

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

BROCK STONE, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 1:17-cv-02459

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

Men and women who are transgender have long served this country in the U.S. Armed Forces. They have seen combat in distant theaters and performed critical roles at home. Many have devoted their careers to service and developed mission-critical skills on which our national defense relies. And since June 30, 2016, these transgender individuals have been able to serve their country openly, when, after extensive study and review, the Department of Defense (“DoD”) concluded that there was no justification to exclude from service someone who is ready, willing, and fit to serve simply because he or she is transgender.

President Donald J. Trump has now overridden DoD’s reasoned determination. Acting without further study and catching DoD by surprise, President Trump announced on Twitter that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military.” One month later, President Trump issued a directive formalizing this change (the “Transgender Service Member Ban” or “Ban”). The directive reverses DoD policy allowing transgender people to serve without fear of being discharged based on their transgender status, bars the military from providing surgical care needed to treat some transgender service members, and blocks new enlistments by transgender individuals who otherwise meet rigorous criteria developed by DoD.

Plaintiffs are service members who are transgender and, at DoD’s encouragement, came out to their commanding officers and colleagues. Some have plans to seek commissions as officers, which the Ban has disrupted. Some have a medical need for surgery the military will now refuse to provide. All have been told by their Commander-in-Chief that despite years of honorable service, they are not wanted in the Armed Forces “in any capacity.”

The Transgender Service Member Ban violates the Constitution’s equal protection guarantee. Although discrimination based on transgender status is subject to heightened

scrutiny, President Trump's purported justifications for the Ban fail even rational basis review. The cost of providing health care to transgender service members is negligible and no different than the kind of expenses the military incurs in providing other types of medical care to service members. Military effectiveness is *enhanced*, not threatened, by the open service of transgender men and women.

Indeed, the remarkable context of this case is that President Trump's asserted military justifications have already been studied at length and rejected *by the military itself*. The Ban reflects a decision to single out a disfavored group and withdraw legal protection based not on evidence but animus, moral disapproval, and crass political calculation.

In addition to violating the Equal Protection Clause, the Ban violates substantive due process, denying individual dignity on wholly irrational grounds. It also violates a federal statute, 10 U.S.C. § 1074, which creates a right to medical care for active-duty service members.

Unless this Court issues a preliminary injunction to restore the status quo, Plaintiffs will suffer irreparable harm. On January 1, 2018, Plaintiffs and others who otherwise meet DoD's strict accession and fitness standards will be denied the opportunity to commission as officers or enlist, simply because they are transgender. No later than March 23 (and in some cases now), Plaintiffs and others with a medical need for surgery will be denied care, simply because they are transgender. On that same day, Plaintiffs and others will lose legal protection and become subject to discharge, simply because they are transgender. And each day that President Trump's unconstitutional directive remains in effect, Plaintiffs and their families continue to grapple with the stress and uncertainty of having their careers, their livelihoods, and their medical care jeopardized by a Commander-in-Chief who rejects their service and their sacrifice.

Plaintiffs ultimately will prevail in this challenge to President Trump’s abrupt, irrational, and unconstitutional decision. Until then, this Court should issue a preliminary injunction to prevent Defendants from enforcing this facially unconstitutional ban and restore the status quo as it existed the morning of July 26, 2017, before President Trump upended thousands of lives with three tweets.

FACTUAL BACKGROUND¹

The military welcomed the open service of transgender service members on June 30, 2016. It did so at the conclusion of an exhaustive review by high-ranking DoD and military officials, who held numerous discussions with military leaders and personnel, commissioned an independent report, and studied the experiences of allied militaries. *See* Expert Decl. of Hon. Brad R. Carson (“Carson”) ¶¶ 8–27. Determining that there was no justification to exclude qualified men and women from service solely because they are transgender, the Secretary of Defense issued DTM 16-005 (the “Open Service Directive”). *See* Decl. of Marianne F. Kies (“Kies”), Ex. 1.² This case arises because President Trump abruptly rescinded the Open Service Directive and replaced it with the Transgender Service Member Ban.

A. Transgender Status and Gender Dysphoria

Men and women who are transgender have a gender different from the one assigned to them at birth. *See* Expert Decl. of Dr. George R. Brown (“Brown”) ¶ 20; Agnes Gereben Schaefer et al., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*,

¹ On a motion for preliminary injunction, the uncontroverted facts alleged in accompanying declarations and the Complaint must be taken as true. *See Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976). Additionally, “district courts may look to and, indeed, in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted.” *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 725–26 (4th Cir. 2016), *vacated on other grounds*, 137 S. Ct. 1239 (2017) (Mem.).

² Unless otherwise noted, the exhibits cited herein are all attached to the Kies Declaration.

RAND Corporation, at 6 (2016) (“RAND Report”) (Brown, Ex. C). Being transgender is not a mental disorder. Brown ¶ 25. Men and women who are transgender have no impairment in judgment, stability, reliability, or general social or vocational capabilities solely because they are transgender. *Id.* They lead productive and successful lives, making substantial contributions to their communities and country.

Because of the incongruence between their actual gender and the gender assigned to them at birth, some (but not all) transgender individuals experience clinically significant distress. Brown ¶¶ 26–28 & Ex. C (RAND Report) at 6. The diagnostic term for such distress is “gender dysphoria.” Brown ¶ 26. There are well-established standards for treatment of gender dysphoria, and this treatment is highly effective at curing all symptoms. *Id.* ¶¶ 32–33. The goal of treatment is to enable the individual to live all aspects of life consistent with his or her gender identity, thereby eliminating the distress associated with the incongruence. *Id.* ¶ 36.

Treatment for gender dysphoria varies depending on the needs of the individual. It can include a “social transition,” whereby the person begins to live in their actual gender. Brown ¶ 36 & Ex. C (RAND Report) at 6. Some may require hormone therapy, *e.g.*, estrogen for a woman who is transgender, or testosterone for a man who is transgender. Brown ¶¶ 36–37 & Ex. C (RAND Report) at 6. And some may undergo one or more surgeries to align their body with their actual gender. *Id.* The greater medical community, including the American Medical Association, the Endocrine Society, the American Psychiatric Association, and the American Psychological Association, accepts all of these courses of treatment as standard, medically

necessary care. Brown ¶ 34. Medicare, state Medicaid programs, and private insurers routinely cover transition-related care as medically necessary treatment.³

B. The Open Service Directive

Starting some time before 1981, DoD enforced a policy barring men and women who are transgender from enlisting or being retained in the Armed Forces. This policy categorically excluded individuals who had had a “change of sex” from enlisting and prohibited persons who are transgender from serving openly, regardless of whether they required any ongoing medical treatment and regardless of their fitness to serve. Brown ¶¶ 39–58 & Ex. C (RAND Report) at 1. During this time, the military treated “Sexual Gender and Identity Disorders” as a condition rendering a service member “administratively unfit,” and allowed these members no opportunity to demonstrate fitness to serve. Brown ¶¶ 48–56. At the same time, DoD permitted individuals who were not transgender — including persons requiring medical interventions for various physical and psychological conditions — to remain in service if they could demonstrate their fitness. Brown ¶ 57.

Despite this policy, for years men and women who are transgender served our country honorably in the Armed Forces, including in combat. As of May 2014, transgender persons accounted for an estimated 8,800 active-duty service members, as well as 134,300 veterans and retirees from Guard or Reserve service. *See Gates & Herman, Transgender Military Service in the United States*, Williams Inst., at 1, 4 (May 2014) (Ex. 4).

³ *See, e.g.*, DHS, Dep’tl Appeals Board, *NCD 140.3, Transsexual Surgery*, No. A-13-87 (May 30, 2014) (Ex. 2); Code of Md. Regs. 10.09.67.26-3 (requiring Maryland Medicaid providers to cover “medically necessary gender reassignment surgery and other somatic specialty care for members with gender identity disorder”); Transcend Legal, *Transgender Insurance Medical Policies* (Ex. 3) (examples of insurance policies covering surgery for gender dysphoria).

On July 13, 2015, then-Secretary of Defense Ashton Carter acknowledged that existing regulations were “an outdated, confusing, inconsistent approach that’s contrary to our value of service and individual merit [and that is] causing uncertainty that distracts commanders from our core missions.” *Statement by Secretary of Defense Ash Carter on DoD Transgender Policy* (July 13, 2015) (Ex. 28). Secretary Carter created a working group to study “the policy and readiness implications of welcoming transgender persons to serve openly.” *Id.*

The DoD working group included representatives of the leadership of the Armed Forces; the Joint Chiefs of Staff; the service secretaries; and personnel, training, readiness, and medical specialists from across the Department. *See id.*; Carson ¶¶ 1, 8–10. Over the next year, the working group performed a systematic review — including meeting with transgender service members deployed throughout the world, and consulting with outside experts, medical professionals, and others. *See Carson* ¶ 10; *DoD Press Briefing by Secretary Carter on Transgender Service Policies in the Pentagon Briefing Room* (June 30, 2016) (Ex. 5).

The working group also commissioned a study by the Forces and Resources Policy Center of the non-partisan RAND National Defense Research Institute (“RAND”). RAND conducted an “extensive literature review”; examined data from inside and outside DoD; studied policies of foreign militaries that permit open service by persons who are transgender; and reviewed DoD’s instructions on enlistment, retention, separation, and deployment. Brown, Ex. C (RAND Report) at 2–3. RAND concluded that the impact on military readiness from open service would be “negligible,” and that associated health care costs would represent “an exceedingly small proportion” of DoD’s overall health care expenditures. *Id.* at xi–xii, 31, 70.

RAND’s findings were consistent with the medical and anecdotal evidence that the working group collected, including evidence related to combat experience. For example, the

working group found that the Military Health System already has an effective process for providing prescribed medications and medical services to deployed service members across the globe, including those in combat settings. Carson ¶ 24; Expert Decl. of Maj. Gen. Margaret C. Wilmoth (U.S. Army, Ret.) (“Wilmoth”) ¶¶ 14–18, 20. The group further concluded that the short periods of non-deployability that *some* transgender service members *might* experience would be comparable to the non-deployability associated with medical conditions the military does not consider a basis for discharge, such as pregnancy, orthopedic injuries, and appendicitis. Carson ¶ 22; Wilmoth ¶ 19. For these and additional reasons, the working group ultimately concluded that “[o]pen service by transgender service members would not impose any significant burdens on readiness, deployability, or unit cohesion.” Wilmoth ¶ 23.

The Secretary of Defense agreed, determining that “open service by transgender Service members while being subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability, and retention, is consistent with military readiness and with strength through diversity.” Ex. 1 (Open Serv. Dir.). On June 30, 2016, the Secretary issued a directive rescinding the historical policy of discriminating against men and women who are transgender.

The Open Service Directive had three main components. *First*, it provided that “no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity.” Ex. 1 at Attach. § 1(a). Men and women who are transgender are “subject to the same standards as any other Service member of the same gender.” *Id.* § 1(b). Medical conditions affecting transgender service members are treated “in a manner consistent with a Service member whose ability to serve is similarly affected for reasons unrelated to gender identity or gender transition.” *Id.*

§ 1(c). Pursuant to this policy change, transgender service members were encouraged to disclose their gender identity to colleagues and leadership. DoD, *Transgender Service in the U.S.*

Military: An Implementation Handbook, at 20 (Sept. 30, 2016) (Ex. 6).

Second, the Open Service Directive provided that “transgender Service members may transition gender while serving” pursuant to contemporaneously-issued guidance. Ex. 1 at Attach. § 3(a). “Any medical care and treatment provided to an individual Service member in the process of gender transition [is] provided in the same manner as other medical care and treatment.” *DoD Instruction 1300.28*, § 1.2(d) (June 30, 2016) (Ex. 7). “Any determination that a transgender Service member is non-deployable at any time w[ould] be consistent with established Military Department and Service standards, as applied to other Service members whose deployability [wa]s similarly affected in comparable circumstances unrelated to gender transition.” *Id.* § 1.2(e).⁴

Third, the Open Service Directive announced that individuals wishing to join the military (a process, applicable to both new enlistees and officer candidates, known as “accession”) would not be prohibited from doing so solely because they are transgender. *See generally* Ex. 1 (Open Serv. Dir.), at Attachment. At the same time, the Directive set out stringent accession requirements beyond those applicable to those already serving, to “ensure that those entering service are free of medical conditions or physical defects that may require excessive time lost from duty.” *Id.* § 2(a). Thus, “[a] history of gender dysphoria” was disqualifying, “**unless**, as

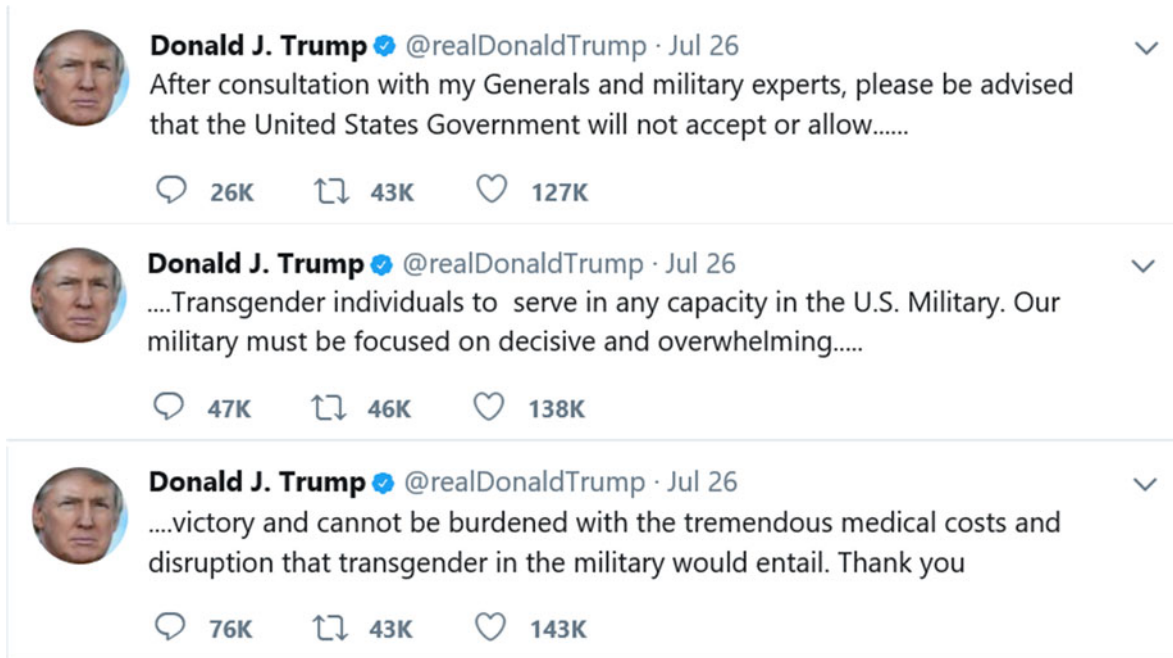
⁴ Surgeries necessary for the treatment of gender dysphoria are comparable to surgeries performed for service members who are not transgender, including chest and breast reconstruction, hysterectomies, and genital reconstruction. Brown ¶ 85; Wilmoth ¶ 20. All of the medications that may be used to treat a service member’s gender dysphoria are used by other service members for conditions unrelated to gender dysphoria. Brown ¶¶ 38, 62–63, 75, 78–79, 81–85. Military policy allows service members to take a range of medications, including hormones, while deployed in combat settings. *Id.* ¶¶ 62, 78–83.

certified by a licensed medical provider, the [prospective enlistee] ha[d] been stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for [at least] 18 months.” *Id.* § 2(a)(1) (emphasis in original). “A history of sex reassignment or genital reconstruction surgery” was also disqualifying unless at least 18 months had passed since the surgery, no further surgery was required, and “no functional limitations or complications persist[ed].” *Id.* § 2(a)(3). Finally, a history of any medical treatment “associated with gender transition” was disqualifying, unless the enlistee had “completed all medical treatment” associated with the transition; had been “stable” in the transition for 18 months; and had been stable on any hormones for 18 months. *Id.* § 2(a)(2). To ensure proper training for those administering the new criteria, DoD provided a period before new enlistments would begin, “[n]ot later than July 1, 2017.” *Id.* § 2(a).

On June 30, 2017 — the day before new enlistments were scheduled to begin — the current Secretary of Defense announced that it was “necessary to defer the start of accessions for six months.” See Jim Mattis, *Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff: Accession of Transgender Individuals into the Military Services* (June 30, 2017) (Ex. 8). Secretary Mattis wished to “personally” receive the views of newly arriving military and civilian leadership. *Id.* He directed the Under Secretary of Defense for Personnel and Readiness to lead a review of the accession policy and to report the results by December 1, 2017. Secretary Mattis stressed that he was “in no way presuppos[ing] the outcome of the review”; that his announcement did not otherwise change the Open Service Directive; and that “we will continue to treat all Service members with dignity and respect.” *Id.*

C. President Trump’s Transgender Service Member Ban

Less than a month after Secretary Mattis announced this review, President Trump abruptly announced a categorical ban on transgender individuals serving in the military. On July 26, 2017, President Trump published three tweets under the handle @realDonaldTrump:



Ex. 19. President Trump later claimed that his Twitter announcement did the military a “great favor” by ending the “confusing issue” of transgender service. Cooper, *Trump Says Transgender Ban Is a ‘Great Favor’ for the Military*, N.Y. Times (Aug. 10, 2017) (Ex. 9).

President Trump’s tweets “startl[ed]” DoD. Dawsey, *John Kelly’s Big Challenge: Controlling the Tweeter in Chief*, Politico (Aug. 4, 2017) (Ex. 10). There is no indication that President Trump consulted with any experts on this issue or that the announcement was based on any new evidence questioning DoD’s previous determinations. Rather, the announcement was made in the context of legislative politics; anti-transgender Members of Congress had tried and failed to defund medical care for transgender service members, and appealed directly to President Trump to intervene. Bade & Dawsey, *Inside Trump’s Snap Decision to Ban*

Transgender Troops, Politico (July 26, 2017) (Ex. 11). It was reported that President Trump hoped the ban would appeal to members of his “base.”⁵

President Trump’s announcement drew swift criticism. Fifty-six retired generals and admirals pointed out that “[t]housands of transgender Americans are currently serving in uniform and there is no reason to single out these brave men and women and deny them the medical care that they require.” *Fifty-Six Retired Generals and Admirals Warn that President Trump’s Anti-Transgender Tweets, if Implemented, Would Degrade Military Readiness*, Palm Center (Aug. 1, 2017) (Ex. 14).

Senator John McCain, Chairman of the Senate Armed Services Committee, stated that “[t]here is no reason to force service members who are able to fight, train, and deploy to leave the military – regardless of their gender identity.” *Statement by SASC Chairman John McCain on Transgender Americans in the Military* (July 26, 2017) (Ex. 15). Senator Tammy Duckworth, an Iraq War veteran, noted that “[i]f you are willing to risk your life for our country and you can do the job, you should be able to serve.” *Duckworth Statement on Reports Trump Administration Directing DoD to Discriminate Against Transgender Servicemembers* (Aug. 24, 2017) (Ex. 16). More than 100 Members of Congress expressed strong “process” concerns, criticizing President Trump’s “refusal to appropriately consult with relevant advisors, experts, or military leaders.” *See Letter from McEachin, et al. to President Trump* (Aug. 29, 2017) (Ex. 17).

President Trump nonetheless formalized the Transgender Service Member Ban in a Memorandum for the Secretary of Defense and the Secretary of Homeland Security, entitled “Military Service by Transgender Individuals.” Ex. 18. The memorandum states that President

⁵ See, e.g., Ex. 11 (*Inside Trump’s Snap Decision*); Miller, *Trump’s Evangelical Advisers Discussed Transgender Ban at White House Meeting*, Religion News Service (July 27, 2017) (Ex. 12); Peoples, *Trump Transgender Ban Nod to Christian Conservatives*, U.S. News & World Report (July 27, 2017) (Ex. 13).

Trump exercised his own “judgment” to determine that DoD had “failed to identify a sufficient basis to conclude” that the Open Service Directive “would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources.” *Id.* § 1(a). The memorandum addressed, and rescinded, each component of the Open Service Directive.

First, the memorandum directed the military to treat transgender service members as subject to discharge, effective March 23, 2018. *Id.* §§ 1, 3. Specifically, President Trump directed the military to “return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016,” a policy he described as “generally prohibit[ing] openly transgender individuals from accession into the United States military and authoriz[ing] the discharge of such individuals.” *Id.* § 1. Discharges pursuant to this policy are temporarily delayed while the Secretary of Defense submits a plan to President Trump, by February 21, 2018, concerning “how to address transgender individuals currently serving in the United States military.” *Id.* § 3. Whatever plan the Secretary submits, the required end result is the fulfillment of President Trump’s avowed goal: a military with no transgender service members “in any capacity.” Ex. 19 (tweets).

Second, President Trump directed the military to “halt all use of DoD or DHS resources to fund sex-reassignment surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex.” *Id.* § 2(b). According to the memorandum, the ban on surgical care takes effect on March 23, 2018. *Id.* § 3. In practice, the military has already ceased providing surgical care to some transgender service members, including Plaintiffs. *See infra* § D.

Third, President Trump directed the military to “maintain the currently effective policy regarding accession of transgender individuals into military service,” *i.e.*, banning such

accessions, until he is provided with a recommendation to the contrary “that I find convincing.” Ex. 18 § 2(a). The indefinite ban on new enlistments and commissions takes effect on January 1, 2018 (the day after Secretary Mattis’s six-month delay of new accessions expires). *Id.* § 3.

Secretary Mattis confirmed that he “will carry out the [P]resident’s policy direction” and develop an implementation plan “[a]s directed.” *Statement by Secretary of Defense Jim Mattis on Military Service by Transgender Individuals* (Aug. 29, 2017) (Ex. 20).

D. Plaintiffs’ Military Service

Plaintiffs include men and women who are transgender and who serve in the U.S. military, and the American Civil Liberties Union of Maryland, Inc. on behalf of its members.

Plaintiff Stone. Brock Stone, a 34-year-old man, is a Petty Officer First Class in the U.S. Navy. He has served for over 11 years, including a nine-month deployment to Afghanistan. Stone ¶ 1. Petty Officer Stone is stationed at Fort Meade, Maryland, where he works as a computer analyst. *Id.* He revealed his transgender status to military personnel in connection with and in reliance upon the Open Service Directive. *Id.* ¶ 2. Petty Officer Stone is eligible for promotion to Chief Petty Officer, a promotion in which he would take great pride, and which would result in a significant pay increase and additional housing allowance. *Id.* ¶ 13. The Transgender Service Member Ban threatens that promotion. *Id.*

Petty Officer Stone is currently undergoing hormone therapy as a part of his gender transition, supervised by DoD medical personnel. *Id.* ¶¶ 4, 9. He plans to receive transition-related surgical care as part of his treatment. *Id.* ¶ 10. The Transgender Service Member Ban immediately jeopardizes Petty Officer Stone’s medically necessary treatment, and compromises his career and financial future. Petty Officer Stone has planned his finances around remaining with the military through retirement and receiving the future retirement benefits to which he

would be entitled; the Ban also compromises his ability to support his wife as she starts a new business. *Id.* ¶¶ 9, 11, 12.

Plaintiff Cole. Kate Cole, a 27-year-old woman, is a Staff Sergeant in the U.S. Army. Cole ¶ 2. She enlisted in the Army at age 17, and has deployed to Afghanistan and also spent two years stationed in Germany, where she rotated through Estonia, Latvia, Lithuania, and Poland. *Id.* Staff Sergeant Cole revealed her transgender status to military personnel following the Open Service Directive. *Id.* ¶ 3. Pursuant to an evaluation and recommendation by DoD medical personnel, she is currently undergoing hormone therapy. *Id.* ¶ 4. Staff Sergeant Cole was scheduled for gender confirmation surgery and reported for a DoD medical consultation for that surgery on September 8, 2017. *Id.* ¶ 11. DoD personnel informed Staff Sergeant Cole that there is no transition-related surgery at this time, and it is not certain if, or when, such surgery will be allowed. *Id.* Staff Sergeant Cole also fears for her career and the financial hardships that discharge would inevitably cause her. *Id.* ¶¶ 12–13.

Plaintiff Doe. John Doe, a 25-year-old man, is a Senior Airman in the U.S. Air Force, in which he has served for almost six years, including a six-month deployment to Qatar. Doe ¶ 2. He is currently pursuing cryogenics certification and is the suicide prevention and interpersonal violence instructor for his base. *Id.* Senior Airman Doe revealed his transgender status to military personnel following the Open Service Directive. *Id.* ¶ 4. After evaluation and recommendation by DoD medical personnel, he has begun medically necessary hormone therapy. *Id.* ¶ 5. Senior Airman Doe was scheduled to undergo a medically recommended hysterectomy in August 2017. *Id.* ¶ 12. He received an e-mail from medical officials at the base where he was to receive treatment stating that all gender transition-related surgeries, including

his own, were on hold; his previously prescribed surgery was apparently deleted from his treatment plan. *Id.*

Senior Airman Doe had planned to serve in the Air Force for the remainder of his career, but now fears discharge. *Id.* ¶ 10. After achieving his current rank, he submitted paperwork to reenlist for another five years. His reenlistment is currently pending. *Id.* He is financially dependent upon military income and related military benefits, including health care. *Id.* ¶ 11. Because of the Ban, he is now unable to plan for his future. *Id.* ¶ 12.

Plaintiff George. Seven Ero George, a 41-year-old man, is an Airman First Class in the Air National Guard. George ¶ 2. He currently works in the security force at Selfridge Air National Guard Base in Michigan. *Id.* Airman First Class George revealed his transgender status to military personnel following the Open Service Directive. *Id.* ¶ 3. Pursuant to an evaluation and recommendation by his civilian healthcare provider, he began to undergo medically necessary hormone therapy. *Id.* ¶¶ 3–4. He has successfully undergone a double mastectomy and chest reconstruction surgery as part of his treatment. *Id.* ¶ 4. He has provided the Air National Guard with documentation of his treatment, and the Air National Guard confirmed that he still met all criteria for service, including deployability. *Id.*

Airman First Class George has been planning to pursue a commission in the U.S. Army Nurse Corps. *Id.* ¶ 5. That career path is foreclosed by President Trump’s indefinite ban on new accessions by men and women who are transgender. Ex. 18 (Ban). Airman First Class George is concerned about both his future financial security and military career opportunities. George ¶¶ 5, 9–13.

Plaintiff Gilbert. Teagan Gilbert, a 31-year-old woman, is a Petty Officer First Class in the U.S. Navy, where she has served for more than 13 years, including a one-year deployment to

Afghanistan. Gilbert ¶ 2. Petty Officer Gilbert has received specialized military training and education, including experience with DoD space systems. *Id.* ¶ 4. She is currently serving in the Naval Reserve as an information and space systems technician. *Id.* Petty Officer Gilbert revealed her transgender status to military personnel following the Open Service Directive. *Id.* ¶ 5. Pursuant to an evaluation and recommendation by DoD medical personnel, she is currently undergoing medically necessary hormone therapy and plans to seek approval of medically-indicated surgical treatment, including gender confirmation surgery. *Id.* ¶ 6.

Petty Officer Gilbert planned to serve in the U.S. military for at least 20 years. *Id.* ¶ 7. The Transgender Service Member Ban is already hindering her career; she perceives increased difficulty in receiving new reservist assignments as a result of the Ban. *Id.* ¶ 11. If discharged, Petty Officer Gilbert will lose not only her own military health care but also health care for her six-year-old son, of whom she has sole custody. *Id.* ¶ 12. Petty Officer Gilbert has plans to apply to Officer Candidate School after completing her college degree, but the accession ban would bar her from receiving a commission. *Id.* ¶ 7; *see* Ex. 18 (Ban).

Plaintiff Parker. Tommie Parker, a 54-year-old woman, is a Technical Sergeant in the Air National Guard. Parker ¶ 2. She has served in the military for over 30 years, including over 16 years on active duty, and currently works as a fuel technician at Stewart Air National Guard Base in New York. *Id.* Technical Sergeant Parker revealed her transgender status to military personnel following the Open Service Directive. *Id.* ¶ 3. Pursuant to an evaluation and recommendation by DoD medical personnel, she began hormone therapy. *Id.* ¶ 4. She intends to serve in the Air National Guard for her entire career, through the next 3.5 years. *Id.* ¶ 5. Now, she fears that she will be discharged and will lose the retirement benefits she would earn with completion of 20 years on active duty. *Id.* ¶ 9. Technical Sergeant Parker is financially

dependent on her military income and other significant benefits, as are her wife and three children. *Id.* ¶ 10.

LEGAL STANDARD

A plaintiff seeking preliminary injunctive relief must show: (1) a clear likelihood of success on the merits; (2) a clear likelihood that he or she will suffer irreparable harm in the absence of such relief; (3) that the balance of equities tips in plaintiff's favor; and (4) that an injunction is in the public interest. *United States v. South Carolina*, 720 F.3d 518, 533 (4th Cir. 2013).

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits of Their Claims.

The Transgender Service Member Ban violates the equal protection and substantive due process guarantees of the U.S. Constitution, as well as service members' statutory right to medical care. Plaintiffs are likely to succeed on the merits of each of these claims.

A. The Transgender Service Member Ban Violates Equal Protection.

“The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.” *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013). This equal protection guarantee applies to men and women who serve in the Armed Forces. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973); *Emory v. Sec’y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987) (per curiam).

While President Trump’s action singling out transgender service members for unequal treatment is subject to heightened scrutiny, the Transgender Service Member Ban cannot survive *any* level of scrutiny. President Trump’s abrupt decision to bar men and women who are transgender from serving in the military defies rational explanation. All of the justifications advanced in defense of the Ban are either demonstrably false or “ma[k]e no sense in light of how

the [military] treat[s] other groups similarly situated in relevant respects.” *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001). The anomalous process — in which a surprise Twitter announcement overrode the military’s extensive evidence-based review — confirms that the Transgender Service Member Ban is “inexplicable by anything but animus toward the class it affects.” *Romer v. Evans*, 517 U.S. 620, 632 (1996).

1. Heightened Scrutiny Applies to the Transgender Service Member Ban.

The Constitution’s equal protection guarantee “stands to ensure that the line drawn between . . . two groups has some modicum of principled validity, through its scrutiny of both the purpose animating the statute as well as the way the line is set.” *Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel*, 20 F.3d 1311, 1321 (4th Cir. 1994). A classification will be “strictly scrutinized” when it “operates to the peculiar disadvantage of a suspect class.” *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 172 (4th Cir. 2000). Courts assess whether a classification is suspect based on whether the class: (i) has historically “been subjected to discrimination,” *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); (ii) has a defining characteristic that “frequently bears no relation to ability to perform or contribute to society,” *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440–41 (1985) (superseded by statute on other grounds); (iii) exhibits “obvious, immutable, or distinguishing characteristics that define [the members of the class] as a discrete group,” *Bowen*, 483 U.S. at 602; and (iv) is politically “vulnerable,” *id.* at 629; *see Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) (applying these considerations), *aff’d*, 133 S. Ct. 2675 (2013). “The presence of *any* of the factors is a signal that the particular classification is ‘more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective,’ thus

requiring heightened scrutiny.” *Golinski v. OPM*, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012) (emphasis added) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982)).

Discrimination based on transgender status implicates all of the traditional heightened-scrutiny factors. “[T]ransgender people as a class have historically been subject to discrimination or differentiation”; “they have a defining characteristic that frequently bears no relation to an ability to perform or contribute to society”; “as a class they exhibit immutable or distinguishing characteristics that define them as a discrete group”; and “as a class, they are a minority with relatively little political power.” *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *see also Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (“There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.”); *G.G. v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729, 730 (4th Cir. 2017) (Davis, J., concurring) (transgender individuals are “a vulnerable group that has traditionally been unrecognized, unrepresented, and unprotected”); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 873–74 (S.D. Ohio 2016), *appeal docketed*, No. 16-4107 (6th Cir. Sept. 28, 2016); *Adkins v. City of N.Y.*, 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015).

Furthermore, discrimination against transgender individuals requires heightened scrutiny because, for at least three reasons, it is a form of discrimination on the basis of sex. First, a person’s transgender status is an inherently sex-based characteristic; discrimination “on the basis of being transgender” is “literally discrimination ‘because of sex.’” *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016).

Second, discrimination against people because they have undergone a gender transition is also inherently based on sex. Just as discrimination based on religion includes discrimination against people who convert from one religion to another, sex discrimination includes discrimination against men or women who have undergone a gender transition from the sex assigned to them at birth. *See Schroer v. Billington*, 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008); *see also Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011) (firing employee because of her “intended gender transition” is sex discrimination); *Dawson v. H&H Elec., Inc.*, 2015 WL 5437101, at *3 (E.D. Ark. Sept. 15, 2015).

And third, discrimination against transgender individuals inherently involves discrimination based on sex stereotypes. “A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. . . . There is thus a congruence between discriminating against transgender . . . individuals and discrimination on the basis of gender-based behavioral norms.” *Glenn*, 663 F.3d at 1316. Accordingly, “any discrimination against transsexuals (as transsexuals) — individuals who, by definition, do not conform to gender stereotypes — is . . . discrimination on the basis of sex.” *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014); *see also Whitaker*, 858 F.3d at 1049–50; *Smith v. City of Salem*, 378 F.3d 566, 569, 572 (6th Cir. 2004).

2. The Transgender Service Member Ban Fails Any Level of Scrutiny.

Although discrimination against transgender service members is subject to heightened scrutiny, the Transgender Service Member Ban cannot withstand any level of review. Even under rational basis review, justifications must have a “footing in the realities of the subject addressed,” *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993), and the government “may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational,” *Cleburne*, 473 U.S. at 446. Moreover, “the disadvantage

imposed” on a discrete group of individuals may not be “born of animosity toward the class of persons affected.” *Romer*, 517 U.S. at 634. Unequal treatment “motivated by an improper animus or purpose” is unconstitutional under any standard. *Windsor*, 133 S. Ct. at 2693.

President Trump’s abrupt decision to bar men and women who are transgender from serving in the military defies rational explanation. The sweeping ban “outrun[s] and belie[s] any legitimate justifications that may be claimed for it.” *Romer*, 517 U.S. at 635; *see also USDA v. Moreno*, 413 U.S. 528, 535–36 (1973) (invalidating law on rational-basis review because “even if we were to accept as rational the Government’s wholly unsubstantiated assumptions concerning [hippies] . . . we still could not agree with the Government’s conclusion that the denial of essential federal food assistance . . . constitutes a rational effort to deal with these concerns”).

a) The Ban is not rationally related to military effectiveness.

Open service by transgender individuals does nothing to “hinder military effectiveness and lethality.” Ex. 18 (Ban) § 1(a). President Trump provided no explanation of what specific concerns he harbors on this score, and the experience of Plaintiffs — who have served for years or even decades, deployed overseas, and received specialized, mission-critical training — alone refutes any uninformed assumption that transgender status is somehow incompatible with effectiveness in the field.

The military already has generally applicable standards and procedures for assessing the medical fitness and deployability of all service members, and for discharging those who are not fit. Transgender service members are held to those same standards, and are dischargeable on the same basis if they fail to meet them. *See* Ex. 1 (Open Serv. Dir.) at Attach. § 1. The military also has an effective system for distributing prescribed medications, including hormones, to deployed service members across the globe, even in combat settings. Wilmoth ¶¶ 14–16; Brown

¶¶ 62, 78–83. Only a few medications “are inherently disqualifying for deployment,” and none of them are used to treat gender dysphoria. Brown ¶ 81. The only people affected by President Trump’s categorical ban are transgender service members who would otherwise qualify as medically fit and deployable under these generally applicable standards. *See City of L.A. v. Patel*, 135 S. Ct. 2443, 2451 (2015) (“The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.”).

To the extent that President Trump assumes that transgender service members who undergo transition-related surgery would be generally non-deployable, that assumption has no basis in fact. Under the strict accessions policy of the Open Service Directive, men and women who are transgender must generally have completed all transition-related surgery 18 months *before* initial enlistment, eliminating any foreseeable need for additional surgery. Ex. 1 at Attach. § 2. Some (but not all) transgender service members who have already enlisted may require medically necessary surgery, but any impact on availability for deployment is “negligible and significantly smaller than the lack of availability due to [other] medical conditions.” Brown, Ex. C (RAND Report) at 46. For example, in 2015 in the Army alone, 14% of active-duty service members were ineligible to deploy for legal, medical, or administrative reasons. *Id.* In comparison, RAND estimates that between eight and 43 labor-years would be unavailable for deployment due to transition-related care in a given year — out of 1.2 million labor-years total in the active component — with a reduction of at most just 0.0015 percent of available deployable labor-years across both the active and reserve components. Brown, Ex. C (RAND Report) at 42.

These *de minimis* deployability constraints plainly cannot justify the sweeping Ban in light of the military’s broader treatment of non-deployability. Brown ¶ 91. Courts long ago struck down an analogous military regulation requiring discharge based on pregnancy — holding

that the regulation was not rationally related to the asserted military objectives of mobility, readiness, and administrative convenience. *See, e.g., Crawford v. Cushman*, 531 F.2d 1114, 1121–25 (2d Cir. 1976). A military that accepts individuals with myriad conditions limiting deployability cannot cite the “negligible” limitations on deployability that a subset of transgender service members may experience as even a rational justification for banning them. *Cf. Cleburne*, 473 U.S. at 450 (“[T]he expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home [for people with disabilities] for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.”); *Bostic v. Schaefer*, 760 F.3d 352, 382 (4th Cir. 2014) (rejecting justification that is “so underinclusive” that its real motivation “must have ‘rest[ed] on an irrational prejudice’” (quoting *Cleburne*, 473 U.S. at 450)).

Far from compromising readiness, the experience from other countries has shown that open service for transgender individuals “*improved* readiness by giving units the tools to address a wider variety of situations and challenges.” Brown, Ex. C (RAND Report) at 61 (emphasis added). An illustrious group of retired generals and admirals underscored this point. *See* Ex. 14 (*Fifty-Six Retired Generals and Admirals*) (“This proposed ban . . . would . . . deprive the military of mission-critical talent . . . [T]ransgender troops have been serving honorably and openly for the past year, and have been widely praised by commanders. . . . The military conducted a thorough research process on this issue and concluded that inclusive policy for transgender troops promotes readiness. . . . We could not agree more.”).⁶

⁶ President Trump has not explained his stray reference to “unit cohesion” (Ex. 18 (Ban) § 1(a)), a rationale he did not mention when he announced the Transgender Service Member Ban on Twitter. To the extent President Trump is speculating that other service members harbor prejudice against people who are transgender and would have difficulty serving with them, this assumption has no factual basis. *See* Carson ¶ 19 (“no evidence that permitting openly

b) The Ban is not rationally related to an interest in avoiding “tremendous costs” to the military.

President Trump also defended the ban by claiming that the cost of providing medical care to transgender service members would be “tremendous” and “tax military resources.” Ex. 19 (tweets); Ex. 18 (Ban) § 1(a). That is simply untrue. Surgeries that treat gender dysphoria are not particularly expensive when compared with surgeries for other conditions. Brown, Ex. C (RAND Report) at 33–37, 70. Indeed, the types of surgeries used to treat gender dysphoria are routinely provided to non-transgender service members. *See id.* at 8–9; Brown ¶¶ 84–85; Wilmoth ¶ 20. The Military Health System already possesses the surgical expertise to perform genital and chest reconstructive surgeries for patients who, *e.g.*, have been in vehicular accidents or wounded in combat. Brown ¶ 85 & Ex. C (RAND Report) at 8; Wilmoth ¶¶ 20–21.

Moreover, because surgeries are not medically necessary for all men and women who are transgender, *see* Brown ¶¶ 26–28, 32–33, and because such surgeries are not foreseeable for new enlistees (who must generally have completed their surgical care), the number of surgeries the military would need to perform to treat gender dysphoria is “overwhelmingly small,” Brown, Ex. C (RAND Report) at 31.

Thus, RAND found that “even in the most extreme scenario,” providing care for men and women who are transgender would entail only a 0.13% increase in active component health care spending — a mere one one-hundredth of one percent of the military’s annual health care budget. Brown, Ex. C (RAND Report) at 33–37, 70. In real terms, the highest-range estimate of

transgender people to serve in the military would disrupt unit cohesion”). This speculation may be based in President Trump’s own misunderstanding of military service and stereotypes about the character of the men and women who serve. *Cf. Mehta, Trump Stands by Tweet Blaming Sexual Assaults in Military on Men and Women Serving Together*, L.A. Times (Sept. 7, 2016) (Ex. 21) (statement by President Trump that sexual assault is the inevitable result of allowing women to serve alongside men in the military).

providing health care to transgender service members would be \$8.4 million, out of \$6.2 *billion* in active component health expenditures. *Id.* at 33–37. This is “little more than a rounding error” in the military’s \$47.8 billion annual health care budget. Belkin, *Caring for Our Transgender Troops*, *New Eng. J. Med.*, at 1 (Aug. 12, 2015) (Ex. 22).⁷

Even if a “cost” justification had any factual basis, reducing costs is not a sufficient governmental interest to justify unequal treatment of similarly situated groups. *See, e.g., Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) (where interest in “cost savings and reducing administrative burdens” “depend[s] upon distinguishing between homosexual and heterosexual employees, similarly situated,” it “cannot survive rational basis review”); *Bassett v. Snyder*, 59 F. Supp. 3d 837, 854 (E.D. Mich. 2014) (“Although a state has a valid interest in preserving the fiscal integrity of its programs and may legitimately attempt to limit its expenditures,” it “may not accomplish such a purpose by invidious distinctions between classes of its citizens.” (internal quotation marks omitted)). Because medical conditions resulting in similar or higher costs for the military are not bases for discharge or denial of care, cost savings does not explain the exclusion of transgender service members with comparable or even less costly medical needs. *Cf. Cleburne*, 473 U.S. at 450; *Bostic*, 760 F.3d at 382.

3. President Trump’s Decision to Single Out Transgender Service Members Is Impermissibly Rooted in Animus and Moral Disapproval.

President Trump’s sweeping and categorical ban is “inexplicable by anything but animus toward the class it affects.” *Romer*, 517 U.S. at 632. It is “a classification of persons undertaken for its own sake, something [the Fifth Amendment] does not permit.” *Id.* at 635. “[A] court applying rational-basis review under the Equal Protection Clause must strike down a government

⁷ For example, the military spends at least 10 times more on medication to treat erectile dysfunction than it would to care for transgender service members. *See Kime, DoD Spends \$84M a Year on Viagra, Similar Meds*, *Military Times* (Feb. 13, 2015) (Ex. 23).

classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.” *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring); *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (rational-basis review not deferential when there is “some reason to infer antipathy”).

“In determining whether a law is motivated by an improper animus or purpose, [d]iscriminations of an unusual character especially require careful consideration.” *Windsor*, 133 S. Ct. at 2693 (internal quotation marks omitted). The extraordinary context of this case is that DoD went through a careful and exhaustive process that *rejected* as factually baseless all of the justifications President Trump now asserts. One would expect, at a minimum, that such a significant policy reversal would have been based on some new evidence casting doubt on the military’s earlier conclusions. But President Trump cited no such evidence, and apparently did not even discuss his plan to ban transgender service members with senior DoD leadership, including Secretary Mattis, who had just instituted an evidence-based assessment of the military’s enlistment policies. Ex. 10 (*John Kelly’s Big Challenge*). This extraordinary procedural irregularity belies the legitimacy of any governmental interest Defendants may assert. *See Int’l Refugee Assistance Project (“IRAP”) v. Trump*, 857 F.3d 554, 596 (4th Cir. 2017) (en banc) (proffered national security interest “is belied by evidence in the record that President Trump issued the First Executive Order without consulting the relevant national security agencies”); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 336 (4th Cir. 2001) (discriminatory purpose shown by “the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures” (internal quotation marks omitted)).

If President Trump had wanted an orderly study of the consequences of the open service policies already in place, he could have allowed the six-month study Secretary Mattis had just announced to run its course. *See* Ex. 8 (*Memorandum for Secretaries*). Indeed, the difference between Secretary Mattis’s action and President Trump’s Ban is stark. Whereas Secretary Mattis announced a six-month study that would “in no way presuppose the outcome of the review,” *id.*, President Trump abruptly went on Twitter to preempt and prejudge his own DoD’s review process. He even claimed to be “doing the military a great favor” by “coming out and just saying it.” Ex. 9.

The haphazard nature of President Trump’s decisionmaking is compounded by the political context in which it occurred. There was no urgency as a matter of *policy* to announce a ban on transgender service on July 26, 2017, given the past and pending studies. The urgency was entirely political: Members of Congress, bearing animus and moral disapproval toward transgender service members, tried to defund transgender medical care, but lacked the votes. *See* Ex. 11 (*Inside Trump’s Snap Decision*).⁸ President Trump made his abrupt announcement on Twitter immediately after direct outreach from these legislators, as this issue threatened to disrupt a spending bill that included funds for the President’s desired border wall with Mexico.

⁸ Even the views expressed publicly by these Members of Congress betrayed their moral disapproval and stereotype-driven views of transgender individuals. Rep. Vicky Hartzler, for example, referred to transgender service members as presenting “disturbing distractions.” *House Armed Services Committee Holds Markup on the Fiscal 2018 Defense Authorization Bill*, Cong. Quarterly (June 28, 2017) (Ex. 24). Rep. Steve King referred to open service as “promoting a transgender agenda.” Fraley, *Iowa Rep. Wants to Strip Military Funding for Transgender Service Members*, KCRG-TV9 (July 12, 2017) (Ex. 25). Rep. Duncan Hunter referred to service by persons who are transgender as “social experimentation” at odds with the military’s “warrior culture.” *Hunter Statement on Transgender Military Service Decision*, Rep. Hunter Newsroom (July 26, 2017) (Ex. 26). Rep. Trent Franks inappropriately suggested that individuals who want to serve “should probably decide whether they’re a man or a woman” first. *See* Ex. 11 (*Inside Trump’s Snap Decision*).

Id. This backdrop reinforces the conclusion that President Trump’s “judgment,” Ex. 18 (Ban) § 1(a), reflected nothing more than a desire to cater to “negative attitudes,” “fear,” and “irrational prejudice.” *Cleburne*, 473 U.S. at 448, 450; *cf. IRAP*, 857 F.3d at 592 (stated national security interest was provided in bad faith, as pretext for religious purpose).

B. The Transgender Service Member Ban Violates the Substantive Due Process Rights of Men and Women Who Are Transgender.

The “substantive component” of due process “includes not only the privileges and rights expressly enumerated by the Bill of Rights, but [also] includes the fundamental rights ‘implicit in the concept of ordered liberty.’” *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1060 (6th Cir. 1998) (quoting *Roe v. Wade*, 410 U.S. 113, 152 (1973)). Government action that “shocks the conscience,” *Rochin v. California*, 342 U.S. 165, 172 (1952), or “arbitrar[ily]” and “outrageous[ly]” infringes a liberty interest, violates substantive due process, *Natale v. Town of Ridgefield*, 170 F.3d 258, 262 (2d Cir. 1999).

The Transgender Service Member Ban embodies such unconstitutional conduct. “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects.” *Lawrence v. Texas*, 539 U.S. 558, 575 (2003). Singling out a group of Americans for special disfavor based solely on a matter intertwined with their “personal identity” offends their “individual dignity.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015). An arbitrary decision plainly inconsistent with all available data to exclude men and women who are transgender from military service serves no legitimate interest, and cannot be reconciled with the liberty and equality protected by the Constitution. “[T]he Fifth Amendment itself withdraws from Government the power to degrade or demean,” as President Trump has done. *Windsor*, 133 S. Ct. at 2695.

President Trump’s abrupt and unconsidered policy change seriously offends another basic element of due process: the right to rely on the Government’s promises. Due process “may constrain the extent to which government can upset settled expectations when changing course and the process by which it must implement such changes.” *Cleburne*, 473 U.S. at 471 n.22. Following the Open Service Directive, Plaintiffs and numerous other service members revealed their transgender status to their commands. The military actively encouraged them to do so in its 2016 Implementation Handbook. *See* Ex. 6 at 20. These decisions to come out as transgender, made in reliance on government assurances, cannot now be undone. President Trump’s Ban breaks faith with service members who took their commanders at their word and heeded the encouragement to come forward. Using that decision as the basis for destroying these service members’ careers offends the basic notions of justice that the Due Process Clause guards. *Cf. Watkins v. U.S. Army*, 875 F.2d 699, 708 (9th Cir. 1989) (finding “affirmative misconduct” by military in admitting and retaining gay service member and then attempting to discharge him on that basis); *Bartko v. SEC*, 845 F.3d 1217, 1227 (D.C. Cir. 2017) (noting that estoppel against the Government is based on egregious misconduct that “rise[s] to a constitutional level”). To hold otherwise would effectively sanction government entrapment. *See Moser v. United States*, 341 U.S. 41, 47 (1951).

C. President Trump’s Ban on Surgical Care Violates 10 U.S.C. § 1074.

President Trump’s decision to ban the provision of surgical care for transgender service members is unlawful for the additional reason that it violates an act of Congress. In order “to create and maintain high morale in the uniformed services,” 10 U.S.C. § 1071, Congress dictated that “a member of a uniformed service . . . is entitled to medical and dental care in any facility of any uniformed service,” *id.* § 1074(a)(1). Section 1074 imposes on the United States a “statutory obligation” to provide medical services. *United States v. Gov’t Emps. Ins. Co.*, 461 F.2d 58, 60

(4th Cir. 1972). Surgical procedures are sometimes medically necessary for the treatment of transgender individuals who have been diagnosed with gender dysphoria. Brown ¶¶ 36–37. When that is the case, the surgery constitutes “medical care,” and service members are entitled to it, just as they and other service members are entitled to and receive necessary medical care for the treatment of other conditions (*e.g.*, gall bladder surgery, laminectomy, and myriad other operations the military performs).

“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952). The President cannot override a duly enacted statute by denying necessary medical care to a group of service members he happens to disfavor. *See generally Ancient Coin Collectors Guild v. U.S. Customs & Border Prot., Dep’t of Homeland Sec.*, 698 F.3d 171, 179 (4th Cir. 2012); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996).⁹

II. Plaintiffs and Other Transgender Service Members and Transgender Persons Who Wish to Serve Will Be Irreparably Harmed Absent Grant of the Requested Relief.

President Trump’s unconstitutional Ban is currently causing irreparable harm, and will cause even greater harm when its mandates take full effect on January 1 and March 23, 2018. *Cf. Nevada v. U.S. Dep’t of Labor*, 218 F. Supp. 3d 520, 525, 532 (E.D. Tex. 2016) (issuing preliminary injunction during six-month delay between publication of final rule and its effective date). Without a preliminary injunction to preserve the status quo, Plaintiffs’ health and careers — and the health and careers of thousands of other transgender service members and qualified individuals who wish to serve — will be irreparably harmed.

⁹ Like any federal agency, DoD may not take actions that are “not in accordance with law” under the Administrative Procedure Act. 5 U.S.C. § 706(2).

a. Prior to the Ban, the military provided necessary medical care, including in some cases appropriate surgery, to service members diagnosed with gender dysphoria. Under President Trump’s directive, no later than March 23, 2018, the military may not generally fund surgical care for transgender service members. *See* Ex. 18 (Ban) § 2(b) (Secretary of Defense “shall . . . halt” use of DoD resources for such surgeries); *id.* § 3 (specifying effective date of § 2(b)). In fact, this prohibition appears already to be in place: planned surgeries for Plaintiffs Cole and Doe have been cancelled. Cole ¶ 11; Doe ¶ 12.

The denial of “medical services” is “exactly the sort of irreparable harm that preliminary injunctions are designed to address.” *Fishman v. Paolucci*, 628 F. App’x 797, 801 (2d Cir. 2015). Research supports the intuitive conclusion that denial of necessary medical care for individuals diagnosed with gender dysphoria leads to “adverse health outcomes.” Brown, Ex. C (RAND Report) at 9–10. Plaintiffs Stone, Cole, Doe, and Gilbert, as well as other similarly situated transgender service members, are irreparably harmed by this denial of medical care. *See supra* Facts § D.

b. Prior to the Ban, DoD had established policies for the accession of new enlistees and candidates for commissions, and these new accessions were to begin on January 1, 2018. Ex. 1 (Open Serv. Dir.); Ex. 8 (*Memorandum for Secretaries*). President Trump’s memorandum changes the status quo by directing that the Secretary of Defense “shall . . . maintain” the ban on “accession of transgender individuals . . . beyond January 1, 2018.” Ex. 18 (Ban) § 2(a); *see also id.* § 3 (specifying effective date of § 2(a)).

Plaintiffs George and Gilbert, like numerous others who want to serve their country and are qualified to join a service, are irreparably harmed by the accession ban. Airman First Class George intends to pursue a commission as an officer in the U.S. Army Nurse Corps, George ¶ 5,

and Petty Officer Gilbert is pursuing a degree with the goal of applying to Officer Candidate School, Gilbert ¶ 7. DoD treats commissioning as a new accession under the applicable regulations and guidance. *See, e.g.*, Ex. 6 (*Handbook*) at 40–41; Brissett, *Transgender Academy Cadets Can Graduate, but Not Commission*, Air Force Magazine (May 19, 2017) (Ex. 27). Denying Plaintiffs this opportunity to further their careers and serve their country in these new capacities is irreparable injury. *See Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017) (“[L]oss of opportunity to pursue one’s chosen profession constitutes irreparable harm.”).

c. Prior to the Ban, DoD policy was that “no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity.” Ex. 1 (Open Serv. Dir.); *see also* Ex. 8 (*Memorandum for Secretaries*). President Trump’s memorandum rescinds this policy effective March 23, 2018. Ex. 18 (Ban) § 1(a) (describing previous policy against open service); *id.* § 1(b) (directing return to previous policy); *id.* § 3 (specifying effective date of § 1(b)). At a minimum, the military will be “authorized [to] discharge” them based on their transgender status. *Id.* § 1(a). And while DoD has been directed to submit an implementation plan concerning “how to address transgender individuals currently serving,” *id.* § 3, President Trump has already dictated the endpoint of that plan: “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.” Ex. 19.

“The unconstitutional discharge of even one servicemember perpetuates a harm to that person that is irreparable.” *Log Cabin Republicans v. United States*, 2012 WL 12952732, at *10 (C.D. Cal. Mar. 15, 2012). A service member facing involuntary discharge suffers at least loss of “medical benefits,” as well as “the stigma of being removed from active duty . . . and labeled

as unfit for service.” *Elzie v. Aspin*, 841 F. Supp. 439, 443 (D.D.C. 1993). He or she may also face the loss of retirement pay. *Id.* Here, Plaintiffs’ careers would be irreparably destroyed if they are barred from continuing their service. They also face the loss of important benefits, including eligibility for promotion and health care for themselves and their dependents. *See, e.g.*, Doe ¶ 11; Gilbert ¶ 12; Stone ¶¶ 12–13.

Even if Plaintiffs are not immediately discharged on March 23, the basis of their service will fundamentally change: rather than serve under a guarantee that their transgender status will not be used against them, they will serve (if at all) under the constant threat of discharge because of that status. Plaintiffs are already experiencing significant uncertainty and stress due to the changed nature of their relationship with the military. Cole ¶ 13; Doe ¶ 12; George ¶ 15; Gilbert ¶ 13; Parker ¶ 13; Stone ¶ 14. Regardless of how Secretary Mattis fills in the details, Plaintiffs face irreparable injury both now and after March 23, 2018.

In addition to all of these harms, the violation of Plaintiffs’ constitutional rights “unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *IRAP*, 857 F.3d at 602. President Trump has singled out transgender men and women who are fit to serve for “disparate treatment,” an act of discrimination that “itself stigmatizes members of a disfavored group as innately inferior.” *Evancho*, 237 F. Supp. 3d at 294. Plaintiffs’ experiences of stigma, rejection, and betrayal are ongoing irreparable harms that flow directly from this unconstitutional Ban. *See* Cole ¶ 14; Doe ¶¶ 12–13; George ¶ 16; Gilbert ¶ 14; Parker ¶ 15; Stone ¶¶ 14–15.

III. The Balance of Equities and the Public Interest Favor an Injunction.

The balance of equities in this case points firmly in Plaintiffs’ favor. Plaintiffs and other transgender service members have suffered and continue to face significant harm from the Transgender Service Member Ban, as do transgender individuals who otherwise meet the

qualifications to enlist or be commissioned. In light of the serious constitutional defects of the Ban, these harms necessarily take precedence in any balancing. “[T]he Government is in no way harmed by issuance of a preliminary injunction which prevents it from enforcing restrictions likely to be found unconstitutional.” *IRAP*, 857 F.3d at 603 (internal quotation marks and alterations omitted).

In any event, Defendants would not be able to point to any harm they would experience if an injunction issued. Plaintiffs simply ask the Court to restore the status quo. The military applies standards to evaluate the medical fitness of all service members, including those who are transgender. An injunction would protect only those who are fit to serve by DoD’s own estimation. Harm to military readiness and effectiveness would result only if the Ban were *not* enjoined. As 56 retired generals and admirals have warned, the Ban, if implemented, would “cause significant disruptions, deprive the military of mission-critical talent, and compromise the integrity of transgender troops who would be forced to live a lie.” Ex. 14.

As for the enlistment of new service members, a preliminary injunction would restore the status quo under which the Open Service Directive was scheduled to take effect on January 1. If Secretary Mattis should further delay accessions or change DoD’s standards following an independent review, that hypothetical agency action could then be evaluated on its own terms under the Administrative Procedure Act and the Constitution. *Cf. IRAP*, 857 F.3d at 599 n.21 (“Whether a statement continues to taint a government action is a fact-specific inquiry for the court evaluating the statement.”).

CONCLUSION

All four factors decisively favor a preliminary injunction. The Transgender Service Member Ban is unconstitutional and invalid on its face, and the Court should enter a preliminary injunction prohibiting Defendants from implementing or enforcing it. *See N.C. State Conf. of*

NAACP v. McCrory, 831 F.3d 204, 238 (4th Cir. 2016) (“When discriminatory intent impermissibly motivates the passage of a law, a court may remedy the injury — the impact of the legislation — by invalidating the law.”); *IRAP*, 857 F.3d at 605 (affirming nationwide injunction; “continued enforcement against similarly situated individuals would only serve to reinforce the ‘message’ that Plaintiffs ‘are outsiders, not full members of the political community’”).

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David M. Zions*
Carolyn F. Corwin*
Mark H. Lynch (Bar No. 12560)†
Jaclyn E. Martinez Resly*
Jeff Bozman*
Marianne F. Kies (Bar No. 18606)
Christopher J. Hanson*
Tom Plotkin*‡
COVINGTON & BURLING LLP
One CityCenter
850 Tenth St. NW
Washington, DC 20001
Telephone: (202) 662-6000
Fax: (202) 778-5987
dzions@cov.com
ccorwin@cov.com
mlynch@cov.com
jmartinezresly@cov.com
jbozman@cov.com
mkies@cov.com
chanson@cov.com
tplotkin@cov.com

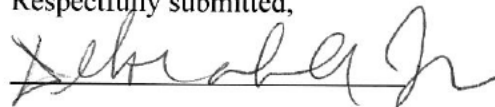
Mitchell A. Kamin*
Nicholas A. Lampros*
COVINGTON & BURLING LLP
1999 Avenue of the Stars, Suite 3500
Los Angeles, California 90067
Telephone: (424) 332-4800
Facsimile: (424) 332-4749
mkamin@cov.com
nlampros@cov.com

* Admitted *pro hac vice*

† Inactive; reactivation application forthcoming

‡ Admitted to the Bars of Pennsylvania and New Jersey, admission to the Bar of the District of Columbia pending; and supervised by the principals of the firm.

Respectfully submitted,



Deborah A. Jeon (Bar No. 06905)
David Rocah (Bar No. 27315)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
OF MARYLAND
3600 Clipper Mill Road, #350
Baltimore, MD 21211
Telephone: (410) 889-8555
Fax: (410) 366-7838
jeon@aclu-md.org
rocah@aclu-md.org

Joshua A. Block*
Chase B. Strangio*
James Esseks*
Leslie Cooper*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: 212-549-2627
Fax: 212-549-2650
jblock@aclu.org
cstrangio@aclu.org
jesseks@aclu.org
lcooper@aclu.org

Attorneys for Plaintiffs