IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2 *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Civil Action No. 17-cv-1597 (CKK)

PLAINTIFFS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

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TABLE OF FREQUENTLY CITED DOCUMENTS

Short Citation	Document and Location
2017 Presidential Memorandum	Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security, dated August 25, 2017 (Milgroom Decl., Ex. T) (previously filed at Dkt. No. 13-2, Ex. A)[1]
2018 Presidential Memorandum	Memorandum for the Secretary of Defense and the Secretary of Homeland Security re: Military Service by Transgender Individuals, dated March 23, 2018 (Milgroom Decl., Ex. FF) (previously filed at Dkt. 96-3)
DTM 16-005	Directive-type Memorandum (DTM) 16-005, "Military Service of Transgender Service Members," dated June 30, 2016 (previously filed at Dkt. No. 13-10, Ex. C)
Interim Guidance	Military Service by Transgender Individuals – Interim Guidance, dated September 14, 2017 (Milgroom Decl., Ex. W) (previously filed at Dkt. No. 45-1)
Mattis Plan	Memorandum for the President re: Military Service by Transgender Individuals, dated February 22, 2018 (Milgroom Decl., Ex. DD) (previously filed at Dkt. No. 96-1)
Panel Report	Department of Defense Report and Recommendations on Military Service by Transgender Persons, dated February 2018 (Milgroom Decl., Ex. EE) (previously filed at Dkt. No. 96-2)
PI Order	Memorandum Opinion Granting in Part and Denying in Part Defendants' Motion to Dismiss and Plaintiffs' Motion for Preliminary Injunction (Dkt. 61)
Terms of Reference	Terms of Reference – Implementation of Presidential Memorandum on Military Service by Transgender Individuals, dated

[1] For the Court's convenience, certain frequently cited documents were filed together with Plaintiffs' cross-motion for summary judgment as exhibits to the Declaration of Lauren Godles Milgroom ("Milgroom Decl."). For those documents, the table notes both their location in the Milgroom Declaration and where they were previously filed in this case.

	September 14, 2017 (Milgroom Decl., Ex. X) (previously filed at Dkt. No. 108-6)
US PI Br.	Defendants' Motion to Dissolve the Preliminary Injunction (Dkt. No. 116)
US SJ Br.	Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint, or, in the Alternative, Defendants' Motion for Summary Judgment (Dkt. No. 115)
US SJ Opp.	Defendants' Reply in Support of Their Motion to Dismiss Plaintiffs' Second Amended Complaint or, in the Alternative, for Summary Judgment, and Opposition to Plaintiffs' Cross-Motion for Summary Judgment (Dkt. No. 138)

INTRODUCTION

The Mattis Plan, like the 2017 Presidential Memorandum, bans people who undergo gender transition from serving in the military. Defendants assert that this is not a ban on transgender people, as the President ordered, but a "new" policy based on a medical condition and thus warrants only the most deferential review. But that defense lacks any footing in reality. On its face, the Mattis Plan restricts military service to individuals who live in their "biological sex"—*i.e.*, who are not transgender.

The Mattis Plan's facial discrimination against transgender people, as well as its targeted revocation of their rights, compels this Court's heightened scrutiny of Defendants' asserted rationales for the ban. The undisputed facts show that Defendants cannot possibly meet that demanding standard. Excluding transgender people works only to prevent otherwise qualified people from serving in our nation's Armed Forces. While Defendants try to portray transgender people as more likely than others to be unfit, they cannot explain why transgender people alone should be subject to categorical exclusion rather than generally applicable enlistment, deployment, and retention standards. Their claim that service by transgender people will harm unit cohesion rests on pernicious stereotypes. And Defendants cannot rely on the added costs of providing medical care to transgender troops where, as here, they have no independent reason for choosing to save costs by excluding those troops.

Defendants' challenge to the standing of Plaintiffs—transgender individuals currently serving or seeking to serve in the military—is likewise baseless. The Mattis Plan, like the 2017 Presidential Memorandum, bars Plaintiffs from entry, subjects them to discharge, and/or forces them to continue serving only on sufferance under a policy that marks them as unfit and inferior. This Court's injunction is the only thing protecting Plaintiffs from those certainly impending harms. But neither that preliminary relief nor the grandfather clause—which itself subjects

Plaintiffs to objectively unequal treatment—defeats Plaintiffs' standing to challenge the Mattis Plan.

ARGUMENT

I. THE COURT SHOULD GRANT SUMMARY JUDGMENT TO PLAINTIFFS ON THEIR EQUAL PROTECTION CLAIM

A. The Mattis Plan Excludes Transgender People From Military Service

This Court should reject Defendants' attempt to blinker reality and recast the Mattis Plan as something other than what it plainly is: a blueprint to ensure that no transgender individuals serve in our Nation's Armed Forces "in any capacity." With the exception of current service members who relied on the Carter Policy, the Mattis Plan bans from enlistment or service anyone who has ever undergone or requires gender transition, *i.e.*, transgender people, a group also sometimes referred to by the now less commonly used word "transsexual." *See*, *e.g.*, *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 658 n.8 (S.D. Tex. 2008) (noting that courts "use the terms 'transgender' and 'transsexual' interchangeably"); *Schroer v. Billington*, 424 F. Supp. 2d 203, 205 (D.D.C. 2006) (using term "transsexual"); Dkt. 13-2, Ex. B at 7 (citing former DODI 6130.03 disqualifying applicants with a history of "transsexualism").

Defendants attempt to sow semantic confusion by arguing that there are "transgender" individuals who can indefinitely live, work, and function in their birth sex. US SJ Opp. 20-21 (citing RAND Report).[2] But the definition of "transgender' that is relevant to Plaintiffs' claims

[2] Defendants' reliance on the argument that only some transgender service members have taken steps to transition since the Carter policy went into effect has no merit. As the RAND Report indicates, only a subset of the total number of transgender people already serving in the military will seek to transition *at any given time*. Dkt. 13-4, Ex. B at 22-30. That is so for a number of reasons. Coming to terms with one's transgender identity is a process that takes varying lengths of time. In addition, decisions about when to initiate the process of gender transition are affected by many factors, including fear of discrimination, medical issues, and career considerations. Transgender people in the military may delay transition for military-specific reasons as well, including the need to plan medical care around deployments or other

is the same as the older term "transsexual"—*i.e.*, a person who lives in accord with their gender identity, not their birth sex. While it is true that the term "transgender" is sometimes used to encompass a much broader range of individuals wo do not conform to gender norms, *see, e.g.*, Dkt. 13-4, Ex. B at 5 (noting the distinction between transgender people and gender-nonconforming people), that is not the meaning of the word as used by Plaintiffs here. As set forth below, both the pre-Carter policy and the Mattis Plan precisely target the class of persons who live in accord with their gender identity, not their birth sex, including Plaintiffs. Defendants' claim that there is a broader group of gender-nonconforming people, also sometimes referred to as transgender, who are unaffected by their policy has no legal bearing on this case, and does not rebut Plaintiffs' claim that the Mattis Plan creates a transgender/transsexual classification.

Defendants relatedly claim that by barring individuals who have undergone or require gender transition, the Mattis Plan turns on a medical condition, not on transgender status itself. US SJ Opp. 22-23. That argument is belied by the language of the Plan, which disqualifies from service "transgender persons who require or have undergone gender transition," regardless of whether they have gender dysphoria. Mattis Plan 2.[3] In addition, as Defendants concede, one of their principal justifications is that gender transition "is unlike any other form of treatment in that it requires a permanent exception from the standards that apply to the patient's biological sex."

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responsibilities, as servicemembers do for many other kinds of care. Thus, it is not surprising that only a subset of current transgender service members have initiated transition since the Carter policy was adopted in June 2016.

[3] The Mattis Plan's reliance on transgender status, not gender dysphoria, is underscored by Defendants' explanation that the plan does not exclude a person who had transient gender dysphoria as a child, but who no longer has gender dysphoria as an adult—*i.e.*, who turned out not to be transgender. Panel Report 42. Plainly, the Mattis Plan's exclusion from military service depends not on a person's history of gender dysphoria, but on that person's transgender status.

US SJ Opp. 39. That argument highlights that Defendants' policy is specifically based on sex, not on a medical condition. *See Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011) (firing employee because of her "intended gender transition" is sex discrimination).

Defendants also argue that the Mattis Plan is not a ban on transgender people, like the pre-Carter policy, because it purportedly differs from the pre-Carter policy in important respects. US SJ Opp. 20. But other than allowing a small number of transgender people who relied on the Carter policy to serve, the Mattis Plan is substantially the same as the pre-Carter ban. The pre-Carter policy excluded potential enlistees who had a history of "transsexualism" or had undergone a "change of sex." Dkt. 13-2, Ex. B at 7 (citing former DODI 6130.03). The Mattis Plan does the same thing using current terminology. It excludes potential enlistees who have a history of "gender dysphoria" (the current diagnosis given to transgender people) or "who require or have undergone gender transition" (a more modern term for "change of sex"). Mattis Plan 2. The pre-Carter policy also mandated the discharge of transgender people who were already serving by requiring individuals with "gender and identity disorders" (the diagnosis then given to transgender people) to undergo mandatory administrative separation rather than referral to a medical board for evaluation of fitness for continued service. Dkt. 128-3 at 1 (citing former DODI 1332.38). In almost precisely the same way, the Mattis Plan creates an exception to the normal medical retention review process applied to other service members and mandates the discharge of any service member who is diagnosed with gender dysphoria and requires "a change of gender." Mattis Plan 2.

Finally, Defendants also contend that the Mattis Plan cannot be viewed as a ban because it is purportedly similar to the Carter policy in two respects. Defendants' arguments on this point strain credulity. First, Defendants contend that the policies are "consistent" because the Carter

policy requires service members to serve in their birth sex before they transition. US SJ Opp. 21. It is true that the Carter policy requires transgender service members to obtain a gender dysphoria diagnosis and a gender transition plan before being able to change from serving in their birth sex to serving in accord with their gender identity. But that does not alter the fundamental difference between the two plans. The Carter policy allows people to remain in service after transition; the Mattis Plan does not. Two policies so fundamentally at odds cannot be said to be "consistent."

Defendants' second attempt to elide the differences between the Carter policy and the Mattis Plan—arguing that, by virtue of the "reliance exception" in the Mattis Plan, both policies permit transgender people to serve openly, US SJ Opp. 21-22—is equally baseless. The "reliance exception" or "grandfather clause" of the Mattis Plan applies only to a small group of current transgender service members to whom the government promised open service and no retaliation. *See* Mattis Plan 2. Its guarantee of continued service for those to whom it applies is time limited, exists only because the Mattis Plan reverses a prior policy that gave transgender individuals a right to serve on equal terms, and becomes meaningless once the last of the transgender service members who came out under the Carter policy leaves the service.

B. The Mattis Plan Is Subject To Heightened Scrutiny

This Court has already determined that a policy excluding transgender people from military service warrants heighted scrutiny because it discriminates based on sex, because discrimination against transgender people independently warrants heightened scrutiny, and because it is a "targeted revocation of rights." PI Order 61-63, 71. Defendants have shown no reason to alter that analysis, nor does any exist.

1. The Mattis Plan warrants no more deference than the President's initial order.

Defendants have failed to rebut this Court's initial finding that the President's decision to reverse the Carter policy was not entitled to any special deference because it was not based on "study and evaluation" or "considered professional judgment." PI Order 67, 70. They have expressly declined to do so, contending that they have no obligation to produce any such evidence. *See* Dkt. 97; US SJ Br. 5. Instead, Defendants have sought to justify the validity of a policy excluding transgender service members after the fact. Under settled law, the government cannot justify a policy that discriminates on a constitutionally suspect basis through *post hoc* rationalizations. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (holding that the government cannot justify sex-based discrimination based on a rationale "hypothesized or invented *post hoc* in response to litigation"); *accord Karnoski v. Trump*, 2018 WL 1784464, at *12 (W.D. Wash. Apr. 13, 2018); *Stockman v. Trump*, No. 5:17-cv-01799-JGB-KK, Dkt. 79, at 19 (C.D. Cal. Dec. 22, 2017).

Defendants argue that they are not simply rubberstamping the President's decision, but rather that the Mattis Plan is based on the military's "independent" judgment and therefore warrants a "highly deferential form of review." US SJ Opp. 27, 32. But the undisputed facts show that the President's directive constrained the result and that the subsequent process was about how—not whether—to reverse the Carter policy. While Defendants cite self-serving language in the Mattis Plan and Panel Report describing the process as an exercise of independent judgment, they do not claim that the Panel or Secretary Mattis were writing on a blank slate. *See id.* at 24-26. Nor does the record offer any support for that contention. The mere invocation of the word "independent" does not change this "sequence of events" or require the Court to disregard the undisputed context in which the process leading to the Mattis Plan

took place. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). Because the conclusion cannot be divorced from that context or the constraints it imposed, the Mattis Plan does not warrant any more deference than the President's initial order.

2. The Mattis Plan would be subject to heightened scrutiny even if it were based on independent military judgment.

In any case, the sex-based policy established by the Mattis Plan would be subject to heightened scrutiny even if—contrary to the undisputed record in this case—it had been adopted by the military independently of the President's orders. "[D]eference does not mean abdication," *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981), particularly where, as here, military policy discriminates on the basis of a suspect or quasi-suspect classification. Federal courts have struck a careful balance between deference to the military and the discharge of their constitutional responsibilities to give meaning to the Equal Protection Clause.[4] Although courts give credence to "the professional judgment of military authorities concerning the relative importance of a particular military interest," *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986), they must also closely scrutinize the fit between the asserted interests and the discriminatory classification.

That is precisely what the Court did in *Rostker*, where it applied the same heightened scrutiny test as in the civilian context to the plaintiffs' equal protection claim. *See* 453 U.S. at 69 (citing *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971)). The Court credited Congress's goal of drafting combat troops as an important governmental objective, but it

[4] Defendants argue that separation-of-powers considerations "require[]" judicial deference to the Mattis Plan. US SJ Opp. 32. But the courts have taken those separation-of-powers considerations into account in striking a balance between deferring to the government's identification of important military interests and protecting service members' fundamental constitutional rights. *See Rostker*, 453 U.S. at 64-68. The separation-of-powers doctrine does not require courts to abdicate their own constitutionally mandated role to enforce fundamental guarantees of equality and due process.

also examined whether excluding women from registering for the draft was "closely related" to that goal. *See id.* at 76-79. Only because then-existing military policy excluded women from combat did the Court find that the exclusion passed that demanding test. *See id.* Contrary to Defendants' assertion, the existence of the combat exclusion, not "administrative burdens," was the basis for the Court's decision. *See id.* at 79. Indeed, a district court recently permitted a renewed challenge to the male-only draft to proceed on the ground that the factual basis underpinning *Rostker* no longer exists now that women can serve in combat. *See National Coal. for Men v. Selective Serv. Sys.*, 2018 WL 1694906, at *4 (S.D. Tex. Apr. 6, 2018) (recognizing that "*Rostker* did not hold that Congress receives blind deference in the area of military affairs").

Likewise, Defendants fail to meaningfully distinguish *Owens v. Brown*, 455 F. Supp. 291, 305-309 (D.D.C. 1978), which struck down a statutory ban on the assignment of female service members to Navy duty vessels because the ban was not substantially related to a legitimate governmental objective. While the district court noted that the ban interfered with the Navy's "discretion in qualifying and assigning women to military duty," it did so only to underscore the overbroad and sweeping nature of the ban. *See id.* at 307-308, 310. Contrary to Defendants' suggestion (at 30-31), nothing in the court's analysis indicates that the same ban would have been constitutional had it been instituted by the military instead of Congress. *See id.* at 306-309.

And in *Adair v. England*, 183 F. Supp. 2d 31, 52 (D.D.C. 2002), while the court acknowledged that the chaplain personnel decisions at issue did not implicate military readiness, it also affirmed that "deference to matters related to management of the military … *does not extend to practices that may subvert one's inalienable constitutional rights*" (emphasis added). Accordingly, the court refused to "take the first step down th[e] slippery slope" of limiting service members' constitutional rights "[b]arring an explicit directive from the Supreme Court or

the D.C. Circuit to do so." *Id.* at 52. Both *Havens v. Mabus*, 146 F. Supp. 3d 202, 205, 215 n.10 (D.D.C. 2015), and *Foster v. Mabus*, 103 F. Supp. 3d 95, 107, 110 n.8 (D.D.C. 2015), only declined to apply *Adair* because those cases involved Administrative Procedure Act claims, not constitutional claims.

Similarly, although Defendants argue that the court's analysis in *Crawford v. Cushman,* 531 F.2d 1114 (2d Cir. 1976), has been partially superseded in light of *Rostker*, the Second Circuit has since reaffirmed that "military conduct is not immune from judicial review when challenged as violative of the Bill of Rights," *Katcoff v. Marsh,* 755 F.2d 223, 233 (2d Cir. 1985). The government can point to nothing to show that *Crawford* would be decided differently by the Second Circuit today. Moreover, Defendants do not argue, nor could they, that the rule invalidated in *Crawford*—a categorical rule requiring discharge of all pregnant soldiers—would survive scrutiny even under their own articulation of deference.[5]

Courts have also held the government to its burden of showing the requisite fit in other military cases involving higher levels of scrutiny. For instance, in *Singh v. McHugh*, 185 F.

[5] Defendants' attempts to distinguish Plaintiffs' other precedents are equally unavailing. In *Frontiero v. Richardson*, 411 U.S. 677, 688-689 (1973), the Supreme Court rejected the government's proffered rationales of administrative efficiency and cost savings for the sex-based military classification under heightened scrutiny—the same rationales Defendants have repeatedly relied on to justify the sex-based classification here, *see, e.g.*, US SJ Opp. 43; US PI Br. 18. In *Steffan v. Perry*, 41 F.3d 677, 689 & n.9 (D.C. Cir. 1994), the court applied rational basis review to regulations barring gay people from attending the Naval Academy or serving in the Navy, but noted that "it would not pass even rational basis review for the military to reject service members because of characteristics—such as race or religion … that have absolutely no bearing on their military service," and that in any event, "[c]lassifications based on race or religion, of course, would trigger strict scrutiny." Defendants also do not dispute that in *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 911-923 (C.D. Cal. 2010), *vacated on other grounds as moot*, 658 F.3d 1162 (9th Cir. 2011), the district court closely scrutinized whether the important governmental interests purportedly furthered by "Don't Ask, Don't Tell" ("DADT") were in fact significantly furthered by DADT and whether DADT was necessary to further those interests.

Supp. 3d 201, 219-220 (D.D.C. 2016), a case involving a Sikh student seeking grooming accommodations in order to enroll in ROTC, the district court addressed "how a court is supposed to incorporate traditional deference to the military into the [Religious Freedom Restoration Act] strict scrutiny analysis." The court rejected the government's argument that it should prevail simply because the case implicated "the composition, training, and equipping of the fighting force[s]," repudiating "'a degree of deference that is tantamount to unquestioning acceptance.'" *Id.* at 221 (quoting *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015)). It held that "while the Court must credit the Army's assertions and give due respect to its articulation of important military interests, the Court may not rely on [the military's] 'mere say-so.' Instead, it must consider whether an exception is required under the strict scrutiny test, and hold defendants to their burden of demonstrating that the denial of the limited accommodation sought in this case is the least restrictive means to advance the Army's compelling interest." *Id.* at 222. The court then held that the Army had not met this demanding standard due to its erratic refusal to "grant an exception to a policy already riddled with [similar] exceptions." *Id.* at 230-232.

C. The Mattis Plan Cannot Survive Heightened Scrutiny

The Mattis Plan is subject to, and cannot survive, heightened scrutiny. Even accepting the government's factual assertions at face value, its arguments rely on stereotypes and overbroad generalizations and fail to show a sufficient reason for subjecting transgender service members to a special rule, rather than evaluating them based on the same standards applied to all service members.

1. Concerns about military readiness do not justify the ban.

Defendants cannot show that the exclusion of transgender people is substantially related to promoting military readiness. *First*, Defendants argue that the stresses of military life may exacerbate transgender service members' gender dysphoria, even after treatment. US SJ Opp.

35. But Defendants' only support for that concern is "the absence of evidence on the impact of deployment on individuals with gender dysphoria." Panel Report 34. In other words, Defendants seek to justify banning transgender people from service based on an absence of data that results from Defendants' own exclusionary policies. That circular justification—transgender people cannot serve because they never have—cannot satisfy even rational basis review, much less the heightened standard applicable here. *Cf. Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 993 (N.D. Cal. 2012) (stating that "[t]radition alone … cannot form an adequate justification for the law" and that "'ancient lineage' of a classification does not render it legitimate").

Second, Defendants seek to portray transgender people as unfit based on data showing high numbers of mental health visits by transgender service members, as compared to service members overall, since the Carter policy went into effect. US SJ Opp. 35. But transgender service members were *required* to make multiple mental health visits for both administrative and medical reasons during this period to obtain transition-related care; such visits were required by regulation to obtain a commander's approval for each step of medically necessary care. Milgroom Decl. Ex. QQ (Brown Decl.), Ex. B (SG Report) at 24-29, Dkt. 148-2. More broadly, it is unsurprising that when the military began to provide medical care for a group that was previously denied such care, the incidence of provider visits increased. In any event, Defendants fail to show a sufficiently close relationship between the mental health concerns purportedly raised by this data in light of generally applicable retention and discharge standards.

Third, Defendants' purported concern that transgender people are more likely to be suicidal (US SJ Opp. 35) is facially inadequate to justify a ban. Defendants invoke a thin body

of inconclusive data,[6] based on the brief period the Carter policy has been in effect, to claim that being suicidal is an inherent characteristic of transgender people. But Defendants cannot justify sex-based discrimination based on such overbroad generalizations, even when they have some statistical support. *Virginia*, 518 U.S. at 540-542 (evidence regarding "the average capacities and preferences of men and women" cannot justify a sex-based exclusion that bars even women who "have the will and capacity" to benefit from "the training and attendant opportunities that VMI uniquely affords"). Defendants do not subject other groups to this type of class-based scrutiny. Dkt. 131-1 at 24-25. Instead, the military relies on universal medical retention standards to screen out those who are unfit to serve, including for suicidality. *See id.* at 23-24; DODI 6130.03 § 5.28(f)(5). There is no legitimate reason to apply a different standard to transgender troops, much less one that is "exceedingly persuasive." *Virginia*, 518 U.S. at 533.

Fourth, Defendants also contend, based solely on unattributed comments from "[s]ome commanders," that transitioning service members "could" be non-deployable for over 2 years. US SJ Opp. 36. That number does not match even the longest estimated times for recovery from surgery combined with the longest estimates for initiation of hormonal therapy included in the Mattis Report. *See* Panel Report 23. But even disregarding that internal inconsistency, such overbroad generalizations do not justify the ban. The Carter policy requires completion of gender transition before a transgender person can enlist. As a result, concerns relating to the time of recovery for gender transition bear no relationship to the accessions ban. Similarly, Defendants do not explain why the universal deployment standard for those already serving

[6] SG Report 29 (stating that the Panel Report "mischaracterizes and selectively cites DoD data on military personnel that, if accurately presented, would in fact demonstrate that rates of suicidal ideation among transgender and non-transgender service members are roughly equivalent").

(requiring discharge of any service member who is nondeployable for longer than 12 months) is not sufficient to ensure that transgender service members, like all others, meet the standards for military readiness.

Finally, it is patently untrue that transgender people are subject to the same universal deployment and medical retention standards as others under the Mattis Plan. US SJ Opp. 38, 40. If that were the case, there would be no need for a special policy requiring the discharge of service members who require transition-related care regardless of their ability to deploy.

2. Concerns about unit cohesion and the maintenance of sex-based policies do not justify the ban.

Defendants' claims that transgender service members undermine unit cohesion and interfere with sex-based standards are baseless—recapitulating the same discredited arguments once used to exclude lesbian, gay, and bisexual people from serving openly and equally. Defendants assert that allowing transgender individuals who "retain some, if not all, of the anatomy of their biological sex" to share facilities with non-transgender individuals violates the privacy of those non-transgender individuals. US SJ Opp. 40-41. But that argument only highlights the impermissible sex stereotypes at the heart of the ban.

As this Court has explained, the defining characteristic of a transgender individual is "that their inward identity, behavior, and possibly physical characteristics, do not conform to stereotypes of how an individual of their assigned sex should feel, act, and look." PI Order 62. Defendants' privacy justification—which assumes that a transgender woman is not really a woman, and so compromises the privacy of "true" women—fails scrutiny for the very reason that it *is* a sex stereotype. "If a state actor cannot defend a sex-based classification by relying upon overbroad generalizations, it follows that sex-based stereotypes are also insufficient to sustain a classification." *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*,

858 F.3d 1034, 1051 (7th Cir. 2017); *see also Doe v. Boyertown Area Sch. Dist.*, No. 17-3113, slip op. at 29-30 (3d Cir. June 18, 2018).

Defendants are wrong to sweep aside the many cases rejecting privacy concerns as a sufficient justification for discrimination against transgender people simply because they do not involve military settings. *See* US SJ Opp. 41. The significance of those cases is not dependent on their factual settings. Rather, they embody a strong legal consensus that privacy concerns cannot justify sex-based exclusions. *Whitaker*, 858 F.3d at 1051; *Boyertown*, slip op. at 20 (holding that the "presence of students who do not share the same birth sex" in school locker rooms and restrooms does not violate the privacy rights of other students). The military's invocation of privacy can no more justify a ban on transgender people serving in the military than it could justify a ban on women at the Virginia Military Institute. *See Virginia*, 518 U.S. at 540 (rejecting lower court's reasoning that exclusion of women was justified by privacy-based concerns).

Defendants are also wrong to argue that because they can change their "policy approach" to addressing issues related to service members' privacy, they can do so by banning an entire group of people from military service based on suspect or quasi-suspect classifications. US SJ Opp. 42. While the military can change its guidance relating to privacy, it is not free to reach a "different policy judgment" (*id.*) that unconstitutionally discriminates based on sex by excluding transgender people, *see Virginia*, 518 U.S. at 540-546 (holding that the need to make alterations or accommodations to protect privacy interests does not justify sex-based discrimination).

Defendants argue that allowing transgender people to serve could "generate perceptions of unfairness," "create additional friction in the ranks," and "frustrate … service members who are not transgender." US SJ Opp. 41. In addition to being almost purely speculative and *post*

hoc, these justifications are nothing more than "a thinly-veiled reference to an assumption that other service members are biased against transgender people," a rationale already rejected as illegitimate by this Court. PI Order 66 n.10.

Defendants' claim that discrimination against transgender people is necessary to avoid liability has no legal basis. Defendants cite *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016), which enjoined enforcement of regulations construing the Affordable Care Act to prohibit the denial of medical treatment to transgender people. Nothing in that case creates a basis for liability for equal treatment of transgender people. In addition, *Franciscan Alliance* concerned the construction of a federal statute, but no construction of a federal statute could overcome the military's constitutional obligation to treat transgender people equally.

3. Banning transgender people from military service cannot be justified based on cost.

Defendants argue that the ban on retention is justified by the "disproportionate" cost of treating gender dysphoria, claiming that under the Carter policy medical costs for service members with gender dysphoria have increased nearly three times compared to other service members.[7] US SJ Opp. 43. But even under rational basis review, the added cost of treating a particular group cannot justify the ban without an adequate explanation of why transgender individuals, as opposed to other persons with medical conditions for which comparable treatment is provided, were selected for exclusion from military service. *See Plyler v. Doe*, 457 U.S. 202, 227 (1982); *Diaz v. Brewer*, 656 F.3d 1008, 1013 (9th Cir. 2011); *cf. Crawford*, 531 F.2d at 1122 (noting that the relevant question is "whether it is rational to classify pregnant personnel

[7] This justification has no bearing on the enlistment ban, since only transgender people who have completed transition and demonstrated sufficient medical stability are eligible to enlist, consistent with the standard applied to people with other treatable conditions.

differently from personnel with all other temporary disabilities"). The cost of care is not a factor in retention for any other group or condition associated with a particular group, and Defendants offer no explanation for why it should be considered a factor here.

For the same reason, Defendants cannot justify the ban based on some transgender service members' need to travel to obtain transition-related care. US SJ Opp. 44. Defendants do not explain why transgender service members should be singled out for different treatment in this regard than other service members who may be diagnosed with conditions that require them to travel to obtain specialized medical care.

Defendants also claim that a greater than anticipated number of service members have received a diagnosis of gender dysphoria since the adoption of the Carter policy. US SJ Opp. 44 n.17 (noting that 937 service members have received such a diagnosis in the past 18 months). But based on Defendants' own data, the actual cost of providing that care thus far is at the lower end of the RAND Report estimates. *Compare* SG Report 37 & n.136 (citing DOD data stating that transition-related health care costs were $2.2 million for fiscal year 2017), *with* Dkt. 13-4, Ex. B at 36 (predicting costs of $5.8 million to $8.4 million). In addition, while Defendants claim that the RAND Report "dramatically underestimated" the number of transgender service members requiring care, they disregard that the RAND Report was not estimating the backlog level of utilization when the ban was first lifted, but rather an annual estimate going forward based on projections of normal usage. At no other time will the military be reacting to a backlog of total denial of care for decades. But in any event, even if current rates of usage persist, Defendants have no legitimate—much less important—reason for conditioning retention based on the cost of care only for a particular group. Defendants' continued assertion of this argument

only underscores their disparate treatment of transgender troops and heightens the inference that such treatment reflects animus rather than legitimate military concerns.

II. THIS COURT SHOULD GRANT SUMMARY JUDGMENT TO PLAINTIFFS ON THEIR DUE PROCESS CLAIM

Plaintiffs have shown that the Mattis Plan violates the constitutional guarantee of due process for three independent reasons: (1) it is arbitrary and has no reasonable relationship to any legitimate governmental objective; (2) it infringes Plaintiffs' constitutionally protected right to live in accord with their gender identity, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015); and (3) it arbitrarily punishes conduct that the government itself previously sanctioned and induced, thereby flouting the basic "considerations of fairness" underlying the Due Process Clause, *Landgraf v. USI Film Prods.,* 511 U.S. 244, 265 (1994).

Defendants respond by citing authority that "there is no protected property interest in continued military service." *Spadone v. McHugh*, 842 F. Supp. 2d 295, 304 (D.D.C. 2012). But Plaintiffs' due process claim is not based on an alleged deprivation of property without due process; it is based on the Mattis Plan's infringement of Plaintiffs' protected liberty interest in living in accord with a fundamental, immutable aspect of their identity. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000). Under the Mattis Plan, non-transgender individuals may serve in accordance with their gender identity, but transgender individuals may not. A policy that conditions military service on the selective deprivation of a fundamental liberty to a group of persons violates due process even if there is no right to serve in the military as a general matter. *See Witt v. Dep't of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008); *see also Obergefell*, 135 S. Ct. at 2603.

Defendants also argue that even if due process protects the right to live in accord with one's gender identity, the Mattis Plan withstands scrutiny because it is putatively directed at a

medical condition rather than transgender status. US SJ Opp. 45. That argument fails for all the reasons already discussed. *Supra* pp. 2-5, 10-17.

Defendants further argue that, to the extent Plaintiffs' due process claim is based on the Mattis Plan's disruption of settled expectations of current service members, it is a "repackaged form" of Plaintiffs' estoppel claim. US SJ Opp. 45. That is incorrect. Wholly independent of equitable principles of estoppel, fundamental considerations of fairness guaranteed by the Due Process Clause "constrain the extent to which government can upset settled expectations." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 471 n.22 (1985). Nor does the grandfather provision cure this violation of basic due process principles. Notwithstanding that limited exception, the Mattis Plan subjects current transgender service members to unequal treatment, as explained above. *Supra* pp. 2-5, 10-17.

III. THIS COURT HAS JURISDICTION TO ENTER RELIEF

A. Plaintiffs Have Standing To Challenge The Mattis Plan

"[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006). Like the President's directives, the Mattis Plan bars Plaintiffs from entry, subjects them to discharge, and/or subjects them to continued service under a discriminatory policy that brands them as unfit and retains them upon sufferance only as "exceptions" to a policy otherwise banning them from serving. Those injuries are sufficient to confer standing.[8]

[8] Defendants' mootness arguments (US SJ Opp. 26) also fail. Plaintiffs' challenge is not moot simply because Plaintiffs have amended their complaint to challenge the Mattis Plan. Defendants argue that a finding of mootness is required by the "presumption of regularity" that attends government action, *see id.*, but mootness does not turn on whether Defendants *intended* to evade judicial review by issuing the Mattis Plan. Rather, the test is objective—whether "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur." *Aref v. Lynch*, 833 F.3d 242, 251 (D.C. Cir. 2016). Here, there is no dispute that

Defendants, even while seeking to dissolve the preliminary injunction, rely on the injunction to challenge the harms to Plaintiffs from the Mattis Plan. But the injunction is what protects Plaintiffs from those harms. The fact that Defendants currently are refraining from enforcing the Mattis Plan "under protest and under the compulsion of an injunction decree" does not deprive Plaintiffs of standing to challenge the Plan. *Altvater v. Freeman*, 319 U.S. 359, 365 (1943).

Defendants contend that no one is harmed by the Mattis Plan because some transgender service members will be grandfathered in, and everyone else—those without a diagnosis or not yet enlisted—can serve in their birth sex or rush to seek medical treatment and enlist before the injunction is lifted and the grandfathering window closes. But Supreme Court precedent is clear that, in order to seek judicial intervention, Plaintiffs need not decide between, on the one hand, serving under the grandfather clause and suffering the constitutional harms inflicted by a policy that deems them unfit and, on the other hand, waiting for the ban to take effect so that they are barred from serving as transgender people. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (holding that a plaintiff's ability to avoid harm "by simply not doing what he claim[s] the right to do" does not render the dispute nonjusticiable where "the threat-eliminating behavior [is] effectively coerced"). It is "[t]he dilemma posed by that coercion"—having to choose between two harmful alternatives—that Plaintiffs seek to avoid. *Id.* (quoting *Abbot Labs. v. Gardner*, 387 U.S. 136, 152 (1967)). The grandfather clause does not cure the harms caused by the Mattis Plan. Even if some Plaintiffs could qualify for that exemption before the Mattis

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Defendants intend to enforce, if permitted to do so, the Mattis Plan, which, as set forth above, is substantially the same as the policy enjoined by this Court.

Plan takes effect, the exemption subjects transgender service members to demeaning and unequal treatment.[9]

Undisputed evidence shows that the Mattis Plan imposes concrete and particularized harm on each of the Plaintiffs.[10] *First*, with respect to accession, it is undisputed that Jane Doe 7 and John Doe 2 intend to join the military, *see* Jane Doe 7 Decl. ¶ 1; John Doe 2 Decl. ¶¶ 8-13, and would be barred under the Mattis Plan because John Doe 2 has undergone gender transition and Jane Doe 7 is in the process of doing so. The government's attempts to sidestep those "certainly impending" injuries fail as a matter of law. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Whether Jane Doe 7 and John Doe 2 could actually succeed in enlisting before the Mattis Plan takes effect—as the government posits, *see* US SJ Br. 12—there is no dispute that the Mattis Plan by its plain terms would bar their intended accession. That injury confers standing to challenge their differential treatment, *see Heckler v. Mathews*, 465 U.S. 728, 737 (1984), even before the Mattis Plan takes effect, *see MedImmune*, 549 U.S. at 126-136. Indeed, Defendants' imposition of a now-or-never choice on transgender individuals like Jane Doe 7 and John Doe 2, while imposing no such time-limited dilemma on enlistment by non-transgender individuals, is a form of discrimination. *See* PI Order 39 ("The 'injury in fact element of standing in an equal protection case is the denial of equal treatment resulting from the imposition of the barrier.'" (quoting *American Freedom Law Ctr. v. Obama*, 821 F.3d 44, 51 (D.C. Cir.

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[9] It is also expressly subject to revocation in the event that a court uses that exemption as a basis for invalidation. While the government tries to make the likelihood of revocation seem remote, *e.g.*, US SJ Br. 12, the Mattis Plan—tellingly—plans for that eventuality, *see* Panel Report 43.

[10] While the government faults Plaintiffs' citations to declarations from before the Mattis Plan was issued, see, e.g., US SJ Opp. 2, 14, the government offers no argument or evidence disputing Plaintiffs' showing that each of them is either a current or prospective service member who will be subject to the Mattis Plan should it take effect. Nothing more is required to demonstrate Plaintiffs' standing.

2016)). Defendants cannot invoke this Court's injunction—the only thing holding open a temporary prospect of accession—while trying to dissolve that injunction, nor can they rely on the injunction to deprive Jane Doe 7 and John Doe 2 of standing to seek permanent relief from the Mattis Plan's bar on accession.

The government contends that Jane Doe 7 and John Doe 2 have no injury in fact because they have not had an enlistment application denied. *See* US SJ Br. 12; US SJ Opp. 16. But for purposes of both Plaintiffs' standing, their sworn intent to enlist is sufficient to establish the relevant injury—which, as this Court has emphasized, is the imposition of a competitive barrier to military service. *See* PI Order 38-47.[11] While the government tries to argue that there is no disparate treatment, *see* US SJ Opp. 14-15, that is an argument on the merits and fails for the reasons already given. *Supra* pp. 10-17.

There is likewise no dispute that Plaintiff Dylan Kohere is transgender and has begun working with medical professionals on a treatment plan for his transition, which he expects to complete before finishing college. Kohere Decl. ¶¶ 1, 10. Like Jane Doe 7 and John Doe 2, he would therefore be ineligible to enlist under the Mattis Plan. The record is uncontroverted that Kohere plans "to spend [his] entire career in the military," *id*. ¶ 2, and would be barred from realizing his intended career path under the Mattis Plan because of his transgender status. In addition, although Defendants take the litigation position that because midshipmen are considered actively serving in the military, Plaintiff Regan Kibby is *only* a retention Plaintiff subject to the grandfather clause, they offer no assurance that he will receive the benefit of that

[11] The government also notes that Jane Doe 7 has not been in recent contact with a Coast Guard recruiter. US SJ Opp. 16 n.5. But there is no reason for her to be in touch with the Coast Guard now, given her sworn statement in May 2018 that she is set to have "one additional surgery this summer and … plan[s] on enlisting 18 months later." Jane Doe 7 Decl. ¶ 1.

clause when commissioning as an officer under the Naval Academy's "commissioning requirements." US SJ Br. 11. Nor have they indicated whether Kibby will have to comply with the 36-month "period of stability" in his birth sex before commissioning—which would bar him from service.

Second, with respect to retention, the undisputed record establishes that Jane Doe 6, a current transgender service member without a military diagnosis of gender dysphoria, made an appointment to obtain a transition plan prior to the President's tweets, but never came out to her doctors or command as a result of the tweets and would face discharge for seeking to transition under the Mattis Plan. Relying on the grandfather clause and the injunction, the government argues that she is free to seek a diagnosis in order to transition, US SJ Opp. 14-15, but this now-or-never choice is in itself a competitive barrier to retention, *see MedImmune*, 549 U.S. at 129. Moreover, if the Mattis Plan becomes effective before Jane Doe 6 receives a diagnosis, being diagnosed and transitioning would subject her to immediate discharge—a career-ending risk she is understandably unwilling to take. Jane Doe 6 Decl. ¶ 18. The other option of concealing her identity for her entire military career is equally untenable. *Id*. ¶ 22. Both horns of Jane Doe 6's dilemma—risking her career or concealing her "authentic self," *id*. ¶ 18—thus entail injury-in-fact, and that Catch-22 created by the Mattis Plan has created significant stress undermining the quality of her life and work, *id*. ¶¶ 13-15, 17-18, 21-22; *see also Karnoski v. Trump*, 2017 WL 6311305, at *4 (W.D. Wash. Dec. 11, 2017) (finding "constitutionally sufficient injury" where transgender service member's "rights to express her authentic gender identity" were impaired by her "'actual and well-founded fear'" she would be discharged as a result (quoting *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988)).

Finally, the Mattis Plan brands all currently serving Plaintiffs—regardless of whether they are grandfathered in or made to serve in their birth sex—as inferior and presumptively unfit to serve. The government tries to minimize the Mattis Plan's inherently unequal treatment of actively serving Plaintiffs as mere "stigmatic injury." US SJ Opp. 11. But in addition to the severe stigma of being deemed unfit to serve, these Plaintiffs have been singled out, "put in a solitary class," *Romer v. Evans*, 517 U.S. 620, 627 (1996), and treated differently than all other service members.

Unlike in the cases cited by Defendants, Plaintiffs here are personally subject to the discriminatory policy being challenged and will concretely suffer unequal treatment as a result of its implementation. The government relies heavily on *Allen v. Wright*, 468 U.S. 737 (1984). But the plaintiffs there, who brought a nationwide class action challenging IRS tax breaks for segregated private schools, did not allege that their children had "ever applied or would ever apply to any private school." *Id*. at 746. The Court thus held that their "stigmatic injury, or denigration, suffered by all members of a racial group," did not represent a sufficiently personal stake to create Article III standing. *Id*. at 754. Here, however, Jane Does 2-6, John Doe 1, and Kibby are not bystanders with a generalized grievance, but actively serving transgender individuals who will experience the consequences of Defendants' transgender ban firsthand. The Mattis Plan will not merely stigmatize them; it will officially place them into an inferior and unequal class. While other service members will enjoy the security and status of serving as honored, respected, and equal members of the Armed Forces, these Plaintiffs and other transgender troops will serve only on conditional sufferance and therefore on objectively unequal terms. Such harms, which are among "the most serious consequences of discriminatory

government action," confer standing to challenge a discriminatory policy to which Plaintiffs are themselves subject. *Allen*, 468 U.S. at 755; *see Heckler*, 465 U.S. at 737.

None of Defendants' other cases addresses standing based on the type of disparate treatment present here. *Moore v. Bryant*, 853 F.3d 245, 249 (5th Cir. 2017), rejected standing to challenge a Confederate emblem on the Mississippi state flag where the plaintiff alleged no unequal treatment from that "symbolic, government, hate speech." But there is a vast difference between a subjective feeling of stigma (however strongly felt) and being treated unequally under a discriminatory policy, as is the case for actively serving Plaintiffs under the Mattis Plan. The discrimination here entails objectively disparate terms and conditions for Plaintiffs' service; it relies neither on "mere personal offense," *In re Navy Chaplaincy*, 534 F.3d 756, 763 (D.C. Cir. 2008)—as in *Allen* and *NAACP v. Horne*, 626 F. App'x 200, 201 (9th Cir. 2015)—nor on abstract disagreement with a purely "'symbolic'" preference by the government for some other group, *Kurtz v. Baker*, 829 F.2d 1133, 1141 (D.C. Cir. 1987). Rather, as in *Heckler*, the discrimination against Plaintiffs arises from the Mattis Plan's singular treatment of transgender service members and the resulting denial of the same security and status afforded to all other service members. As the Supreme Court explained, such discrimination—by treating "members of the disfavored group as 'innately inferior'"—"can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." 465 U.S. at 739-740; *see also Norwood v. Harrison*, 413 U.S. 455, 469 (1973) ("discriminatory treatment exerts a pervasive influence").

B. Plaintiffs' Injuries Are Redressable

Defendants—reprising their claim that the President is "absolutely immune" from suits in equity against "him in his official capacity," Dkt. 90 at 7—argue that "the Court … should dismiss [him] as a defendant because any injuries caused by [him] are not redressable," US SJ

Br. 20-21. But there is no dispute that enjoining the other Defendants and declaring Defendants' policy to be unconstitutional will redress harms to Plaintiffs caused by both the President's actions and the Mattis Plan. *Supra* pp. 18-24; PI Order 30-51. The government's redressability argument is in reality a claim that because "injunctive relief against those other Defendants" may at least partially redress harms traceable to the President, Dkt. 90 at 7, he is improperly before this Court. But the government has yet to cite *any* case dictating the dismissal of the President in such circumstances. As Plaintiffs have explained, the scope of relief is a matter not of the Court's jurisdiction but of its remedial judgment, informed by respect for the Office of the Presidency and the nature of the constitutional violation. Dkt. 92 at 11-14.[12]

CONCLUSION

Plaintiffs' cross-motion for summary judgment should be granted.

[12] This Court's decision in *Lovitky v. Trump*, 2018 WL 1730278 (D.D.C. Apr. 10, 2018), is not to the contrary. The plaintiff there failed to prove jurisdiction under the mandamus or any other statute. *Id*. at *7. Here, there is undisputed federal question jurisdiction, and the declaration that Plaintiffs seek concerns only "the correction of an unconstitutional act" the President has already taken—something "closely resembl[ing] the performance of 'a mere ministerial duty,' where 'nothing [is] left to discretion.'" *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 2018 WL 2327290, at *23 (S.D.N.Y. May 23, 2018). In any event, a *declaration* regarding the President's past actions is "'not ultimately coercive,'" *Steffel v. Thompson*, 415 U.S. 452, 471 (1974), and does not implicate the separation-of-powers concerns identified by Defendants. *See Knight*, 2018 WL 2327290, at *11, *23-24. Such relief is therefore appropriate in this case in addition to an injunction against Defendants other than the President.

June 22, 2018

Respectfully submitted,

/s/ Alan E. Schoenfeld

Alan E. Schoenfeld (pro hac vice)
WILMER CUTLER PICKERING
HALE & DORR LLP
7 World Trade Center
250 Greenwich St.
New York, New York 10007
Telephone: 212-230-8800
Fax: 212-230-8888

Paul R.Q. Wolfson (D.C. Bar No. 414759)
Kevin M. Lamb (D.C. Bar No. 1030783)
WILMER CUTLER PICKERING
HALE & DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
Telephone: 202-663-6000
Fax: 202-663-6363

Christopher R. Looney (pro hac vice)
Harriet Hoder (pro hac vice)
Adam M. Cambier (pro hac vice)
WILMER CUTLER PICKERING
HALE & DORR LLP
60 State Street
Boston, Massachusetts 02109
Telephone: 617-526-6000
Fax: 617-526-5000

Nancy Lynn Schroeder (pro hac vice)
WILMER CUTLER PICKERING
HALE & DORR LLP
350 S. Grand Ave., Ste. 2100
Los Angeles, California 90071
Telephone: 213-443-5300
Fax: 213-443-5400
Attorneys for Plaintiffs

Claire Laporte (*pro hac vice*)
Matthew E. Miller (*pro hac vice*)
Daniel McFadden (*pro hac vice*)
Kathleen M. Brill (*pro hac vice*)
Michael Licker (*pro hac vice*)
Rachel C. Hutchinson (*pro hac vice*)
Lauren Godles Milgroom (*pro hac vice*)
FOLEY HOAG LLP
155 Seaport Blvd.
Boston, Massachusetts 02210
Telephone: 617-832-1000
Fax: 617-832-7000

Theresa M. Roosevelt (D.C. Bar No. 1021853)
FOLEY HOAG LLP
1717 K Street NW
Washington, DC 20006
Telephone: 202-223-1200
Fax: 202-785-6687

Jennifer Levi (*pro hac vice*)
Mary L. Bonauto (*pro hac vice*)
GLBTQ LEGAL ADVOCATES & DEFENDERS
18 Tremont St., Ste. 950
Boston, Massachusetts 02108
Telephone: 617-426-1350
Fax: 617-426-3594

Shannon P. Minter (*pro hac vice*)
Amy Whelan (*pro hac vice*)
Chris Stoll (*pro hac vice*)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market St., Ste. 370
San Francisco, California 94102
Telephone: 415-392-6257
Fax: 415-392-8442