

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Jane Doe 1, *et al.*,

Plaintiffs,

v.

Donald J. Trump, *et al.*,

Defendants.

Case No. 1:17-cv-01597

Hon. Colleen Kollar-Kotelly

**BRIEF OF AMICI CURIAE NATIONAL CENTER FOR TRANSGENDER EQUALITY,
TENNESSEE TRANSGENDER POLITICAL COALITION, TGI NETWORK OF
RHODE ISLAND, TRANSGENDER ALLIES GROUP, TRANSGENDER LEGAL
DEFENSE AND EDUCATION FUND, TRANSOHIO, TRANSGENDER RESOURCE
CENTER OF NEW MEXICO, AND SOUTHERN ARIZONA GENDER ALLIANCE
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

INTRODUCTION & INTEREST OF *AMICI* 1

ARGUMENT 4

I. THE BAN IS THE PRODUCT OF UNCONSTITUTIONAL ANIMUS TOWARD
TRANSGENDER PEOPLE..... 5

A. The Animus Behind The Ban Is Apparent From The Categorical Nature Of The
Ban As Well As The Circumstances Of Its Announcement 5

1. Clear evidence of animus is available on Twitter 5

2. The ban is a direct response to hate groups’ lobbying and political
maneuvering over the border wall 8

3. The reasons offered for the ban are pretextual..... 13

B. The Trump Administration Has Engaged In A Pattern Of Discrimination Against
Transgender Americans 15

II. THE BAN IS UNCONSTITUTIONAL BECAUSE IT VIOLATES PLAINTIFFS’
FUNDAMENTAL RIGHT TO PERSONAL AUTONOMY..... 22

CONCLUSION..... 25

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Am. Bus. Ass’n v. Rogoff</i> , 649 F.3d 734 (D.C. Cir. 2011).....	24
<i>Bd. of Educ. v. Dep’t of Educ.</i> , 208 F. Supp. 3d 850 (S.D. Ohio 2016)	18
<i>Bolling v. Sharpe</i> , 347 U.S. 497 (1954).....	5
<i>Carey v. Population Servs. Int’l</i> , 431 U.S. 678 (1977).....	22
<i>Cooper Hosp. v. Burwell</i> , 179 F. Supp. 3d 31 (D.D.C. 2016)	24
<i>Dep’t of Agriculture v. Moreno</i> , 413 U.S. 528 (1973).....	5
<i>Dodds v. Dep’t of Educ.</i> , 845 F.3d 217 (6th Cir. 2016)	18
<i>Doe ex rel. Doe v. Yunits</i> , No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct 11, 2000).....	24
<i>In re Golinski</i> , 587 F.3d 901 (9th Cir. 2009)	23
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965).....	23
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003).....	23
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967).....	23
<i>Norsworthy v. Beard</i> , 87 F. Supp. 3d 1104 (N.D. Cal. 2015)	23
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015).....	22, 23

Perry v. Brown,
671 F.3d 1052 (9th Cir. 2012)7, 8, 15

Planned Parenthood v. Casey,
505 U.S. 833 (1992).....23

Plyler v. Doe,
457 U.S. 202 (1982).....6

Roberts v. U.S. Jaycees,
468 U.S. 609 (1984).....23

Romer v. Evans,
517 U.S. 620 (1996).....6, 7, 8, 15

Skinner v. Oklahoma ex rel. Williamson,
316 U.S. 535 (1942).....23

SmithKline Beecham Corp. v. Abbott Labs.,
740 F.3d 471 (9th Cir. 2014)24

Troxel v. Granville,
530 U.S. 57 (2000).....23

United States v. Marcum,
60 M.J. 198 (C.A.A.F. 2004)24

United States v. Windsor,
133 S. Ct. 2675 (2013).....5, 6, 7

Witt v. Dep’t of Air Force,
527 F.3d 806 (9th Cir. 2008)24

Zablocki v. Redhail,
434 U.S. 374 (1978).....23

Other Authorities

82 Fed. Reg. 13359 (Mar. 10, 2017).....19

A Crisis of Hate: A Mid-Year Report on Lesbian, Gay, Bisexual, Transgender & Queer Hate Violence Homicides, NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS (2017).....16

Active Anti-LGBT Groups, SOUTHERN POVERTY LAW CENTER (2016)10

Alan Feuer, *Justice Dep’t Says Rights Law Doesn’t Protect Gays*, N.Y. TIMES (July 27, 2017)18

Andy Towle, *Watch: Rep. Mike Pence Speaks Out Against ‘Mainstreaming Homosexuality’ Into the Military*, TOWLEROAD (Nov. 19, 2010).....21

Asawin Suebsaeng, *et al.*, *Trump Bows to Religious Right, Bans Trans Troops*, THE DAILY BEAST (July 27, 2017).....9, 21

Barbara Starr, *et al.*, *US Joint Chiefs blindsided by Trump’s transgender ban*, CNN (July 26, 2017).....8

Ben Lane, *Democrats ask Carson, HUD to do more to protect LGBTQ people from hous. discrimination*, HOUSINGWIRE (July 6, 2017).....18

Benjamin Wermund & Kimberly Hefling, *Trump’s education secretary pick supported anti-gay causes*, POLITICO (Nov. 25, 2016).....22

Chris Riotta, *Trump Admin. Says Employers Can Fire People For Being Gay*, NEWSWEEK (Sept. 28, 2017).....18

Christopher Ingraham, *The Military spends five times as much on Viagra as it would on transgender troops’ medical care*, WASH. POST (July 26, 2017).....14

Dale O’Leary & Peter Sprigg, *Understanding & Responding to the Transgender Movement*, FAMILY RESEARCH COUNCIL (June 2015).....12, 13

Dylan Stafford, *Trump WH declines to recognize LGBT Pride Month*, CNN (June 30, 2017).....17

Emma Brown, *Educ. Dep’t. closes transgender student cases as it pushes to scale back civil rights investigations*, WASH. POST (June 17, 2017).....17

Emmarie Huetteman, *House Approves Spending Package, Border Wall & All*, N.Y. TIMES (July 27, 2017).....13

Eugene Scott & Ashley Killough, *Ben Carson compared being transgender to changing ethnicities*, CNN (July 19, 2016).....21

Extremist Group Info: Family Research Council, SOUTHERN POVERTY LAW CENTER (2017).....12

Extremist Info: Tony Perkins, SOUTHERN POVERTY LAW CENTER (2017).....12

Greg Price, *Trump Banned Transgender Troops for 74 Miles of Border Wall Funding: Report*, NEWSWEEK (July 26, 2017).....13

Hansi Lo Wang, *Census Bureau Caught In Political Mess Over LGBT Data*, NPR (July 18, 2017).....20

Jacob Pramuk, *Trump banned transgender troops after border wall funding was threatened, report says*, CNBC (July 26, 2017).....13

James McIntyre & Travis J. Tritten, *Trump’s tweets on military transgender ban send Pentagon aides scrambling*, WASH. EXAMINER (July 26, 2017)8

Jane Mayer, *The Danger of President Pence*, NEW YORKER (Oct. 16, 2017)21

Jeremy W. Peters, *Trump Keeps His Conservative Movement Allies Closest*, N.Y. TIMES (Aug. 2, 2017)12

John H. Thompson, *Director’s Blog: Planned Subjects for the 2020 Census & the Am. Community Survey*, U.S. CENSUS BUREAU (Mar. 29, 2017)20

Jonathan Drew, *Justice Dep’t backs off request to halt N.C. ‘bathroom bill,’* BOSTON GLOBE (Mar. 7, 2017)17

Jonathan Easley, *Ben Carson: Being transgender ‘doesn’t make any sense,’* THE HILL (July 19, 2016)21

Joni B. Hannigan, *School District Waits on Supreme Court after Walmart Attorney Pushes Transgender Rights*, CHRISTIAN EXAMINER (May 18, 2015)11

Joseph Goldstein, *Discrimination Based on Sex is Debated in Case of Gay Sky Diver*, N.Y. TIMES (Sept. 26, 2017)18

Josh Gerstein, *Feds drop request to rein in ban on Obama transgender policy*, POLITICO (Feb. 11, 2017)16

Julie Hirschfeld Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*, N.Y. TIMES (July 26, 2017)8, 9

Kevin Bohn, *Justice Dep’t no longer fighting injunction on transgender sch. guidance*, CNN (Feb. 11, 2017)16

Letter from Liberty Counsel to the City Manager of the City of Palm Bay, Florida, regarding “Analysis of harms engendered by proposed ‘Human Rights Ordinance,’” LIBERTY COUNSEL (Feb. 1, 2016)11

Liam Stack, *Mike Pence & ‘Conversion Therapy’: A History*, N.Y. TIMES (Nov. 30, 2016)21

Liberty Counsel Presents Fairfax Transgender Case to VA Supreme Court, BCNN1 (July 30, 2016)11

Mary Emily O’Hara, *Justice Dep’t Withdraws Lawsuit Over HB2 ‘Bathroom Bill’*, NBC NEWS (Apr. 14, 2017)17

Mat Staver, *America was formed using this action*, LIBERTY COUNSEL (Apr. 21, 2015)11

Mat Staver, *Fighting on behalf of religious liberty*, LIBERTY COUNSEL (Oct. 31, 2016)10

Mat Staver, *Liberty Counsel Fights Transgender Teaching in Public School*, LIBERTY COUNSEL (Nov. 30, 2015)11

Matt Sedensky, *Federal Surveys Trim LGBT Questions, Alarming Advocates*, U.S. NEWS & WORLD REP. (Mar. 20, 2017)19, 20

Molly Redden, *The Legal Battle for Gay Conversion Therapy Is A Losing One*, THE NEW REPUBLIC (Aug. 20, 2013)10

Off. of the Atty. Gen., *Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Oct. 4, 2017)19

Philip Bump, *Last year, June was National Pride Month. This year, it isn't.*, WASH. POST (June 27, 2017).....17

Phillip Elliot, *LGBT Rights Group Opposes Donald Trump’s Health Sec’y Nominee Tom Price*, TIME (Jan. 17, 2017).....22

Rachael Bade & Josh Dawsey, *Inside Trump’s snap decision to ban transgender troops: A congressional fight over sex reassignment surgery threatened funding for his border wall*, POLITICO (July 26, 2017)13

Rebecca Kheel & Rebecca Savransky, *Trump to ban transgender people from all military service*, THE HILL (July 26, 2017)9

Report of the 2015 U.S. Transgender Survey, NAT’L CTR. FOR TRANSGENDER EQUALITY 3 (Dec. 2016)16

Sadie Gurman & David Crary, *Justice Dep’t ends Obama-era workplace protections for transgender people*, CHICAGO TRIBUNE (Oct. 5, 2017).....19

Safiyah Riddle, *Tony Perkins: FRC Worked With White House To Stop Transgender ‘Cultural Grenade’*, RIGHT WING WATCH (July 28, 2017)11

Service Members Grasp for “Transgender” Straws, LIBERTY COUNSEL (Aug. 9, 2017)11

Steve Peoples, *Trump Transgender Ban Nod to Christian Conservatives*, U.S. NEWS & WORLD REP. (July 27, 2017)9

Tom Porter, *Transgender Military Ban: The Rise Of Anti-LGBT Hate Groups In Trump’s White House*, NEWSWEEK (July 26, 2017)9

Trump’s Transgender Ban Would Cost \$960 Million, Say Navy Professors in New Report, PALM CENTER (Aug. 9, 2017)15

Trump Says No “Transgender” in the Military, LIBERTY COUNSEL (July 26, 2017)10

U.S. CONST. amend. V5

U.S. Dep’t of Justice & U.S. Dep’t of Education, “Dear Colleague” Letter, WASH. POST (Feb. 22, 2017).....17

INTRODUCTION & INTEREST OF *AMICI*

The Trump Administration’s categorical ban on military service by transgender men and women is a textbook case of overt discrimination. After more than a year of rigorous study, in June 2016, the Department of Defense concluded that permitting transgender people to serve openly would have no adverse effect on military readiness or effectiveness.¹ For more than a year, transgender service members lawfully served this country openly, honorably, and with distinction. Ignoring this, on July 26, 2017, President Trump abruptly tweeted: “[T]he United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military.” That sweeping pronouncement and a related policy memorandum issued a month later were not motivated by any legitimate governmental interest; rather, they were the fruit of invidious discrimination against warriors, heroes, and public servants for no reason other than the fact they are transgender.

The ban is unconstitutional. The government cannot single out a politically unpopular class of people just because of that group’s defining characteristic. The Fifth Amendment’s guarantees of equal protection and due process of law forbid it. The abrupt ban on military service by transgender people is repugnant to these fundamental constitutional principles.

Amici curiae are groups that advocate for the basic human rights and equal dignity of transgender Americans. The ban is a direct affront to *amici*’s core mission. Accordingly, *amici* submit this brief in support of Plaintiffs’ Application for Preliminary Injunction (ECF No. 13) to enjoin enforcement of the ban.

¹ See ECF No. 13 (“Pl. Br.”) at 3–4 (“The RAND Report reviewed all of the relevant scholarly literature and empirical data, including the extensive medical literature, actuarial data, and research and reports from the eighteen other countries that permit open service by transgender personnel. It concluded that allowing transgender people to serve openly would have no adverse impact on unit cohesion, operational effectiveness, or readiness.”) (citing ECF No. 13-4, Pl. Ex. B (“RAND Report”)).

- **National Center for Transgender Equality (NCTE)** is a national social justice organization founded in 2003 and devoted to advancing justice, opportunity, and well-being for transgender people through education and advocacy on national issues. NCTE has worked with local, state, and federal government agencies and other organizations around the country for over a decade to develop fair and effective policies.
- **Tennessee Transgender Political Coalition** educates and advocates on transgender-related legislation at the federal, state, and local levels. The Coalition is dedicated to raising public awareness and building alliances with other organizations concerned with equal rights legislation.
- **TGI Network of Rhode Island** advocates for the transgender community of Rhode Island. The Trump Administration has targeted service members and, in doing so, has called into question the ability of all transgender Americans to contribute meaningfully to society. TGI Network of Rhode Island stands against the ban.
- **Transgender Allies Group (TAG)** has been providing education about and advocacy for transgender citizens in Nevada since 2012. One of its efforts led to the drafting and implementation in 2015 of Washoe County School District's Transgender and Gender Non-Conforming inclusionary policy, the first of its kind in Nevada and a model example that the U.S. Department of Education shared with the country in 2016. TAG has seen students thrive with acceptance and inclusion, looking forward to work and school opportunities after graduation. Banning participation in military service takes away an important opportunity for transgender students, instigating stigma and shame from being excluded the chance to serve their country. This ban

must be overturned.

- **Transgender Legal Defense & Education Fund (TLDEF)** is a non-profit law firm that represents and advocates for the transgender community. TLDEF is committed to ending discrimination against transgender people, and to achieving equality for transgender people through impact litigation and education. TLDEF's clients include transgender people of all ages, who come from diverse racial, ethnic, socio-economic, and faith backgrounds (including backgrounds of military service).
- **TransOhio** advocates for and supports transgender people throughout the State of Ohio. This includes transgender veterans, active military personnel, and individuals who wish to serve in the military.
- **Transgender Resource Center of New Mexico (TGRCNM)** provides transgender cultural competency education all over New Mexico, individual and policy-level advocacy, and direct services for transgender individuals. Many of the people TGRCNM works for are current or former service people who have been willing to sacrifice everything to serve the United States. TGRCNM stands behind these members of the transgender community.
- **Southern Arizona Gender Alliance (SAGA)** is a grass-roots organization of trans activists based in Tucson, Arizona. For two decades, SAGA has helped create a welcoming and supportive community for transgender and other gender nonconforming people in Southern Arizona through advocacy, community education, resource referral, and peer support.

ARGUMENT

The Trump Administration's categorical ban on military service by transgender persons violates the constitutional guarantees of equal protection and due process. As *amici* explain below, Plaintiffs are likely to succeed on the merits of their constitutional claims because the ban was intended to, and does, single out a historically disfavored group for harm based on animus toward that group. The discriminatory motivation for the ban is shown by the ban itself, which excludes an entire group of people from serving their country simply because of who they are. The circumstances surrounding the announcement of the ban further confirm the animus behind it, including secretive lobbying by anti-LGBT hate groups, congressional demands that the President act against transgender service members as quid pro quo for support of the President's promised border wall, the profoundly unusual Twitter announcement, and the unfounded and pretextual justifications offered for the ban. And, tellingly, it is part of an ongoing pattern of hostility toward transgender Americans by the Administration. Whether motivated by pure enmity, a desire for political gain at the expense of a disfavored minority, or some combination of the two, the ban is the result of animus.

This effort to denigrate and harm transgender people is a violation of the equal protection principles embodied in the Due Process Clause of the Fifth Amendment, whether subjected to rational basis review or a heightened level of scrutiny. Moreover, the ban violates the fundamental right of personal autonomy secured by the Due Process Clause—a right that includes the liberty of all persons to live in accord with their gender identity.

Plaintiffs are therefore likely to succeed on the merits of their constitutional claims. *Amici* respectfully urge the Court to grant Plaintiffs' request for a preliminary injunction.

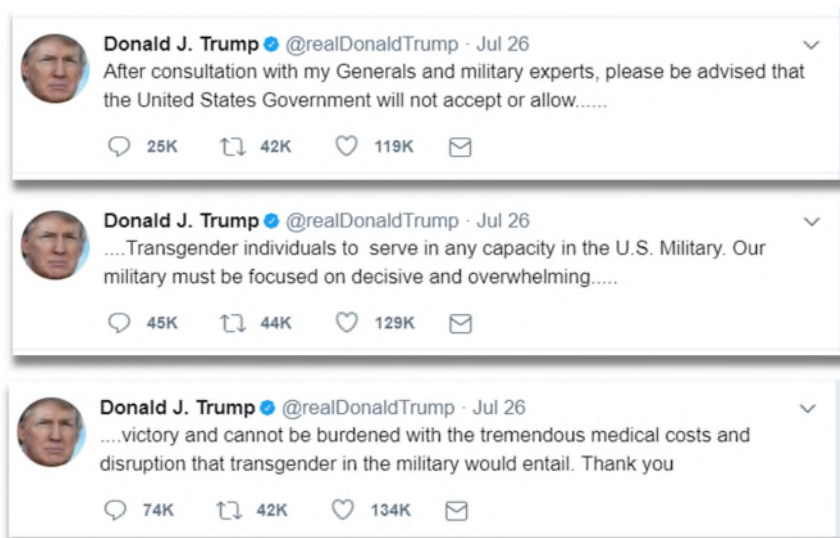
I. THE BAN IS THE PRODUCT OF UNCONSTITUTIONAL ANIMUS TOWARD TRANSGENDER PEOPLE.

“The Constitution’s guarantee of equality must at the very least mean that a bare ... desire to harm a politically unpopular group cannot justify disparate treatment of that group.” *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (citation omitted). Put simply, the government cannot treat one group of citizens differently than the rest without good reason. *See* U.S. CONST. amend. V; *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Discriminatory animus against the disfavored group is never a good reason. For “no legitimate purpose” can overcome a “purpose and effect to disparage and injure” the express targets of governmental action. *Windsor*, 133 S. Ct. 2696; *accord Dep’t of Agriculture v. Moreno*, 413 U.S. 528, 534–35 (1973). The transgender military ban fails that basic test.

A. The Animus Behind The Ban Is Apparent From The Categorical Nature Of The Ban As Well As The Circumstances Of Its Announcement.

1. Clear evidence of animus is available on Twitter.

On the morning of July 26, 2017, President Trump—without any previous public statements on the issue from the White House or military leadership—announced the ban in three successive tweets from his personal Twitter account (@realDonaldTrump):



In just over 400 characters, the President declared a categorical ban on all transgender people from any form of military service to be the policy of the United States government. In several ways, the animus behind the ban is plain from those tweets.

First, the ban declares all transgender people unfit for military service “in any capacity” simply because they are transgender. The ban thereby teaches that transgender people are unworthy of the honor and sacrifice of serving their country. The “practical effect of the law here in question [is] to impose a disadvantage, a separate status, and so a stigma upon all” transgender people. *Windsor*, 133 S. Ct. at 2693. By imposing such a “broad and undifferentiated disability on a single named group,” *Romer v. Evans*, 517 U.S. 620, 632 (1996), the ban uniquely demeans transgender people. No other group of Americans is categorically disqualified from military service based on a trait, like gender identity, that has nothing to do with individuals’ fitness to serve and everything to do with who they are. “Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of ‘class or caste’ treatment that the” Constitution’s guarantee of equal protection prohibits. *Plyler v. Doe*, 457 U.S. 202, 218 n.14 (1982); *see also Windsor*, 133 S. Ct. at 2693 (“[D]iscriminations of an unusual character’ especially require careful consideration.”) (quoting *Romer*, 517 U.S. at 633).

Second, the ban is highly unusual because it deprives transgender members of the military of their already-established right to serve openly.² The targeted exclusion of a particular

² In opposing Plaintiffs’ request for a preliminary injunction, Defendants argued that Plaintiffs have not been harmed by the July 26, 2017 announcement, the August 25, 2017 Presidential Memorandum formalizing the ban, or the subsequent Interim Guidance issued by Defense Secretary James Mattis because, essentially, nothing has changed. ECF No. 45 at 15–20. This is incorrect for numerous reasons, *see* Pl. Br. 29–34, including because it is contrary to what the Presidential Memorandum actually says. The Memorandum acknowledges that, as of June 2016, transgender people were “permitt[ed] ... to serve openly in the military,” and that the Department of Defense was authorized to use its “resources to fund sex-reassignment surgical procedures.” Pres. Mem. § 1(a). While the Presidential Memorandum nominally delayed until

class of people from previously enjoyed rights is indicative of animus. *See Romer*, 517 U.S. at 627 (holding that law prohibited local governments from adopting statutes protecting gays and lesbians from discrimination was motivated by animus, and noting that it uniquely “withdr[ew] from homosexuals, but no others, specific legal protection ... and it forb[ade] reinstatement of these laws and policies”); *Windsor*, 133 S. Ct. at 2693 (“The history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity [already] conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence.”). Expressing disapproval of transgender men and women is not incidental to the ban—it is its essence and purpose.

That the right of transgender Americans to serve openly was established in 2016 is irrelevant. California’s struggle with marriage equality is instructive. In July 2008, the California Supreme Court declared laws barring same-sex marriage repugnant to the California Constitution. Marriage equality was the law in California for just a few months. In November 2008, California voters passed Proposition 8, which amended the California State Constitution to prohibit same-sex marriage. The Ninth Circuit later declared Proposition 8 an unconstitutional violation of the Equal Protection Clause. *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012), *vacated on other grounds sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). And in doing so, the court stated:

Withdrawing from a disfavored group the right to obtain a designation with significant societal consequences is different from declining to extend that designation in the first place, *regardless of whether the right was withdrawn after a week, a year, or a decade*. The action of changing something suggests a more deliberate purpose than does the inaction of leaving it as it is.

March 2018 implementation of its provisions requiring actual separation of transgender service members, *but see* Pl. Br. 31–33, the President’s orders are clear and the Memorandum affords the Secretaries of Defense and Homeland Security no discretion to deviate from the policy of denying transgender men and women the opportunity to serve.

Id. at 1079–80 (emphasis added); *see, e.g., Romer*, 517 U.S. at 634–35 (law that revokes the right to seek legal protections is “a denial of equal protection of the laws in the most literal sense”).

The California Supreme Court ruling that struck down laws against same-sex marriage was a step toward equality, and Proposition 8 was a step back—a backlash intended to take rights away from a disfavored minority group. So too, the previous Department of Defense policy allowing transgender men and women to serve openly was a step toward equality. And so too is the transgender ban an unconstitutional step back and an effort to strip an unpopular minority of established rights. Like Proposition 8 before it, the transgender ban is an expression of ongoing animus, whipped into a fury by meaningful progress by the disfavored group.

2. The ban is a direct response to hate groups’ lobbying and political maneuvering over the border wall.

Animus is manifest not only in the nature of the ban itself, but also in the events and omissions that led to its announcement. In his July 26 tweets, the President stated that he had consulted with the military (“my Generals”) and military experts. It has been widely reported that the President did not, in fact, consult with military leaders prior to announcing the ban; indeed, military officials were “blindsided” by the announcement³ as no one at the Pentagon “had any idea that the president was unilaterally ending an Obama-era policy.”⁴ The profoundly

³ See Julie Hirschfeld Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*, N.Y. TIMES (July 26, 2017), <http://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html> (“President Trump abruptly announced a ban on transgender people serving in the military on Wednesday, blindsiding his defense secretary.”); *see also* Barbara Starr, *et al.*, *US Joint Chiefs blindsided by Trump’s transgender ban*, CNN (July 26, 2017), <http://www.cnn.com/2017/07/27/politics/trump-military-transgender-ban-joint-chief/s/> (“The Joint Chiefs of Staff, including chairman General Joseph Dunford, were not aware President Donald Trump planned to tweet a ban on transgender service members, three US defense officials told CNN—the latest indication that top military leaders across all four service branches were blindsided by the President’s announcement.”).

⁴ James McIntyre & Travis J. Tritten, *Trump’s tweets on military transgender ban send Pentagon aides scrambling*, WASH. EXAMINER (July 26, 2017), <http://www.washingtonexaminer.com>.

irregular process of announcing a major policy change via Twitter, without any prior public discussion or significant agency input, especially when accompanied by false statements, is strong evidence that the ban was not motivated by any claimed legitimate interest. It was, rather, a knee-jerk decision to harm a vulnerable and unpopular minority.⁵

Although he did not consult the military, the President was in contact with anti-LGBT activists and hate groups.⁶ On July 21, 2017, less than one week before President Trump tweeted

com/trumps-tweets-on-military-transgender-ban-send-pentagon-aides-scrambling/article/2629740 (“President Trump’s tweets banning transgender people from serving in the military set off a mad scramble at the Pentagon Wednesday morning, as officials raced to sort out the details after the surprise announcement. It appeared initially that no one in the building had any idea that the president was unilaterally ending an Obama-era policy.”)

⁵ Davis & Cooper, *supra* note 3 (“Mr. Trump and Republican lawmakers had come under pressure from Tony Perkins, the president of the Family Resource Council.”); *see also* Steve Peoples, *Trump Transgender Ban Nod to Christian Conservatives*, U.S. NEWS & WORLD REP. (July 27, 2017), <http://www.usnews.com/news/politics/articles/2017-07-27/trump-transgender-ban-nod-to-christian-conservatives> (“[F]or Christian conservatives across middle America who make up much of Trump’s base, Wednesday’s announcement served as a powerful reminder that he remains committed to their values.”); *see also* Davis & Cooper, *supra* note 3 (“[T]he announcement pleased elements of Mr. Trump’s base who have been dismayed to see the president break so bitterly in recent days with Attorney General Jeff Sessions, a hard-line conservative.”); Rebecca Kheel & Rebecca Savransky, *Trump to ban transgender people from all military service*, THE HILL (July 26, 2017) (“Trump’s decision is a gesture to the conservative base at a time when he’s facing declining poll numbers and increasing pressure over the Russia investigation.”), <http://thehill.com/homenews/administration/343847-trump-calls-for-ban-on-transgender-individuals-in-military>; Asawin Suebsaeng, *et al.*, *Trump Bows to Religious Right, Bans Trans Troops*, THE DAILY BEAST (July 27, 2017), <http://www.thedailybeast.com/trump-bows-to-religious-right-bans-trans-troops> (“On the anniversary of Harry S. Truman’s desegregation of the military, President Donald Trump on Wednesday abruptly reversed the move to openly integrate trans service members. The announcement came in the form of a tweeted edict that was designed to appeal to the religious hard right, White House officials told The Daily Beast.”).

⁶ *See generally* Tom Porter, *Transgender Military Ban: The Rise Of Anti-LGBT Hate Groups In Trump’s White House*, NEWSWEEK (July 26, 2017), <http://www.newsweek.com/anti-lgbt-hate-groups-transgender-military-ban-trump-642218> (noting that in July, Attorney General Jeff Sessions met privately “with the Alliance Defending Freedom (ADF), which has characterized homosexuality as a ‘degradation of our human dignity’ and falsely linked it to pedophilia,” and that in June 2017 “Vice President Mike Pence pledged his unwavering support for Focus on the Family, another anti-LGBT group, whose founder, James Dobson, has blamed the 2012 Sandy Hook shooting on the growing acceptance of LGBT rights in America”).

the ban, Jonathan Alexandre, Director of Public Policy at Liberty Counsel, “met with White House officials and discussed th[e] issue” of open service by transgender individuals in the military.⁷ In those meetings, Liberty Counsel urged President Trump to implement a ban, “stressing the importance of the President’s power to direct his generals to prioritize unit cohesion and military readiness rather than sacrificing them to the demands of the transgender lobby.”⁸

Liberty Counsel is classified as an anti-LGBT hate group.⁹ And for good reason. For example, Liberty Counsel supports so-called “conversion therapy” for LGBT people, and has opposed laws banning such practices even though they have been condemned by every major medical and mental health organization in the country.¹⁰ When anti-LGBT activist Scott Lively was accused of crimes against humanity for authoring a law in Uganda referred to as the “kill the gays” bill, Liberty Counsel claimed the suit was an effort “to criminalize Christianity.”¹¹ Liberty Counsel even compared the Supreme Court’s case law on same-sex marriage with the Dred Scott

⁷ *Trump Says No “Transgenderers” in the Military*, LIBERTY COUNSEL (July 26, 2017), <http://www.lc.org/newsroom/details/072617-trump-says-no-transgenderers-in-the-military/>.

⁸ *Id.*

⁹ *Active Anti-LGBT Groups*, SOUTHERN POVERTY LAW CENTER (2016), <http://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-lgbt> (“Anti-LGBT groups on the SPLC hate list often link homosexuality to pedophilia, claim that same-sex marriage and LGBT people in general are dangers to children, that homosexuality itself is dangerous, support the criminalization of homosexuality and transgender identity, and that there is a conspiracy called the ‘homosexual agenda’ at work that seeks to destroy Christianity and the whole of society. Viewing homosexuality as unbiblical or simply opposing same-sex marriage does not qualify an organization to be listed as an anti-LGBT hate group.”).

¹⁰ Molly Redden, *The Legal Battle for Gay Conversion Therapy Is A Losing One*, THE NEW REPUBLIC (Aug. 20, 2013) (describing Liberty Counsel founder Mat Staver’s opposition to a New Jersey bill banning conversion therapy and quoting Mr. Staver as ascribing same-sex attraction to child sexual abuse), <http://newrepublic.com/article/114385/gay-conversion-therapy-faces-legal-battles-california-new-jersey>.

¹¹ Mat Staver, *Fighting on behalf of religious liberty*, LIBERTY COUNSEL (Oct. 31, 2016), <http://libertycounsel.com/fighting-on-behalf-of-religious-liberty-liberty-counsel/>.

decision.¹² As to military service in particular, the group ardently opposed the prior open service policy because, in its view, “gender confusion is never stable.”¹³ The hate group opposes all forms of civil rights protections for “homosexuality (‘sexual orientation’) and cross-dressing (‘gender identity’ or ‘gender expression’).”¹⁴ One of its primary goals is to prohibit transgender individuals from working as teachers in public schools.¹⁵

Speaking to “Breitbart Daily News” after announcement of the ban, Tony Perkins, the head of the Family Research Council, described similarly “working with the White House” on the issue, and stated that he knew, in advance, that the President would be taking action.¹⁶ According to *The New York Times*, Perkins “pressed Mr. Trump for months to make the

¹² Mat Staver, *America was formed using this action*, LIBERTY COUNSEL (Apr. 21, 2015), <http://libertycounsel.com/america-was-formed-using-this-action-liberty-counsel/>.

¹³ *Service Members Grasp for “Transgender” Straws*, LIBERTY COUNSEL (Aug. 9, 2017), <http://www.lc.org/newsroom/details/080917-service-members-grasp-for-transgender-straws>.

¹⁴ Letter from Liberty Counsel to City Manager, City of Palm Bay, Florida, re: “Analysis of harms engendered by proposed ‘Human Rights Ordinance,’” at 1, LIBERTY COUNSEL (Feb. 1, 2016), <http://www.lc.org/PDFs/Attachments%20to%20PRs%20and%20LAs/020516-Liberty-Counsel-Ltr-to-Palm-Bay-RE-HRO.pdf>.

¹⁵ See, e.g., Mat Staver, *Liberty Counsel Fights Transgender Teaching in Public School*, LIBERTY COUNSEL (Nov. 30, 2015), <http://libertycounsel.com/liberty-counsel-fights-transgender-teaching-in-public-school/> (“[Y]et another school system attempted to place our kids in the LGBT indoctrination movement.”); Joni B. Hannigan, *School District Waits on Supreme Court after Walmart Attorney Pushes Transgender Rights*, CHRISTIAN EXAMINER (May 18, 2015), <http://www.christianexaminer.com/article/walmart-attorney-twists-arms-of-school-board-about-transgender-rights/48955.htm> (Liberty Counsel criticized transgender kindergarten teacher for teaching “while engaging in distracting ‘gender identity or expression’ by cross-dressing in class”); see also *Liberty Counsel Presents Fairfax Transgender Case to VA Supreme Court*, BCNN1 (July 30, 2016), <http://blackchristiannews.com/2016/07/liberty-counsel-presents-fairfax-transgender-case-to-va-supreme-court/> (Mat Staver, the Founder and Chairman of Liberty Counsel, argued that “[a]llowing boys to use private facilities for girls violates the right to privacy and places girls at risk of sexual abuse”).

¹⁶ Safiyah Riddle, *Tony Perkins: FRC Worked With White House To Stop Transgender ‘Cultural Grenade,’* RIGHT WING WATCH (July 28, 2017), <http://www.rightwingwatch.org/post/tony-perkins-frc-worked-with-white-house-to-stop-transgender-cultural-grenade/>.

statement he issued [on July 26] saying transgender people would be barred from the military.”¹⁷

Like Liberty Counsel, the Family Research Council is classified as an anti-LGBT hate group.¹⁸ Among other things, the Family Research Council “often makes false claims about the LGBT community based on discredited research and junk science.”¹⁹ Family Research Council has advocated for “criminal sanctions against homosexual behavior.”²⁰ The hate group claims the “transgender movement” is the third wave in an “assault on the sexes”—the first being “the modern feminism movement” and the second, “the homosexual movement.”²¹ In this group’s view, transgender rights are an affront to “basic reality” and “[t]here is no rational or compassionate reason to affirm a distorted psychological self-concept that one’s ‘gender

¹⁷ Jeremy W. Peters, *Trump Keeps His Conservative Movement Allies Closest*, N.Y. TIMES (Aug. 2, 2017), http://www.nytimes.com/2017/08/02/us/politics/trump-conservative-republicans.html?_r=0.

¹⁸ *Active Anti-LGBT Groups*, *supra* note 9; *see also Extremist Info: Tony Perkins*, SOUTHERN POVERTY LAW CENTER (2017), <http://www.splcenter.org/fighting-hate/extremist-files/individual/tony-perkins> (“Tony Perkins heads the Family Research Council, an anti-LGBT hate group located in Washington, D.C. Perkins has a sordid political history, having once purchased Klansman David Duke’s mailing list for use in a Louisiana political campaign he was managing. In 2001, Perkins gave a speech to a Louisiana chapter of the Council of Conservative Citizens, a white supremacist group. Since joining the FRC, Perkins has taken the group in a harder anti-LGBT direction, using it to publish false propaganda about that community and contending that gay rights advocates intend to round up Christians in ‘boxcars.’”).

¹⁹ *Extremist Group Info: Family Research Council*, SOUTHERN POVERTY LAW CENTER (2017), <http://www.splcenter.org/fighting-hate/extremist-files/group/family-research-council> (“In March 2008, Sprigg responded to a question about allowing the non-American same-sex partners of American citizens to immigrate to the United States by saying, ‘I would much prefer to export homosexuals from the United States than import them.’ He later apologized, but in February 2009, he told MSNBC’s Matthews, ‘I think there would be a place for criminal sanctions on homosexual behavior.’ ‘So we should outlaw gay behavior?’ Matthews asked. ‘Yes,’ Sprigg replied.”).

²⁰ *Id.*

²¹ Dale O’Leary & Peter Sprigg, *Understanding & Responding to the Transgender Movement*, FAMILY RESEARCH COUNCIL (June 2015), <http://www.frc.org/transgender>.

identity’ is different from one’s biological sex.”²²

Immediately prior to announcing the ban, President Trump also faced critical pressure from members of Congress to make a political deal that would harm transgender troops. In late July, several conservative House Republicans were threatening to vote against legislation that would have funded several Administration priorities, including funding construction of a border wall between the United States and Mexico, unless the legislation also included a ban on the use of Department of Defense resources for gender transition surgeries. Having failed to obtain support for such a provision from either congressional leadership or Defense Secretary James Mattis, these House members approached the President directly. The President did them one better and announced the across-the-board ban on military service by transgender men and women.²³ The next day, the House “approved ... a bundle of spending bills, including \$1.57 billion that President Trump requested to build a wall along the Mexican border.”²⁴

3. The reasons offered for the ban are pretextual.

The stated rationales for the ban are pretextual, which is further evidence that its true

²² *Id.*

²³ Rachael Bade & Josh Dawsey, *Inside Trump’s snap decision to ban transgender troops: A congressional fight over sex reassignment surgery threatened funding for his border wall*, POLITICO (July 26, 2017), <http://www.politico.com/story/2017/07/26/trump-transgender-military-ban-behind-the-scenes-240990>; *see also* Greg Price, *Trump Banned Transgender Troops for 74 Miles of Border Wall Funding: Report*, NEWSWEEK (July 26, 2017), <http://www.newsweek.com/trump-transgender-ban-wall-642456>; Jacob Pramuk, *Trump banned transgender troops after border wall funding was threatened, report says*, CNBC (July 26, 2017), <http://www.cnbc.com/2017/07/26/trump-banned-transgender-troops-after-border-wall-was-threatened-report.html>.

²⁴ Emmarie Huetteman, *House Approves Spending Package, Border Wall & All*, N.Y. TIMES (July 27, 2017), <http://www.nytimes.com/2017/07/27/us/politics/house-spending-bill-border-wall.html> (“In recent weeks, a skirmish over whether the Pentagon should pay for medical treatment related to gender transition had divided Republicans and threatened to derail the package. Republicans decided not to include the amendment [stripping funding for gender transition medical treatment] and the issue was sidelined when Mr. Trump abruptly announced in a series of posts to Twitter on Wednesday that he intended to ban transgender service members entirely, citing in part the ‘tremendous medical costs and disruption.’”).

purpose is to harm transgender men and women. In his Twitter announcement, the President specifically claimed the ban was related to military effectiveness and medical costs: “Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in [sic] the military would entail.” The August 25, 2017 Presidential Memorandum on “Military Service by Transgender Individuals” followed the lead of the President’s tweets, stating: “In my judgment, the previous Administration failed to identify a sufficient basis to conclude” that military service by transgender people “would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources.” Pres. Mem. § 1(a).

As Plaintiffs have explained in detail (Pl. Br. 3–5), thorough study by the military has shown that none of these concerns is borne out by the facts. After extensive research and analyses, the Department of Defense determined that open service by transgender individuals in the military would have no negative impact on readiness (effectiveness and lethality) or unit cohesion.²⁵ In fact, the opposite is true; continuing the ban would disrupt unit cohesion and readiness.²⁶ And the medical costs associated with open service are not “tremendous”; they are *de minimis*²⁷ “budget dust”²⁸ that is less significant than a rounding error.²⁹ In sharp contrast, a recent report by military experts estimates that implementing the ban would cost \$960 million—

²⁵ RAND Report at xiii, 39–47.

²⁶ *Id.* at 46; Fanning Decl. ¶ 24; James Decl. ¶¶ 12–13, 17; Mabus Decl. ¶ 17.

²⁷ RAND Report at 46.

²⁸ Mabus Decl. ¶ 41; *see also* RAND Report at xi; Carson Decl. ¶ 16.

²⁹ Mabus Decl. ¶ 41; *see also* Christopher Ingraham, *The Military spends five times as much on Viagra as it would on transgender troops’ medical care*, WASH. POST (July 26, 2017), <http://www.washingtonpost.com/news/wonk/wp/2017/07/26/the-military-spends-five-times-as-much-on-viagra-as-it-would-on-transgender-troops-medical-care/>.

more than 100 times the cost of providing necessary healthcare services to transgender troops.³⁰

The use of unfounded rationalizations is strong indication that the true motive for the ban is animus. *See, e.g., Romer*, 517 U.S. at 635 (the constitutional guarantee of equal protection under the law will not tolerate “a status-based enactment divorced from any factual context from which [one] could discern a relationship to legitimate state interests”); *Perry*, 671 F.3d at 1081 (“A law that has no practical effect except to strip one group of [a] right ... raises an even stronger inference that the disadvantage imposed is born of animosity toward the class of persons affected.”) (citation omitted).

Moreover, the ban’s “sheer breadth is discontinuous with the reasons offered for it,” so much so that it “seems inexplicable by anything other than animus toward the class it affects.” *Romer*, 517 U.S. at 632. Transgender individuals are banned from military service “*in any capacity*.” When, as here, the breadth of governmental discrimination “is so far removed from the[] particular justifications” given, it is “impossible to credit them.” *Id.* at 635.

B. The Trump Administration Has Engaged In A Pattern Of Discrimination Against Transgender Americans.

The ban on military service by transgender people is only one of many actions taken by the Trump Administration to deliberately target and systematically dismantle legal protections for transgender Americans. Soon after President Trump’s inauguration, the Executive Branch began taking a series of concrete steps to make transgender people *more* vulnerable to discrimination—discrimination and even danger that is familiar to far too many transgender

³⁰ *Trump’s Transgender Ban Would Cost \$960 Million, Say Navy Professors in New Report*, PALM CENTER (Aug. 9, 2017), <http://www.palmcenter.org/trumps-transgender-ban-cost-960-million-say-navy-professors-new-report/>.

Americans.³¹ Rolling back legal protections for transgender people was—and is—an urgent Administration priority. For example:

- On February 10, 2017, a day after Attorney General Jeff Sessions was sworn in, the Department of Justice stopped defending federal guidance that protected transgender students’ privacy and right to use the restroom that aligns with their gender identity.³²
- On February 22, 2017, the Departments of Justice and Education issued a joint letter formally withdrawing that critical guidance and taking the position that Title IX of the Civil Rights Act’s prohibition of discrimination based on “sex” does not bar

³¹ For example, nearly a third (29%) of transgender Americans live poverty and/or have experienced homelessness—more than double the poverty and homelessness rates for the U.S. as a whole. Report of the 2015 U.S. Transgender Survey, NAT’L CTR. FOR TRANSGENDER EQUALITY, at 3 (Dec. 2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>. Moreover, transgender Americans are three times more likely to experience unemployment than Americans who are not transgender. *Id.* And transgender Americans are historically—and *increasingly*—vulnerable to violence. *See, e.g., id.; A Crisis of Hate: A Mid-Year Report on Lesbian, Gay, Bisexual, Transgender & Queer Hate Violence Homicides*, NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS (2017), <http://avp.org/wp-content/uploads/2017/08/NCAVP-A-Crisis-of-Hate-Final.pdf> (“Over the last five years, NCAVP has reported a consistent if not steady rise of reports of homicides of transgender and gender non-conforming people. Thus far in 2017, NCAVP has already collected information on 19 hate-violence related homicides of transgender and gender non-conforming people, compared to 19 reports in the entire year of 2016.”).

³² *See* Notice Of Withdrawal Of Motion, *Texas v. United States*, No. 16-11564 (5th Cir., filed Feb. 10, 2017); *see also* Kevin Bohn, *Justice Dep’t no longer fighting injunction on transgender sch. guidance*, CNN (Feb. 11, 2017), <http://www.cnn.com/2017/02/11/politics/justice-department-transgender-guidance-case/>; Josh Gerstein, *Feds drop request to rein in ban on Obama transgender policy*, POLITICO (Feb. 11, 2017), <http://www.politico.com/blogs/under-the-radar/2017/02/feds-obama-transgender-policy-234928> (noting the inconsistency between DOJ arguments that a nationwide injunction against President Trump’s travel ban executive order were overbroad and its acceptance of a nationwide injunction against enforcement of the policy protecting the ability of transgender students to use the bathroom consistent with their gender identity).

discrimination based on gender identity.³³

- On March 7, 2017, on the Department of Justice’s motion, a federal court halted the agency’s pending lawsuit to enjoin enforcement of North Carolina’s controversial HB2, which prohibits transgender people from using the bathroom appropriate for their gender.³⁴ On April 14, 2017, the Department dropped the case.³⁵
- On June 14, 2017,³⁶ the Department of Education withdrew, without explanation, the agency’s prior finding that an Ohio school district violated Title IX by discriminating against a transgender student.³⁷ The agency took this wholly unnecessary action even though the Southern District of Ohio had already held that the student was likely to

³³ U.S. Dep’t of Justice & U.S. Dep’t of Education, “Dear Colleague” Letter, WASH. POST (Feb. 22, 2017), <http://apps.washingtonpost.com/g/documents/national/departments-of-education-and-justice-roll-back-transgender-student-protections/2344/>.

³⁴ See Order, *United States v. North Carolina*, No. 16-425, ECF No. 237 (M.D.N.C., Mar. 3, 2017); Jonathan Drew, *Justice Dep’t backs off request to halt N.C. ‘bathroom bill,’* BOSTON GLOBE (Mar. 7, 2017), <http://www.bostonglobe.com/news/nation/2017/03/06/justice-department-backs-off-request-halt-bathroom-bill/WplpQMy8s7Uc8zHpyfITtO/story.html>.

³⁵ See Notice of Voluntary Dismissal, *United States v. North Carolina*, No. 16-425, ECF No. 245 (M.D.N.C., filed Apr. 14, 2017). The Department of Justice purported to withdraw the lawsuit after HB2 was withdrawn and replaced with HB142, “a similar” bill that is only “slightly less discriminatory” than its predecessor, since it still bans local non-discrimination ordinances and “puts control over bathroom access in the hands of state legislators.” Mary Emily O’Hara, *Justice Dep’t Withdraws Lawsuit Over HB2 ‘Bathroom Bill,’* NBC NEWS (Apr. 14, 2017), <http://www.nbcnews.com/feature/nbc-out/justice-department-withdraws-lawsuit-over-hb2-bathroom-bill-n746551>.

³⁶ June is widely celebrated as LGBT Pride Month, and had been so celebrated by two previous administrations. The Trump Administration did not note the many Pride Month celebrations around the country, or issue any similar proclamation. Dylan Stafford, *Trump WH declines to recognize LGBT Pride Month*, CNN (June 30, 2017), <http://www.cnn.com/2017/06/30/politics/trump-pride-month/index.html>; Philip Bump, *Last year, June was National Pride Month. This year, it isn’t.*, WASH. POST (June 27, 2017), <http://www.washingtonpost.com/news/politics/wp/2017/06/27/last-year-june-was-national-pride-month-this-year-it-isnt>.

³⁷ Emma Brown, *Educ. Dep’t. closes transgender student cases as it pushes to scale back civil rights investigations*, WASH. POST (June 17, 2017), http://www.washingtonpost.com/local/education/education-dept-closes-transgender-student-cases-as-it-pushes-to-scale-back-civil-rights-investigations/2017/06/17/08e10de2-5367-11e7-91eb-9611861a988f_story.html.

succeed on the merits of her Title IX and Equal Protection Clause claims arising from the same conduct.³⁸

- By July 2017, without notice or explanation, the Department of Housing and Urban Development deleted from its website:
 1. a guide for HUD grantees on ensuring equal access for transgender people;
 2. a self-assessment tool for shelters to evaluate their compliance with anti-discrimination laws and best practices; and
 3. a “decision tree” for shelters regarding equal access to LGBT people.³⁹

Notably, the Department of Justice has not just abandoned its previous efforts to protect the rights of LGBT people; it has gone out of its way to argue *against* legal protections for LGBT people. In July 2017, the Department took the unusual step of intervening in private employment litigation to argue that Title VII of the Civil Rights Act *does not* protect workers from being fired for being LGBT—the same case in which the Equal Employment Opportunity Commission had filed a brief arguing that Title VII *does* so protect LGBT workers.⁴⁰ And on

³⁸ See *Bd. of Educ. v. Dep’t of Educ.*, 208 F. Supp. 3d 850, 871, 877 (S.D. Ohio 2016). The Sixth Circuit refused to stay an injunction issued against further discrimination by the district court, reasoning that the school district was unlikely to succeed on its appeal of the injunction. *Dodds v. Dep’t of Educ.*, 845 F.3d 217, 221–22 (6th Cir. 2016).

³⁹ Ben Lane, *Democrats ask Carson, HUD to do more to protect LGBTQ people from hous. discrimination*, HOUSINGWIRE (July 6, 2017), <http://www.housingwire.com/articles/40623-democrats-want-carson-hud-to-do-more-to-protect-lgbtq-people-from-housing-discrimination>.

⁴⁰ Alan Feuer, *Justice Dep’t Says Rights Law Doesn’t Protect Gays*, N.Y. TIMES (July 27, 2017), <http://www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html>; Joseph Goldstein, *Discrimination Based on Sex is Debated in Case of Gay Sky Diver*, N.Y. TIMES (Sept. 26, 2017), <http://www.nytimes.com/2017/09/26/nyregion/discrimination-based-on-sex-sky-diver-donald-zarda.html> (noting that during oral argument before the Second Circuit, the Department of Justice and the EEOC argued opposite sides of the case, prompting numerous expressions of concern by the *en banc* panel); Chris Riotta, *Trump Admin. Says Employers Can Fire People For Being Gay*, NEWSWEEK (Sept. 28, 2017), <http://www.newsweek.com/trump-doj-fired-being-gay-lgbt-issues-jeff-sessions-673398> (noting that the Department of Justice asserted that the EEOC was “not speaking for the United States,”

October 4, 2017, the Department issued a formal memorandum declaring that Title VII does not prohibit discrimination in the workplace on the basis of gender identity.⁴¹

The government cannot rationalize whether to treat transgender men and women as full and equal citizens as an issue in need of further study. It is notable that there has been a coordinated effort within the Executive Branch to *avoid* collecting data about LGBT Americans. For example, in the first 100 days after President Trump’s inauguration:

- Without explanation, the Department of Housing and Urban Development withdrew a data collection initiative designed to assess compliance with two LGBT-focused programs: (i) the LGBT Homelessness Prevention Initiative, and (ii) the Equal Access in Accordance with an Individuals Gender Identity in Community Planning and Development Programs.⁴²
- The annual National Survey of Older Americans Act Participants collects data on those who take part in programs funded by the Older Americans Act, including those receiving transportation, homemaker, and meal services, or visiting senior centers. The Department of Health and Human Services deleted a single question from the survey—a question asking whether the respondent is gay, lesbian, bisexual, or homosexual.⁴³ On condition of

and substantively argued that “[e]mployers under Title VII are permitted to consider employees’ out-of-work sexual conduct” when making employment decisions).

⁴¹ Off. of the Atty. Gen., Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Oct. 4, 2017), <http://www.documentcloud.org/documents/4067437-Sessions-memo-reversing-gender-identity-civil.html>; Sadie Gurman & David Crary, *Justice Dep’t ends Obama-era workplace protections for transgender people*, CHICAGO TRIBUNE (Oct. 5, 2017), <http://www.chicagotribune.com/business/ct-transgender-workplace-protections-20171005-story.html>.

⁴² 82 Fed. Reg. 13359 (Mar. 10, 2017).

⁴³ Matt Sedensky, *Federal Surveys Trim LGBT Questions, Alarming Advocates*, U.S. NEWS & WORLD REP. (Mar. 20, 2017), <http://www.usnews.com/news/us/articles/2017-03-20/federal-surveys-trim-lgbt-questions-alarming-advocates>.

anonymity, a Trump administration official admitted that political appointees within the Department “targeted LGBT questions” in their review of the survey.⁴⁴

- Similarly, the Department of Health and Human Services deleted questions regarding sexual orientation from the Annual Program Performance Report for Centers for Independent Living, which gathers feedback on counseling, skills training, and other services provided to individuals with disabilities.⁴⁵
- In March, the Census Bureau determined that there was “no federal data need” to ask about gender identity and sexual orientation in the 2020 Census.⁴⁶ The Bureau reached this conclusion despite having previously been asked to collect data on sexual orientation and gender identity by more than seventy-five members of Congress, as well as the Department of Justice, Department of Housing and Urban Development, the Centers for Medicare and Medicaid Services, and the Environmental Protection Agency.⁴⁷

The Executive Branch’s claimed desire to “study” issues affecting transgender people is fundamentally inconsistent with the pattern of ensuring that there is no data to study.

This escalating pattern of hostility against transgender individuals is consistent with views long held and expressed by senior Administration officials. “According to White House sources, Vice President Mike Pence ha[d] been pushing hard for this kind of shift of policy in the

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ John H. Thompson, *Director’s Blog: Planned Subjects for the 2020 Census & the Am. Community Survey*, U.S. CENSUS BUREAU (Mar. 29, 2017), http://www.census.gov/newsroom/blogs/director/2017/03/planned_subjects_2020.html.

⁴⁷ *Id.*; see Hansi Lo Wang, *Census Bureau Caught In Political Mess Over LGBT Data*, NPR (July 18, 2017), <http://www.npr.org/2017/07/18/536484467/census-bureau-found-no-need-for-lgbt-data-despite-4-agencies-requesting-it>.

military, as had senior officials such as [now-former] chief strategist Steve Bannon.”⁴⁸ Mr. Pence was a strong supporter of the “Don’t Ask Don’t Tell” policy, which similar to the transgender ban, barred gay and lesbian Americans from serving openly in the military. And he vigorously opposed its repeal. When he served in the House, Mr. Pence took an eerily-familiar position: “to mainstream homosexuality within active duty military would have an impact on *unit cohesion*, would have an impact on recruitment, and impact on *readiness*.”⁴⁹ Vice President Pence’s hostility toward LGBT individuals is well documented.⁵⁰ So much so that President Trump, when recently asked about LGBT rights, pointed to Mr. Pence and said: “Don’t ask this guy—he wants to hang them all.”⁵¹

A number of Cabinet members have long track records of hostility toward LGBT people.

These include:

- Ben Carson, the Secretary of the Department of Housing and Urban Development, who has called transgender people “the height of absurdity.”⁵²
- Tom Price, the former Secretary of the Department of Health and Human Services,

⁴⁸ Suebsaeng, *et al.*, *supra* note 5.

⁴⁹ Andy Towle, *Watch: Rep. Mike Pence Speaks Out Against ‘Mainstreaming Homosexuality’ Into the Military*, TOWLEROAD (Nov. 19, 2010) (emphases added), <http://www.towleroad.com/2010/11/pence-2/>.

⁵⁰ See, e.g., Liam Stack, *Mike Pence & ‘Conversion Therapy’: A History*, N.Y. TIMES (Nov. 30, 2016), <http://www.nytimes.com/2016/11/30/us/politics/mike-pence-and-conversion-therapy-a-history.html>.

⁵¹ Jane Mayer, *The Danger of President Pence*, NEW YORKER (Oct. 16, 2017), <http://www.newyorker.com/magazine/2017/10/23/the-danger-of-president-pence>.

⁵² Eugene Scott & Ashley Killough, *Ben Carson compared being transgender to changing ethnicities*, CNN (July 19, 2016), <http://www.cnn.com/2016/07/19/politics/ben-carson-transgender/>; see also Jonathan Easley, *Ben Carson: Being transgender ‘doesn’t make any sense,’* THE HILL (July 19, 2016), <http://thehill.com/blogs/ballot-box/presidential-races/288324-ben-carson-being-transgender-doesnt-make-any-sense>.

who called federal protections for transgender students “absurd.”⁵³

- Betsy DeVos, the Secretary of the Department of Education, who, with her husband, gave hundreds of thousands of dollars to Focus on the Family, “a conservative Christian group whose founder called the battle against LGBT rights a ‘second civil war.’”⁵⁴

* * * * *

In short, the nature of the ban, the context in which it was announced, and the Administration’s many other anti-transgender actions show that the ban was motivated by discriminatory animus. The ban is therefore unconstitutional.

II. THE BAN IS UNCONSTITUTIONAL BECAUSE IT VIOLATES PLAINTIFFS’ FUNDAMENTAL RIGHT TO PERSONAL AUTONOMY.

“The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015). The Due Process Clause protects a fundamental right to personal liberty—freedom that extends to a variety of issues “central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.” *Id.* at 2597; *see, e.g., Carey v. Population Servs. Int’l*, 431 U.S. 678, 684 (1977) (“This right of personal privacy includes ‘the interest in independence in making certain kinds of important decisions.’”) (quoting *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977)).

The fundamental right to personal autonomy extends to a number of central life decisions, including the freedom to choose whether to marry, whom to marry, whether to use

⁵³ Phillip Elliot, *LGBT Rights Group Opposes Donald Trump’s Health Sec’y Nominee Tom Price*, TIME (Jan. 17, 2017), <http://time.com/4637046/donald-trump-hhs-lgbt/>.

⁵⁴ Benjamin Wermund & Kimberly Hefling, *Trump’s education secretary pick supported anti-gay causes*, POLITICO (Nov. 25, 2016), <http://www.politico.com/story/2016/11/betsy-devos-education-secretary-civil-rights-gay-transgender-students-231837>.

birth control, whether to have children, how to rear and educate children, and whether to engage in consensual adult intimacy. *See Obergefell*, 135 S. Ct. at 2599, *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992); *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *see also Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). As the Supreme Court explained a quarter century ago:

These matters, involving the most intimate and personal choices a person may make in a lifetime, *choices central to personal dignity and autonomy*, are central to the liberty protected by the [Due Process Clause of the] Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Casey, 505 U.S. at 851 (emphasis added); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984) (“[O]ne’s identity ... is central to any concept of liberty.”).

Gender identity is a central aspect of personhood that may not be dictated or punished by the government. *See* Pl. Br. 22–23. The fundamental right to autonomy protected by the Constitution includes the right to live in accord with one’s gender identity. Transgender people’s gender identity is both “immutable and irrelevant to their ability to contribute to society.” *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 n.8 (N.D. Cal. 2015). The fundamental right to autonomy includes a person’s right to be transgender or to not be transgender, just as it includes a right to be heterosexual, lesbian, gay, or bisexual. *See, e.g., Lawrence*, 539 U.S. at 562 (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”); *In re Golinski*, 587 F.3d 901, 903–04 (9th Cir. 2009) (“*Lawrence* rests explicitly on the proposition that ‘our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child

rearing, and education,’ and that one’s sexual orientation therefore enjoys protection from punishment.”) (quoting *Lawrence*, 539 U.S. at 574); *cf. Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *4 (Mass. Super. Ct. Oct 11, 2000) (transgender student’s gender expression was protected speech), *aff’d sub nom., Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

Banning transgender people from serving in the military without a compelling (or even rational) basis—and indeed, based on a bare desire to harm and disparage transgender people—is a violation of the fundamental right to autonomy, and thus is subject to heightened scrutiny. *See, e.g., Am. Bus. Ass’n v. Rogoff*, 649 F.3d 734, 738 (D.C. Cir. 2011) (“[S]tricter scrutiny is required for classifications that ... infringe fundamental constitutional rights.”) (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993)); *see also Cooper Hosp. v. Burwell*, 179 F. Supp. 3d 31, 46 (D.D.C. 2016), *aff’d sub nom., Cooper Hosp. Univ. Med. Ctr. v. Price*, 688 F. App’x 11 (D.C. Cir. 2017) (examining whether heightened scrutiny for infringement of a “fundamental constitutional right” applied to plaintiff’s argument for the right to health care).

The ban intrudes upon the right of transgender service members to live as who they are, consistent with a core aspect of their identity. Although certain intrusions on fundamental rights may be permissible in the military context, governmental actions burdening a serviceperson’s fundamental right to personal autonomy are subject to heightened scrutiny. *Witt v. Dep’t of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008) (heightened scrutiny applies “when the government attempts to intrude upon ... the rights [of personal autonomy] identified in *Lawrence*”); *see SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480–84, 489 (9th Cir. 2014) (heightened scrutiny applies to claims involving sexual orientation in light of *Lawrence* and *Windsor*); *cf. United States v. Marcum*, 60 M.J. 198, 204–06 (C.A.A.F. 2004) (using “searching

constitutional inquiry” as a heightened standard of review in the military context despite declining to find a fundamental right in its analysis of *Lawrence*, and acknowledging that constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope such rights are plainly inapplicable).

Thus, the Trump Administration’s categorical ban on military service by transgender people is subject to heightened scrutiny. But the ban fails under any level of constitutional review. As Plaintiffs have shown, the ban does not serve any legitimate governmental interest, much less the type of compelling interest required when fundamental rights are at stake. Pl. Br. 20. The facts demonstrating animus (*see supra*) confirm the absence of any legitimate governmental purpose.

CONCLUSION

For all of these reasons, *amici* respectfully submit that Plaintiffs are likely to prevail on the merits of their constitutional claims and, accordingly, urge the Court to grant Plaintiff’s Application for Preliminary Injunction.

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

Dated: October 16, 2017

By: s/ Susan Baker Manning

Susan Baker Manning (DC Bar No. 499635)

susan.manning@morganlewis.com

Stephanie Schuster (DC Bar No. 1011924)

stephanie.schuster@morganlewis.com

1111 Pennsylvania Avenue, NW

Washington, DC 20004

T: 202.739.3000

F: 202.739.3001

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that, on October 16, 2017, a true and correct copy of the foregoing was served on all counsel of record via CM/ECF.

s/ Susan Baker Manning
Susan Baker Manning