The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al, Plaintiffs, v. DONALD TRUMP, et al, Defendants.	Case No: 2:17-cv-1297-MJP **WASHINGTON'S MOTION FOR SUMMARY JUDGMENT** Noted for February 16, 2018 ORAL ARGUMENT REQUESTED
STATE OF WASHINGTON, Intervenor-Plaintiff, v. DONALD TRUMP, et al, Intervenor-Defendants.	

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I. INTRODUCTION

In the six months since President Trump issued a string of surprise tweets announcing the Transgender Military Service Ban ("Ban"), the federal government and its officers ("Defendants") have failed to produce any evidence that justified the President's sweeping, facially discriminatory announcement. Since then, this Court and others have enjoined the Ban, concluding that it is unconstitutional and wholly at odds with the very military goals it claims to advance. Defendants have appealed none of those injunctions, apparently hoping that new reports or analyses might someday backfill the missing evidence. But the die was cast with the President's Twitter announcement.

The State of Washington ("Washington") now moves for summary judgment on its two constitutional claims. Defendants' own public statements and evidence demonstrate that the Ban violates equal protection because the classification based on transgender status bears no relationship – let alone a substantial relationship – to any important governmental objective. Likewise, the Ban violates substantive due process because Defendants offer no explanation why a categorical prohibition based on gender identity, rather than an assessment of each soldier or recruit on his or her merits, is necessary to further the military's goals of readiness, unit cohesion, or cost control.

From the start, the Ban was an indefensible policy in search of a justification. There was no evidence to support the President's policy at the time he announced it, and no amount of post-hoc maneuvering can change that. The Court should credit the government's own multi-year studies and conclusions showing that a ban on transgender service members and recruits actually harms the military, and grant summary judgment in favor of the State.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

The following undisputed facts are taken from this Court's prior rulings and Defendants' evidence, briefing, and public statements.

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A. Defendants Implement the Transgender Military Service Ban

The United States Military has long maintained a facially discriminatory policy barring transgender individuals from openly serving and acceding into military service. ECF 34-1; ECF 69 at 4.

In July 2015, former Secretary of Defense Ashton Carter created a Working Group "to study . . . the policy and readiness implications of welcoming transgender persons to serve openly." ECF 48-1. The Working Group considered medical, military, and personnel experts' advice, and Department of Defense ("DoD") commissioned a civilian research group, the RAND Corporation, to assess how open service by transgender individuals would impact the military's effectiveness and readiness. ECF 103 at 4 (citing ECF 30 ¶ 161; ECF 46 ¶ 10); ECF 46-2; ECF 34-1 at 5-6. The RAND study "concluded that allowing transgender individuals to serve would not negatively impact military effectiveness, readiness, or unit cohesion, and that the costs of providing transgender service members with transition-related healthcare would be 'exceedingly small' compared with DoD's overall healthcare expenditures." ECF 103 at 4; ECF 46-2 at 90-93.

After reviewing the recommendations of the Working Group and the RAND Corporation's findings, on June 30, 2016, Secretary Carter issued a directive allowing transgender individuals currently serving in the military to do so openly. ECF 48-3. Secretary Carter also directed the military to allow transgender individuals to accede into the military beginning July 1, 2017. *Id.* On June 30, 2017, Secretary of Defense James Mattis extended the date for accepting transgender recruits to January 1, 2018. ECF 34-3.

On July 26, 2017, President Trump reversed this policy. ECF 103 at 3. In a series of statements on Twitter, the President announced that he would no longer allow "transgender individuals to serve in any capacity in the U.S. military." *Id.* (citing ECF 34-6).

One month later, on August 25, 2017, President Trump issued a Presidential Memorandum directing the Secretaries of Defense and Homeland Security "to 'return' to the

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military's policy authorizing the discharge of openly transgender individuals (the 'Retention Directive'); to prohibit the accession (bringing into service) of openly transgender individuals (the 'Accession Directive'); and to prohibit the funding of certain surgical procedures for transgender service members (the 'Medical Care Directive')." ECF 103 at 3; ECF 34-7 §§ 1(b), 2(a)-(b). The Accession Directive was scheduled to take effect on January 1, 2018, and the Retention and Medical Care Directives were ordered to take effect on March 23, 2018. *Id*. § 3. The President directed the Secretary of Defense to develop a plan for implementing the directive, which is to remain in place indefinitely. *Id*. §§ 2-3.

President Trump's Memorandum stated his belief that the Ban is necessary because, "[i]n [his] judgment, the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." ECF 34-7 § 1(a). However, the Memorandum cited no study, report, or other evidence to support the President's assertion.

Pursuant to the President's instructions, on September 14, 2017, Secretary Mattis issued Interim Guidance regarding military service by transgender individuals. ECF 69-1. The Interim Guidance confirms that Secretary Mattis will "implement the policy and directives in the Presidential Memorandum," including reverting the military back to its longstanding accession policy "which generally prohibit[s] the accession of transgender individuals into the Military Services[.]" *Id*. at 2-3. The Interim Guidance, pending the issuance of the Secretary's report and plan, due February 21, 2018, directs military leadership to take "no action" to involuntarily separate or discharge an active military member solely on the basis that they are transgender. *Id*. The Interim Guidance further confirms that "no new sex reassignment surgical procedures for military personnel will be permitted after March 22, 2018." *Id.* Other than the Presidential Memorandum, the Interim Guidance cited no basis for the changes in military policy.

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B. Washington Sues to Vindicate Its Interests

Three days after President Trump issued the Presidential Memorandum, the Karnoski plaintiffs filed this lawsuit. ECF 1. Washington moved to intervene, alleging the Ban violates the equal protection and substantive due process guarantees of the Fifth Amendment, causing harm to Washington's unique state interests. ECF 55; ECF 104 ¶¶.

The Court granted Washington's motion, explaining, "Washington is home to approximately 60,000 active, reserve, and National Guard members, and the military is the second largest public employer in the state." ECF 101 at 5. This includes the Washington National Guard, which is comprised of military service members who assist with emergency preparedness, disaster recovery planning, and who are deployed to protect Washington's natural resources from wildfires, landslides, flooding, and earthquakes. *Id.*; ECF 103 at 11. These Guard members are dedicated to safeguarding lives, property, and the economy of Washington State. *Id.*

The Governor has the authority to deploy the Washington National Guard for intrastate emergencies. Wash. Rev. Code §§ 38.04.010; 38.04.040. When the Governor deploys the Guard for state service ("State Active Duty"), Guard members fall under Washington's command. During State Active Duty, Washington pays Guard members' wages and provides disability and life insurance benefits for injuries they may sustain while serving their state. Wash. Rev. Code § 38.24.050; ECF 101 at 5; ECF 103 at 11-12. Further, the Governor has an obligation to ensure that the National Guard conforms to all federal and state laws and regulations, including the state and federal constitutions. Wash. Rev. Code § 38.08.010. However, recruitment for the Washington National Guard is subject to DoD policies governing accession into military service, including the Accession Directive. 10 U.S.C. § 12201(b).

Washington is also home to approximately 32,850 transgender adults. ECF 103 at 11. Washington state law protects its residents against sex, gender, and gender identity

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discrimination, including in employment. *See* Wash. Rev. Code §§ 49.60.030; 49.60.040(25)-(26); 49.60.180.

C. The Ban Is Enjoined by this Court and Others

The Karnoski plaintiffs moved for a preliminary injunction, arguing that the Ban violates their constitutional rights to equal protection, due process, and free speech. ECF 32. Washington joined the motion. ECF 97. On December 11, 2017, the Court enjoined Defendants "from taking any action relative to transgender individuals that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement." ECF 103 at 23. The Court concluded that the plaintiffs established a likelihood of success on their equal protection, substantive due process, and First Amendment claims. *Id.* at 15-20. The Court further concluded that the remaining injunctive factors – irreparable harm, the balance of equities, and the public interest – weighed in favor of preliminary relief. *Id*. at 20-22.

With respect to Washington specifically, the Court ruled that Washington has standing to challenge the Ban's harms to its ability to recruit and retain members of the Washington National Guard, protect its territory and natural resources, maintain and enforce its anti-discrimination laws, protect its residents from discrimination, and ensure that employment opportunities in the state are not unlawfully restricted based on gender identity. ECF 103 at 11-12. In granting preliminary injunctive relief, the Court determined that the Ban irreparably harms Washington's sovereign and quasi-sovereign interests by forcing it "to expend its scarce resources to support a discriminatory policy when it provides funding or deploys the National Guard," and by threatening "its ability to recruit and retain service personnel for the Washington National Guard." ECF 103 at 21.

On December 15, 2017, Defendants sought clarification and a partial stay of the injunction against the Accession Directive, ECF 106, and simultaneously appealed the preliminary injunction, ECF 105. Defendants then filed an Emergency Motion for Administrative Stay and Motion for Stay Pending Appeal before the Ninth Circuit. *Karnoski v.*

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Trump, No. 17-36009 (9th Cir. Dec. 15, 2017), ECF 3-1. After expedited briefing, but before their emergency motion or appeal was heard, Defendants withdrew both. Notice of Withdrawal of Emergency Stay Motion, *Karnoski*, No. 17-36009 (9th Cir. Dec. 29, 2017), ECF 20; Notice of Voluntary Dismissal of Appeal, *Karnoski*, No. 17-36009 (9th Cir. Dec. 29, 2017), ECF 21. This Court denied Defendants' motion for clarification and partial stay. ECF 121.

Three other district courts also issued injunctions against the Ban. On October 30, 2017, the District Court for the District of Columbia issued an order barring Defendants from implementing the Accession and Retention Directives. *Doe 1 v. Trump*, No. 17-1597, 2017 WL 4873042, at *33 (D.D.C. Oct. 30, 2017). The District Courts of Maryland and Central District of California enjoined the Accession, Retention, and Medical Care Directives. *Stone v. Trump*, No. MJG-17-2459, 2017 WL 5589122, at *16 (D. Md. Nov. 21, 2017); Order Denying Defendants' Motion to Dismiss and Granting Plaintiffs' Motion for Preliminary Injunction at 21, *Stockman v. Trump*, No. 5:17-cv-1799-JGB (C.D. Cal. Dec. 22, 2017), ECF 79. In three of these cases, including this one, Defendants repeated the same pattern of filing emergency motions and appeals. All were either denied or withdrawn. Order, *Doe 1*, No. 17-cv-01597-CKK (D.D.C. Dec. 11, 2017), ECF 75; *Doe 1 v. Trump*, No. 17-5267, 2017 WL 6553389, at *2 (D.C. Cir. Dec. 22, 2017); Memorandum & Order RE: Clarification, *Stone*, No. MJG-17-2459 (D. Md. Dec. 28, 2017), ECF 101; Order, *Stone v. Trump*, No. 17-2398 (4th Cir. Dec. 31, 2017), ECF 31.

In the midst of this litigation, on December 8, 2017, DoD issued Policy Memorandum 2-5, titled "Transgender Applicant Processing." ECF 120-1. The policy was DoD's directive and guide for acceding transgender individuals into the military starting January 1, 2018. *Id.* Policy Memorandum 2-5 sets forth specific guidance regarding the processing of transgender applicants to all personnel and staff at USMEPCOM, the command unit whose mission is to determine "the physical, mental and moral qualifications of every new member of the armed services."[1] Policy

[1] U.S. Military Entrance Processing Command, "Freedom's Front Door," *available at* http://www.mepcom.army.mil/Command/.

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Memorandum 2-5 provides the standard for processing transgender applicants and evaluating their applications, including verifying identity and fitness to serve. ECF 102-1. Among other things, the policy instructs USMEPCOM personnel to indicate an applicant's preferred gender on official forms; verify an applicant's preferred gender using a birth certificate, court order, or U.S. passport; address applicants by their preferred gender name and pronoun; allow the applicant or medical provider to request a chaperone at any time; and ensure "the gender of the chaperone . . . be the same as the applicant's preferred gender." *Id.* at 4. On January 1, 2018, for the first time, openly transgender individuals were allowed to access into the United States Military.

III. ARGUMENT

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56(a) provides that summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A trial court may only consider admissible evidence in ruling on a motion for summary judgment. *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002) (citing Fed. R. Civ. P. 56(e)); *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988)). "The mere existence of a scintilla of evidence in support of the [opponent's] position will be insufficient [to defeat summary judgment]; there must be evidence on which the [trier of fact] could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Here, to avoid summary judgment, Defendants must submit evidence to support their claimed justifications for the Ban, because conclusory allegations without factual support are insufficient to defeat summary judgment. *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) (citing *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993)). As there are no material disputed facts about President Trump's implementation of the Ban, summary judgment is appropriate at this early stage of litigation.

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B. The Ban Violates Equal Protection

The equal protection guarantee of the Fifth Amendment prohibits federal government action "denying to any person the equal protection of the laws." *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

Following longstanding equal protection jurisprudence, this Court previously concluded that the Ban "distinguishes on the basis of transgender status, a quasi-suspect classification, and is therefore subject to intermediate scrutiny." ECF 103 at 15 (citing *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001)). In arriving at this conclusion, the Court followed clear precedent that gender discrimination, including discrimination based on a "socially-constructed gender expectation," is a form of sex discrimination. *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989)). *See also Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982) (holding unconstitutional statute whose "objective itself reflects archaic and stereotypic notions"); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (sex classifications may not serve as "artificial constraints on an individual's opportunity"); *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1048 (7th Cir. 2017) (holding that sex discrimination includes discrimination against a transgender person for failure to "conform to the sex-based stereotypes of the sex that he or she was assigned at birth"); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (holding that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination").

To survive intermediate scrutiny, Defendants must show an "exceedingly persuasive justification" for the Ban by proving that (1) it serves "important governmental objectives," and (2) "the discriminatory means employed are substantially related to the achievement of those objectives." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (quoting *Virginia*, 518 U.S. at 533). "[T]he classification must substantially serve an important governmental interest *today*, for 'in interpreting the equal protection guarantee, we have recognized that new insights and societal understandings can reveal unjustified inequality that once passed unnoticed and

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unchallenged.'" *Id.* at 1690 (internal brackets and punctuation omitted) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)). In applying this straightforward test, "[c]are must be taken in ascertaining whether the . . . [government's] objective itself reflects archaic and stereotypic notions." *Hogan*, 458 U.S. at 724.

1. Military readiness and cost control can be important governmental interests, but must be established by evidence

Defendants claim that the Ban is necessary to ensure that open military service by transgender individuals does not "hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." ECF 56-1. However, while courts have consistently held that these interests are important, Defendants must provide more than bald assertions that these interests are at risk. *See Witt v. Dep't of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) (accepting that "unit cohesion" may be an important governmental interest, but remanding for determination whether that interest was actually implicated by the facts); *Watkins v. U.S. Army*, 875 F.2d 699, 709 (9th Cir. 1989) (rejecting military's attempt to bar an exemplary gay soldier from reenlistment where "no evidence" supported military's concerns of a "degrading effect upon unit performance, morale or discipline . . . and job performance"). Indeed, assertions of a governmental interest made without any citation to an evidentiary basis that the interest is threatened may lead to the opposite conclusion – that the interest is not, in fact, threatened. *See e.g.*, *Virginia*, 518 U.S. at 535-36 (affirming that "precedent instructs that 'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded"); *Stone*, 2017 WL 5589122, at *15 (rejecting the asserted interests for the Ban because "President Trump's tweets did not emerge from a policy review, nor did the Presidential Memorandum identify any policymaking process or evidence" that supported it).

Defendants have simply presented no evidence whatsoever that military readiness and unit cohesion are *actually* put at risk by open service by transgender service members. The Ban

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fails the first prong of intermediate scrutiny, and the Court should grant summary judgment to Washington on its equal protection claim.

2. There is no substantial relationship between the Ban and the asserted governmental interests

Even apart from whether the Ban furthers important governmental interests, Defendants must show a substantial relationship between the Ban and their military goals. *Morales-Santana*, 137 S. Ct. at 1690. Defendants fall dramatically short. The government's own evidence demonstrates that the Ban undermines – not furthers – military readiness and unit cohesion. And, as a matter of law, there can be no substantial relationship between the Ban and the asserted governmental interests when all of Defendants' justifications were developed post-hoc.

a. The Ban undermines the asserted governmental interests in readiness, unit cohesion, and cost control

A policy fails the second prong of intermediate scrutiny where, as here, the challenged policy undermines the important governmental interest purportedly served by the discriminatory policy. *See Morales-Santana*, 137 S. Ct. at 1697-98; *Hogan*, 458 U.S. at 729-30. Recently, the Supreme Court addressed a sex-based equal protection challenge in *Morales-Santana*. 137 S. Ct. 1678. Morales-Santana challenged a longstanding rule that transmitted U.S. citizenship differently to children of unwed citizens depending on the sex of the U.S.-citizen parent. *Id.* at 1682. The government argued that its discriminatory policy was necessary to forward the important governmental interest of ensuring that children are not born "stateless." *Id.* at 1696. However, researchers, including a multi-year research project performed by the United Nations High Commissioner for Refugees, found that policies like the one at issue were a major *cause* of children being born stateless. *Id.* (noting that researchers determined that "discrimination against either mothers or fathers in citizenship and nationality laws is a major cause of statelessness"). The Court held that the government had failed to subject its assumptions to a "reality check," and struck down the gender classification as insufficiently tailored to the governmental objective. *Id.* at 1697-98.

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Similarly, the Supreme Court held that a university's policy of excluding males from nursing school violated equal protection when the sex-based policy perpetuated gender stereotypes, rather than furthered the university's goal of rectifying past discrimination against women. *Hogan*, 458 U.S. at 729-30. In arriving at its holding, the Court noted that although the university recited the "benign, compensatory purpose" of reducing gender-based stereotypes, its policy of limiting the nursing program to women actually reinforced the stereotypes that only women work as nurses. *Id.* (noting that "[r]ather than compensate for discriminatory barriers faced by women, [the university's] policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as exclusively a woman's job").

Applying these settled principles, this Court correctly rejected Defendants' assumption that barring transgender people from military service somehow furthers government's interests in readiness or cost control. ECF 103 at 16. In granting preliminary relief, the Court cited the government's own evidence that banning transgender individuals from service affirmatively harms military budgets and readiness by causing "loss of qualified personnel, erosion of unit cohesion, and erosion of trust in command." *Id.* (citing ECF 46 ¶¶ 25-26; ECF 48 ¶¶ 45-47); *see also* ECF 46-2 at 39-47 (RAND Corporation report finding "no evidence" that allowing transgender individuals to serve in the military would undermine lethality, unit cohesion, effectiveness, or readiness and noting that disallowing transgender individuals to serve would cause the military to lose skilled and qualified personnel).

Other courts agree. *See Doe 1*, 2017 WL 4873042, at *30 ("[A]ll of the reasons proffered by the President for excluding transgender individuals from the military [are] not merely unsupported, but [are] actually contradicted by the studies, conclusions, and judgment of the military itself."); *id.* at *33 ("On the record before the Court, there is absolutely no support for the claim that the ongoing service of transgender people would have *any* negative effect[] on the military at all. In fact, there is considerable evidence that it is the *discharge* and *banning* of such individuals that would have such effects."); *Stone*, 2017 WL 5589122, at *16 (same); Order

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Denying Defendants' Motion to Dismiss and Granting Plaintiffs' Motion for Preliminary Injunction at 20, *Stockman*, No. 5:17-cv-1799-JGB (C.D. Cal. Dec. 22, 2017), ECF 79 (same).

As the Ban undercuts the very governmental interests it purports to promote, it cannot be deemed substantially related to those same interests. Accordingly, the Ban fails intermediate scrutiny.

b. A promise of future justification is insufficient to satisfy intermediate scrutiny

In the absence of any evidentiary support, Defendants' primary argument in support of the Ban appears to be a promise that Defendants will issue a "final" policy excluding transgender individuals from serving in the military, and justifications will accompany that forthcoming policy. *See* ECF 69 at 20-21 (noting that "[t]he Court does not have before it the final policy [or] justifications for that final policy"). As a matter of law, post-hoc justifications are insufficient to satisfy intermediate scrutiny, and Defendants' concession that they plan to rely on post-hoc justifications dooms any defense to Washington's equal protection claim.

The Supreme Court has consistently held that post-hoc rationales are legally insufficient to inoculate sex-based classifications. "It will not do to 'hypothesiz[e] or inven[t]' governmental purposes for gender classifications '*post hoc* in response to litigation.'" *Morales-Santana*, 137 S. Ct. at 1696-97 (rejecting post-hoc claim of governmental interest that is not supported by the record) (quoting *Virginia*, 518 U.S. at 533, 535-36). Instead, the Court has consistently required government entities to prove a "genuine" need for a sex-based classification, and has been clear that post-hoc justifications do not qualify. *Virginia*, 518 U.S. at 532-33.

Here, Defendants' own pleadings confirm that there is no current justification for the Ban, but Defendants assure the Court that DoD is working to "complete its study and implement its final policy." ECF 106 at 6; *see also* ECF 69 at 40 (conceding that the "final policy" remains to be "studied, developed and implemented"); *id.* at 37 n.12 (conceding that a review is only "now underway"). This process is exactly backwards. The Court should evaluate the Ban on the

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evidence presented at the time it was announced, which is no evidence at all. The Ban is unrelated to any government objective, and fails intermediate scrutiny.[2]

c. "Military deference" is no substitute for constitutional tailoring

While courts owe deference to well-reasoned policies or practices developed by military experts or the Legislature, neither is "free to disregard the Constitution when [they] act in the area of military affairs." *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). In reviewing military action for constitutional compliance, courts may accord deference where the challenged restriction arises from military expertise or developed research. *Id*. Here, by contrast, the Defendants' evidence demonstrates that President Trump initiated the Ban without performing research or consulting with military professionals. This Court owes no deference to his decision.

In *Rostker*, the Court assessed the constitutionality of the provision of the Military Selective Service Act exempting women from Selective Service registration requirements. 453 U.S. at 59. While acknowledging the deference applicable to "legislative and executive judgments in the area of military affairs," the Court was quick to reaffirm that the Due Process Clause provides protections in the military context. *Id.* at 66-67. The Court upheld the Selective Service exemption for women after reviewing the congressional record and decision making process, and concluding that it was not the result of "reflexive[]" or "unthinking[]" bias. *Id.* at 72. Instead, it was appropriate to defer to Congress's "careful[]" evaluation of the evidence, which was "extensively considered" in "hearings, floor debate, and in committee." *Id.* at 72, 82.

Similarly, in a challenge involving religious head coverings, the Court began by noting the deferential review standard owed to military regulations. *Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986). The Court was careful to explain, however, that such deference attaches to the "professional judgment of military authorities concerning the relative importance of a particular military interest." *Id.* at 507; *see also Dep't of Navy v. Egan*, 484 U.S. 518, 527, 530-

[2] The Court was correct to conclude that the wholesale lack of evidence would also cause the Ban to fail ordinary rational basis review. *See* ECF 103 at 18 n.8.

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31 (1988) (deferring to a longstanding military information and staffing classification system and noting the statutory scheme out of which the system arose). Indeed, in *Goldman*, a case involving a "military regulation" governing uniform standards, judicial deference was appropriate because the record showed that it constituted the "considered professional judgment of the Air Force" developed over multiple years. 475 U.S. at 508-09.

Rostker, *Goldman*, and *Egan* demonstrate that deference is only given to considered military decision making, not where military policy is the result of reflexive, impulsive or baseless decisions unrooted in evidence or the professional judgment of military authorities. *See Watkins*, 875 F.2d at 729 (reminding that there are limits to court deference in the military context and noting that "it is unthinkable that the judiciary would defer to the Army's prior 'professional' judgment that black and white soldiers had to be segregated to avoid interracial tensions"). *See also Rostker*, 453 U.S. at 57; *Witt*, 527 F.3d at 820.

Such is the case here. The Ban is not the outcome of any study, but rather President Trump's abrupt action on a "major policy change[] that will gravely affect the lives of many Americans." *Doe 1*, 2017 WL 4873042, at *30. Indeed, the Ban flies in the face of the conclusions and recommendations only recently reached by military professionals and researchers following a multi-year assessment of the impact that open service and accession by transgender individuals might have on military readiness, efficacy, and budgetary constraints. ECF 103 at 4 (citing ECF 30 at ¶¶ 159-62; ECF 32 at 9-10; ECF 46 ¶ 11); ECF 34-1 at 4-5. If this Court accords deference to any military policies or guidance in this matter, it should be to those careful and considered conclusions, not an unresearched blanket Ban – the justifications for which Defendants have yet to provide to this or any court. Precedent simply provides no support for a grant of special deference under these circumstances, either to President Trump's tweets, the Presidential Memorandum, or any hastily crafted "studies" that may be developed to provide cover for the Ban.

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Finally, Defendants imply that because the Ban is longstanding military policy, it must be constitutional. *See* ECF 69 at 29 ("The military's longstanding accessions policy is subject to a highly deferential form of review"). This Court should reject such an argument. Regardless of a policy's age, every government policy is subject to constitutional review and must be held invalid if it violates constitutional guarantees. As the Supreme Court has recently confirmed, when "interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understanding can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." *Obergefell*, 135 S. Ct. at 2590. The fact that the military has long excluded transgender individuals from service and denied them medically necessary healthcare does not transform an unlawful policy into a constitutional or unreviewable one. It just confirms the critical role of judicial review as a check on such military policies.

In sum, Defendants have not produced evidence sufficient to show that the Ban furthers any government objectives – much less important ones. Even if they had, there is no evidence whatsoever that a categorical Ban is substantially related to military readiness, lethality, unit cohesion, or cost control. The Ban violates both prongs of intermediate scrutiny, and the Court should grant summary judgment on Washington's claim that it violates the equal protection guarantee of the Fifth Amendment.

C. The Ban Violates Substantive Due Process

The Ban also violates the substantive due process protections of the Fifth Amendment. "The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (citing *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). Indeed, the "Due Process Clause 'protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them.'" *Id.* (quoting *Collins*, 503 U.S. at 125). "The theory is that some liberties are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' and therefore cannot be deprived without compelling justification." *Obergefell*,

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135 S. Ct. at 2597-98 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). The fundamental liberties protected by this Clause extend to "certain personal choices central to individual dignity and autonomy – including intimate choices that define personal identity and beliefs." *Id*. at 2597-98 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), and *Griswold v. Connecticut*, 381 U.S. 479, 484–486 (1965)). The personal choices protected by substantive due process include choices at the core of personal autonomy and self-definition, *id.* at 2599, including "the ability independently to define one's identity[,]" *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984)). *See also Abbott v. Abbott*, 560 U.S. 1, 11 (2010); *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

Asserting one's own gender identity is a core aspect of personal autonomy and self-definition and, as such, is a fundamental right protected by substantive due process guarantees. A restriction on such a fundamental right – even in the military context – can only be sustained if: (1) the restriction advances an important governmental interest; (2) the intrusion significantly furthers that interest, and (3) a less intrusive means will not substantially achieve the government's interest. *Witt*, 527 F.3d at 819. In this case, the due process and equal protection analyses are closely related. As with the equal protection claim, the Ban fails every prong of the due process test, and summary judgment is appropriate.

1. There is no evidence that the Ban improves military readiness or cost control

Presumably, and consistent with their equal protection defense, Defendants will claim that the Ban is necessary to ensure that open military service by transgender individuals does not "hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." *See* ECF 56-1 § 1(a). Where supported by evidence, courts have consistently found these to be important governmental interests for meeting the first prong of a substantive due process challenge. *See, e.g.*, *Witt*, 527 F.3d at 820 (citing cases). But simply reciting the key words "military," "lethality," "unit cohesion," or "force," without more, is insufficient to sustain a

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discriminatory policy. *Witt*, 527 F.3d at 820 n.10; *Watkins*, 875 F.2d at 699. Defendants have submitted no evidence in support of the President's policy, and, on this basis alone, the Court should grant summary judgment on Washington's substantive due process claim.

2. The Ban does not significantly further the alleged military interests

Even had Defendants offered evidence that the Ban furthers an important governmental interest – and they have not – Defendants fail to show that the Ban's intrusion on fundamental rights is substantially connected to the military's interests. As discussed, the government's own evidence shows that military readiness, efficacy, unit cohesion, and budgetary goals are harmed by the exclusion of transgender individuals from service, *not* by allowing transgender individuals to serve including the "loss of qualified personnel, erosion of unit cohesion, and erosion of trust in command." ECF 103 at 16 (citing ECF 46 ¶¶ 25-26; ECF 48 ¶¶ 45-47). Defendants' stated interests are insufficient to "justify [the] intrusion into the personal and private life of the individual." *Lawrence*, 539 U.S. at 578. The Ban fails under the second step of the due process analysis.

3. The Ban is not the least intrusive means by which Defendants can protect the asserted government interests

"Even though governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Aptheker v. Sec'y of State*, 378 U.S. 500, 508 (1964) (internal quotation marks omitted)). Courts will not sustain a discriminatory policy or practice unless "a less intrusive means [is] unlikely to achieve substantially the government's interest." *Witt*, 527 F.3d at 819.

A blanket Ban excluding all transgender individuals from military service cannot possibly be the least intrusive means to promote military interests. An obvious, less restrictive alternative is to evaluate service members and recruits individually to determine whether any of them "hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources"

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as compared with other soldiers. *Cf.* ECF 56-1 § 1(a). That is precisely the analysis that the Ninth Circuit requires in the military context. *Witt*, 527 F.3d at 821 & n.11 (remanding for determination whether applying Don't Ask, Don't Tell "specifically to Major Witt . . . would achieve substantially the government's interest," but expressing skepticism where the alleged facts showed that "Major Witt was a model officer" and that "it was her suspension . . . not her homosexuality, that damaged unit cohesion"); *see also Watkins*, 875 F.2d at 708-09 (estopping the military from denying soldier's reenlistment where record showed that service member had "greatly benefitted the Army, and therefore the country, by his military service" which had been marked by "nothing but the highest praise").

Finally, and critically, individualized assessment of service members and recruits imposes no new or different burdens on the military. It is the standard practice applicable to all service members and recruits to determine whether they are fit for service and whether their individual characteristics (specializations, training, medical needs) affect their proper assignment. *See* Department of Defense Instruction ("DoDI") 6130.03, Medical Standards for Appointment, Enlistment, or Induction in the Military Services; DoDI 6490.03, Deployment Health Assessment.[3] Defendants routinely determine whether a recruit is fit for service based on background, medical condition, or any number of additional factors. *Id*. With respect to transgender recruits specifically, the military's own evidence shows that it is well equipped to evaluate the fitness of individual applicants, and has been doing so since January 1, 2018. ECF 120-1. There is simply no reason to think that the military is incapable of individually assessing a transgender person's fitness to serve without regard- to their gender identity, just as it does for individuals of diverse racial, religious, language, medical, and educational backgrounds. A categorical ban is not the least-intrusive means to achieve the military's interests, and the Ban fails the third prong of the due process analysis.

[3] *Available at*: http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003p.pdf, *and* http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/649003p.pdf.

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IV. CONCLUSION

The Transgender Military Service Ban violates the Fifth Amendment's guarantees of equal protection and due process. The Court should grant summary judgment in favor of Washington on both of its claims.

DATED this 25th day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 25th day of January, 2018.

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