissolve the preliminary injunction, arguing that

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<sup>201</sup> *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at \*11 (W.D. Wash. Apr. 13, 2018), *vacated and remanded*, 926 F.3d 1180 (9th Cir. 2019); *see also id.* at \*9 (“At the preliminary injunction stage, the Court found that transgender people were, at minimum, a quasi-suspect class.”).

<sup>202</sup> *Karnoski*, 2017 WL 6311305, at \*8 (“In *Rostker* the Supreme Court considered whether the Military Selective Service Act (“MSSA”), which compelled draft registration for men only, was unconstitutional. Finding that the MSSA was enacted after extensive review of legislative testimony, floor debates, and committee reports, the Supreme Court held that Congress was entitled to deference when, in ‘exercising the congressional authority to raise and support armies and make rules for their governance,’ it does not act [without] reason.” (quoting *Rostker v. Goldberg*, 453 U.S. 57, 59, 71–72 (1981))).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Stockman v. Trump*, No. EDCV 17-1799 JGB, 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017).

<sup>206</sup> Aiden Stockman, intending to join the Air Force, Nicholas Talbott, intending to join the Air Force National Guard, and Tamasyn Reeves, intending to serve in the Navy. *Id.* at \*4–5.

<sup>207</sup> John Doe 1, serving in the Air Force, John Doe 2, serving in the Army, Jane Doe 2, serving in the Air Force, and, most notably, Jaquice Tate, a distinguished Sergeant in the Army. *See id.* at \*5–6 (“[Tate] enlisted in 2008 and has served domestically, in Germany, and on deployment in Iraq. For his service in Iraq, he was awarded an Army Commendation Medal. He has also received multiple Army Achievement Medals, Certificates of Appreciation, and two Colonel Coins of Excellence.” (citations omitted)).

<sup>208</sup> The LGBTQ civil rights advocacy organization Equality California. *Id.* at \*6.

<sup>209</sup> *Id.* at \*1.

<sup>210</sup> *Id.* at \*15 (“[A]ll the evidence in the record suggests the ban’s cost savings to the government is miniscule. Furthermore, Defendants’ unsupported allegation that allowing transgender individuals to be in the military would adversely affect unit cohesion is similarly unsupported by the proffered evidence. These justifications fall far short of exceedingly persuasive. Accordingly, the Court finds Plaintiffs have demonstrated their Equal Protection claim will likely succeed on the merits and further analysis of their other claims is unnecessary at this stage of the proceedings.” (citations omitted)).

the district court’s reasoning for granting the injunction in 2017 no longer stood.<sup>211</sup> Essentially, the government claimed that the rationale for the policy was no longer based on three tweets from the president, but rather a more engaged study of the military’s interests in maintaining a ready, cohesive, and effective military. The government claimed that the Mattis policy memorialized a more robust study of the inherent risks of transgender persons serving in the armed forces, thus obviating the earlier rationale for issuing the preliminary injunction:

Last December, this Court entered a preliminary injunction forbidding the enforcement of several directives in a Presidential Memorandum from August 2017 concerning military service by transgender individuals. The Court understood these directives to institute a policy “categorically excluding transgender individuals” based on reasons that “were not supported and were in fact contradicted by the only military judgment available at the time.” . . . The bases for that preliminary injunction no longer exist.<sup>212</sup>

The district court was not persuaded.<sup>213</sup> We also find the government’s claims lacking merit and constitutionally flawed. The court rightfully concluded that the enactment of the newer policy, based on the Mattis policy, does not render moot a prior challenge where the new law is substantially similar to the first. The first policy banned transgender individuals based on the government’s claims that gender dysphoria should disqualify individuals from serving in the armed services. These claims were rooted in highly speculative presumptions without a showing of any evidence. The Mattis policy simply repeated these claims and was so fundamentally similar that the court denied the government’s motion.<sup>214</sup>

Simply put, every district court to consider this issue concluded that the government’s claims lack persuasion and the policy to ban transgender individuals from serving in the military is unjustified by any legitimate purpose, and thus, is unconstitutional. We agree with the district courts’ findings that the government could not bar “an otherwise qualified class of

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<sup>211</sup> Defendants’ Motion to Dissolve the Preliminary Injunction at 1, *Stockman v. Trump*, 331 F. Supp. 3d 990 (C.D. Cal. 2018) (No. 5:17-CV-01799-JGB-KK) (citations omitted); *see also id.* at 2 (“To the extent that Plaintiffs may seek to challenge that new policy, that independent controversy should not be litigated under the shadow of a preliminary injunction of a Presidential Memorandum that is no longer in effect.”).

<sup>212</sup> *Id.* (citations omitted).

<sup>213</sup> *Stockman*, 331 F. Supp. 3d at 998.

<sup>214</sup> *Id.* at 999, 1004 (“Defendants contend this policy has exceptions which will allow some transgender individuals to serve in the military, yet these very exceptions expose the policy as being substantially the same as the first.” (citation omitted)).

discrete and insular minorities from joining the armed forces.”<sup>215</sup> The President’s tweets were exceedingly unpersuasive as were the subsequent military reports, which merely repeated similar assertions levied against other minority groups, including African Americans who sought fuller integration in the military during Jim Crow.<sup>216</sup>

### III. THE SUPREME COURT’S LIFTING OF THE INJUNCTIONS ON THE DISTRICT COURT DECISIONS WAS UNJUSTIFIED

The Trump Administration, eager to enforce its transgender ban, appealed the district court injunctions in related cases in California and Washington to the Supreme Court, despite the fact that the cases were already appealed to and under review in the Ninth Circuit Court of Appeals and review in the other Circuits was underway.<sup>217</sup> This was, at bottom, the government’s blatant attempt to circumvent the appellate review process in order to implement the Administration’s ban. In seeking this extraordinary diversion of process, the government further expressed the odious intent of its ban.

In this Part, we briefly describe why the Court’s intervention was premature and procedurally flawed. The government sought extraordinary review based on what it articulated was a matter of grave urgency for the military, because “the authority of the U.S. military to determine who may serve in the Nation’s armed forces” was at stake.<sup>218</sup> Yet, the facts that the military pointed to showed no greater urgency than prior military matters settled through the ordinary judicial process.<sup>219</sup>

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<sup>215</sup> *Id.* at 1004.

<sup>216</sup> *See id.*

<sup>217</sup> *Karnoski v. Trump*, 926 F.3d 1180, 1187 (9th Cir. 2019) (“In light of the Supreme Court’s January 22, 2019 stay of the district court’s preliminary injunction, we stay the preliminary injunction through the district court’s further consideration of Defendants’ motion to dissolve the injunction.”).

<sup>218</sup> Petition for a Writ of Certiorari Before Judgment at 16, *Trump v. Karnoski*, 139 S. Ct. 950 (2019) (No. 18-676).

<sup>219</sup> *See* Brief in Opposition, *supra* note 3, at 18–19 (“[E]xtensive record evidence shows that transgender men and women have been serving honorably and effectively, including on active duty in combat zones. For example, during congressional hearings in April 2018, the heads of three service branches testified that they were unaware of any evidence that service by transgender people impairs military effectiveness, and that transgender individuals are able to meet service standards and serve without issue. The very policy that petitioners want to implement—the Mattis Plan—would itself allow hundreds of transgender individuals to continue serving in the armed forces through a grandfather provision—an exception that cannot be squared with the government’s claims of urgency to eliminate all other transgender personnel.” (citations omitted)).

### A. *A Problem of Process*

It is unusual for the Supreme Court to lift preliminary injunctions issued by a district court.<sup>220</sup> In its briefs to the Court appealing the injunctions, the government claimed that the district courts' reasons for granting the injunctions "are wrong" and "warrant [the Supreme Court's] immediate review."<sup>221</sup> The government urged the Court to engage in an unusual practice and grant the petitions for writs of certiorari before judgement. The government emphasized that without the Court's "prompt" intervention, the military would not be able to implement its policy.<sup>222</sup>

The Trump Administration asked the Supreme Court to take the cases before they reached review in the United States Courts of Appeals.<sup>223</sup> The government claimed immediate relief was necessary because the district court entered a nationwide preliminary injunction blocking President Trump's implementation of the policy banning transgender persons from serving in the military. In its brief to the Court, the government claimed that this policy, "in Secretary Mattis's professional judgment, 'will place the Department of Defense in the strongest position to protect the American people, to fight and win America's wars, and to ensure the survival and success of our Service members around the world.'"<sup>224</sup>

On January 22, 2019, the Court granted stays on the preliminary injunctions in *Trump v. Karnoski* and *Trump v. Stockman*. The injunction in *Doe 2 v. Shanahan* was dissolved by the D.C. Circuit Court of Appeals later in 2019. By staying the preliminary injunctions, the ban on military service by transgender individuals could go into effect immediately while the cases are being heard in the United States courts of appeals.<sup>225</sup> The Supreme Court's conservative majority provided neither guidance nor explanation when it lifted the district courts' stays in a 5–4 decision, which allowed President Trump's ban on military service by transgender individuals to go

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<sup>220</sup> See, e.g., *Heckler v. Lopez*, 463 U.S. 1328, 1330 (Rehnquist, Circuit Justice 1983) (in chambers) ("[A] stay application to a Circuit Justice on a matter before a court of appeals is rarely granted." (quoting *Atiyeh v. Capps*, 499 U.S. 1312, 1313 (Rehnquist, Circuit Justice 1981) (in chambers))).

<sup>221</sup> Petition for a Writ of Certiorari Before Judgment at 12, *Trump v. Stockman*, 139 S. Ct. 950 (2019) (No. 18-678).

<sup>222</sup> *Id.* at 11.

<sup>223</sup> *Id.* at 12.

<sup>224</sup> *Id.* at 12–13 (citations omitted).

<sup>225</sup> *Trump v. Karnoski*, 139 S. Ct. 950, 950 (2019) (mem.); *Trump v. Stockman*, 139 S. Ct. 950, 950 (2019) (mem.).

into immediate effect. Justices Ginsburg, Breyer, Sotomayor, and Kagan voted to deny the government's application.<sup>226</sup>

Even while the Court declined to take the cases on writ of certiorari, its lifting of the injunctions was nonetheless extraordinary. In a line of cases (military and non-related to military) dating back decades, especially those involving important matters of constitutionality, the Court consistently expressed the preference and benefit of review by courts of appeals.<sup>227</sup> For instance, in *United States v. Mendoza*, the Court articulated that it benefits from allowing circuit courts to consider a question before its review.<sup>228</sup> The Court has consistently recognized the "wisdom of allowing difficult issues to mature through full consideration by the courts of appeals" prior to its review.<sup>229</sup> There is no reason why the review of the Trump transgender military ban should have been treated any differently.

*B. The Government's Urgency to Implement a Discriminatory Policy Did Not Justify Extraordinary Supreme Court Review*

We contend that the government's claims did not arise to the level of paramount importance such to circumvent appellate review and justify the Court's extraordinary intervention of imposing stays of the injunctions. Moreover, nothing in the Mattis policy, President Trump's tweets, or any other government brief or memorandum suggests the ban credibly articulated a pressing need for the Court's intervention.

The government claimed that lifting the preliminary injunctions deserved immediate action from the Supreme Court because the district courts' injunctions interfered with the "adoption of [the Mattis] policy that the military, in its best professional judgement, has determined is necessary."<sup>230</sup> The government asserted that a failure to immediately implement the policy placed the military in grave danger and "posed too great a risk to military effectiveness and lethality."<sup>231</sup>

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<sup>226</sup> *Trump v. Karnoski*, 139 S. Ct. 950, 950 (2019) (mem.); see *Trump v. Stockman*, 139 S. Ct. 950, 950 (2019) (mem.).

<sup>227</sup> See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdan v. Rumsfeld*, 543 U.S. 1096 (2005) (denying petition for certiorari before judgment); *Goldman v. Weinberger*, 475 U.S. 503 (1986).

<sup>228</sup> 464 U.S. 154, 160 (1984).

<sup>229</sup> Brief in Opposition, *supra* note 3, at 18 (citing *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977)).

<sup>230</sup> Government's Mot. to Expedite Briefing Schedule at 3, *Doe 2 v. Trump*, 315 F. Supp. 3d 474 (D.D.C. Sept. 10, 2018) (No. 18-5257).

<sup>231</sup> Petition for a Writ of Certiorari, *supra* note 22, at 12.

The Trump Administration expressed hardship at being “forced to maintain that prior policy for nearly a year.”<sup>232</sup> It further claimed that without the Court’s “prompt intervention,” the military’s discriminatory policy was unlikely to be implemented “any time soon.”<sup>233</sup> Although its claims appeared neither extraordinary nor time-sensitive, especially given the constitutional questions at stake, the government appealed to the Court rather than abide by traditional appellate judicial process. We find several problems here with the government’s claims.

First, as we have explained here and as is copiously documented elsewhere, including the RAND Report, the Carter Working Group Report, and in the district courts’ opinions, there is no current harm to the military in permitting transgender personnel to serve. Indeed, the government cannot prove past harm given that transgender personnel have been permitted to openly serve since the issuance of the Carter Policy and have secretly served for much longer.

Second, the government claimed the Supreme Court’s intervention—either by granting certiorari or by staying the preliminary injunctions—was urgent. However, the government’s own litigation strategy belies and contradicts its claims.<sup>234</sup> Originally, the “government voluntarily withdrew its first appeal of the preliminary injunction and did not seek a stay or review” from the Supreme Court.<sup>235</sup> At no prior stage in this litigation had the government found its interests of such urgency as to seek a stay. In fact, at one point in the underlying litigation, the government waited three months before seeking a stay of the injunction from the district court.<sup>236</sup> In light of the government’s litigation choices and the procedural history of the case, the government lacked credibility in its new claim that banning transgender individuals from the military is of “such imperative public importance as to justify th[e] Court’s immediate review.”<sup>237</sup>

Third, the government has emphasized that its current policy (the Mattis policy) is not a rubber stamp of the President’s first policy articulated through tweets. The government has stressed that its current policy is the result of serious deliberation and study across the military and inclusive of transgender personnel.<sup>238</sup> It is highly relevant then that the government, after such extensive deliberation, still cannot show that the national interest is harmed. The government has not provided evidence that the military has

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<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> Brief in Opposition, *supra* note 3, at 19–20.

<sup>235</sup> *Id.* at 20.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* (internal quotations and citations omitted).

<sup>238</sup> *Id.*

suffered or is currently suffering by permitting transgender individuals to serve in its ranks. Earlier, we scrutinized the government's troubling and unsubstantiated claims related to cohesion and readiness, exactly the same arguments that have been used to exclude Black, gay, lesbian, and bisexual individuals from the military in the past.

It is difficult to reconcile the government's convoluted argumentation that: (a) transgender persons must be banned from the armed forces because they pose various threats to a safe and secure military, while (b) transgender personnel currently serving may be grandfathered in and continue to serve. The claims for urgent Supreme Court intervention were speculative at best.

In this regard, the Supreme Court ignored the extensive record of evidence that disproved the government's claims. Not only was there no urgent harm to national interests or military interests such as to justify the Court staying the injunctions, but the government was actually benefiting from the military service of transgender personnel. Transgender individuals were already serving "honorably and effectively, including on active duty in combat zones."<sup>239</sup> As pointed out in the opposition brief, "[D]uring congressional hearings in April 2018, the heads of three service branches testified that they were unaware of any evidence that service by transgender people impairs military effectiveness, and that transgender individuals are able to meet service standards and serve without issue."<sup>240</sup>

Finally, there was no need for the Court's expedited intervention because the district courts and the courts of appeals were already proceeding expeditiously and with "due regard for the need to develop a complete record to facilitate judicial review."<sup>241</sup> Discovery continued at the district court and the circuit court of appeals was already considering the government's appeal on an expedited basis.

At the very least, it is difficult to see how the Court's majority could conclude that the preliminary injunctions issued by the district courts should be stayed. A highly deferential standard must be met for the Court to stay a preliminary injunction issued by a trial court,<sup>242</sup> and in the case at hand the Supreme Court did not reach that high standard.

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<sup>239</sup> See *id.* at 19.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> See *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (articulating the stay standard) (citing *Lucas v. Townsend*, 486 U.S. 1301, 1304 (Kennedy, Circuit Justice 1988) (in chambers); *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (Brennan, Circuit Justice 1980) (in chambers)).

IV. THE COURT’S LIFTING OF THE INJUNCTIONS LIKELY REFLECTS A  
MAJOR SHIFT ON THE COURT AS TO LGBTQ ISSUES WITHOUT JUSTICE  
KENNEDY

The government’s ban on transgender individuals serving in the military underscores additional civil rights and civil liberties concerns related to LGBTQ equality, which we briefly address here. The Trump Administration’s efforts to bar transgender military service align with its other efforts to formally retrench the rights and equality of transgender men and women. It fits a broader pattern of government-led efforts to undo civil rights safeguards that protect LGBTQ individuals. These efforts extend beyond the military to include other basic human dignities, including health care,<sup>243</sup> the ability to travel,<sup>244</sup> and more. This is what makes the Supreme Court’s stay of the district court injunctions all the more problematic and disconcerting.

During President Trump’s first two years in office: his first Attorney General reversed federal policy protecting transgender workers from discrimination under Title VII;<sup>245</sup> the Administration unexpectedly intervened in a major federal lawsuit to stress that the Civil Rights Act of 1964 does not apply to gay workers—and therefore does not protect them from discrimination;<sup>246</sup> the Bureau of Prisons repealed rules “that had

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<sup>243</sup> See Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27846, 27871 (June 14, 2019) (to be codified at 42 C.F.R. pts. 438, 440, 460, 45 C.F.R. pts. 86, 92, 147, 155–56) (“[T]he current regulation does *not* treat ‘an individual’s sexual orientation status alone [a]s a form of sex discrimination under Section 1557.’ It is the position of the United States government that Title VII . . . ‘does not reach discrimination based on sexual orientation.’” (citations omitted)).

<sup>244</sup> Edward Wong & Michael Schwartz, *U.S. Bans Diplomatic Visas for Foreign Same-Sex Domestic Partners*, N.Y. TIMES (Oct. 2, 2018), <https://www.nytimes.com/2018/10/02/us/politics/visa-ban-same-sex-partners-diplomats.html> [<https://perma.cc/JSX5-6VFU>] (“United Nations employees were notified in a memo last month that only married same-sex partners seeking to accompany newly arrived officials to the United States would be eligible for a G-4 visa.”).

<sup>245</sup> Dominic Holden, *Jeff Sessions Just Reversed a Policy that Protects Transgender Workers from Discrimination*, BUZZFEED NEWS (Oct. 5, 2017, 10:00 AM, updated 11:14 AM), <https://www.buzzfeednews.com/article/dominicholden/jeff-sessions-just-reversed-a-policy-that-protects> [<https://perma.cc/4KBT-7E53>] (noting that according to Sessions, “Title VII’s prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status”); see also Brief for Respondent, *supra* note 6 (brief in which the Administration advocates turning their policy position into law, codifying this narrowing interpretation of Title VII).

<sup>246</sup> This action was particularly unusual as the government was not a party to the litigation. The government’s brief stated, “The sole question here is whether, as a matter of law, Title VII reaches sexual orientation discrimination. It does not, as has been settled for decades. Any efforts to amend Title VII’s scope should be directed to Congress rather than the courts.” Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623 at 2, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2017) (No. 15-3775); see also Dean Spade & Craig Willse, *Sex, Gender, and War in an Age of Multicultural Imperialism*, 1 QED: A JOURNAL IN GLBTQ WORLDMAKING 5 (2014).

allowed transgender inmates to use facilities, including cellblocks and bathrooms, that match their gender identity;<sup>247</sup> the Department of Education refused to implement protections for transgender students and withdrew Obama-era guidance that extended Title IX protection to transgender discrimination;<sup>248</sup> the Administration instituted a military ban, barring transgender individuals from serving openly; and the Administration denied visas to same-sex partners of diplomats, among other expressions of hostility toward LGBTQ rights.<sup>249</sup>

Given this, we conclude this Essay with a prediction. The Supreme Court's lift of the district court injunctions blocking the implementation of a Trump Administration policy to effectively ban transgender military members from joining the United States military does not bode well for LGBTQ rights. Our concern is not rooted in anecdote, but close observation of the Trump Administration's actions. In this Part, we briefly discuss what the Court's actions related to the military ban might foretell.

In one example, the Department of Health and Human Services has proposed regulations that will replace an Obama-era rule expanding the definition of sex discrimination to include gender identity. The revision of the "on the basis of sex" definition to include harms inflicted against transgender persons was hailed by advocacy groups as a profound human and civil rights advancement.<sup>250</sup> However, the Trump Administration,

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<sup>247</sup> Dominic Holden, *We Made a List of All the Anti-LGBT Stuff Trump Has Done As President*, BUZZFEED NEWS (June 30, 2018, 10:08 AM), <https://www.buzzfeednews.com/article/dominicholden/trump-lgbt-anti-actions-administration-pride-month><https://www.buzzfeednews.com/article/dominicholden/trump-lgbt-anti-actions-administration-pride-month> [https://perma.cc/B9LZ-J5F8]; see also U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, CHANGE NOTICE: TRANSGENDER OFFENDER MANUAL (2018), <https://www.documentcloud.org/documents/4459297-BOP-Change-Order-Transgender-Offender-Manual-5.html> [https://perma.cc/M759-RHMS] ("The designation to a facility of the inmate's identified gender would be appropriate only in rare cases . . .").

<sup>248</sup> Letter from Edwin S. Kneidler, Deputy Solicitor Gen., U.S. Dep't of Justice, to Hon. Scott S. Harris, Clerk, Supreme Court of the U.S. (Feb. 22, 2017), <https://assets.documentcloud.org/documents/3473548/GG-DOJ-16-273.pdf> [https://perma.cc/W3HU-VASK] ("This letter is to inform the Court that, on February 22, 2017, the Department of Education, in conjunction with the Department of Justice's Office for Civil Rights, announced their decision to withdraw that guidance and a subsequent joint guidance letter, not to rely on the views expressed in the guidance . . .").

<sup>249</sup> Colum Lynch, *Trump Administration to Deny Visas to Same-Sex Partners of Diplomats*, U.N. OFFICIALS, FOREIGN POL'Y (Oct. 1, 2018, 6:36 PM), <https://foreignpolicy.com/2018/10/01/trump-administration-to-deny-visas-to-same-sex-partners-of-diplomats-un-officials-gay-lgbt> [https://perma.cc/L2PR-VCV9].

<sup>250</sup> Emanuella Grinberg, *Feds Issue Guidance on Transgender Access to School Bathrooms*, CNN (May 14, 2016, 3:48 AM), <https://www.cnn.com/2016/05/12/politics/transgender-bathrooms-obama-administration/index.html> [https://perma.cc/A4EA-UK68] ("These groundbreaking guidelines not only underscore the Obama administration's position that discriminating against transgender students is flat-out against the law, but they provide public school districts with needed and specific guidance

through its Department of Health and Human Services, has proposed a new policy, *Nondiscrimination in Health and Health Education Programs or Activities*, which would roll back the extension of “on the basis of sex” to exclude discrimination against transgender individuals.<sup>251</sup>

Furthermore, the Trump Administration is transparent in its discriminatory intent. As the Administration states in its supplement to the proposed rule change, it finds the rule to be “overbroad” in its inclusion of transgender persons.<sup>252</sup> The Trump Administration expressed concern that the policy *would not permit* discrimination against transgender persons.<sup>253</sup> That is, a change in the Obama-era policy would permit health care workers to “object to performing procedures like gender reassignment surgery.”<sup>254</sup> If the Trump rule goes into effect, insurers would no longer be required to cover all services for their transgender customers.<sup>255</sup>

This new rule and others respond to calls from religious communities to reshape federal policies that seek to grant civil rights and civil liberties protections to LGBTQ persons.<sup>256</sup> The Trump Administration has responded with great deference to these groups and, as such, has advanced policies that negatively impact LGBTQ persons across a broad spectrum of fundamental life activities including health, employment, housing, and education.<sup>257</sup>

In the health context, the Obama Administration sought to prohibit discrimination in health care delivery and thereby extend civil rights protections through the Affordable Care Act (ACA), which “prohibits

guaranteeing that transgender students should be using facilities consistent with their gender identity,” said Human Rights Campaign President Chad Griffin.”).

<sup>251</sup> Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27846 (June 14, 2019) (to be codified at 42 C.F.R. pts. 438, 440, 460; 45 C.F.R. pts. 86, 92, 147, 155, 156).

<sup>252</sup> Proposed Rule, Nondiscrimination in Health and Health Education Programs or Activities, Department of Health and Human Services, at 16, <https://www.hhs.gov/sites/default/files/1557-nprm-hhs.pdf> [<https://perma.cc/39AC-47GP>]; *see also* Executive Order on the Establishment of a White House Faith and Opportunity Initiative May 3, 2018 (amending Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations)

<sup>253</sup> Goodnough et al., *supra* note 6; *see* Proposed Rule, Nondiscrimination in Health and Health Education Programs or Activities, *supra* note 252, at 16.

<sup>254</sup> Goodnough et al. *supra* note 6.

<sup>255</sup> *Id.*

<sup>256</sup> *See* Gregory Korte, *Trump Signs Executive Order Giving More Freedom to Federally Funded Religious Groups*, USA TODAY (May 3 2018, 2:36 PM), <https://www.usatoday.com/story/news/politics/2018/05/03/faith-based-initiatives-trump-signs-order-national-day-prayer/577171002/> [<https://perma.cc/8REG-LZN8>] (quoting Rachel Laser, CEO of Americans United for Separation of Church and State, as saying “[t]he whole Trump-Pence line of activity around this issue is enabling fundamentalists to impose their religion on the rest of us.”); Julie Moreau, *Anti-LGBTQ Adoption Bills ‘Snowballing’ in State Legislatures, Rights Group Says*, NBC NEWS (Apr. 4, 2019, 5:31 PM), <https://www.nbcnews.com/feature/nbc-out/anti-lgbtq-adoption-bills-snowballing-state-legislatures-rights-group-says-n991156> [<https://perma.cc/M494-QP26>].

<sup>257</sup> Goodnough et al., *supra* note 6.

discrimination based on race, color, national origin, sex, age or disability.”<sup>258</sup> The ACA also prohibits discrimination in “any health program or activity” that receives federal financial assistance. By including gender identity as a feature of sex and extending protections to transgender individuals, the Obama Administration afforded important civil rights protections to a community that had previously been the subject of stereotype, scorn, and discrimination.

We do not address here the subsequent litigation filed by religious medical providers and groups challenging the expanded definition and implementation of the new rule.<sup>259</sup> Our point is simply this: by seeking to roll back protections afforded transgender children, teens, and adults during the Obama Administration, President Trump has confirmed his belief that transgender persons deserve fewer rights than others.

In the employment context, the Trump Administration has challenged the meaning of *sex* in relation to workplace discrimination. The Trump Administration argues that Title VII does not bar discrimination against gays and transgender persons in the workplace.<sup>260</sup> And, given the vestiges of homophobia and transphobia that remain in our society, the President is not alone. The Supreme Court will consider whether Title VII bars workplace discrimination against LGBTQ persons in the coming year.<sup>261</sup>

The Administration’s expanded “conscience rule,” although more widely debated in light of its serious implications for reproductive health and rights, also seriously implicates LGBTQ rights.<sup>262</sup> This expanded “conscience rule” not only permits health care workers to deny people

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<sup>258</sup> *Id.*

<sup>259</sup> *See, e.g.*, *Franciscan Alliance, Inc. v. Azar*, No. 16-cv-000108-O, 2019 WL 5157100, at \*9 (N.D. Tex., Oct. 15, 2019) (holding that Christian health care professionals may refuse to perform transgender-related care contrary to their religious beliefs).

<sup>260</sup> Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27846, 27871 (June 14, 2019) (to be codified at 42 C.F.R. pts. 438, 440, 460; 45 C.F.R. pts. 86, 92, 147, 155, 156) (“[T]he current regulation does *not* treat ‘an individual’s sexual orientation status alone [a]s a form of sex discrimination under Section 1557.’ It is the position of the United States government that Title VII . . . ‘does not reach discrimination based on sexual orientation.’ . . . It is also the position of the United States government that ‘Title VII’s prohibition on sex discrimination . . . does not encompass discrimination based on gender identity *per se*, including transgender status.’” (citations omitted)).

<sup>261</sup> *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), *cert granted*, 139 S. Ct. 1599 (2019) (mem.). *Compare id. with Bostock v. Clayton Co.*, Ga, 723 Fed. A’ppx 964 (11th Cir. 2018).

<sup>262</sup> Michele Goodwin & Allison Whelan, *Constitutional Exceptionalism*, 2016 U. ILL. L. REV. 1287, 1312 (2016) (explaining “[m]any conscience laws permit and protect a health care provider’s or institution’s refusal to provide or participate in reproductive health care services such as abortion and sterilization. Montana’s law, for example, permits all persons to refuse to participate in a sterilization based on moral convictions. Separate federal laws and regulations, such as Title VII of the Civil Rights Act of 1964, prohibit employers from discriminating against current or potential employees ‘based on religion, including religiously based objections to performing specific job functions.’”)

reproductive services, including abortions and sterilizations, but would also deny other services that might be sought by transgender individuals on the basis of protecting health care providers' religious and moral interests.<sup>263</sup>

This rule, along with the others that are religiously based that involve reproductive health care, are particularly problematic as they use religion as the basis for justifying harm to others. In other words, today conscience clauses serve to shield from punishment what would otherwise be considered unconstitutionally impermissible behavior. Elsewhere we write about the problems associated with this type of rulemaking.<sup>264</sup> Simply put, religion is not and certainly should not serve as a justification for harming and burdening the civil rights and civil liberties of others. However, the Trump Administration has weaponized religion for just this reason. Even more, his Administration has expanded what were already problematic grounds for infringing the constitutional rights of others—religion—to something far vaguer—*moral rights*.

The Trump Administration, through the Department of Housing and Urban Development, has also issued a proposal that would permit homeless shelters to segregate transgender people according to their biological sex. This would also include requiring them to use bathrooms and sleep in accommodations that correspond with their biological sex from birth.<sup>265</sup>

In the health context, the Trump Administration's proposed policies would "allow and even encourage providers who are biased against transgender people to deny them treatment."<sup>266</sup> The new rules resituate civil rights protections altogether by taking protections away from patients who experience discriminatory treatment and by protecting the individuals who discriminate against them, described as "clinicians who have objections to treating them, or insurers who do not want to pay for their care."<sup>267</sup>

We find all these proposals to be hostile to the constitutional rights of transgender individuals, singling them out for unequal treatment, denying them protections from discrimination, and more. Moreover, we predict the attacks on transgender persons will not be isolated to these examples. Because the Trump Administration's policies in this regard are rooted in stereotypes and stigmas related to sex, it is very likely that the Administration's efforts to undo civil rights will begin to chip away at protections for gay, lesbian, and bisexual people.

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<sup>263</sup> Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23170 (May 21, 2018) (to be codified at 45 C.F.R. pt. 88).

<sup>264</sup> Erwin Chemerinsky & Michele Goodwin, *Religion Is Not a Basis for Harming Others*, 104 GEO. L.J. 1111, 1134 (2016).

<sup>265</sup> Goodnough et al., *supra* note 6.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

In this Essay, we have demonstrated how the Court took an extraordinary measure in staying the lower courts' preliminary injunctions. Our concern looking forward is that the constitutional gains related to sex and LGBTQ equality, particularly as evidenced through Supreme Court victories, may very well obscure the Supreme Court's preservation of discrimination through transformation. While on one hand, the Court has rejected anti-LGBTQ discrimination in the form of marriage equality, policies and challenges brought forth by the Trump administration will test the Court's longer-term commitments to full equality.

Indeed, while LGBTQ advocates heralded the Supreme Court's rulings in *United States v. Windsor*<sup>268</sup> and *Obergefell v. Hodges*<sup>269</sup> as throwing off the vestiges and badges of homophobia, discrimination against those attracted to the same gender, and stereotyping of sexual minorities, we caution that their celebration may have been premature. The majority opinion in every Supreme Court decision in U.S. history expanding rights for gay, lesbian, and bisexual people was written by Justice Kennedy: *Romer v. Evans*;<sup>270</sup> *Lawrence v. Texas*;<sup>271</sup> *United States v. Windsor*;<sup>272</sup> *Obergefell v. Hodges*.<sup>273</sup> Without Justice Kennedy it is hard to count five votes for the future of LGBTQ rights.

This transformation of LGBTQ discrimination, we envisage, will manifest despite lofty predictions that Chief Justice John Roberts might now be a "swing vote." Sadly, predictions otherwise are more illusory than real, as evidenced by Justice Roberts's dissents in *Windsor*<sup>274</sup> and *Obergefell*.<sup>275</sup> Indeed, in *Obergefell*—which declared unconstitutional state laws prohibiting same-sex marriage—Roberts wrote a vehement dissent.<sup>276</sup> Notably, it is the only dissent Roberts has read from the bench since coming on to the Court in 2005.<sup>277</sup>

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<sup>268</sup> *United States v. Windsor*, 135 S. Ct. 2675 (2013).

<sup>269</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>270</sup> *Romer v. Evans*, 517 U.S. 620, 623 (1996).

<sup>271</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>272</sup> *Windsor*, 135 S. Ct. at 2682.

<sup>273</sup> *Obergefell*, 135 S. Ct. at 2593.

<sup>274</sup> *Windsor*, 135 S. Ct. at 2696 (Roberts, J., dissenting).

<sup>275</sup> *Obergefell*, 135 S. Ct. at 2611 (Roberts, J., dissenting).

<sup>276</sup> *See id.* at 2612 ("The majority's decision is an act of will, not legal judgment. The right [to marriage] has no basis in the Constitution or this Court's precedent . . . It can be tempting for judges to confuse our own preferences with the requirements of the law.").

<sup>277</sup> Ariane de Vogue, *Roberts Issues Stern Dissent in Same-Sex Marriage Case*, CNN (June 26, 2015, 5:52 PM), <https://www.cnn.com/2015/06/26/politics/john-roberts-gay-marriage-dissent/index.html> [<https://perma.cc/2VUB-RWYH>] ("In [issuing his *Obergefell* dissent], Roberts did something he has never done before: He read parts of his dissent from the bench. It is a move the justices save only for cases they really care about, and in his 10 years on the bench, no other case prompted Roberts to take such a step.").

Justices Thomas and Alito never once have voted in favor of LGBTQ rights. Those who favor such protections hope that Justice Gorsuch or Justice Kavanaugh will side with the more liberal Justices on these issues. That is what makes so disturbing their joining with Justices Roberts, Thomas, and Alito to lift the preliminary injunctions against the Trump Administration's transgender military ban—LGBTQ advocates and individuals may have lost their potential allies.

The Supreme Court's action in the transgender military ban case offers an important lens for thinking about targeted discrimination against LGBTQ persons. This is especially important in light of what appears to be a Trump Administration mandate to curtail their rights. We predict that the Court's actions will signal to lower courts, Congress, and state legislatures that discrimination against sexual minorities is permissible so long as it does not involve marriage equality. In other words, the Court's actions may well presage myriad forms of discrimination not only against transgender military service members but also everyone in the LGBTQ community. Our position is not alarmist, but actually a call to alarm.

As we explained in this Essay, it is unusual for the Supreme Court to lift preliminary injunctions issued by a district court.<sup>278</sup> Moreover, doing so often indicates that the higher court concluded that the party seeking such relief is likely to prevail on the merits.<sup>279</sup> We argue that because the Court intervened and lifted the injunction, this may well reflect how it will vote on the merits when the issue comes before it. It also may reflect a new majority much more hostile to LGBTQ rights more generally. After all, there is no basis for excluding transgender individuals from serving in the military other than prejudice.

#### CONCLUSION

In this Essay, we argue that the transgender military ban imposed by the Trump Administration cannot be justified on legal grounds. Nor can it be justified based on health and safety. Finally, we show that the military ban on transgender individuals serving in the military cannot be justified based

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<sup>278</sup> See, e.g., *Heckler v. Lopez*, 463 U.S. 1328, 1330 (Rehnquist, Circuit Justice 1983) (in chambers) (“[A] stay application to a Circuit Justice on a matter before a court of appeals is rarely granted.” (quoting *Atiyeh v. Capps*, 499 U.S. 1312, 1313 (Rehnquist, Circuit Justice 1981) (in chambers))).

<sup>279</sup> To obtain a stay, among other requirements, the petitioner must show that there is a “fair prospect that a majority of the Court will vote to reverse the judgment below.” *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (citing *Lucas v. Townsend*, 486 U.S. 1301, 1304 (Kennedy, Circuit Justice 1988) (in chambers); *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (Brennan, Circuit Justice 1980) (in chambers)).

on matters of efficiency, preparedness, or combat readiness—arguments used by President Trump to justify the military ban. Indeed, despite transgender individuals serving openly in the military in recent years, the Trump Administration has not been able to offer in reports or court documents proof of its claims that transgender service members undermine combat readiness and thus pose a risk to the military.

What is clear, however, is the use of historic tropes rooted in animus and stereotype that have resurfaced to further discrimination. Old patterns of discrimination and old justifications for discrimination now resurface against LGBTQ individuals—and specifically in this case transgender service members. The advancements in LGBTQ equality, which under the Obama Administration were perceived as secure, now are vulnerable.

Thus, for all the civil rights advancements within the military, including permitting African Americans to serve, banning segregation, lifting the ceiling on women’s service, and permitting gay people to serve, prejudice remains. One form of discrimination has given way to another. In this way, unjustified prejudice has transformed. However, it has not been eviscerated. This is what we might refer to as preservation through transformation.<sup>280</sup> Professor Siegel suggests that enduring prejudices can be masked through their transformation. Isolated, but seemingly impactful legal victories can also produce this effect.

For example, ending slavery can be perceived as rendering equality, when in actuality, it may not confer political or social rights. To the contrary, ending involuntary servitude might actually lead to the creation of other discriminatory policies and practices—which it did. Professor Siegel explains it this way: “White Americans who emphatically opposed slavery regularly disagreed about what it would mean to emancipate African-Americans.”<sup>281</sup> That is, “[s]ome defined freedom from slavery as equality in civil rights; others insisted that emancipating African-Americans from slavery entailed equality in civil *and* political rights; but most white Americans who opposed slavery did not think its abolition required giving African-Americans equality in ‘social rights.’”<sup>282</sup> Similarly, Supreme Court victories with regard to marriage equality or decriminalizing sodomy are not enough to forge LGBTQ equality and may even allow people to become complacent and prematurely believe that equality has been achieved.

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<sup>280</sup> See Siegel, *supra* note 16, at 1119 (“[T]he effort to disestablish the common law of marital status transformed its structure and translated its justifications into a more contemporary gender idiom—a reform dynamic I call ‘preservation-through-transformation.’”).

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 1119–20.

Rather, a true LGBTQ-focused civil rights agenda will not only seek to ban prior practices of discrimination but also to advance civil rights. Yet, advancing civil rights alone will not be sufficient without attention to enforcement. Ultimately, promoting equality in the military will only occur when those who wish to, and are qualified to, serve are permitted to do so with dignity and respect.

