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15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA
17

18
19 AIDEN STOCKMAN, *et al.*,
20 Plaintiffs,
21 v.
22 DONALD J. TRUMP, *et al.*,
23 Defendants.
24

Case No. 5:17-cv-01799-JGB-KK

**BRIEF OF AMICI CURIAE
IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

Hearing
Date: November 20, 2017
Time: 9:00 a.m.
Courtroom: 1
Judge: Hon. Jesus G. Bernal

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INTRODUCTION & INTEREST OF AMICI

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

15 The ban is unconstitutional. The government cannot single out a politically
16 unpopular class of people just because of that group’s defining characteristic. The
17 Fifth Amendment’s guarantees of equal protection and due process of law forbid it.
18 The abrupt ban on military service by transgender people is repugnant to these
19 fundamental constitutional principles. The United States District Court for the
20

21 ¹ See ECF No. 15 (“Pl. Br.”) at 3 (“RAND conducted an exhaustive review of
22 existing research, analyzed DOD data and policies related to readiness, as well
23 those of foreign militaries, and also examined medical information and cost
24 structures – including all available actuarial data to conclude how many transgender
25 service members are likely to seek gender transition-related medical treatment.
26 RAND subsequently issued a report reflecting the conclusions reached following its
27 exhaustive study (the ‘RAND Report’). The RAND Report stated that there would
28 be no negative impact on military readiness or deployability from allowing
transgender service members to serve openly, and that related medical costs would
comprise an “exceedingly small” share of DOD health expenditures.”) (citing ECF
No. 26, Pl. Ex. B (“RAND Report”)).

1 District of Columbia already determined that the ban is likely to be struck down as
2 unconstitutional and, accordingly, issued a preliminary injunction on the
3 President’s directives that the military prohibit transgender individuals from
4 entering the military, and that the military discharge active transgender service
5 members. *Doe 1 v. Trump*, — F. Supp. 3d —, 2017 WL 4873042, at *2 (D.D.C.
6 Oct. 30, 2017). This Court should do the same.

7 *Amici curiae* are groups that advocate for the basic human rights and equal
8 dignity of transgender Americans. The ban is a direct affront to *amici*’s core
9 mission. Accordingly, *amici* submit this brief in support of Plaintiffs’ Motion for
10 Preliminary Injunction (ECF No. 15) to enjoin enforcement of the ban.

- 11 • **Transgender American Veterans Association (TAVA)** is a non-profit
12 organization, founded in 2003, that acts proactively with other concerned
13 LGBT organizations to ensure that transgender veterans will receive
14 appropriate care for their medical conditions in accordance with the Veterans
15 Health Administration’s Customer Service Standards. TAVA helps in
16 educating the Department of Veterans Affairs and the Department of Defense
17 on issues regarding fair and equal treatment of transgender and transsexual
18 individuals, and helps the general transgender community when deemed
19 appropriate.
- 20 • **National Center for Transgender Equality (NCTE)** is a national social
21 justice organization founded in 2003 and devoted to advancing justice,
22 opportunity, and well-being for transgender people through education and
23 advocacy on national issues. NCTE has worked with local, state, and federal
24 government agencies and other organizations around the country for over a
25 decade to develop fair and effective policies.
- 26 • **Southern Arizona Gender Alliance (SAGA)** is a grass-roots organization
27 of trans activists based in Tucson, Arizona. For two decades, SAGA has
28 helped create a welcoming and supportive community for transgender and

1 other gender nonconforming people in Southern Arizona through advocacy,
2 community education, resource referral and peer support. Because Southern
3 Arizona includes two major military bases (Fort Huachuca Army Base and
4 Davis-Monthan Air Force Base), SAGA serves many active duty and reserve
5 service members who are directly affected by the ban on transgender military
6 service, as well as transgender veterans who fear their medical care and other
7 Veteran's Administration benefits are at risk given the anti-transgender
8 assumptions on which this policy is based.

- 9 • **Tennessee Transgender Political Coalition** educates and advocates on
10 transgender-related legislation at the federal, state and local levels. The
11 Coalition is dedicated to raising public awareness and building alliances with
12 other organizations concerned with equal rights legislation.
- 13 • **TGI Network of Rhode Island** advocates for the transgender community of
14 Rhode Island. The Trump Administration has targeted service members and,
15 in doing so, has called into question the ability of all transgender Americans
16 to contribute meaningfully to society. TGI Network of Rhode Island stands
17 against the ban.
- 18 • **Transgender Allies Group (TAG)** has been providing education about and
19 advocacy for transgender citizens in Nevada since 2012. One of its efforts led
20 to the drafting and implementation in 2015 of Washoe County School
21 District's Transgender and Gender Non-Conforming inclusionary policy, the
22 first of its kind in Nevada and a model example that the U.S. Department of
23 Education shared with the country in 2016. TAG has seen students thrive
24 with acceptance and inclusion, looking forward to work and school
25 opportunities after graduation. Banning participation in military service takes
26 away an important opportunity for transgender students, instigating stigma
27 and shame from being excluded from the chance to serve their country. This
28 ban must be overturned.

- 1 • **Transgender Legal Defense & Education Fund (TLDEF)** is a non-profit
2 law firm that represents and advocates for the transgender community.
3 TLDEF is committed to ending discrimination against transgender people,
4 and to achieving equality for transgender people through impact litigation
5 and education. TLDEF’s clients include transgender people of all ages, who
6 come from diverse racial, ethnic, socio-economic, and faith backgrounds
7 (including backgrounds of military service).
- 8 • **Transgender Resource Center of New Mexico (TGRCNM)** provides
9 transgender cultural competency education all over New Mexico, individual
10 and policy-level advocacy, and direct services for transgender individuals.
11 Many of the people TGRCNM works for are current or former service people
12 who have been willing to sacrifice everything to serve the United States.
13 TGRCNM stands behind these members of the transgender community.
- 14 • **TransOhio** advocates for and supports transgender people throughout the
15 State of Ohio. This includes transgender veterans, active military personnel,
16 and individuals who wish to serve in the military.
- 17 • **Trans Youth Equality Foundation (TYEF)** provides education, advocacy
18 and support for transgender and gender non-conforming children and youth
19 and their families. TYEF’s mission is to share information about the unique
20 needs of this community, partnering with families, educators, and service
21 providers to help foster a healthy, caring, and safe environment for all
22 transgender children.

ARGUMENT

23
24 The Trump Administration’s categorical ban on military service by
25 transgender persons violates the constitutional guarantees of equal protection and
26 due process. As *amici* explain below, Plaintiffs are likely to succeed on the merits
27 of their constitutional claims because the ban was intended to, and does, single out
28

1 a historically disfavored group for harm based on animus toward that group. The
2 discriminatory motivation for the ban is shown by the ban itself, which excludes an
3 entire group of people from serving their country simply because of who they are.
4 The circumstances surrounding the announcement of the ban further confirm the
5 animus behind it, including secret lobbying by anti-LGBT hate groups,
6 congressional demands that the President act against transgender service members
7 as *quid pro quo* for support of the President’s promised border wall, the profoundly
8 unusual Twitter announcement, and the unfounded and pretextual justifications
9 offered for the ban. And, tellingly, the ban is part of an ongoing pattern of hostility
10 toward transgender Americans by the Administration. Whether motivated by pure
11 enmity, a desire for political gain at the expense of a disfavored minority, or some
12 combination of the two, the ban is the result of animus.

13 This effort to denigrate and harm transgender people is a violation of the
14 equal protection principles embodied in the Due Process Clause of the Fifth
15 Amendment, whether subjected to rational basis review or a heightened level of
16 scrutiny. *See Doe 1*, 2017 WL 4873042, at *28 (applying “an intermediate level of
17 scrutiny to Defendants’ exclusion of transgender individuals from the military, akin
18 to the level of scrutiny applicable in gender discrimination cases”). Moreover, the
19 ban violates the fundamental right of personal autonomy secured by the Due
20 Process Clause—a right that includes the liberty of all persons to live in accord with
21 their gender identity.

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

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

27 “The Constitution’s guarantee of equality must at the very least mean that a
28 bare ... desire to harm a politically unpopular group cannot justify disparate

1 treatment of that group.” *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013)
2 (citation omitted). Put simply, the government cannot treat one group of citizens
3 differently than the rest without good reason. See U.S. CONST. amend. V; *Bolling v.*
4 *Sharpe*, 347 U.S. 497, 499 (1954). Discriminatory animus against the disfavored
5 group is never a good reason. For “no legitimate purpose” can overcome a “purpose
6 and effect to disparage and injure” the express targets of governmental action.
7 *Windsor*, 133 S. Ct. 2696; accord *Dep’t of Agriculture v. Moreno*, 413 U.S. 528,
8 534–35 (1973). The transgender military ban fails that basic test.

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

12 **1. Clear evidence of animus is available on Twitter.**

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



28 In just over 400 characters, the President declared a categorical ban on all

1 transgender people from any form of military service to be the policy of the United
2 States government. In several ways, the animus behind the ban is plain from those
3 tweets.

4 *First*, the ban declares all transgender people unfit for military service “in
5 any capacity” simply because they are transgender. The ban thereby teaches that
6 transgender people are unworthy of the honor and sacrifice of serving their country.
7 The “practical effect of the law here in question [is] to impose a disadvantage, a
8 separate status, and so a stigma upon all” transgender people. *Windsor*, 133 S. Ct. at
9 2693. By imposing such a “broad and undifferentiated disability on a single named
10 group,” *Romer v. Evans*, 517 U.S. 620, 632 (1996), the ban uniquely demeans
11 transgender people. No other group of Americans is categorically disqualified from
12 military service based on a trait, like gender identity, that has nothing to do with
13 individuals’ fitness to serve and everything to do with who they are. *See Doe 1*,
14 2017 WL 4873042, at *29 (“[T]he Court reiterates precisely what is at issue in this
15 case: a policy banning the accession, and allowing the discharge, of an entire
16 category of individuals from the military solely because they are transgender,
17 despite their ability to meet all of the physical, psychological, and other standards
18 from military service.”). “Legislation imposing special disabilities upon groups
19 disfavored by virtue of circumstances beyond their control suggests the kind of
20 ‘class or caste’ treatment that the” Constitution’s guarantee of equal protection
21 prohibits. *Plyler v. Doe*, 457 U.S. 202, 218 n.14 (1982); *see also Windsor*, 133 S.
22 Ct. at 2693 (“‘[D]iscriminations of an unusual character’ especially require careful
23 consideration.”) (quoting *Romer*, 517 U.S. at 633).

24 *Second*, the ban is highly unusual because it deprives transgender members
25 of the military of their already-established right to serve openly.² The targeted
26

27 ² In opposing Plaintiffs’ request for a preliminary injunction, Defendants
28 argued that Plaintiffs have not been harmed by the July 26, 2017 announcement, the

(footnote continued)

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

12 That the right of transgender Americans to serve openly was established in
13 2016 is irrelevant. “The targeted revocation of rights from a particular class of
14 people which they had previously enjoyed—for however short a period of time—is
15 a fundamentally different act than not giving those rights in the first place.” *Doe I*,
16 2017 WL 4873042, at *31.

17 California’s struggle with marriage equality is instructive. In July 2008, the

18 _____
19 August 25, 2017 Presidential Memorandum formalizing the ban, or the subsequent
20 Interim Guidance issued by Defense Secretary James Mattis because, essentially,
21 nothing has changed. ECF No. 36 at 13–18. This is incorrect for numerous reasons,
22 *see* Pl. Br. 30–34, including because it is contrary to what the August 25
23 Memorandum actually says. The August 25 Memorandum acknowledges that, as of
24 June 2016, transgender people were “permitt[ed] ... to serve openly in the
25 military,” and that the Department of Defense was authorized to use its “resources
26 to fund sex-reassignment surgical procedures.” The August 25 Memorandum
27 § 1(a). While the August 25 Memorandum nominally delayed until March 2018
28 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 August 25
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.

1 California Supreme Court declared laws barring same-sex marriage repugnant to
2 the California Constitution. Marriage equality was the law in California for just a
3 few months. In November 2008, California voters passed Proposition 8, which
4 amended the California State Constitution to prohibit same-sex marriage. The Ninth
5 Circuit later declared Proposition 8 an unconstitutional violation of the Equal
6 Protection Clause. *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012), *vacated on*
7 *other grounds sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). And in
8 doing so, the court stated:

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

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

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

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

3 Animus is manifest not only in the nature of the ban itself, but also in the
4 events and omissions that led to its announcement. In his July 26 tweets, the
5 President stated that he had consulted with the military (“my Generals”) and
6 military experts. It has been widely reported that the President did not, in fact,
7 consult with military leaders prior to announcing the ban; indeed, military officials
8 were “blindsided” by the announcement³ as no one at the Pentagon “had any idea
9 that the president was unilaterally ending an Obama-era policy.”⁴ The profoundly
10 irregular process of announcing a major policy change via Twitter, without any
11 prior public discussion or significant agency input, especially when accompanied
12 by false statements, is strong evidence that the ban was not motivated by any
13 claimed legitimate interest. *See Doe I*, 2017 WL 4873042, at *30 (the fact that “the

14 _____
15 ³ *See* Julie Hirschfeld Davis & Helene Cooper, *Trump Says Transgender*
16 *People Will Not Be Allowed in the Military*, N.Y. TIMES (July 26, 2017),
17 <http://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html>
18 (“President Trump abruptly announced a ban on transgender people serving in the
19 military on Wednesday, blindsiding his defense secretary.”); *see also* Barbara Starr,
20 *et al.*, *US Joint Chiefs blindsided by Trump’s transgender ban*, CNN (July 26,
21 2017), [http://www.cnn.com/2017/07/27/politics/trump-military-transgender-ban-joi-](http://www.cnn.com/2017/07/27/politics/trump-military-transgender-ban-joint-chiefs/)
22 [nt-chiefs/](http://www.cnn.com/2017/07/27/politics/trump-military-transgender-ban-joint-chiefs/) (“The Joint Chiefs of Staff, including chairman General Joseph Dunford,
23 were not aware President Donald Trump planned to tweet a ban on transgender
24 service members, three US defense officials told CNN—the latest indication that
25 top military leaders across all four service branches were blindsided by the
26 President’s announcement.”).

27 ⁴ James McIntyre & Travis J. Tritten, *Trump’s tweets on military transgender*
28 *ban send Pentagon aides scrambling*, WASH. EXAMINER (July 26, 2017),
[http://www.washingtonexaminer.com/trumps-tweets-on-military-transgender-ban-s-](http://www.washingtonexaminer.com/trumps-tweets-on-military-transgender-ban-s-end-pentagon-aides-scrambling/article/2629740)
end-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.”)

1 President abruptly announced, via Twitter—without any of the formality or
2 deliberative processes that generally accompany the development and
3 announcement of major policy changes that will gravely affect the lives of many
4 Americans—that all transgender individuals would be precluded from participating
5 in the military” is indicative of discriminatory animus). It was, rather, a knee-jerk
6 decision to harm a vulnerable and unpopular minority.⁵

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

9 ⁵ Davis & Cooper, *supra* note 3 (“Mr. Trump and Republican lawmakers had
10 come under pressure from Tony Perkins, the president of the Family Resource
11 Council.”); *see also* Steve Peoples, *Trump Transgender Ban Nod to Christian*
12 *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-conserv](http://www.usnews.com/news/politics/articles/2017-07-27/trump-transgender-ban-nod-to-christian-conservatives)
13 *atives* (“[F]or Christian conservatives across middle America who make up much of
14 Trump’s base, Wednesday’s announcement served as a powerful reminder that he
15 remains committed to their values.”); *see also* Davis & Cooper, *supra* note 3
16 (“[T]he announcement pleased elements of Mr. Trump’s base who have been
17 dismayed to see the president break so bitterly in recent days with Attorney General
18 Jeff Sessions, a hard-line conservative.”); Rebecca Kheel & Rebecca Savransky,
19 *Trump to ban transgender people from all military service*, THE HILL (July 26,
20 2017) (“Trump’s decision is a gesture to the conservative base at a time when he’s
21 facing declining poll numbers and increasing pressure over the Russia
22 investigation.”), [http://thehill.com/homenews/administration/343847-trump-calls-fo](http://thehill.com/homenews/administration/343847-trump-calls-for-ban-on-transgender-individuals-in-military)
23 *r-ban-on-transgender-individuals-in-military*; Asawin Suebsaeng, *et al.*, *Trump*
24 *Bows to Religious Right, Bans Trans Troops*, THE DAILY BEAST (July 27, 2017),
25 <http://www.thedailybeast.com/trump-bows-to-religious-right-bans-trans-troops>
26 (“On the anniversary of Harry S. Truman’s desegregation of the military, President
27 Donald Trump on Wednesday abruptly reversed the move to openly integrate trans
28 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

(footnote continued)

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

7 Liberty Counsel is classified as an anti-LGBT hate group.⁹ And for good
8 reason. For example, Liberty Counsel supports so-called “conversion therapy” for
9 LGBT people, and has opposed laws banning such practices even though they have
10 been condemned by every major medical and mental health organization in the
11 country.¹⁰ When anti-LGBT activist Scott Lively was accused of crimes against
12

13 ‘degradation of our human dignity’ and falsely linked it to pedophilia,” and that in
14 June 2017 “Vice President Mike Pence pledged his unwavering support for Focus
15 on the Family, another anti-LGBT group, whose founder, James Dobson, has
16 blamed the 2012 Sandy Hook shooting on the growing acceptance of LGBT rights
in America”).

17 ⁷ *Trump Says No “Transgenderers” in the Military*, LIBERTY COUNSEL (July 26,
18 2017), [http://www.lc.org/newsroom/details/072617-trump-says-no-transgenderers-in-](http://www.lc.org/newsroom/details/072617-trump-says-no-transgenderers-in-the-military/)
the-military/.

19 ⁸ *Id.*

20 ⁹ *Active Anti-LGBT Groups*, SOUTHERN POVERTY LAW CENTER (2016),
21 <http://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-lgbt> (“Anti-
22 LGBT groups on the SPLC hate list often link homosexuality to pedophilia, claim
23 that same-sex marriage and LGBT people in general are dangers to children, that
24 homosexuality itself is dangerous, support the criminalization of homosexuality and
25 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.”).

26 ¹⁰ Molly Redden, *The Legal Battle for Gay Conversion Therapy Is A Losing*
27 *One*, THE NEW REPUBLIC (Aug. 20, 2013) (describing Liberty Counsel founder Mat
28 Staver’s opposition to a New Jersey bill banning conversion therapy and quoting
Mr. Staver as ascribing same-sex attraction to child sexual abuse),

(footnote continued)

1 humanity for authoring a law in Uganda referred to as the “kill the gays” bill,
2 Liberty Counsel claimed the suit was an effort “to criminalize Christianity.”¹¹
3 Liberty Counsel even compared the Supreme Court’s case law on same-sex
4 marriage with the Dred Scott decision.¹² As to military service in particular, the
5 group ardently opposed the prior open service policy because, in its view, “gender
6 confusion is never stable.”¹³ The hate group opposes all forms of civil rights
7 protections for “homosexuality (‘sexual orientation’) and cross-dressing (‘gender
8 identity’ or ‘gender expression’).”¹⁴ One of its primary goals is to prohibit
9 transgender individuals from working as teachers in public schools.¹⁵

10 _____
11 <http://newrepublic.com/article/114385/gay-conversion-therapy-faces-legal-battles-california-new-jersey>.

12 ¹¹ Mat Staver, *Fighting on behalf of religious liberty*, LIBERTY COUNSEL (Oct.
13 31, 2016), <http://libertycounsel.com/fighting-on-behalf-of-religious-liberty-liberty-counsel/>.

14 ¹² Mat Staver, *America was formed using this action*, LIBERTY COUNSEL (Apr.
15 21, 2015), <http://libertycounsel.com/america-was-formed-using-this-action-liberty-counsel/>.

16 ¹³ *Service Members Grasp for “Transgender” Straws*, LIBERTY COUNSEL (Aug.
17 9, 2017), <http://www.lc.org/newsroom/details/080917-service-members-grasp-for-transgender-straws>.

18 ¹⁴ Letter from Liberty Counsel to City Manager, City of Palm Bay, Florida, re:
19 “Analysis of harms engendered by proposed ‘Human Rights Ordinance,’” at 1,
20 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>.

21 ¹⁵ See, e.g., Mat Staver, *Liberty Counsel Fights Transgender Teaching in*
22 *Public School*, LIBERTY COUNSEL (Nov. 30, 2015), <http://libertycounsel.com/liberty-counsel-fights-transgender-teaching-in-public-school/> (“[Y]et another school
23 system attempted to place our kids in the LGBT indoctrination movement.”); Joni
24 B. Hannigan, *School District Waits on Supreme Court after Walmart Attorney*
25 *Pushes Transgender Rights*, CHRISTIAN EXAMINER (May 18, 2015),
26 <http://www.christianexaminer.com/article/walmart-attorney-twists-arms-of-school-board-about-transgender-rights/48955.htm> (Liberty Counsel criticized transgender
27 kindergarten teacher for teaching “while engaging in distracting ‘gender identity or
28 expression’ by cross-dressing in class”); see also *Liberty Counsel Presents Fairfax*

(footnote continued)

1 Speaking to “Breitbart Daily News” after announcement of the ban, Tony
2 Perkins, the head of the Family Research Council, described similarly “working
3 with the White House” on the issue, and stated that he knew, in advance, that the
4 President would be taking action.¹⁶ According to *The New York Times*, Perkins
5 “pressed Mr. Trump for months to make the statement he issued [on July 26] saying
6 transgender people would be barred from the military.”¹⁷

7 Like Liberty Counsel, the Family Research Council is classified as an anti-
8 LGBT hate group.¹⁸ Among other things, the Family Research Council “often
9 makes false claims about the LGBT community based on discredited research and
10
11

12 *Transgender Case to VA Supreme Court*, BCNN1 (July 30, 2016),
13 [http://blackchristiannews.com/2016/07/liberty-counsel-presents-fairfax-transgender](http://blackchristiannews.com/2016/07/liberty-counsel-presents-fairfax-transgender-case-to-va-supreme-court/)
14 [-case-to-va-supreme-court/](http://blackchristiannews.com/2016/07/liberty-counsel-presents-fairfax-transgender-case-to-va-supreme-court/) (Mat Staver, the Founder and Chairman of Liberty
15 Counsel, argued that “[a]llowing boys to use private facilities for girls violates the
16 right to privacy and places girls at risk of sexual abuse”).

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

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

21 ¹⁸ *Active Anti-LGBT Groups*, *supra* note 9; *see also Extremist Info: Tony*
22 *Perkins*, SOUTHERN POVERTY LAW CENTER (2017), [http://www.splcenter.org/fighti](http://www.splcenter.org/fighting-hate/extremist-files/individual/tony-perkins)
23 [ng-hate/extremist-files/individual/tony-perkins](http://www.splcenter.org/fighting-hate/extremist-files/individual/tony-perkins) (“Tony Perkins heads the Family
24 Research Council, an anti-LGBT hate group located in Washington, D.C. Perkins
25 has a sordid political history, having once purchased Klansman David Duke’s
26 mailing list for use in a Louisiana political campaign he was managing. In 2001,
27 Perkins gave a speech to a Louisiana chapter of the Council of Conservative
28 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.’”).

1 junk science.”¹⁹ Family Research Council has advocated for “criminal sanctions
2 against homosexual behavior.”²⁰ The hate group claims the “transgender
3 movement” is the third wave in an “assault on the sexes”—the first being “the
4 modern feminism movement,” and the second, “the homosexual movement.”²¹ In
5 this group’s view, transgender rights are an affront to “basic reality” and “[t]here is
6 no rational or compassionate reason to affirm a distorted psychological self-concept
7 that one’s ‘gender identity’ is different from one’s biological sex.”²²

8 Immediately prior to announcing the ban, President Trump also faced critical
9 pressure from members of Congress to make a political deal that would harm
10 transgender troops. In late July, several conservative House Republicans were
11 threatening to vote against legislation that would have funded several
12 Administration priorities, including funding construction of a border wall between
13 the United States and Mexico, unless the legislation also included a ban on the use
14 of Department of Defense resources for gender transition surgeries. Having failed
15 to obtain support for such a provision from either congressional leadership or
16 Defense Secretary James Mattis, these House members approached the President
17 directly. The President did them one better and announced the across-the-board ban

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

25 ²⁰ *Id.*

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

²² *Id.*

1 on military service by transgender men and women.²³ The next day, the House
2 “approved ... a bundle of spending bills, including \$1.57 billion that President
3 Trump requested to build a wall along the Mexican border.”²⁴

4 **3. The reasons offered for the ban are pretextual.**

5 The stated rationales for the ban are pretextual, which is further evidence that
6 its true purpose is to harm transgender men and women. In his Twitter
7 announcement, the President specifically claimed the ban was related to military
8 effectiveness and medical costs: “Our military must be focused on decisive and
9 overwhelming victory and cannot be burdened with the tremendous medical costs
10 and disruption that transgender in [sic] the military would entail.” The August 25,
11 2017 Presidential Memorandum on “Military Service by Transgender Individuals”
12 followed the lead of the President’s tweets, stating: “In my judgment, the previous
13 Administration failed to identify a sufficient basis to conclude” that military service
14 by transgender people “would not hinder military effectiveness and lethality,

15 ²³ Rachael Bade & Josh Dawsey, *Inside Trump’s snap decision to ban*
16 *transgender troops: A congressional fight over sex reassignment surgery*
17 *threatened funding for his border wall*, POLITICO (July 26, 2017),
18 [http://www.politico.com/story/2017/07/26/trump-transgender-military-ban-behind-](http://www.politico.com/story/2017/07/26/trump-transgender-military-ban-behind-the-scenes-240990)
19 [the-scenes-240990](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*
20 *Miles of Border Wall Funding: Report*, NEWSWEEK (July 26, 2017),
21 <http://www.newsweek.com/trump-transgender-ban-wall-642456>; Jacob Pramuk,
22 *Trump banned transgender troops after border wall funding was threatened, report*
23 *says*, CNBC (July 26, 2017), [http://www.cnbc.com/2017/07/26/trump-banned-](http://www.cnbc.com/2017/07/26/trump-banned-transgender-troops-after-border-wall-was-threatened-report.html)
24 [transgender-troops-after-border-wall-was-threatened-report.html](http://www.cnbc.com/2017/07/26/trump-banned-transgender-troops-after-border-wall-was-threatened-report.html).

25 ²⁴ Emmarie Huetteman, *House Approves Spending Package, Border Wall &*
26 *All*, N.Y. TIMES (July 27, 2017), [http://www.nytimes.com/2017/07/27/us/politics/house-](http://www.nytimes.com/2017/07/27/us/politics/house-spending-bill-border-wall.html)
27 [spending-bill-border-wall.html](http://www.nytimes.com/2017/07/27/us/politics/house-spending-bill-border-wall.html) (“In recent weeks, a skirmish over whether the
28 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.’”).

1 disrupt unit cohesion, or tax military resources.” The August 25 Memorandum
2 § 1(a).

3 “[A]ll of the reasons proffered by the President for excluding transgender
4 individuals from the military in this case were not merely unsupported, but were
5 actually *contradicted* by the studies, conclusions and judgment of the military
6 itself.” *Doe 1*, 2017 WL 4873042, at *30 (emphasis in original). As Plaintiffs have
7 explained in detail (Pl. Br. 2–6), thorough study by the military has shown that
8 none of these concerns is borne out by the facts. After extensive research and
9 analyses, the Department of Defense determined that open service by transgender
10 individuals in the military would have no negative impact on readiness
11 (effectiveness and lethality) or unit cohesion.²⁵ In fact, the opposite is true;
12 continuing the ban would disrupt unit cohesion and readiness.²⁶ And the medical
13 costs associated with open service are not “tremendous”; they are *de minimis*²⁷
14 “budget dust”²⁸ that is less significant than a rounding error.²⁹ In sharp contrast, a
15 recent report by military experts estimates that implementing the ban would cost
16 \$960 million—more than 100 times the cost of providing necessary healthcare
17 services to transgender troops.³⁰

18 The use of unfounded rationalizations is strong indication that the true

19 _____
20 ²⁵ RAND Report at xiii, 39–47.

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

22 ²⁷ RAND Report at 46.

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

24 ²⁹ Mabus Decl. ¶ 41; *see also* Christopher Ingraham, *The Military spends five*
25 *times as much on Viagra as it would on transgender troops’ medical care*, WASH.
26 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/>.

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

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

8 Moreover, the ban’s “sheer breadth is discontinuous with the reasons offered
9 for it,” so much so that it “seems inexplicable by anything other than animus
10 toward the class it affects.” *Romer*, 517 U.S. at 632. Transgender individuals are
11 banned from military service “*in any capacity*.” *See Doe I*, 2017 WL 4873042, at
12 *29 (“[T]he reasons given for the decision to exclude transgender service members
13 appear to be hypothetical and extremely overbroad.”). When, as here, the breadth of
14 governmental discrimination “is so far removed from the[] particular justifications”
15 given, it is “impossible to credit them.” *Romer*, 517 U.S. at 635.

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

18 The ban on military service by transgender people is only one of many
19 actions taken by the Trump Administration to deliberately target and systematically
20 dismantle legal protections for transgender Americans. Soon after President
21 Trump’s inauguration, the Executive Branch began taking a series of concrete steps
22 to make transgender people *more* vulnerable to discrimination—discrimination and
23 even danger that are familiar to far too many transgender Americans.³¹ Rolling back
24

25 ³¹ For example, nearly a third (29%) of transgender Americans live in poverty
26 and/or have experienced homelessness—more than double the poverty and
27 homelessness rates for the U.S. as a whole. Report of the 2015 U.S. Transgender
28 Survey, NAT’L CTR. FOR TRANSGENDER EQUALITY, at 3 (Dec. 2016),
<http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report>

(footnote continued)

1 legal protections for transgender people was—and is—an urgent Administration
2 priority. For example:

- 3 • On February 10, 2017, a day after Attorney General Jeff Sessions was
4 sworn in, the Department of Justice stopped defending federal guidance
5 that protected transgender students’ privacy and right to use the restroom
6 that aligns with their gender identity.³²
- 7 • On February 22, 2017, the Departments of Justice and Education issued a
8 joint letter formally withdrawing that critical guidance and taking the
9 position that Title IX of the Civil Rights Act’s prohibition of
10 discrimination based on “sex” does not bar discrimination based on
11

12
13 _____
14 %20-%20FINAL%201.6.17.pdf. Moreover, transgender Americans are three times
15 more likely to experience unemployment than Americans who are not transgender.
16 *Id.* And transgender Americans are historically—and *increasingly*—vulnerable to
17 violence. *See, e.g., id.; A Crisis of Hate: A Mid-Year Report on Lesbian, Gay,*
18 *Bisexual, Transgender & Queer Hate Violence Homicides*, NAT’L COAL. OF
19 ANTI-VIOLENCE PROGRAMS (2017), [http://avp.org/wp-content/uploads/2017/08/NC](http://avp.org/wp-content/uploads/2017/08/NC-AVP-A-Crisis-of-Hate-Final.pdf)
20 [AVP-A-Crisis-of-Hate-Final.pdf](http://avp.org/wp-content/uploads/2017/08/NC-AVP-A-Crisis-of-Hate-Final.pdf) (“Over the last five years, NCAVP has reported a
21 consistent if not steady rise of reports of homicides of transgender and gender non-
22 conforming people. Thus far in 2017, NCAVP has already collected information on
23 19 hate-violence related homicides of transgender and gender non-conforming
24 people, compared to 19 reports in the entire year of 2016.”).

25 ³² *See* Notice Of Withdrawal Of Motion, *Texas v. United States*, No. 16-11564
26 (5th Cir., filed Feb. 10, 2017); *see also* Kevin Bohn, *Justice Dep’t no longer*
27 *fighting injunction on transgender sch. guidance*, CNN (Feb. 11, 2017),
28 [http://www.cnn.com/2017/02/11/politics/justice-department-transgender-guidance-](http://www.cnn.com/2017/02/11/politics/justice-department-transgender-guidance-case/)
[case/](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/20](http://www.politico.com/blogs/under-the-radar/2017/02/feds-obama-transgender-policy-234928)
[17/02/feds-obama-transgender-policy-234928](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).

1 gender identity.³³

- 2
- 3 • On March 7, 2017, on the Department of Justice’s motion, a federal court
4 halted the agency’s pending lawsuit to enjoin enforcement of North
5 Carolina’s controversial HB2, which prohibits transgender people from
6 using the bathroom appropriate for their gender.³⁴ On April 14, 2017, the
7 Department dropped the case.³⁵
 - 8 • On June 14, 2017,³⁶ the Department of Education withdrew, without
9 explanation, the agency’s prior finding that an Ohio school district

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

13 ³⁴ See Order, *United States v. North Carolina*, No. 16-425, ECF No. 237
14 (M.D.N.C., Mar. 3, 2017); Jonathan Drew, *Justice Dep’t backs off request to halt*
15 *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>.

16 ³⁵ See Notice of Voluntary Dismissal, *United States v. North Carolina*, No. 16-
17 425, ECF No. 245 (M.D.N.C., filed Apr. 14, 2017). The Department of Justice
18 purported to withdraw the lawsuit after HB2 was withdrawn and replaced with
19 HB142, “a similar” bill that is only “slightly less discriminatory” than its
20 predecessor, since it still bans local non-discrimination ordinances and “puts control
21 over bathroom access in the hands of state legislators.” Mary Emily O’Hara, *Justice*
22 *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>.

23 ³⁶ June is widely celebrated as LGBT Pride Month, and had been so celebrated
24 by two previous administrations. The Trump Administration did not note the many
25 Pride Month celebrations around the country, or issue any similar proclamation.
26 Dylan Stafford, *Trump WH declines to recognize LGBT Pride Month*, CNN (June
27 30, 2017), <http://www.cnn.com/2017/06/30/politics/trump-pride-month/index.html>;
28 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>.

1 violated Title IX by discriminating against a transgender student.³⁷ The
2 agency took this wholly unnecessary action even though the Southern
3 District of Ohio had already held that the student was likely to succeed on
4 the merits of her Title IX and Equal Protection Clause claims arising from
5 the same conduct.³⁸

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

14 Notably, the Department of Justice has not just abandoned its previous efforts
15 to protect the rights of LGBT people; it has gone out of its way to argue *against*
16 legal protections for LGBT people. In July 2017, the Department took the unusual
17 step of intervening in private employment litigation to argue that Title VII of the

18 ³⁷ Emma Brown, *Educ. Dep’t. closes transgender student cases as it pushes to*
19 *scale back civil rights investigations*, WASH. POST (June 17, 2017),
20 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.

21 ³⁸ *See Bd. of Educ. v. Dep’t of Educ.*, 208 F. Supp. 3d 850, 871, 877 (S.D. Ohio
22 2016). The Sixth Circuit refused to stay an injunction issued against further
23 discrimination by the district court, reasoning that the school district was unlikely
24 to succeed on its appeal of the injunction. *Dodds v. Dep’t of Educ.*, 845 F.3d 217,
25 221–22 (6th Cir. 2016).

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

1 Civil Rights Act *does not* protect workers from being fired for being LGBT—the
2 same case in which the Equal Employment Opportunity Commission had filed a
3 brief arguing that Title VII *does* so protect LGBT workers.⁴⁰ And on October 4,
4 2017, the Department issued a formal memorandum declaring that Title VII does
5 not prohibit discrimination in the workplace on the basis of gender identity.⁴¹

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

- 11 • Without explanation, the Department of Housing and Urban Development
12 withdrew a data collection initiative designed to assess compliance with two

14 ⁴⁰ Alan Feuer, *Justice Dep’t Says Rights Law Doesn’t Protect Gays*, N.Y.
15 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
17 Justice and the EEOC argued opposite sides of the case, prompting numerous
18 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
21 United States,” and substantively argued that “[e]mployers under Title VII are
22 permitted to consider employees’ out-of-work sexual conduct” when making
23 employment decisions).

24 ⁴¹ Off. of the Atty. Gen., Revised Treatment of Transgender Employment
25 Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Oct. 4,
26 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
27 (Oct. 5, 2017), <http://www.chicagotribune.com/business/ct-transgender-workplace-protections-20171005-story.html>.

1 LGBT-focused programs: (i) the LGBT Homelessness Prevention Initiative,
2 and (ii) the Equal Access in Accordance with an Individuals Gender Identity
3 in Community Planning and Development Programs.⁴²

- 4 • The annual National Survey of Older Americans Act Participants collects
5 data on those who take part in programs funded by the Older Americans Act,
6 including those receiving transportation, homemaker, and meal services, or
7 visiting senior centers. The Department of Health and Human Services
8 deleted a single question from the survey—a question asking whether the
9 respondent is gay, lesbian, bisexual, or homosexual.⁴³ On condition of
10 anonymity, a Trump administration official admitted that political appointees
11 within the Department “targeted LGBT questions” in their review of the
12 survey.⁴⁴
- 13 • Similarly, the Department of Health and Human Services deleted questions
14 regarding sexual orientation from the Annual Program Performance Report
15 for Centers for Independent Living, which gathers feedback on counseling,
16 skills training, and other services provided to individuals with disabilities.⁴⁵
- 17 • In March, the Census Bureau determined that there was “no federal data
18 need” to ask about gender identity and sexual orientation in the 2020
19 Census.⁴⁶ The Bureau reached this conclusion despite having previously been
20 asked to collect data on sexual orientation and gender identity by more than

21 _____
22 ⁴² 82 Fed. Reg. 13359 (Mar. 10, 2017).

23 ⁴³ Matt Sedensky, *Federal Surveys Trim LGBT Questions, Alarming Advocates*,
24 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>.

25 ⁴⁴ *Id.*

26 ⁴⁵ *Id.*

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

1 seventy-five members of Congress, as well as the Department of Justice,
2 Department of Housing and Urban Development, the Centers for Medicare
3 and Medicaid Services, and the Environmental Protection Agency.⁴⁷

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

7 This escalating pattern of hostility against transgender individuals is
8 consistent with views long held and expressed by senior Administration officials.
9 “According to White House sources, Vice President Mike Pence ha[d] been
10 pushing hard for this kind of shift of policy in the military, as had senior officials
11 such as [now-former] chief strategist Steve Bannon.”⁴⁸ Mr. Pence was a strong
12 supporter of the “Don’t Ask Don’t Tell” policy, which similar to the transgender
13 ban, barred gay and lesbian Americans from serving openly in the military. And he
14 vigorously opposed its repeal. When he served in the House, Mr. Pence took an
15 eerily-familiar position: “to mainstream homosexuality within active duty military
16 would have an impact on *unit cohesion*, would have an impact on recruitment, and
17 impact on *readiness*.”⁴⁹ Vice President Pence’s hostility toward LGBT individuals
18 is well documented.⁵⁰ So much so that President Trump, when recently asked about
19 LGBT rights, pointed to Mr. Pence and said: “Don’t ask this guy—he wants to hang
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21 ⁴⁷ *Id.*; see Hansi Lo Wang, *Census Bureau Caught In Political Mess Over*
22 *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>.

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

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

26 ⁵⁰ See, e.g., Liam Stack, *Mike Pence & ‘Conversion Therapy’: A History*, N.Y.
27 *TIMES* (Nov. 30, 2016), <http://www.nytimes.com/2016/11/30/us/politics/mike-pence-and-conversion-therapy-a-history.html>.
28

1 them all.”⁵¹

2 A number of Cabinet members have long track records of hostility toward
3 LGBT people. These include:

- 4 • Ben Carson, the Secretary of the Department of Housing and Urban
5 Development, who has called transgender people “the height of
6 absurdity.”⁵²
- 7 • Tom Price, the former Secretary of the Department of Health and Human
8 Services, who called federal protections for transgender students
9 “absurd.”⁵³
- 10 • Betsy DeVos, the Secretary of the Department of Education, who, with
11 her husband, gave hundreds of thousands of dollars to Focus on the
12 Family, “a conservative Christian group whose founder called the battle
13 against LGBT rights a ‘second civil war.’”⁵⁴

14 * * * * *

15 In short, the nature of the ban, the context in which it was announced, and the
16 Administration’s many other anti-transgender actions show that the ban was

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18 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>.

19 ⁵² Eugene Scott & Ashley Killough, *Ben Carson compared being transgender*
20 *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/allot-box/presidential-races/288324-ben-carson-being-transgender-doesnt-make-any-sense>.

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

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26 ⁵⁴ Benjamin Wermund & Kimberly Hefling, *Trump’s education secretary pick*
27 *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>.

1 motivated by discriminatory animus. The ban is therefore unconstitutional.

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

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

14 The fundamental right to personal autonomy extends to a number of central
15 life decisions, including the freedom to choose whether to marry, whom to marry,
16 whether to use birth control, whether to have children, how to rear and educate
17 children, and whether to engage in consensual adult intimacy. *See Obergefell*, 135
18 S. Ct. at 2599, *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Loving v. Virginia*,
19 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Planned*
20 *Parenthood v. Casey*, 505 U.S. 833, 851 (1992); *Troxel v. Granville*, 530 U.S. 57,
21 65–66 (2000); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *see also Skinner v.*
22 *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). As the Supreme Court
23 explained a quarter century ago:

24 These matters, involving the most intimate and personal choices a
25 person may make in a lifetime, *choices central to personal dignity and*
26 *autonomy*, are central to the liberty protected by the [Due Process
27 Clause of the] Fourteenth Amendment. At the heart of liberty is the
28 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

1 could not define the attributes of personhood were they formed under
2 compulsion of the State.

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

5 Gender identity is a central aspect of personhood that may not be dictated or
6 punished by the government. *See* Pl. Br. 22–23. The fundamental right to autonomy
7 protected by the Constitution includes the right to live in accord with one’s gender
8 identity. Transgender people’s gender identity is both “immutable and irrelevant to
9 their ability to contribute to society.” *Norsworthy v. Beard*, 87 F. Supp. 3d 1104,
10 1119 n.8 (N.D. Cal. 2015). The fundamental right to autonomy includes a person’s
11 right to be transgender or to not be transgender, just as it includes a right to be
12 heterosexual, lesbian, gay, or bisexual. *See, e.g., Lawrence*, 539 U.S. at 562
13 (“Liberty presumes an autonomy of self that includes freedom of thought, belief,
14 expression, and certain intimate conduct.”); *In re Golinski*, 587 F.3d 901, 903–04
15 (9th Cir. 2009) (“*Lawrence* rests explicitly on the proposition that ‘our laws and
16 tradition afford constitutional protection to personal decisions relating to marriage,
17 procreation, contraception, family relationships, child rearing, and education,’ and
18 that one’s sexual orientation therefore enjoys protection from punishment.”)
19 (quoting *Lawrence*, 539 U.S. at 574); *cf. Doe ex rel. Doe v. Yunits*, No. 001060A,
20 2000 WL 33162199, at *4 (Mass. Super. Ct. Oct 11, 2000) (transgender student’s
21 gender expression was protected speech), *aff’d sub nom., Doe v. Brockton Sch.*
22 *Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

23 Banning transgender people from serving in the military without a
24 compelling (or even rational) basis—and indeed, based on a bare desire to harm and
25 disparage transgender people—is a violation of the fundamental right to autonomy,
26 and thus is subject to heightened scrutiny. *See, e.g., Am. Bus. Ass’n v. Rogoff*, 649
27 F.3d 734, 738 (D.C. Cir. 2011) (“[S]tricter scrutiny is required for classifications
28 that ... infringe fundamental constitutional rights.”) (citing *FCC v. Beach*

1 *Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)); *see also Cooper Hosp. v. Burwell*, 179
2 F. Supp. 3d 31, 46 (D.D.C. 2016), *aff'd sub nom., Cooper Hosp. Univ. Med. Ctr. v.*
3 *Price*, 688 F. App'x 11 (D.C. Cir. 2017) (examining whether heightened scrutiny
4 for infringement of a “fundamental constitutional right” applied to plaintiff’s
5 argument for the right to health care).

6 The ban intrudes upon the right of transgender service members to live as
7 who they are, consistent with a core aspect of their identity. Although certain
8 intrusions on fundamental rights may be permissible in the military context,
9 governmental actions burdening a serviceperson’s fundamental right to personal
10 autonomy are subject to heightened scrutiny. *Witt v. Dep’t of Air Force*, 527 F.3d
11 806, 819 (9th Cir. 2008) (heightened scrutiny applies “when the government
12 attempts to intrude upon ... the rights [of personal autonomy] identified in
13 *Lawrence*”); *see SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480–84,
14 489 (9th Cir. 2014) (heightened scrutiny applies to claims involving sexual
15 orientation in light of *Lawrence* and *Windsor*); *cf. United States v. Marcum*, 60 M.J.
16 198, 204–06 (C.A.A.F. 2004) (using “searching constitutional inquiry” as a
17 heightened standard of review in the military context despite declining to find a
18 fundamental right in its analysis of *Lawrence*, and acknowledging that
19 constitutional rights identified by the Supreme Court generally apply to members of
20 the military unless by text or scope such rights are plainly inapplicable).

21 Thus, the Trump Administration’s categorical ban on military service by
22 transgender people is subject to heightened scrutiny. But the ban fails under any
23 level of constitutional review. As Plaintiffs have shown, the ban does not serve any
24 legitimate governmental interest, much less the type of compelling interest required
25 when fundamental rights are at stake. Pl. Br. 15-22. The facts demonstrating animus
26 (*see supra*) confirm the absence of any legitimate governmental purpose.

27 **CONCLUSION**


28 For all of these reasons, *amici* respectfully submit that Plaintiffs are likely to

1 prevail on the merits of their constitutional claims and, accordingly, urge the Court
2 to grant Plaintiff's Motion for Preliminary Injunction.

3 Dated: November 6, 2017

Respectfully submitted,

4 MORGAN, LEWIS & BOCKIUS LLP

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6 By: 
7 Susan Baker Manning

8 *Counsel for Amici Curiae*

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CERTIFICATE OF SERVICE

I hereby certify that, on November 6, 2017, a true and correct copy of the foregoing was served on all counsel of record via CM/ECF.

Dated: November 6, 2017

MORGAN, LEWIS & BOCKIUS LLP

By: 
Susan Baker Manning