No. 18-17381

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JIAHAO KUANG, *et al.*,
Plaintiffs-Appellees,
v.

U.S. DEPARTMENT OF DEFENSE, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
Case No. 3:18-CV-03698-JST
Honorable Jon S. Tigar

BRIEF OF THE MODERN MILITARY ASSOCIATION OF AMERICA, THE CENTER FOR LAW AND MILITARY POLICY, THE HONORABLE GORDON O. TANNER, AND THE SERVICE WOMEN'S ACTION NETWORK AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), undersigned counsel for Amici make the following disclosures: The Modern Military Association of America ("MMAA") is a nonprofit corporation and has no parent companies, subsidiaries, or affiliates that have issued shares to the public. The Center for Law and Military Policy ("CLMP") is a nonprofit corporation and has no parent companies, subsidiaries, or affiliates that have issued shares to the public. The Service Women's Action Network ("SWAN") is a nonprofit corporation and has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTEREST AND IDENTITY OF AMICI CURIAE[1]

The amici curiae are the Modern Military Association of America ("MMAA"), The Center for Law and Military Policy ("CLMP"), the Honorable Gordon O. Tanner, former General Counsel of the United States Air Force and Assistant Secretary for Manpower and Reserve Affairs, and the Service Women's Action Network ("SWAN").

MMAA is the nation's largest non-profit, non-partisan organization of LGBTQ service members, military spouses, veterans, their families, and allies. It is currently comprised of over 75,000 members and supporters. Since 1993, MMAA and its predecessor entities have assisted over 12,500 clients and filed lawsuits challenging laws and regulations that result in discrimination and stigma, including the "Don't Ask, Don't Tell" policy, regulations prohibiting same-sex military spouses from receiving spousal benefits, the current ban on openly transgender people serving in the United States military, and the regulations negatively affecting service members with HIV.

CLMP is a nonprofit organization dedicated to strengthening the legal protections of those who serve our nation in uniform. CLMP conducts research

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[1] In accordance with Fed. R. App. P. 29 (a)(4)(E), counsel for Amici affirms that no counsel for any party authored this brief in whole or in part, and no person, party or entity, other than Amici and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. This brief is filed with the consent of all parties. *See* Motion for Leave to File Amici Brief, filed concurrently.

and produces educational material in order to strengthen the legal protections of service members and veterans. This matter is of particular interest to CLMP's Immigration & Deportation Division, which aims to support policies that will allow veterans to lawfully remain in the United States.

The Honorable Gordon Tanner served as the General Counsel of the U.S. Department of the Air Force and Chief Legal Officer and Chief Ethics Official for the Air Force from 2014–2017. Prior to his appointment, he retired from the Senior Executive Service as the Principal Deputy Assistant Secretary of the Air Force for Manpower and Reserve Affairs. He acted for and assisted in executing the responsibilities of the Assistant Secretary in the supervision of manpower, military and civilian personnel, Reserve component affairs, and readiness support for the Department of the Air Force.

SWAN, founded in 2007, is the voice of women in the military. It is a member-driven organization advocating for the individual and collective needs of Servicewomen past, present and future. Today, nearly 2.5 million women have served or are serving in the U.S. military. Even as the country's total veteran population declines, the number of women veterans is growing and is projected to keep increasing for the foreseeable future. These women will become a powerful cohort of leaders in all parts of society. SWAN connects Servicewomen to each other and critical community-based resources; educates policy makers and

governmental leaders on matters affecting women in the military—often in coalition with other veteran, civil rights, and social justice organizations; actively works to affect cultural change, root-out gender bias, and eliminate sexual assault, harassment and discrimination within the military; and works with the legal community to protect the rights of our members.

Amici, and the people they serve and represent, often seek judicial redress regarding military regulations, policies, and actions that adversely affect them. Under the Panel's reasoning, few, if any, of these claims would be justiciable. If upheld, the ruling will have sweeping consequences for Amici, as it will chill, if not eliminate, the ability to seek judicial redress to enforce constitutional rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree wholeheartedly with Plaintiffs' request for en banc review. We submit this brief to underscore how the Panel's decision in this case needlessly muddies this Circuit's case law, and to highlight how it may seriously impair efforts to challenge a wide array of arbitrary and discriminatory military policies.

The Panel's decision abdicated the judiciary's essential role in reviewing administrative policies and protecting the rights of aspiring service members, who have volunteered to serve and protect our country. In concluding that courts are foreclosed from reviewing a Department of Defense ("DoD") policy, the Panel misapplied a prudential doctrine of reviewability, ignored the district court's facts

and findings, and created an intra-circuit conflict regarding the level of harm necessary to find in favor of justiciability. Rehearing en banc is warranted for two reasons.

First, the Panel misapplied the standard in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), by requiring Plaintiffs to identify a "grave injury." This is an extraordinary departure from previous rulings of this Court, which have required that injury be only "not insignificant," and can be satisfied by "potential injury" that is "neither economic nor physical." *Barber v. Widnall*, 78 F.3d 1419, 1423 (9th Cir. 1996). By requiring a heightened showing of injury, the Panel opinion significantly increases the burden on all plaintiffs seeking to challenge military policies.

Second, the Panel opinion misapprehends the injuries at issue here. Amici are well aware of the substantial and long-lasting harms caused by unnecessary and unequal enlistment regulations. For those seeking to serve, policies like the one here dramatically alter military and post-military career prospects, diminish future earnings, and stigmatize those affected. These are real, cognizable injuries that cannot, and should not, be ignored. *See Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) ("[D]iminished . . . opportunity to pursue [Plaintiffs'] chosen professions," particularly "early in their careers," constitutes an irreparable injury). In addition, by making it harder—if not impossible—to challenge

unconstitutional policies, the Panel opinion harms the military itself: discriminatory policies will remain in place and, history shows, lead to decreased morale and thus problems in recruitment and retention. In a time when the military is having trouble meeting recruiting goals, this is untenable.

ARGUMENT

I. The Panel Created a Heightened Standard that Departs from Circuit Precedent and Substantially Impairs Future Challenges to Military Policy.

En banc review is necessary because the Panel applied a heightened standard that is contrary to this Court's prior rulings and threatens to eliminate all future challenges to military policy, regulation, or action.

A. The Panel erred by applying *Mindes* contrary to Circuit precedent.

The Panel erred in applying the second *Mindes* factor in a manner that establishes a heightened pleading standard—"grave injury"—thus creating an intra-circuit split.[2]

[2] In addition to raising the standard to "grave injury" under *Mindes*, the Panel appears to have introduced a new "not far-fetched" level of deference that is at odds with Ninth Circuit precedent. This Court has said that, in applying the *Mindes* factors, "[t]he degree of deference due to factual assertions by the military is proportionate to the need for the application of military experience, judgment, and expertise in evaluating the assertion." *Khalsa v. Weinberger*, 779 F.2d 1393, 1400 n.4 (9th Cir. 1985). Here, the record reveals that the military applied no experience, judgment, or expertise in determining that foreign nationals pose a greater security risk than U.S. nationals. Thus, the Court owes no deference to that determination.

The Fifth Circuit's decision in *Mindes* provides a four-factor test for reviewability of some claims against the military. The second factor asks the court to review "the potential injury to the plaintiffs if review is refused." (Mem. at 3). Previously, this Court has held that such injury need only be "not insignificant." *Barber*, 78 F.3d at 1423. In *Barber*, a retired Air Force pilot sought judicial review of the Secretary of the Air Force's denial of his petition to correct his military record to reflect sole credit for having shot down a plane carrying the architect of the Pearl Harbor attack. In holding the claim was justiciable, the court found the pilot had sufficiently alleged a potentially "not insignificant" injury even though it was "neither economic nor physical." The injury was sufficient, under *Mindes*, based solely upon the pilot's "strong interest in having his military record accurately reflect his participation in an event of deep personal and historic significance." *Barber*, 78 F.3d at 1422–23.

This Court in *Barber* gave no hint, much less a holding, that a plaintiff must allege a "grave injury." Nevertheless, the Panel here departed from this precedent and imposed a heightened, almost insurmountable burden: in concluding that the second *Mindes* factors was not met, the Panel stated that it "identif[ied] no ***grave injury*** that will result if the district court refuses to review" Plaintiffs' claim. (Mem. at 5). But this Circuit has never suggested that the "potential injury" factor under *Mindes* need rise to the level of "grave," or the type of life- or freedom-

threatening injuries that the adjective implies. Nor does the Panel cite any authority for this heightened burden.[3]

Moreover, this Court and lower courts in this Circuit have routinely held that economic injury, like that here, is sufficient to satisfy the *Mindes* injury prong. For example, in *Christoffersen v. Wash. State Nat. Guard*, 855 F.2d 1437 (9th Cir. 1988), the court evaluated a loss of eligibility for benefits, noted the injury was "primarily economic," and concluded nevertheless that it still tipped in plaintiffs' favor. *Id.* at 1443-44. District courts in this Circuit have applied the same reasoning. In *Serv. Women's Action Network v. Mattis*, 320 F. Supp. 3d 1082, 1094 (N.D. Cal. 2018) ("*SWAN*"), the court found a sufficient injury resulted from "being denied assignment to any brigades outside of Fort Bragg and Fort Hood (for the Army) and being subject to segregation on the basis of sex (both Army and Marines)." *Id*. The denial of an assignment, like the unequal delay in accession alleged here, results in diminished career prospects and potential earnings. These impacts alone, under this Circuit's jurisprudence, are sufficient to constitute injury under *Mindes*.

The *SWAN* court also recognized that the potential injury was even more significant when considering all those potentially affected, rather than just the

[3] Even so, Plaintiffs' injuries here are unquestionably "graver" than those that were sufficient in *Barber*. Here, Plaintiffs face delays in pursuing their careers ***at all***, as well as the attendant consequences from that delay, but *Barber* involved merely a records correction.

named plaintiffs. *Id.* Here, the district court applied the same reasoning and recognized that the potential injury was "bolstered by the size of the class represented by Plaintiffs" and that "[c]ommon sense dictates that the Court consider the number of persons affected in determining potential injury." (N.D. Cal. Order, Nov. 16, 2018 at 20). And, as discussed further below, the harm extends to the families of these service members that are, as a result of the Policy, held in limbo between their military and civilian lives. The Panel disregarded this compelling evidence of harm.

En banc review is warranted to correct the Panel's inappropriate creation of a heightened standard, contrary to Circuit precedent.

B. The Panel's "grave injury" standard places an impossibly high burden on future challenges against the military.

If allowed to stand, the "grave injury" standard that the Panel improperly created would threaten the ability of nearly anyone, including Amici and the people they serve, to bring future challenges against the military.

The Panel did not define "grave injury." In the legal context, "grave injury" is typically reserved for catastrophic injuries, such as death, loss of limb, and serious medical conditions or effects on health. *See, e.g.*, *Mendez v. Cty. Of L.A.*, 897 F.3d 1067, 1071-72 (9th Cir. 2018) (using "grave injury" to describe injuries suffered by person shot ten times and who lost "much of his leg"); *Cook v. AVI Casino Enter., Inc.*, 548 F.3d 718, 728 (9th Cir. 2008) (Gould, concurring) (using

"grave injury" to refer to a loss of leg). Even if that is not what the Panel meant, the ordinary meaning of the word "grave" suggests a consequence that is extremely serious or of critical importance.

Under this new, heightened standard, many cases that were previously found justiciable would not pass but may instead be dismissed. In *SWAN*, plaintiffs challenged policies that dictated when and where women service members could begin their specialized combat training after accessing and completing boot camp. 320 F. Supp. 3d at 1086. If not corrected, the *SWAN* case—and others like it—would be dismissed under the Panel's heightened standard.

If left in place, then, the Panel's "grave injury" standard will place an impossibly high burden on future litigants, including Amici and the people they serve—who may wish to challenge military policies and actions that unfairly discriminate and violate the Constitution. Such a radical change in legal standards deserves more than one short paragraph devoid of authority. The full court should review en banc.

II. The Panel Misapprehended Plaintiffs' Injuries.

In addition to misapplying the law, the Panel also failed to recognize the substantial injuries that Plaintiffs will suffer by the inability to correct, or even challenge, discriminatory policies. The Panel dismissed Plaintiffs' injuries in a few conclusory sentences. However, the Amici, who represent and advocate for people

the Policy affects, have the experience and perspective to understand that these injuries are not illusory and should not be dismissed. Review is thus warranted.

Aspiring service members are asked to make a commitment to their country when they enlist. This commitment involves setting aside other career choices, alerting employers that they may be called away at an unknown time in the future, and remaining in limbo while awaiting orders to report to basic training. The process takes time. But extensive delay is both unusual and harmful. It prevents progress in a civilian career, it causes stress and anxiety, and it delays military career progression as well. These injuries are real and substantial, not speculative or *de minimis*.

These harms are not theoretical. An enlistment delay has lasting negative effects on career prospects. One such effect is "loss of designation," where the accession delay causes the enlistee to lose their original career-track designation. LPRs who lose designation may be unable to gain and develop the specialized skills needed to advance in the military. This is precisely what Plaintiffs experienced: their originally designated positions were not available after the Policy caused delay. (N.D. Cal. Order, Nov. 16, 2018 at 8). Plaintiff Kuang's designation changed from personnel specialist ("PS") to "undesignated," placing him on an entirely separate career track with different responsibilities and historically disparate advancement rates. *See* Navy Administrative Policy

("NAVADMIN") 118/18 (May 14, 2018). In the civilian context, a similar reassignment can be an adverse action. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 70–71 (2006) (reassignment to more arduous, less prestigious position could constitute an adverse action).

The loss of designation also negatively affects post-military career prospects. Plaintiff Kuang's initial PS designation is similar to a human resources specialist in the civilian context. The skills he was set to learn would transfer into civilian job prospects in the Human Resource field. As an undesignated Sailor, that is no longer the case.

A delay in any career, military included, also causes real financial harm. The harm is particularly amplified when the delay occurs at the beginning of a career. LPRs who are delayed will advance through the ranks later, will receive pay increases later, and will be eligible for citizenship later. *See* NAVADMIN 118/18 (undesignated Sailors will be eligible for selective bonuses only until after they have been designated into a "rate," or job specialty). Delays could also harm aspiring enlistees who are older. For example, waivers are required for aspiring Marines aged twenty-nine or older. A significant delay could result in ineligibility altogether. *See* Marine Corps Military Personnel Procurement Manual, Volume 2 Enlisted Procurement (June 2004).

These injuries are not isolated. The Policy not only affects numerous service members, but also their families. LPRs have served in our country's armed services since the day it was founded. *See* Muzaffar Chishti, Austin Rose, and Stephen Yale-Loehr, *Immigrants in the Military: Evolving Recruitment Needs Can Accommodate National Security Concerns*. (2019 forthcoming), https://www.migrationpolicy.org/sites/default/files/publications/MPI-Noncitizens-Military-Final.pdf. Some 35,000 non-citizens currently serve, and about 8,000 join each year. *Id.* Given the large numbers of LPRs who serve, and further including their families who are also affected, policies governing enlistment have a broad impact. Those families wait alongside the service members, remain in limbo, and suffer overall lower incomes.

III. The Challenged Policy Harms the Military as Well.

The Policy harms the military as well as aspiring enlistees. Enjoining these harms, as the District Court's preliminary injunction held, does not "interfere[] with military functions." *Khalsa*, 779 F.2d at 1398. DoD has long recognized that "discrimination against persons or groups based on … national origin … is contrary to good order and discipline and is counterproductive to combat readiness and mission accomplishment." DoD Directive 1350.2 §4.2 (Aug. 18, 1995). Throughout its history, the military has exercised great care in the selection, training, and retention of qualified personnel as an integral aspect of military

readiness. Policies that discriminate based on group characteristics, rather than fitness to serve, undermine our national-security interests. These harms went unacknowledged by the Panel but should not be casually brushed aside.

Permitting discrimination based on national origin and immigration status would have a corrosive effect. LPRs have served with distinction throughout our nation's history: more than 20% of all Medal of Honor recipients are immigrants. *See* U.S. Citizenship and Immigration Services, *USCIS Facilities Dedicated to the Memory of Immigrant Medal of Honor Recipients*, https://www.uscis.gov/about-us/find-uscis-office/uscis-facilities-dedicated-memory-immigrant-medal-honor-recipients (last updated Jan. 24, 2014). Immigrants also serve beyond their initial enlistment: according to one study, the attrition rate for noncitizens is more than 10% lower than for citizens, "meaning that noncitizens are more likely to serve in the military for extended periods of time." Chishti, et al., p. 2. A loss in the ability to recruit LPRs will therefore result in diminished military readiness.

This effect is well documented in other contexts. For example, the military's experience with Don't Ask Don't Tell ("DADT")—which prohibited the service by openly lesbian, gay, and bisexual people—found that the discriminatory 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*, Current Psychiatry Rep. 18:56, at p. 2 (online ed. Apr. 16,

2016), http://cir.usc.edu/wp-content/uploads/2016/04/GoldbachCastro-LGBT-Military.pdf. Repeal of DADT "[made] our military and our nation stronger, much stronger." U.S. Dep't of Def. *Remarks by Secretary Hagel at the Lesbian, Gay, Bisexual, Transgender Pride Month Event in the Pentagon Auditorium* (June 25, 2013), http://archive.defense.gov/transcripts/transcript.aspx?transcriptid=5262.

DADT also demonstrated that the decreased morale caused by discriminatory policies damaged the ability to recruit and retain qualified candidates. *See* Gary J. Gates, The Williams Inst., *Effects of "Don't Ask, Don't Tell" on Retention Among Lesbian, Gay and Bisexual Military Personnel* (2007), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-EffectsOfDontAskDontTellOnRetention-Mar-2007.pdf. But the military today is already facing problems in recruiting and retention. *See* Meghan Myers, *The Army Is Supposed to Be Growing, But This Year, It Didn't At All*, Army Times (Sept. 21, 2018), https://www.armytimes.com/news/your-army/2018/09/21/the-army-is-supposed-to-be-growing-but-this-year-it-didnt-at-all/. Immigrants fill the gap, but discriminatory policies prevent their enlistment and also deter them from even making the attempt.

LPR service members further provide valuable, often unique, linguistic diversity and volunteer at a rate disproportionate to their citizen counterparts. As the district court noted, "statutory eligibility for naturalization is an important

benefit of military service," (N.D. Cal. Order, Nov. 16, 2018 at 53), and is often used as a recruiting tool. The United States has relied exclusively on an all-volunteer military since the Vietnam War, and the ability to recruit, enlist, and retain qualified, diverse service members is paramount to that mission.

Delays in accession and declining recruitment will result in fewer LPRs advancing to senior-enlisted positions, creating a less diverse military leadership. Ongoing concern about the diversity in the military's leadership recently prompted Congress to establish what became the Military Leadership Diversity Commission ("MLDC"), an independent body comprised of current and former military officers, senior enlisted personnel and civilians. *From Representation to Inclusion: Diversity Leadership for the 21st-Century Military*, *Final Report xvi* (2011), https://www.hsdl.org/?view&did=11390. As the MLDC reported, "[i]ncluding a broad range of men and women from different backgrounds can increase the likelihood that the U.S. military 'knows the enemy' and is better able to work with international partners by adding to the cultural and linguistic knowledge base from which U.S. forces may draw." *Id.* at 17. *See also* Dep't of Defense, Defense Language Transformation Roadmap 3 (Jan. 2005) http://www.defense.gov/news/mar2005/d20050330roadmap.pdf (describing the need for expertise on "less-commonly-taught-languages" in order to sustain coalitions, pursue regional stability and conduct multi-national missions.).

IV. Holding the Policy "In Abeyance" Does Not Diminish the Need for En Banc Review.

The DoD's July 30, 2019 "Expedited Screening Protocol" (ESP) purports to hold the challenged Policy "in abeyance" for a six-month review. But this does not correct the Panel's errors, discussed above, that would long outlast the policy review. Only en banc review can do that. Further, the ESP highlights the arbitrariness of DoD's decision making. When combined with the Panel's nonjusticiability ruling, the ESP has a broad chilling effect on LPR enlistment. LPRs who wish to enlist face the uncertainty of whether a future policy—now completely insulated from judicial review—will return them to equal footing with their citizen counterparts or extend their wait time for months, years, or longer.

V. Designating the Opinion "Non-Precedential" Does Not Diminish the Need for En Banc Review.

The Panel opinion should be reviewed en banc despite its non-precedential designation. District courts regularly cite such opinions, and courts—including this Court—and litigants regularly rely upon them for their persuasive value. *See, e.g.*, *Rounds v. Comm'r Soc. Sec. Admin.*, 795 F.3d 1177, 1185 (9th Cir. 2015) (finding "persuasive" an unpublished panel opinion that "rejected a similar argument"); *Uche-Uwakwe v. Shinseki*, 972 F. Supp. 2d 1159, 1189 n.14 (C.D. Cal. 2013) (citing two "unpublished Ninth Circuit cases as persuasive authority"). . In fact, the DoD cited unpublished Ninth Circuit opinions in its briefing below.

(App. Reply Br. at 26–27). The Circuit's rules also prohibit courts from restricting the citation of such opinions. Ninth Circuit Rule 36.3. As a result, this Circuit has a clear interest in ensuring that even its non-precedential opinions are correct and do not create intra-circuit conflicts.

CONCLUSION

The Panel here erred in its application of the *Mindes* analysis and, as a result, issued an opinion that creates an intra-circuit split, ignores the serious harm done to Plaintiffs and the military overall, and insulates DoD policies from any meaningful review. Amici strongly encourage the Circuit to reconsider the Panel's ruling and grant Plaintiffs' motion for rehearing en banc.

Dated: August 26, 2019

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 29(b)(4) and 9th Cir. R. 32-1(e), the attached brief is double spaced, uses a proportionately spaced typeface of 14 points or more, and contains a total of 3746 words, excluding the items exempted by Fed. R. App. P. 32(f), based on the word count program in Microsoft Word.

Dated: August 26, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing using the Court's CM/ECF filing system. Counsel registered with the CM/ECF system were served by operation of the Court's CM/ECF system per Fed. R. App. P. 25 and 9th Cir. R. 25-5(f)(1) on August 26, 2019.

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