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19  
20 **UNITED STATES DISTRICT COURT**  
21 **CENTRAL DISTRICT OF CALIFORNIA**

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

25 Plaintiffs,

26 v.

27 DONALD J. TRUMP, et al.

28 Defendants.

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

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

Hearing

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

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1 **I. INTRODUCTION**

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

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

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

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

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

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

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

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

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

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

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

21 Defendants’ focus on the Interim Guidance is a classic “red herring.” *Doe*,  
22 2017 WL 4873042, at \*17. Plaintiffs challenge *the ban* because *it* is “the operative  
23 policy toward military service by transgender service members.” *Id.* By contrast:

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

28 <sup>1</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed to  
them in Plaintiffs’ Motion for Preliminary Injunction (the “PI Motion”).

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

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

13 The President is the Commander-in-Chief, and his August 25 Memorandum  
 14 is “the operative policy toward military service by transgender service members.”

15 *Id.* at \*17. This Court must “assume that [it] will be faithfully executed.” *Id.*

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

### 18 **III. PLAINTIFFS’ CLAIMS ARE JUSTICIABLE**

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

#### 29 **A. This Lawsuit Satisfies the Standing Requirements of Article III.**

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

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

3 To establish injury in fact, a plaintiff must show that he or she has suffered  
4 an “invasion of a legally protected interest” that is “concrete and particularized”  
5 and “actual or imminent.”<sup>3</sup> *Lujan*, 504 U.S. at 560 (internal citation omitted).  
6 Plaintiffs’ claims easily pass muster. Not only do Plaintiffs face future harms, but  
7 they also are suffering current injuries as a consequence of the ban. (*See*  
8 Supplemental Declaration of Raymond Edwin Mabus, Jr. (“Mabus Supp. Decl.”),  
9 ¶¶ 3-7). Each of these injuries is caused by the ban, and each is sufficient to confer  
10 standing upon Plaintiffs to bring the asserted claims. *See Doe*, 2017 WL 4873042,  
11 at \*15-26.

12  
13  
14 <sup>2</sup> To be clear, Plaintiffs satisfy the latter two elements. There is a clear causal  
15 chain between the ban and harms to Plaintiffs. And a favorable court decision here  
16 declaring that such a ban violates the Constitution and enjoining Defendants from  
17 excluding Plaintiffs from the military solely because they are transgender would  
18 redress the alleged injury. Left in force, the ban creates a presumption and  
19 perception that Plaintiffs and other transgender people “hinder military  
20 effectiveness,” “disrupt unit cohesion,” and “tax military resources.” An  
21 injunction prohibiting enforcement of the ban and an order permitting enlistment  
22 will reverse those presumptions, permitting Plaintiffs once again to serve in the  
23 military on equal terms, and thus redressing the injuries Plaintiffs are suffering.

24 <sup>3</sup> The “especially rigorous” standard Defendants ask the Court to apply (*see Opp.* at  
25 12, citing *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013)) has never been  
26 used to deny standing to plaintiffs *who are themselves* the direct and actual targets  
27 of a discriminatory policy. The cases elaborating this principle involved claims by  
28 plaintiffs with an undifferentiated and attenuated connection to the policy  
challenged as unconstitutional. *See, e.g., Clapper*, 568 U.S. at 408-11 (challenge  
by attorneys, journalists, and human rights organizations to policy authorizing  
surveillance of people outside the United States); *Raines v. Byrd*, 521 U.S. 811,  
819-20 (1997) (challenge by members of Congress to statute granting line item  
veto power); *Valley Forge Christian Coll. v. Americans United for Separation of*  
*Church & State, Inc.*, 454 U.S. 464, 473-74 (1982) (challenge by taxpayers to  
transfer of property to religious organization); *Schlesinger v. Reservists Comm. to*  
*Stop the War*, 418 U.S. 208, 220-22 (1974) (challenge by ordinary citizens to  
membership of members of Congress in armed forces reserves). Where, as here,  
Plaintiffs are directly targeted by a policy, ordinary standing principles apply.



1                   **1. Plaintiffs Injuries Are Concrete and Particularized.**

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

19                   The Supreme Court consistently has held that such “discrimination itself”<sup>4</sup>  
20 constitutes a concrete and particularized injury sufficient to invoke the federal  
21 judicial power under Article III. *See Heckler v. Mathews*, 465 U.S. 728, 739-40  
22 (1984); *Latta v. Otter*, 771 F.3d 456, 467 n.7 (9th Cir. 2014) (same); *see also, e.g.,*  
23 *Hassan v. City of New York*, 804 F.3d 277, 289-90 (3d Cir. 2015) (holding a  
24 “discriminatory classification is itself a penalty . . . and thus qualifies as an actual  
25

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

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

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

25 Plaintiffs’ injuries are compounded by the loss of tenure, career prospects,  
26 and medical care that the ban imposes. (*See* Tate Decl., ¶¶ 21-30; Jane Doe Decl.,  
27 ¶¶ 17-18; John Doe 1 Decl., ¶¶ 20-22; John Doe 2 Decl., ¶¶ 30-37; Stockman  
28 Decl., ¶¶ 15-17; Talbott Decl., ¶¶ 16-17; Reeves Decl., ¶¶ 13-14; *see also* Mabus

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

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

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

## 25 **2. Plaintiffs Injuries Are “Actual” and “Imminent.”**

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

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

13 **a. Enlisted service member Plaintiffs are harmed.**

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

18 “[W]here threatened action by *government* is concerned, [courts] do not  
 19 require a plaintiff to expose himself to liability before bringing suit to challenge the  
 20 basis for the threat.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29  
 21 (2007) (emphasis in original); *see also Nat. Res. Def. Council*, 735 F.3d at 878 (a  
 22 “credible threat” of “probabilistic harm” is sufficient). The enlisted service  
 23 member Plaintiffs accordingly need not “await the consummation of threatened  
 24 injury to obtain preventive relief.” *Pac. Gas & Elec. v. State Energy Res. Conserv.*  
 25 *& Dev. Comm’n*, 461 U.S. 190, 201 (1983). It makes no difference that a few  
 26 months remain before the ban on active service members becomes fully  
 27 operational, or that the Interim Guidance supposes that no enlisted transgender  
 28 service members will be separated in the “interim.” (*Cf.* Opp. at 1, 6.) “Where the

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

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

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

1 F.3d 180, 188 (4th Cir. 2007) (holding statutory challenge justiciable despite  
2 absence of implementing regulations because “[r]egulations could not alter the  
3 Act’s provisions, which clearly establish the . . . requirements [plaintiff] claims are  
4 invalid”). As “Plaintiffs make it perfectly clear that they are challenging the  
5 constitutionality” of the ban enacted by the Presidential Memorandum *itself*, “the  
6 court has no need to consider the effect of [not-yet-issued] regulations or to wait  
7 and see what steps [DOD] takes to implement” it. *Alpine Ridge Grp. v. Kemp*, 764  
8 F. Supp. 1393, 1396 (W.D. Wash. 1990), *rev’d on other grounds Cisneros v.*  
9 *Alpine Ridge Group*, 508 U.S. 10 (1993); *see also Acacia Villa v. Kemp*, 774 F.  
10 Supp. 1240, 1246-47 (C.D. Cal. 1990), *rev’d on other grounds Cisneros*, 508 U.S.  
11 10 (same).

12 Because they presently face a credible threat or substantial risk of harm from  
13 the ban, the provisions of which are “certainly impending,” the enlisted service  
14 member Plaintiffs’ claims are justiciable now.

15 **b. Accession Plaintiffs are harmed.**

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

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

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

16 Moreover, as a matter of settled law, plaintiffs are not obliged to apply for  
17 an individual waiver of government policies that unconstitutionally discriminate  
18 against them as a class. Indeed, the need to apply for such a waiver—when others  
19 have no such need—is in and of itself a violation of equal protection. *See Hawaii*  
20 *v. Trump*, 859 F.3d 741, 767-68 (9th Cir. 2017) (holding a plaintiff need not wait  
21 for denial of discretionary waiver from travel ban in order to challenge the ban  
22 itself), *vacated as moot on unrelated grounds*, 2017 WL 4782860, at \*1 (U.S. Oct.  
23 24, 2017); *Doe*, 2017 WL 4873042, at \*21 (holding that accession Plaintiff had  
24 standing “even if a bona fide waiver process were made available” because “a  
25 waiver process would not vitiate the barrier that [the accession Plaintiff] claims is  
26 violative of equal protection”).

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

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

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

13 **B. Plaintiffs’ Claims Are Ripe for Adjudication.**

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

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

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



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

4 **1. Plaintiffs’ Claims Are Fit for Review.**

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

8 First, because whether the ban is a facially unconstitutional enactment is a  
9 “purely legal” question, it is “appropriate for judicial resolution at this time.”  
10 *Abbott Labs.*, 387 U.S. at 149; *see also Commodity Trend Serv., Inc. v. CFTC*, 149  
11 F.3d 679, 687 n.3 (7th Cir. 1998) (“A facial constitutional challenge presents only  
12 a legal issue—the quintessentially ‘fit’ issue for present judicial resolution.”); *Doe*,  
13 2017 WL 4873042, at \*24 (holding plaintiffs’ facial equal protection challenge to  
14 the ban presented a purely legal question fit for review).

15 Second, and precisely because this is a facial constitutional challenge,  
16 further factual development is irrelevant in assessing whether the ban offends the  
17 guarantees of the Fifth and First Amendments. *Doe*, 2017 WL 4873042, at \*24.  
18 The challenged ban is the “definitive” and “operative policy” recorded in the  
19 Federal Register regulating “military service by transgender service members.”  
20 *Doe*, 2017 WL 4873042, at \*17; *see Military Service by Transgender Individuals*,  
21 82 Fed. Reg. 41319 (Aug. 30, 2017). Adjudication of this case requires the Court  
22 to analyze only the terms of that enactment under the U.S. Constitution and the  
23 authorities relied upon in parties’ briefing.

24 For much the same reason, Plaintiffs’ challenge is directed at “final action.”  
25 It makes no difference to the constitutional analysis how the DOD fills in the  
26 details of the ban with implementing rules. *See Doe*, 2017 WL 4873042, at \*17,  
27 \*24; *Union Pac.*, 346 F.3d at 870 n.20, 872 n.22; *see also Antelope*, 395 F.3d at  
28

1 1133 (holding that for purposes of justiciability determination, a court must accept  
2 validity of plaintiff’s legal theory on the merits).

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

5 The hardship factor of the prudential ripeness inquiry “serves as a  
6 counterbalance to any interest the judiciary has in delaying consideration of a  
7 case.” *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838  
8 (9th Cir. 2012). Where “there are no institutional interests favoring postponing  
9 review,” courts hold “there are no conflicting interests to balance,” *Payne Enters.,*  
10 *Inc. v. U.S.*, 837 F.2d 486, 493 (D.C. Cir. 1988), and “a petitioner need not satisfy  
11 the hardship prong,” *AT&T Corp. v. F.C.C.*, 349 F.3d 692, 700 (D.C. Cir. 2003).  
12 Here, there is no institutional interest in favoring delayed review. In fact, there is  
13 an indisputable interest in having the constitutionality of the ban settled.<sup>5</sup> *See Doe*,  
14 2017 WL 4873042, at \*25 (holding plaintiffs’ challenge to “facial validity” of the  
15 ban “means that the Court would not benefit from delay”). Thus, as an initial  
16 matter, Plaintiffs’ claims are prudentially ripe even without needing to show  
17 hardship.

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

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

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

5 Moreover, absent pre-enforcement review, the current service member  
6 Plaintiffs each will be forced to choose between resigning their commissions to  
7 find another means of self-support in anticipation of the ban’s effective date, or  
8 risk discharge with no means of support while a post-enforcement challenge  
9 proceeds. (*See* Tate Decl., ¶¶ 25-26; John Doe 1 Decl., ¶ 20; John Doe 2 Decl., ¶¶  
10 30-31; Jane Doe Decl., ¶ 16.) Similarly, the accession Plaintiffs will be forced to  
11 choose whether to abandon their plans to join the military or risk being harmed by  
12 having foregone other opportunities if a post-enforcement challenge fails.  
13 (Stockman Decl., ¶ 15; Talbott Decl., ¶ 17; Reeves Decl., ¶ 13). The ban thus  
14 presents a comply-or-defy decision that courts find sufficient hardship to grant  
15 review. *See Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004) (holding  
16 constitutional claims were ripe for review where the “‘challenged regulations  
17 presents plaintiffs with the immediate dilemma to choose between complying with  
18 newly imposed, disadvantageous restrictions and risking serious penalties for  
19 violation’”) (quoting *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1172 (9th Cir.  
20 2001)).

21 The hardships that flow from the ban also render exhaustion of internal  
22 military procedures unnecessary. Contrary to Defendants’ suggestion that this suit  
23 is unripe because Plaintiffs have not exhausted administrative remedies (Opp. at  
24 16-18), exhaustion is not required when, as here, “substantial constitutional  
25 questions are raised” and particularly when the challenged policy inflicts class-  
26 based stigmatic harms. *Muhammad v. Sec’y. of Army*, 770 F.2d 1494, 1495 (9th  
27 Cir. 1995); *see also Wenger v. Monroe*, 282 F.3d 1068, 1074 (9th Cir. 2002)  
28 (holding exhaustion requirement excused where it would be futile and noting that

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

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

7 \* \* \*

8 For the foregoing reasons, Plaintiffs’ claims are justiciable. The Court  
9 should consider their motion for a preliminary injunction on the merits and grant  
10 the requested relief.<sup>6</sup>

#### 11 **IV. A PRELIMINARY INJUNCTION IS WARRANTED**

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

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21  
22 <sup>6</sup> The preliminary injunction ordered in *Doe*, 2017 WL 4873042, does not affect  
23 the justiciability of Plaintiffs’ claims in this case. See *N. Stevedoring and*  
24 *Handling Corp. v. Int’l Longshoremen’s and Warehousemen’s Union, Local No.*  
25 *60*, 685 F.2d 344, 346 (9th Cir. 1982) (holding action challenging union picketing  
26 was not mooted when NLRB secured a preliminary injunction against same  
27 picketing in another tribunal, since it was possible that the injunction could be  
28 lifted in final determination of the merits, and picketing could recur); *Nat’l Wildlife*  
*Fed. v. Burford*, 677 F. Supp. 1445, 1453 (D. Mont. 1985) (holding action to void  
coal leases was not mooted by order issued by another court to void the very same  
leases because it was possible that other “decision to void the [leases]” could be  
“reversed in whole or in part”), *aff’d* 871 F.2d 849 (9th Cir. 1989); see Wright &  
Miller, 13B Fed. Prac. & Proc. Juris. § 3533.2.1 (3d ed. 2017) at n. 19-27.

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

3 **A. Absent an Injunction, Plaintiffs Will Suffer Irreparable Harm**

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

16 “It is well established that the deprivation of constitutional rights  
17 ‘unquestionably constitutes irreparable injury.’” *Hernandez v. Sessions*, 872 F.3d  
18 976, 994 (9th Cir. 2017) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).  
19 Subjugating Plaintiffs to exclusion, unequal treatment, and forced separation  
20 simply because they are transgender violates their constitutional rights and thus  
21 “unquestionably” establishes that they will suffer irreparable injuries absent  
22

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

1 injunctive relief. *Id.*; see generally *infra* § III.B. That alone is enough to  
 2 demonstrate irreparable injury.<sup>8</sup>

3 In addition, Plaintiffs have demonstrated specific irreparable injuries, not  
 4 compensable by “damages and back pay,” beyond the constitutional violations.  
 5 First, Plaintiffs who are forced to pursue different opportunities because of this ban  
 6 will be irreparably harmed by the loss of their ability to pursue their chosen  
 7 military profession. See *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th  
 8 Cir. 2017) (holding the “diminished . . . opportunity to pursue [one’s] chosen  
 9 profession . . . constitutes irreparable harm.”); *Enyart v. Nat’l Conference of Bar*  
 10 *Examiners, Inc.*, 630 F.3d 1153, 1166 (9th Cir. 2011) (holding plaintiff established  
 11 irreparable harm by demonstrating that the challenged bar exam policies denied her  
 12 eligibility to become a lawyer); (Tate Decl., ¶¶ 25, 27; Jane Doe Decl., ¶¶ 16-18,  
 13 22; John Doe 1 Decl., ¶ 20; John Doe 2 Decl., ¶¶ 31, 36; see also Mabus Supp.  
 14 Decl., ¶¶ 4-7; Fanning Supp. Decl., ¶ 5-6; Eitelberg Decl. ¶ 8.)

15 Second, Plaintiffs also suffer irreparable harms because of the professional  
 16 stigma and negative public perception the ban creates and reinforces, including that  
 17 Plaintiffs are unfit for or incapable of service solely because they are transgender.  
 18 *Enyart*, 630 F.3d at 1166 (holding plaintiff could establish irreparable harm by  
 19

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20 <sup>8</sup> Defendants cite a First Circuit decision, *Vaqueria Tres Monjitas, Inc. v. Irizarry*,  
 21 587 F.3d 464, 484 (1st Cir. 2009), for the proposition that violations of equal  
 22 protection and due process do not automatically constitute irreparable injuries.  
 23 (Opp. at 20.) But “[t]here is no indication that the Ninth Circuit requires a  
 24 constitutional right to be ‘fundamental’ in order to support a conclusion that its  
 25 violation would constitute an irreparable injury. Rather, it has held more generally  
 26 that ‘an alleged constitutional infringement will often alone constitute irreparable  
 27 harm.’” *Cedar Point Nursery v. Gould*, 2016 WL 3019277, at \*8 (E.D. Cal. May  
 28 26, 2016) (quoting *Assoc’d Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991)) (rejecting government’s reliance on  
*Vaqueria* and concluding plaintiffs would “be able to show an irreparable injury if  
 they can show that [the challenged activities] are unconstitutional.”). In any event,  
 Plaintiffs allege the ban violates their fundamental rights to be free from invidious  
 discrimination under the Equal Protection Clause, to autonomy under the Due  
 Process Clause, and to freedom of expression under the First Amendment.

1 demonstrating that the challenged bar exam policies “likely” imposed a  
 2 “professional stigma” against persons with disabilities) (emphasis original); *see*  
 3 *also Elzie v. Aspin*, 841 F. Supp. 439, 443 (D.D.C. 1993) (holding being “labeled  
 4 as unfit for service solely on the basis of . . . sexual orientation, a criterion which  
 5 has no bearing on [plaintiff’s] ability to perform his job,” constitutes irreparable  
 6 harm); (Tate Decl., ¶¶ 23, 25; Jane Doe Decl., ¶¶ 21, 23; John Doe 1 Decl., ¶¶ 23-  
 7 24; John Doe 2 Decl., ¶ 33 (cataloging loss of public confidence and experienced  
 8 stigma); James Supp. Decl., ¶ 8; Eitelberg Decl., ¶ 11; Fanning Supp. Decl., ¶ 5).

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

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

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

23 **1. *The Ban Violates Equal Protection.***

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

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

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

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

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

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



1 informed by relevant evidence and expertise. For example, in *Rostker*, the  
 2 Supreme Court found that “Congress did not act unthinkingly or reflexively and  
 3 not for any considered reason” when it passed the policy at issue in that case. 453  
 4 U.S. at 61, 72 (noting “Congress considered the question at great length,” held  
 5 hearings, and made findings). Here, such study and evaluation of evidence  
 6 warranting judicial deference “is completely absent from the current record.” *Doe*,  
 7 2017 WL 4873042, at \*31. “To the contrary, the record at this stage of the case  
 8 shows that the reasons offered for categorically excluding transgender individuals  
 9 were not supported and were in fact contradicted by the only military judgment  
 10 available at the time.” *Id.*

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

13 Defendants do not dispute that discrimination against transgender people  
 14 meets all of the established criteria for determining when strict scrutiny applies.  
 15 (PI Mot. at 12-15); *see also Doe*, 2017 WL 4873042, at \*60 (“The transgender  
 16 community satisfies these criteria.”). Many other courts have subjected such  
 17 discrimination to heightened review. *See Doe*, 2017 WL 4873042, at \*61 (citing  
 18 cases). This Court should do so as well to ensure that governmental laws and  
 19 policies based on bias against disfavored groups are subject to meaningful review.  
 20 This goal is particularly important in military cases, where it is essential that our  
 21 nation’s armed forces reflect the diversity of our country and are open to all  
 22 Americans who are otherwise qualified to serve. (*See Fanning Supp. Decl.*, ¶¶ 9-  
 23 10; *James Decl.*, ¶ 46; *James Supp. Decl.*, ¶ 9; *Mabus Decl.*, ¶¶ 17, 42, 46; *Mabus*  
 24 *Supp. Decl.*, ¶¶ 8-9.)

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

1 form of sex-based discrimination. Defendants do not even mention *Schwenk*;  
2 however, that holding is binding here and requires the application of heightened  
3 review. As *Schwenk* itself makes clear by citing Title VII case law to support its  
4 analysis of the Gender Motivated Violence Act, the Ninth Circuit’s determination  
5 that anti-transgender discrimination is based on a person’s sex applies regardless of  
6 the specific statute or, in this case, constitutional provision at issue. A government  
7 policy that facially discriminates against transgender people, as the ban does here,  
8 must minimally be evaluated under the heightened standard applied to any form of  
9 sex-based discrimination. See, e.g., *Glenn v Brumby* 663 F.3d 1312, 1316 (11th  
10 Cir. 2011); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d  
11 1034, 1051 (7th Cir. 2017); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir.  
12 2004); *Rosa v. Park W Bank Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); see  
13 also *Doe*, 2017 WL 4873042, at \*27-\*28.

14 Under that standard, the government must demonstrate “an exceedingly  
15 persuasive” justification for the ban. *United States v. Virginia*, 518 U.S. 515, 531  
16 (1996). “The burden of justification is demanding and rests entirely on” the  
17 Defendants. *Id.* at 533. “The justification must be genuine, not hypothesized or  
18 invented *post hoc* in response to litigation,” and “it must not rely on overbroad  
19 generalizations.” *Id.* None of the justifications proffered by Defendants come  
20 close to meeting this standard here. Defendants cite three reasons for the ban.  
21 First, they claim that “at least some transgender individuals suffer from medical  
22 conditions that could impede the performance of their duties.” (Opp. at 29.)  
23 Second, Defendants argue that certain medical conditions “may limit the  
24 deployability of transgender individuals as well as impose additional costs on the  
25 armed forces.” (Opp. at 29.) Third, Defendants claim that “the President could  
26 reasonably conclude” that permitting transgender people to serve in the military  
27 would harm “unit cohesion.” (Opp. at 30.)

28

1 Defendants cannot show that the ban is substantially related to any of these  
2 asserted justifications. As the court in *Doe* correctly held, Defendants’ arguments  
3 that transgender people may have medical conditions that could affect their  
4 deployability “are hypothetical and extremely overbroad.” *Doe*, 2017 WL  
5 4873042, at \*29. Plainly, “these hypothetical concerns could be raised about *any*  
6 service members.” *Id.* In addition, “these concerns do not explain the need to  
7 discharge and deny accession to *all* transgender people who meet the relevant  
8 physical, mental, and medical standards for service.” *Id.* Like the measure struck  
9 down in *Romer v. Evans*, 517 U.S. at 632, the policy’s “sheer breadth is so  
10 discontinuous with the reasons offered for it that it seems inexplicable by anything  
11 other than animus toward the class it affects.”

12 Defendants’ invocation of cost is equally unavailing. (*See Opp.* at 30.)  
13 Under settled law, the government cannot justify discrimination under strict or  
14 intermediate scrutiny based on an asserted interest in conserving costs, even where  
15 the government could show that significant savings would actually result. *See*,  
16 *e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 688-89 (1973) (rejecting  
17 “administrative convenience” as a sufficient justification for the government’s  
18 disparate treatment of men and women); *Stanley v. Illinois*, 405 U.S. 645, 656-58  
19 (1972) (same); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 775 (9th Cir. 2014)  
20 (holding that “administrative convenience is a thoroughly inadequate basis for the  
21 deprivation of core constitutional rights”) (internal citation omitted); *see also infra*  
22 § IV.B.d.3. Defendants’ attempted reliance on cost to justify such a categorical  
23 ban is particularly unavailing in this case, where there is no dispute that the cost of  
24 providing medical care to transgender service members is insignificant. *See Doe*,  
25 2017 WL 4873042, at \*29 (“The breadth of [the ban] is also discontinuous with the  
26 purported concern about costs, which, in addition to having been found to be  
27 minimal or negligible, apparently are primarily related to a surgical procedure that  
28 only a subset of transgender individuals will even need.”).

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

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

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

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

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

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

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

23 Defendants contend that they need not justify the ban because it simply  
 24 continues a longstanding prior policy. (Opp. at 17-19.) Defendants are wrong.  
 25 “Before the [ban], transgender people had already been given the right to serve  
 26 openly and the right to accede by a date certain in early 2018. The [ban] took  
 27 those rights away from transgender people and transgender people only.” *Doe*,  
 28 2017 WL 4873042, at \*31. “The targeted revocation of rights from a particular

1 class of people which they had previously enjoyed—for however short a period of  
2 time—is a fundamentally different act than not giving those rights in the first  
3 place, and it will be the government’s burden in this case to show that *this* act was  
4 substantially related to an important government objectives.” *Id.* (emphasis in  
5 original). In *Perry v. Brown*, 671 F.3d 1052, 1079-80 (9th Cir. 2012), *vacated and*  
6 *remanded on other grounds sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652  
7 (2013), the Ninth Circuit held that Proposition 8, which eliminated the freedom to  
8 marry for same-sex couples in California, was unconstitutional because the State  
9 could not justify eliminating a right that had previously been recognized.  
10 “Withdrawing [a right] from a disfavored group . . . is different from declining to  
11 extend the designation in the first place, regardless of whether the right was  
12 withdrawn after a week, a year, or a decade.” *Id.*; *see also Romer v. Evans*, 517  
13 U.S. 620, 627 (1996) (striking down Colorado law that “withdr[ew] from [gay  
14 people] . . . specific legal protection . . . and . . . forb[ade] reinstatement of these  
15 laws and policies”); *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013)  
16 (concluding that the federal Defense of Marriage Act was enacted to “disparage  
17 and to injure” married same-sex couples because it “refus[ed] to acknowledge a  
18 status” previously granted). Under this settled law, the government must justify its  
19 decision regardless of whether it reinstates an older policy. Its inability to do so  
20 reflects an improper purpose to “disparage and to injure” transgender service  
21 members and those who wish to serve.

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

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

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

10 With respect to accessions in particular, the June 2016 policy recognized  
11 that any medical conditions associated with transgender people are curable; thus,  
12 there is no reason to treat transgender people differently than the military already  
13 treats those with other curable conditions.<sup>9</sup> (*See Brown Decl.*, ¶¶ 44-46 (describing  
14 how “the enlistment policy” revived by the ban “treated transgender individuals in  
15 an inconsistent manner compared with how the military addressed persons with  
16 other curable medical conditions”).) Defendants may not single out transgender  
17 people and treat them differently given the complete absence of any legitimate  
18 reason to do so. *Garrett*, 531 U.S. at 366 n.4; *In re Levenson*, 587 F.3d 925, 933  
19 (9th Cir. 2009) (holding proffered government interest “d[id] not provide a rational  
20 basis for” a public policy where policy was “drastically underinclusive” in  
21 advancing that interest).

22 This case is not about “line-drawing” or a battle of experts where people  
23 with “almost equally strong claim[s]” are placed on different sides of a line. *Cf.*  
24 *FCC v. Beach Commcn’s Inc.*, 508 U.S. 307, 315-16 (1993). Defendants baldly  
25

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

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

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

9 Defendants’ reliance on the purported costs associated with providing  
10 medical care to transgender persons is unavailing under rational basis review, just  
11 as it is unavailing under heightened scrutiny. Under settled law, “something more  
12 than an invocation of the public fisc is necessary to demonstrate the rationality of  
13 selecting [one group], rather than some other group, to suffer the burden of cost-  
14 cutting legislation.” *Lyng v. Int’l Union*, 485 U.S. 360, 376-77 (1988); *see also In*  
15 *re Levenson*, 587 F.3d at 933. Here, Defendants do not attempt to meet even this  
16 minimal requirement, merely contending, without more, that even though the cost  
17 of providing care to transgender persons is negligible, the military may  
18 nevertheless “decide how best to spend its money.” (Opp. at 30.) That bare  
19 assertion is insufficient to justify a categorical ban even under rational basis  
20 review. Any denial of benefits to *any* group will *always* save resources, so the  
21 government must do more than state a desire to cut costs; it must justify why it  
22 chose a particular group to bear the burdens of cost-cutting, and “do more than  
23 justify its classification with a concise expression of intent to discriminate.” *Plyler*  
24 *v. Doe*, 457 U.S. 202, 227, 229 (1982) (cost-cutting could not justify denying free  
25 public education to children of undocumented immigrants who “[i]n terms of  
26 educational cost and need . . . are basically indistinguishable from legally resident  
27 alien children”) (internal quotation marks omitted); *Shapiro v. Thompson*, 394 U.S.  
28 618, 633 (1969) (“[a state] must do more than show that denying welfare benefits



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

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

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

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

1 leadership based on their performance, not their identities. (Mabus Supp. Decl.,  
 2 ¶ 8; Eitelberg Decl., ¶ 13.) In contrast, excluding a group of people from military  
 3 service for reasons unrelated to their abilities weakens military readiness because it  
 4 erodes the principle of merit upon which the military’s strength rests. (Fanning  
 5 Decl., ¶ 60; Fanning Supp. Decl., ¶ 7; James Decl., ¶ 43; James Supp. Decl., ¶ 9;  
 6 Mabus Supp. Decl., ¶ 12.) Moreover, it is well-settled that the government  
 7 “cannot, indirectly or directly give . . . effect” to “private biases.” *Palmore v.*  
 8 *Sidoti*, 466 U.S. 429, 433 (1984); *Cleburne*, 473 U.S. at 448. Accordingly, to the  
 9 extent concern about unit cohesion is simply another way of excluding a group of  
 10 people *because* the group experiences social prejudice, it cannot justify the ban  
 11 under any level of review.

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

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

1 *Arlington Heights*, 429 U.S. at 266-68 (describing factors that show “improper  
2 purposes are playing a role”).

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

## 5 **2. *The Ban Violates Due Process.***

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

14 As an initial matter, Defendants fail to rebut Plaintiffs’ demonstration that  
15 the ban is subject to heightened review because it burdens their constitutionally  
16 protected liberty interest in living in accordance with their gender identity, a “basic  
17 component of a person’s core identity.” *Hernandez-Montiel v. INS*, 225 F.3d 1084,  
18 1094 (9th Cir. 2000) (internal citations and quotation marks omitted), *overruled on*  
19 *other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (en banc);  
20 *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 n.8 (N.D. Cal. 2015) (transgender  
21 identity is “immutable”); *see also* Brown Decl., ¶¶ 21-23.

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

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27  
28 <sup>10</sup> In some instances, Defendants actually attack claims that were never raised in Plaintiffs’ PI Motion. (*E.g.*, *Opp.* at 32-33.)

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

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

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

28

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

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

27

28 <sup>11</sup> At a minimum, due process requires that a governmental policy must at least be  
rationally related to a legitimate government interest. *See Washington v.*

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

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

25  
26  
27 *Glucksberg*, 521 U.S. 702, 728 (1997) (explaining that substantive component of  
28 due process “requires . . . that [public policies] be rationally related to legitimate  
government interests”). For the reasons stated above, *see supra* § IV.B.1.c, the ban  
fails even this minimal test.

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

7 **3. The Ban Violates the First Amendment.**

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

12 Defendants argue that the accessions ban “turns on whether a person’s  
13 current or history of gender dysphoria or gender transition meets medical  
14 standards, not because of the message one’s gender identity conveys.” (Opp. at  
15 34.) That is incorrect. The accessions ban prohibits individuals from enlisting  
16 solely because they are transgender, regardless of their current or past medical  
17 treatment. As the August 25 Memorandum expressly acknowledges, the ban  
18 reinstates a policy that “generally prohibit[s] openly transgender individuals from  
19 accession[.]” (Sieff Decl., Ex. G at § 1(a)); *see also Doe*, 2017 WL 4873042 at  
20 \*30; (Brown Decl., ¶ 40; Carson Decl., ¶ 28; Eitelberg Decl., ¶ 10; Fanning Decl.,  
21 ¶ 56; James Decl., ¶ 37; Mabus Decl., ¶ 39.) Accordingly, Defendants’ attempt to  
22 recast the accessions policy as a ban on the underlying medical condition, rather  
23 than on the expression of transgender identity, has no merit.

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

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

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



1 2010) (rejecting government’s comparison to *Brown* and finding that banning open  
2 service by gays and lesbians violated First Amendment). Thus, even under the  
3 standard advanced by Defendants, the ban violates the First Amendment.

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

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

14 An injunction would also serve the public interest, because “it is always in  
15 the public interest to prevent the violation of a party’s constitutional rights.”  
16 *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). And while Plaintiffs  
17 agree that the “public has a strong interest in national defense” (*Opp.* at 36), that  
18 interest is best served by retaining top-level talent, not by expelling highly capable  
19 officers and active service members from their critical military positions. (*See*  
20 *Fanning Decl.*, ¶ 60; *James Decl.* ¶¶ 40-41; *Mabus Decl.* ¶ 45; *see also Tate Decl.*,  
21 ¶¶ 4-9, 11, 30; *John Doe 1 Decl.*, ¶¶ 8-9, 24-25; *John Doe 2 Decl.*, ¶ 5; *Jane Doe*  
22 *Decl.*, ¶¶ 4-7.)

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

27  
28

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

3           Defendants ask the Court to limit any injunction to the Plaintiffs (Opp. at 37-  
4 39), but a broad injunction against the ban is the only remedy that would “provide  
5 complete relief to the plaintiffs.” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S.  
6 753, 765 (1994) (citation omitted). One of the principal irreparable injuries  
7 Plaintiffs seek to enjoin is the professional stigma they suffer from being labeled  
8 unfit by official government policy. (*See supra* § III.A.) An injunction that  
9 exempted Plaintiffs from the ban, but permitted Defendants to discriminate against  
10 other transgender people, leaves the federal imprimatur behind that stigma in place.

11           In addition, a facially unconstitutional policy cannot be enforced *anywhere*.  
12 The Supreme Court has long explained that “the scope of injunctive relief is  
13 dictated by the extent of the violation established.” *Califano v. Yamasaki*, 442  
14 U.S. 682, 702 (1979); *see also Texas v. United States*, 809 F.3d 134 (5th Cir.  
15 2015), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016) (affirming  
16 nationwide injunction of executive immigration directive). Particularly in cases  
17 concerning the lawfulness or constitutionality of a federal enactment, the Ninth  
18 Circuit has long held that broad “relief may be appropriate even in an individual  
19 action.” *Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987) (holding that,  
20 given the nationwide scope of the claim at issue, “the district court could hardly”  
21 have issued an injunction “on anything other than a nationwide basis”);  
22 *Washington v. Trump*, 847 F.3d 1151, 1166-67 (9th Cir. 2017) (declining to “limit”  
23 the scope of an injunction against President Trump’s travel ban); *Cty. of Santa*  
24 *Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017) (enjoining President  
25 Trump’s “sanctuary city” Executive Order nationwide). The law in other circuits  
26 is the same. *See Int’l Refugee Assist. Project v. Trump*, 857 F.3d 554, 605 (4th Cir.  
27 2017) (en banc) (“[B]ecause [the immigration ban] likely violates the  
28 Establishment Clause, enjoining it only as to Plaintiffs would not cure the

1 constitutional deficiency, which would endure in all [of the ban’s] applications.”),  
 2 *vacated as moot* 2017 WL 4518553 (U.S. Oct. 10, 2017); *Decker v. O’Donnell*,  
 3 661 F.2d 598, 618 (7th Cir. 1980) (holding a nationwide injunction is appropriate  
 4 against a facially unconstitutional federal law).

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

## 15 **V. CONCLUSION**

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

18 Dated: November 6, 2017

Respectfully submitted,

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