The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

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

Defendants.

Case No. 2:17-cv-01297-MJP

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: February 16, 2018

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

INTRODUCTION

President Trump's unilateral decision to strip transgender people of the honor of military service and the means to care for their medical needs was unconstitutional from the moment it was announced to the world on July 26, 2017. In the months since that time, the rest of the federal government has scrambled to construct a defense of that decision—from the White House staff saddled with transforming three 140-character tweets into a Presidential Memorandum, to the blindsided Department of Defense officials dispatched to conduct a "study" of President Trump's decision, to the Department of Justice lawyers tasked with stretching the powers of the Presidency to justify an unprecedented betrayal of those willing to lay down their lives for our country. But no amount of reverse engineering by this vast array of federal officials can create the impossible: the existence of an adequate justification for President Trump's decision *at the time the decision was actually made*. For that simple reason, Plaintiffs are entitled to summary judgment.

This deficiency in the government's defense became especially pronounced after Plaintiffs moved for a preliminary injunction. In response, Defendants mounted no substantive defense of President Trump's policy (the "Ban"), because the factual support they sought to tender was still being conceived through the "study" mandated by President Trump. Against this backdrop, this Court concluded that the Ban was unsupported by any adequate justification; indeed, it also found that the proffered justifications were contradicted by the extant evidence, including the military's own comprehensive review. Defendants cannot rectify this deficiency with *post hoc* factual support that could not have actually motivated President Trump's decision because it did not exist when the decision was made. Instead, the Ban must be measured against the state of affairs that existed on July 26, 2017—and this Court has already confirmed that the Ban fails any level of constitutional scrutiny when examined against that record.

Based on the argument and evidence presented in support of Plaintiffs' preliminary injunction motion, and submitted again here, this Court has everything it needs to grant summary judgment to Plaintiffs, declaring the Ban unconstitutional and permanently enjoining it from ever being implemented.

STATEMENT OF UNDISPUTED FACTS[1]

I. Comprehensive Review Leading to Open Military Service by Transgender People

Transgender people have always served in the military, but until recently, they served in silence. In 2010, Congress repealed the so-called "Don't Ask, Don't Tell" statute preventing openly gay, lesbian, and bisexual people from serving the military, which raised questions about the military's policy on service by transgender people. Decl. of Eric Fanning ¶ 11. Particularly among commanders in the field, there was increasing awareness that there were capable and experienced transgender service members in every branch of the military. *Id.* Starting in 2014, the military thus took steps to evaluate its policy concerning transgender service members. Decl. of Deborah Lee James ¶ 7.

First, in 2014, the Department of Defense (DoD) eliminated a then-existing categorical ban on service by transgender people, thereby enabling each branch of the military to reassess its own service-specific ban. *Id.* ¶ 8. As of August 2014, there was thus "no longer a department-wide position on whether transgender persons should be disqualified for retention." *Id.*

Second, in July 2015, former Secretary of Defense Ashton Carter ordered a working group of senior DoD personnel to identify practical issues related to transgender Americans serving openly and to develop a plan to address those issues and maximize military readiness ("Working Group"). Decl. of Brad Carson ¶ 8; Decl. of Michael Mullen ¶ 6. The Working Group included roughly twenty-five members, and each branch of military service was represented by a senior uniformed officer, a senior civilian official, and various staff members. Carson Decl. ¶ 9. When the Working Group was in operation, its proceedings were reported to and reviewed by upper level DoD personnel at meetings attended by the Joint Chiefs of Staff, the Service Secretaries, and the Secretary of Defense. Decl. of Raymond Mabus ¶ 20.

Among other steps, the Working Group commissioned the RAND Corporation, a nonprofit research institution that provides research and analysis to the Armed Services, to study the impact of allowing transgender people to serve openly. Carson Decl. ¶ 11. In particular,

[1] The record here includes substantially similar declarations as those submitted in support of Plaintiffs' preliminary injunction motion, supplemented with relevant factual updates as appropriate, as well as declarations from former Secretary of the Army Eric Fanning and former Secretary of the Air Force Deborah Lee James.

RAND was instructed to study (1) the health care needs of the transgender population and the likely costs of providing health care coverage for transition-related treatments; (2) the potential readiness implications of allowing transgender service members to serve openly; and (3) the experiences of foreign militaries that permit transgender service members to serve openly. Mabus Decl., Ex. B (hereinafter, "RAND Report") at iii.

To answer these questions, RAND examined, among other data, transgender population prevalence estimates, transition-related care usage data, care utilization rates from foreign countries, rates of gender dysphoria in the United States veteran population, and the likely monetary costs and deployment-related effects of transition-related health care. *Id.* at 12, 13, 29, 33-42. The report also examined open service by transgender people in the Australian, Canadian, Israeli, and United Kingdom militaries, *id.* at 51-61, and ultimately returned 112 pages of analysis and findings.

This extensive endeavor found "no evidence" that allowing transgender people to serve openly would negatively impact unit cohesion, operational effectiveness, or readiness. *Id.* at xiii, 39-47. It also concluded that coverage for transition-related medical care would represent an "exceedingly small" portion of DoD's overall health care expenditure. *Id.* at xi. Conversely, the report affirmatively identified "significant costs" if transgender troops were separated through a ban on open service, as the military would lose skilled and qualified personnel, requiring expensive and time-consuming training to fill vacancies in units, Carson Decl. ¶ 21; Mabus Decl. ¶ 18, would have to engage in "costly administrative processes" to effect their discharge, and would risk "declining productivity, and other negative outcomes due to lack of treatment for gender identity–related issues," RAND Report at 46.

In addition to considering the analysis of the RAND Report, the Working Group also considered the comprehensive advice of medical experts, personnel experts, and readiness experts, as well as health insurance companies, civilian employers, and commanders whose units included transgender service members. Carson Decl. ¶ 10. The goal of the Working Group was to be as comprehensive as possible and, to that end, it considered "all available" literature and evidence. James Decl. ¶ 11.

As noted, the goal of the Working Group was to identify and address all relevant issues relating to service by openly transgender people. Carson Decl. ¶ 22. For example, the Working Group considered the psychological health and stability of transgender people. It confirmed that being transgender—that is, having a gender identity different from one's birth-assigned sex—is not a psychological disorder. *Id.* ¶ 23; *accord* Decl. of George Brown ¶ 24. While some transgender people experience gender dysphoria, which is clinically significant distress associated with the incongruence between one's gender identity and birth-assigned sex, that condition can be fully resolved with appropriate medical care. Carson Decl. ¶ 23; Brown Decl. ¶ 31. The Working Group also examined the issue of deployability, and it determined that service members with periods of limited deployability due to transition-related care should not be treated differently from other service members who are temporarily non-deployable due to other medical conditions. Carson Decl. ¶ 22; Mabus Decl. ¶ 15; James Decl. ¶ 18; Fanning Decl. ¶ 18.

By the conclusion of its discussion and analysis, all members of the Working Group (including senior uniformed personnel) unanimously agreed that transgender people should be permitted to serve openly. Mabus Decl. ¶ 21; James Decl. ¶ 22; Fanning Decl. ¶ 25; Carson Decl. ¶ 27. The Working Group concluded that banning service by transgender individuals would harm the military by excluding qualified individuals based on a characteristic unrelated to fitness to serve and lead to the loss of highly trained and experienced service members. Carson Decl. ¶¶ 25-26; Mabus Decl. ¶ 18; James Decl. ¶¶ 20-23; Fanning Decl. ¶¶ 21-22.

Based on the recommendations of the Working Group, Secretary Carter issued a formal directive on June 30, 2016 setting forth the policy "that service in the United States military should be open to all who can meet the rigorous standards for military service and readiness" and that "transgender individuals shall be allowed to serve in the military." Mabus Decl., Ex. C at 2. The policy was designed to be implemented over the course of a year, with accessions (i.e., entry into the military) of transgender troops to begin on July 1, 2017, which was subsequently extended by six months to January 1, 2018. *Id.*, Ex. C, Attachment at 1; Decl. of Derek Newman, Ex. 4. Each of the military services took steps to begin implementing the policy. Mabus Decl. ¶ 25; James Decl. ¶ 27; Fanning Decl. ¶ 41.

For more than a year after June 2016, numerous service members disclosed their transgender status to the military in reliance upon DoD guidance that they would not be discharged on that basis. Mabus Decl. ¶ 37. They risked their jobs, housing, and progress toward retirement benefits in reliance upon DoD's assurances. *Id.* ¶ 49.

II. President Trump's Ban on Military Service by Transgender People

On July 26, 2017, President Trump unexpectedly reversed military policy with respect to service by transgender people. President Trump announced through a series of tweets that he would "not accept or allow" transgender people "to serve in any capacity in the U.S. Military" and expressed that the military "cannot be burdened with the tremendous medical costs and disruption that transgender [people] in the military would entail." Newman Decl., Ex. 1. On August 25, 2017, he issued a Presidential Memorandum implementing this discriminatory policy (together with tweets, "the Ban"). *Id.*, Ex. 2.

The Ban includes three components. First, in a complete reversal of existing military policy, the Ban provides for the discharge of openly transgender service members. *Id.*, Ex. 2 (directing the Secretaries of Defense and Homeland Security to "return" to the former policy of excluding transgender service members). Second, the Ban indefinitely bars the accession of transgender individuals into the military. *Id.* While the government has suggested in prior filings that the accessions ban could be subject to waiver, *see* Dkt. No. 69 at 7, these waivers have never been granted to the knowledge of those familiar with the process. Brown Decl. ¶ 40; Decl. of Raymond Mabus, Dkt. No. 86, ¶ 10. Third, the Ban singles out the health care needs of transgender service members for adverse, discriminatory treatment. Newman Decl., Ex. 2 (prohibiting the military from "fund[ing] sex reassignment surgical procedures for military personnel," subject to limited exceptions).

In contrast to the years of work and process that led to the military's prior inclusive policy, there is no indication, much less evidence, that President Trump's July 26, 2017 announcement was the product of any meaningful factual inquiry, deliberative review, or considered military judgment. Mabus Decl. ¶¶ 40, 47-48, 52; James Decl. ¶ 38; Fanning Decl. ¶ 55; *see also* Newman Decl., Exs. 6-8. As Secretary Mabus explains, "[e]ven individuals who had

reservations at the time the Working Group was announced trusted in the process and believed it was a fair and deliberative process that met the high standards of the military." Mabus Decl. ¶ 48. However, President Trump's "abrupt reversal leaves the impression among service members that military decision making is instead arbitrary and subject to political whims." *Id.*

Upon receipt of the Presidential Memorandum, the Department of Defense stated that it "will carry out the president's direction" and that, "[a]s directed, [it] will develop a study and implementation plan." Newman Decl., Ex 2. The unequivocal purpose of the plan is "to implement the policy and directives in the Presidential Memorandum." *Id.*, Ex. 3.

III. Plaintiffs

Plaintiffs include six transgender individuals who are currently serving in the military, three transgender individuals who wish to join the military, and three organizations whose members are injured by the Ban.

The Plaintiffs who are currently serving bring a wealth of talent and experience to the military. They have fought terrorism, served in far-flung locations around the world, and promoted stability in strife-riven regions. Decl. of Terece Lewis ¶ 5; Decl. of Lindsey Muller ¶ 9; Decl. of Phillip Stephens ¶ 7. They perform a wide range of roles vital to the military, including intelligence analysis, aviation, mechanical work, and servicing of information systems. Decl. of Cathrine Schmid Decl. ¶ 7; Decl. of Megan Winters ¶ 7; Muller Decl. ¶ 7; Lewis Decl. ¶ 6; Stephens Decl. ¶ 7. They have collectively served our country for decades, and each represents a significant investment of public resources, including specialized training. Muller Decl. ¶ 11; Winters Decl. ¶ 7; Stephens Decl. ¶ 7. The Plaintiffs who wish to join the military aspire to perform social work, teach survival skills, and dispose of explosive ordnance. Decl. of Ryan Karnoski ¶ 4; Decl. of D.L. ¶ 4; Decl. of Conner Callahan ¶ 5. All the individual Plaintiffs are united by their common desire to serve our country, putting the needs of others before their own and enduring the dangers and sacrifices required by military life.

The fact that the individual Plaintiffs are transgender has no bearing on their individual fitness to serve. To the contrary, the military has bestowed honors on a number of them in recognition of their exemplary service. Schmid Decl. ¶ 15; Muller Decl. ¶ 12; Lewis Decl. ¶ 7.

Many also serve as officers, and one has more than a thousand service members under her command. Muller Decl. ¶ 7; Lewis Decl. ¶ 3; Winters Decl. ¶ 3; Stephens Decl. ¶ 3. The loss of their skill, talent, and experience would leave the military with gaping, costly-to-fill holes. James Decl. ¶¶ 40-41; Fanning Decl. ¶ 57; Mabus Decl. ¶ 45; Mullen Decl. ¶ 8; Carson ¶¶ 31-32. Furthermore, in working with transgender service members to develop their transition plans, the military's own medical staff have acknowledged that Plaintiffs are fit to serve. Lewis Decl. ¶ 16; Stephens Decl. ¶ 15; Winters Decl. ¶ 30; Muller Decl. ¶ 37; *accord* Brown Decl. ¶ 55.

Plaintiffs relied on the government's assurances that they would be able to serve openly. Many took steps to transition only after the government lifted the ban on open service. Lewis Decl. ¶ 11; Stephens Decl. ¶ 12; Winters Decl. ¶ 12. One began hormone therapy on the day before President Trump announced the Ban, long after the military had implemented the framework for open service. Lewis Decl. ¶ 13.

Plaintiffs have worked closely with their chain of command during their transition, as required by military policy, thereby ensuring that the needs of the military continue to be met. Schmid Decl. ¶ 13; Muller Decl. ¶ 37; Winters Decl. ¶ 16; Lewis Decl. ¶ 15; Stephens Decl. ¶ 18. Transitioning has not only helped transgender service members excel in their own performance by facilitating their health, but it has also allowed them to forge stronger relationships with other service members, thereby fostering greater trust and unit cohesion. Lewis Decl. ¶ 25; Schmid Decl. ¶¶ 16-17; Stephens Decl. ¶ 19; Muller Decl. ¶ 24 Stephens Decl. ¶ 33.

The individual Plaintiffs, as well as members of Plaintiffs Human Rights Campaign, American Military Partners Association, and Gender Justice League, suffer a variety of harms on account of the Ban. Decl. of Sarah Warbelow; Decl. of Ashley Broadway; Decl. of Danni Askini. As this Court previously found when granting a preliminary injunction, the Ban denies them "the opportunity to serve in the military on the same terms as other service members, deprives them of dignity, and subjects them to stigmatization," betraying their commitment to service of their fellow Americans. Dkt. No. 103 (hereafter, "Order") at 8. The Ban has also created "a credible threat of discharge," *id.* at 7, as illustrated by the separation proceedings threatened against

Plaintiff Winters prior to this Court's preliminary injunction. Winters Decl. ¶¶ 23-24. By threatening Plaintiffs' careers, the Ban has also threatened the resources they use to sustain their families. Lewis Decl. ¶¶ 8, 22 (describing child with serious medical needs whose well-being hinges on family health coverage provided to service members); *accord* Broadway Decl. ¶ 9. Furthermore, in cutting off health services that can be critical to transgender people, the Ban has singled out their medical needs as less important and deserving of care than those of other service members. Order at 8; Decl. of Jane Doe ¶¶ 12-13; Stephens Decl. ¶ 14; Lewis Decl. ¶ 17; Winters Decl. ¶ 32; Schmid Decl. ¶ 11.

The Ban has likewise, but for preliminary injunctions issued by courts, closed the military to transgender accessions. "Plaintiffs Karnoski, D.L, and Callahan . . . face a credible threat of being denied opportunities to compete for accession on equal footing with non-transgender individuals."[2] Order at 7-8. Indeed, the Ban also closes doors even for those already in military ranks. Schmid Decl. ¶¶ 28-32 (describing impact of accession ban on warrant officer application); *see also* Decl. of Timothy McCracken, Dkt. No. 70, ¶ 70 (admitting that Plaintiff Schmid's application was put "on hold . . . [i]n accordance with the Secretary's Interim Guidance concerning accessions").

Finally, by threatening Plaintiffs' ability to join or stay in the military, the Ban has also chilled Plaintiffs' freedom of expression and intruded upon their liberty to live in accordance with their gender identity. Order at 8; Doe Decl. ¶¶ 3-17.

LEGAL STANDARD

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). By its terms, "this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported

[2] Following this Court's preliminary injunction, Plaintiff Callahan has taken steps to begin the enlistment process. Callahan Decl. ¶¶ 15-19. Based on the accessions criteria currently in effect, Plaintiff D.L. intends to apply to the military 18 months after the completion of medical treatment associated with his gender transition. D.L. Decl. ¶ 5. Plaintiff Karnoski has a pending application to graduate school, the outcome of which affects whether he would either join the Reserves or seek commission for active duty, and he also desires reasonable certainty before joining the military that he will not thereafter be discharged because of his transgender status, which is dependent upon litigation developments beyond the preliminary injunction. Karnoski Decl. ¶¶ 22-23.

motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). Instead, "the requirement is that there be no *genuine* issue of *material* fact." *Id.* To be material, a dispute must be substantive enough to "affect the outcome of the suit under the governing law." *Id.* at 248. "[I]rrelevant or unnecessary" disputes do not prevent granting the motion, *id.*, and "[a] party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda," *S.A. Empresa v. Walter Kidde & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982).

ARGUMENT

This Court has already ruled on the central issues in this case: that the Ban requires heightened scrutiny because it discriminates against transgender people, that the Ban intrudes on Plaintiffs' liberty to live in accordance with their gender identity, and that the Ban imposes a content-based restriction on speech. Order at 15-20. As this Court explained, Plaintiffs "raise purely legal issues (*i.e.*, whether the Presidential Memorandum violates their constitutional rights)," *id.* at 12, and those issues are ripe for resolution through summary judgment.

This Court also determined that Defendants failed to meet their burden of justifying the Ban's constitutional intrusions, because "all of the reasons proffered by the President for excluding transgender individuals from the military [are] not merely unsupported, but [are] actually *contradicted* by the studies, conclusions, and judgment of the military itself." *Id.* at 16 (quoting *Doe v. Trump* ("*Doe*"), -- F. Supp. 3d --, 2017 WL 4873042, at *30 (D.D.C. 2017). Accordingly, when President Trump announced the Ban on July 26, 2017, there is no genuine dispute that he lacked the requisite support to justify his sweeping decision to bar transgender people from military service. Nothing manufactured by the government after-the-fact can change that reality.

Plaintiffs have assembled an extensive record confirming what the military has already learned throughout history, time and again: maintaining readiness and upholding nondiscrimination are not mutually exclusive but, rather, go hand-in-hand. The Ban's presumptive exclusion of an entire class of people based on their gender identity deprives the military of qualified, skilled, and talented individuals. That exclusion is also profoundly damaging to those directly affected—not only threatening their livelihoods and their ability to

care for themselves, but also denigrating their value as members of society worthy of equal dignity and respect. Because Defendants have not justified, and cannot justify, those harms, this Court should grant summary judgment to Plaintiffs, issue declaratory relief holding the Ban unconstitutional, and permanently enjoin Defendants from ever implementing any aspect of it.

I. The Ban's Discrimination Against Transgender People Violates Equal Protection.

Plaintiffs have shown that the Ban violates their basic right to equal protection under the law. This Court has already held that the Ban is subject to intermediate scrutiny, at a minimum, because it discriminates based on sex. In addition, because discrimination against transgender people exhibits all the indicia of a suspect classification, the Ban should also be subject to strict scrutiny. But under any level of scrutiny, including rational basis review, the Ban is bereft of any constitutionally adequate justification. Accordingly, Defendants also cannot meet their burden of showing that the Ban substantially furthers an important government interest under intermediate scrutiny, nor that it is narrowly tailored to any compelling interest under strict scrutiny.

A. The Ban Requires Heightened Scrutiny, Both Because It Discriminates Based on Sex and Because It Employs a Suspect Classification.

Laws are subject to heightened judicial scrutiny when they classify or discriminate among individuals based on presumptively illegitimate lines. For example, "[d]iscriminations that burden some despised or politically powerless groups are so likely to reflect antipathy against those groups that the classifications . . . must be strictly scrutinized." *Watkins v. Army*, 875 F.2d 699, 712 n.4 (9th Cir. 1989) (Norris, J., concurring) (analyzing sexual orientation discrimination as a suspect classification). "Such groups are generally termed 'suspect classes.'" *Id.* Similarly, certain other groups with a "history of past discrimination" are "entitle[d] . . . to intermediate scrutiny" and are "termed 'quasi-suspect' classes" under equal protection doctrine. *Id.* "When conducting an equal protection analysis," courts thus first ask whether a "legislative or administrative classification at issue burdens a suspect or quasi-suspect class." *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001) (internal quotation marks omitted).

Sex Discrimination. Here, the Court correctly held that the Ban discriminates on the basis of sex, a quasi-suspect classification, and is therefore subject to intermediate scrutiny at a

minimum. Order at 15; *see also United States v. Virginia* ("*VMI*"), 518 U.S. 515, 532-34 (1996) (requiring the government to provide an "exceedingly persuasive justification" for the exclusion of women from the Virginia Military Institute); *Ball*, 254 F.3d at 823 (recognizing that sex discrimination constitutes a quasi-suspect classification). The reason for that is straightforward: discrimination against transgender people inherently turns on sex-based considerations. *See Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (holding that discrimination motivated by an individual's gender identity or perceived gender nonconformity is a form of gender discrimination); *Stockman v. Trump*, No. EDCV 17-1799 JGB (KKx) (C.D. Cal. Dec. 22, 2017) (granting preliminary injunction against Ban and recognizing that "discrimination on the basis of one's transgender status is equivalent to sex-based discrimination");[3] *accord Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (canvassing authority that discrimination against transgender people constitutes sex-based discrimination); Mabus Decl., Ex. C, Attachment at 2 (DoD admitting that discrimination against individuals "based on gender identity is a form of sex discrimination"). It is impossible to take "gender" out of discrimination against trans*gender* people.

Suspect Classification. Furthermore, discrimination against transgender people also independently requires strict scrutiny. *See Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2014) ("discrimination based on transgender status independently qualifies as a suspect classification"). Strict scrutiny is warranted where the government targets a class that (1) has been "historically subjected to discrimination," (2) has a defining characteristic bearing no "relation to ability to perform or contribute to society," (3) has "obvious, immutable, or distinguishing characteristics," and (4) is "a minority or politically powerless." *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd on other grounds*, 133 S. Ct. 2675 (2013) (internal quotation marks omitted). The first two considerations alone can be dispositive. *See Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012).

All of these indicia are present in the case of government discrimination against transgender people. First, there has been a long and ugly history of discrimination against

[3] *Available at* http://www.nclrights.org/wp-content/uploads/2017/08/CA-Order-Trans-Ban.pdf/.

transgender people, which remains pervasive to this day. "As a class, transgender individuals have suffered, and continue to suffer, severe persecution and discrimination." *Doe*, 2017 WL 4873042, at *27. Transgender people experience "alarming rates" of harassment and physical violence relative to the general population. *See* Newman Decl., Ex. 5. It is "common-sense knowledge that transgender individuals face hostility and discrimination in our society." *Brocksmith v. United States*, 99 A.3d 690, 698 (D.C. 2014); *see also Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015). "There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity." *Whitaker*, 858 F.3d at 1051.

Second, this longstanding discrimination is unrelated to transgender people's ability to contribute to society. *See Doe*, 2017 WL 4873042, at *27 (noting the absence of any "argument or evidence suggesting that being transgender in any way limits one's ability to contribute to society"); *Adkins*, 143 F. Supp. 3d at 139 ("The Court is not aware of any data or argument suggesting that a transgender person, simply by virtue of transgender status, is any less productive than any other member of society."); Brown Decl. ¶¶ 86-89. Because transgender people satisfy the two considerations most important to the suspect nature of a classification, government discrimination against transgender people should be subject to strict scrutiny.

While nothing more is needed, the third and fourth considerations militating in favor of strict scrutiny are present here as well. "Transgender individuals have immutable and distinguishing characteristics that make them a discernable class." *Doe*, 2017 WL 4873042, at *27; *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) ("as a class they exhibit immutable or distinguishing characteristics that define them as a discrete group"). As evidenced by Plaintiffs' expert testimony, gender identity is recognized as an immutable characteristic. Brown Decl. ¶¶ 19-29; *see also Norsworthy*, 87 F. Supp. 3d at 1119 n.8 (gender identity "equally immutable" as sexual orientation).

Finally, transgender people are also relatively politically powerless. *Doe*, 2017 WL 4873042, at *27 ("transgender people as a group represent a very small subset of society lacking the sort of political power other groups might harness to protect themselves from

discrimination"); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) ("as a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings, transgender people are a politically powerless minority group"); *Adkins*, 143 F. Supp. 3d at 140 ("[T]ransgender people lack the political strength to protect themselves."). Because discrimination against transgender people rings every alarm bell alerting courts to a suspect classification, the Ban should be subject to strict scrutiny.

Import of Heightened Scrutiny. The application of any form of heightened scrutiny, regardless of whether strict or intermediate, informs several aspects of the equal protection analysis. First, the government bears the burden of justifying the discrimination at issue; it is not the plaintiffs' burden to demonstrate that the challenged action is unconstitutional. As the Supreme Court has explained, "[t]he burden of justification is demanding and it rests entirely on the State." *VMI*, 518 U.S. at 533; *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980) ("The burden . . . is on those defending the discrimination to make out the claimed justification."). The burden is allocated to the government because discrimination employing a suspect or quasi-suspect classification comes with "a strong presumption" of invalidity. *VMI*, 518 U.S. at 332 (internal quotation marks omitted). Under intermediate scrutiny, the government's burden is to show that the challenged action bears a substantial relationship to important government interests, whereas under strict scrutiny, the government must show that the challenged action is narrowly tailored to compelling interests.

Second, under heightened scrutiny, the government is limited to the actual and "genuine" justifications that motivated its action at the time; it cannot rely upon hypothetical or *post hoc* justifications conceived after the fact. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1696-97 (2017); *VMI*, 518 U.S. at 533 ("The justification must be genuine, not hypothesized or invented post hoc in response to litigation."); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481-82 (9th Cir. 2014) (holding, under heightened scrutiny, that courts must scrutinize the "actual purposes" at the time the discrimination was adopted rather than "hypothetical justifications"); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) ("this test requires a

'genuine' justification"). In other words, the government cannot rely upon "rationalizations for actions in fact differently grounded" at the relevant time. *VMI*, 518 U.S. at 536.

Third, heightened scrutiny requires that the government "justify the harm imposed." *SmithKline Beecham*, 740 F.3d at 482 (observing that "words like *harm* or *injury* rarely appear" in cases applying ordinary rational basis review but repeatedly appear in case law analyzing sexual orientation discrimination, which requires heightened scrutiny). In evaluating the government's proffered justification, courts must also take into account the "resulting injury and indignity" inflicted by the government's discrimination, including "the imposition of a second-class status," which is "itself a harm of great constitutional significance." *Id.* The gravity of the irreparable harms at stake here supported this Court's issuance of a preliminary injunction.

B. The Government Lacks Any Justification for the Sweeping Exclusion of Transgender People from Military Service and the Deprivation of Medically Necessary Care.

Under any level of scrutiny, there is no constitutionally adequate justification for the Ban. Defendants "fail to show that the policy prohibiting transgender individuals from serving openly is related to the achievement of" their alleged governmental interests. Order at 16. As this Court recognized, the Ban is unsupported by even a rational basis, let alone the exceedingly persuasive justification required under intermediate scrutiny. Order at 18 n.2; *cf. Stone v. Trump*, -- F. Supp. 3d --, 2017 WL 5589122, at *16 (D. Md. 2017) (holding that the Ban is "unlikely to survive a rational review" because "[t]he lack of any justification for the abrupt policy change, combined with the discriminatory impact to a group of our military service members who have served our country capably and honorably, cannot possibly constitute a legitimate governmental interest"). The D.C. Circuit similarly found that the Ban was likely unconstitutional because of its sheer breadth; the unusual and abrupt circumstances of its announcement; the fact that the reasons cited for the Ban were unsupported by any facts; and the recent rejection by the military of those cited reasons. *Doe 1 v. Trump*, No. 17-5267, 2017 WL 6553389, at *1 (D.C. Cir. Dec. 22, 2017).

As discussed below, the government offers three justifications for the Ban: military effectiveness, unit cohesion, and cost. Newman Decl., Ex. 2. However, "all of the reasons proffered by the President for excluding transgender individuals from the military [are] not

merely unsupported, but [are] actually *contradicted* by the studies, conclusions, and judgment of the military itself." Order at 16 (quoting *Doe*, 2017 WL 4873042, at *30 (emphasis added)). The thorough review and analysis previously conducted by the military belies each and every one of the President's proffered reasons for treating transgender people differently than others capable of military service. *See* Mabus Decl. ¶ 40 ("President Trump's stated rationales for reversing the policy . . . have no basis in fact and are refuted by the comprehensive analysis of relevant data and information that was carefully, thoroughly, and deliberately conducted by the Working Group."); James Decl. ¶¶ 11, 38 (Working Group considered "all available" evidence); Fanning Decl. ¶ 55.

The Ban is a policy in search of a justification. "This would be a different case," as the district court in *Doe* explained, if President Trump had *first* undertaken a study of military policy "and then decided that banning all transgender individuals from serving in the military was beneficial to the various military objectives cited." 2017 WL 4873042, at *32. But "[t]he Court can only assess Plaintiffs' equal protection claim based on the facts before it," and "it appears that the rights of a class of individuals were summarily and abruptly revoked for reasons contrary to the only then-available studies." *Id.* Indeed, "Defendants themselves highlight the absence of any prior studies or evaluations supporting the proffered justifications by arguing that they must *now* conduct studies regarding transgender military service before they can adequately defend the President's decision." *Id.* at *29.

Because the Ban was adopted without any indication of "considered reason or deliberation," this Court also correctly held that the government's attempt to invoke military deference cannot shield the Ban from constitutional scrutiny or invalidation. Order at 17-18; *cf. Rostker v. Goldberg*, 453 U.S. 57, 72 (1981) (recognizing that deference in military affairs would not be warranted for acts undertaken "reflexively and not for any considered reason") (internal quotation marks omitted).

1. Barring Qualified Individuals From the Military Because They Are Transgender Does Not Further Military Effectiveness.

First, there is no rational connection between the exclusion of transgender service members and military effectiveness. Instead, as this Court recognized, "[n]ot only did the DoD previously conclude that allowing transgender individuals to serve openly would not impact military effectiveness and readiness," it "concluded that *prohibiting* open service would have negative impacts including loss of qualified personnel, erosion of unit cohesion, and erosion of trust in command." Order at 16.

Like all service members, transgender people who wish to serve must already "meet the rigorous standards for military service and readiness." Mabus Decl., Ex. C. The policy that permitted transgender people to serve openly subjected them "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." *Id.* Accordingly, the Ban excludes individuals from serving merely because of their gender identity, despite being otherwise qualified to serve. Turning away or discharging otherwise qualified individuals from service reduces the pool of talent from which the military can draw to support an all-volunteer force. Mabus Decl. ¶ 45; Fanning Decl. ¶ 57; James Decl. ¶¶ 40-41. This arbitrary exclusion of individuals based on a characteristic with no relevance to their fitness to serve damages the military's interests. Carson Decl. ¶¶ 17, 26; Mabus Decl. ¶ 14; James Decl. ¶¶ 40-41.

The decades of honorable service that the Plaintiffs have collectively devoted to the military illustrate the invaluable contributions of transgender people to our collective defense. Indeed, many of the Plaintiffs are highly decorated as a result of this service. For example, in her thirteen years of service, Staff Sergeant Schmid has earned three Commendation Medals and three Achievement Medals. Schmid Decl. ¶ 15. Petty Officer Lewis has earned a dozen medals for a wide variety of achievements. Lewis Decl. ¶ 7. Although President Trump has now publicly branded them as "burden[s]" and "disruption[s]" within the military, Newman Decl., Ex. 1, their records of service indisputably tell a different story. The military would suffer "an immediate negative impact on readiness" by separating qualified transgender service members, who serve at

all levels. Mabus Decl. ¶¶ 18, 45; RAND Report at 46. Barring transgender people from accession would also harm readiness by depriving the military of future talent.

There is no support for the fiction that being transgender is incompatible with military service. Being transgender is not a mental disorder, and men and women who are transgender have no impairment in their capabilities simply because of their transgender status. Brown Decl. ¶ 24. The government also cannot justify the Ban's sweeping exclusion of transgender people by resorting to unsupported or overbroad generalizations about gender dysphoria, the fully treatable distress that a subset of transgender people may experience, or gender transition, which forms part of the medical treatment for gender dysphoria. *Id.* ¶¶ 25-27, 30-32; *accord* Order at 17 (rejecting the government's cited concerns as "extremely overbroad" and noting that "*all* service members might suffer from medical conditions that could impede performance"); *VMI*, 518 U.S. at 533 (forbidding reliance "on overbroad generalizations about the different talents, capacities, or preferences" of the excluded class). For example, under the accessions policy currently in effect, transgender applicants must generally have already completed transition-related medical treatment 18 months before joining the military. Mabus Decl., Ex. C.

For those who come to terms with their gender identity while serving, there is no basis for singling out their health care needs for unequal treatment. This includes any "negligible" short-term periods of deployment unavailability—particularly in comparison to the significantly longer periods of deployment unavailability experienced by other active-duty soldiers for myriad reasons. RAND Report at 46; Carson Decl. ¶ 22; Mabus Decl. ¶ 15; Fanning Decl. ¶ 18; James Decl. ¶ 18; Brown Decl. ¶ 88. The RAND Report analyzed all available evidence and concluded that the total impact of transition-related medical care would be a mere "0.0015 percent of available deployable labor-years" across the entire force. RAND Report at 42; *compare id.* at 46 (fourteen percent of Army active component troops are non-deployable at any given time). Foreign militaries with inclusive policies similarly report no reduced ability to serve from transgender service members. *Id.* at 60-61.

"[I]t is common for service members to be non-deployable for periods of time due to an array of [] conditions." Order at 17. Pregnancy is one illustration of a medical condition that may

temporarily limit deployability—but the military does not authorize the presumptive discharge of all service members who become pregnant, nor could it constitutionally do so. *See Crawford v. Cushman*, 531 F.2d 1114, 1121-25 (2d Cir. 1976) (striking down a military regulation implementing mandatory discharge for pregnant troops, because it lacked a rational relation to the military objectives of mobility, readiness, and administrative convenience); *see also Latta v. Otter*, 771 F.3d 456, 472 (9th Cir. 2014) (rejecting government's proffered justification under heightened scrutiny where it was "grossly over- and under-inclusive"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (same under rational basis review). There is, in short, no medical justification for banning transgender people from military service.

Finally, the abrupt policy reversal represented by the Ban is an "enormous distraction" and stressor to currently serving transgender troops, their chain of command, and their colleagues—one that erodes force morale and trust in command and detracts from readiness. Mabus Decl. ¶¶ 47-52; Fanning Decl. ¶¶ 58-61; James Decl. ¶¶ 43-47; Carson Decl. ¶¶ 33-36. The policy "bait-and-switch" causes disruption that undermines military readiness and lethality. Carson Decl. ¶ 33. It also tarnishes the military's image and reputation as a meritocracy premised on fairness and equality. That damages the military's ability to attract talent, harming effectiveness. Mabus Decl. ¶¶ 51-52.

2. Excluding Transgender People From Military Service Does Not Promote Unit Cohesion.

Second, the Ban cannot be justified by unit cohesion. Notably, President Trump never even cited unit cohesion in his July 26, 2017 statements, and the Presidential Memorandum also fails to articulate the precise concern at issue. To the extent that the government seeks to give legal effect to any private bias against transgender people, that is an illegitimate interest as a matter of law. *Witt v. Dep't. of Air Force*, 527 F.3d 806, 820 n.10 (9th Cir. 2008) (holding that appeals to unit cohesion based on prejudice against lesbian and gay service members were inconsistent with Supreme Court precedent that the law cannot give effect to private bias); *accord Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

In any event, the Ban does nothing to further unit cohesion and in fact undermines it. After closely examining this issue, the military found no evidence that permitting open service by transgender people would negatively impact unit cohesion. Mabus Decl. ¶ 14; James Decl. ¶ 14; Fanning Decl. ¶ 24. For example, Secretary Mabus oversaw the Navy implementation of open service for transgender service members, which "was relatively low-key, triggered few emotional responses, and was viewed as 'no big deal.'" Mabus Decl. ¶ 24. For more than a year now, transgender service members have served openly without any adverse effect on cohesion. *Id.* ¶ 43. Plaintiffs' transgender status has not impeded their units from working together to accomplish tasks. Muller Decl. ¶ 19; Schmid Decl. ¶ 17. Indeed, Plaintiffs' experiences illustrate that open service can promote unit cohesion, because requiring service members to hide parts of their identity can weaken bonds among unit members. Schmid Decl. ¶¶ 14, 17; Stephens Decl. ¶¶ 18, 30; *see also* Mabus Decl. ¶ 46; Decl. of Mark Eitelberg ¶¶ 13-14. This echoes the experience of foreign militaries, which have improved cohesion through inclusive policies toward transgender soldiers. Mabus Decl. ¶¶ 17, 42; Carson Decl. ¶ 19. The Ban thus "negatively impacts unit cohesion." Mabus Decl. ¶ 46.

Similar concerns about unit cohesion were raised as to women in combat positions, racial integration, and open service by lesbian, gay, and bisexual service members—but in every case those fears "proved to be unfounded." Carson Decl. ¶ 19; Mabus Decl. ¶ 42; RAND Report at 44. And just as lesbian, gay, and bisexual soldiers should not have to lie about who they are in order to serve, neither should transgender soldiers. Mullen Decl. ¶ 12.

3. Cost Savings from the Selective Withdrawal of Medically Necessary Care for Transgender Service Members Cannot Justify the Ban.

Third, cost savings cannot support the Ban, whether as a justification for excluding transgender people from military service or for denying them health care. Order at 17; *Doe*, 2017 WL 4873042, at *29. Like all other service members, transgender service members may have needs requiring medically necessary care.[4] But the Supreme Court has long made clear that cost

[4] There is no genuine dispute that transition-related care such as surgery can be medically necessary, as the military's own medical staff have acknowledged in developing Plaintiffs' transition plans. *See, e.g.*, Stephens Decl. ¶ 15; Winters Decl. ¶ 30; *see also* RAND Report at x; Brown Decl. ¶¶ 33, 35; Dep't of Health and Human Servs.,

savings alone cannot justify discrimination: the government cannot "protect the public fisc by drawing an invidious distinction between classes" of persons. *Mem. Hosp. v. Maricopa Cty.*, 415 U.S. 250, 263 (1974); *see also Plyler v. Doe*, 457 U.S. 202, 227 (1982) ("the preservation of resources standing alone can hardly justify the classification used in allocating those resources").

For example, courts have held that the government may not discriminate against employees with same-sex partners by selectively depriving the latter of health care benefits—even though there is no dispute that it would save money to do so. *See Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) (holding that cost savings failed to supply a rational basis for the government "distinguishing between homosexual and heterosexual employees, similarly situated"); *Bassett v. Snyder*, 59 F. Supp. 837, 855 (E.D. Mich. 2014) ("cost savings alone are insufficient to justify an otherwise discriminatory statute").

Notably, the medical procedures targeted by the Ban are also already provided to other service members for reasons unrelated to gender transition. RAND Report at 8; Brown Decl. ¶ 61. Cost savings are legally inadequate to justify the selective withdrawal of medically necessary care from transgender people. *See Norsworthy*, 87 F. Supp. 3d at 1120 ("treat[ing] [a transgender person] differently from a similarly situated non-transgender [person] in need of medically necessary surgery" is not substantially related to an important government interest).

Furthermore, this Court has already found that the costs of transition-related care are "exceedingly minimal." Order at 17. The RAND Report estimated that providing transition-related care to active-duty service members would cost (at most) $8.4 million annually, compared to the $49.3 billion spent on DoD health care in 2014. RAND Report at 36, 70. In other words, the costs of providing appropriate medical care amount to "budget dust," and "hardly even a rounding error, by military leadership."[5] Mabus Decl. ¶ 41. In addition, the estimated cost of separating transgender service members and finding and training replacements

Dep'tl Appeals Board, NCD 140.3, Transsexual Surgery, No. A-13-87, 2014 WL 2558402 (May 30, 2014) (invalidating Medicare's exclusion of transition-related surgical care).

[5] To put that into further perspective, the military's estimated cost savings from a proposal to incentivize the use of generic and mail order drugs is $16 million a year—approximately double the upper-range estimate of providing transition-related care (both surgical and non-surgical) to service members. Newman Decl., Ex. 10 at 5. The military has also spent $84 million a year on medication to treat erectile dysfunction. *Id.*, Ex. 9.

is $960 million—*more than 100 times greater* than the cost of providing medically necessary care to transgender service members. Mabus Decl. ¶ 18; Carson Decl. ¶ 32. Indeed, the cost to train and replace even a single soldier lost due to the Ban is $75,000. Carson Decl., Ex. A at 4.

II. The Ban Violates Plaintiffs' Substantive Due Process Right to Live in Accordance with Their Gender Identity Free From Government Intrusion.

Plaintiffs have likewise shown that the Ban violates a fundamental liberty interest to live in accordance with one's gender identity. As this Court recognized, the substantive guarantee of the Fifth Amendment's Due Process Clause protects "fundamental liberty interests in individual dignity, autonomy, and privacy," and Plaintiffs possess "the right to make decisions concerning bodily integrity and self-definition central to an individual's identity." Order at 18 (citing *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

Gender identity is both immutable and "so fundamental to one's identity that a person should not be required to abandon [it]." *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005); Brown Decl. ¶¶ 19-29. Because "the ability independently to define one's identity [] is central to any concept of liberty," it warrants "a substantial measure of sanctuary from unjustified interference by the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-19 (1984). The government may not penalize Plaintiffs for living in accord with their gender identity, which is integral to their understanding of themselves as the men and women that they are—just as gender is an essential aspect of identity for those who are not transgender. Courts have guarded against government encroachment upon fundamental liberty interests, including when the military penalized service members for forming intimate relationships with same-sex partners, *Witt*, 527 F.3d at 814-21, or for exercising the right to have children, *Crawford*, 531 F.2d at 1125.

There is no question that the Ban "directly interferes with Plaintiffs' ability to define and express their gender identity, and penalizes Plaintiffs for exercising their fundamental right to do so openly." Order at 19. That direct interference triggers heightened scrutiny: Defendants must show that the Ban is "necessary" to further an important government interest at a minimum, *Witt*, 527 F.3d at 819, but they cannot do so, particularly given the Ban's sweeping breadth. For the

same reasons that the Ban fails any level of scrutiny under equal protection, it is likewise unconstitutional under due process.

III. The Ban's Prohibition Against Openly Transgender Service Members Violates Plaintiffs' First Amendment Right to Express Their Gender Identity.

Plaintiffs have also shown that the Ban violates their First Amendment rights. On its face, the Ban "prohibit[s] *openly* transgender individuals from accession into the United States military and authorize[s] the discharge of such individuals," reversing the prior policy "permitting transgender individuals to serve *openly*." Newman Decl., Ex. 2 (emphases added). President Trump regards openly transgender service members to be "disruption[s]." *Id.*, Ex. 1. This Court recognized that the Ban constitutes a content-based regulation of speech, because it "penalizes transgender service members—but not others—for disclosing their gender identity" and thus requires, but fails, heightened scrutiny under the First Amendment. Order at 19-20.

The Ban employs a form of content discrimination that is especially noxious to the First Amendment: viewpoint discrimination. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (explaining that viewpoint discrimination represents "an egregious form of content discrimination"). Viewpoint discrimination occurs where "the government prohibits speech by particular speakers, thereby suppressing a particular view about a subject." *Giebel v. Sylvester*, 244 F.3d 1182, 1188 (9th Cir. 2001) (internal quotation marks omitted). Under the Ban, non-transgender service members are free to express their gender identity, but transgender service members are not. For example, the government will permit Plaintiff Jane Doe to express that she is a man (even though that is incorrect), but it will not permit her to express that she is a woman.

That restriction has significant practical repercussions: it bars transgender service members from openly advocating for their own equal treatment and from powerfully demonstrating, by personal example, the value of open service. By deterring transgender people from "coming out," the Ban disables a critical tool for transgender people to advocate for themselves, dismantle stereotypes, and counteract discrimination. *Cf. Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1075 (D. Nev. 2001) (holding that student speech disclosing sexual orientation

was constitutionally protected by First Amendment); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1284-85 (D. Utah 1998) (coming out as lesbian to employer protected by First Amendment); *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st. Cir. 1974) (explaining that a gay student organization sought to convey a basic message: "that homosexuals exist, that they feel repressed by existing laws and attitudes, that they wish to emerge from their isolation, and that public understanding of their attitudes and problems is desirable for society").

Because of the unique harms imposed by viewpoint discrimination, it is subject to strict scrutiny, including in the military context. Notwithstanding any deference that may otherwise be afforded to the military in appropriate circumstances, "regulations restricting speech on military installations may not discriminate against speech based on its viewpoint." *Nieto v. Flatau*, 715 F. Supp. 2d 650, 655 (E.D.N.C. 2010). The government may not "selectively grant[] safe passage to speech of which [officials] approve while curbing speech of which they disapprove . . . even in the military." *Id.* (internal quotation marks omitted).

As this Court recognized, the Ban does not survive any level of First Amendment scrutiny, even if Defendants were afforded the benefit of a more deferential standard for content-based (but viewpoint-neutral) restrictions on speech in the military context. Order at 20. There is no rational, important, or compelling governmental interest in prohibiting transgender people from disclosing and expressing their gender identity. To the contrary, Plaintiffs have shown that the Ban chills a wide swath of speech by transgender service members that is essential to building trust and cohesion, as discussed above. *Cf. Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 927 (C.D. Cal. 2010) (holding that "Don't Ask, Don't Tell" imposed a restriction on speech "far greater than necessary to protect the Government's [purported] interests"), *vacated on other grounds*, 658 F.3d 1162 (9th Cir. 2011). The government's attempt to force transgender people to once again serve in silence violates the First Amendment.

CONCLUSION

The Ban is unsupported by any constitutionally adequate government interest as a matter of law—and indulging the fiction that there is even a reasonable dispute to the contrary would only lend credibility to the government's defense premised on the inferiority of transgender

people, thereby widening and deepening the profound harms that the Ban has already wrought. The lives of Plaintiffs and many others have been turned upside down because of President Trump's actions; the only way for them to regain the security necessary to move forward with their lives is through the conclusive invalidation of the Ban.

Plaintiffs thus respectfully request that this Court enter summary judgment in their favor, issue declaratory relief holding the Ban unconstitutional, and permanently enjoin Defendants and those acting in concert with them or subject to their control from taking any action relative to transgender individuals that is inconsistent with the *status quo* that existed on July 25, 2017, prior to the Ban.

Respectfully submitted January 25, 2018.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on January 25, 2018.

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