UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LT JANE DOE, Plaintiff, v. MARK T. ESPER, *et al*., Defendants.	CIVIL ACTION NO. 1:20-cv-10530-FDS **ORAL ARGUMENT REQUESTED**

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiff Jane Doe ("Plaintiff" or "Lieutenant Doe") is a career Navy officer who has served her country for nearly a decade. Lieutenant Doe is an exemplary officer who has pursued training and advanced education that give her specialized expertise critical to the Navy's mission. Lieutenant Doe is transgender. She came to terms with being transgender last summer, and a military medical provider diagnosed Lieutenant Doe with gender dysphoria in late June 2019. If Lieutenant Doe were not transgender and had been diagnosed with any other medical condition—or even with the same medical condition two months earlier—she would be given medically appropriate care to treat her condition, be subject to the military's generally applicable fitness standards, and go through the same fitness evaluation process as other service members. Instead, under a policy the Department of Defense ("DoD") announced in March 2018 and implemented in April 2019 (the "Transgender Military Ban" or the "Ban"), Lieutenant Doe faces discharge regardless of her continued ability to meet military readiness and deployability standards. Lieutenant Doe is subject to a retention standard that applies only to transgender people, and that threatens to end her career for reasons that have nothing to do with her ability to serve. And, unlike service members with other conditions, the military is denying Lieutenant Doe the medical care she needs, including gender transition-related care that is safe, effective, and medically necessary for her.

Defendants' policy bars continued service by individuals who, like Lieutenant Doe, disclose their transgender identity and seek to transition. *See* Ex. 1 at 2–3.[1] Although Lieutenant Doe has requested a discretionary waiver of the Ban that would allow her to continue to serve,

[1] All cited exhibits are attached to the Declaration of Susan Baker Manning filed herewith in further support of Plaintiff's Motion for Preliminary Injunction.

Plaintiff understands that DoD has never granted such a waiver. And in any event, the requirement that Lieutenant Doe, because she is transgender, must seek a waiver that no other service member who meets the military's standards for fitness and deployability is required to seek, simply underscores that the Ban subjects Plaintiff to objectively unequal treatment. For these reasons, Defendants' Ban is unconstitutional as applied to Lieutenant Doe because it violates at least the equal protection component of the Fifth Amendment.

Lieutenant Doe seeks a preliminary injunction that will preserve the *status quo* by prohibiting Defendants from enforcing the Ban against her, including not requiring her to seek a discretionary waiver, while this case is pending. Lieutenant Doe seeks a preliminary injunction to ensure that Defendants will not end her career before this case can be resolved on the merits and so that she can receive medically necessary care while she continues to serve.

All four preliminary injunction factors cut sharply in Plaintiff's favor.

Likelihood of success on the merits. Lieutenant Doe is likely to succeed on her equal protection claim. The Ban singles out Lieutenant Doe and other transgender people for overtly unequal treatment and fails even rational basis review, much less the heightened scrutiny that applies here. In March 2018, DoD released its *Report and Recommendations on Military Service by Transgender Persons* (the "Report") (Ex. 2) in an effort to provide a *post hoc* justification for the previously announced policy banning transgender people from military service. The Report is an outcome-driven document that traffics in stereotypes, misreads the evidence it cites, and ignores the international scientific and medical consensus about the treatment of gender dysphoria—an issue that is well outside the military's area of particular expertise. The Report speculates that openly transgender service members "could" impair readiness, "could" undermine unit cohesion, and "could" lead to disproportionate costs; however, none of those rationales holds water. Nothing

in the Report justifies subjecting Lieutenant Doe and other transgender persons to different retention standards than those generally applicable to all other service members.

First, banning Lieutenant Doe and other transgender people from service does not enhance military readiness. Like all service members, Lieutenant Doe must meet all generally applicable fitness and deployability standards. There is no justification for declaring her unfit merely because she is transgender or has gender dysphoria. Nothing justifies a special rule that singles out and disqualifies transgender people who meet all generally applicable military standards.

Second, the Report includes no specific evidence that the mere presence of transgender service members harms unit cohesion. That lack of evidence speaks volumes because, when DoD issued the Report, there were already nearly a thousand openly transgender people serving in the military, and the policy's grandfather clause allows them to continue to serve. If the mere presence of transgender service members undermined unit cohesion, the grandfather clause would make no sense. In addition, less than a month after the Report was released, all five service chiefs testified to Congress that the presence of openly transgender service members had *not* harmed unit cohesion. Lieutenant Doe's exemplary record further belies any suggestion that her continued service would be a detriment to the Navy.

Third, healthcare costs cannot justify discharging Lieutenant Doe from the Navy. In 2017, the cost of providing medically necessary care to all transgender service members was less than one tenth of one percent (0.001%) of the military's health care budget for active service members, an amount so small that military leaders described it as "budget dust."

Irreparable injury. The Ban subjects Lieutenant Doe to unequal treatment and disparate standards for military service that Defendants apply only to transgender service members, while permitting all other service members to be judged based on generally applicable standards. This

unequal treatment itself constitutes irreparable harm. The Ban also threatens to end her military career and take away her livelihood—the sole support for Plaintiff, her spouse, and young children—for reasons that have nothing to do with her abilities or dedication to duty. In addition, Lieutenant Doe is being irreparably injured every day that the Ban prevents her from receiving needed medical care.

Balance of equities and public interest. The requested injunction will maintain the *status quo* without harming Defendants in any way. The Navy and the public will benefit from Lieutenant Doe's ongoing service and will continue to see a positive return on the Navy's substantial investment in Lieutenant Doe's training and post-graduate education. In contrast, if Defendants discharge Lieutenant Doe, the Navy and the public will lose that investment and incur the cost (in both time and money) of training a replacement.

In fact, DoD has already determined that its commitment to, and investment in, already-serving transgender service members "outweigh the risks" that the Report claims are associated with open service by transgender men and women. Defendants' Ban includes an exception for transgender service members who served openly between June 2016 (when, after extensive study and preparation, the military began allowing transgender people to serve openly) and the effective date of the new policy. It allows those grandfathered service members to serve openly in their true gender and to receive transition-related medical care as necessary. The requested injunction will merely require the Navy to follow the policies it already has in place, allow Lieutenant Doe to serve on the same terms as transgender service members who have the benefit of the grandfather clause, and allow her to receive the same necessary medical care while her underlying challenge to the policy proceeds. Although Lieutenant Doe came to terms with her transgender identity two months too late to fall within the scope of the grandfather clause, that does not change anything

about the balance of equities or the public interest, both of which strongly favor Plaintiff's requested preliminary relief.

Lieutenant Doe has served her country with loyalty and distinction. This Court should preliminarily enjoin Defendants from enforcing the Ban against her so that she may continue to do so while this case is pending.

STATEMENT OF FACTS

I. THE BAN ON OPEN MILITARY SERVICE BY TRANSGENDER PEOPLE.

A. In 2016, the Military Determined That There Is No Basis to Exclude Transgender People from Service and Ended the Previous Ban on Open Service.

In July 2015, Secretary of Defense Ashton Carter ordered a working group of senior DoD personnel to study the issue of open military service by transgender Americans and to develop a plan to address any associated practical issues (the "Working Group"). Ex. 3; Carson Decl. ¶ 11; Mabus Decl. ¶ 16; Wilmoth Decl. ¶ 16.[2] The Working Group amassed and considered comprehensive advice from medical, personnel, and readiness experts, as well as health insurers, civilian employers, and commanders whose units included transgender service members. Carson Decl. ¶ 14; Mabus Decl. ¶¶ 16-31; Wilmoth Decl. ¶¶ 15-23. The Working Group also commissioned the RAND Corporation to study the effects of allowing transgender people to serve openly. Carson Decl. ¶ 15. RAND reviewed extensive data and found "no evidence" that allowing transgender people to serve openly would negatively affect unit cohesion, operational effectiveness, or readiness. Ex. 4 (the "RAND Report") at xiii, 39–47; Carson Decl. ¶ 20; Mabus

[2] Submitted herewith in further support of Plaintiff's Motion for Preliminary Injunction are the Declarations of (a) Lieutenant Doe, (b) George R. Brown, M.D., D.F.A.P.A., (c) Brad R. Carson, (d) Raymond E. Mabus, Jr., and (e) Margaret C. Wilmoth. References to these Declarations appear as "[Declarant] ¶ __."

Decl. ¶ 22. Conversely, the RAND Report identified "significant costs" that would be incurred if transgender troops were separated through a ban on open service, as the military would lose skilled and qualified personnel, requiring expensive and time-consuming training to fill vacancies. Ex. 4 at 46; Carson Decl. ¶ 24.

The Working Group, along with senior DoD personnel, concluded that transgender people should be permitted to serve openly. Carson Decl. ¶ 37; Mabus Decl. ¶ 29; Wilmoth Decl. ¶ 21. Accordingly, on June 30, 2016, Secretary Carter issued a formal policy directive stating that "transgender individuals shall be allowed to serve in the military." Ex. 5 at 2. In announcing the policy, Secretary Carter stated:

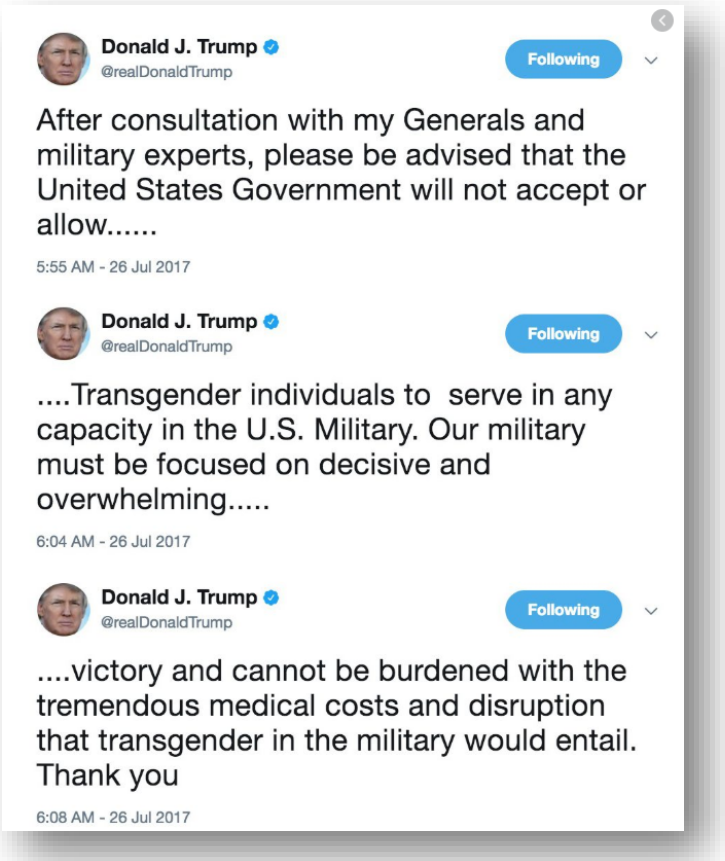
> The policy of the Department of Defense is that service in the United States military should be open to ***all who can meet the rigorous standards for military service and readiness***. . . . These policies and procedures are premised on my conclusion that open service by transgender Service members ***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.

Id. (emphases added).

Under DoD's 2016 open-service policy, transgender service members were able to disclose their transgender identities to their commanders for the first time without fear of discharge, change their gender marker in the Defense Enrollment Eligibility Reporting System (DEERS) (the administrative gender marker upon which all gender-specific military rules and regulations turn), and obtain transition-related medical care subject to the same rules and standards applied to all other medical conditions. *Id.* at Attachment. DoD issued detailed guidance on the policy and each service branch took steps to implement the policy, including training every active duty service member on the policy. Ex. 6 (DoD guidance memorandum); Ex. 7 (DoD Instruction 1300.28); Ex. 8 (Implementation Handbook); Ex. 9; Ex. 10; Mabus Decl. ¶ 32-44; Carson Decl. ¶ 27.

B. In 2017, President Trump Issued a New Ban on Military Service by Transgender People.

On July 26, 2017, over a year after transgender people began serving openly, President Trump abruptly announced via Twitter that the military would return to discriminating unlawfully against transgender people. He stated: "the United States Government will not accept or allow [] Transgender individuals to serve in any capacity in the U.S. Military." Ex. 11.



The President announced this new policy without having sought the advice of, or even notifying, the Secretary of Defense, the Joint Chiefs of Staff, or other military leaders. *See* Exs. 12, 13. A month later, the President formally ordered DoD leaders to reinstate the ban "on military service by transgender individuals that was in place prior to June 2016," and directed his Secretary of Defense, James N. Mattis, to develop a "plan for implementing" his orders by February 21,

2018. Ex. 14 (Memorandum Regarding Military Service by Transgender Individuals, 82 Fed. Reg. 41319 (entered Aug. 30, 2017)) (the "August 2017 Directive").

Pursuant to the President's orders to implement the announced ban, Secretary Mattis convened a panel to review military service by transgender people. Exs. 15, 16. The panel included senior Pentagon personnel, Ex. 2 at 18, but, unlike the Working Group established under Secretary Carter, does not appear to have included the Surgeons General or even any military officials with medical expertise. Brown Decl. ¶ 31; Carson Decl. ¶ 70.

On March 23, 2018, DoD released Secretary Mattis's plan for implementing a comprehensive ban on military service by transgender people, targeting both transgender people who seek to join the military and those who, like Lieutenant Doe, are already serving.[3] This plan was set out in a 44-page report and three-page cover memo dated February 22, 2018 from Secretary Mattis to the President, documents that together constitute the Transgender Military Ban at issue in this case. *See* Exs. 1, 2. The Ban is unique in that no other military policy excludes a class of persons from an equal opportunity to enlist or serve in the U.S. military based on their identity. The plan set forth a series of restrictions expressly and exclusively targeting "transgender persons." In particular, the plan instructed:

- "*Transgender persons* with a history or diagnosis of gender dysphoria are disqualified from military service, except under . . . limited circumstances," including "(1) if they have been stable for 36 consecutive months in their biological sex prior to accession"; "(2) Service members diagnosed with gender dysphoria after entering into service may be retained if they do not require a change of gender . . ."; or (3) if they are "currently serving" and "have been diagnosed with gender dysphoria since the previous administration's policy took effect and prior to the effective date of this new policy."

- "*Transgender persons* who require or have undergone gender transition are disqualified from military service."

[3] Because Lieutenant Doe is a current service member, this case challenges the Ban's bars to retention and medical care, not its accession provisions.

- "*Transgender persons* without history or diagnosis of gender dysphoria"—that is, transgender persons who may not be caught up by one or both of the above restrictions—may serve only "in their biological sex."

Ex. 1 at 2–3 (emphases added).

In short, except for the small number of transgender service members subject to the policy's grandfather clause, the Ban prohibits "transgender persons"—including those who meet all generally applicable military standards—from openly serving in the military. *See id.*; Ex. 2 at 5 (exempting current transgender service members "who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy [*i.e.*, June 2016], but before the effective date of [the] new policy [*i.e.*, April 2019]"); *id*. at 41 (same). Only grandfathered service members "may continue to receive medically necessary care, to change their gender marker in [DEERS], and to serve in their preferred gender." *Id*. at 5–6

Also on March 23, 2018, President Trump revoked his August 2017 Directive and authorized Secretary Mattis to carry out the plan. Ex. 17. Four federal district courts had previously found that barring transgender people from military service likely violated the requirement of equal protection and enjoined its implementation. After those injunctions were dissolved, Defendants proceeded to implement the Ban.[4] On March 12, 2019, DoD issued

[4] Four district courts issued nationwide injunctions against implementation of the President's August 2017 Directive. *See Doe 1 v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017); *Karnoski v. Trump*, 2017 WL 6311305 (W.D. Wa. Dec. 11, 2017); *Stockman v. Trump*, 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017); *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017). After the current Ban was announced (and the August 2017 Directive was revoked), the government sought to vacate the stays. Three of the four courts declined to do so. *Doe 2 v. Trump*, 315 F. Supp. 3d 474 (D.D.C. 2018); *Karnoski*, No. 17-cv-01297, ECF No. 233 (W.D. Wa.); *Stockman*, No. 17-cv-01799, ECF No. 124 (C.D. Cal.). However, the Supreme Court summarily granted the government's requests to stay the *Karnoski* and *Stockman* injunctions pending appeal. *See Trump v. Karnoski*, No. 18A625 (U.S. Jan. 22, 2019); *Trump v. Stockman*, No. 18A627 (U.S. Jan. 22, 2019). Without considering the merits of the original preliminary injunction order, both the D.C. Circuit and the Ninth Circuit determined that the Ban constituted "a significant change in facts" vis-à-vis the version of the ban announced in 2017. *Doe 2 v. Shanahan*, 755 F. App'x 19, 22

additional instructions for carrying out the Ban. Ex. 18 Attach. 3. The Ban went into effect on April 12, 2019. *Id.* at 1; *see also* Exs. 19, 20.

II. LIEUTENANT DOE IS SUBJECT TO DISCHARGE UNDER THE BAN.

Lieutenant Doe applied to the Navy's Officer Candidate School shortly after graduating from college with an engineering degree, and received her commission in 2010. Declaration of Plaintiff Jane Doe ("Doe Decl.") ¶ 2. Among other assignments, Lieutenant Doe has served two extended tours of duty as a Surface Warfare Officer and deployed around the world. *Id*. Lieutenant Doe has also pursued multiple advanced degrees to further her work on behalf of the Navy. *Id*.

In mid-April 2019, during Plaintiff's annual physical, Lieutenant Doe requested information about treatment for symptoms of depression and anxiety. *Id*. ¶ 4. Plaintiff then began voluntary mental-health treatment, during which she came to terms with being transgender. *Id*. ¶ 4. In June 2019, a military medical provider diagnosed Lieutenant Doe with gender dysphoria. *Id*. Following military rules, Plaintiff disclosed her gender identity to her commanding officer shortly thereafter. *Id*. ¶ 5. Lieutenant Doe is not subject the grandfather clause because she received her gender dysphoria diagnosis two months after the Ban took effect in April 2019. Instead, Plaintiff faces involuntary separation from the Navy even though she meets all generally applicable military standards. *Id.* ¶¶ 8, 17; *see also* Exs. 1, 2, 18-20.

(D.C. Cir. 2019) (vacating the injunction without prejudice); *Karnoski v. Trump*, 926 F.3d 1180, 1198 (9th Cir. 2019) (remanding to the district court to determine whether the preliminary injunction should be vacated). In both *Karnoski* and *Stockman*, the preliminary injunction was subsequently vacated by stipulation of the parties. *Karnoski*, No. 17-cv-01297, ECF No. 350 (W.D. Wa.); *Stockman*, No. 17-cv-01799, ECF Nos. 169, 172, 174 (C.D. Cal.). Following the D.C. Circuit and Ninth Circuit decisions, the *Stone* district court also vacated its injunction. *Stone*, No. 17-cv-02459, ECF No. 263 (D. Md.). None of the plaintiffs in the four cases—most of whom are currently serving members who have the benefit of the grandfather clause—moved for a preliminary injunction specifically prohibiting enforcement of the current iteration of the Ban.

In October 2019, in the hope of avoiding discharge, Lieutenant Doe requested a waiver of the Ban that, if granted, would allow her to transition and serve as a female, *i.e.*, to serve in the gender consistent with who Plaintiff is and consistent with the standards applicable to all female service members (including transgender female service members who are within the scope of the grandfather clause). Doe Decl. ¶ 12; *see also* Exs. 2, 18–20. Lieutenant Doe was forced to prepare and submit the waiver request without the benefit of guidance on its form or content because DoD has never issued any such guidance or even identified the criteria or timeframe within which a waiver request will be adjudicated. Doe Decl. ¶ 14. To Plaintiff's knowledge, DoD has never granted such a waiver, and after nearly five months, Lieutenant Doe's waiver request remains pending. *Id*. ¶¶ 14, 16.

Because of the Ban, Lieutenant Doe is in the lose-lose position of being unable to serve openly as a transgender person, and unable to obtain needed medical care that the Ban categorically prohibits. *Id.* ¶¶ 9–11; Ex. 2 at 32. Navy medical staff confirmed in February 2020 that gender transition is medically necessary for Lieutenant Doe. *Id*. ¶¶ 15, 17. Plaintiff is now at imminent risk of losing the career she loves, and which provides the sole source of income and healthcare benefits for her family. *Id*. ¶¶ 17, 19, 22–23.

Plaintiff's existing orders require her to report to her current duty station through approximately mid-2020. Doe Decl. ¶ 21. Given the Navy's substantial investment in her training and education, Plaintiff's orders also include an additional six-year service obligation to the Navy. *Id*. ¶¶ 2, 21. This service obligation represents a reciprocal agreement whereby Plaintiff has committed to serve the Navy—and the Navy has committed to employ her—through approximately 2026. *Id.* ¶ 21.

ARGUMENT

The preliminary injunction standard is a familiar one. The movant "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The likelihood of success and irreparable harm factors weigh most heavily in the analysis. *See Esso Std. Oil Co. v. Monroig–Zayas*, 445 F.3d 13, 18 (1st Cir. 2006) (describing likelihood of success as "[t]he sine qua non of this four-part inquiry") (citation omitted); *Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc.*, 645 F.3d 26, 32 (1st Cir. 2011) (irreparable injury is "'[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction'") (quoting 11A Wright & Miller, Fed. Prac. & Proc. § 2948.1). The balance of equities and public interest factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, all four factors strongly favor the preliminary injunction Plaintiff seeks.

I. LIEUTENANT DOE IS LIKELY TO SUCCEED ON THE MERITS.

A. The Transgender Military Ban Violates Equal Protection.

The Ban is an unvarnished assault on transgender Americans that violates Lieutenant Doe's right to the equal protection of the law under any level of scrutiny. On its face, the Ban applies only to "transgender persons" and subjects them to a different retention standard than all other service members. Any other service member who is diagnosed with a treatable medical condition is subject to an individualized fitness assessment; in contrast, a transgender service member who is diagnosed with gender dysphoria is deemed presumptively unfit, without regard to their individual circumstances, and is subject to discharge unless they apply for and are granted a discretionary waiver with no articulated criteria and that is not required of any other group. As such, the Ban classifies on the basis of transgender status and on the basis of sex, thereby triggering

heightened scrutiny. The Ban cannot meet that heightened test because there is not even a rational justification, much less an important or compelling one, for subjecting transgender service members to a different set of rules than those applied to everyone else when considering whether to retain them in military service. To the contrary, because the Ban creates an irrational presumption against the retention of transgender persons who are otherwise qualified and fit to serve, it fails even rational basis review.

1. The Transgender Military Ban Is Subject to Strict Scrutiny Because It Targets a Suspect Class: Transgender People.

The Constitution's equal protection guarantee requires that government classifications serve at least a rational purpose and reflect more than a mere desire to disadvantage a particular group. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–40 (1985). Certain government classifications are subject to a more demanding test because they reflect historical patterns of inequality and are thus more likely simply to reflect those patterns than to serve a legitimate governmental purpose. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979). In particular, courts apply strict scrutiny to laws or policies that classify based on grounds deemed inherently "suspect." Within this Circuit, a suspect class is one "characterized by some unpopular trait or affiliation . . . reflect[ing] [a] special likelihood of bias [against them] on the part of the ruling majority." *Mills v. State of Maine*, 118 F.3d 37, 47 (1st Cir. 1997) (final alteration in original); *accord Mulero-Carrillo v. Roman-Hernandez*, 790 F.3d 99, 106 n.2 (1st Cir. 2015) (same); *see also Eulitt ex rel. Eulitt v. Maine, Dep't of Educ.*, 386 F.3d 344, 353 n.3 (1st Cir. 2004) (identifying the "traditional indicia of suspect classification . . . as immutable characteristics determined by birth or membership in a group that is politically powerless").

Applying this test here, the Ban is subject to strict scrutiny because transgender persons "meet the indicia of a 'suspect' or 'quasi-suspect classification' identified by the Supreme Court."

Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2014) ("[D]iscrimination based on transgender status independently qualifies as a suspect classification."); *see also Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 749 (E.D. Va. 2018) (applying heightened scrutiny); *Board of Educ. v. Dep't of Educ.*, 208 F. Supp. 3d 850, 873 (S.D. Ohio 2016) (same); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (same).

To start, transgender people have experienced a long and ugly history of bias, which remains pervasive to this day. *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Grimm*, 302 F. Supp. 3d at 749; *see also* Ex. 21 at 4 (explaining that transgender people "experience[] harassment and violence at alarmingly high rates" relative to the general population). This longstanding bias is unrelated to transgender persons' ability to contribute to society. *See Board of Educ.*, 208 F. Supp. 3d at 874; *Adkins*, 143 F. Supp. 3d at 139; Brown Decl. ¶¶ 26-28.

Further, gender identity is both a distinguishing trait and an immutable one. *See, e.g., Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 329 (D.P.R. 2018) ("Transgenderism is an immutable characteristic."); *Norsworthy*, 87 F. Supp. 3d at 1119 n.8; Brown Decl. ¶¶ 17-25.

Finally, transgender persons have relatively limited political power. *See, e.g., Adkins*, 143 F. Supp. 3d at 140 ("[T]ransgender people lack the political strength to protect themselves.").

For all of these reasons, the Court should apply strict scrutiny to the Ban because it explicitly targets transgender individuals as a suspect class.

2. The Ban Is Subject to at Least Intermediate Scrutiny Because It Is a Sex-Based Classification.

Discrimination against transgender people is also a form of sex-based discrimination that is, at the least, subject to intermediate scrutiny and invalidated unless Defendants can show that it has an "exceedingly persuasive justification." *See United States v. Virginia*, 518 U.S. 515, 534–36 (1996) ("*VMI*"); *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("classifications by gender must

serve important governmental objectives and must be substantially related to achievement of those objectives" in order to be upheld); *Karnoski*, 926 F.3d at 1200-01 (transgender military ban subject to heightened scrutiny); *Doe v. Mass. Dept. of Corr.*, No. 17-12255-RGS, 2018 WL 2994403, at *9 (D. Mass. June 14, 2018) ("[W]here a State creates a classification based on transgender status, the classification is tantamount to discrimination based on sex and is therefore subject to heightened judicial scrutiny above the normal 'rational basis' test.") (citation omitted).

Discrimination against transgender people discriminates based on sex in at least three ways.

First, transgender status is defined by reference to a person's sex. Transgender people have a gender identity that differs from their birth sex. Brown Decl. ¶¶ 17-20. It is impossible to recognize a person as being transgender without taking their birth sex into account. For this reason, courts have overwhelmingly found that discrimination on the basis of transgender status is sex discrimination. *See, e.g.*, *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Whitaker*, 858 F.3d at 1047-51; *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016); *see also* Ex. 5 Attach. at 2 (DoD admission that discrimination against individuals "based on their gender identity is sex discrimination").

Second, discrimination against transgender people is also impermissible sex stereotyping. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 294 (1989) (explaining that sex-based discrimination may take the form of discrimination based on sex stereotypes); *Rosa*, 214 F.3d at 215–16 (following *Price Waterhouse* and holding that complaint alleging discrimination against transgender woman stated a claim for sex discrimination). Because transgender persons' "outward behavior and inward identity do not meet social definitions" associated with their birth sex, *Schwenk*, 204 F.3d at 1201, there is an inherent "congruence between discriminating against

transgender . . . individuals and discrimination on the basis of gender-based behavioral norms," *Glenn*, 663 F.3d at 1316. As the Eleventh Circuit has explained, "A person is defined as transgender precisely because of the perception that his or her behavior transgresses stereotypes." *Id*. Accordingly, by targeting transgender people, the Ban "inherently discriminate[]" based on a person's "failure to conform to gender stereotypes." *Doe 1*, 275 F. Supp. 3d at 209-10; *see also Fabian*, 172 F. Supp. 3d at 526–27; *Whitaker*, 858 F.3d at 1047–51; *Smith*, 378 F.3d at 572-75; *Schwenk*, 204 F.3d at 1200-03; *Finkle v. Howard Cty*., 12 F. Supp. 3d 780, 788 (D. Md. 2014); *Grimm*, 302 F. Supp. 3d at 745; *Evancho v. Pine-Richland Sch. Dist*., 237 F. Supp. 3d 267, 293 (W.D. Pa. 2017); *Valentine Ge v. Dun & Bradstreet, Inc*., No. 6:15-CV-1029-ORL-41GJK, 2017 WL 347582, at *4 (M.D. Fla. Jan. 24, 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ*., 208 F. Supp. 3d 850, 877 (S.D. Ohio 2016); *Roberts v. Clark Cty. Sch. Dist*., 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016); *Fabian v. Hosp. of Cent. Conn*., 172 F. Supp. 3d 509, 527 (D. Conn. 2016); *Rumble v. Fairview Health Servs*., No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415, *2 (D. Minn. Mar. 16, 2015); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc*., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *Mitchell v. Axcan Scandipharm*, 2006 WL 4561731 (W.D. Pa. Feb. 21, 2006); *Tronetti v. Healthnet Lakeshore Hosp*., 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003).

Treating persons differently because of a past or future gender transition is "literally discrimination 'because of . . . sex.'" *Schroer v. Billington* 577 F. Supp. 2d 293, 306 (D.D.C. 2008); *see also Glenn*, 663 F.3d at 1320-21 (transgender woman unlawfully fired based on employer's "perception" she was "'a man dressed as a woman'"); *Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App'x 883, 890–92 (11th Cir. 2016). The Ban discriminates based on sex because it singles out a particular medical condition that is defined in relation to a person's birth

sex and because the treatment for the condition involves a change of sex. The central feature of gender dysphoria is discomfort with one's birth sex. Similarly, the recognized medical treatments for gender dysphoria include gender transition—i.e., a change of sex. Brown Decl. ¶¶ 21-25. The Ban thus discriminates based on sex both because it excludes transgender service members who have gender dysphoria and because it bars them from needed medical care because that care involves a change of sex.

Thus, as with other government discrimination based on sex—including in areas touching upon matters of defense and national security—the Ban is subject to at least intermediate scrutiny. *See VMI*, 518 U.S. at 532–34 (requiring the government to provide an "exceedingly persuasive justification" for the exclusion of women from a military academy and forbidding reliance "on overbroad generalizations about the different talents, capacities, or preferences" of the excluded class); *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689–90 (2017) (striking down a sex-based classification in the Immigration and Naturalization Act under intermediate scrutiny); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion) (applying heightened scrutiny to strike down sex-based military benefits policy). Defendants must therefore show that the Ban, at a minimum, substantially furthers an important government interest. *VMI*, 518 U.S. at 533. Under both strict and intermediate scrutiny, only the actual justifications that motivated the government's action at the time count; the government cannot rely upon hypothetical justifications or those conceived after the fact. *Morales-Santana*, 137 S. Ct. at 1696–97.

3. The Ban Is Unconstitutional Under Any Standard Because There Is No Rational Basis for It.

The purported rationales for the Ban fail even the most deferential standard of review. Under rational basis review, a classification must "bear a rational relationship to an independent and legitimate legislative end" to "ensure that classifications are not drawn for the purpose of

disadvantaging the group burdened by the law." *Romer v. Evans*, 517 U.S. 620, 632–33 (1996).

The government offers three justifications for the Ban, speculating that open service by transgender service persons "*could* [1] impair unit readiness, [2] undermine unit cohesion, as well as good order and discipline . . . and [3] lead to disproportionate costs." *See* Ex. 1 at 5 (emphasis added); *see also* Ex. 2 at 32–41. According to the government, these hypothetical concerns are driven by "considerable medical uncertainty" about the efficacy of treatment for gender dysphoria. Ex. 2 at 5; *see id*. at 6, 14, 27, 32, 34, 44.

In reality, however, no such "medical uncertainty" exists. To the contrary, there is an international consensus among medical experts, supported by robust evidence, that gender transition is an effective treatment for gender dysphoria. The evidence also demonstrates that transgender troops are just as deployable and medically fit for duty as non-transgender people; that open service by transgender troops in fact promotes readiness and has not compromised unit cohesion, good order, or discipline; and that the cost of medical care for transgender troops is inconsequential in the context of military healthcare spending, and a small fraction of the monetary cost of the Ban.

a. There is no rational connection between unit readiness and discharging Lieutenant Doe or other transgender service members.

DoD's leading justification for the Ban is that permitting transgender persons to serve openly could compromise the readiness of military units because there is "considerable scientific uncertainty" about the efficacy of treatment for gender dysphoria and because persons with gender dysphoria are, by definition, medically unfit for service. *See* Ex. 2 at 5, 32–35. Neither assertion is true.

Transition-related care is safe and effective. The Ban is premised on a proposition that is contrary to settled medical and scientific consensus, and about which the military has no special expertise. Contrary to DoD's representations about alleged "scientific uncertainty," there is "[a]n international consensus among medical experts affirm[ing] the efficacy of transition-related health care." Ex. 23 at 5; *see also* Brown Decl. ¶¶ 30–41. Gender dysphoria is a highly treatable condition, and the appropriate treatments are well-established and effective. Brown Decl. ¶¶ 21–25; *see also generally id*. at 30-41; Ex. 4 at 7; Ex. 24. The Report relies on claims about gender dysphoria and transgender identity that have no basis in fact, science, or medicine and which the mainstream medical community has unequivocally rejected. Brown Decl. at ¶¶ 30–41; Ex. 23 at 1-2, 4-13.

As soon as DoD released the Report, leading medical experts immediately criticized it as medically and scientifically baseless. The American Psychological Association, for example, was "alarmed by the administration's *misuse of psychological science* to stigmatize transgender Americans and justify limiting their ability to serve in uniform and access medically necessary care." Ex. 25 (emphasis added). Six former U.S. Surgeons General criticized the Report for "mischaracteriz[ing] the robust body of peer-reviewed research on the effectiveness of transgender medical care," Ex. 26, as did the American Medical Association, Ex. 27. Three former military Surgeons General co-authored a report titled "DoD's Rationale for Reinstating the Transgender Ban Is Contradicted by Evidence," which identified the numerous flaws that pervade the Report and discussed the extensive evidence showing the efficacy of medical care for transgender persons. Ex. 23; s*ee also* Ex. 28 ("Former Surgeons General Debunk Pentagon Assertions About Medical Fitness of Transgender Troops" (Mar. 28, 2018)); Ex. 29 (American Psychiatric Association statement "reiterat[ing] its strong opposition to a ban of transgender Americans from the U.S.

military") (Mar. 24, 2018)).

The Report erroneously claims that the efficacy of gender transition must be demonstrated by randomized controlled studies. Ex. 2 at 26–27. Medical standards of care are not, however, determined solely through double-blind studies, which, in the case of surgical procedures, are often impossible, unethical, or both. Brown Decl. ¶¶ 36-41. DoD cannot justify the Ban by holding transition-related care to a standard that few, if any, medical conditions are required to meet. Brown Decl. at 36-41. at 12–13 (noting that common medical interventions like tonsillectomies and appendectomies have not been validated through double-blind studies); Ex. 23 at 7-8.

Similarly, the Report repeatedly asserts that treatment does not "fully remedy" symptoms of gender dysphoria, Ex. 2 at 14, 24, 32, 35, a standard that neither the military nor public health entities use to evaluate the efficacy of medical treatment, Ex. 23 at 8. "An expectation of certainty is an unrealistic and counterproductive standard of evidence for health policy—whether civilian or military—because even the most well-established medical treatments could not satisfy that standard." Ex. 28 ("Former Surgeons General Debunk Pentagon Assertions about Medical Fitness of Transgender Troops"); *see also* Ex. 23 at 7-8.

Ignoring decades of peer-reviewed research, the Report focuses on only a handful of studies and misstates their results. *See* Ex. 2 at 24-27. For instance, DoD relies heavily on a 2016 U.S. Centers for Medicare and Medicaid Services ("CMS") study to argue that there is "considerable scientific uncertainty" regarding the effectiveness of transition-related treatment. Ex. 2 at 24. In that report, CMS found precisely the opposite—that transition-related treatment *is safe*, *effective*, *and non-experimental*—and that specific appropriate medical treatments must be determined on an individual basis. Brown Decl. ¶¶ 40-41; Ex. 30 at 41; Ex. 23 at 8–10; *see also id*. at 9–10 (quoting the former Acting Administrator of CMS, who criticized the Report for

"purposeful[ly] misreading" the "unrelated 2016 CMS decision").

In short, the Ban's fundamental premise—that the efficacy of gender dysphoria treatment is scientifically "uncertain"—has no credible basis.

Transgender people are just as fit to serve as non-transgender people. Open service by Lieutenant Doe and other transgender service members has no negative effect on military readiness or effectiveness. To the contrary, the Ban harms military readiness by arbitrarily excluding skilled and capable individuals like Plaintiff based on a characteristic with "no relevance to a person's fitness to serve," Carson Decl. ¶ 35, while an open service policy enhances readiness in numerous ways, *id.* ¶¶ 23, 33, 99-100, 109-10; Mabus Decl. ¶ 25, 91-100; Wilmoth Decl. ¶ 31. To the extent there might ever be a question about Lieutenant Doe's fitness—and, to be clear, *no one has questioned Plaintiff's fitness to serve*—she must be judged on an individual basis under generally applicable standards through the same Medical Evaluation Board and Physical Evaluation Board and process as other service members.

Under the 2016 open-service policy, transgender men and women were subject to the same fitness and deployability standards as all other service members. Ex. 5 at 2; Ex. 7 § 1.2(a)-(b); Ex. 9 § 4(b)-(c); Ex. 10 § 4(g)-(h). The open-service policy allowed transgender men and women to ensure that their gender was accurately reflected in DoD's personnel records, and required them to comply with all gender-specific standards. Ex. 7 § 1.2(b); Ex. 9 § 4(c); Ex. 10 § 4(g). Under the 2016 open-service policy, the military subjected all persons—transgender and non-transgender—to generally applicable standards.[5]

[5] Transgender men and women who are currently able to serve pursuant to the grandfather clause are subject to the terms of the 2016 policy (Ex. 2 at 5–6; Ex. 18 Attach. 3 § 1(c)-(d)), and thus they too are obligated to comply with all generally applicable standards.

Thus, the issue is not whether transgender people are required to adhere to military standards. They are; they can; and they do. The question is whether Defendants constitutionally may declare that transgender people are unfit to serve based on a separate set of standards that target transgender people alone.

The military's separation requirements treat gender dysphoria very differently than other medical conditions. Most mental health conditions that are not deemed a physical disability through the standard Medical Evaluation Board (MEB) and Physical Evaluation Board (PEB) process can trigger discharge only after a "health provider concludes that the disorder is so severe that the Service member's ability to function effectively in the military environment is significantly impaired" on an individual basis; however, no such individualized assessment is available to those with gender dysphoria. *See* Ex. 32 (DoDI 1332.30 §§ 9.2(c) (mental conditions generally), 9.2(d) (gender dysphoria)).[6]

Although the Report emphasizes the "multifaceted mental health problems" purportedly "associated with gender dysphoria," Ex. 2 at 5, there is no basis to subject current service members who are diagnosed with gender dysphoria to different and more onerous retention requirements than those imposed on service members who develop any other medical or mental health condition. In those circumstances, standard military protocol mandates an individualized evaluation of the service member's continued fitness to serve, in keeping with the established MEB/PEB processes that are prescribed by DoD regulations. *See generally* Ex. 31 (DoDI 1332.18); *Roe v. Dep't of Def.*, 947 F.3d 207, 222 (4th Cir. 2020) ("[DoD] regulations require *individualized determinations*

[6] The purported availability of a discretionary waiver serves only to underscore this unequal treatment; it does not cure it. Because she is transgender, Lieutenant Doe must seek a waiver that no other service member who meets the military's standards for fitness and deployability is required to seek.

based on objective evidence to determine a service member's fitness for duty or separation[.]") (emphasis added). The Ban shuts transgender service members out of this standard procedure. Instead, persons diagnosed with gender dysphoria are subject to discharge without any individualized assessment of fitness to serve.

In addition, there is no medical basis for using a transgender person's diagnosis of gender dysphoria as a proxy for other medical conditions that person does not actually have. The military does not do so for other medical conditions and has no basis to do so for gender dysphoria. The military does not, for example, automatically discharge members who experience anxiety or depression once in service and has standards in place evaluate the fitness of service members who actually develop such conditions. *See generally* Ex. 31. The American Psychiatric Association responded to the Report's flawed reasoning by reiterating that "[t]ransgender people do not have a mental disorder; thus, *they suffer no impairment whatsoever* in their judgment or ability to work." Ex. 33 (emphasis added); Brown Decl. ¶ 20; Ex. 23 at 17 (noting that the diagnostic criteria for gender dysphoria may be satisfied without any form of impairment).

Transition-related medical care does not raise any treatment or deployability issues that are not already addressed by existing standards and policies. For example, military policy allows service members to take a range of medications, including hormones, while deployed in combat settings, and "maintains a sophisticated and effective system for distributing prescription medications to deployed service members worldwide." Ex. 34 at 207; Brown Decl. ¶¶ 56-63; *see also* Ex. 35 (projecting that "[n]o more than 140 active-duty service members a year would likely seek gender-transition hormone treatments"). Transgender service members receiving hormone therapy are no more or less deployable than service members who deploy while taking hormones for other reasons or taking other prescribed medications. Brown Decl. ¶¶ 56–63;

Wilmoth Decl. ¶¶ 26–27.

Similarly, military policy already provides for the discharge of any service member who is non-deployable for more than a year. *See* Ex. 36 at § 1.2; *see also* Ex. 31; Brown Decl. ¶¶ 43, 64. There is no justification for creating a unique rule for transgender service members. If transition-related healthcare causes a service member to be non-deployable for a limited amount of time, but the service member still complies with the generally applicable standards, there is no rational, nondiscriminatory reason for discharging the service member merely because the treatment was for gender dysphoria rather than another medical condition. Brown Decl. ¶ 64; Wilmoth Decl. ¶ 21.

In addition, there is no evidence that recovery times for transition-related surgical care would have any material impact on force readiness. The RAND Report analyzed all available evidence and projected relatively low numbers of transition-related surgical procedures—which is consistent with DoD data during the open service policy—and recovery times of two months or less for even the most complex procedures. Ex. 4 at 40–42; *see also* Ex. 37. RAND concluded that the total impact of transition-related medical care would be a mere "0.0015 percent of available deployable labor-years" across the entire force. Ex. 4 at 42; Ex. 35 (projecting that the deployability of 25 to 130 service members would be effected in any given year); *compare* Ex. 4 at 46 (fourteen percent of Army active component troops are non-deployable at any given time). Foreign militaries with inclusive policies similarly report no reduced ability to serve from transgender persons serving openly. Carson Decl. ¶ 23; Mabus Decl. ¶ 25; Wilmoth Decl. ¶ 29; Ex. 4 at 45; Ex. 23 at 34-38. There is no basis for holding transgender service members who undergo transition-related care to a different standard of deployability than the standard applied to other service members who undergo treatment for injuries, infectious disease, pregnancy, and

myriad other conditions. Carson Decl. ¶ 21; Wilmoth Decl. ¶¶ 21, 24–31; Brown Decl. ¶ 43.

The Military Health System has ample capacity to meet the healthcare needs of transgender service members. Ex. 4 at 7–9; Carson Decl. ¶ 17, 30; Wilmoth Decl. ¶¶ 14, 24–31. The military is, in fact, currently providing for the health care needs of nearly a thousand transgender service members who have the benefit of the grandfather clause, and provides similar care to non-transgender patients with analogous medical needs. Ex. 4 at 6-9; Wilmoth Decl. ¶¶ 14, 24–31.

There is no legitimate medical justification for subjecting transgender people to a different retention standard; in contrast, the military would suffer "an immediate negative impact on readiness" by discharging qualified transgender service members who serve at all levels. Mabus Decl. ¶¶ 91-93, 100; Carson Decl. ¶¶ 109-10; Ex. 4 at 46; *see also* Ex. 38 (statement of 56 retired generals and admirals that ban would degrade readiness). The military has invested considerable resources in training Lieutenant Doe; it would incur a significant burden to replace her.

b. The Ban does not rationally advance unit cohesion.

Lieutenant Doe is an exemplary officer. There is no reason to believe that allowing Lieutenant Doe to serve openly would harm her unit. Discharging Lieutenant Doe will harm the Navy by depriving it of a talented and dedicated leader. *See infra* at 27; *see also generally* Carson Decl. ¶¶ 106-10; Mabus Decl. ¶¶ 92-93.

The military estimates that there are nearly a thousand transgender men and women who serve openly under the grandfather clause. Ex. 2 at 7 n.10. By the time DoD issued the Report, transgender people had been serving openly for almost two years. Harkening back to the justifications advanced in support of the military's now (rightly) abandoned policies of racial segregation and "Don't Ask/Don't Tell," the Report speculates that the presence of transgender service members could harm unit cohesion. Carson Decl. ¶ 108; Mabus Decl. ¶ 93. The Report cites no data for that speculation; instead, it offers a single anecdote about a dispute between a

transgender service member and a non-transgender service member. Ex. 2 at 37. The Report does not divulge how that single incident was resolved, an omission that is consistent with the Report's conspicuous failure to discuss the extensive training that every service member received as part of the 2016 open service policy, or the DoD guidance that gives commanders the tools to resolve privacy and other specific issues that may arise. Carson Decl. ¶¶ 27-28, 32, 64, 94, 106–08; Ex. 8 at 29, 60–65.

The Report's speculation is directly contradicted by DoD's own experience that transgender service members have served openly without any adverse effect on cohesion. In April 2017, just a month after DoD released the Report, then-Army Chief of Staff (and current Chairman of the Joint Chiefs of Staff) Mark Milley testified before Congress that the effect of the open service policy on unit cohesion was "monitored very closely" and that he had "received *precisely zero* reports of issues of cohesion, discipline, [or] morale." Ex. 39 (emphasis added). Each of the other four Service Chiefs agreed. *Id.*; *see also* Mabus Decl. ¶ 45 ("I did not receive any reports that [] disclosure [of transgender status] harmed the operational effectiveness of any Navy units"). This echoes the experience of foreign militaries with inclusive policies toward transgender soldiers, which have experienced no adverse effect on unit cohesion, and to the contrary have in some cases reported *improved* cohesion and readiness. Carson Decl. ¶ 23; Mabus Decl. ¶ 25; Wilmoth Decl. ¶ 29; Ex. 4 at 44.

Similar concerns about unit cohesion were raised as objections to allowing women in combat positions, racial integration, and open service by lesbian, gay, and bisexual service members—but in every case those fears "proved to be unfounded." Carson Decl. ¶¶ 22, 108; Mabus Decl. ¶¶ 92-93; Ex. 4 at 44.

c. There is no cost justification for the Ban.

The Ban cannot be justified by cost considerations. The Report ignores DoD's own data showing that the cost of transition-related care under the open service policy was $2.2 million in 2017, which is less than RAND's lowest estimate of $2.4 million. Ex. 4 at 36, 70; *see also id*. at xii (noting that the total 2014 military health system budget was $49.3 billion). RAND correctly concluded that the cost of healthcare for transgender service members "will have little impact on and represents an exceedingly small proportion of [active component] health care expenditures . . . and overall DoD health care expenditures." Ex. 4 at xi; *see also* Ex. 41. The cost of providing appropriate medical treatment to transgender troops is so low that it has been described as "budget dust," and hardly even a rounding error, by military leadership. *See Karnoski*, 2017 WL 6311305 at *8; *see also* Mabus Decl. ¶¶ 21-25, 86; Carson Decl. ¶ 18, 19, 35, 74, 96, 104, 105.

The Report's emphasis on the relative cost of health care for transgender service members is misleading. The Report asserts that, since the 2016 open service policy was implemented, medical costs for service members diagnosed with gender dysphoria have increased to nearly three times the cost of medical care for service members without such a diagnosis and speculates that costs could continue to increase. Ex. 2 at 41. *Any* comparison of average healthcare costs for persons with a particular medical condition are likely to be greater than average healthcare costs for persons without a condition. Carson Decl. ¶ 74; Ex. 23 at 41–42.

The Report also does not address the cost of discharging and replacing qualified transgender service members. DoD's investment in training Lieutenant Doe, a highly specialized and educated officer, is much higher than average, *see supra* at 26, and accordingly the cost of replacing her would be much higher, as well. Even focusing on the cost of discharging a typical service member, a study coauthored by professors associated with the Naval Postgraduate School

estimated that the cost of discharging all transgender military personnel would be $960 million—*more than 100 times* the annual cost of providing medically necessary care to transgender service members. Ex. 42 at 7; Carson Decl. ¶ 105.

Even if the monetary benefits of the Ban outweighed the costs, the government may not "protect the public fisc by drawing an invidious distinction between classes" of persons. *Mem. Hosp. v. Maricopa Cty.*, 415 U.S. 250, 263 (1974). But DoD's own data shows that the Ban is not driven by cost concerns and, to the contrary, is a drain on public resources.

B. The Ban Is Not Entitled to Deference.

The government may seek to defend the Ban by claiming that courts must defer to military decision-makers, but this Court should reject that argument. "The military has not been exempted from constitutional provisions that protect the rights of individuals," and "[i]t is precisely the role of the courts to determine whether those rights have been violated." *Emory v. Sec'y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987). As such, the Ban is not immune from judicial review simply because it is a military policy, without regard to: (a) the suspect nature of the classification on which it rests; (b) the questionable process by which it was adopted; (c) the fact that the subject matter it addresses is well outside the military's particular expertise; or (d) the lack of any rational fit between the Ban and its asserted justifications. Each of these factors is relevant to this Court's analysis, and each weighs against deference in this case.

First, as the Supreme Court has made clear, when a military policy is based on a suspect classification, courts must apply the same heightened equal protection standard applied in non-military settings. There is no military exception to equal protection. In *Rostker v. Goldberg*, the Supreme Court expressly rejected the argument that it should apply a "different equal protection test" in "military context[s]." 453 U.S. 57, 69–71 (1981); *see also Steffan v. Perry*, 41 F.3d 677,

689 n.9 (D.C. Cir. 1994) (explaining that even in military cases, "[c]lassifications based on race or religion, of course, would trigger strict scrutiny"). Similarly, in *Frontiero*, the Supreme Court applied heightened scrutiny to strike down a federal law treating military wives, but not husbands, as dependents. 411 U.S. at 688–91. In no case has the Court held that deference to military judgment warrants lowering the degree of scrutiny that courts apply to disparate treatment based on a particular classification in a civilian setting.

Instead, the Supreme Court has explained that courts should generally defer when it comes to the military's assessments about the importance of specific *military interests*—particularly those interests that might not be important or even legitimate in civilian settings. For example, in *Goldman v. Weinberger*, the Supreme Court credited the importance of the military's asserted interest in the need for "uniformity"—a consideration with far less relevance to civilian workplaces. 475 U.S. 503, 507, 510 (1986). Similarly, in *Rostker*, the Court recognized the "important governmental interest" in "raising and supporting armies." 453 U.S. at 70; *see also Sanchez ex rel. D.R.-S. v. U.S.*, 671 F.3d 86, 103 (1st Cir. 2012) (holding that, in appropriate circumstances, courts give deference to "the professional judgment of military authorities" on "military interest[s]"—there, as to questions related to military training exercises).

But, even where it may apply, deference to military judgment does not convert heightened scrutiny into rational-basis review. In *Rostker*, for instance, the Supreme Court did not simply rubberstamp the military's men-only draft registration policy. To the contrary, the Court upheld a statute exempting women from draft registration only because at the time Congress decided to retain the exemption, women were not eligible to serve in combat positions—an underlying exclusion that was not challenged in that litigation. 453 U.S. at 77. The Supreme Court applied the same level of heightened scrutiny that governs sex-based classifications in civilian settings,

finding that "[t]he exemption of women from registration [was] . . . closely related to Congress' purpose in authorizing registration" for the drafting of combat troops. *Id*. at 79.

Here, the Ban applies to "transgender persons," a classification that warrants heightened scrutiny both on its own terms and as a type of sex discrimination. Accordingly, heightened scrutiny applies, notwithstanding the military context. *See*, *e.g*., *Stone*, 280 F. Supp. 3d at 768 (applying heightened scrutiny to earlier version of the ban because "transgender individuals appear to satisfy the criteria of at least a quasi-suspect classification" and declining to simply "defer[]" to "the military's policymaking process"); *Doe 1*, 275 F. Supp. 3d at 210 (rejecting government's deference claim and applying heightened scrutiny to prior iteration of ban because "the Court is not powerless to assess whether the constitutional rights of America's service members have been violated").

Second, deference is due only where the military policy is based upon the "considered professional judgment" of "appropriate military officials," *Goldman*, 475 U.S. at 509–10, which Plaintiff disputes here. As other courts hearing challenges to the Ban have found, Defendants have not established sufficient facts on comparable records to show that the Ban was the product of such independent professional judgment. For example, in *Doe 2 v*. *Shanahan,* Judge Wilkins identified the nature of the process leading to the Ban as one of the key unresolved issues that it was premature to address on the existing record in that case, without further development at the trial level. *See* 917 F.3d 694, 704 (D.C. Cir. 2019) (concurring) (also explaining that determining "the correct standard of review" requires a "careful assessment of a number of factors, including . . . whether Congress or the Executive used considered professional judgment" and, relatedly, "whether the policy was motivated by animus").

Here, for the reasons explained, *see supra* at 28-30, Plaintiff is likely to prevail on her claim that the Ban was not the product of independent military judgment; rather, it was constrained by the President's abrupt order to ban transgender people from military service. The record shows that in June 2016 the military concluded, based on a comprehensive analysis of this issue, that there is no military reason to exclude transgender people from military service. Exs. 3-5. Little more than a year later, DoD leaders reversed that decision under circumstances suggesting that the process was constrained by the President's order to reverse the open service policy, rather than reflecting independent military judgment.[7] No such facts were present or even alleged in *Rostker* or *Goldman*, or, any other case in which military deference was found to apply.

Third, Plaintiff is also likely to succeed in her claim that the Ban warrants little or no deference because it relies heavily on rejecting the medical consensus regarding the mental health of transgender people and the efficacy of gender transition. Under settled law, where a military policy does not implicate issues unique to the military, deference is not appropriate. *See Frontiero*, 411 U.S. at 678–79 (giving no deference and striking down facially discriminatory military decree); *Goldman v. Sec'y of Def.*, 734 F.2d 1531, 1537 (D.C. Cir. 1984) (observing that *Frontiero* "extend[ed] no special deference to statutes providing benefits to members of the uniformed services that never purported to be a congressional judgment on a uniquely military matter"); *see also Dunlap v. Tenn.*, 514 F.2d 130, 133 (6th Cir. 1975) ("[D]ecisions which are made for non-military reasons involving no application of military expertise may well be outside the boundaries

[7] The highly unusual process that led to the Ban's adoption underscores the absence of any independent military judgment. For instance, the Panel that Secretary Mattis convened did not include any medical experts, nor did it receive input from many other common military constituencies whose input is ordinarily sought on important personnel policy questions. Brown Decl. ¶ 31; Carson Decl. ¶ 80, 90; Mabus Decl. ¶¶ 55-79 (contrasting this process with the military's typical approach).

of the doctrine of nonreviewability."), *rev'd on other grounds*, 426 U.S. 312 (1975); *Service Women's Action Network v. Mattis*, 320 F. Supp. 3d 1082, 1097 (N.D. Cal. 2018) (denying motion to dismiss on nonjusticiability grounds where military failed to show any special military expertise involved in case concerning gender integration).

Here, the government's defense of the Ban is largely premised on claims about medical issues about which the military has no specialized expertise. *See supra* at 19–21; Carson Decl. ¶ 42, 52–55, 59–64, 90; Mabus Decl. ¶ 87. There is no more basis for the military to independently reject the medical and scientific consensus on the nature of gender dysphoria and the efficacy of its treatment than for it to cast aside scientific consensus about cancer, heart disease, or any other less politically charged medical condition.

Finally, Plaintiff is likely to succeed on the merits of her claim because, even if the military's assertions about transgender people warranted deference, the required fit between the Ban and its asserted justifications is entirely lacking. As explained, the government cannot demonstrate any rational connection between the Ban and concerns about unit readiness, unit cohesion, or costs. *See supra* at 18–30.

In sum, the Ban is not entitled to any special deference, but, even if it were, Plaintiff is likely to succeed in her claim that the Ban is unconstitutional.

II. LIEUTENANT DOE WILL BE IRREPARABLY INJURED IN THE ABSENCE OF A PRELIMINARY INJUNCTION.

Irreparable harm exists "[w]here a plaintiff stands to suffer a substantial injury that cannot adequately be compensated by an end-of-the-case award of money damages." *Rosario-Urdaz v. Rivera-Hernandez*, 350 F.3d 219, 222 (1st Cir. 2003) (citing *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996)). The First Circuit has stressed that "the measure of irreparable harm is not a rigid one"; rather, it applies "as a sliding scale, working in conjunction

with a moving party's likelihood of success on the merits." *Vaqueria Tres Monjitas*, *Inc*. *v*. *Irizarry*, 587 F.3d 464, 485 (1st Cir. 2009) (collecting cases). District courts have "broad discretion to evaluate the irreparability of alleged harm." *Id*. (quoting *K-Mart Corp*. *v*. *Oriental Plaza*, *Inc*., 875 F.3d 907, 915 (1st Cir. 1989)). Here, the record confirms that, unless the Court issues a preliminary injunction prohibiting Defendants from enforcing the Ban against Lieutenant Doe, she will suffer irreparable harm in several independent, but overlapping, ways.

First, the ongoing violation of Lieutenant Doe's constitutional rights is itself irreparable harm. *See Fireside Nissan*, *Inc*. *v*. *Fanning*, 30 F.3d 206, 211 (1st Cir. 1994); *Airbnb*, *Inc*. *v*. *City of Bos*., 386 F. Supp. 3d 113, 125 (D. Mass. 2019) (finding irreparable harm based on application of an "unconstitutional" regulation); *Hannon v*. *Allen*, 241 F. Supp. 2d 71, 78 (D. Mass. 2003) ("Even the temporary loss of a constitutional right may be a form of irreparable harm.") (citing *Public Serv*. *Co*. *v*. *Town of W*. *Newbury*, 835 F.2d 380, 382 (1st Cir. 1987)).

Second, the Ban arbitrarily bars Lieutenant Doe from receiving medically needed care. Denial of medically necessary care is harmful and dangerous. Brown Decl. ¶ 34. It unquestionably constitutes irreparable injury. *United Steelworkers*, *AFL-CIO v*. *Textron*, *Inc*., 836 F.2d 6, 8 (1st Cir. 1987) (Breyer, J.) (holding that loss of healthcare benefits and deprivation of medical care constituted irreparable harm) (collecting cases); *Mass*. *Ass'n of Older Ams*. *v*. *Sharp*, 700 F.2d 749, 753 (1st Cir. 1983) ("Termination of benefits that causes individuals to forego . . . necessary medical care is clearly irreparable injury."); *Estate of Aitken v*. *Shalala*, 986 F. Supp. 57, 65 (D. Mass. 1997) (same) ("There is no practical difference in predicament between a patient who is denied . . . all possible treatments and one who . . . only . . . the specific treatment she needs.").

Third, the immediate threat of discharge and its associated negative consequences for Lieutenant Doe and her family constitute irreparable injury. Lieutenant Doe is the sole source of

financial support for her family, including her spouse and two young children. Doe Decl. ¶ 19. If discharged from the Navy, she and her family will forfeit their only source of income, along with medical, educational, and other benefits. *McVeigh v. Cohen*, 983 F. Supp. 215, 221 (D.D.C. 1998) ("Without this Court's immediate intervention, the Plaintiff will lose his job, income, pension, health and life insurance, and all the other benefits attendant with being a Naval officer."). Those serious consequences will irreparably injure Plaintiff and her family. If the Navy discharges Lieutenant Doe while this case is pending, that damage to her career can never be undone.

Fourth, Lieutenant Doe faces other forms of irreparable harm, including the serious stigma that the Ban imposes. By singling her out for unequal treatment, Defendants inflict immediate and lasting harm on Lieutenant Doe by labeling her unfit because she is transgender, without any connection to her qualifications or abilities to serve. Doe Decl. ¶¶ 9–11, 17–23. As other courts have recognized, this sort of stigmatization and arbitrariness inflicts irreparable harm that cannot be undone. *See*, *e.g.*, *Roe v. Dep't of Def.*, 947 F.3d 207, 229 (4th Cir. 2020) (holding that plaintiffs would suffer irreparable harm if removed from military service due to being HIV positive because it would be a "particularly heinous brand of discharge" based on "outmoded policies" that "bear[] no relationship to their ability to perform," and because of the "stigma facing those living with HIV"); *Elzie v. Aspin*, 841 F. Supp. 439, 443 (D.D.C. 1993) (holding that "the stigma of being removed from active duty . . . and labeled as unfit for service solely on the basis of [one's] sexual orientation" gave rise to irreparable harm; "Plaintiff did not become any less of a Marine on the day he announced his sexual orientation."). *Cf. Axelrod v. Phillips Acad., Andover*, 36 F. Supp. 2d 46, 50 (D. Mass. 1999) (school officials' dismissal of student created irreparable harm, including the "stigma of expulsion" and the inability to "graduate with his class").

The fear of discharge and the associated stigma is particularly acute for Lieutenant Doe, for whom her career is not just a job, but a calling to service that is part of her identity as a Navy officer and an American. Doe Decl. ¶ 23. In this way, the potential loss of Plaintiff's career is more than the loss of an income and benefits; it would profoundly damage her sense of herself, and a reputation of service that Lieutenant Doe has spent a decade building, and which she hopes to continue cultivating for many years to come. *Id*. ¶¶ 1, 21, 23. *Cf*. *Bonds v*. *Heyman*, 950 F. Supp. 1202, 1215 (D.D.C. 1997) (concluding that a Smithsonian employee's layoff would inflict irreparable emotional and mental distress given "how much of her life is tied to her career").

Notably, every district court that enjoined the transgender ban set out in the August 2017 Directive easily concluded that the plaintiffs in those cases faced irreparable harm in the absence of immediate relief.[8] Those Courts enjoined the first version of the ban, which differs at least in form from the Ban at issue here. Unlike Lieutenant Doe, all of the plaintiffs in those cases who are currently serving openly have the benefit of the grandfather clause. Those plaintiffs are not currently at risk of discharge; Lieutenant Doe is.

[8] *See Doe*, 275 F. Supp. 3d at 216 ("The impending ban brands and stigmatizes Plaintiffs as less capable of serving in the military, reduces their stature among their peers and officers, stunts the growth of their careers, and threatens to derail their chosen calling or access to unique educational opportunities."), *injunction vacated on other grounds*, 755 F. App'x 19 (D.C. Cir. 2019); *Stone*, 280 F. Supp. 3d at 769 ("Plaintiffs' injuries as described above are the result of alleged violations of their rights to equal protection of the laws under the Fifth Amendment. In the context of an alleged violation of constitutional rights, a plaintiff's claimed irreparable harm is inseparably linked to the likelihood of success on the merits."), *injunction stayed on other grounds*, 2019 WL 5697228 (D. Md. Mar. 7, 2019); *Karnoski* 2017 WL 6311305, at *9 (concluding that plaintiffs demonstrated irreparable harm in the form of "denial of career opportunities and transition-related medical care, stigmatic injury, and impairment of self-expression," among other ways), *injunction stayed on other grounds*, 926 F.3d 1180 (9th Cir. 2019); *Stockman*, 2017 WL 9732572, at *15 ("Plaintiffs allege, and the Court agrees, the ban sends a damaging public message that transgender people are not fit to serve in the military."), *injunction stayed on other grounds*, 2019 WL 6125075 (9th Cir. Aug. 26, 2019).

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVOR A PRELIMINARY INJUNCTION.

A party seeking a preliminary injunction must demonstrate both that "that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. The balance-of-equities factor directs the Court to "balance the competing claims of injury and . . . consider the effect on each party of the granting or withholding of the requested relief." *Id*. at 24; *see also Nken*, 556 U.S. at 435 (when the government is the party opposing the injunction, the balance of equities and public interest factors merge); *Devitri v. Cronen*, 289 F. Supp. 3d 287, 297 (D. Mass. 2018) (same). These factors are easily satisfied here. There are *no* equities or public interest in prohibiting Plaintiff from continuing to serve merely because she is transgender.

"[E]nforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013); *accord Siembra Finca Carmen, LLC v. Secretary of Dep't of Agriculture P.R.*, — F. Supp. 3d —, 2020 WL 557208, at *11 (D.P.R. Feb. 4. 2020) ("Just as a government has no interest in enforcing an unconstitutional law, the public interest is harmed by the enforcement of laws repugnant to the United States Constitution"); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (en banc) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) ("Surely, upholding constitutional rights serves the public interest."). Because Lieutenant Doe is likely to succeed on the merits of her constitutional claims, the public interest favors an injunction on this basis alone.

In addition, in the absence of injunctive relief, Lieutenant Doe will suffer other irreparable harms, including the loss of her career and the associated income and medical benefits that support Lieutenant Doe and her family and the denial of medically necessary care. *See supra* at 32-35.

In contrast, permitting Lieutenant Doe to continue to serve will not harm Defendants in any way. There is no plausible argument that enjoining the Navy from enforcing the Ban against Lieutenant Doe during the pendency of this case will have any negative effect on military readiness or lethality. In fact, as explained above, the evidence shows the opposite. *See supra* at 21-26.

The Navy has already invested substantial public funds in Lieutenant Doe's training and education. Doe Decl. ¶ 2. That investment will be wasted if Lieutenant Doe is discharged from the Navy for reasons unrelated to her ability to serve with distinction and honor, and the government will incur the significant expense of training a replacement. By adopting the grandfather policy, DoD has already determined that retaining qualified transgender service members benefits the military and that those benefits *outweigh the risks identified in this report*." Ex. 2 at 43 (emphasis added); *see also id*. at 6 (same). If Lieutenant Doe had been diagnosed with gender dysphoria two months earlier, she would be covered under the grandfather clause. It is simply not plausible for Defendants to argue that there is any credible risk to the military as a result of her continued service.

A preliminary injunction would merely require the Navy to follow rules and procedures that have already been implemented, about which extensive training has already taken place, and that it is currently applying to other openly transgender Navy personnel. Allowing one more dedicated officer to serve on the same terms will cost the Navy nothing but will mean everything to Lieutenant Doe and her family.

CONCLUSION

For all of these reasons, Plaintiff respectfully requests that the Court grant this Motion and enter an order preliminarily enjoining Defendants from enforcing the Ban against Lieutenant Doe.

Dated: March 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daniel J. Ball, hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants identified on the Notice of Electronic Filing and that, pursuant to Fed. R. Civ. P. 5(b), copies of this document will be hand-delivered to the United States Attorney for the District of Massachusetts, and be served upon the Office of the Secretary of Defense, the Office of the Secretary of the Navy, and the United States Attorney General on March 17, 2020 or as soon thereafter as feasible.

Dated: March 17, 2020

/s/ Daniel J. Ball
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