

The Honorable Marsha J. Pechman

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

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

Defendants.

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

**PLAINTIFFS’ MOTION FOR
SUMMARY JUDGMENT**

NOTE ON MOTION CALENDAR:
February 16, 2018

ORAL ARGUMENT REQUESTED

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INTRODUCTION

1
2 President Trump’s unilateral decision to strip transgender people of the honor of military
3 service and the means to care for their medical needs was unconstitutional from the moment it
4 was announced to the world on July 26, 2017. In the months since that time, the rest of the
5 federal government has scrambled to construct a defense of that decision—from the White
6 House staff saddled with transforming three 140-character tweets into a Presidential
7 Memorandum, to the blindsided Department of Defense officials dispatched to conduct a “study”
8 of President Trump’s decision, to the Department of Justice lawyers tasked with stretching the
9 powers of the Presidency to justify an unprecedented betrayal of those willing to lay down their
10 lives for our country. But no amount of reverse engineering by this vast array of federal officials
11 can create the impossible: the existence of an adequate justification for President Trump’s
12 decision *at the time the decision was actually made*. For that simple reason, Plaintiffs are entitled
13 to summary judgment.

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

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

1 **STATEMENT OF UNDISPUTED FACTS¹**

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

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

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

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

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

27
28 ¹ The record here includes substantially similar declarations as those submitted in support of Plaintiffs’ preliminary injunction motion, supplemented with relevant factual updates as appropriate, as well as declarations from former Secretary of the Army Eric Fanning and former Secretary of the Air Force Deborah Lee James.

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

6 To answer these questions, RAND examined, among other data, transgender population
7 prevalence estimates, transition-related care usage data, care utilization rates from foreign
8 countries, rates of gender dysphoria in the United States veteran population, and the likely
9 monetary costs and deployment-related effects of transition-related health care. *Id.* at 12, 13, 29,
10 33-42. The report also examined open service by transgender people in the Australian, Canadian,
11 Israeli, and United Kingdom militaries, *id.* at 51-61, and ultimately returned 112 pages of
12 analysis and findings.

13 This extensive endeavor found “no evidence” that allowing transgender people to serve
14 openly would negatively impact unit cohesion, operational effectiveness, or readiness. *Id.* at xiii,
15 39-47. It also concluded that coverage for transition-related medical care would represent an
16 “exceedingly small” portion of DoD’s overall health care expenditure. *Id.* at xi. Conversely, the
17 report affirmatively identified “significant costs” if transgender troops were separated through a
18 ban on open service, as the military would lose skilled and qualified personnel, requiring
19 expensive and time-consuming training to fill vacancies in units, Carson Decl. ¶ 21; Mabus Decl.
20 ¶ 18, would have to engage in “costly administrative processes” to effect their discharge, and
21 would risk “declining productivity, and other negative outcomes due to lack of treatment for
22 gender identity–related issues,” RAND Report at 46.

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

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

13 By the conclusion of its discussion and analysis, all members of the Working Group
14 (including senior uniformed personnel) unanimously agreed that transgender people should be
15 permitted to serve openly. Mabus Decl. ¶ 21; James Decl. ¶ 22; Fanning Decl. ¶ 25; Carson Decl.
16 ¶ 27. The Working Group concluded that banning service by transgender individuals would harm
17 the military by excluding qualified individuals based on a characteristic unrelated to fitness to
18 serve and lead to the loss of highly trained and experienced service members. Carson Decl. ¶¶
19 25-26; Mabus Decl. ¶ 18; James Decl. ¶¶ 20-23; Fanning Decl. ¶¶ 21-22.

20 Based on the recommendations of the Working Group, Secretary Carter issued a formal
21 directive on June 30, 2016 setting forth the policy “that service in the United States military
22 should be open to all who can meet the rigorous standards for military service and readiness” and
23 that “transgender individuals shall be allowed to serve in the military.” Mabus Decl., Ex. C at 2.
24 The policy was designed to be implemented over the course of a year, with accessions (i.e., entry
25 into the military) of transgender troops to begin on July 1, 2017, which was subsequently
26 extended by six months to January 1, 2018. *Id.*, Ex. C, Attachment at 1; Decl. of Derek Newman,
27 Ex. 4. Each of the military services took steps to begin implementing the policy. Mabus Decl.
28 ¶ 25; James Decl. ¶ 27; Fanning Decl. ¶ 41.

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

5 **II. President Trump’s Ban on Military Service by Transgender People**

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

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

24 In contrast to the years of work and process that led to the military’s prior inclusive
25 policy, there is no indication, much less evidence, that President Trump’s July 26, 2017
26 announcement was the product of any meaningful factual inquiry, deliberative review, or
27 considered military judgment. Mabus Decl. ¶¶ 40, 47-48, 52; James Decl. ¶ 38; Fanning Decl. ¶
28 55; *see also* Newman Decl., Exs. 6-8. As Secretary Mabus explains, “[e]ven individuals who had

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

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

9 **III. Plaintiffs**

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

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

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

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

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

13 Plaintiffs have worked closely with their chain of command during their transition, as
14 required by military policy, thereby ensuring that the needs of the military continue to be met.
15 Schmid Decl. ¶ 13; Muller Decl. ¶ 37; Winters Decl. ¶ 16; Lewis Decl. ¶ 15; Stephens Decl.
16 ¶ 18. Transitioning has not only helped transgender service members excel in their own
17 performance by facilitating their health, but it has also allowed them to forge stronger
18 relationships with other service members, thereby fostering greater trust and unit cohesion.
19 Lewis Decl. ¶ 25; Schmid Decl. ¶¶ 16-17; Stephens Decl. ¶ 19; Muller Decl. ¶ 24 Stephens Decl.
20 ¶ 33.

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

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

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

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

20 LEGAL STANDARD

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

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

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

7 ARGUMENT

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

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

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

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

5 **I. The Ban’s Discrimination Against Transgender People Violates Equal Protection.**

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

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

16 Laws are subject to heightened judicial scrutiny when they classify or discriminate
 17 among individuals based on presumptively illegitimate lines. For example, “[d]iscriminations
 18 that burden some despised or politically powerless groups are so likely to reflect antipathy
 19 against those groups that the classifications . . . must be strictly scrutinized.” *Watkins v. Army*,
 20 875 F.2d 699, 712 n.4 (9th Cir. 1989) (Norris, J., concurring) (analyzing sexual orientation
 21 discrimination as a suspect classification). “Such groups are generally termed ‘suspect classes.’”
 22 *Id.* Similarly, certain other groups with a “history of past discrimination” are “entitle[d] . . . to
 23 intermediate scrutiny” and are “termed ‘quasi-suspect’ classes” under equal protection doctrine.
 24 *Id.* “When conducting an equal protection analysis,” courts thus first ask whether a “legislative
 25 or administrative classification at issue burdens a suspect or quasi-suspect class.” *Ball v.*
 26 *Massanari*, 254 F.3d 817, 823 (9th Cir. 2001) (internal quotation marks omitted).

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

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

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

26 All of these indicia are present in the case of government discrimination against
27 transgender people. First, there has been a long and ugly history of discrimination against
28

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

1 transgender people, which remains pervasive to this day. “As a class, transgender individuals
2 have suffered, and continue to suffer, severe persecution and discrimination.” *Doe*, 2017 WL
3 4873042, at *27. Transgender people experience “alarming rates” of harassment and physical
4 violence relative to the general population. *See Newman Decl.*, Ex. 5. It is “common-sense
5 knowledge that transgender individuals face hostility and discrimination in our society.”
6 *Brocksmith v. United States*, 99 A.3d 690, 698 (D.C. 2014); *see also Adkins v. City of New York*,
7 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015). “There is no denying that transgender individuals
8 face discrimination, harassment, and violence because of their gender identity.” *Whitaker*, 858
9 F.3d at 1051.

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

18 While nothing more is needed, the third and fourth considerations militating in favor of
19 strict scrutiny are present here as well. “Transgender individuals have immutable and
20 distinguishing characteristics that make them a discernable class.” *Doe*, 2017 WL 4873042, at
21 *27; *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (“as a class
22 they exhibit immutable or distinguishing characteristics that define them as a discrete group”).
23 As evidenced by Plaintiffs’ expert testimony, gender identity is recognized as an immutable
24 characteristic. *Brown Decl.* ¶¶ 19-29; *see also Norsworthy*, 87 F. Supp. 3d at 1119 n.8 (gender
25 identity “equally immutable” as sexual orientation).

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

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

8 ***Import of Heightened Scrutiny.*** The application of any form of heightened scrutiny,
9 regardless of whether strict or intermediate, informs several aspects of the equal protection
10 analysis. First, the government bears the burden of justifying the discrimination at issue; it is not
11 the plaintiffs’ burden to demonstrate that the challenged action is unconstitutional. As the
12 Supreme Court has explained, “[t]he burden of justification is demanding and it rests entirely on
13 the State.” *VMI*, 518 U.S. at 533; *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980)
14 (“The burden . . . is on those defending the discrimination to make out the claimed
15 justification.”). The burden is allocated to the government because discrimination employing a
16 suspect or quasi-suspect classification comes with “a strong presumption” of invalidity. *VMI*,
17 518 U.S. at 332 (internal quotation marks omitted). Under intermediate scrutiny, the
18 government’s burden is to show that the challenged action bears a substantial relationship to
19 important government interests, whereas under strict scrutiny, the government must show that
20 the challenged action is narrowly tailored to compelling interests.

21 Second, under heightened scrutiny, the government is limited to the actual and “genuine”
22 justifications that motivated its action at the time; it cannot rely upon hypothetical or *post hoc*
23 justifications conceived after the fact. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1696-
24 97 (2017); *VMI*, 518 U.S. at 533 (“The justification must be genuine, not hypothesized or
25 invented post hoc in response to litigation.”); *SmithKline Beecham Corp. v. Abbott Labs.*, 740
26 F.3d 471, 481-82 (9th Cir. 2014) (holding, under heightened scrutiny, that courts must scrutinize
27 the “actual purposes” at the time the discrimination was adopted rather than “hypothetical
28 justifications”); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (“this test requires a

1 ‘genuine’ justification”). In other words, the government cannot rely upon “rationalizations for
2 actions in fact differently grounded” at the relevant time. *VMI*, 518 U.S. at 536.

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

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

14 Under any level of scrutiny, there is no constitutionally adequate justification for the Ban.
15 Defendants “fail to show that the policy prohibiting transgender individuals from serving openly
16 is related to the achievement of” their alleged governmental interests. Order at 16. As this Court
17 recognized, the Ban is unsupported by even a rational basis, let alone the exceedingly persuasive
18 justification required under intermediate scrutiny. Order at 18 n.2; *cf. Stone v. Trump*, -- F. Supp.
19 3d --, 2017 WL 5589122, at *16 (D. Md. 2017) (holding that the Ban is “unlikely to survive a
20 rational review” because “[t]he lack of any justification for the abrupt policy change, combined
21 with the discriminatory impact to a group of our military service members who have served our
22 country capably and honorably, cannot possibly constitute a legitimate governmental interest”).
23 The D.C. Circuit similarly found that the Ban was likely unconstitutional because of its sheer
24 breadth; the unusual and abrupt circumstances of its announcement; the fact that the reasons
25 cited for the Ban were unsupported by any facts; and the recent rejection by the military of those
26 cited reasons. *Doe 1 v. Trump*, No. 17-5267, 2017 WL 6553389, at *1 (D.C. Cir. Dec. 22, 2017).

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

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

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

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

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

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

9 Like all service members, transgender people who wish to serve must already “meet the
10 rigorous standards for military service and readiness.” Mabus Decl., Ex. C. The policy that
11 permitted transgender people to serve openly subjected them “to the same standards and
12 procedures as other members with regard to their medical fitness for duty, physical fitness,
13 uniform and grooming, deployability, and retention.” *Id.* Accordingly, the Ban excludes
14 individuals from serving merely because of their gender identity, despite being otherwise
15 qualified to serve. Turning away or discharging otherwise qualified individuals from service
16 reduces the pool of talent from which the military can draw to support an all-volunteer force.
17 Mabus Decl. ¶ 45; Fanning Decl. ¶ 57; James Decl. ¶¶ 40-41. This arbitrary exclusion of
18 individuals based on a characteristic with no relevance to their fitness to serve damages the
19 military’s interests. Carson Decl. ¶¶ 17, 26; Mabus Decl. ¶ 14; James Decl. ¶¶ 40-41.

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

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

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

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

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

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

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

18 **2. Excluding Transgender People From Military Service Does Not** 19 **Promote Unit Cohesion.**

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

1 In any event, the Ban does nothing to further unit cohesion and in fact undermines it.
 2 After closely examining this issue, the military found no evidence that permitting open service
 3 by transgender people would negatively impact unit cohesion. Mabus Decl. ¶ 14; James Decl. ¶
 4 14; Fanning Decl. ¶ 24. For example, Secretary Mabus oversaw the Navy implementation of
 5 open service for transgender service members, which “was relatively low-key, triggered few
 6 emotional responses, and was viewed as ‘no big deal.’” Mabus Decl. ¶ 24. For more than a year
 7 now, transgender service members have served openly without any adverse effect on cohesion.
 8 *Id.* ¶ 43. Plaintiffs’ transgender status has not impeded their units from working together to
 9 accomplish tasks. Muller Decl. ¶ 19; Schmid Decl. ¶ 17. Indeed, Plaintiffs’ experiences illustrate
 10 that open service can promote unit cohesion, because requiring service members to hide parts of
 11 their identity can weaken bonds among unit members. Schmid Decl. ¶¶ 14, 17; Stephens Decl.
 12 ¶¶ 18, 30; *see also* Mabus Decl. ¶ 46; Decl. of Mark Eitelberg ¶¶ 13-14. This echoes the
 13 experience of foreign militaries, which have improved cohesion through inclusive policies
 14 toward transgender soldiers. Mabus Decl. ¶¶ 17, 42; Carson Decl. ¶ 19. The Ban thus “negatively
 15 impacts unit cohesion.” Mabus Decl. ¶ 46.

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

21 **3. Cost Savings from the Selective Withdrawal of Medically Necessary** 22 **Care for Transgender Service Members Cannot Justify the Ban.**

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

27
 28 ⁴ There is no genuine dispute that transition-related care such as surgery can be medically necessary, as the
 military’s own medical staff have acknowledged in developing Plaintiffs’ transition plans. *See, e.g.*, Stephens Decl.
 ¶ 15; Winters Decl. ¶ 30; *see also* RAND Report at x; Brown Decl. ¶¶ 33, 35; Dep’t of Health and Human Servs.,
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1 savings alone cannot justify discrimination: the government cannot “protect the public fisc by
2 drawing an invidious distinction between classes” of persons. *Mem. Hosp. v. Maricopa Cty.*, 415
3 U.S. 250, 263 (1974); *see also Plyler v. Doe*, 457 U.S. 202, 227 (1982) (“the preservation of
4 resources standing alone can hardly justify the classification used in allocating those resources”).

5 For example, courts have held that the government may not discriminate against
6 employees with same-sex partners by selectively depriving the latter of health care benefits—
7 even though there is no dispute that it would save money to do so. *See Diaz v. Brewer*, 656 F.3d
8 1008, 1014 (9th Cir. 2011) (holding that cost savings failed to supply a rational basis for the
9 government “distinguishing between homosexual and heterosexual employees, similarly
10 situated”); *Bassett v. Snyder*, 59 F. Supp. 837, 855 (E.D. Mich. 2014) (“cost savings alone are
11 insufficient to justify an otherwise discriminatory statute”).

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

18 Furthermore, this Court has already found that the costs of transition-related care are
19 “exceedingly minimal.” Order at 17. The RAND Report estimated that providing
20 transition-related care to active-duty service members would cost (at most) \$8.4 million
21 annually, compared to the \$49.3 billion spent on DoD health care in 2014. RAND Report at 36,
22 70. In other words, the costs of providing appropriate medical care amount to “budget dust,” and
23 “hardly even a rounding error, by military leadership.”⁵ Mabus Decl. ¶ 41. In addition, the
24 estimated cost of separating transgender service members and finding and training replacements
25

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

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

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

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

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

12 Gender identity is both immutable and “so fundamental to one’s identity that a person
 13 should not be required to abandon [it].” *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th
 14 Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir.
 15 2005); Brown Decl. ¶¶ 19-29. Because “the ability independently to define one’s identity [] is
 16 central to any concept of liberty,” it warrants “a substantial measure of sanctuary from
 17 unjustified interference by the State.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-19 (1984). The
 18 government may not penalize Plaintiffs for living in accord with their gender identity, which is
 19 integral to their understanding of themselves as the men and women that they are—just as gender
 20 is an essential aspect of identity for those who are not transgender. Courts have guarded against
 21 government encroachment upon fundamental liberty interests, including when the military
 22 penalized service members for forming intimate relationships with same-sex partners, *Witt*, 527
 23 F.3d at 814-21, or for exercising the right to have children, *Crawford*, 531 F.2d at 1125.

24 There is no question that the Ban “directly interferes with Plaintiffs’ ability to define and
 25 express their gender identity, and penalizes Plaintiffs for exercising their fundamental right to do
 26 so openly.” Order at 19. That direct interference triggers heightened scrutiny: Defendants must
 27 show that the Ban is “necessary” to further an important government interest at a minimum, *Witt*,
 28 527 F.3d at 819, but they cannot do so, particularly given the Ban’s sweeping breadth. For the

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

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

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

13 The Ban employs a form of content discrimination that is especially noxious to the First
14 Amendment: viewpoint discrimination. *See Rosenberger v. Rector & Visitors of Univ. of Va.*,
15 515 U.S. 819, 829 (1995) (explaining that viewpoint discrimination represents “an egregious
16 form of content discrimination”). Viewpoint discrimination occurs where “the government
17 prohibits speech by particular speakers, thereby suppressing a particular view about a subject.”
18 *Giebel v. Sylvester*, 244 F.3d 1182, 1188 (9th Cir. 2001) (internal quotation marks omitted).
19 Under the Ban, non-transgender service members are free to express their gender identity, but
20 transgender service members are not. For example, the government will permit Plaintiff Jane
21 Doe to express that she is a man (even though that is incorrect), but it will not permit her to
22 express that she is a woman.

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

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

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

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

25 CONCLUSION

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

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

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

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11 Respectfully submitted January 25, 2018.

12 **NEWMAN DU WORS LLP**

13 

14 Derek A. Newman, WSBA #26967

15 *dn@newmanlaw.com*

16 Samantha Everett, WSBA #47533

17 *samantha@newmanlaw.com*

18 2101 Fourth Ave., Ste. 1500

19 Seattle, WA 98121

20 (206) 274-2800

21 **LAMDBA LEGAL DEFENSE AND EDUCATION
22 FUND, INC.**

23 Tara Borelli, WSBA #36759

24 *tborelli@lambdalegal.org*

25 Camilla B. Taylor (admitted pro hac vice)

26 Peter C. Renn (admitted pro hac vice)

27 Natalie Nardecchia (admitted pro hac vice)

28 Sasha Buchert (admitted pro hac vice)

Kara Ingelhart (admitted pro hac vice)

Carl Charles (admitted pro hac vice)

OUTSERVE-SLDN, INC.

Peter Perkowski (admitted pro hac vice)

KIRKLAND & ELLIS LLP

James F. Hurst, P.C. (admitted pro hac vice)

Jordan M. Heinz (admitted pro hac vice)

Scott Lerner (admitted pro hac vice)

Vanessa Barsanti (admitted pro hac vice)
Daniel I. Siegfried (admitted pro hac vice)
Ben Tyson (admitted pro hac vice)

Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

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



Derek A. Newman, WSBA #26967
dn@newmanlaw.com
Newman Du Wors LLP
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

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