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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AIDEN STOCKMAN; NICOLAS TALBOTT; TAMASYN REEVES; JAQUICE TATE; JOHN DOES 1-2; JANE DOE; and EQUALITY CALIFORNIA,

Plaintiffs,

v.

DONALD J. TRUMP, et al.

Defendants.

CASE NO. 5:17-CV-01799-JGB-KK

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND REPLY IN FURTHER SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Hearing

Date: November 20, 2017
Time: 9:00 a.m.
Courtroom: 1

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I. INTRODUCTION

Plaintiffs—transgender individuals who currently serve in the military or have taken concrete steps to accede into the military, and similarly situated members of Equality California—bring this action to prevent the irreparable harms caused by the President's order banning military service by transgender people and denying them essential medical care. *See Military Service by Transgender Individuals*, 82 Fed. Reg. 41319 (Aug. 30, 2017) (the "ban"). Absent the relief sought, Plaintiffs will suffer serious and irreparable injuries, including denial of their constitutional rights, denigration of their abilities and reputation, and loss of tenure, career prospects, and medical care.

Defendants contend that Plaintiffs will suffer no "injury in fact" or "irreparable harm" until the government actually discharges them or, in the case of the plaintiffs seeking to enlist, denies them accession into the military. (Defs.' Mot. to Dismiss and Opp. to Pls.' Mot. for Prelim. Inj., ("Opp.") at 1-2.) As the United States District Court for the District of Columbia recently held, these jurisdictional arguments "wither away under scrutiny." *Doe v. Trump*, No. CV 17-1597 (CKK), 2017 WL 4873042, at *1 (D.D.C. Oct. 30, 2017) ("*Doe*"). Under settled law, enlisted Plaintiffs have standing to challenge a policy that facially targets them and is set to take effect on a date certain: March 23, 2018. Similarly, Plaintiffs who seek to enlist have standing to challenge a policy, already in effect, that bars their enlistment. That Defendants continue to work on plans to implement the ban and have issued Interim Guidance does not make the facially discriminatory ban any less subject to challenge or its harms any less immediate.

Defendants' responses to the merits of Plaintiffs' constitutional claims also fall short. Defendants do not dispute that transgender people meet the criteria for a suspect class under established equal protection doctrine, nor do they rebut Plaintiffs' showing that discrimination based on a person's transgender status is inherently sex-based and thus warrants heightened scrutiny for that reason as well.

Rather than seeking to justify the ban under the heightened standard of review that applies in this case, Defendants urge the Court to defer to the President's ban simply because it applies in a military, rather than civilian, context. But as the U.S. Supreme Court has made clear, courts do not apply a lower standard of equal protection review to military policies and only defer to the proffered justifications for such policies when they are based on considered military judgment, evidence, and expertise. None of the factors warranting deference is present here, where the President abruptly reversed a policy adopted by the military itself after a long and comprehensive process of analysis and review. In any event, the reasons offered by Defendants do not justify such a sweeping and categorical ban under any level of review. The absence of any rational basis for the ban, its facial targeting of a disfavored group, and the highly unusual circumstances under which it was adopted lead to the inescapable inference that it is based on animus—discrimination for its own sake—and not on any legitimate military concerns.

Defendants also fail to rebut Plaintiffs' due process and First Amendment claims. As Plaintiffs have shown, the ban infringes upon their constitutionally protected right to autonomy—specifically, the right as transgender persons to live in accordance with their core, immutable gender identities. Defendants deny that such a right exists, but fail to provide any substantive argument to rebut it. Similarly, rather than addressing Plaintiffs' claim that due process prevents the government from penalizing Plaintiffs for engaging in the very same conduct that the government itself induced, Defendants rebut judicial estoppel and procedural due process claims that Plaintiffs did not raise.

Defendants also fail to rebut Plaintiffs' First Amendment claims. The ban is subject to strict scrutiny because it severely limits Plaintiffs' ability to advocate for themselves and to express pro-transgender views. Even under a more lenient standard of review, however, the ban fails because it sweeps far more broadly than necessary to achieve any possible permissible goal. For these reasons, Plaintiffs

have stated valid constitutional claims and are likely to prevail on the merits of their claims.

Finally, as the District Court for D.C. recognized: "Absent an injunction, Plaintiffs will suffer a number of harms that cannot be remedied after that fact even if Plaintiffs were to eventually succeed in this lawsuit. The impending ban brands and stigmatizes Plaintiffs as less capable of serving in the military, reduces their stature among their peers and officers, stunts the growth of their careers, and threatens to derail their chosen calling . . . ." *Doe*, 2017 WL 4873042, at *32. In contrast, Defendants have not identified any way in which granting injunctive relief would harm the military or the public interest.

Plaintiffs respectfully ask that the Court deny Defendants' motion to dismiss and grant the injunctive relief that Plaintiffs seek.

II. THE INTERIM GUIDANCE HAS NO BEARING ON ANY MOTIONS PENDING BEFORE THE COURT

Defendants' principal argument—regarding both the justiciability and merits of Plaintiffs' claims—hinges upon their contention that the Presidents' August 25 Memorandum[1] is somehow immune to challenge because the government also has issued "Interim Guidance." (*See* Opp. at 8, 12, 15, 16, 21-24.) However, the effect of the Memorandum—a policy banning transgender individuals from military service—cannot be and is not changed by the Interim Guidance.

Defendants' focus on the Interim Guidance is a classic "red herring." *Doe*, 2017 WL 4873042, at *17. Plaintiffs challenge *the ban* because *it* is "the operative policy toward military service by transgender service members." *Id.* By contrast:

> [T]the ***Interim Guidance must be read as implementing the directives*** of the Presidential Memorandum, and any protections afforded by the Interim Guidance are necessarily ***limited to the extent they conflict*** with the express directives of the memorandum. . . . . ***Nothing in***

[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in Plaintiffs' Motion for Preliminary Injunction (the "PI Motion").

> ***the August 2017 Statement by Secretary Mattis, or the Interim Guidance, can or does alter these realities***. . . . [T]he military is studying how to implement the directives of the Presidential Memorandum . . . [b]ut the decisions that must be made are ***how to best implement a policy under which transgender accession is prohibited, and discharge of transgender service members is authorized***. Unless the directives of the Presidential Memorandum are altered—and there is no evidence that they will be—***military policy toward transgender individuals must fit within these confines***.

Id. at *17-18 (citations omitted, emphasis added).

The President is the Commander-in-Chief, and his August 25 Memorandum is "the operative policy toward military service by transgender service members." *Id.* at *17. This Court must "assume that [it] will be faithfully executed." *Id.*

The Interim Guidance thus is irrelevant to consideration of either Plaintiffs' motion for a preliminary injunction or Defendants' motion to dismiss.

III. PLAINTIFFS' CLAIMS ARE JUSTICIABLE

Plaintiffs' claims satisfy both the standing and ripeness requirements of Article III, as well as the additional "prudential ripeness" filter courts have historically applied. Unless the Court intervenes, beginning on March 23, 2018, current service member Plaintiffs will become subject to discharge simply for being transgender. These Plaintiffs have standing because they are the explicit targets of threatened government discrimination and because the ban denies their fitness to serve. The Plaintiffs who have taken steps to enlist in military service also have standing because, under the ban, they categorically are barred from enlisting even if they are otherwise qualified. These actual injuries and imminent threats create a constitutionally and prudentially justiciable case.

A. This Lawsuit Satisfies the Standing Requirements of Article III.

The "irreducible constitutional minimum" required to invoke federal jurisdiction under Article III "contains three elements: (1) injury in fact; (2) causation; and (3) the likelihood that a favorable decision will redress the injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Defendants concede

the latter two elements and expressly confine their standing and ripeness challenge to the first element—injury in fact.[2] (*See* Opp. at 11-12.)

To establish injury in fact, a plaintiff must show that he or she has suffered an "invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent."[3] *Lujan*, 504 U.S. at 560 (internal citation omitted). Plaintiffs' claims easily pass muster. Not only do Plaintiffs face future harms, but they also are suffering current injuries as a consequence of the ban. (*See* Supplemental Declaration of Raymond Edwin Mabus, Jr. ("Mabus Supp. Decl."), ¶¶ 3-7). Each of these injuries is caused by the ban, and each is sufficient to confer standing upon Plaintiffs to bring the asserted claims. *See Doe*, 2017 WL 4873042, at *15-26.

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[2] To be clear, Plaintiffs satisfy the latter two elements. There is a clear causal chain between the ban and harms to Plaintiffs. And a favorable court decision here declaring that such a ban violates the Constitution and enjoining Defendants from excluding Plaintiffs from the military solely because they are transgender would redress the alleged injury. Left in force, the ban creates a presumption and perception that Plaintiffs and other transgender people "hinder military effectiveness," "disrupt unit cohesion," and "tax military resources." An injunction prohibiting enforcement of the ban and an order permitting enlistment will reverse those presumptions, permitting Plaintiffs once again to serve in the military on equal terms, and thus redressing the injuries Plaintiffs are suffering.

[3] The "especially rigorous" standard Defendants ask the Court to apply (*see* Opp. at 12, citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013)) has never been used to deny standing to plaintiffs *who are themselves* the direct and actual targets of a discriminatory policy. The cases elaborating this principle involved claims by plaintiffs with an undifferentiated and attenuated connection to the policy challenged as unconstitutional. *See, e.g.*, *Clapper*, 568 U.S. at 408-11 (challenge by attorneys, journalists, and human rights organizations to policy authorizing surveillance of people outside the United States); *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997) (challenge by members of Congress to statute granting line item veto power); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473-74 (1982) (challenge by taxpayers to transfer of property to religious organization); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-22 (1974) (challenge by ordinary citizens to membership of members of Congress in armed forces reserves). Where, as here, Plaintiffs are directly targeted by a policy, ordinary standing principles apply.

1. *Plaintiffs Injuries Are Concrete and Particularized.*

Plaintiffs are transgender individuals who serve in the military (Tate Decl., ¶¶ 4-8; Jane Doe Decl., ¶¶ 2-7; John Doe 1 Decl., ¶¶ 5-9; John Doe 2 Decl., ¶ 5), or who have taken substantial steps toward accession, including by sitting for the ASVAB exam, soliciting meetings with recruiters, and affirmatively attempting to enlist (Stockman Decl., ¶¶ 8-10; Talbott Decl., ¶¶ 3, 10-13; Reeves Decl., ¶ 5). The enlisted service member Plaintiffs are injured concretely and personally by the ban as it facially targets them for forced separation from the military solely because they are transgender and terminates military payment for their necessary medical care. The accession Plaintiffs, who are "able and ready" to accede into service, are injured concretely and personally by the ban because it categorically excludes them from enlisting in the military for the same reason. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (holding government's denial of an equal opportunity to those who are "able and ready" to compete because of a discriminatory policy constitutes injury in fact); *Gratz v. Bollinger*, 539 U.S. 244, 260-61 (2003) (holding plaintiff who intended to but had not yet applied to University of Michigan had standing to challenge allegedly discriminatory admissions policy).

The Supreme Court consistently has held that such "discrimination itself"[4] constitutes a concrete and particularized injury sufficient to invoke the federal judicial power under Article III. *See Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984); *Latta v. Otter*, 771 F.3d 456, 467 n.7 (9th Cir. 2014) (same); *see also, e.g.*, *Hassan v. City of New York*, 804 F.3d 277, 289-90 (3d Cir. 2015) (holding a "discriminatory classification is itself a penalty . . . and thus qualifies as an actual

[4] For the purpose of assessing justiciability, the Court must presume Plaintiffs' legal theories of constitutional harm are valid. *See United States v. Antelope*, 395 F.3d 1128, 1133 (9th Cir. 2005) (assessing justiciability from plaintiff's perspective, "in whose shoes we stand when deciding this threshold issue of justiciability," and therefore assuming "his legal argument is correct").

injury for [justiciability] purposes, where a citizen's right to equal treatment is at stake") (internal citation omitted); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 293, 294 n.44 (W.D. Pa. 2017) ("settled precedent provides that impermissible distinctions by official edict cause tangible Constitutional harm" and "a bare equal protection violation is sufficient to constitute an injury in fact"). The ban imposes precisely these injuries. *See Doe*, 2017 WL 4873042, at *20-23.

The ban also imposes additional personalized injuries upon Plaintiffs by demeaning their abilities and fitness as transgender individuals to serve in the military, and their capabilities more broadly. (Declaration of Mark J. Eitelberg ("Eitelberg Decl."), ¶ 11; Supplemental Declaration of Deborah Lee James ("James Supp. Decl."), ¶ 8; Tate Decl., ¶ 23; Jane Doe Decl., ¶ 22-24; John Doe 1 Decl., ¶ 24; John Doe 2 Decl., ¶ 33; Stockman Decl., ¶ 18; Talbott Decl., ¶ 18; Reeves Decl., ¶15-16; Zbur Decl., ¶ 7); *see also Doe*, 2017 WL 4873042, at *32 ("The impending ban brands and stigmatizes Plaintiffs as less capable of serving in the military, reduces their stature among their peers and officers, stunts the growth of their careers, and threatens to derail their chosen calling or access to unique educational opportunities."). These kinds of injuries, based on the public perceptions of a person's capabilities that a government policy creates or reinforces with its imprimatur, are more than sufficient to satisfy Article III. *See Meese v. Keene*, 481 U.S. 465, 473-74 (1987) (holding asserted harms to plaintiff's "personal, political, and professional reputation" sufficient to confer Article III standing); *see also Doe v. Nat'l Bd. of Med. Exs.*, 199 F.3d 146, 153 (3d Cir. 1999) (finding injury in fact where plaintiff alleged that being identified as disabled by the defendant would have an adverse effect on plaintiff's future job prospects).

Plaintiffs' injuries are compounded by the loss of tenure, career prospects, and medical care that the ban imposes. (*See* Tate Decl., ¶¶ 21-30; Jane Doe Decl., ¶¶ 17-18; John Doe 1 Decl., ¶¶ 20-22; John Doe 2 Decl., ¶¶ 30-37; Stockman Decl., ¶¶ 15-17; Talbott Decl., ¶¶ 16-17; Reeves Decl., ¶¶ 13-14; *see also* Mabus

Supp. Decl., ¶¶ 4-7; Eitelberg Decl., ¶ 8; Fanning Supp. Decl., ¶ 5..) There is no credible dispute that Plaintiffs have suffered and will suffer personal concrete injuries as a result of the ban. With respect to medical care in particular, Defendants erroneously claim that "none of the service member Plaintiffs . . . . even plan to seek sex reassignment treatment through the military now or in the future." (Opp. at 14.) Not so. Before the moratorium imposed by the ban, Plaintiffs Tate, John Doe 1, and John Doe 2 followed military protocol to plan for gender transition-related surgery. (*See* Tate Decl., ¶ 21; Supplemental Declaration of John Doe 1 ("John Doe 1 Supp. Decl."), ¶ 4; John Doe 2 Decl., ¶ 22; Supplemental Declaration of John Doe 2 ("John Doe 2 Supp. Decl."), ¶ 4.) Because those procedures are planned for dates beyond March 2018, the ban prohibits Plaintiffs from obtaining these surgeries.

For many of the same reasons, Equality California's claims are justiciable: (1) its members include currently serving transgender service members, as well as transgender people who have taken steps to enlist, all of whom suffer constitutional injuries sufficient to trigger Article III jurisdiction (*see* Zbur Decl., ¶¶ 2-4); (2) advocating for the equality of transgender people is central to Equality California's organizational mission; and (3) its members need not supply any evidence to advance this facial constitutional challenge, nor would any remedy ordered by the Court to enjoin the ban require their participation. *See Assoc'd Gen. Contractors of Am. v. Metro. Water Dist. of S. Cal.*, 159 F.3d 1178, 1181 (9th Cir. 1998).

Given the concrete and particularized injuries caused by the ban, Plaintiffs have standing to pursue the claims asserted in the Complaint, and Defendants' motion to dismiss should be denied.

2. *Plaintiffs Injuries Are "Actual" and "Imminent."*

An injury is actual and imminent "if the threatened injury is 'certainly impending' or there is a 'substantial risk' that the harm will occur.'" *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 (2014); *see also see also Nat. Res.*

Def. Council v. E.P.A., 735 F.3d 873, 878 (9th Cir. 2013) ("We have consistently held that injury is 'actual or imminent' where there is a 'credible threat' that a probabilistic harm will materialize."). Defendants' argument that the injuries Plaintiffs allege are not "actual or imminent" ignores that the ban *already* has the force of law, *already* is in effect with respect to the accession Plaintiffs, *already* is imposing serious concrete harms upon both the accession *and* current service member Plaintiffs by demeaning their abilities and fitness to serve, and establishes a date certain of March 23, 2018 by which service members will be subject to discharge and to the denial of transition-related surgeries. (*See supra* § II.A.1.a.) Plaintiffs also are presently compelled to make important and irrevocable decisions about their lives and futures under an unconstitutional ban that will take full effect in just a few months.

a. Enlisted service member Plaintiffs are harmed.

In addition to the *current* harms the enlisted service member Plaintiffs already are suffering, future harms are "imminent" when key provisions of the ban "take effect on March 23, 2018." (Opp. at 6.) Those harms slated to begin in fewer than 5 months also confer standing.

"[W]here threatened action by *government* is concerned, [courts] do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) (emphasis in original); *see also Nat. Res. Def. Council*, 735 F.3d at 878 (a "credible threat" of "probabilistic harm" is sufficient). The enlisted service member Plaintiffs accordingly need not "await the consummation of threatened injury to obtain preventive relief." *Pac. Gas & Elec. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 201 (1983). It makes no difference that a few months remain before the ban on active service members becomes fully operational, or that the Interim Guidance supposes that no enlisted transgender service members will be separated in the "interim." (*Cf.* Opp. at 1, 6.) "Where the

inevitability of the operation of a [policy] against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974); *see also Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 327 (7th Cir. 1985) (noting that "[t]he statute challenged in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), had an effective date two years in the future, yet the Court found the suit" justiciable).

Nor can Defendants dodge a pre-enforcement challenge to the ban's provisions by characterizing the ban as subject to further DOD implementing rules that have not yet issued. (Opp. at 15-16.) Plaintiffs' challenge is to the ban itself, *irrespective* of how it may be implemented administratively; the DOD has no discretion over the *requirement* that the substantive provisions of the ban "will be" effective on March 23, 2018. (Opp. at 1.) "The President controls the United States military" and the "directives of the Presidential Memorandum" to DOD "are *definitive*" and "*the operative policy* toward military service by transgender service members." *Doe*, 2017 WL 4873042, at *17. The Interim Guidance does not change that.

In these circumstances, courts routinely hear and decide cases before the promulgation of implementing regulations. *See Union Pac. R.R. Co. v. Cal. Pub. Utils. Comm'n*, 346 F.3d 851, 872 n.22 (9th Cir. 2003) (holding statutory challenge justiciable despite absence of implementing regulations "because it is clear that any standard required" under the challenged act would suffer the legal defect plaintiff alleged, even though "no standards [were] issued" at the time of adjudication); *Nance v. EPA*, 645 F.2d 701, 713, 717 (9th Cir. 1981) (holding statutory challenge justiciable over objection that "[t]he EPA has not yet promulgated regulations under the amended act . . . and thus has not had any measurable adverse impact upon the petitioners in this case" because the challenged act required rules enforcing the challenged provision); *Retail Indus. Leaders Ass'n v. Fielder*, 475

F.3d 180, 188 (4th Cir. 2007) (holding statutory challenge justiciable despite absence of implementing regulations because "[r]egulations could not alter the Act's provisions, which clearly establish the . . . requirements [plaintiff] claims are invalid"). As "Plaintiffs make it perfectly clear that they are challenging the constitutionality" of the ban enacted by the Presidential Memorandum *itself*, "the court has no need to consider the effect of [not-yet-issued] regulations or to wait and see what steps [DOD] takes to implement" it. *Alpine Ridge Grp. v. Kemp*, 764 F. Supp. 1393, 1396 (W.D. Wash. 1990), *rev'd on other grounds Cisneros v. Alpine Ridge Group*, 508 U.S. 10 (1993); *see also Acacia Villa v. Kemp*, 774 F. Supp. 1240, 1246-47 (C.D. Cal. 1990), *rev'd on other grounds Cisneros*, 508 U.S. 10 (same).

Because they presently face a credible threat or substantial risk of harm from the ban, the provisions of which are "certainly impending," the enlisted service member Plaintiffs' claims are justiciable now.

b. Accession Plaintiffs are harmed.

Plaintiffs Stockman, Talbott, and Reeves are harmed by the ban because it expressly and categorically prohibits them from enlisting in the military. Notwithstanding that overt and tangible harm, Defendants erroneously contend that Plaintiffs are eligible for "individualized waivers" and therefore cannot show an Article III injury in fact until they have (a) been denied accession, (b) applied for a waiver, and (c) been turned down again. (Opp. at 14.)

As a factual matter, that is incorrect. Transgender people have *never* been eligible for DODI 6130.03 medical waivers. *See Doe*, 2017 WL 4873042, at *21 (finding "no evidence that waivers are actually made available to transgender individuals, or that they will be"); (*see also* Mabus Supp. Decl., ¶ 10; Supplemental Declaration of Eric K. Fanning ("Fanning Supp. Decl."), ¶ 11; James Supp. Decl., ¶ 10; Supplemental Declaration of George Richard Brown ("Brown Supp. Decl."), ¶ 11.) Those waivers are available only for conditions listed in

DODI 6130.03 with stipulated waiver qualification criteria. No such criteria are stipulated for the conditions related to being transgender ("transsexualism" and "change of sex"). (*Compare* DOD Instruction 6130.03 at Encl. 4.15(r), 4.29(r) (Apr. 28, 2010) ("DODI 6130.03") (categorically disqualifying transgender applicants from military service without stipulating conditions for waiver) *with* DODI 6130.03 at Encl. 4.29(a) (stipulating six conditions that an applicant with Attention Deficit Hyperactivity Disorder may meet to receive a service eligibility waiver notwithstanding standard disqualification); *accord* Brown Decl., ¶¶ 40-41 (stating that "because certain conditions related to being transgender ('change of sex') were formerly grounds for discharge from the military, men and women who are transgender could not obtain medical waivers to enter the military"); Brown Supp. Decl., ¶ 12.) And the August 25 Memorandum itself confirms that transgender persons are categorically ineligible to serve. The suggestion that Plaintiffs *could* obtain accession waivers notwithstanding the ban—let alone that they *must* in order to challenge it—has no basis.

Moreover, as a matter of settled law, plaintiffs are not obliged to apply for an individual waiver of government policies that unconstitutionally discriminate against them as a class. Indeed, the need to apply for such a waiver—when others have no such need—is in and of itself a violation of equal protection. *See Hawaii v. Trump*, 859 F.3d 741, 767-68 (9th Cir. 2017) (holding a plaintiff need not wait for denial of discretionary waiver from travel ban in order to challenge the ban itself), *vacated as moot on unrelated grounds*, 2017 WL 4782860, at *1 (U.S. Oct. 24, 2017); *Doe*, 2017 WL 4873042, at *21 (holding that accession Plaintiff had standing "even if a bona fide waiver process were made available" because "a waiver process would not vitiate the barrier that [the accession Plaintiff] claims is violative of equal protection").

Similarly, it is not necessary for Plaintiffs to submit a formal application to enlist and be denied in order to challenge the ban. Such a futile exercise is not

required to confer standing. A potential job applicant suffers cognizable harm from a discriminatory hiring practice even if she does not apply for the job in question. *See, e.g., Gratz*, 539 U.S. at 262 (holding that "denial of equal treatment resulting from the imposition of [a] barrier" is *itself* an injury, regardless of whether it results in the "ultimate inability to obtain [a] benefit"); *Int'l Bd. of Teamsters v. U.S.*, 431 U.S. 324, 366 (1977) ("When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitted an application.").

Defendants' arguments that Plaintiffs Stockman, Talbott, and Reeves lack standing fail; each of the accession Plaintiffs satisfies constitutional standing requirements.

B. Plaintiffs' Claims Are Ripe for Adjudication.

Because Plaintiffs' have standing to challenge the ban, their claims meet the constitutional requirement of ripeness as well. *See Bishop Paiute Tribe v. Inyo Cnty.*, 863 F.3d 1144, 1153 (9th Cir. 2017). Here, Defendants do not challenge constitutional ripeness, but claim that Plaintiffs' claims are not prudentially ripe.

As an initial matter, where Plaintiffs have met the standing and ripeness requirements of Article III and no established abstention doctrine applies, courts have limited discretion to dismiss a claim based solely on prudential grounds. *See Susan B. Anthony List*, 134 S. Ct. at 2347 (noting the Supreme Court's repeated "reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging.") (internal citations omitted). Here, Plaintiffs have established both standing and constitutional ripeness; accordingly, there is no basis to apply the prudential ripeness doctrine.

In any event, Plaintiffs claims are ripe as a prudential matter. In assessing prudential ripeness, a court considers "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court

consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967); *see also Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1141 (9th Cir. 2000). Both factors are met here.

1. *Plaintiffs' Claims Are Fit for Review.*

A claim is "fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010) (citation omitted).

First, because whether the ban is a facially unconstitutional enactment is a "purely legal" question, it is "appropriate for judicial resolution at this time." *Abbott Labs.*, 387 U.S. at 149; *see also Commodity Trend Serv., Inc. v. CFTC*, 149 F.3d 679, 687 n.3 (7th Cir. 1998) ("A facial constitutional challenge presents only a legal issue—the quintessentially 'fit' issue for present judicial resolution."); *Doe*, 2017 WL 4873042, at *24 (holding plaintiffs' facial equal protection challenge to the ban presented a purely legal question fit for review).

Second, and precisely because this is a facial constitutional challenge, further factual development is irrelevant in assessing whether the ban offends the guarantees of the Fifth and First Amendments. *Doe*, 2017 WL 4873042, at *24. The challenged ban is the "definitive" and "operative policy" recorded in the Federal Register regulating "military service by transgender service members." *Doe*, 2017 WL 4873042, at *17; *see Military Service by Transgender Individuals*, 82 Fed. Reg. 41319 (Aug. 30, 2017). Adjudication of this case requires the Court to analyze only the terms of that enactment under the U.S. Constitution and the authorities relied upon in parties' briefing.

For much the same reason, Plaintiffs' challenge is directed at "final action." It makes no difference to the constitutional analysis how the DOD fills in the details of the ban with implementing rules. *See Doe*, 2017 WL 4873042, at *17, *24; *Union Pac.*, 346 F.3d at 870 n.20, 872 n.22; *see also Antelope*, 395 F.3d at

1133 (holding that for purposes of justiciability determination, a court must accept validity of plaintiff's legal theory on the merits).

2. *Plaintiffs Will Continue to Suffer Hardship Absent Adjudication.*

The hardship factor of the prudential ripeness inquiry "serves as a counterbalance to any interest the judiciary has in delaying consideration of a case." *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012). Where "there are no institutional interests favoring postponing review," courts hold "there are no conflicting interests to balance," *Payne Enters., Inc. v. U.S.*, 837 F.2d 486, 493 (D.C. Cir. 1988), and "a petitioner need not satisfy the hardship prong," *AT&T Corp. v. F.C.C.*, 349 F.3d 692, 700 (D.C. Cir. 2003). Here, there is no institutional interest in favoring delayed review. In fact, there is an indisputable interest in having the constitutionality of the ban settled.[5] *See Doe*, 2017 WL 4873042, at *25 (holding plaintiffs' challenge to "facial validity" of the ban "means that the Court would not benefit from delay"). Thus, as an initial matter, Plaintiffs' claims are prudentially ripe even without needing to show hardship.

In any event, Plaintiffs satisfy the hardship requirement. "To meet the hardship requirement, a litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009) (finding plaintiffs' constitutional claims ripe because "unless [they] prevail in this litigation, they will suffer the very injury they assert"). The many hardships Plaintiffs would suffer from withholding review of this case are clear.

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[5] The only interest Defendants assert—that this Court's review would somehow impede *their* ability to further study whether it makes sense to ban categorically transgender people from the military (*see, e.g.*, Opp. at 36)—is baseless, and not the kind of *judicial* interest that triggers a hardship review. In any event, adjudication of Plaintiffs' claims would *not* prevent any *post hoc* study.

Plaintiffs *already* are suffering cognizable constitutional injuries, as well as other concrete injuries to their careers from the government's policy that they are unfit to serve. (*See supra* §§ II.A.1-2.) Denying adjudication only guarantees these injuries will continue, unabated.

Moreover, absent pre-enforcement review, the current service member Plaintiffs each will be forced to choose between resigning their commissions to find another means of self-support in anticipation of the ban's effective date, or risk discharge with no means of support while a post-enforcement challenge proceeds. (*See* Tate Decl., ¶¶ 25-26; John Doe 1 Decl., ¶ 20; John Doe 2 Decl., ¶¶ 30-31; Jane Doe Decl., ¶ 16.) Similarly, the accession Plaintiffs will be forced to choose whether to abandon their plans to join the military or risk being harmed by having foregone other opportunities if a post-enforcement challenge fails. (Stockman Decl., ¶ 15; Talbott Decl., ¶ 17; Reeves Decl., ¶ 13). The ban thus presents a comply-or-defy decision that courts find sufficient hardship to grant review. *See Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004) (holding constitutional claims were ripe for review where the "'challenged regulations presents plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation'") (quoting *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1172 (9th Cir. 2001)).

The hardships that flow from the ban also render exhaustion of internal military procedures unnecessary. Contrary to Defendants' suggestion that this suit is unripe because Plaintiffs have not exhausted administrative remedies (Opp. at 16-18), exhaustion is not required when, as here, "substantial constitutional questions are raised" and particularly when the challenged policy inflicts class-based stigmatic harms. *Muhammad v. Sec'y. of Army*, 770 F.2d 1494, 1495 (9th Cir. 1995); *see also Wenger v. Monroe*, 282 F.3d 1068, 1074 (9th Cir. 2002) (holding exhaustion requirement excused where it would be futile and noting that

"termination of employment or alteration of some right or status recognized by law" that damages "standing and associations in the community" is a cognizable constitutional injury).

Plaintiffs currently face hardship as a result of the ban, and will continue to suffer those and even more hardships in the event the constitutionality of the ban is not determined at this time. Their claims are ripe for review by this Court.

* * *

For the foregoing reasons, Plaintiffs' claims are justiciable. The Court should consider their motion for a preliminary injunction on the merits and grant the requested relief.[6]

IV. A PRELIMINARY INJUNCTION IS WARRANTED

Defendants' opposition to Plaintiffs' motion for a preliminary injunction rests almost entirely upon the baseless claim that Plaintiffs are not suffering irreparable injuries because the ban is not yet in effect. But for the same reasons that Plaintiffs' claims are justiciable, Plaintiffs will continue to suffer irreparable harm absent an injunction. And to the extent Defendants actually contest Plaintiffs' claims on their constitutional merits—as opposed to simply incanting that they have been brought too soon, or target the "wrong" policy—their arguments have no merit. As set forth in Plaintiffs' PI Motion, and as confirmed recently by the District Court in *Doe*, Plaintiffs are likely to succeed on the merits

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[6] The preliminary injunction ordered in *Doe*, 2017 WL 4873042, does not affect the justiciability of Plaintiffs' claims in this case. *See N. Stevedoring and Handling Corp. v. Int'l Longshoremen's and Warehousemen's Union, Local No. 60*, 685 F.2d 344, 346 (9th Cir. 1982) (holding action challenging union picketing was not mooted when NLRB secured a preliminary injunction against same picketing in another tribunal, since it was possible that the injunction could be lifted in final determination of the merits, and picketing could recur); *Nat'l Wildlife Fed. v. Burford*, 677 F. Supp. 1445, 1453 (D. Mont. 1985) (holding action to void coal leases was not mooted by order issued by another court to void the very same leases because it was possible that other "decision to void the [leases]" could be "reversed in whole or in part"), *aff'd* 871 F.2d 849 (9th Cir. 1989); *see* Wright & Miller, 13B Fed. Prac. & Proc. Juris. § 3533.2.1 (3d ed. 2017) at n. 19-27.

of their claims. Absent preliminary relief from this Court, they will continue to suffer irreparable harms.

A. Absent an Injunction, Plaintiffs Will Suffer Irreparable Harm

Defendants assert that Plaintiffs cannot establish irreparable harm "for much the same reasons they lack standing," and that Plaintiffs' injuries are not "beyond remediation." (Opp. at 20.) The first argument fails for the same reason it failed in the justiciability context: Plaintiffs are suffering irreparable injuries now, and additional irreparable injuries are certainly impending. *See Privetera v. Cal. Bd. Of Med. Quality Assur.*, 926 F.2d 890, 897 (9th Cir. 1991) (holding the district court erred in denying a preliminary injunction on the ground that the asserted injury to plaintiff was three months away). As for their second argument, Defendants attempt to reduce Plaintiffs' claims to a simple employment dispute, where the injuries "could be compensated in damages and back pay." (Opp. at 20.)[7] But Plaintiffs' injuries include constitutional and other harms that cannot be redressed by money damages.

"It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Subjugating Plaintiffs to exclusion, unequal treatment, and forced separation simply because they are transgender violates their constitutional rights and thus "unquestionably" establishes that they will suffer irreparable injuries absent

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[7] Along these lines, Defendants cite *Hartikka v. United States*, 754 F.2d 1516 (9th Cir. 1985), and assert the Court should require a "stronger" than usual "showing of irreparable harm" because this case, like that one, arises in "the military context." (Opp. at 19.) But *Hartikka* did not involve a facial constitutional challenge to a policy targeting an entire class of people. Rather, it involved a U.S. Air Force captain appealing his discharge for "drunk and disorderly conduct"—including "wrongfully discharg[ing] a semi-automatic weapon in the direction of a neighbor's house while highly intoxicated"—under military procedures. *Id.* at 1517. Those facts bear no resemblance to the claims here.

injunctive relief. *Id.*; *see generally infra* § III.B. That alone is enough to demonstrate irreparable injury.[8]

In addition, Plaintiffs have demonstrated specific irreparable injuries, not compensable by "damages and back pay," beyond the constitutional violations. First, Plaintiffs who are forced to pursue different opportunities because of this ban will be irreparably harmed by the loss of their ability to pursue their chosen military profession. *See Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017) (holding the "diminished . . . opportunity to pursue [one's] chosen profession . . . constitutes irreparable harm."); *Enyart v. Nat'l Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1166 (9th Cir. 2011) (holding plaintiff established irreparable harm by demonstrating that the challenged bar exam policies denied her eligibility to become a lawyer); (Tate Decl., ¶¶ 25, 27; Jane Doe Decl., ¶¶ 16-18, 22; John Doe 1 Decl., ¶ 20; John Doe 2 Decl., ¶¶ 31, 36; *see also* Mabus Supp. Decl., ¶¶ 4-7; Fanning Supp. Decl., ¶ 5-6; Eitelberg Decl. ¶ 8.)

Second, Plaintiffs also suffer irreparable harms because of the professional stigma and negative public perception the ban creates and reinforces, including that Plaintiffs are unfit for or incapable of service solely because they are transgender. *Enyart*, 630 F.3d at 1166 (holding plaintiff could establish irreparable harm by

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[8] Defendants cite a First Circuit decision, *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 484 (1st Cir. 2009), for the proposition that violations of equal protection and due process do not automatically constitute irreparable injuries. (Opp. at 20.) But "[t]here is no indication that the Ninth Circuit requires a constitutional right to be 'fundamental' in order to support a conclusion that its violation would constitute an irreparable injury. Rather, it has held more generally that 'an alleged constitutional infringement will often alone constitute irreparable harm.'" *Cedar Point Nursery v. Gould*, 2016 WL 3019277, at *8 (E.D. Cal. May 26, 2016) (quoting *Assoc'd Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991)) (rejecting government's reliance on *Vaqueria* and concluding plaintiffs would "be able to show an irreparable injury if they can show that [the challenged activities] are unconstitutional."). In any event, Plaintiffs allege the ban violates their fundamental rights to be free from invidious discrimination under the Equal Protection Clause, to autonomy under the Due Process Clause, and to freedom of expression under the First Amendment.

demonstrating that the challenged bar exam policies "*likely*" imposed a "professional stigma" against persons with disabilities) (emphasis original); *see also Elzie v. Aspin*, 841 F. Supp. 439, 443 (D.D.C. 1993) (holding being "labeled as unfit for service solely on the basis of . . . sexual orientation, a criterion which has no bearing on [plaintiff's] ability to perform his job," constitutes irreparable harm); (Tate Decl., ¶¶ 23, 25; Jane Doe Decl., ¶¶ 21, 23; John Doe 1 Decl., ¶¶ 23-24; John Doe 2 Decl., ¶ 33 (cataloging loss of public confidence and experienced stigma); James Supp. Decl., ¶ 8; Eitelberg Decl., ¶ 11; Fanning Supp. Decl., ¶ 5).

Third, Plaintiffs are harmed by the loss of medically necessary healthcare. *See Fishman v. Paolucci*, 628 F. App'x 797, 801 (2d Cir. 2015) ("A lack of medical services is exactly the sort of irreparable harm that preliminary injunctions are designed to address.").

Finally, the ban compromises Plaintiffs' livelihood and opportunities for advancement. (*See* Mabus Supp. Decl., ¶¶ 4-7 (explaining that because of the ban, "command lacks the requisite certainty that transgender service members will be able to complete the terms of their deployments"); Eitelberg Decl., ¶ 7 (explaining that the ban will cause commanders to be reluctant to invest in training individuals who might leave in "the near future, or to entrust them with important assignments"); Fanning Supp. Decl., ¶¶ 5-6 (explaining that the ban limits advancement and promotion opportunities). Each of these injuries is irreparable and warrants injunctive relief.

B. Plaintiffs Are Likely to Prevail on the Merits of Their Claims.

1. *The Ban Violates Equal Protection.*

Plaintiffs have shown that the ban violates the Fifth Amendment's guarantee of equal protection. (*See* PI Mot. at 11-22.) Rather than rebutting that claim, Defendants defend the constitutionality of the Interim Guidance, which Plaintiffs do not challenge. (*See* Opp. at 25-26.) To the limited extent Defendants address the merits of Plaintiffs' equal protection claim, they erroneously claim the ban is

subject to "highly deferential review" merely because it involves military policy. (Opp. at 24-31.) Under settled law, there is no "military exception" to the requirement of equal protection. The ban's facial classification against transgender people warrants, and cannot survive, heightened scrutiny. And because it lacks even a rational basis and bears the hallmarks of having been enacted for an improper discriminatory purpose, it cannot survive any level of review.

a. *Military policies are not subject to a deferential level of equal protection scrutiny.*

The President cannot discriminate invidiously against transgender people simply because the ban is a military, rather than civilian, policy. The government is not "free to disregard the Constitution when it acts in the area of military affairs." *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981); *see also Chappell v. Wallace*, 462 U.S. 296, 304 (1983) ("This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service."). The Supreme Court has rejected the argument—asserted by Defendants here—that courts should apply a more deferential level of review to military policies even when they facially discriminate on a basis that would otherwise warrant heightened scrutiny. In *Rostker*, the Court "expressly declined to hold that the intermediate scrutiny applicable to gender discrimination did not apply in the military personnel context." *Doe*, 2017 WL 4873042, at *31; 453 U.S. at 79-83. Under this settled law, Defendants' contention that heightened scrutiny applies only to military policies that seek "to exclude a race or religion" (Opp. at 26) has no merit.

b. *Deference does not apply where there was no exercise of considered military judgment.*

In assessing the strength of a proffered justification for a military policy, courts defer to such justifications *only* when they are the product of a deliberative process that draws upon the considered judgment of military professionals,

informed by relevant evidence and expertise. For example, in *Rostker*, the Supreme Court found that "Congress did not act unthinkingly or reflexively and not for any considered reason" when it passed the policy at issue in that case. 453 U.S. at 61, 72 (noting "Congress considered the question at great length," held hearings, and made findings). Here, such study and evaluation of evidence warranting judicial deference "is completely absent from the current record." *Doe*, 2017 WL 4873042, at *31. "To the contrary, the record at this stage of the case shows that the reasons offered for categorically excluding transgender individuals were not supported and were in fact contradicted by the only military judgment available at the time." *Id.*

c. *The ban's facial discrimination against transgender people requires, and fails, heightened scrutiny.*

Defendants do not dispute that discrimination against transgender people meets all of the established criteria for determining when strict scrutiny applies. (PI Mot. at 12-15); *see also Doe*, 2017 WL 4873042, at *60 ("The transgender community satisfies these criteria."). Many other courts have subjected such discrimination to heightened review. *See Doe*, 2017 WL 4873042, at *61 (citing cases). This Court should do so as well to ensure that governmental laws and policies based on bias against disfavored groups are subject to meaningful review. This goal is particularly important in military cases, where it is essential that our nation's armed forces reflect the diversity of our country and are open to all Americans who are otherwise qualified to serve. (*See* Fanning Supp. Decl., ¶¶ 9-10; James Decl., ¶ 46; James Supp. Decl., ¶ 9; Mabus Decl., ¶¶ 17, 42, 46; Mabus Supp. Decl., ¶¶ 8-9.)

Defendants also fail to rebut Plaintiffs' demonstration that discrimination against transgender people additionally warrants heightened scrutiny because it is based on sex. In *Schwenk v Hartford*, 204 F.3d 1187, 1200-02 (9th Cir. 2000), the Ninth Circuit held that discrimination based on a person's transgender status is a

form of sex-based discrimination. Defendants do not even mention *Schwenk*; however, that holding is binding here and requires the application of heightened review. As *Schwenk* itself makes clear by citing Title VII case law to support its analysis of the Gender Motivated Violence Act, the Ninth Circuit's determination that anti-transgender discrimination is based on a person's sex applies regardless of the specific statute or, in this case, constitutional provision at issue. A government policy that facially discriminates against transgender people, as the ban does here, must minimally be evaluated under the heightened standard applied to any form of sex-based discrimination. *See, e.g, Glenn v Brumby* 663 F.3d 1312, 1316 (11th Cir. 2011); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park W Bank Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *see also Doe*, 2017 WL 4873042, at *27-*28.

Under that standard, the government must demonstrate "an exceedingly persuasive" justification for the ban. *United States v. Virginia*, 518 U.S. 515, 531 (1996). "The burden of justification is demanding and rests entirely on" the Defendants. *Id*. at 533. "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation," and "it must not rely on overbroad generalizations." *Id*. None of the justifications proffered by Defendants come close to meeting this standard here. Defendants cite three reasons for the ban. First, they claim that "at least some transgender individuals suffer from medical conditions that could impede the performance of their duties." (Opp. at 29.) Second, Defendants argue that certain medical conditions "may limit the deployability of transgender individuals as well as impose additional costs on the armed forces." (Opp. at 29.) Third, Defendants claim that "the President could reasonably conclude" that permitting transgender people to serve in the military would harm "unit cohesion." (Opp. at 30.)

Defendants cannot show that the ban is substantially related to any of these asserted justifications. As the court in *Doe* correctly held, Defendants' arguments that transgender people may have medical conditions that could affect their deployability "are hypothetical and extremely overbroad." *Doe*, 2017 WL 4873042, at *29. Plainly, "these hypothetical concerns could be raised about *any* service members." *Id.* In addition, "these concerns do not explain the need to discharge and deny accession to *all* transgender people who meet the relevant physical, mental, and medical standards for service." *Id.* Like the measure struck down in in *Romer v. Evans*, 517 U.S. at 632, the policy's "sheer breadth is so discontinuous with the reasons offered for it that it seems inexplicable by anything other than animus toward the class it affects."

Defendants' invocation of cost is equally unavailing. (*See* Opp. at 30.) Under settled law, the government cannot justify discrimination under strict or intermediate scrutiny based on an asserted interest in conserving costs, even where the government could show that significant savings would actually result. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 688-89 (1973) (rejecting "administrative convenience" as a sufficient justification for the government's disparate treatment of men and women); *Stanley v. Illinois*, 405 U.S. 645, 656-58 (1972) (same); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 775 (9th Cir. 2014) (holding that "administrative convenience is a thoroughly inadequate basis for the deprivation of core constitutional rights") (internal citation omitted); *see also infra* § IV.B.d.3. Defendants' attempted reliance on cost to justify such a categorical ban is particularly unavailing in this case, where there is no dispute that the cost of providing medical care to transgender service members is insignificant. *See Doe*, 2017 WL 4873042, at *29 ("The breadth of [the ban] is also discontinuous with the purported concern about costs, which, in addition to having been found to be minimal or negligible, apparently are primarily related to a surgical procedure that only a subset of transgender individuals will even need.").

Finally, Defendants do not explain, let alone support, their claim that permitting transgender individuals to serve in the military might harm "unit cohesion." To the contrary, Defendants acknowledge the absence of any evidence to support such a claim—merely asserting, without more, that it is somehow "reasonable" to assume that permitting transgender people to serve would have an adverse impact. (Opp. at 30-31.) "At *most*, Defendants' reasons appear therefore to be based on unsupported, 'overboard generalizations about the different talents, capacities, or preferences' of transgender people." *Doe*, 2017 WL 4873042, at *29 (citing *Virginia*, 518 U.S. at 533).

In *Doe*, the court noted that it did not base "its conclusion solely on the speculative and overbroad nature of the President's reasons." *Id.* at *30. It further concluded that "the reasons proffered by the President for excluding transgender individuals from the military in this case were not merely unsupported, but were actually *contradicted* by the studies, conclusions and judgment of the military itself." *Id.* In particular, "the RAND National Defense Research Institute conducted a study and issued a report largely debunking any potential concerns about unit cohesion, military readiness, deployability or health care costs related to transgender military service." *Id.* In addition, the Working Group "unanimously concluded that there were no barriers that should prevent transgender individuals from serving in the military, rejecting the very concerns supposedly underlying the [ban]." *Id.* "In short, the military concerns purportedly underlying the President's decision had been studied and rejected by the military itself." *Id.* Accordingly, the *Doe* court concluded that "[t]his highly unusual situation is further evidence that the reasons offered for the [ban] were not substantially related to the military interests the Presidential Memorandum cited." *Id.* This Court should reach the same conclusion here.

The ban fails heightened review for an additional reason as well. The President abruptly—in a series of tweets, and without any formal or deliberative

process—reversed a policy that had been relied upon by many service members. "These circumstances provide additional support for Plaintiffs' claim that the decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy." *Doe*, 2017 WL 4873042, at *30 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)).

d. *The ban cannot survive any level of scrutiny.*

In addition to being too hypothetical and overbroad to pass muster under the heightened scrutiny that must be applied in this case, none of the proffered justifications for the ban survive even rational basis review. Under rational basis review, justifications must have a "footing in the realities of the subject addressed," *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993), and Defendants "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985); *see also Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001). Here, Defendants advance no argument that can justify the ban under any level of review. The absence of any rational relationship between the ban and its asserted justifications, as well as the highly unusual circumstances of its adoption, lead to the inescapable inference that it was adopted based on bias, rather than on legitimate military concerns.

(1) Defendants' argument that they need not justify the ban because it reinstates a prior policy has no merit.

Defendants contend that they need not justify the ban because it simply continues a longstanding prior policy. (Opp. at 17-19.) Defendants are wrong. "Before the [ban], transgender people had already been given the right to serve openly and the right to accede by a date certain in early 2018. The [ban] took those rights away from transgender people and transgender people only." *Doe*, 2017 WL 4873042, at *31. "The targeted revocation of rights from a particular

class of people which they had previously enjoyed—for however short a period of time—is a fundamentally different act than not giving those rights in the first place, and it will be the government's burden in this case to show that *this* act was substantially related to an important government objectives." *Id*. (emphasis in original). In *Perry v. Brown*, 671 F.3d 1052, 1079-80 (9th Cir. 2012), *vacated and remanded on other grounds sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), the Ninth Circuit held that Proposition 8, which eliminated the freedom to marry for same-sex couples in California, was unconstitutional because the State could not justify eliminating a right that had previously been recognized. "Withdrawing [a right] from a disfavored group . . . is different from declining to extend the designation in the first place, regardless of whether the right was withdrawn after a week, a year, or a decade." *Id*.; *see also Romer v. Evans*, 517 U.S. 620, 627 (1996) (striking down Colorado law that "withdr[ew] from [gay people] . . . specific legal protection . . . and . . . forb[ade] reinstatement of these laws and policies"); *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013) (concluding that the federal Defense of Marriage Act was enacted to "disparage and to injure" married same-sex couples because it "refus[ed] to acknowledge a status" previously granted). Under this settled law, the government must justify its decision regardless of whether it reinstitutes an older policy. Its inability to do so reflects an improper purpose to "disparage and to injure" transgender service members and those who wish to serve.

(2) Deployability does not justify the ban even under rational basis review.

Defendants' claim that the ban is justified because "at least some transgender individuals suffer from medical conditions that could impede the performance of their duties" (Opp. at 29) cannot withstand even the most cursory analysis. The June 2016 Open Service Policy requires that transgender people meet all of the same service qualifications that non-transgender people meet. (PI

Mot. at 4-5); *see also Doe*, 2017 WL 4873042, at *28-29 (noting the President's policy bars "an entire category of individuals from the military solely because they are transgender, despite their ability to meet all of the physical, psychological, and other standards for military service"). Accordingly, those affected by the President's categorical ban are transgender service members who are qualified and medically fit for service under generally applicable standards. *See City of L.A. v. Patel*, 135 S. Ct. 2443, 2451 (2015) ("The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.").

With respect to accessions in particular, the June 2016 policy recognized that any medical conditions associated with transgender people are curable; thus, there is no reason to treat transgender people differently than the military already treats those with other curable conditions.[9] (*See* Brown Decl., ¶¶ 44-46 (describing how "the enlistment policy" revived by the ban "treated transgender individuals in an inconsistent manner compared with how the military addressed persons with other curable medical conditions").) Defendants may not single out transgender people and treat them differently given the complete absence of any legitimate reason to do so. *Garrett*, 531 U.S. at 366 n.4; *In re Levenson*, 587 F.3d 925, 933 (9th Cir. 2009) (holding proffered government interest "d[id] not provide a rational basis for" a public policy where policy was "drastically underinclusive" in advancing that interest).

This case is not about "line-drawing" or a battle of experts where people with "almost equally strong claim[s]" are placed on different sides of a line. *Cf. FCC v. Beach Commcn's Inc.*, 508 U.S. 307, 315-16 (1993). Defendants baldly

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[9] Defendants' indirect suggestion that gender dysphoria is comparable to other disqualifying conditions has no basis. Defendants erroneously claim that the World Health Organization classifies "transsexualism" as a "disorder of adult personality and behavior," when in fact the WHO has rejected that classification as lacking any medical or scientific basis. (*See* Brown Supp. Decl., ¶¶ 4-10.)

assert that "[r]easonable people could disagree over whether these individuals should be able to serve" (Opp. at 31), but they fail to offer any possible legitimate basis for such a disagreement. There is *no* "almost equally strong claim" to be made that gender dysphoria is similar to disqualifying unmanageable conditions like contagious and infectious diseases, or physical defects that make training impossible. (*See* Brown Decl., ¶ 42.)

(3) Costs do not justify the ban even under rational basis review.

Defendants' reliance on the purported costs associated with providing medical care to transgender persons is unavailing under rational basis review, just as it is unavailing under heightened scrutiny. Under settled law, "something more than an invocation of the public fisc is necessary to demonstrate the rationality of selecting [one group], rather than some other group, to suffer the burden of cost-cutting legislation." *Lyng v. Int'l Union*, 485 U.S. 360, 376-77 (1988); *see also In re Levenson*, 587 F.3d at 933. Here, Defendants do not attempt to meet even this minimal requirement, merely contending, without more, that even though the cost of providing care to transgender persons is negligible, the military may nevertheless "decide how best to spend its money." (Opp. at 30.) That bare assertion is insufficient to justify a categorical ban even under rational basis review. *Any* denial of benefits to *any* group will *always* save resources, so the government must do more than state a desire to cut costs; it must justify why it chose a particular group to bear the burdens of cost-cutting, and "do more than justify its classification with a concise expression of intent to discriminate." *Plyler v. Doe*, 457 U.S. 202, 227, 229 (1982) (cost-cutting could not justify denying free public education to children of undocumented immigrants who "[i]n terms of educational cost and need . . . are basically indistinguishable from legally resident alien children") (internal quotation marks omitted); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) ("[a state] must do more than show that denying welfare benefits

to new residents saves money"), *overruled in part on other grounds, Edelman v. Jordan*, 415 U.S. 651 (1974). Here, there is no rational justification for making transgender service members bear the weight of cost cutting measures especially where there is no medical distinction made, or even offered, by the military between those conditions experienced by transgender service members and those experienced by others.

This asserted rationale is particularly irrational and implausible given the military's own recent conclusion—which Defendants do not dispute—that the costs of providing medical care to transgender service members is extremely low. As in *Romer*, the contrast between the sweeping exclusion established by the ban and the insignificance of the costs at issue make this rationale "impossible to credit." 517 U.S. at 635 (holding Colorado's asserted interest in "conserving resources to fight discrimination against other groups" was "impossible to credit" in light of the breadth of Amendment 2).

(4) Unit cohesion does not justify the ban even under rational basis review.

The invocation of "unit cohesion" as a proposed justification for bans on military service by qualified Americans has a long and discredited history and does not supply any persuasive justification for this ban. Transgender service members, including Plaintiffs, already have been serving openly and honorably without any adverse impact upon "unit cohesion" (Tate Decl., ¶ 19; Jane Doe 1 Decl., ¶ 14; John Doe 1 Decl., ¶¶ 19, 25; John Doe 2 Decl., ¶¶ 18, 20), and "there is no evidence that permitting openly transgender people to serve in the military would disrupt unit cohesion." (Carson Decl., ¶ 19, Ex. B at xiii, 39-47 (RAND Report).) To the contrary, all of the available evidence, as well as the judgment of military professionals, shows that permitting open service strengthens unit cohesion by encouraging honesty, by showing that diversity is a strength, and by reinforcing that the military is a meritocracy where people contribute to the mission and rise in

leadership based on their performance, not their identities. (Mabus Supp. Decl., ¶ 8; Eitelberg Decl., ¶ 13.) In contrast, excluding a group of people from military service for reasons unrelated to their abilities weakens military readiness because it erodes the principle of merit upon which the military's strength rests. (Fanning Decl., ¶ 60; Fanning Supp. Decl., ¶ 7; James Decl., ¶ 43; James Supp. Decl., ¶ 9; Mabus Supp. Decl., ¶ 12.) Moreover, it is well-settled that the government "cannot, indirectly or directly give . . . effect" to "private biases." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *Cleburne*, 473 U.S. at 448. Accordingly, to the extent concern about unit cohesion is simply another way of excluding a group of people *because* the group experiences social prejudice, it cannot justify the ban under any level of review.

(5) The ban is inexplicable by anything other than bias toward transgender people.

For all of the reasons stated above, the ban is inexplicable by anything other than bias toward transgender people, which is impermissible under any level of review. "In determining whether a law is motivated by an improper animus or purpose, 'discriminations of an unusual character' especially require careful consideration." *Windsor*, 133 S. Ct. at 2693 (quoting *Romer*, 517 U.S. at 633). "The discrimination in this case was certainly of an unusual character." *Doe*, 2017 WL 4873042, at *30. The ban reversed a policy that was adopted after extensive deliberation and review by the military itself and was relied upon by many transgender service members. The President's announcement of the ban was abrupt and highly unusual, "without any of the formality or deliberative processes that generally accompany the development and announcement of major policy changes that will gravely affect the lives of many Americans." *Id.* The terms of the ban were sweeping and categorical—"that all transgender individuals would be precluded from participating in the military in any capacity." *Id.* "It is not within our tradition to enact laws of this sort." *Romer*, 517 U.S. at 633; *see also Vill. of*

Arlington Heights, 429 U.S. at 266-68 (describing factors that show "improper purposes are playing a role").

Plaintiffs are accordingly likely to prevail on the merits of their equal protection claim.

2. *The Ban Violates Due Process.*

Defendants' ban also violates the Fifth Amendment's due process guarantee because it infringes upon a constitutionally protected liberty interest in being able to live in accordance with one's innate gender identity, and because it punishes transgender people for taking actions—identifying themselves as transgender to their commanding officers and others—that the government itself induced. (*See* PI Mot. at 22-27.) Putting aside Defendants' reprisal of meritless ripeness arguments (Opp. at 31-32), Defendants' arguments in response to Plaintiffs' due process claim largely ignore the substance of Plaintiffs' claims.[10]

As an initial matter, Defendants fail to rebut Plaintiffs' demonstration that the ban is subject to heightened review because it burdens their constitutionally protected liberty interest in living in accordance with their gender identity, a "basic component of a person's core identity." *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000) (internal citations and quotation marks omitted), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (en banc); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 n.8 (N.D. Cal. 2015) (transgender identity is "immutable"); *see also* Brown Decl., ¶¶ 21-23.

Defendants' argument that Plaintiffs have not "narrowly and accurately define[d]" the interest they seek to vindicate has no merit. (Opp. at 33.) The interest Plaintiffs assert is the freedom to live in accordance with one's gender identity—a characteristic the Ninth Circuit has held to be a "basic component of a person's core identity." *Hernandez-Montiel*, 224 F.3d at 1094 (internal citations

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[10] In some instances, Defendants actually attack claims that were never raised in Plaintiffs' PI Motion. (*E.g.*, Opp. at 32-33.)

and quotation marks omitted). In that case, the Ninth Circuit recognized the transgender plaintiff could not change that core aspect of personal identity and should not have to do so in order to avoid persecution. *Id.* Similarly, Plaintiffs cannot change their gender identities and should not have to do so in order to avoid discrimination.

Like other laws that have been struck down because they burden a fundamental right only for the members of a disfavored group (*see* PI Mot. at 25), the ban burdens this aspect of personal autonomy only for transgender people. Other service members can live in accordance with their gender identity: under the ban, transgender people—and only transgender people—cannot. Non-transgender service members—*i.e.*, the majority of service members whose gender identity matches their assigned sex at birth—are free to live, work, and identify consistent with their core gender identity. In contrast, the ban denies transgender people the same freedom. Under the ban, transgender people who are open about their gender identity are prohibited from enlisting and are subject to discharge.

In *Witt v. Dep't of Air Force*, 527 F.3d 806, 814-21 (9th Cir. 2008), the Ninth Circuit held that a military regulation that selectively infringes upon a constitutionally protected liberty interest—in that case, the right of unmarried adults to enter into a consensual intimate relationship as established in *Lawrence v. Texas*, 123 S.Ct. 2472 (2003)—is subject to heightened scrutiny. That holding is applicable here, and Defendants have cited no authority or argument to the contrary. Instead, Defendants fall back upon their erroneous argument that plaintiffs lack standing, contending only that "unlike the plaintiff in *Witt*, Plaintiffs have not been discharged." (Opp. at 31-33.) That argument has no bearing on the merits of Plaintiffs' due process claim. Like the plaintiff in *Witt*, Plaintiffs have stated a valid due process claim, based upon the government's infringement of a constitutionally protected liberty interest.

Defendants mischaracterize Plaintiffs' claim as an interest in having the military "disregard their transgender status." (Opp. at 33.) That reframing misses the point and turns the requirement of substantive due process on its head. The ban violates due process because it uses Plaintiffs' transgender status, an immutable, core aspect of their identities, as a proxy for unfitness. The ban deprives all persons with that identity the ability to serve, across the board, with no individualized consideration of their ability. Put simply, transgender persons have a protected due process right to live in accordance with their gender identity, just as do all other people. The ban infringes upon that right by categorically barring them from military service for exercising that fundamental freedom, without regard to their fitness or ability to serve.

In a closely analogous case, the Second Circuit explained why a categorical ban on service by pregnant women in the Marines similarly violated due process: "the Marine Corps, instead of taking an individualized approach to the disability of pregnancy, established a general rule that seriously affects the ability of women Marines who are physically able to be mobile and ready . . . [A] mandatory discharge regulation is overbroad and overly restrictive because it penalizes the decision to bear a child by those Marines whose mobility and readiness would not be reduced, either during most months preceding birth or during their careers after birth." *Crawford v. Cushman*, 531 F.2d 1114, 1125 (2d Cir. 1976). So, too, here: a ban on transgender people serving is overbroad and overly restrictive because it penalizes a constitutionally protected aspect of personal liberty—here, the ability to live in accordance with one's gender identity—that has no impact on a person's ability to serve. And where, as here, the government does not even argue that there is a substantial relationship between that identity and military concerns, the ban fails under heightened review.[11]

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[11] At a minimum, due process requires that a governmental policy must at least be rationally related to a legitimate government interest. *See Washington v.*

Finally, the ban violates due process because the government induced transgender service members to come out to their command, and now threatens them with forced separation and the loss of medical care for having done so. (*See* PI Mot. at 25-27.) In response, Defendants argue that a "judicial estoppel" claim cannot succeed on these facts. (*See* Opp. at 32-33 (citing judicial estoppel cases *United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995), *New Hampshire v. Maine,* 532 U.S. 742, 755 (2001), *Emery Mineral Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984), and a recent Supreme Court decision interpreting the Administrative Procedures Act, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct 1199, 1210 (2015)).) Defendants' rebuttal is nonresponsive because Plaintiffs do not advance a "judicial estoppel" claim, and the authorities upon which their argument rests are inapplicable to Plaintiffs' due process claim.

Defendants fail to respond to the key cases upon which Plaintiffs rely to show the fundamental unfairness of allowing the government to punish people for relying on settled policies. *See INS v. St. Cyr*, 533 U.S. 289, 323 (2001) (holding undocumented immigrants who pled guilty, "[r]elying on the settled practice" that they would be eligible for deportation waivers, could not be deported after the Attorney General's discretion to issue those waivers was eliminated); *Cox v. Louisiana*, 379 U.S. 559, 569-570 (1965) (overturning conviction where party reasonably relied on government's own representations about lawfulness of the conduct); *cf. Watkins v. U.S. Army*, 875 F.2d 699, 708 (9th Cir. 1989) (holding the government was equitably estopped from discharging a gay man from military service after it "acted affirmatively" to "admit[]," "retain[]," and "promot[e]" him, and then encouraged the disclosure that it used to discharge him).

Glucksberg, 521 U.S. 702, 728 (1997) (explaining that substantive component of due process "requires . . . that [public policies] be rationally related to legitimate government interests"). For the reasons stated above, *see supra* § IV.B.1.c, the ban fails even this minimal test.

The government is not "estopped from changing generally applicable policies." (Opp. at 32.) When there are legitimate reasons to do so and doing so withstands constitutional review, it surely can make changes in policy. But the government cannot induce individuals to rely on a policy and then punish them when they do. To this point, Defendants have no reply. Plaintiffs are therefore likely to succeed on this claim as well.

3. *The Ban Violates the First Amendment.*

Defendants also have no persuasive response to Plaintiffs' First Amendment claim. They again defend the constitutionality of the Interim Guidance, ignoring Plaintiffs' challenge of the ban itself. To the limited extent Defendants address Plaintiffs' actual First Amendment claim, their arguments miss the mark.

Defendants argue that the accessions ban "turns on whether a person's current or history of gender dysphoria or gender transition meets medical standards, not because of the message one's gender identity conveys." (Opp. at 34.) That is incorrect. The accessions ban prohibits individuals from enlisting solely because they are transgender, regardless of their current or past medical treatment. As the August 25 Memorandum expressly acknowledges, the ban reinstates a policy that "generally prohibit[s] openly transgender individuals from accession[.]" (Sieff Decl., Ex. G at § 1(a)); *see also Doe*, 2017 WL 4873042 at *30; (Brown Decl., ¶ 40; Carson Decl., ¶ 28; Eitelberg Decl., ¶ 10; Fanning Decl., ¶ 56; James Decl., ¶ 37; Mabus Decl., ¶ 39.) Accordingly, Defendants' attempt to recast the accessions policy as a ban on the underlying medical condition, rather than on the expression of transgender identity, has no merit.

Defendants also fail to acknowledge that because the ban restricts speech based on its viewpoint, it is subject to strict scrutiny. As Defendants concede (Opp. at 35), "regulations restricting speech on military installations may not discriminate against speech based upon its viewpoint." *Nieto v. Flatau*, 715 F. Supp. 2d 650, 655 (E.D.N.C. 2010). "Generally speaking, a regulation is

viewpoint based if it suppresses the expression of one side of a particular debate," *id.*, which is precisely what the transgender ban does. It prohibits transgender people in the military from openly advocating for their own equal treatment and restricts their ability to discuss or demonstrate by example their competency as service members. Persons who take a different view are not similarly restricted. By picking one side of a debate and authorizing speech only on that side and restricting speech on the other, the ban imposes a viewpoint-based restriction that is subject to strict scrutiny. Because Defendants cannot show that the ban serves even a legitimate purpose, much less that it is narrowly tailored to serve a compelling government interest, it violates the First Amendment.

Because Defendants ignore the ban's viewpoint-based restriction on speech, they erroneously rely upon *Brown v. Glines*, 444 U.S. 348, 355 (1980) and *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) for the proposition that "regulation of speech in the military survives . . . if it restrict[s] speech no more than is reasonably necessary to protect the substantial government interest." (Opp. at 35 (quotations omitted).) Those cases do not apply to a viewpoint-based restriction. But even under that more lenient standard, the ban is far too broad to survive a First Amendment challenge. The regulations in *Brown* and *Weinberger* were narrow, limiting speech only on military bases or when expressed by service members on duty and in uniform. *Brown*, 444 U.S. at 348 (distribution of flyers *on base*); *Weinberger*, 475 U.S. at 507 (wearing yarmulke while *on duty and in uniform*). Here, the ban goes far beyond limiting Plaintiffs' expression while on base or on duty. Because the ban penalizes Plaintiffs if they are discovered to be or declare themselves to be transgender *at all*, it curtails Plaintiffs' ability to identify themselves as transgender in any forum—whether publicly or privately, at a political rally, in a newspaper op-ed, or on social media. The ban's restriction is thus "far greater than necessary to protect the Government's [purported] interests." *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 927 (C.D. Cal.

2010) (rejecting government's comparison to *Brown* and finding that banning open service by gays and lesbians violated First Amendment). Thus, even under the standard advanced by Defendants, the ban violates the First Amendment.

C. The Public Interest and Equity Sharply Favor an Injunction.

Defendants fail to identify a single, actual harm that it would suffer from the proposed injunction. (*See* Opp. at 36.) To the extent Defendants claim an injunction against enforcing the ban would interfere with DOD's ability to study the merits of banning transgender people from the military generally (Opp. at 36), the claim has no bearing in fact or law. An injunction against enforcement of the ban will not prevent Defendants from assessing the impact of transgender individuals in the military. By contrast, Plaintiffs' lives, livelihoods and constitutional rights will be injured should the Court delay in acting. The balance of equities weighs heavily in favor of an injunction.

An injunction would also serve the public interest, because "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). And while Plaintiffs agree that the "public has a strong interest in national defense" (Opp. at 36), that interest is best served by retaining top-level talent, not by expelling highly capable officers and active service members from their critical military positions. (*See* Fanning Decl., ¶ 60; James Decl. ¶¶ 40-41; Mabus Decl. ¶ 45; *see also* Tate Decl., ¶¶ 4-9, 11, 30; John Doe 1 Decl., ¶¶ 8-9, 24-25; John Doe 2 Decl., ¶ 5; Jane Doe Decl., ¶¶ 4-7.)

In short, "there is absolutely no support for the claim that the ongoing service of transgender people would have any negative effective on the military at all. In fact, there is considerable evidence that it is the discharge and banning of such individuals that would have such effects." *Doe*, 2017 WL 4873042, at *33.

D. Because The Ban Is Facially Unconstitutional, The Court Should Enjoin Defendants From Enforcing It Altogether.

Defendants ask the Court to limit any injunction to the Plaintiffs (Opp. at 37-39), but a broad injunction against the ban is the only remedy that would "provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted). One of the principal irreparable injuries Plaintiffs seek to enjoin is the professional stigma they suffer from being labeled unfit by official government policy. (*See supra* § III.A.) An injunction that exempted Plaintiffs from the ban, but permitted Defendants to discriminate against other transgender people, leaves the federal imprimatur behind that stigma in place.

In addition, a facially unconstitutional policy cannot be enforced *anywhere*. The Supreme Court has long explained that "the scope of injunctive relief is dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (affirming nationwide injunction of executive immigration directive). Particularly in cases concerning the lawfulness or constitutionality of a federal enactment, the Ninth Circuit has long held that broad "relief may be appropriate even in an individual action." *Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987) (holding that, given the nationwide scope of the claim at issue, "the district court could hardly" have issued an injunction "on anything other than a nationwide basis"); *Washington v. Trump*, 847 F.3d 1151, 1166-67 (9th Cir. 2017) (declining to "limit" the scope of an injunction against President Trump's travel ban); *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017) (enjoining President Trump's "sanctuary city" Executive Order nationwide). The law in other circuits is the same. *See Int'l Refugee Assist. Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017) (en banc) ("[B]ecause [the immigration ban] likely violates the Establishment Clause, enjoining it only as to Plaintiffs would not cure the

constitutional deficiency, which would endure in all [of the ban's] applications."), *vacated as moot* 2017 WL 4518553 (U.S. Oct. 10, 2017); *Decker v. O'Donnell*, 661 F.2d 598, 618 (7th Cir. 1980) (holding a nationwide injunction is appropriate against a facially unconstitutional federal law).

Defendants ask the Court to ignore these principles and authorities solely because this case involves the military, citing *Meinhold v. U.S. Department of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994) for the proposition that "injunctions concerning military policies" require "special" scrutiny and limitation. (Opp. at 38.) While the Ninth Circuit affirmed a limited injunction in that case, it explained that it was appropriate because "Meinhold sought *only* to have *his* discharge voided and to be reinstated." *Meinhold*, 34 F.3d at 1480 (emphasis added). The case did not involve a facial challenge to the policy at issue. Here, Plaintiffs are bringing a facial claim, and their injuries cannot be redressed without enjoining the ban in its entirety. *Madsen*, 512 U.S. at 765.

V. CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss and grant a preliminary injunction.

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Respectfully submitted,

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