No. 19-1194

IN THE
Supreme Court of the United States

JIAHAO KUANG, ET AL.,
Petitioners,
v.

U.S. DEPARTMENT OF DEFENSE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE MODERN MILITARY ASSOCIATION OF AMERICA, THE CENTER FOR LAW AND MILITARY POLICY, THE HONORABLE GORDON O. TANNER, THE SERVICE WOMEN'S ACTION NETWORK, MR. C. DIXON OSBURN, THE MILITARY OFFICERS ASSOCIATION OF AMERICA, THE AMERICAN GI FORUM, AND THE MINORITY VETERANS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Amici curiae are officials and organizations who seek to improve our military and fight discrimination in the Armed Forces.[2] Many have filed *amicus* briefs in this Court in prior cases implicating servicemembers' liberty and equality. *Amici* have a vital interest in this case because it involves an important issue that affects them, their members, and the constituencies they serve: whether lawsuits challenging allegedly discriminatory military policies can be heard on their merits. *Amici* file this brief to illuminate the longstanding partnership between the military and our nation's immigrants; the history of discrimination in the military and the harms it causes; and the consequences of allowing decisions like the one below to stand.

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[1] All parties received notice of and consented to this filing. No party or party's counsel wholly or partially authored this brief. Only *amici* and counsel for *amici* funded its preparation and submission.

[2] A list of *amici curiae* is attached as Appendix A.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Mindes v. Seaman*, 453 F.2d 197, 199 (5th Cir. 1971), the Fifth Circuit divined its own "judicial policy akin to comity," fashioning a multi-step, multi-factor balancing test to determine "when internal military affairs should be subjected to court review." *Mindes*, and the lower-court doctrine that now bears its name, violates courts' "virtually unflagging obligation ... to exercise" their jurisdiction. *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015) (citation omitted). In so doing, it shields from scrutiny discriminatory practices by the military, including ones like the policy under review ("the Policy"), which delays accession to basic training for lawful permanent residents ("LPRs") but not for citizens. *Amici* have fought against similar discriminatory policies, occasionally having to run *Mindes*'s gauntlet despite its utter lack of constitutional or statutory foundation. Yet after five decades—adopted by several circuits, rejected by others, and in various stages of limbo elsewhere—the *Mindes* doctrine still drags its dreary length before the courts. This Court should grant the plaintiffs' petition and inter *Mindes*.

The Ninth Circuit's summary dismissal of Petitioners' Administrative Procedure Act ("APA") claim ignores the fruitful partnership the military has long enjoyed with our nation's immigrants. From the Revolutionary War to the War on Terror, immigrants have served the United States honorably and in great numbers. The military has consistently recruited and drafted foreign-born servicemembers, including non-citizens. In return, for over 150 years Congress has

offered expedited citizenship to immigrants who serve. The statutory process to which the Department of Defense ("DOD") now delays LPRs access exemplifies that promise.

As the military itself recognizes, however, the Armed Forces have also struggled with a parallel history of prejudice. From denying entry, to limiting job options and advancement, to failing to address intolerance, the military has at times practiced or allowed discrimination on racial, gender, sexual orientation/identity, and other grounds.

Discrimination has inflicted many harms on servicemembers or potential servicemembers. Some have been barred or discharged from service. Others have seen their careers stall, unable to move vertically into the officer ranks or horizontally into combat roles. Some have suffered physical or psychological trauma. Others have felt the effects in their wallets. The Policy, by delaying accession into the military, contains elements of all these harms.

Military discrimination has also hurt the military itself. Most obviously, it long denied the Armed Forces valuable pools of potential recruits. Discrimination or its perception has also damaged morale, inflaming tensions from the Civil War to the Vietnam War and inhibiting integration today. And it has kept the officer corps overly homogenous in an age when, more than ever, the military has recognized the need for greater diversity. The Policy reproduces many of these same institutional harms.

Against the backdrop of the military's struggles with discrimination, the *Mindes* doctrine's effect is particularly pernicious. For the doctrine relies on unpredictable judge-made factors to determine whether military decisions can be challenged at all. *Mindes* thus hinders efforts to end the sorts of governmental discrimination that *amici* have long fought. Had *Mindes* been in place nationwide, many of this Court's cases reviewing military policies on the merits would have risked being dismissed as nonjusticiable, or at least would have had to run an additional, artificial obstacle course. And *Mindes* is also uncertain in scope, its progeny having extended the doctrine beyond its core of internal military decision-making. With such hazy boundaries, *Mindes* poses a danger to anti-discrimination suits and other important efforts to create a stronger American military.

ARGUMENT

I. IMMIGRANTS HAVE SERVED HONORABLY IN THE MILITARY THROUGHOUT AMERICAN HISTORY AND RECEIVED CITIZENSHIP BENEFITS IN RETURN

The Ninth Circuit's decision to refuse review in this case gave short shrift to the long and valuable partnership the military has enjoyed with American immigrants. LPRs and other immigrants have served with distinction throughout our nation's history, and we have long expedited citizenship for those who serve.

Many prominent names adorn the list of immigrants who fought in the Revolutionary War. Alexander

Hamilton, born in Nevis, joined the budding Continental Army in February 1776 as an artillery captain. Ron Chernow, *Alexander Hamilton* 7, 72 (2004). George Washington named Hamilton one of his aides-de-camp, *id.* at 85, and Hamilton led three battalions that helped capture the British redoubts at the Battle of Yorktown, *id.* at 162-64. During the Quasi-War with France, Hamilton served as Inspector General, second-in-command of the Army. *Id.* at 555, 560.

The self-styled Baron von Steuben, a Prussian military officer, joined the Continental Army as a lieutenant general. Ron Chernow, *Washington: A Life* 332 (2010). Steuben singlehandedly professionalized the Army, drilling troops during their winter at Valley Forge. *Id.* at 333. Steuben also developed an instruction manual for drilling and marching so effective it was used until the Civil War. *Id.*

The Marquis de Lafayette, a nineteen-year-old French nobleman, became an honorary major general and a Washington confidante. *Id.* at 297-98. He followed Lord Cornwallis's army through Virginia and took charge of "impounding" the British forces at Yorktown. John Ferling, *Almost a Miracle: The American Victory in the War of Independence* 527 (2007). Lafayette remains, perhaps, "America's favorite fighting Frenchman." Original Broadway Cast, *Guns and Ships*, Hamilton (Atlantic Records 2015).

Many other lesser-known immigrants also played important roles in the Continental Army. French-born Colonel Louis de Presle Duportail led the Army's engineers. Ferling 439. Polish-born Colonel Andrew

Thaddeus Kosciuszko commanded the engineers who built West Point. *Id.* Scottish-born Robert Erskine became army geographer, in charge of sketching war zones. *Id.* at 339-40. Polish-born Casimir Pulaski became master of horse. *Id.* at 440. The wider cast of soldiers, too, contained many immigrants. By 1779, "[t]he army boasted a 'German Battalion' and almost 50 percent of the men in some Pennsylvania regiments were Irish immigrants." *Id.* German immigrants and Hessian deserters alone made up 12% of the Continental Army. Nancy Gentille Ford, *Americans All!: Foreign-Born Soldiers in World War I*, at 47 (2001).

The following decades saw even greater service from immigrants. Irish and German-born soldiers made up 47% of military recruits in the 1840s, as the Mexican-American War swelled the ranks. *Id.* at 48. During the Civil War, even after a population-wide draft, foreign-born Americans comprised about 25% of the entire Union Army and over 43% of its sailors. Don H. Doyle, *The Cause of All Nations: An International History of the American Civil War* 170 (2015).

Union States actively recruited immigrant soldiers, often with polyglot advertisements. One New York broadside from 1861, for instance, read: "*Patrioti Italiani! Honvedek! Amis de la liberté! Deutsche Freiheits Kaempfer!* (Italian patriots! Hungarians! Friends of liberty! German freedom fighters!), 'Arouse! Arouse! Arouse!'" *Id.* at 160-61. The Union also surreptitiously recruited in Europe. It issued Circular 19 to embassies across the continent, advertising America's abundance of cheap land and ample opportunities—a tactic that more than doubled

immigration by the end of the war. *Id.* at 177-78. The publicity campaign also accomplished its hidden military recruitment goal, as many of those who immigrated enlisted in the Union Army. *Id.*

Immigrants likewise played significant roles in the past century's wars. During World War I, the military drafted nearly half a million immigrants into service. Ford 3. Foreign-born draftees comprised 18% of the U.S. military during the war. *Id.* Any man of eligible age who had filed papers of citizenship intent qualified for the draft, regardless whether he had completed the five-year residency the naturalization process otherwise required. *Id.* at 48. Even many who had not yet filed papers were swept up into the local drafts. *Id.* at 55-56. Indeed, Marcelino Serna, an undocumented Mexican immigrant, became Texas's most decorated soldier in the war. *Marcelino Serna*, Hispanic Medal of Honor Society, https://tinyurl.com/yb7m29hs (last visited May 1, 2020).

During World War II, another 300,000 foreign-born men enlisted or were drafted, 36% of whom were non-citizens. Watson B. Miller, *Foreign Born in the United States Army During World War II, With Special Reference to the Alien*, 6 Immigr. & Naturalization Serv. Monthly Rev. 48, 48 & tbl. 1 (1948), https://tinyurl.com/yb5odkrs. Again, all immigrant men who had filed papers of citizenship intent were draft-eligible; those who had not filed were later inducted, too. *Id.* at 50.

This history of honorable service continues to the present day. Over 530,000 living veterans were born

abroad. Jie Zong & Jeanne Batalova, *Immigrant Veterans in the United States*, Migration Pol'y Inst. (May 16, 2019), https://tinyurl.com/yby2935s. And more than 20% of all Medal of Honor recipients are immigrants. *See Archive Statistics*, Congressional Medal of Honor Society, https://tinyurl.com/abeezdb (last visited Apr. 17, 2020) (3,508 total recipients); *USCIS Facilities Dedicated to the Memory of Immigrant Medal of Honor Recipients*, U.S. Citizenship & Immigr. Servs., https://tinyurl.com/ydzbb9x2 (last updated Nov. 21, 2019) (over 700 immigrant recipients). Immigrants also serve beyond their initial enlistments: according to one study, the attrition rate for noncitizens is more than 10% lower than for citizens. Muzaffar Chishti et al., Policy Brief: *Noncitizens in the U.S. Military: Navigating National Security Concerns and Recruitment Needs*, Migration Pol'y Inst. (May 2019), https://tinyurl.com/ybkezatq. Non-LPRs deemed "vital" to national security may enlist, as well, under the Military Accessions Vital to the National Interest (MAVNI) program. 10 U.S.C. § 504(b)(2).

In recognition of these contributions, America has long offered expedited naturalization to immigrants who join the military. *See* Darlene C. Goring, *In Service to America: Naturalization of Undocumented Alien Veterans*, 31 Seton Hall L. Rev. 400, 402 (2000). The practice began with the country: some States promised citizenship as a lure to recruit foreign soldiers during the Revolutionary War. Zachary R. New, *Ending Citizenship for Service in the Forever Wars*, 129 Yale L.J. F. 552, 554 (2020). In 1862, Congress followed suit by passing the Alien Soldiers Naturalization Act, which replaced the papers-of-intent process and reduced the

residency requirement from five years to one for Army enlistees. Goring 411-12. Congres extended the Act to the Navy and Marines in 1894. *Id.* at 413.

Congress provided these expedited naturalization procedures to World War I veterans in 1918, and repeatedly extended the time for soldiers to use these procedures. *Id.* at 415-17. Over 300,000 immigrants became citizens after World War I under this legislation. *The Immigrant Army: Immigrant Service Members in World War I*, U.S. Citizenship & Immigr. Servs. (last updated Mar. 5, 2020), https://tinyurl.com/v97c8rw.

In 1940, Congress further expanded expedited naturalization to veterans who "honorably served at any time," and eliminated the residency requirement. Goring 419 (citation omitted). Statutes in 1942 and 1944 removed more barriers, including race and legal entry requirements. *Military Naturalization During WWII*, U.S. Citizenship & Immigr. Servs. (last updated Dec. 6, 2019), https://tinyurl.com/yaft4r92. Another 109,000 foreign-born veterans became citizens from 1943-1945. New 554.

Then the Immigration and Nationality Act of 1952 ("INA") "dramatically enlarged the class of persons eligible for naturalization through military service," setting the baseline for modern expedited naturalization statutes. Goring 426. Today, the INA provides two paths to citizenship for military service, one for peacetime and one for wartime. New 556. Since 9/11, the military has operated under the latter version, 8 U.S.C. § 1440. Under this statute, any noncitizen who serves honorably in the military and who enlists within the U.S. or

becomes an LPR after enlistment may become a citizen—even while still serving. 8 U.S.C. § 1440(a). Section 1440 and its peacetime counterpart, 8 U.S.C. § 1439, fulfill America's promise to the many immigrants who serve our country in uniform.

II. THE MILITARY'S HISTORY OF DISCRIMINATION HAS HARMED SERVICEMEMBERS AND THE MILITARY ITSELF

Despite this long history of welcoming foreign-born servicemembers, the military has wrestled with discrimination against various minority groups. Such discrimination inflicts myriad harms against its intended victims. But it also backfires against the military itself, weakening the Armed Forces from within.

A. The Military Has Grappled with Discrimination for Two Centuries

Just like the country as a whole, the military has evolved in its treatment of minority groups. As the Army itself has recognized, the military "is not entirely a reflection of American society. It has discriminated over the years against a variety of American citizens that it has deemed unfit for service." *The Army and Diversity*, U.S. Army Ctr. of Mil. Hist., https://tinyurl.com/yadnvwf4 (last visited Apr. 17, 2020). Indeed, "African-Americans, Hispanic-Americans, Asian-Americans, women and homosexuals have at various times been banned from service, allowed in only in small numbers, or allowed in only under special conditions." *Id.*

Race Discrimination: As early as 1775, Congress prohibited black Americans from enlisting in the Army. Ferling 341. When military need finally convinced the Union to accept black servicemembers during the Civil War, it fomented political backlash and inflamed racial tensions. James McPherson, *Battle Cry of Freedom: The Civil War Era* 563, 565 (1988). Black regiments "were segregated, given less pay than white soldiers, commanded by white officers … and intended for use mainly as garrison and labor battalions." *Id.* at 565.

The military continued to employ race-based structures for the next eight decades. During World War I, for instance, Congress employed separate "white" and "black" drafts. Kristy N. Kamarck, Cong. Research Serv., R44321, *Diversity, Inclusion, and Equal Opportunity in the Armed Services: Background and Issues for Congress* 12 (June 5, 2019), https://tinyurl.com/y8wu9nk6. Hispanic, Native-American, and Asian-American draftees were usually treated as "white," but some States drafted Chinese-Americans as "black." *Id.* at 12-13. Congress repeated these separate race-based drafts in World War II and maintained a 10% quota for black soldiers. *Id.* at 13. The Army "did not allow black officers to outrank or command white officers in the same unit," creating racial imbalances among the officer corps. *Id.* Some Japanese-American soldiers, meanwhile, were discharged after Pearl Harbor out of race-based suspicion. *Id.*

The Army largely integrated in the 1950s, though discrimination persisted. *Id.* at 15. Racial and socioeconomic disparities in draft deferments during the Vietnam War caused a perception that draft boards

disproportionately chose black men for combat. *Id.* at 17. Perceived patterns of bias sparked violent incidents, and even a full-scale race riot, at military institutions. *Id.* at 18. To this day, minority servicemembers are disciplined at higher rates and remain underrepresented as officers. *Id.* at 19-20.

Sex Discrimination: Women have long faced discrimination in the military, as well. The military first admitted women only as nurses, in the Army and Navy Nurse Corps. *Id.* at 23. Over 13,000 women enlisted in the Corps during World War I, but they "were not eligible for retirement or veterans' benefits." *Id.* The military finally created women's auxiliaries to the services in World War II, and over 350,000 women served as mechanics, air traffic controllers, and instructors—and even fighter pilots. *Id.* at 23-24. But none served in direct combat roles, and even the pilots "were not afforded military benefits or given veteran status until 1977." *Id.* at 24.

Even when Congress integrated women into the military proper in 1948, it retained overtly gender-based policies. Women could not serve in combat or rise in rank above lieutenant colonel/commander. *Id.* Congress set quotas for women, at 2% of servicemembers and 10% of officers. *Id.* And until this Court declared the practice unconstitutional, male spouses of female servicemembers had to prove dependency to receive survivors' benefits. *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973) (plurality opinion).

Helped along by federal statutes, discrimination has declined in recent decades. Still, only in 2015 did DOD

first open combat positions to women. Kamarck 29. Sexual assault remains a serious concern. *Id.* at 28-29; *see Women in the Military: Where They Stand*, Serv. Women's Action Network ("SWAN") 20 (10th ed. 2019), https://tinyurl.com/yasrwdms. And like minority servicemembers, women are underrepresented in the senior officer ranks. Kamarck 30; SWAN 19.

Sexual Orientation / Gender Identity Discrimination: Unlike its racial and gender restrictions, the military's explicit ban on LGBTQ servicemembers is of recent vintage. Kamarck 34. But the military long used indirect means to achieve the same ends. The Continental Army discharged its first soldier for homosexuality in 1778. *Freedom to Serve Guide*, OutServe-SLDN 3 (2d ed. 2018), https://tinyurl.com/y97wp9fv. And Article 93 of the Articles of War, introduced during World War I and approved by Congress in 1920, classified sodomy as a crime. *Id.*; *see* Kamarck 33 & n.157. Army directives issued in 1941 went further, barring men with "homosexual proclivities," many of whom were deemed to have "psychopathic personality disorders." Allan Berube, *Coming Out Under Fire: The History of Gay Men and Women in World War Two*, at 12 (1990).

Similar policies followed for the rest of the century. The Uniform Code of Military Justice re-codified the sodomy prohibition in 1951. OutServe-SLDN 3. Two years later, President Eisenhower issued Executive Order 10450, which listed "sexual perversion"—including homosexuality—as a security ground for firing federal employees. *Id.*; *see* Kamarck 34. The military used Order 10450 to fire transgender servicemembers,

as well. OutServe-SLDN 3. In 1981, DOD revised Directive 1332.14 to state, flat-out, that "[h]omosexuality is incompatible with military service." Kamarck 35 (citation omitted). The military also applied medical regulations in the 1980s to remove transgender servicemembers. OutServe-SLDN 3.

By the 1990s, these anti-LGBTQ directives came under fire. A 1988 DOD report found that homosexuality posed no national security threat. *Id.* Yet in 1994 Congress codified the military's policies against LGB service. Kamarck 36. In compromise, Congress also passed Don't Ask, Don't Tell ("DADT"), which forbade DOD from asking questions about, and servicemembers from speaking about, servicemembers' sexuality. *Id.* LGB Americans could now serve in the military, though they had to remain closeted. OutServe-SLDN 4. The military discharged over 13,000 servicemembers under DADT. Kamarck 37. Several organizations, including the precursor to *amicus* Modern Military Association of America, formed to challenge DADT. OutServe-SLDN 4. The policy finally met its end in 2010. Kamarck 38.

But other forms of discrimination remained. Until this Court declared the Defense of Marriage Act unconstitutional, *United States v. Windsor*, 570 U.S. 744 (2013), DOD refused benefits to same-sex married couples, Kamarck 38-39. DOD has also "treated the physical and psychological aspects of transgender conditions as disqualifying conditions" for service. *Id.* at 40. DOD briefly lifted this ban in 2016, but in 2017 and 2018 re-imposed it as to anyone with gender dysphoria. *Id.* at 41-42. Legal challenges to the ban are ongoing. *See*,

e.g., *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. filed Aug. 28, 2017).

B. Discrimination in the Military Harms Servicemembers and Potential Servicemembers

Throughout American history, military discrimination has hurt those against whom it was practiced. It long prevented qualified applicants from joining the military at all—and, in some cases, continues to do so. For centuries, prejudice also kept minority and female soldiers from combat duty and saddled them with support roles. *See supra* Part II.A.

Discrimination also has less obvious effects. For instance, gender discrimination has caused servicemembers physical and psychological harm. *See* Carl Andrew Castro et al., *Sexual Assault in the Military*, 17 Current Psychiatry Rep. 54, 55-56 (2015), https://tinyurl.com/y9supxw4. In DOD's 2018 annual review, 24.2% of servicewomen and 6.3% of servicemen reported being sexually harassed in the past year; 6% of servicewomen and 0.7% of servicemen reported being sexually assaulted. *Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2018*, Dep't of Def. 3, 12 (2019), https://tinyurl.com/y88k7fbr. These servicemembers exhibit higher rates of physical and psychological health symptoms, including PTSD, depression, and risky behaviors. Ashley C. Schuyler et al., *Military Sexual Assault (MSA) Among Veterans in Southern California*, 23 Traumatology 223, 228-29 (2017), https://tinyurl.com/ycf9pmnm.

Discriminatory actions have also caused servicemembers financial harm. Under the Militia Act of 1862, for example, "blacks enrolled in the [Union Army] were regarded as laborers and paid several dollars a month less than white soldiers." McPherson 789. They finally received partial retroactive pay equity in 1864, after sustained protests by abolitionists and threats of mutiny among black soldiers. *Id.* Only those who were already free before the war began got full back-pay. *Id.* Official quotas and unofficial practices alike also limited black and female servicemembers from rising through the officer ranks. Kamarck 13-14, 20-21, 24-25. Reduced career prospects translated into reduced financial ones.

The Policy follows in the footsteps of these historical wrongs. Of course, the Policy hurts LPRs by delaying their path to citizenship. Congress provides a right to expedited naturalization for LPRs who engage in active service during periods of "armed conflict with a hostile foreign force." 8 U.S.C. § 1440(a). But the Policy places LPRs' enlistments on hold for 350 days on average. Pet. App. 32a. Thus, under the Policy, LPRs lose nearly a year in which they would otherwise have been U.S. servicemembers and American citizens.

Enlistment delays likewise harm LPRs' career prospects. The Policy can cause "loss of designation," where accession delays deprive enlistees of their career-track designations. LPRs who lose designation may be deprived of the specialized skills needed to advance in the military. Petitioners' experiences exemplify this concern. Mr. Kuang's designation changed from personnel specialist ("PS") to "undesignated," placing him on a separate career track with mainly manual-labor

responsibilities and lower advancement rates. *See* Navy Administrative Policy ("NAVADMIN") 118/18 (May 14, 2018); Pet. App. 16a. Similarly, a military recruiter informed Mr. Cooke that the auto mechanic designation for which he joined may be unavailable by the time he can enlist under the Policy. Pet. App. 16a.

Loss of designation also hurts post-military career prospects. Mr. Kuang's initial designation is similar to a human resources specialist; the skills he would have learned would transfer to civilian human resources jobs. As an undesignated Sailor, that is no longer so. Likewise, Mr. Cooke's auto mechanic designation would allow him to seek civilian jobs as a mechanic after his time in the military. As an undesignated Airman, that, too, is no longer true.

The Policy's delay likewise causes both short- and long-term financial harm to affected enlistees. While they await their delayed enlistments, LPRs must scramble to find employment with little certainty as to when they may be called to duty. Mr. Kuang, for instance, did not apply to college in anticipation of entering active service, and he has faced difficulties in finding interim employment or education. Pet. App. 16a. Mr. Cooke had resigned his job in anticipation of shipping out; while he regained his job after the Air Force delayed his ship-out date, he could not further his career because of uncertainty as to when he would leave. *Id.* The Policy also has downstream effects: delayed accession means delayed salaries, delayed raises, and delayed advancement.

C. Discrimination Hurts the Military

While discrimination in the military clearly harms its targets, prejudice also harms the military itself.

First, by banning or limiting service by various minority groups, the military deprived itself of available personnel. States only began recruiting black soldiers for the Continental Army in 1778, as "indomitable recruiting woes" broke down Washington's and other officials' resistance to arming African-Americans. Ferling 341-42. The need became so dire that, by the end of the war, black soldiers rose from merely "a few score" to perhaps 10% of the Army. *Id.* at 341, 344. Likewise, Congress only authorized enrollment of black soldiers during the Civil War because of a manpower shortage: funneling black enlistees into labor battalions would free white soldiers for combat. McPherson 564.

And, of course, forbidding women from serving left untapped half the population. The Continental Army banned female enlistment but employed soldiers' wives and other "camp followers" as nurses, laundresses, and officers' housekeepers. Ferling 428-29. During the Civil War, too, women acted mainly as nurses, and female slaves were pressed into service in Confederate military hospitals. McPherson 478-81. Despite severe troop shortages in these and other wars, the military did not accept women in the services until World War II. But today, even without a draft or an all-gender Selective Service system, 216,000 women serve on active duty—61% of them minority women. SWAN 17.

DADT, too, led to 13,000 discharges and likely discouraged thousands of LGB Americans from attempting to enlist. Gary J. Gates, *Effects of "Don't Ask, Don't Tell" on Retention Among Lesbian, Gay and Bisexual Military Personnel*, Williams Inst. 1 (2007), https://tinyurl.com/yc9uystj; Kamarck 36-37.

Discrimination also harms morale. Lower pay, worse assignments, and rampant racism led black soldiers to threaten mutiny during the Civil War. Rick Beard, *Black Union Soldiers Fought a Costly Battle for Equal Pay*, Military Times (Feb. 12, 2018), https:// https://tinyurl.com/yaozvgch. Racial tensions—ranging from slurs, to riots, to murders by grenade of disliked officers—also contributed to the Army's breakdown during the Vietnam War. Max Hastings, *Vietnam: An Epic Tragedy, 1945-1975*, at 526, 528-30 (2018).

More recently, studies of gender integration found that concerns about sexual harassment and assault hurt morale. Margaret C. Harrell & Laura L. Miller, *New Opportunities for Military Women: Effects Upon Readiness, Cohesion, and Morale* 73-77 (1997), https://tinyurl.com/ydyk94wh. The military's experience with DADT likewise found that the anti-LGB policy damaged morale. *See, e.g.*, Jeremy T. Goldbach & Carl Andrew Castro, *Lesbian, Gay, Bisexual and Transgender (LGBT) Service Members: Life After Don't Ask, Don't Tell*, 18 Current Psychiatry Rep. 56, 57 (2016), https://tinyurl.com/yclsdb83.

Finally, discrimination hampers the military's efforts to foster diversity. As former military officials have repeatedly advised this Court, "a highly qualified,

racially and ethnically diverse officer corps is essential to the effectiveness of the Armed Forces." Brief of Lt. Gen. Julius W. Becton, Jr. et al. at 2, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), 2015 WL 6774556 ("*Fisher* Br."); *see id.* at 1-2 & n.2 (citing similar prior briefs). Indeed, by the 1970s, racial alienation compounded by a lack of minority officers "caused the Armed Forces to teeter 'on the verge of self-destruction.'" *Id.* at 8 (citation omitted).

Officer diversity is vital to military cohesion and institutional legitimacy. *Id.* at 9; *see* Mil. Leadership Diversity Comm'n ("MLDC"), *From Representation to Inclusion: Diversity Leadership for the 21st-Century Military*, *Final Report* 14-15 (2011), https://tinyurl.com/yc4djyrk. The post-9/11 landscape has only increased the premium on officer-corps diversity. *Fisher* Br. 9-12. Historically, however, the same quota systems and policies that limited female and minority enlistment kept the officer ranks more homogenous than they would otherwise be. *See supra* Part II.A. While many of those overt restrictions have disappeared, a number of "structural and perceptual" barriers remain at each stage of military advancement. MLDC 46.

At times, the government itself has recognized the negative implications of such policies. The President's Committee on Equality of Treatment and Opportunity in the Armed Forces, formed by President Truman, found "that existing segregation policies were contributing to inefficiencies through unfilled billets, training backlogs, and less capable units." Kamarck 14. In 2009, concern about diversity in military leadership

prompted Congress to establish the Military Leadership Diversity Commission. MLDC vii. The military also acknowledges that policies that differentiate based on group characteristics are "contrary to good order and discipline and [are] counterproductive to combat readiness and mission accomplishment." DoD Directive 1350.2 §4.2 (Aug. 18, 1995).

The challenged Policy repeats the same harms as past discriminatory practices. As in times past, today's military faces personnel shortages. Meghann Myers, *The Army Is Supposed to Be Growing, But This Year, It Didn't At All*, Army Times (Sept. 21, 2018), https://tinyurl.com/yxr62bet. Immigrants help meet this shortfall, but the Policy removes "an important benefit of military service" that the military had used "as a recruiting tool." Pet. App. 84a. LPR servicemembers also provide valuable cultural and linguistic diversity and volunteer at a rate disproportionate to their citizen counterparts. Both the MLDC and the DOD itself have recognized the vital importance of such diversity. *Defense Language Transformation Roadmap*, Dep't of Def., 3 (Jan. 2005), https://tinyurl.com/ycck4jxt; MLDC 17. Delays in accession and declining recruitment thus deprive the military of valuable manpower and knowledge. The Policy will also cause fewer LPRs to reach senior positions, creating a less diverse military leadership. Without doubt, the Policy harms the military—and, as Petitioners proved, DOD has shown no corresponding benefit. Pet. App. 85a.

III. THE *MINDES* DOCTRINE MAKES IT MORE DIFFICULT TO COMBAT DISCRIMINATION IN THE MILITARY

Discrimination in the military has not just been harmful to servicemembers and the Armed Forces; it has been, in many cases, illegal. But the *Mindes* doctrine artificially constricts access to the courts when military policies are at issue. *Mindes* distorts the presumption of judicial review of government action, erecting a lawless barrier to challenging unlawful military discrimination.

The *Mindes* doctrine requires those bringing discrimination or other claims against the military to navigate an obstacle course merely to seek review. Plaintiffs must first raise the correct sorts of claims and prove "exhaustion of available intraservice corrective measures." *Mindes*, 453 F.2d at 201. They then must pass a four-part test weighing "the substance of th[eir] allegation in light of the policy reasons behind nonreview of military matters." *Id.* One factor is "[t]he nature and strength of the … challenge." *Id. Mindes* thus "intertwines the concept of justiciability with the standards to be applied to the merits of the case." *Dillard v. Brown*, 652 F.2d 316, 323 (3d Cir. 1981). It also examines the plaintiffs' injury, the "anticipated interference with the military function," and the military expertise involved. *Mindes*, 453 F.2d at 201. *Mindes* thereby lets judges refuse review of even constitutional claims, based only on their free-floating conjecture that "the remedy sought … would be so disruptive to military service that the claim should not be entertained." *Holdiness v. Stroud*, 808 F.2d 417, 423 (5th Cir. 1987).

Indeed, as its elements suggest, the *Mindes* framework operates similarly to "application of the preliminary injunction factors." *Roe v. Dep't of Def.*, 947 F.3d 207, 218 (4th Cir. 2020) (citation omitted). That comparison underlines *Mindes*'s deficiencies. This Court has often counseled that preliminary injunctions are "an extraordinary remedy." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (citation omitted). By layering *Mindes* atop the traditional deference the military receives on the merits, lower courts replace the presumption of judicial review with a preliminary-injunction-like skepticism of justiciability. Which is ironic, since this Court's touchstone case on the preliminary injunction standards *itself* concerned internal military policy—and examined the plaintiffs' statutory claim on the merits. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 12 (2008) (claim "that the Navy's sonar-training program harmed marine mammals, and that the Navy should have prepared an environmental impact statement").

To best illustrate the potential danger and hazy scope of the *Mindes* doctrine, consider the implications if it had been adopted nationwide. This Court has decided on the merits many cases involving internal military matters. Yet under *Mindes*, these same cases could have been dismissed as unreviewable. For instance, in *Brown v. Glines*, 444 U.S. 348, 349 (1980), the Court heard a First Amendment and statutory challenge to Air Force regulations requiring servicemembers to obtain approval from their commanders before circulating petitions on Air Force bases. With nary a word on justiciability, the Court gave Glines's claims a full airing on the merits. *Id.* at 353-61; *see also Greer v.*

Spock, 424 U.S. 828, 838 (1976) (reviewing on the merits similar regulations at Fort Dix).

Mindes poses an even graver threat in discrimination cases, because the injuries discriminatory policies impose—and the concomitant costs of denying review—are all the greater. Consider a sampling of the cases to which *Mindes* would apply. In *Greer*, the Court addressed bans on political speeches or leaflets. 424 U.S. at 838-39. Likewise, this Court has reviewed a Free Exercise Clause challenge to an Air Force regulation that prohibited wearing "headgear," including yarmulkes, indoors. *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986). Under *Mindes*, however, such First Amendment claims—and, indeed, a host of Religious Freedom Restoration Act claims, *see United States v. Sterling*, 75 M.J. 407, 410 (C.A.A.F. 2016) (RFRA "applies in the military context")—might never make it past the justiciability stage. *See Khalsa v. Weinberger*, 787 F.2d 1288, 1289 (9th Cir. 1985) (finding nonreviewable a First Amendment challenge to a *Goldman*-like regulation).

Mindes could also have hindered lower-court review of discriminatory policies some *amici* fought. In *Phillips v. Perry*, 106 F.3d 1420, 1424 (9th Cir. 1997), a sailor discharged under DADT challenged both the DADT statute *and* DOD's implementing regulations under the Equal Protection Clause. The court upheld the policy under rational basis review. *Id.* at 1427. But it did so on the merits. Under *Mindes*, the court could have applied an even lower standard: non-reviewability. Likewise, the Fourth Circuit considered a challenge by *amicus* Modern Military Association of America to military

regulations of servicemembers with HIV—but it had to work through *Mindes* first. *See Roe*, 947 F.3d at 218.

Amicus SWAN has also challenged gender-discriminatory policies that continue to bar women from serving in combat roles. *Serv. Women's Action Network v. Mattis*, 320 F. Supp. 3d 1082 (N.D. Cal. 2018). Bound by circuit precedent, the district court applied *Mindes*, but it found the claim reviewable. *Id.* at 1092-97. The court later ruled that SWAN pleaded a plausible equal protection claim. *Serv. Women's Action Network v. Mattis*, 352 F. Supp. 3d 977, 992 (N.D. Cal. 2018). But the case has not yet been appealed; a circuit panel might favor stricter application of *Mindes*, as did the panel in this case. A different district judge, too, could well have dismissed this meritorious claim as unreviewable.

Suits challenging personnel decisions and policies are *Mindes*'s bread-and-butter. But *Mindes* has also limited servicemembers' ability to clear their names following courts-martial. *See, e.g.*, *Daugherty v. United States*, 73 F. App'x 326, 331 (10th Cir. 2003) (applying *Mindes* to dismiss APA claim brought by retired commander, who sought "expungement from his military record of all court martial actions, findings, and conclusions"); *Tatum v. United States*, No. CIV.A. RDB-06-2307, 2007 WL 2316275, at *2, *5 (D. Md. Aug. 7, 2007) (applying *Mindes* to bar collateral Fifth and Eighth Amendment challenges to court-martial convictions), *summarily aff'd*, 272 F. App'x 251 (4th Cir. 2008).

And some courts have even applied *Mindes* against civilians, reasoning that "[s]ome decisions, by their nature, are inherently military, regardless of who the

plaintiff is." *Meister v. Texas Adjutant Gen.'s Dep't*, 233 F.3d 332, 340 (5th Cir. 2000) (challenge by civilian to hiring decisions); *cf. Bledsoe v. Webb*, 839 F.2d 1357, 1360 (9th Cir. 1988) (allowing contractor's Title VII claim to proceed "since the plaintiff is not a member of the 'military services' *and* since no policy or function is implicated which is unmistakably military in nature" (emphasis added)). Such cases raise the prospect that *Mindes* could extend to outward-facing military orders.

In short, the panel below dismissed a strong APA challenge to a discriminatory policy, under a doctrine indeterminate in both scope and application. But "military decisions are not … immune from judicial review, and here, Congress has provided for review through the APA." *Roe*, 947 F.3d at 230; *see Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2567 (2019) (APA "embodies a 'basic presumption of judicial review'" (citation omitted)). This Court should grant the petition in this case, reverse *Mindes*, and allow that congressionally-mandated review to move forward.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

MAY 4, 2020

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APPENDIX

Appendix A – List of Amici

American GI Forum
https://agifus.com/index.php/en/home-en-gb/about-agif

Center for Law and Military Policy
https://centerforlaw.org

Military Officers Association of America
https://www.moaa.org/content/about-moaa/mission

Minority Veterans of America
https://www.minorityvets.org

Modern Military Association of America
https://modernmilitary.org/about

Mr. C. Dixon Osburn, former Executive Director, Center for Justice and Accountability; former co-founder and Executive Director, Servicemembers Legal Defense Network

Service Women's Action Network
https://www.servicewomen.org/who-we-are/#about

Hon. Gordon O. Tanner, former General Counsel, U.S. Department of the Air Force; former Governor of Wake Island