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19
20 **UNITED STATES DISTRICT COURT**
21 **CENTRAL DISTRICT OF CALIFORNIA**

22 AIDEN STOCKMAN; NICOLAS
TALBOTT; TAMASYN REEVES;
23 JAQUICE TATE; JOHN DOES 1-2;
JANE DOE; and EQUALITY
24 CALIFORNIA,

25 Plaintiffs,

26 v.

27 DONALD J. TRUMP, et al.

28 Defendants.

CASE NO. 5:17-CV-01799-JGB-KK

**PLAINTIFFS' OPPOSITION
TO DEFENDANTS' MOTION
TO DISMISS AND REPLY
IN FURTHER SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

Hearing

Date: November 20, 2017
Time: 9:00 a.m.
Courtroom: 1

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TABLE OF AUTHORITIES

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CASES

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 14

Acacia Villa v. Kemp,
774 F. Supp. 1240 (C.D. Cal. 1990), *rev'd on other grounds*
Cisneros v. Alpine Ridge Grp., 508 U.S. 10 (1993)..... 11

Alpine Ridge Grp. v. Kemp,
764 F. Supp. 1393 (W.D. Wash. 1990), *rev'd on other grounds*
Cisneros v. Alpine Ridge Group, 508 U.S. 10 (1993)..... 11

Am. Booksellers Ass'n, Inc. v. Hudnut,
771 F.2d 323 (7th Cir. 1985)..... 10

Ariz. Dream Act Coal. v. Brewer,
855 F.3d 957 (9th Cir. 2017)..... 19

Assoc'd Gen. Contractors of Am. v. Metro. Water Dist. of S. Cal.,
159 F.3d 1178 (9th Cir. 1998)..... 8

Assoc'd Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity,
950 F.2d 1401 (9th Cir. 1991)..... 19

AT&T Corp. v. F.C.C.,
349 F.3d 692 (D.C. Cir. 2003) 15

Bd. of Trs. of the Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 26, 28

Bishop Paiute Tribe v. Inyo Cnty.,
863 F.3d 1144 (9th Cir. 2017)..... 13

Blanchette v. Conn. Gen. Ins. Corps.,
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1 *Brown v. Glines*,
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3 *Califano v. Yamasaki*,
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5 *Cedar Point Nursery v. Gould*,
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7 *Chappell v. Wallace*,
 8 462 U.S. 296 (1983) 21

9 *City of Auburn v. Qwest Corp.*,
 10 260 F.3d 1160 (9th Cir. 2001)..... 16

11 *City of Cleburne v. Cleburne Living Ctr.*,
 12 473 U.S. 432 (1985) 26, 31

13 *City of L.A. v. Patel*,
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15 *Clapper v. Amnesty Int’l USA*,
 16 568 U.S. 398 (2013) 5

17 *Commodity Trend Serv., Inc. v. CFTC*,
 18 149 F.3d 679 (7th Cir. 1998)..... 14

19 *Cox v. Louisiana*,
 20 379 U.S. 559 (1965) 35

21 *Crawford v. Cushman*,
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23 *Cty. of Santa Clara v. Trump*,
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25 *Decker v. O’Donnell*,
 26 661 F.2d 598 (7th Cir. 1980)..... 39

27 *Doe v. Nat’l Bd. of Med. Exs.*,
 28 199 F.3d 146 (3d Cir. 1999) 7

Doe v. Trump,
 No. CV 17-1597 (CKK), 2017 WL 4873042
 (D.D.C. Oct. 30, 2017) *passim*

1 *Elrod v. Burns*,
 2 427 U.S. 347 (1976) 18

3 *Elzie v. Aspin*,
 4 841 F. Supp. 439 (D.D.C. 1993) 20

5 *Emery Mineral Corp. v. Secretary of Labor*,
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7 *Enyart v. Nat’l Conference of Bar Examiners, Inc.*,
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9 *Evancho v. Pine-Richland Sch. Dist.*,
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10 *FCC v. Beach Commcn’s Inc.*,
 11 508 U.S. 307 (1993) 28

12 *Fishman v. Paolucci*,
 13 628 F. App’x 797 (2d Cir. 2015) 20

14 *Frontiero v. Richardson*,
 15 411 U.S. 677 (1973) 24

16 *Glenn v. Brumby*,
 17 663 F.3d 1312 (11th Cir. 2011) 23

18 *Goldman v. Weinberger*,
 19 475 U.S. 503 (1986) 37

20 *Gratz v. Bollinger*,
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21 *Hartikka v. United States*,
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23 *Hassan v. City of New York*,
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25 *Hawaii v. Trump*,
 26 859 F.3d 741 (9th Cir. 2017), *vacated as moot on unrelated*
 27 *grounds*, 2017 WL 4782860 (U.S. Oct. 24, 2017) 12

28 *Heckler v. Mathews*,
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1 *Heller v. Doe by Doe,*
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3 *Hernandez v. Sessions,*
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5 *Hernandez-Montiel v. INS,*
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7 *INS v. St. Cyr,*
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9 *Int’l Bd. of Teamsters v. U.S.,*
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11 *Int’l Refugee Assist. Project v. Trump,*
 12 857 F.3d 554 (4th Cir. 2017) (en banc), *vacated as moot*
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13 *Latta v. Otter,*
 14 771 F.3d 456 (9th Cir. 2014) 6

15 *Lawrence v. Texas,*
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17 *In re Levenson,*
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19 *Log Cabin Republicans v. United States,*
 20 716 F. Supp. 2d 884 (C.D. Cal. 2010) 37

21 *Lopez-Valenzuela v. Arpaio,*
 22 770 F.3d 772 (9th Cir. 2014) 24

23 *Lujan v. Defenders of Wildlife,*
 24 504 U.S. 555 (1992) 5

25 *Lyng v. Int’l Union,*
 26 485 U.S. 360 (1988) 29

27 *Madsen v. Women’s Health Ctr., Inc.,*
 28 512 U.S. 753 (1994) 38, 40

Maldonado v. Harris,
 370 F.3d 945 (9th Cir. 2004) 16

1 *MedImmune, Inc. v. Genentech, Inc.*,
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3 *Meese v. Keene*,
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5 *Meinhold v. U.S. Department of Defense*,
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7 *Melendres v. Arpaio*,
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9 *Muhammad v. Sec’y. of Army*,
 770 F.2d 1494 (9th Cir. 1995)..... 16

10 *N. Stevedoring and Handling Corp. v. Int’l Longshoremen’s and*
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 12 685 F.2d 344 (9th Cir. 1982)..... 17

13 *Nance v. EPA*,
 14 645 F.2d 701 (9th Cir. 1981)..... 10

15 *Nat’l Wildlife Fed. v. Burford*,
 16 677 F. Supp. 1445 (D. Mont. 1985),
aff’d 871 F.2d 849 (9th Cir. 1989) 17

17 *Nat. Res. Def. Council v. E.P.A.*,
 18 735 F.3d 873 (9th Cir. 2013)..... 8, 9

19 *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of*
 20 *Jacksonville*,
 21 508 U.S. 656 (1993) 6

22 *New Hampshire v. Maine*,
 532 U.S. 742 (2001) 35

23 *Nieto v. Flatau*,
 24 715 F. Supp. 2d 650 (E.D.N.C. 2010)..... 36

25 *Norsworthy v. Beard*,
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27 *Oklevueha Native Am. Church of Haw., Inc. v. Holder*,
 28 676 F.3d 829 (9th Cir. 2012)..... 15

1 *Pac. Gas & Elec. v. State Energy Res. Conserv. & Dev. Comm’n*,
 2 461 U.S. 190 (1983) 9

3 *Palmore v. Sidoti*,
 4 466 U.S. 429 (1984) 31

5 *Payne Enters., Inc. v. U.S.*,
 6 837 F.2d 486 (D.C. Cir. 1988) 15

7 *Perez v. Mortgage Bankers Ass’n*,
 8 135 S. Ct 1199 (2015) 35

9 *Perry v. Brown*,
 10 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded on other*
 11 *grounds sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) 27, 37

12 *Pierce v. Society of Sisters*,
 13 268 U.S. 510 (1925) 10

14 *Plyler v. Doe*,
 15 457 U.S. 202 (1982) 29

16 *Privetera v. Cal. Bd. Of Med. Quality Assur.*,
 17 926 F.2d 890 (9th Cir. 1991)..... 18

18 *Raines v. Byrd*,
 19 521 U.S. 811 (1997) 5

20 *Retail Indus. Leaders Ass’n v. Fielder*,
 21 475 F.3d 180 (4th Cir. 2007)..... 10

22 *Romer v. Evans*,
 23 517 U.S. 620 (1996) 24, 27, 30, 31

24 *Rosa v. Park W Bank Trust Co.*,
 25 214 F.3d 213 (1st Cir. 2000) 23

26 *Rostker v. Goldberg*,
 27 453 U.S. 57 (1981) 21, 22

28 *Schlesinger v. Reservists Comm. to Stop the War*,
 418 U.S. 208 (1974) 5

Schwenk v Hartford,
 204 F.3d 1187 (9th Cir. 2000)..... 22, 23

1 *Shapiro v. Thompson*,
 2 394 U.S. 618 (1969), *overruled in part on other grounds*,
 3 *Edelman v. Jordan*, 415 U.S. 651 (1974)..... 29

4 *Smith v. City of Salem*,
 5 378 F.3d 566 (6th Cir. 2004)..... 23

6 *Stanley v. Illinois*,
 7 405 U.S. 645 (1972) 24

8 *Stormans, Inc. v. Selecky*,
 9 586 F.3d 1109 (9th Cir. 2009)..... 15

10 *Susan B. Anthony List v. Driehaus*,
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12 *Texas v. United States*,
 13 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*,
 14 136 S. Ct. 2271 (2016) 39

15 *Thomas v. Anchorage Equal Rights Comm'n*,
 16 220 F.3d 1134 (9th Cir. 2000)..... 14

17 *Thomas v. Gonzales*,
 18 409 F.3d 1177 (9th Cir. 2005)..... 32

19 *Union Pac. R.R. Co. v. Cal. Pub. Utils. Comm'n*,
 20 346 F.3d 851 (9th Cir. 2003)..... 10, 14

21 *United States v. Antelope*,
 22 395 F.3d 1128 (9th Cir. 2005)..... 6, 14

23 *United States v. Owens*,
 24 54 F.3d 271 (6th Cir. 1995)..... 35

25 *United States v. Virginia*,
 26 518 U.S. 515 (1996) 23, 25

27 *United States v. Windsor*,
 28 133 S. Ct. 2675 (2013) 27, 31

*Valley Forge Christian Coll. v. Americans United for Separation of
 Church & State, Inc.*,
 454 U.S. 464 (1982) 5

1 *Vaqueria Tres Monjitas, Inc. v. Irizarry,*
 2 587 F.3d 464 (1st Cir. 2009) 19
 3 *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,*
 4 429 U.S. 252 (1977) 26, 31
 5 *Washington v. Glucksberg,*
 6 521 U.S. 702 (1997) 34
 7 *Washington v. Trump,*
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 9 *Watkins v. U.S. Army,*
 10 875 F.2d 699 (9th Cir. 1989)..... 35
 11 *Wenger v. Monroe,*
 12 282 F.3d 1068 (9th Cir. 2002)..... 16
 13 *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,*
 14 858 F.3d 1034 (7th Cir. 2017)..... 23
 15 *Witt v. Dep’t of Air Force,*
 16 527 F.3d 806 (9th Cir. 2008)..... 33
 17 *Wolfson v. Brammer,*
 18 616 F.3d 1045 (9th Cir. 2010)..... 14

OTHER AUTHORITIES

19 *Wright & Miller, 13B Fed. Prac. & Proc. Juris. § 3533.2.1*
 20 (3d ed. 2017)..... 17
 21 *Military Service by Transgender Individuals, 82 Fed. Reg. 41319*
 22 (Aug. 30, 2017)..... 1, 14
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1 **I. INTRODUCTION**

2 Plaintiffs—transgender individuals who currently serve in the military or
3 have taken concrete steps to accede into the military, and similarly situated
4 members of Equality California—bring this action to prevent the irreparable harms
5 caused by the President’s order banning military service by transgender people and
6 denying them essential medical care. *See Military Service by Transgender*
7 *Individuals*, 82 Fed. Reg. 41319 (Aug. 30, 2017) (the “ban”). Absent the relief
8 sought, Plaintiffs will suffer serious and irreparable injuries, including denial of
9 their constitutional rights, denigration of their abilities and reputation, and loss of
10 tenure, career prospects, and medical care.

11 Defendants contend that Plaintiffs will suffer no “injury in fact” or
12 “irreparable harm” until the government actually discharges them or, in the case of
13 the plaintiffs seeking to enlist, denies them accession into the military. (Defs.’ Mot.
14 to Dismiss and Opp. to Pls.’ Mot. for Prelim. Inj., (“Opp.”) at 1-2.) As the United
15 States District Court for the District of Columbia recently held, these jurisdictional
16 arguments “wither away under scrutiny.” *Doe v. Trump*, No. CV 17-1597 (CKK),
17 2017 WL 4873042, at *1 (D.D.C. Oct. 30, 2017) (“Doe”). Under settled law,
18 enlisted Plaintiffs have standing to challenge a policy that facially targets them and
19 is set to take effect on a date certain: March 23, 2018. Similarly, Plaintiffs who
20 seek to enlist have standing to challenge a policy, already in effect, that bars their
21 enlistment. That Defendants continue to work on plans to implement the ban and
22 have issued Interim Guidance does not make the facially discriminatory ban any
23 less subject to challenge or its harms any less immediate.

24 Defendants’ responses to the merits of Plaintiffs’ constitutional claims also
25 fall short. Defendants do not dispute that transgender people meet the criteria for a
26 suspect class under established equal protection doctrine, nor do they rebut
27 Plaintiffs’ showing that discrimination based on a person’s transgender status is
28 inherently sex-based and thus warrants heightened scrutiny for that reason as well.

1 Rather than seeking to justify the ban under the heightened standard of review that
2 applies in this case, Defendants urge the Court to defer to the President's ban
3 simply because it applies in a military, rather than civilian, context. But as the
4 U.S. Supreme Court has made clear, courts do not apply a lower standard of equal
5 protection review to military policies and only defer to the proffered justifications
6 for such policies when they are based on considered military judgment, evidence,
7 and expertise. None of the factors warranting deference is present here, where the
8 President abruptly reversed a policy adopted by the military itself after a long and
9 comprehensive process of analysis and review. In any event, the reasons offered
10 by Defendants do not justify such a sweeping and categorical ban under any level
11 of review. The absence of any rational basis for the ban, its facial targeting of a
12 disfavored group, and the highly unusual circumstances under which it was
13 adopted lead to the inescapable inference that it is based on animus—
14 discrimination for its own sake—and not on any legitimate military concerns.

15 Defendants also fail to rebut Plaintiffs' due process and First Amendment
16 claims. As Plaintiffs have shown, the ban infringes upon their constitutionally
17 protected right to autonomy—specifically, the right as transgender persons to live
18 in accordance with their core, immutable gender identities. Defendants deny that
19 such a right exists, but fail to provide any substantive argument to rebut it.
20 Similarly, rather than addressing Plaintiffs' claim that due process prevents the
21 government from penalizing Plaintiffs for engaging in the very same conduct that
22 the government itself induced, Defendants rebut judicial estoppel and procedural
23 due process claims that Plaintiffs did not raise.

24 Defendants also fail to rebut Plaintiffs' First Amendment claims. The ban is
25 subject to strict scrutiny because it severely limits Plaintiffs' ability to advocate for
26 themselves and to express pro-transgender views. Even under a more lenient
27 standard of review, however, the ban fails because it sweeps far more broadly than
28 necessary to achieve any possible permissible goal. For these reasons, Plaintiffs

1 have stated valid constitutional claims and are likely to prevail on the merits of
2 their claims.

3 Finally, as the District Court for D.C. recognized: “Absent an injunction,
4 Plaintiffs will suffer a number of harms that cannot be remedied after that fact even
5 if Plaintiffs were to eventually succeed in this lawsuit. The impending ban brands
6 and stigmatizes Plaintiffs as less capable of serving in the military, reduces their
7 stature among their peers and officers, stunts the growth of their careers, and
8 threatens to derail their chosen calling” *Doe*, 2017 WL 4873042, at *32. In
9 contrast, Defendants have not identified any way in which granting injunctive
10 relief would harm the military or the public interest.

11 Plaintiffs respectfully ask that the Court deny Defendants’ motion to dismiss
12 and grant the injunctive relief that Plaintiffs seek.

13 **II. THE INTERIM GUIDANCE HAS NO BEARING ON ANY MOTIONS**
14 **PENDING BEFORE THE COURT**

15 Defendants’ principal argument—regarding both the justiciability and merits
16 of Plaintiffs’ claims—hinges upon their contention that the Presidents’ August 25
17 Memorandum¹ is somehow immune to challenge because the government also has
18 issued “Interim Guidance.” (*See Opp.* at 8, 12, 15, 16, 21-24.) However, the effect
19 of the Memorandum—a policy banning transgender individuals from military
20 service—cannot be and is not changed by the Interim Guidance.

21 Defendants’ focus on the Interim Guidance is a classic “red herring.” *Doe*,
22 2017 WL 4873042, at *17. Plaintiffs challenge *the ban* because *it* is “the operative
23 policy toward military service by transgender service members.” *Id.* By contrast:

24 [T]he *Interim Guidance must be read as implementing*
25 *the directives* of the Presidential Memorandum, and any
26 protections afforded by the Interim Guidance are
27 necessarily *limited to the extent they conflict* with the
express directives of the memorandum. . . . *Nothing in*

28 ¹ Capitalized terms not otherwise defined herein shall have the meaning ascribed to
them in Plaintiffs’ Motion for Preliminary Injunction (the “PI Motion”).

1 *the August 2017 Statement by Secretary Mattis, or the*
 2 *Interim Guidance, can or does alter these realities. . . .*
 3 [T]he military is studying how to implement the
 4 directives of the Presidential Memorandum . . . [b]ut the
 5 decisions that must be made are *how to best implement a*
 6 *policy under which transgender accession is prohibited,*
and discharge of transgender service members is
authorized. Unless the directives of the Presidential
Memorandum are altered—and there is no evidence that
they will be—military policy toward transgender
individuals must fit within these confines.

7 *Id.* at *17-18 (citations omitted, emphasis added).

8 The President is the Commander-in-Chief, and his August 25 Memorandum
 9 is “the operative policy toward military service by transgender service members.”

10 *Id.* at *17. This Court must “assume that [it] will be faithfully executed.” *Id.*

11 The Interim Guidance thus is irrelevant to consideration of either Plaintiffs’
 12 motion for a preliminary injunction or Defendants’ motion to dismiss.

13 **III. PLAINTIFFS’ CLAIMS ARE JUSTICIABLE**

14 Plaintiffs’ claims satisfy both the standing and ripeness requirements of
 15 Article III, as well as the additional “prudential ripeness” filter courts have
 16 historically applied. Unless the Court intervenes, beginning on March 23, 2018,
 17 current service member Plaintiffs will become subject to discharge simply for
 18 being transgender. These Plaintiffs have standing because they are the explicit
 19 targets of threatened government discrimination and because the ban denies their
 20 fitness to serve. The Plaintiffs who have taken steps to enlist in military service
 21 also have standing because, under the ban, they categorically are barred from
 22 enlisting even if they are otherwise qualified. These actual injuries and imminent
 23 threats create a constitutionally and prudentially justiciable case.

24 **A. This Lawsuit Satisfies the Standing Requirements of Article III.**

25 The “irreducible constitutional minimum” required to invoke federal
 26 jurisdiction under Article III “contains three elements: (1) injury in fact; (2)
 27 causation; and (3) the likelihood that a favorable decision will redress the injury.”

28 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Defendants concede

1 the latter two elements and expressly confine their standing and ripeness challenge
2 to the first element—injury in fact.² (*See Opp.* at 11-12.)

3 To establish injury in fact, a plaintiff must show that he or she has suffered
4 an “invasion of a legally protected interest” that is “concrete and particularized”
5 and “actual or imminent.”³ *Lujan*, 504 U.S. at 560 (internal citation omitted).
6 Plaintiffs’ claims easily pass muster. Not only do Plaintiffs face future harms, but
7 they also are suffering current injuries as a consequence of the ban. (*See*
8 Supplemental Declaration of Raymond Edwin Mabus, Jr. (“Mabus Supp. Decl.”),
9 ¶¶ 3-7). Each of these injuries is caused by the ban, and each is sufficient to confer
10 standing upon Plaintiffs to bring the asserted claims. *See Doe*, 2017 WL 4873042,
11 at *15-26.

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14 ² To be clear, Plaintiffs satisfy the latter two elements. There is a clear causal
15 chain between the ban and harms to Plaintiffs. And a favorable court decision here
16 declaring that such a ban violates the Constitution and enjoining Defendants from
17 excluding Plaintiffs from the military solely because they are transgender would
18 redress the alleged injury. Left in force, the ban creates a presumption and
19 perception that Plaintiffs and other transgender people “hinder military
20 effectiveness,” “disrupt unit cohesion,” and “tax military resources.” An
21 injunction prohibiting enforcement of the ban and an order permitting enlistment
22 will reverse those presumptions, permitting Plaintiffs once again to serve in the
23 military on equal terms, and thus redressing the injuries Plaintiffs are suffering.

24 ³ The “especially rigorous” standard Defendants ask the Court to apply (*see Opp.* at
25 12, citing *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013)) has never been
26 used to deny standing to plaintiffs *who are themselves* the direct and actual targets
27 of a discriminatory policy. The cases elaborating this principle involved claims by
28 plaintiffs with an undifferentiated and attenuated connection to the policy
challenged as unconstitutional. *See, e.g., Clapper*, 568 U.S. at 408-11 (challenge
by attorneys, journalists, and human rights organizations to policy authorizing
surveillance of people outside the United States); *Raines v. Byrd*, 521 U.S. 811,
819-20 (1997) (challenge by members of Congress to statute granting line item
veto power); *Valley Forge Christian Coll. v. Americans United for Separation of
Church & State, Inc.*, 454 U.S. 464, 473-74 (1982) (challenge by taxpayers to
transfer of property to religious organization); *Schlesinger v. Reservists Comm. to
Stop the War*, 418 U.S. 208, 220-22 (1974) (challenge by ordinary citizens to
membership of members of Congress in armed forces reserves). Where, as here,
Plaintiffs are directly targeted by a policy, ordinary standing principles apply.

1 **1. Plaintiffs Injuries Are Concrete and Particularized.**

2 Plaintiffs are transgender individuals who serve in the military (Tate Decl.,
3 ¶¶ 4-8; Jane Doe Decl., ¶¶ 2-7; John Doe 1 Decl., ¶¶ 5-9; John Doe 2 Decl., ¶ 5),
4 or who have taken substantial steps toward accession, including by sitting for the
5 ASVAB exam, soliciting meetings with recruiters, and affirmatively attempting to
6 enlist (Stockman Decl., ¶¶ 8-10; Talbott Decl., ¶¶ 3, 10-13; Reeves Decl., ¶ 5).
7 The enlisted service member Plaintiffs are injured concretely and personally by the
8 ban as it facially targets them for forced separation from the military solely
9 because they are transgender and terminates military payment for their necessary
10 medical care. The accession Plaintiffs, who are “able and ready” to accede into
11 service, are injured concretely and personally by the ban because it categorically
12 excludes them from enlisting in the military for the same reason. *See Ne. Fla.*
13 *Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508
14 U.S. 656, 666 (1993) (holding government’s denial of an equal opportunity to
15 those who are “able and ready” to compete because of a discriminatory policy
16 constitutes injury in fact); *Gratz v. Bollinger*, 539 U.S. 244, 260-61 (2003)
17 (holding plaintiff who intended to but had not yet applied to University of
18 Michigan had standing to challenge allegedly discriminatory admissions policy).

19 The Supreme Court consistently has held that such “discrimination itself”⁴
20 constitutes a concrete and particularized injury sufficient to invoke the federal
21 judicial power under Article III. *See Heckler v. Mathews*, 465 U.S. 728, 739-40
22 (1984); *Latta v. Otter*, 771 F.3d 456, 467 n.7 (9th Cir. 2014) (same); *see also, e.g.,*
23 *Hassan v. City of New York*, 804 F.3d 277, 289-90 (3d Cir. 2015) (holding a
24 “discriminatory classification is itself a penalty . . . and thus qualifies as an actual
25

26 ⁴ For the purpose of assessing justiciability, the Court must presume Plaintiffs’
27 legal theories of constitutional harm are valid. *See United States v. Antelope*, 395
28 F.3d 1128, 1133 (9th Cir. 2005) (assessing justiciability from plaintiff’s
perspective, “in whose shoes we stand when deciding this threshold issue of
justiciability,” and therefore assuming “his legal argument is correct”).

1 injury for [justiciability] purposes, where a citizen’s right to equal treatment is at
2 stake”) (internal citation omitted); *Evancho v. Pine-Richland Sch. Dist.*, 237 F.
3 Supp. 3d 267, 293, 294 n.44 (W.D. Pa. 2017) (“settled precedent provides that
4 impermissible distinctions by official edict cause tangible Constitutional harm” and
5 “a bare equal protection violation is sufficient to constitute an injury in fact”). The
6 ban imposes precisely these injuries. *See Doe*, 2017 WL 4873042, at *20-23.

7 The ban also imposes additional personalized injuries upon Plaintiffs by
8 demeaning their abilities and fitness as transgender individuals to serve in the
9 military, and their capabilities more broadly. (Declaration of Mark J. Eitelberg
10 (“Eitelberg Decl.”), ¶ 11; Supplemental Declaration of Deborah Lee James
11 (“James Supp. Decl.”), ¶ 8; Tate Decl., ¶ 23; Jane Doe Decl., ¶ 22-24; John Doe 1
12 Decl., ¶ 24; John Doe 2 Decl., ¶ 33; Stockman Decl., ¶ 18; Talbott Decl., ¶ 18;
13 Reeves Decl., ¶15-16; Zbur Decl., ¶ 7); *see also Doe*, 2017 WL 4873042, at *32
14 (“The impending ban brands and stigmatizes Plaintiffs as less capable of serving in
15 the military, reduces their stature among their peers and officers, stunts the growth
16 of their careers, and threatens to derail their chosen calling or access to unique
17 educational opportunities.”). These kinds of injuries, based on the public
18 perceptions of a person’s capabilities that a government policy creates or reinforces
19 with its imprimatur, are more than sufficient to satisfy Article III. *See Meese v.*
20 *Keene*, 481 U.S. 465, 473-74 (1987) (holding asserted harms to plaintiff’s
21 “personal, political, and professional reputation” sufficient to confer Article III
22 standing); *see also Doe v. Nat’l Bd. of Med. Exs.*, 199 F.3d 146, 153 (3d Cir. 1999)
23 (finding injury in fact where plaintiff alleged that being identified as disabled by
24 the defendant would have an adverse effect on plaintiff’s future job prospects).

25 Plaintiffs’ injuries are compounded by the loss of tenure, career prospects,
26 and medical care that the ban imposes. (*See* Tate Decl., ¶¶ 21-30; Jane Doe Decl.,
27 ¶¶ 17-18; John Doe 1 Decl., ¶¶ 20-22; John Doe 2 Decl., ¶¶ 30-37; Stockman
28 Decl., ¶¶ 15-17; Talbott Decl., ¶¶ 16-17; Reeves Decl., ¶¶ 13-14; *see also* Mabus

1 Supp. Decl., ¶¶ 4-7; Eitelberg Decl., ¶ 8; Fanning Supp. Decl., ¶ 5.) There is no
 2 credible dispute that Plaintiffs have suffered and will suffer personal concrete
 3 injuries as a result of the ban. With respect to medical care in particular,
 4 Defendants erroneously claim that “none of the service member Plaintiffs
 5 even plan to seek sex reassignment treatment through the military now or in the
 6 future.” (Opp. at 14.) Not so. Before the moratorium imposed by the ban,
 7 Plaintiffs Tate, John Doe 1, and John Doe 2 followed military protocol to plan for
 8 gender transition-related surgery. (See Tate Decl., ¶ 21; Supplemental Declaration
 9 of John Doe 1 (“John Doe 1 Supp. Decl.”), ¶ 4; John Doe 2 Decl., ¶ 22;
 10 Supplemental Declaration of John Doe 2 (“John Doe 2 Supp. Decl.”), ¶ 4.)
 11 Because those procedures are planned for dates beyond March 2018, the ban
 12 prohibits Plaintiffs from obtaining these surgeries.

13 For many of the same reasons, Equality California’s claims are justiciable:
 14 (1) its members include currently serving transgender service members, as well as
 15 transgender people who have taken steps to enlist, all of whom suffer constitutional
 16 injuries sufficient to trigger Article III jurisdiction (*see* Zbur Decl., ¶¶ 2-4); (2)
 17 advocating for the equality of transgender people is central to Equality California’s
 18 organizational mission; and (3) its members need not supply any evidence to
 19 advance this facial constitutional challenge, nor would any remedy ordered by the
 20 Court to enjoin the ban require their participation. *See Assoc’d Gen. Contractors*
 21 *of Am. v. Metro. Water Dist. of S. Cal.*, 159 F.3d 1178, 1181 (9th Cir. 1998).

22 Given the concrete and particularized injuries caused by the ban, Plaintiffs
 23 have standing to pursue the claims asserted in the Complaint, and Defendants’
 24 motion to dismiss should be denied.

25 **2. Plaintiffs Injuries Are “Actual” and “Imminent.”**

26 An injury is actual and imminent “if the threatened injury is ‘certainly
 27 impending’ or there is a ‘substantial risk’ that the harm will occur.” *Susan B.*
 28 *Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 (2014); *see also see also Nat. Res.*

1 *Def. Council v. E.P.A.*, 735 F.3d 873, 878 (9th Cir. 2013) (“We have consistently
2 held that injury is ‘actual or imminent’ where there is a ‘credible threat’ that a
3 probabilistic harm will materialize.”). Defendants’ argument that the injuries
4 Plaintiffs allege are not “actual or imminent” ignores that the ban *already* has the
5 force of law, *already* is in effect with respect to the accession Plaintiffs, *already* is
6 imposing serious concrete harms upon both the accession *and* current service
7 member Plaintiffs by demeaning their abilities and fitness to serve, and establishes
8 a date certain of March 23, 2018 by which service members will be subject to
9 discharge and to the denial of transition-related surgeries. (*See supra* § II.A.1.a.)
10 Plaintiffs also are presently compelled to make important and irrevocable decisions
11 about their lives and futures under an unconstitutional ban that will take full effect
12 in just a few months.

13 **a. Enlisted service member Plaintiffs are harmed.**

14 In addition to the *current* harms the enlisted service member Plaintiffs
15 already are suffering, future harms are “imminent” when key provisions of the ban
16 “take effect on March 23, 2018.” (Opp. at 6.) Those harms slated to begin in
17 fewer than 5 months also confer standing.

18 “[W]here threatened action by *government* is concerned, [courts] do not
19 require a plaintiff to expose himself to liability before bringing suit to challenge the
20 basis for the threat.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29
21 (2007) (emphasis in original); *see also Nat. Res. Def. Council*, 735 F.3d at 878 (a
22 “credible threat” of “probabilistic harm” is sufficient). The enlisted service
23 member Plaintiffs accordingly need not “await the consummation of threatened
24 injury to obtain preventive relief.” *Pac. Gas & Elec. v. State Energy Res. Conserv.*
25 *& Dev. Comm’n*, 461 U.S. 190, 201 (1983). It makes no difference that a few
26 months remain before the ban on active service members becomes fully
27 operational, or that the Interim Guidance supposes that no enlisted transgender
28 service members will be separated in the “interim.” (*Cf.* Opp. at 1, 6.) “Where the

1 inevitability of the operation of a [policy] against certain individuals is patent, it is
2 irrelevant to the existence of a justiciable controversy that there will be a time
3 delay before the disputed provisions will come into effect.” *Blanchette v. Conn.*
4 *Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974); *see also Am. Booksellers Ass’n, Inc. v.*
5 *Hudnut*, 771 F.2d 323, 327 (7th Cir. 1985) (noting that “[t]he statute challenged in
6 *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), had an effective date two years in
7 the future, yet the Court found the suit” justiciable).

8 Nor can Defendants dodge a pre-enforcement challenge to the ban’s
9 provisions by characterizing the ban as subject to further DOD implementing rules
10 that have not yet issued. (Opp. at 15-16.) Plaintiffs’ challenge is to the ban itself,
11 *irrespective* of how it may be implemented administratively; the DOD has no
12 discretion over the *requirement* that the substantive provisions of the ban “will be”
13 effective on March 23, 2018. (Opp. at 1.) “The President controls the United
14 States military” and the “directives of the Presidential Memorandum” to DOD “are
15 *definitive*” and “*the operative policy* toward military service by transgender service
16 members.” *Doe*, 2017 WL 4873042, at *17. The Interim Guidance does not
17 change that.

18 In these circumstances, courts routinely hear and decide cases before the
19 promulgation of implementing regulations. *See Union Pac. R.R. Co. v. Cal. Pub.*
20 *Utils. Comm’n*, 346 F.3d 851, 872 n.22 (9th Cir. 2003) (holding statutory challenge
21 justiciable despite absence of implementing regulations “because it is clear that any
22 standard required” under the challenged act would suffer the legal defect plaintiff
23 alleged, even though “no standards [were] issued” at the time of adjudication);
24 *Nance v. EPA*, 645 F.2d 701, 713, 717 (9th Cir. 1981) (holding statutory challenge
25 justiciable over objection that “[t]he EPA has not yet promulgated regulations
26 under the amended act . . . and thus has not had any measurable adverse impact
27 upon the petitioners in this case” because the challenged act required rules
28 enforcing the challenged provision); *Retail Indus. Leaders Ass’n v. Fielder*, 475

1 F.3d 180, 188 (4th Cir. 2007) (holding statutory challenge justiciable despite
2 absence of implementing regulations because “[r]egulations could not alter the
3 Act’s provisions, which clearly establish the . . . requirements [plaintiff] claims are
4 invalid”). As “Plaintiffs make it perfectly clear that they are challenging the
5 constitutionality” of the ban enacted by the Presidential Memorandum *itself*, “the
6 court has no need to consider the effect of [not-yet-issued] regulations or to wait
7 and see what steps [DOD] takes to implement” it. *Alpine Ridge Grp. v. Kemp*, 764
8 F. Supp. 1393, 1396 (W.D. Wash. 1990), *rev’d on other grounds Cisneros v.*
9 *Alpine Ridge Group*, 508 U.S. 10 (1993); *see also Acacia Villa v. Kemp*, 774 F.
10 Supp. 1240, 1246-47 (C.D. Cal. 1990), *rev’d on other grounds Cisneros*, 508 U.S.
11 10 (same).

12 Because they presently face a credible threat or substantial risk of harm from
13 the ban, the provisions of which are “certainly impending,” the enlisted service
14 member Plaintiffs’ claims are justiciable now.

15 **b. Accession Plaintiffs are harmed.**

16 Plaintiffs Stockman, Talbott, and Reeves are harmed by the ban because it
17 expressly and categorically prohibits them from enlisting in the military.
18 Notwithstanding that overt and tangible harm, Defendants erroneously contend that
19 Plaintiffs are eligible for “individualized waivers” and therefore cannot show an
20 Article III injury in fact until they have (a) been denied accession, (b) applied for a
21 waiver, and (c) been turned down again. (Opp. at 14.)

22 As a factual matter, that is incorrect. Transgender people have *never* been
23 eligible for DODI 6130.03 medical waivers. *See Doe*, 2017 WL 4873042, at *21
24 (finding “no evidence that waivers are actually made available to transgender
25 individuals, or that they will be”); (*see also* Mabus Supp. Decl., ¶ 10;
26 Supplemental Declaration of Eric K. Fanning (“Fanning Supp. Decl.”), ¶ 11; James
27 Supp. Decl., ¶ 10; Supplemental Declaration of George Richard Brown (“Brown
28 Supp. Decl.”), ¶ 11.) Those waivers are available only for conditions listed in

1 DODI 6130.03 with stipulated waiver qualification criteria. No such criteria are
2 stipulated for the conditions related to being transgender (“transsexualism” and
3 “change of sex”). (*Compare* DOD Instruction 6130.03 at Encl. 4.15(r), 4.29(r)
4 (Apr. 28, 2010) (“DODI 6130.03”) (categorically disqualifying transgender
5 applicants from military service without stipulating conditions for waiver) *with*
6 DODI 6130.03 at Encl. 4.29(a) (stipulating six conditions that an applicant with
7 Attention Deficit Hyperactivity Disorder may meet to receive a service eligibility
8 waiver notwithstanding standard disqualification); *accord* Brown Decl., ¶¶ 40-41
9 (stating that “because certain conditions related to being transgender (‘change of
10 sex’) were formerly grounds for discharge from the military, men and women who
11 are transgender could not obtain medical waivers to enter the military”); Brown
12 Supp. Decl., ¶ 12.) And the August 25 Memorandum itself confirms that
13 transgender persons are categorically ineligible to serve. The suggestion that
14 Plaintiffs *could* obtain accession waivers notwithstanding the ban—let alone that
15 they *must* in order to challenge it—has no basis.

16 Moreover, as a matter of settled law, plaintiffs are not obliged to apply for
17 an individual waiver of government policies that unconstitutionally discriminate
18 against them as a class. Indeed, the need to apply for such a waiver—when others
19 have no such need—is in and of itself a violation of equal protection. *See Hawaii*
20 *v. Trump*, 859 F.3d 741, 767-68 (9th Cir. 2017) (holding a plaintiff need not wait
21 for denial of discretionary waiver from travel ban in order to challenge the ban
22 itself), *vacated as moot on unrelated grounds*, 2017 WL 4782860, at *1 (U.S. Oct.
23 24, 2017); *Doe*, 2017 WL 4873042, at *21 (holding that accession Plaintiff had
24 standing “even if a bona fide waiver process were made available” because “a
25 waiver process would not vitiate the barrier that [the accession Plaintiff] claims is
26 violative of equal protection”).

27 Similarly, it is not necessary for Plaintiffs to submit a formal application to
28 enlist and be denied in order to challenge the ban. Such a futile exercise is not

1 required to confer standing. A potential job applicant suffers cognizable harm
2 from a discriminatory hiring practice even if she does not apply for the job in
3 question. *See, e.g., Gratz*, 539 U.S. at 262 (holding that “denial of equal treatment
4 resulting from the imposition of [a] barrier” is *itself* an injury, regardless of
5 whether it results in the “ultimate inability to obtain [a] benefit”); *Int’l Bd. of*
6 *Teamsters v. U.S.*, 431 U.S. 324, 366 (1977) (“When a person’s desire for a job is
7 not translated into a formal application solely because of his unwillingness to
8 engage in a futile gesture he is as much a victim of discrimination as is he who
9 goes through the motions of submitted an application.”).

10 Defendants’ arguments that Plaintiffs Stockman, Talbott, and Reeves lack
11 standing fail; each of the accession Plaintiffs satisfies constitutional standing
12 requirements.

13 **B. Plaintiffs’ Claims Are Ripe for Adjudication.**

14 Because Plaintiffs’ have standing to challenge the ban, their claims meet the
15 constitutional requirement of ripeness as well. *See Bishop Paiute Tribe v. Inyo*
16 *Cnty.*, 863 F.3d 1144, 1153 (9th Cir. 2017). Here, Defendants do not challenge
17 constitutional ripeness, but claim that Plaintiffs’ claims are not prudentially ripe.

18 As an initial matter, where Plaintiffs have met the standing and ripeness
19 requirements of Article III and no established abstention doctrine applies, courts
20 have limited discretion to dismiss a claim based solely on prudential grounds. *See*
21 *Susan B. Anthony List*, 134 S. Ct. at 2347 (noting the Supreme Court’s repeated
22 “reaffirmation of the principle that a federal court’s obligation to hear and decide
23 cases within its jurisdiction is virtually unflagging.”) (internal citations omitted).
24 Here, Plaintiffs have established both standing and constitutional ripeness;
25 accordingly, there is no basis to apply the prudential ripeness doctrine.

26 In any event, Plaintiffs claims are ripe as a prudential matter. In assessing
27 prudential ripeness, a court considers “both the fitness of the issues for judicial
28 decision and the hardship to the parties of withholding court

1 consideration.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967); *see also*
2 *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1141 (9th Cir. 2000).
3 Both factors are met here.

4 **1. Plaintiffs’ Claims Are Fit for Review.**

5 A claim is “fit for decision if the issues raised are primarily legal, do not
6 require further factual development, and the challenged action is final.” *Wolfson v.*
7 *Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010) (citation omitted).

8 First, because whether the ban is a facially unconstitutional enactment is a
9 “purely legal” question, it is “appropriate for judicial resolution at this time.”
10 *Abbott Labs.*, 387 U.S. at 149; *see also Commodity Trend Serv., Inc. v. CFTC*, 149
11 F.3d 679, 687 n.3 (7th Cir. 1998) (“A facial constitutional challenge presents only
12 a legal issue—the quintessentially ‘fit’ issue for present judicial resolution.”); *Doe*,
13 2017 WL 4873042, at *24 (holding plaintiffs’ facial equal protection challenge to
14 the ban presented a purely legal question fit for review).

15 Second, and precisely because this is a facial constitutional challenge,
16 further factual development is irrelevant in assessing whether the ban offends the
17 guarantees of the Fifth and First Amendments. *Doe*, 2017 WL 4873042, at *24.
18 The challenged ban is the “definitive” and “operative policy” recorded in the
19 Federal Register regulating “military service by transgender service members.”
20 *Doe*, 2017 WL 4873042, at *17; *see Military Service by Transgender Individuals*,
21 82 Fed. Reg. 41319 (Aug. 30, 2017). Adjudication of this case requires the Court
22 to analyze only the terms of that enactment under the U.S. Constitution and the
23 authorities relied upon in parties’ briefing.

24 For much the same reason, Plaintiffs’ challenge is directed at “final action.”
25 It makes no difference to the constitutional analysis how the DOD fills in the
26 details of the ban with implementing rules. *See Doe*, 2017 WL 4873042, at *17,
27 *24; *Union Pac.*, 346 F.3d at 870 n.20, 872 n.22; *see also Antelope*, 395 F.3d at
28

1 1133 (holding that for purposes of justiciability determination, a court must accept
2 validity of plaintiff’s legal theory on the merits).

3 **2. *Plaintiffs Will Continue to Suffer Hardship Absent***
4 ***Adjudication.***

5 The hardship factor of the prudential ripeness inquiry “serves as a
6 counterbalance to any interest the judiciary has in delaying consideration of a
7 case.” *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838
8 (9th Cir. 2012). Where “there are no institutional interests favoring postponing
9 review,” courts hold “there are no conflicting interests to balance,” *Payne Enters.,*
10 *Inc. v. U.S.*, 837 F.2d 486, 493 (D.C. Cir. 1988), and “a petitioner need not satisfy
11 the hardship prong,” *AT&T Corp. v. F.C.C.*, 349 F.3d 692, 700 (D.C. Cir. 2003).
12 Here, there is no institutional interest in favoring delayed review. In fact, there is
13 an indisputable interest in having the constitutionality of the ban settled.⁵ *See Doe*,
14 2017 WL 4873042, at *25 (holding plaintiffs’ challenge to “facial validity” of the
15 ban “means that the Court would not benefit from delay”). Thus, as an initial
16 matter, Plaintiffs’ claims are prudentially ripe even without needing to show
17 hardship.

18 In any event, Plaintiffs satisfy the hardship requirement. “To meet the
19 hardship requirement, a litigant must show that withholding review would result in
20 direct and immediate hardship and would entail more than possible financial loss.”
21 *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009) (finding plaintiffs’
22 constitutional claims ripe because “unless [they] prevail in this litigation, they will
23 suffer the very injury they assert”). The many hardships Plaintiffs would suffer
24 from withholding review of this case are clear.

25
26 ⁵ The only interest Defendants assert—that this Court’s review would somehow
27 impede *their* ability to further study whether it makes sense to ban categorically
28 transgender people from the military (*see, e.g.*, Opp. at 36)—is baseless, and not
the kind of *judicial* interest that triggers a hardship review. In any event,
adjudication of Plaintiffs’ claims would *not* prevent any *post hoc* study.

1 Plaintiffs *already* are suffering cognizable constitutional injuries, as well as
2 other concrete injuries to their careers from the government’s policy that they are
3 unfit to serve. (*See supra* §§ II.A.1-2.) Denying adjudication only guarantees
4 these injuries will continue, unabated.

5 Moreover, absent pre-enforcement review, the current service member
6 Plaintiffs each will be forced to choose between resigning their commissions to
7 find another means of self-support in anticipation of the ban’s effective date, or
8 risk discharge with no means of support while a post-enforcement challenge
9 proceeds. (*See* Tate Decl., ¶¶ 25-26; John Doe 1 Decl., ¶ 20; John Doe 2 Decl., ¶¶
10 30-31; Jane Doe Decl., ¶ 16.) Similarly, the accession Plaintiffs will be forced to
11 choose whether to abandon their plans to join the military or risk being harmed by
12 having foregone other opportunities if a post-enforcement challenge fails.
13 (Stockman Decl., ¶ 15; Talbott Decl., ¶ 17; Reeves Decl., ¶ 13). The ban thus
14 presents a comply-or-defy decision that courts find sufficient hardship to grant
15 review. *See Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004) (holding
16 constitutional claims were ripe for review where the “‘challenged regulations
17 presents plaintiffs with the immediate dilemma to choose between complying with
18 newly imposed, disadvantageous restrictions and risking serious penalties for
19 violation’”) (quoting *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1172 (9th Cir.
20 2001)).

21 The hardships that flow from the ban also render exhaustion of internal
22 military procedures unnecessary. Contrary to Defendants’ suggestion that this suit
23 is unripe because Plaintiffs have not exhausted administrative remedies (Opp. at
24 16-18), exhaustion is not required when, as here, “substantial constitutional
25 questions are raised” and particularly when the challenged policy inflicts class-
26 based stigmatic harms. *Muhammad v. Sec’y. of Army*, 770 F.2d 1494, 1495 (9th
27 Cir. 1995); *see also Wenger v. Monroe*, 282 F.3d 1068, 1074 (9th Cir. 2002)
28 (holding exhaustion requirement excused where it would be futile and noting that

1 “termination of employment or alteration of some right or status recognized by
2 law” that damages “standing and associations in the community” is a cognizable
3 constitutional injury).

4 Plaintiffs currently face hardship as a result of the ban, and will continue to
5 suffer those and even more hardships in the event the constitutionality of the ban is
6 not determined at this time. Their claims are ripe for review by this Court.

7 * * *

8 For the foregoing reasons, Plaintiffs’ claims are justiciable. The Court
9 should consider their motion for a preliminary injunction on the merits and grant
10 the requested relief.⁶

11 **IV. A PRELIMINARY INJUNCTION IS WARRANTED**

12 Defendants’ opposition to Plaintiffs’ motion for a preliminary injunction
13 rests almost entirely upon the baseless claim that Plaintiffs are not suffering
14 irreparable injuries because the ban is not yet in effect. But for the same reasons
15 that Plaintiffs’ claims are justiciable, Plaintiffs will continue to suffer irreparable
16 harm absent an injunction. And to the extent Defendants actually contest
17 Plaintiffs’ claims on their constitutional merits—as opposed to simply incanting
18 that they have been brought too soon, or target the “wrong” policy—their
19 arguments have no merit. As set forth in Plaintiffs’ PI Motion, and as confirmed
20 recently by the District Court in *Doe*, Plaintiffs are likely to succeed on the merits

21
22 ⁶ The preliminary injunction ordered in *Doe*, 2017 WL 4873042, does not affect
23 the justiciability of Plaintiffs’ claims in this case. See *N. Stevedoring and*
24 *Handling Corp. v. Int’l Longshoremen’s and Warehousemen’s Union, Local No.*
25 *60*, 685 F.2d 344, 346 (9th Cir. 1982) (holding action challenging union picketing
26 was not mooted when NLRB secured a preliminary injunction against same
27 picketing in another tribunal, since it was possible that the injunction could be
28 lifted in final determination of the merits, and picketing could recur); *Nat’l Wildlife*
Fed. v. Burford, 677 F. Supp. 1445, 1453 (D. Mont. 1985) (holding action to void
coal leases was not mooted by order issued by another court to void the very same
leases because it was possible that other “decision to void the [leases]” could be
“reversed in whole or in part”), *aff’d* 871 F.2d 849 (9th Cir. 1989); see Wright &
Miller, 13B Fed. Prac. & Proc. Juris. § 3533.2.1 (3d ed. 2017) at n. 19-27.

1 of their claims. Absent preliminary relief from this Court, they will continue to
2 suffer irreparable harms.

3 **A. Absent an Injunction, Plaintiffs Will Suffer Irreparable Harm**

4 Defendants assert that Plaintiffs cannot establish irreparable harm “for much
5 the same reasons they lack standing,” and that Plaintiffs’ injuries are not “beyond
6 remediation.” (Opp. at 20.) The first argument fails for the same reason it failed in
7 the justiciability context: Plaintiffs are suffering irreparable injuries now, and
8 additional irreparable injuries are certainly impending. *See Privetera v. Cal. Bd.*
9 *Of Med. Quality Assur.*, 926 F.2d 890, 897 (9th Cir. 1991) (holding the district
10 court erred in denying a preliminary injunction on the ground that the asserted
11 injury to plaintiff was three months away). As for their second argument,
12 Defendants attempt to reduce Plaintiffs’ claims to a simple employment dispute,
13 where the injuries “could be compensated in damages and back pay.” (Opp. at
14 20.)⁷ But Plaintiffs’ injuries include constitutional and other harms that cannot be
15 redressed by money damages.

16 “It is well established that the deprivation of constitutional rights
17 ‘unquestionably constitutes irreparable injury.’” *Hernandez v. Sessions*, 872 F.3d
18 976, 994 (9th Cir. 2017) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).
19 Subjugating Plaintiffs to exclusion, unequal treatment, and forced separation
20 simply because they are transgender violates their constitutional rights and thus
21 “unquestionably” establishes that they will suffer irreparable injuries absent
22

23 _____
24 ⁷ Along these lines, Defendants cite *Hartikka v. United States*, 754 F.2d 1516 (9th
25 Cir. 1985), and assert the Court should require a “stronger” than usual “showing of
26 irreparable harm” because this case, like that one, arises in “the military context.”
27 (Opp. at 19.) But *Hartikka* did not involve a facial constitutional challenge to a
28 policy targeting an entire class of people. Rather, it involved a U.S. Air Force
captain appealing his discharge for “drunk and disorderly conduct”—including
“wrongfully discharg[ing] a semi-automatic weapon in the direction of a
neighbor’s house while highly intoxicated”—under military procedures. *Id.* at
1517. Those facts bear no resemblance to the claims here.

1 injunctive relief. *Id.*; *see generally infra* § III.B. That alone is enough to
 2 demonstrate irreparable injury.⁸

3 In addition, Plaintiffs have demonstrated specific irreparable injuries, not
 4 compensable by “damages and back pay,” beyond the constitutional violations.
 5 First, Plaintiffs who are forced to pursue different opportunities because of this ban
 6 will be irreparably harmed by the loss of their ability to pursue their chosen
 7 military profession. *See Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th
 8 Cir. 2017) (holding the “diminished . . . opportunity to pursue [one’s] chosen
 9 profession . . . constitutes irreparable harm.”); *Enyart v. Nat’l Conference of Bar*
 10 *Examiners, Inc.*, 630 F.3d 1153, 1166 (9th Cir. 2011) (holding plaintiff established
 11 irreparable harm by demonstrating that the challenged bar exam policies denied her
 12 eligibility to become a lawyer); (Tate Decl., ¶¶ 25, 27; Jane Doe Decl., ¶¶ 16-18,
 13 22; John Doe 1 Decl., ¶ 20; John Doe 2 Decl., ¶¶ 31, 36; *see also* Mabus Supp.
 14 Decl., ¶¶ 4-7; Fanning Supp. Decl., ¶ 5-6; Eitelberg Decl. ¶ 8.)

15 Second, Plaintiffs also suffer irreparable harms because of the professional
 16 stigma and negative public perception the ban creates and reinforces, including that
 17 Plaintiffs are unfit for or incapable of service solely because they are transgender.
 18 *Enyart*, 630 F.3d at 1166 (holding plaintiff could establish irreparable harm by
 19

20 ⁸ Defendants cite a First Circuit decision, *Vaqueria Tres Monjitas, Inc. v. Irizarry*,
 21 587 F.3d 464, 484 (1st Cir. 2009), for the proposition that violations of equal
 22 protection and due process do not automatically constitute irreparable injuries.
 23 (Opp. at 20.) But “[t]here is no indication that the Ninth Circuit requires a
 24 constitutional right to be ‘fundamental’ in order to support a conclusion that its
 25 violation would constitute an irreparable injury. Rather, it has held more generally
 26 that ‘an alleged constitutional infringement will often alone constitute irreparable
 27 harm.’” *Cedar Point Nursery v. Gould*, 2016 WL 3019277, at *8 (E.D. Cal. May
 28 26, 2016) (quoting *Assoc’d Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991)) (rejecting government’s reliance on
Vaqueria and concluding plaintiffs would “be able to show an irreparable injury if
 they can show that [the challenged activities] are unconstitutional.”). In any event,
 Plaintiffs allege the ban violates their fundamental rights to be free from invidious
 discrimination under the Equal Protection Clause, to autonomy under the Due
 Process Clause, and to freedom of expression under the First Amendment.

1 demonstrating that the challenged bar exam policies “likely” imposed a
 2 “professional stigma” against persons with disabilities) (emphasis original); *see*
 3 *also Elzie v. Aspin*, 841 F. Supp. 439, 443 (D.D.C. 1993) (holding being “labeled
 4 as unfit for service solely on the basis of . . . sexual orientation, a criterion which
 5 has no bearing on [plaintiff’s] ability to perform his job,” constitutes irreparable
 6 harm); (Tate Decl., ¶¶ 23, 25; Jane Doe Decl., ¶¶ 21, 23; John Doe 1 Decl., ¶¶ 23-
 7 24; John Doe 2 Decl., ¶ 33 (cataloging loss of public confidence and experienced
 8 stigma); James Supp. Decl., ¶ 8; Eitelberg Decl., ¶ 11; Fanning Supp. Decl., ¶ 5).

9 Third, Plaintiffs are harmed by the loss of medically necessary healthcare.
 10 *See Fishman v. Paolucci*, 628 F. App’x 797, 801 (2d Cir. 2015) (“A lack of
 11 medical services is exactly the sort of irreparable harm that preliminary injunctions
 12 are designed to address.”).

13 Finally, the ban compromises Plaintiffs’ livelihood and opportunities for
 14 advancement. (*See Mabus Supp. Decl.*, ¶¶ 4-7 (explaining that because of the ban,
 15 “command lacks the requisite certainty that transgender service members will be
 16 able to complete the terms of their deployments”); Eitelberg Decl., ¶ 7 (explaining
 17 that the ban will cause commanders to be reluctant to invest in training individuals
 18 who might leave in “the near future, or to entrust them with important
 19 assignments”); Fanning Supp. Decl., ¶¶ 5-6 (explaining that the ban limits
 20 advancement and promotion opportunities). Each of these injuries is irreparable
 21 and warrants injunctive relief.

22 **B. Plaintiffs Are Likely to Prevail on the Merits of Their Claims.**

23 **1. The Ban Violates Equal Protection.**

24 Plaintiffs have shown that the ban violates the Fifth Amendment’s guarantee
 25 of equal protection. (*See PI Mot.* at 11-22.) Rather than rebutting that claim,
 26 Defendants defend the constitutionality of the Interim Guidance, which Plaintiffs
 27 do not challenge. (*See Opp.* at 25-26.) To the limited extent Defendants address
 28 the merits of Plaintiffs’ equal protection claim, they erroneously claim the ban is

1 subject to “highly deferential review” merely because it involves military policy.
 2 (Opp. at 24-31.) Under settled law, there is no “military exception” to the
 3 requirement of equal protection. The ban’s facial classification against transgender
 4 people warrants, and cannot survive, heightened scrutiny. And because it lacks
 5 even a rational basis and bears the hallmarks of having been enacted for an
 6 improper discriminatory purpose, it cannot survive any level of review.

7 **a. *Military policies are not subject to a deferential level of***
 8 ***equal protection scrutiny.***

9 The President cannot discriminate invidiously against transgender people
 10 simply because the ban is a military, rather than civilian, policy. The government
 11 is not “free to disregard the Constitution when it acts in the area of military
 12 affairs.” *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981); *see also Chappell v.*
 13 *Wallace*, 462 U.S. 296, 304 (1983) (“This Court has never held, nor do we now
 14 hold, that military personnel are barred from all redress in civilian courts for
 15 constitutional wrongs suffered in the course of military service.”). The Supreme
 16 Court has rejected the argument—asserted by Defendants here—that courts should
 17 apply a more deferential level of review to military policies even when they
 18 facially discriminate on a basis that would otherwise warrant heightened scrutiny.
 19 In *Rostker*, the Court “expressly declined to hold that the intermediate scrutiny
 20 applicable to gender discrimination did not apply in the military personnel
 21 context.” *Doe*, 2017 WL 4873042, at *31; 453 U.S. at 79-83. Under this settled
 22 law, Defendants’ contention that heightened scrutiny applies only to military
 23 policies that seek “to exclude a race or religion” (Opp. at 26) has no merit.

24 **b. *Deference does not apply where there was no exercise***
 25 ***of considered military judgment.***

26 In assessing the strength of a proffered justification for a military policy,
 27 courts defer to such justifications *only* when they are the product of a deliberative
 28 process that draws upon the considered judgment of military professionals,

1 informed by relevant evidence and expertise. For example, in *Rostker*, the
 2 Supreme Court found that “Congress did not act unthinkingly or reflexively and
 3 not for any considered reason” when it passed the policy at issue in that case. 453
 4 U.S. at 61, 72 (noting “Congress considered the question at great length,” held
 5 hearings, and made findings). Here, such study and evaluation of evidence
 6 warranting judicial deference “is completely absent from the current record.” *Doe*,
 7 2017 WL 4873042, at *31. “To the contrary, the record at this stage of the case
 8 shows that the reasons offered for categorically excluding transgender individuals
 9 were not supported and were in fact contradicted by the only military judgment
 10 available at the time.” *Id.*

11 **c. *The ban’s facial discrimination against transgender***
 12 ***people requires, and fails, heightened scrutiny.***

13 Defendants do not dispute that discrimination against transgender people
 14 meets all of the established criteria for determining when strict scrutiny applies.
 15 (PI Mot. at 12-15); *see also Doe*, 2017 WL 4873042, at *60 (“The transgender
 16 community satisfies these criteria.”). Many other courts have subjected such
 17 discrimination to heightened review. *See Doe*, 2017 WL 4873042, at *61 (citing
 18 cases). This Court should do so as well to ensure that governmental laws and
 19 policies based on bias against disfavored groups are subject to meaningful review.
 20 This goal is particularly important in military cases, where it is essential that our
 21 nation’s armed forces reflect the diversity of our country and are open to all
 22 Americans who are otherwise qualified to serve. (*See Fanning Supp. Decl.*, ¶¶ 9-
 23 10; *James Decl.*, ¶ 46; *James Supp. Decl.*, ¶ 9; *Mabus Decl.*, ¶¶ 17, 42, 46; *Mabus*
 24 *Supp. Decl.*, ¶¶ 8-9.)

25 Defendants also fail to rebut Plaintiffs’ demonstration that discrimination
 26 against transgender people additionally warrants heightened scrutiny because it is
 27 based on sex. In *Schwenk v Hartford*, 204 F.3d 1187, 1200-02 (9th Cir. 2000), the
 28 Ninth Circuit held that discrimination based on a person’s transgender status is a

1 form of sex-based discrimination. Defendants do not even mention *Schwenk*;
2 however, that holding is binding here and requires the application of heightened
3 review. As *Schwenk* itself makes clear by citing Title VII case law to support its
4 analysis of the Gender Motivated Violence Act, the Ninth Circuit’s determination
5 that anti-transgender discrimination is based on a person’s sex applies regardless of
6 the specific statute or, in this case, constitutional provision at issue. A government
7 policy that facially discriminates against transgender people, as the ban does here,
8 must minimally be evaluated under the heightened standard applied to any form of
9 sex-based discrimination. See, e.g., *Glenn v Brumby* 663 F.3d 1312, 1316 (11th
10 Cir. 2011); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d
11 1034, 1051 (7th Cir. 2017); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir.
12 2004); *Rosa v. Park W Bank Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); see
13 also *Doe*, 2017 WL 4873042, at *27-*28.

14 Under that standard, the government must demonstrate “an exceedingly
15 persuasive” justification for the ban. *United States v. Virginia*, 518 U.S. 515, 531
16 (1996). “The burden of justification is demanding and rests entirely on” the
17 Defendants. *Id.* at 533. “The justification must be genuine, not hypothesized or
18 invented *post hoc* in response to litigation,” and “it must not rely on overbroad
19 generalizations.” *Id.* None of the justifications proffered by Defendants come
20 close to meeting this standard here. Defendants cite three reasons for the ban.
21 First, they claim that “at least some transgender individuals suffer from medical
22 conditions that could impede the performance of their duties.” (Opp. at 29.)
23 Second, Defendants argue that certain medical conditions “may limit the
24 deployability of transgender individuals as well as impose additional costs on the
25 armed forces.” (Opp. at 29.) Third, Defendants claim that “the President could
26 reasonably conclude” that permitting transgender people to serve in the military
27 would harm “unit cohesion.” (Opp. at 30.)

28

1 Defendants cannot show that the ban is substantially related to any of these
2 asserted justifications. As the court in *Doe* correctly held, Defendants’ arguments
3 that transgender people may have medical conditions that could affect their
4 deployability “are hypothetical and extremely overbroad.” *Doe*, 2017 WL
5 4873042, at *29. Plainly, “these hypothetical concerns could be raised about *any*
6 service members.” *Id.* In addition, “these concerns do not explain the need to
7 discharge and deny accession to *all* transgender people who meet the relevant
8 physical, mental, and medical standards for service.” *Id.* Like the measure struck
9 down in *Romer v. Evans*, 517 U.S. at 632, the policy’s “sheer breadth is so
10 discontinuous with the reasons offered for it that it seems inexplicable by anything
11 other than animus toward the class it affects.”

12 Defendants’ invocation of cost is equally unavailing. (*See Opp.* at 30.)
13 Under settled law, the government cannot justify discrimination under strict or
14 intermediate scrutiny based on an asserted interest in conserving costs, even where
15 the government could show that significant savings would actually result. *See*,
16 *e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 688-89 (1973) (rejecting
17 “administrative convenience” as a sufficient justification for the government’s
18 disparate treatment of men and women); *Stanley v. Illinois*, 405 U.S. 645, 656-58
19 (1972) (same); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 775 (9th Cir. 2014)
20 (holding that “administrative convenience is a thoroughly inadequate basis for the
21 deprivation of core constitutional rights”) (internal citation omitted); *see also infra*
22 § IV.B.d.3. Defendants’ attempted reliance on cost to justify such a categorical
23 ban is particularly unavailing in this case, where there is no dispute that the cost of
24 providing medical care to transgender service members is insignificant. *See Doe*,
25 2017 WL 4873042, at *29 (“The breadth of [the ban] is also discontinuous with the
26 purported concern about costs, which, in addition to having been found to be
27 minimal or negligible, apparently are primarily related to a surgical procedure that
28 only a subset of transgender individuals will even need.”).

1 Finally, Defendants do not explain, let alone support, their claim that
2 permitting transgender individuals to serve in the military might harm “unit
3 cohesion.” To the contrary, Defendants acknowledge the absence of any evidence
4 to support such a claim—merely asserting, without more, that it is somehow
5 “reasonable” to assume that permitting transgender people to serve would have an
6 adverse impact. (Opp. at 30-31.) “At *most*, Defendants’ reasons appear therefore
7 to be based on unsupported, ‘overboard generalizations about the different talents,
8 capacities, or preferences’ of transgender people.” *Doe*, 2017 WL 4873042, at *29
9 (citing *Virginia*, 518 U.S. at 533).

10 In *Doe*, the court noted that it did not base “its conclusion solely on the
11 speculative and overbroad nature of the President’s reasons.” *Id.* at *30. It further
12 concluded that “the reasons proffered by the President for excluding transgender
13 individuals from the military in this case were not merely unsupported, but were
14 actually *contradicted* by the studies, conclusions and judgment of the military
15 itself.” *Id.* In particular, “the RAND National Defense Research Institute
16 conducted a study and issued a report largely debunking any potential concerns
17 about unit cohesion, military readiness, deployability or health care costs related to
18 transgender military service.” *Id.* In addition, the Working Group “unanimously
19 concluded that there were no barriers that should prevent transgender individuals
20 from serving in the military, rejecting the very concerns supposedly underlying the
21 [ban].” *Id.* “In short, the military concerns purportedly underlying the President’s
22 decision had been studied and rejected by the military itself.” *Id.* Accordingly, the
23 *Doe* court concluded that “[t]his highly unusual situation is further evidence that
24 the reasons offered for the [ban] were not substantially related to the military
25 interests the Presidential Memorandum cited.” *Id.* This Court should reach the
26 same conclusion here.

27 The ban fails heightened review for an additional reason as well. The
28 President abruptly—in a series of tweets, and without any formal or deliberative

1 process—reversed a policy that had been relied upon by many service members.
 2 “These circumstances provide additional support for Plaintiffs’ claim that the
 3 decision to exclude transgender individuals was not driven by genuine concerns
 4 regarding military efficacy.” *Doe*, 2017 WL 4873042, at *30 (citing *Vill. of*
 5 *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)).

6 **d. *The ban cannot survive any level of scrutiny.***

7 In addition to being too hypothetical and overbroad to pass muster under the
 8 heightened scrutiny that must be applied in this case, none of the proffered
 9 justifications for the ban survive even rational basis review. Under rational basis
 10 review, justifications must have a “footing in the realities of the subject
 11 addressed,” *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993), and Defendants “may
 12 not rely on a classification whose relationship to an asserted goal is so attenuated
 13 as to render the distinction arbitrary or irrational.” *City of Cleburne v. Cleburne*
 14 *Living Ctr.*, 473 U.S. 432, 446 (1985); *see also Bd. of Trs. of the Univ. of Ala. v.*
 15 *Garrett*, 531 U.S. 356, 366 n.4 (2001). Here, Defendants advance no argument
 16 that can justify the ban under any level of review. The absence of any rational
 17 relationship between the ban and its asserted justifications, as well as the highly
 18 unusual circumstances of its adoption, lead to the inescapable inference that it was
 19 adopted based on bias, rather than on legitimate military concerns.

20 (1) Defendants’ argument that they need not justify
 21 the ban because it reinstates a prior policy has no
 22 merit.

23 Defendants contend that they need not justify the ban because it simply
 24 continues a longstanding prior policy. (Opp. at 17-19.) Defendants are wrong.
 25 “Before the [ban], transgender people had already been given the right to serve
 26 openly and the right to accede by a date certain in early 2018. The [ban] took
 27 those rights away from transgender people and transgender people only.” *Doe*,
 28 2017 WL 4873042, at *31. “The targeted revocation of rights from a particular

1 class of people which they had previously enjoyed—for however short a period of
2 time—is a fundamentally different act than not giving those rights in the first
3 place, and it will be the government’s burden in this case to show that *this* act was
4 substantially related to an important government objectives.” *Id.* (emphasis in
5 original). In *Perry v. Brown*, 671 F.3d 1052, 1079-80 (9th Cir. 2012), *vacated and*
6 *remanded on other grounds sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652
7 (2013), the Ninth Circuit held that Proposition 8, which eliminated the freedom to
8 marry for same-sex couples in California, was unconstitutional because the State
9 could not justify eliminating a right that had previously been recognized.
10 “Withdrawing [a right] from a disfavored group . . . is different from declining to
11 extend the designation in the first place, regardless of whether the right was
12 withdrawn after a week, a year, or a decade.” *Id.*; *see also Romer v. Evans*, 517
13 U.S. 620, 627 (1996) (striking down Colorado law that “withdr[ew] from [gay
14 people] . . . specific legal protection . . . and . . . forb[ade] reinstatement of these
15 laws and policies”); *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013)
16 (concluding that the federal Defense of Marriage Act was enacted to “disparage
17 and to injure” married same-sex couples because it “refus[ed] to acknowledge a
18 status” previously granted). Under this settled law, the government must justify its
19 decision regardless of whether it reinstates an older policy. Its inability to do so
20 reflects an improper purpose to “disparage and to injure” transgender service
21 members and those who wish to serve.

22 (2) Deployability does not justify the ban even under
23 rational basis review.

24 Defendants’ claim that the ban is justified because “at least some
25 transgender individuals suffer from medical conditions that could impede the
26 performance of their duties” (Opp. at 29) cannot withstand even the most cursory
27 analysis. The June 2016 Open Service Policy requires that transgender people
28 meet all of the same service qualifications that non-transgender people meet. (PI

1 Mot. at 4-5); *see also Doe*, 2017 WL 4873042, at *28-29 (noting the President’s
 2 policy bars “an entire category of individuals from the military solely because they
 3 are transgender, despite their ability to meet all of the physical, psychological, and
 4 other standards for military service”). Accordingly, those affected by the
 5 President’s categorical ban are transgender service members who are qualified and
 6 medically fit for service under generally applicable standards. *See City of L.A. v.*
 7 *Patel*, 135 S. Ct. 2443, 2451 (2015) (“The proper focus of the constitutional
 8 inquiry is the group for whom the law is a restriction, not the group for whom the
 9 law is irrelevant.”).

10 With respect to accessions in particular, the June 2016 policy recognized
 11 that any medical conditions associated with transgender people are curable; thus,
 12 there is no reason to treat transgender people differently than the military already
 13 treats those with other curable conditions.⁹ (*See Brown Decl.*, ¶¶ 44-46 (describing
 14 how “the enlistment policy” revived by the ban “treated transgender individuals in
 15 an inconsistent manner compared with how the military addressed persons with
 16 other curable medical conditions”).) Defendants may not single out transgender
 17 people and treat them differently given the complete absence of any legitimate
 18 reason to do so. *Garrett*, 531 U.S. at 366 n.4; *In re Levenson*, 587 F.3d 925, 933
 19 (9th Cir. 2009) (holding proffered government interest “d[id] not provide a rational
 20 basis for” a public policy where policy was “drastically underinclusive” in
 21 advancing that interest).

22 This case is not about “line-drawing” or a battle of experts where people
 23 with “almost equally strong claim[s]” are placed on different sides of a line. *Cf.*
 24 *FCC v. Beach Commcn’s Inc.*, 508 U.S. 307, 315-16 (1993). Defendants baldly
 25

26 ⁹ Defendants’ indirect suggestion that gender dysphoria is comparable to other
 27 disqualifying conditions has no basis. Defendants erroneously claim that the
 28 World Health Organization classifies “transsexualism” as a “disorder of adult
 personality and behavior,” when in fact the WHO has rejected that classification as
 lacking any medical or scientific basis. (*See Brown Supp. Decl.*, ¶¶ 4-10.)

1 assert that “[r]easonable people could disagree over whether these individuals
2 should be able to serve” (Opp. at 31), but they fail to offer any possible legitimate
3 basis for such a disagreement. There is *no* “almost equally strong claim” to be
4 made that gender dysphoria is similar to disqualifying unmanageable conditions
5 like contagious and infectious diseases, or physical defects that make training
6 impossible. (*See* Brown Decl., ¶ 42.)

7 (3) Costs do not justify the ban even under rational
8 basis review.

9 Defendants’ reliance on the purported costs associated with providing
10 medical care to transgender persons is unavailing under rational basis review, just
11 as it is unavailing under heightened scrutiny. Under settled law, “something more
12 than an invocation of the public fisc is necessary to demonstrate the rationality of
13 selecting [one group], rather than some other group, to suffer the burden of cost-
14 cutting legislation.” *Lyng v. Int’l Union*, 485 U.S. 360, 376-77 (1988); *see also In*
15 *re Levenson*, 587 F.3d at 933. Here, Defendants do not attempt to meet even this
16 minimal requirement, merely contending, without more, that even though the cost
17 of providing care to transgender persons is negligible, the military may
18 nevertheless “decide how best to spend its money.” (Opp. at 30.) That bare
19 assertion is insufficient to justify a categorical ban even under rational basis
20 review. *Any* denial of benefits to *any* group will *always* save resources, so the
21 government must do more than state a desire to cut costs; it must justify why it
22 chose a particular group to bear the burdens of cost-cutting, and “do more than
23 justify its classification with a concise expression of intent to discriminate.” *Plyler*
24 *v. Doe*, 457 U.S. 202, 227, 229 (1982) (cost-cutting could not justify denying free
25 public education to children of undocumented immigrants who “[i]n terms of
26 educational cost and need . . . are basically indistinguishable from legally resident
27 alien children”) (internal quotation marks omitted); *Shapiro v. Thompson*, 394 U.S.
28 618, 633 (1969) (“[a state] must do more than show that denying welfare benefits

1 to new residents saves money”), *overruled in part on other grounds, Edelman v.*
2 *Jordan*, 415 U.S. 651 (1974). Here, there is no rational justification for making
3 transgender service members bear the weight of cost cutting measures especially
4 where there is no medical distinction made, or even offered, by the military
5 between those conditions experienced by transgender service members and those
6 experienced by others.

7 This asserted rationale is particularly irrational and implausible given the
8 military’s own recent conclusion—which Defendants do not dispute—that the
9 costs of providing medical care to transgender service members is extremely low.
10 As in *Romer*, the contrast between the sweeping exclusion established by the ban
11 and the insignificance of the costs at issue make this rationale “impossible to
12 credit.” 517 U.S. at 635 (holding Colorado’s asserted interest in “conserving
13 resources to fight discrimination against other groups” was “impossible to credit”
14 in light of the breadth of Amendment 2).

15 (4) Unit cohesion does not justify the ban even under
16 rational basis review.

17 The invocation of “unit cohesion” as a proposed justification for bans on
18 military service by qualified Americans has a long and discredited history and does
19 not supply any persuasive justification for this ban. Transgender service members,
20 including Plaintiffs, already have been serving openly and honorably without any
21 adverse impact upon “unit cohesion” (Tate Decl., ¶ 19; Jane Doe 1 Decl., ¶ 14;
22 John Doe 1 Decl., ¶¶ 19, 25; John Doe 2 Decl., ¶¶ 18, 20), and “there is no
23 evidence that permitting openly transgender people to serve in the military would
24 disrupt unit cohesion.” (Carson Decl., ¶ 19, Ex. B at xiii, 39-47 (RAND Report).)
25 To the contrary, all of the available evidence, as well as the judgment of military
26 professionals, shows that permitting open service strengthens unit cohesion by
27 encouraging honesty, by showing that diversity is a strength, and by reinforcing
28 that the military is a meritocracy where people contribute to the mission and rise in

1 leadership based on their performance, not their identities. (Mabus Supp. Decl.,
 2 ¶ 8; Eitelberg Decl., ¶ 13.) In contrast, excluding a group of people from military
 3 service for reasons unrelated to their abilities weakens military readiness because it
 4 erodes the principle of merit upon which the military’s strength rests. (Fanning
 5 Decl., ¶ 60; Fanning Supp. Decl., ¶ 7; James Decl., ¶ 43; James Supp. Decl., ¶ 9;
 6 Mabus Supp. Decl., ¶ 12.) Moreover, it is well-settled that the government
 7 “cannot, indirectly or directly give . . . effect” to “private biases.” *Palmore v.*
 8 *Sidoti*, 466 U.S. 429, 433 (1984); *Cleburne*, 473 U.S. at 448. Accordingly, to the
 9 extent concern about unit cohesion is simply another way of excluding a group of
 10 people *because* the group experiences social prejudice, it cannot justify the ban
 11 under any level of review.

12 (5) The ban is inexplicable by anything other than bias
 13 toward transgender people.

14 For all of the reasons stated above, the ban is inexplicable by anything other
 15 than bias toward transgender people, which is impermissible under any level of
 16 review. “In determining whether a law is motivated by an improper animus or
 17 purpose, ‘discriminations of an unusual character’ especially require careful
 18 consideration.” *Windsor*, 133 S. Ct. at 2693 (quoting *Romer*, 517 U.S. at 633).
 19 “The discrimination in this case was certainly of an unusual character.” *Doe*, 2017
 20 WL 4873042, at *30. The ban reversed a policy that was adopted after extensive
 21 deliberation and review by the military itself and was relied upon by many
 22 transgender service members. The President’s announcement of the ban was
 23 abrupt and highly unusual, “without any of the formality or deliberative processes
 24 that generally accompany the development and announcement of major policy
 25 changes that will gravely affect the lives of many Americans.” *Id.* The terms of
 26 the ban were sweeping and categorical—“that all transgender individuals would be
 27 precluded from participating in the military in any capacity.” *Id.* “It is not within
 28 our tradition to enact laws of this sort.” *Romer*, 517 U.S. at 633; *see also Vill. of*

1 *Arlington Heights*, 429 U.S. at 266-68 (describing factors that show “improper
2 purposes are playing a role”).

3 Plaintiffs are accordingly likely to prevail on the merits of their equal
4 protection claim.

5 **2. *The Ban Violates Due Process.***

6 Defendants’ ban also violates the Fifth Amendment’s due process guarantee
7 because it infringes upon a constitutionally protected liberty interest in being able
8 to live in accordance with one’s innate gender identity, and because it punishes
9 transgender people for taking actions—identifying themselves as transgender to
10 their commanding officers and others—that the government itself induced. (*See* PI
11 Mot. at 22-27.) Putting aside Defendants’ reprisal of meritless ripeness arguments
12 (*Opp.* at 31-32), Defendants’ arguments in response to Plaintiffs’ due process
13 claim largely ignore the substance of Plaintiffs’ claims.¹⁰

14 As an initial matter, Defendants fail to rebut Plaintiffs’ demonstration that
15 the ban is subject to heightened review because it burdens their constitutionally
16 protected liberty interest in living in accordance with their gender identity, a “basic
17 component of a person’s core identity.” *Hernandez-Montiel v. INS*, 225 F.3d 1084,
18 1094 (9th Cir. 2000) (internal citations and quotation marks omitted), *overruled on*
19 *other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (en banc);
20 *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 n.8 (N.D. Cal. 2015) (transgender
21 identity is “immutable”); *see also* Brown Decl., ¶¶ 21-23.

22 Defendants’ argument that Plaintiffs have not “narrowly and accurately
23 define[d]” the interest they seek to vindicate has no merit. (*Opp.* at 33.) The
24 interest Plaintiffs assert is the freedom to live in accordance with one’s gender
25 identity—a characteristic the Ninth Circuit has held to be a “basic component of a
26 person’s core identity.” *Hernandez-Montiel*, 224 F.3d at 1094 (internal citations

27
28 ¹⁰ In some instances, Defendants actually attack claims that were never raised in Plaintiffs’ PI Motion. (*E.g.*, *Opp.* at 32-33.)

1 and quotation marks omitted). In that case, the Ninth Circuit recognized the
2 transgender plaintiff could not change that core aspect of personal identity and
3 should not have to do so in order to avoid persecution. *Id.* Similarly, Plaintiffs
4 cannot change their gender identities and should not have to do so in order to avoid
5 discrimination.

6 Like other laws that have been struck down because they burden a
7 fundamental right only for the members of a disfavored group (*see* PI Mot. at 25),
8 the ban burdens this aspect of personal autonomy only for transgender people.
9 Other service members can live in accordance with their gender identity: under the
10 ban, transgender people—and only transgender people—cannot. Non-transgender
11 service members—*i.e.*, the majority of service members whose gender identity
12 matches their assigned sex at birth—are free to live, work, and identify consistent
13 with their core gender identity. In contrast, the ban denies transgender people the
14 same freedom. Under the ban, transgender people who are open about their gender
15 identity are prohibited from enlisting and are subject to discharge.

16 In *Witt v. Dep't of Air Force*, 527 F.3d 806, 814-21 (9th Cir. 2008), the
17 Ninth Circuit held that a military regulation that selectively infringes upon a
18 constitutionally protected liberty interest—in that case, the right of unmarried
19 adults to enter into a consensual intimate relationship as established in *Lawrence v.*
20 *Texas*, 123 S.Ct. 2472 (2003)—is subject to heightened scrutiny. That holding is
21 applicable here, and Defendants have cited no authority or argument to the
22 contrary. Instead, Defendants fall back upon their erroneous argument that
23 plaintiffs lack standing, contending only that “unlike the plaintiff in *Witt*, Plaintiffs
24 have not been discharged.” (Opp. at 31-33.) That argument has no bearing on the
25 merits of Plaintiffs’ due process claim. Like the plaintiff in *Witt*, Plaintiffs have
26 stated a valid due process claim, based upon the government’s infringement of a
27 constitutionally protected liberty interest.

28

1 Defendants mischaracterize Plaintiffs’ claim as an interest in having the
2 military “disregard their transgender status.” (Opp. at 33.) That reframing misses
3 the point and turns the requirement of substantive due process on its head. The ban
4 violates due process because it uses Plaintiffs’ transgender status, an immutable,
5 core aspect of their identities, as a proxy for unfitness. The ban deprives all
6 persons with that identity the ability to serve, across the board, with no
7 individualized consideration of their ability. Put simply, transgender persons have
8 a protected due process right to live in accordance with their gender identity, just
9 as do all other people. The ban infringes upon that right by categorically barring
10 them from military service for exercising that fundamental freedom, without regard
11 to their fitness or ability to serve.

12 In a closely analogous case, the Second Circuit explained why a categorical
13 ban on service by pregnant women in the Marines similarly violated due
14 process: “the Marine Corps, instead of taking an individualized approach to the
15 disability of pregnancy, established a general rule that seriously affects the ability
16 of women Marines who are physically able to be mobile and ready . . . [A]
17 mandatory discharge regulation is overbroad and overly restrictive because it
18 penalizes the decision to bear a child by those Marines whose mobility and
19 readiness would not be reduced, either during most months preceding birth or
20 during their careers after birth.” *Crawford v. Cushman*, 531 F.2d 1114, 1125 (2d
21 Cir. 1976). So, too, here: a ban on transgender people serving is overbroad and
22 overly restrictive because it penalizes a constitutionally protected aspect of
23 personal liberty—here, the ability to live in accordance with one’s gender
24 identity—that has no impact on a person’s ability to serve. And where, as here, the
25 government does not even argue that there is a substantial relationship between
26 that identity and military concerns, the ban fails under heightened review.¹¹

27

28 ¹¹ At a minimum, due process requires that a governmental policy must at least be
rationally related to a legitimate government interest. *See Washington v.*

1 Finally, the ban violates due process because the government induced
2 transgender service members to come out to their command, and now threatens
3 them with forced separation and the loss of medical care for having done so. (*See*
4 *PI Mot.* at 25-27.) In response, Defendants argue that a “judicial estoppel” claim
5 cannot succeed on these facts. (*See Opp.* at 32-33 (citing judicial estoppel cases
6 *United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995), *New Hampshire v.*
7 *Maine*, 532 U.S. 742, 755 (2001), *Emery Mineral Corp. v. Secretary of Labor*, 744
8 F.2d 1411, 1416 (10th Cir. 1984), and a recent Supreme Court decision
9 interpreting the Administrative Procedures Act, *Perez v. Mortgage Bankers Ass’n*,
10 135 S. Ct 1199, 1210 (2015)).) Defendants’ rebuttal is nonresponsive because
11 Plaintiffs do not advance a “judicial estoppel” claim, and the authorities upon
12 which their argument rests are inapplicable to Plaintiffs’ due process claim.

13 Defendants fail to respond to the key cases upon which Plaintiffs rely to
14 show the fundamental unfairness of allowing the government to punish people for
15 relying on settled policies. *See INS v. St. Cyr*, 533 U.S. 289, 323 (2001) (holding
16 undocumented immigrants who pled guilty, “[r]elying on the settled practice” that
17 they would be eligible for deportation waivers, could not be deported after the
18 Attorney General’s discretion to issue those waivers was eliminated); *Cox v.*
19 *Louisiana*, 379 U.S. 559, 569-570 (1965) (overturning conviction where party
20 reasonably relied on government’s own representations about lawfulness of the
21 conduct); *cf. Watkins v. U.S. Army*, 875 F.2d 699, 708 (9th Cir. 1989) (holding the
22 government was equitably estopped from discharging a gay man from military
23 service after it “acted affirmatively” to “admit[,],” “retain[,],” and “promot[e]” him,
24 and then encouraged the disclosure that it used to discharge him).

25
26
27 *Glucksberg*, 521 U.S. 702, 728 (1997) (explaining that substantive component of
28 due process “requires . . . that [public policies] be rationally related to legitimate
government interests”). For the reasons stated above, *see supra* § IV.B.1.c, the ban
fails even this minimal test.

1 The government is not “estopped from changing generally applicable
2 policies.” (Opp. at 32.) When there are legitimate reasons to do so and doing so
3 withstands constitutional review, it surely can make changes in policy. But the
4 government cannot induce individuals to rely on a policy and then punish them
5 when they do. To this point, Defendants have no reply. Plaintiffs are therefore
6 likely to succeed on this claim as well.

7 **3. The Ban Violates the First Amendment.**

8 Defendants also have no persuasive response to Plaintiffs’ First Amendment
9 claim. They again defend the constitutionality of the Interim Guidance, ignoring
10 Plaintiffs’ challenge of the ban itself. To the limited extent Defendants address
11 Plaintiffs’ actual First Amendment claim, their arguments miss the mark.

12 Defendants argue that the accessions ban “turns on whether a person’s
13 current or history of gender dysphoria or gender transition meets medical
14 standards, not because of the message one’s gender identity conveys.” (Opp. at
15 34.) That is incorrect. The accessions ban prohibits individuals from enlisting
16 solely because they are transgender, regardless of their current or past medical
17 treatment. As the August 25 Memorandum expressly acknowledges, the ban
18 reinstates a policy that “generally prohibit[s] openly transgender individuals from
19 accession[.]” (Sieff Decl., Ex. G at § 1(a)); *see also Doe*, 2017 WL 4873042 at
20 *30; (Brown Decl., ¶ 40; Carson Decl., ¶ 28; Eitelberg Decl., ¶ 10; Fanning Decl.,
21 ¶ 56; James Decl., ¶ 37; Mabus Decl., ¶ 39.) Accordingly, Defendants’ attempt to
22 recast the accessions policy as a ban on the underlying medical condition, rather
23 than on the expression of transgender identity, has no merit.

24 Defendants also fail to acknowledge that because the ban restricts speech
25 based on its viewpoint, it is subject to strict scrutiny. As Defendants concede
26 (Opp. at 35), “regulations restricting speech on military installations may not
27 discriminate against speech based upon its viewpoint.” *Nieto v. Flatau*, 715 F.
28 Supp. 2d 650, 655 (E.D.N.C. 2010). “Generally speaking, a regulation is

1 viewpoint based if it suppresses the expression of one side of a particular debate,”
2 *id.*, which is precisely what the transgender ban does. It prohibits transgender
3 people in the military from openly advocating for their own equal treatment and
4 restricts their ability to discuss or demonstrate by example their competency as
5 service members. Persons who take a different view are not similarly restricted.
6 By picking one side of a debate and authorizing speech only on that side and
7 restricting speech on the other, the ban imposes a viewpoint-based restriction that
8 is subject to strict scrutiny. Because Defendants cannot show that the ban serves
9 even a legitimate purpose, much less that it is narrowly tailored to serve a
10 compelling government interest, it violates the First Amendment.

11 Because Defendants ignore the ban’s viewpoint-based restriction on speech,
12 they erroneously rely upon *Brown v. Glines*, 444 U.S. 348, 355 (1980) and
13 *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) for the proposition that
14 “regulation of speech in the military survives . . . if it restrict[s] speech no more
15 than is reasonably necessary to protect the substantial government interest.” (Opp.
16 at 35 (quotations omitted).) Those cases do not apply to a viewpoint-based
17 restriction. But even under that more lenient standard, the ban is far too broad to
18 survive a First Amendment challenge. The regulations in *Brown* and *Weinberger*
19 were narrow, limiting speech only on military bases or when expressed by service
20 members on duty and in uniform. *Brown*, 444 U.S. at 348 (distribution of flyers *on*
21 *base*); *Weinberger*, 475 U.S. at 507 (wearing yarmulke while *on duty and in*
22 *uniform*). Here, the ban goes far beyond limiting Plaintiffs’ expression while on
23 base or on duty. Because the ban penalizes Plaintiffs if they are discovered to be
24 or declare themselves to be transgender *at all*, it curtails Plaintiffs’ ability to
25 identify themselves as transgender in any forum—whether publicly or privately, at
26 a political rally, in a newspaper op-ed, or on social media. The ban’s restriction is
27 thus “far greater than necessary to protect the Government’s [purported] interests.”
28 *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 927 (C.D. Cal.

1 2010) (rejecting government’s comparison to *Brown* and finding that banning open
2 service by gays and lesbians violated First Amendment). Thus, even under the
3 standard advanced by Defendants, the ban violates the First Amendment.

4 **C. The Public Interest and Equity Sharply Favor an Injunction.**

5 Defendants fail to identify a single, actual harm that it would suffer from the
6 proposed injunction. (*See Opp.* at 36.) To the extent Defendants claim an
7 injunction against enforcing the ban would interfere with DOD’s ability to study
8 the merits of banning transgender people from the military generally (*Opp.* at 36),
9 the claim has no bearing in fact or law. An injunction against enforcement of the
10 ban will not prevent Defendants from assessing the impact of transgender
11 individuals in the military. By contrast, Plaintiffs’ lives, livelihoods and
12 constitutional rights will be injured should the Court delay in acting. The balance
13 of equities weighs heavily in favor of an injunction.

14 An injunction would also serve the public interest, because “it is always in
15 the public interest to prevent the violation of a party’s constitutional rights.”
16 *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). And while Plaintiffs
17 agree that the “public has a strong interest in national defense” (*Opp.* at 36), that
18 interest is best served by retaining top-level talent, not by expelling highly capable
19 officers and active service members from their critical military positions. (*See*
20 *Fanning Decl.*, ¶ 60; *James Decl.* ¶¶ 40-41; *Mabus Decl.* ¶ 45; *see also Tate Decl.*,
21 ¶¶ 4-9, 11, 30; *John Doe 1 Decl.*, ¶¶ 8-9, 24-25; *John Doe 2 Decl.*, ¶ 5; *Jane Doe*
22 *Decl.*, ¶¶ 4-7.)

23 In short, “there is absolutely no support for the claim that the ongoing
24 service of transgender people would have any negative effective on the military at
25 all. In fact, there is considerable evidence that it is the discharge and banning of
26 such individuals that would have such effects.” *Doe*, 2017 WL 4873042, at *33.

27
28

1 **D. Because The Ban Is Facially Unconstitutional, The Court Should**
2 **Enjoin Defendants From Enforcing It Altogether.**

3 Defendants ask the Court to limit any injunction to the Plaintiffs (Opp. at 37-
4 39), but a broad injunction against the ban is the only remedy that would “provide
5 complete relief to the plaintiffs.” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S.
6 753, 765 (1994) (citation omitted). One of the principal irreparable injuries
7 Plaintiffs seek to enjoin is the professional stigma they suffer from being labeled
8 unfit by official government policy. (*See supra* § III.A.) An injunction that
9 exempted Plaintiffs from the ban, but permitted Defendants to discriminate against
10 other transgender people, leaves the federal imprimatur behind that stigma in place.

11 In addition, a facially unconstitutional policy cannot be enforced *anywhere*.
12 The Supreme Court has long explained that “the scope of injunctive relief is
13 dictated by the extent of the violation established.” *Califano v. Yamasaki*, 442
14 U.S. 682, 702 (1979); *see also Texas v. United States*, 809 F.3d 134 (5th Cir.
15 2015), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016) (affirming
16 nationwide injunction of executive immigration directive). Particularly in cases
17 concerning the lawfulness or constitutionality of a federal enactment, the Ninth
18 Circuit has long held that broad “relief may be appropriate even in an individual
19 action.” *Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987) (holding that,
20 given the nationwide scope of the claim at issue, “the district court could hardly”
21 have issued an injunction “on anything other than a nationwide basis”);
22 *Washington v. Trump*, 847 F.3d 1151, 1166-67 (9th Cir. 2017) (declining to “limit”
23 the scope of an injunction against President Trump’s travel ban); *Cty. of Santa*
24 *Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017) (enjoining President
25 Trump’s “sanctuary city” Executive Order nationwide). The law in other circuits
26 is the same. *See Int’l Refugee Assist. Project v. Trump*, 857 F.3d 554, 605 (4th Cir.
27 2017) (en banc) (“[B]ecause [the immigration ban] likely violates the
28 Establishment Clause, enjoining it only as to Plaintiffs would not cure the

1 constitutional deficiency, which would endure in all [of the ban’s] applications.”),
 2 *vacated as moot* 2017 WL 4518553 (U.S. Oct. 10, 2017); *Decker v. O’Donnell*,
 3 661 F.2d 598, 618 (7th Cir. 1980) (holding a nationwide injunction is appropriate
 4 against a facially unconstitutional federal law).

5 Defendants ask the Court to ignore these principles and authorities solely
 6 because this case involves the military, citing *Meinhold v. U.S. Department of*
 7 *Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994) for the proposition that “injunctions
 8 concerning military policies” require “special” scrutiny and limitation. (Opp. at
 9 38.) While the Ninth Circuit affirmed a limited injunction in that case, it explained
 10 that it was appropriate because “Meinhold sought *only* to have *his* discharge
 11 voided and to be reinstated.” *Meinhold*, 34 F.3d at 1480 (emphasis added). The
 12 case did not involve a facial challenge to the policy at issue. Here, Plaintiffs are
 13 bringing a facial claim, and their injuries cannot be redressed without enjoining the
 14 ban in its entirety. *Madsen*, 512 U.S. at 765.

15 V. CONCLUSION

16 Plaintiffs respectfully request that the Court deny Defendants’ motion to
 17 dismiss and grant a preliminary injunction.

18 Dated: November 6, 2017

Respectfully submitted,

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By: /s/ Amy C. Quartarolo

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UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

AIDEN STOCKMAN; NICOLAS
 TALBOTT; TAMASYN REEVES;
 JAQUICE TATE; JOHN DOES 1-2;
 JANE DOE; and EQUALITY
 CALIFORNIA,

Plaintiffs,

v.

DONALD J. TRUMP, et al.

Defendants.

CASE NO. 5:17-cv-01799-JGB-KKx

SUPPLEMENTAL DECLARATION
 OF ERIC K. FANNING IN
 SUPPORT OF PLAINTIFFS’
 MOTION FOR PRELIMINARY
 INJUNCTION

Hearing

Date: November 20, 2017
 Time: 9:00 a.m.
 Courtroom: 1

1 I, Eric K. Fanning, declare as follows:

2 1. As set forth in my earlier declaration signed and dated September 30,
3 2017, I oversaw the Department of the Army’s participation in the Working Group
4 that comprehensively reviewed military policy with regard to transgender persons
5 serving openly in each of the service branches and which attempted to identify any
6 practical, objective impediments to such service. It was based upon that review and
7 the recommendations of that group that the Department of Defense announced on
8 June 30, 2016, that transgender service members could openly serve in the U.S.
9 military.

10 2. My earlier declaration also sets forth my awareness of the
11 announcements of a new policy on transgender service, both through Twitter in
12 late July 2017, and then in a Presidential Memorandum (“the Memorandum”)
13 issued by the White House on August 25, 2017. Although providing the
14 Secretaries of Defense and Homeland Security the opportunity to review the
15 current policies, the Memorandum sets March 23, 2018 as the date by which the
16 June 2016 policy “shall” be reversed (section 3) and transgender individuals will
17 be subject to discharge as a result of disclosure of their transgender status.

18 3. Based on my knowledge and experience in military personnel and
19 readiness challenges, as a result of service as a senior executive in each of the three
20 military departments as well as Chief of Staff to the Secretary of Defense, the
21 recently announced policy change is causing significant harm to current
22 servicemembers who have already disclosed their status as an individual who is
23 also transgender to their commanders.

24 4. The Memorandum asserts that the “previous Administration” had an
25 “[in]sufficient basis” for allowing open service, and therefore, this Administration
26 is directing the reversal of policy changes that had enabled open service based on
27 its “meaningful concerns” about the impact of open service on “under military
28 effectiveness and lethality, disrupt unit cohesion, or tax military resources.”

1 5. In my experience, this communicates that the Commander in Chief of
2 the U.S. military believes that transgender service members are unfit for military
3 duty solely because of their transgender status. It degrades the value of
4 transgender individuals not only to those service members themselves, but gives
5 license to their leaders and fellow service members to do the same, in an
6 environment where the ability to unqualifiedly and mutually rely on each other is
7 an indispensable element of service. The Memorandum on its face marks these
8 service members as deserving of impending involuntary discharge.

9 6. The Memorandum alone, and certainly when animated by the
10 President’s tweets, causes harm by preventing transgender service members from
11 serving on equal terms with other service members based on their merit; serves to
12 substantially limiting their advancement and promotion opportunities in the
13 military; and undermines their standing with superiors and peers, as described
14 above. Opportunity to succeed and advance in the military should not depend on
15 gender identity, nor any other factor other than ability to meet the required
16 standards.

17 7. The harm extends beyond the individuals involved to the whole ethos
18 of the military as a meritocracy where all Americans who want to serve and can
19 meet its standards should be afforded the opportunity to do so. Unjustified,
20 categorical bans on Americans qualified and ready to serve diminishes that
21 organizing principle.

22 8. Furthermore, the Presidential Memorandum and Secretary of Defense
23 Jim Mattis’ August 29, 2017 announcement that he will “carry out the president’s
24 policy direction” by “develop[ing] a study and implementation plan” sends the
25 clear message to American society that the U.S. Army is not, as General Mark
26 Milley, the Army’s Chief of Staff and highest ranked officer, declared in 2016
27 “open to all Americans who meet the standard, regardless of who they are.”
28

1 9. That declaration is essential to ensuring the military has access to the
2 best and brightest America has to offer and that those who seek to serve know that
3 they will be judged by their performance alone, rather than the artificial prejudices
4 that once hampered the advancement and acceptance of African Americans,
5 women, religious minorities, and gays and lesbians in our nation's armed forces.

6 10. In addition, when the military fails to keep pace with the demographic
7 change of our nation and departs from the core principle of opportunity for all that
8 can meet its high standards, it results in an erosion of understanding between those
9 who serve and those who freedom those service members defend. The President's
10 tweets and directive undoubtedly exacerbate this divide, both by creating a single
11 class of Americans he deems unfit to serve and dividing the nation by telling them
12 that only these individuals are unfit.

13 11. Finally, during my tenure as Secretary of the Army, I am unaware of
14 any instance prior to or after June 2016 when a transgender person seeking to enlist
15 or accept a commission in the Army was granted a waiver from the Army's
16 medical accession standards.

17 I declare under the penalty of perjury that the foregoing is true and correct.

18
19
20 Dated: November 2, 2017


Eric K. Fanning

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 CALIFORNIA,

25 Plaintiffs,

26 v.

27 DONALD J. TRUMP, et al.

28 Defendants.

CASE NO. 5:17-cv-01799-JGB-KKx

SUPPLEMENTAL DECLARATION
 OF RAYMOND EDWIN MABUS, JR.
 IN SUPPORT OF PLAINTIFFS'
 MOTION FOR PRELIMINARY
 INJUNCTION

Hearing

Date: November 20, 2017
 Time: 9:00 a.m.
 Courtroom: 1

MABUS SUPPLEMENTAL DECL. ISO MOTION FOR
 PRELIMINARY INJUNCTION

1 I, Raymond Edwin Mabus, Jr., declare as follows:

2 1. As set forth in my earlier declaration signed and dated September 24,
3 2017, I was part of a Working Group that comprehensively reviewed military
4 policy with regard to transgender people serving across the service branches. It
5 was based upon that review and the recommendations of that group that the
6 Department of Defense announced in June 2016 that it would begin allowing
7 transgender people to serve openly in the military.

8 2. As further set forth in that declaration, I am aware that in a series of
9 announcements made on Twitter on July 26, 2017, and then again in a formal
10 memorandum issued by the White House on August 25, 2017, President Trump
11 announced the reversal of military policy stating that transgender individuals
12 would no longer be able to serve in any capacity. The memorandum set March 23,
13 2018 as the date when military policy would revert to the pre-June 2016 policy
14 whereby transgender individuals are subject to discharge upon disclosure of their
15 transgender status.

16 3. Based on my experience in military personnel and operations, the
17 recently announced policy change is presently causing significant harms to current
18 servicemembers who have disclosed that they are transgender. Those harms are
19 not speculative or future harms. They are current harms that prevent transgender
20 service members from serving on equal terms with non-transgender service
21 members and that impose substantial limitations on their opportunities within the
22 military.

23 4. Consideration of the ways in which deployment decisions are made
24 highlights the current limitations and lost opportunities being experienced by
25 transgender service members. Consistent with naval operations, ships may deploy
26 for up to 9 months at a time. Commanders making decisions about how to staff
27 naval operations must consider the length of time that a sailor will be available for
28 a deployment. If a sailor may not be available for the full length of a deployment,

1 command knows that they will have to expend significant resources to backfill
2 staffing needs in order to address the diminishment of resources. Rather than face
3 those challenges, command will predictably make assignments based on certainty
4 about sailors' ability to serve the full length of deployment.

5 5. Because of the announcement of the ban on transgender people being
6 able to serve after March 2018, command lacks the requisite certainty that
7 transgender service members will be able to complete the terms of their
8 deployments where they extend beyond that date.

9 6. Similarly, command must regularly make personnel decisions that
10 relate to "permanent change of station" (PCS) moves. PCS moves are made to
11 ensure maximum utilization of personnel and to achieve military missions. PCS
12 moves involve transporting service members and their families to a different base
13 and duty station, often across the country or the world. The introduction of any
14 uncertainty with regard to a service member's future service, or status, changes
15 command's consideration of PCS moves and military operations staffing. Based
16 on my experience, the announced ban on transgender people serving is impacting
17 PCS moves.

18 7. As a result of the announced ban, transgender service members are
19 losing opportunities for assignments that they are capable of doing. These include
20 lost opportunities for deployment, training, and assignments. These lost
21 opportunities are based not on individual assessment of the service member's merit
22 but rather based on whether the person is transgender. These lost opportunities, in
23 addition to depriving transgender members of the military of the ability to serve on
24 equal footing with their peers, hinder transgender service members opportunities
25 for advancement and promotions as well.

26 8. The impact of this immediate harm reaches beyond the individual
27 service member and affects the institution of the military as a whole. The military
28 is designed to be a meritocracy where individuals receive opportunities and tackle

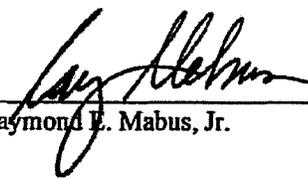
1 assignments based on their ability to do the job. The institution is weakened when
2 people are denied the ability to serve not because they are unqualified or because
3 they cannot do the job but because of who they are.

4 9. The ban on transgender service members weakens the military in a
5 second way as well. With an all-volunteer force, which is the current structure of
6 the military, a small segment of the population is responsible for the security of the
7 whole. In this circumstance, it becomes even more important to have a diverse
8 military in order to maintain a strong connection between those who serve to
9 protect society and the society that the force is protecting. Banning a segment of
10 the community from service weakens the bond of that connection between the
11 military and society and sends a message that certain segments of the community
12 are not within the scope of the mission. That message interferes with and
13 diminishes military readiness and lethality.

14 10. In addition, I know of no instance either prior to June 2016 or since
15 when a transgender person seeking to enlist was granted a waiver to the ban on
16 service. In any case, it would be futile for a transgender person to seek a waiver to
17 join the military at this point in time since, according to the announced policy, they
18 would be subject to administrative discharge as soon as March 2018.

19 I declare under the penalty of perjury that the foregoing is true and correct.
20

21 Dated: November 2, 2017


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25 Plaintiffs,

26 v.

27 DONALD J. TRUMP, et al.

28 Defendants.

CASE NO. 5:17-cv-01799-JGB-KKx

SUPPLEMENTAL DECLARATION
OF DEBORAH LEE JAMES IN
SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION

Hearing

Date: November 20, 2017
Time: 9:00 a.m.
Courtroom: 1

JAMES SUPPLEMENTAL DECL. ISO MOTION FOR
PRELIMINARY INJUNCTION

1 I, Deborah Lee James, declare as follows:

2 1. As noted in my prior declaration, I served as the Secretary of the
3 United States Air Force (“USAF”) from December 20, 2013 to January 20, 2017.
4 As Secretary, I was responsible for supervising the Department of the Air Force’s
5 participation in a working group convened by the Department of Defense in 2015
6 to identify the practical issues related to transgender Americans serving openly in
7 the Armed Forces, and to develop an implementation plan that addressed those
8 issues with the goal of maximizing military readiness (the “Working Group”).

9 2. Based on the Working Group’s analysis and recommendations, the
10 Department of Defense announced in June 2016 that it would begin to allow
11 transgender people to serve openly in the Armed Forces.

12 3. On July 26, 2017, President Donald Trump issued a statement that
13 transgender individuals will not be permitted to serve in any capacity in the Armed
14 Forces. On August 25, 2017, President Trump issued a memorandum to the
15 Secretary of Defense and the Secretary of Homeland Security to reverse the policy
16 adopted in June 2016 that permitted military service by openly transgender
17 persons. The President’s memorandum stated that the military would return to the
18 pre-June 2016 policy on March 23, 2018.

19 4. Based on my experience regarding military personnel, and in
20 particular personnel and operations of the USAF, the President’s announced
21 decision to ban openly transgender people from serving in the military effective
22 March 23, 2018 is presently harming transgender people currently serving in the
23 military in several significant respects.

24 5. Airmen are typically deployed for periods of time that exceed several
25 months, and planning for a deployment begins several months in advance of the
26 deployment. Commanders in charge of overseeing deployments must take into
27 account the certainty with which Airmen will be available for the entire length of a
28 deployment when making assignment decisions.

1 6. Given the President’s announcement that transgender service
2 members will be subject to separation from the military beginning March 23, 2018,
3 commanders cannot rely on transgender Airmen being able to complete
4 deployments that continue beyond that date. Transgender Airmen with
5 deployment terms that extend beyond March 2018 will thus lose opportunities for
6 assignments because command will not be able to determine with certainty that
7 transgender Airmen will be present for the entire duration of the deployment. In
8 addition to negatively impacting individual Airmen, this uncertainty harms USAF
9 readiness and capabilities where commanders are not able to make assignments
10 based solely on the capabilities and experiences of those under their command.

11 7. Even outside the deployment context, transgender Airmen will lose
12 out on assignments, opportunities, and experiences they would otherwise receive
13 but for the President’s announcement that they will be subject to separation in
14 March 2018. Commanders will be reluctant to invest time and money on training
15 transgender Airmen for important or significant assignments or tasks where
16 commanders believe the Airmen will be expected to leave the USAF in the near
17 future.

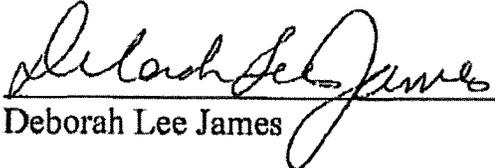
18 8. In addition, the President’s announced ban on transgender people
19 serving in the military creates a sub-class of service members, placing transgender
20 people on unequal footing as compared to their non-transgender peers for reasons
21 having nothing to do with their capabilities or past performance, and suggesting
22 that transgender Airmen are unworthy of their comrades’ trust and support. A lack
23 of trust among service members is deeply concerning, as trust and respect
24 throughout the chain of command is essential to promote military effectiveness.
25 Thus, in addition to causing present harm to transgender Airmen, the President’s
26 ban will have a deleterious effect on the USAF’s effectiveness and capabilities as
27 well.

28

1 9. The President’s announced ban is also anathema to the ethos of the
2 military in general, and in particular the USAF. In the USAF, individual Airmen
3 are given assignments and receive commendations and promotions on the basis of
4 their individual merit and skill set. The USAF, and the military in general, are
5 weakened when this fundamental building block of their identities is fractured
6 through suggesting that service members should be judged based on characteristics
7 having nothing to do with their ability to perform their job.

8 10. Finally, I am not aware of any instance – before or after June 2016 –
9 where a transgender person seeking to join the military was granted a waiver to the
10 ban on service of openly transgender individuals. Even if a transgender person
11 were to seek a waiver at this time, doing so would be futile in light of the
12 President’s order making transgender service members subject to separation
13 beginning in March 2018.

14
15 Dated: November 2, 2017


Deborah Lee James

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20 UNITED STATES DISTRICT COURT
 21 CENTRAL DISTRICT OF CALIFORNIA

22 AIDEN STOCKMAN; NICOLAS
 TALBOTT; TAMASYN REEVES;
 23 JAQUICE TATE; JOHN DOES 1-2;
 24 JANE DOE; and EQUALITY
 CALIFORNIA,

25 Plaintiffs,

26 v.

27 DONALD J. TRUMP, et al.

28 Defendants.

CASE NO. 5:17-cv-01799-JGB-KKx

SUPPLEMENTAL DECLARATION
 OF GEORGE RICHARD BROWN,
 MD, DFAPA IN SUPPORT OF
 PLAINTIFFS' MOTION FOR
 PRELIMINARY INJUNCTION

Hearing

Date: November 20, 2017
 Time: 9:00 a.m.
 Courtroom: 1

1 1. I, George R. Brown, M.D., have been retained by counsel for
2 Plaintiffs as an expert in connection with the above-captioned litigation.

3 2. I make this declaration based on my own personal knowledge.

4 3. I offer this declaration as a supplement to my previous declaration
5 submitted in the above-captioned case [Docket No. 27] describing my professional
6 education, experience, and background, including my awareness of the extensive
7 process that led to the adoption of a Department of Defense policy in June 2016
8 permitting transgender people to serve in the military.

9 **The Categorization of Medical Conditions Related to Gender Identity**
10 **in the ICD-10 and the Forthcoming ICD-11**

11 4. The World Health Organization (WHO) is in the process of
12 developing the eleventh revision of the International Classification of Diseases and
13 Related Health Problems (ICD-11), which is expected to be approved by the World
14 Health Assembly in May 2018. (See Exhibit A, Geoffrey M. Reed et al.,
15 “Disorders related to sexuality and gender identity in the ICD-11: revising the
16 ICD-10 based on current scientific evidence, best clinical practices, and human
17 rights considerations,” *World Psychiatry* 15:3, 205 (October 2016) (hereinafter
18 “Reed”).)

19 5. The ICD-10 was approved in 1990, nearly thirty years ago. The
20 current period between revisions is the longest in the history of the ICD, which has
21 resulted in some portions of the ICD-10 being significantly outdated. In particular,
22 the portions of the ICD-10 relating to gender identity required significant revision
23 in order to reflect advances in the research and the current scientific understanding
24 of gender identity, transgender people, and the medical treatments for medical
25 conditions relating to gender identity and gender dysphoria.

26 6. In order to provide scientifically and clinically sound
27 recommendations about these needed revisions, the WHO Departments of Mental
28 Health and Substance Abuse and of Reproductive Health and Research appointed a

1 Joint Working Group to develop specific recommendations for how to revise the
2 ICD-10 categories relating to gender identity. The Joint Working Group reviewed
3 available scientific evidence as well as relevant information on health policies and
4 health professionals' experience with the ICD-10 categories, in addition to other
5 relevant materials, including what were then proposals for revising the American
6 Psychiatric Association's DSM-5. The Joint Working Group made specific
7 proposals regarding the placement and organization of categories and drafted
8 diagnostic guidelines for the ICD-11 recommended diagnostic categories. I was
9 invited to present my ideas on these matters at a meeting of this group in Oslo,
10 Norway, and I had the opportunity to meet with Mr. Reed personally regarding the
11 revisions.

12 7. The Joint Working Group recommended retaining diagnoses for
13 gender incongruence (a new term that replaces Transsexualism and Gender
14 Identity Disorder, but applies to the same patients previously diagnosed with these
15 conditions) in order to preserve access to health service for transgender people, but
16 moving these categories out of the ICD-11 chapter on Mental and Behavioral
17 Disorders to the proposed new ICD-11 chapter on Conditions Related to Sexual
18 Health. The Working Group recommended changing the ICD-10 category F64.0
19 Transsexualism to Gender Incongruence of Adolescence and Adulthood and the
20 ICD-10 F64.2 Gender Identity Disorder of Childhood to Gender Incongruence of
21 Childhood.

22 8. The main reason for moving and renaming these diagnoses was to
23 reflect current scientific research and knowledge about gender identity and
24 transgender people, which recognizes that being transgender is not a disorder, that
25 transition-related care is a basic aspect of promoting health and well-being for
26 transgender people, and that gender dysphoria is a curable condition that has
27 medical components and should not be limited to a mental health diagnosis.

28

1 individual cannot receive a waiver for a prior course of treatment for gender
2 dysphoria, irrespective of the success of that treatment.

3 12. The current enlistment policy allows waivers for a variety of medical
4 conditions. However, entry waivers will not be granted for conditions that would
5 disqualify an individual from the possibility of retention. Because being
6 transgender is a disqualifying condition for retention, transgender people cannot
7 obtain medical waivers to enter the military.

8 13. The enlistment policy treats gender dysphoria differently than other
9 curable conditions. The result of this inconsistency is that transgender personnel
10 are excluded or singled out for disqualification from enlistment, even when they
11 are mentally and physically healthy.

12 14. In my thirty-two years of working as an active duty military
13 psychiatrist or VHA psychiatrist, I am unaware of any waiver ever being granted
14 for any transgender person seeking to enlist in any branch of the Armed Forces.

15 I declare under penalty of perjury that the foregoing is true and correct.

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Dated: November 3, 2017

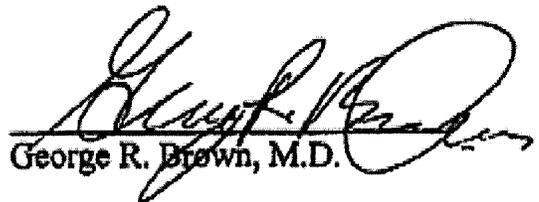

George R. Brown, M.D.

Exhibit A

Disorders related to sexuality and gender identity in the ICD-11: revising the ICD-10 classification based on current scientific evidence, best clinical practices, and human rights considerations

Geoffrey M. Reed^{1,2}, Jack Drescher³, Richard B. Krueger⁴, Elham Atalla⁵, Susan D. Cochran⁶, Michael B. First⁴, Peggy T. Cohen-Kettenis⁷, Iván Arango-de Montis⁸, Sharon J. Parish⁹, Sara Cottler¹⁰, Peer Briken¹¹, Shekhar Saxena¹

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In the World Health Organization's forthcoming eleventh revision of the International Classification of Diseases and Related Health Problems (ICD-11), substantial changes have been proposed to the ICD-10 classification of mental and behavioural disorders related to sexuality and gender identity. These concern the following ICD-10 disorder groupings: F52 Sexual dysfunctions, not caused by organic disorder or disease; F64 Gender identity disorders; F65 Disorders of sexual preference; and F66 Psychological and behavioural disorders associated with sexual development and orientation. Changes have been proposed based on advances in research and clinical practice, and major shifts in social attitudes and in relevant policies, laws, and human rights standards. This paper describes the main recommended changes, the rationale and evidence considered, and important differences from the DSM-5. An integrated classification of sexual dysfunctions has been proposed for a new chapter on Conditions Related to Sexual Health, overcoming the mind/body separation that is inherent in ICD-10. Gender identity disorders in ICD-10 have been reconceptualized as Gender incongruence, and also proposed to be moved to the new chapter on sexual health. The proposed classification of Paraphilic disorders distinguishes between conditions that are relevant to public health and clinical psychopathology and those that merely reflect private behaviour. ICD-10 categories related to sexual orientation have been recommended for deletion from the ICD-11.

Key words: International Classification of Diseases, ICD-11, sexual health, sexual dysfunctions, transgender, gender dysphoria, gender incongruence, paraphilic disorders, sexual orientation, DSM-5

(*World Psychiatry* 2016;15:205–221)

The World Health Organization (WHO) is in the process of developing the eleventh revision of the International Classification of Diseases and Related Health Problems (ICD-11). The ICD-11 is expected to be approved by the World Health Assembly in May 2018. The ICD-10 was approved in 1990, making the current period between revisions the longest in the history of the ICD.

In 2007, the WHO Department of Mental Health and Substance Abuse appointed the International Advisory Group for the Revision of ICD-10 Mental and Behavioural Disorders, to provide policy guidance and consultation throughout the development of the ICD-11 classification of mental and behavioural disorders¹. As the revision process advanced, a series of Working Groups in different disorder content areas were also appointed to review available evidence and develop recommendations regarding needed revisions in specific diagnostic groupings².

From early in the revision process, it was clear that there were a series of complex and potentially controversial issues associated with the ICD-10 categories related to sexuality and gender identity, including the following disorder groupings: F52 Sexual dysfunctions, not caused by organic disorder or disease; F64 Gender identity disorders; F65 Disorders of sexual preference; and F66 Psychological and behavioural disorders

associated with sexual development and orientation. During the more than 25 years since the approval of ICD-10, there have been substantial advances in research relevant to these categories, as well as major changes in social attitudes and in relevant policies, laws, and human rights standards.

Due to the complexity of this context and the need to take a broad perspective in order to develop scientifically and clinically sound recommendations that would facilitate access to health services, the WHO Departments of Mental Health and Substance Abuse and of Reproductive Health and Research have worked together to propose revisions in these areas. The two WHO departments appointed a joint Working Group on Sexual Disorders and Sexual Health to assist in the development of specific recommendations.

The first task of the Working Group was to review available scientific evidence as well as relevant information on health policies and health professionals' experience with the ICD-10 diagnostic categories identified above. These issues were examined within various settings, including primary care and specialist health care settings, as well as social service and forensic contexts. Also considered were human rights issues pertinent to diagnostic classification in each of the areas under the Working Group's purview. The Working Group was also asked to review what were then proposals for the American

Psychiatric Association's DSM-5³, and to consider the clinical utility of those proposals and their suitability for global implementation in various settings. Finally, the Working Group was asked to prepare specific proposals, including the placement and organization of categories, and to draft diagnostic guidelines for the ICD-11 recommended diagnostic categories, in line with the overall ICD revision requirements².

The following sections describe the main recommended changes for the above-mentioned four areas in the ICD-11 as compared to ICD-10. The ICD-10 Clinical Descriptions and Diagnostic Guidelines for Mental and Behavioural Disorders⁴, the version intended for use by specialist mental health professionals, is used as the frame of reference for this comparison. The rationale for changes, the evidence considered, and specific comments on differences from DSM-5 are also provided.

PROPOSED CHANGES TO F52 SEXUAL DYSFUNCTIONS, NOT CAUSED BY ORGANIC DISORDER OR DISEASE

The ICD-10 classification of Sexual dysfunctions (F52) is based on a Cartesian separation of "organic" and "non-organic" conditions. Sexual dysfunctions considered "non-organic" are classified in the ICD-10 chapter on Mental and Behavioural Disorders, and most "organic" sexual dysfunctions are classified in the chapter on Diseases of the Genitourinary System. However, substantial evidence has accumulated since ICD-10's publication indicating that the origin and maintenance of sexual dysfunctions frequently involves the interaction of physical and psychological factors⁵. The ICD-10 classification of sexual dysfunctions is therefore not consistent with current, more integrative clinical approaches in sexual health⁶⁻⁹.

The Working Group on Sexual Disorders and Sexual Health has proposed an integrated classification of sexual dysfunctions for ICD-11 (see Table 1) that is more closely informed by current evidence and best practices, to be included in a new ICD-11 chapter on Conditions Related to Sexual Health¹⁰. The proposed integrated classification encompasses the sexual dysfunctions listed in the ICD-10 chapter on Mental and Behavioural Disorders and many of those currently found in the chapter on Diseases of the Genitourinary System¹¹.

In the proposed diagnostic guidelines for ICD-11, sexual response is described as a complex interaction of psychological, interpersonal, social, cultural, physiological and gender-influenced processes. Any of these factors may contribute to the development of sexual dysfunctions⁸, which are described as syndromes that comprise the various ways in which people may have difficulty experiencing personally satisfying, non-coercive sexual activities.

The proposed ICD-11 diagnostic guidelines organize Sexual dysfunctions into four main groups: Sexual desire and arousal dysfunctions; Orgasmic dysfunctions; Ejaculatory dysfunctions; and Other specified sexual dysfunctions. In addition, a

separate grouping of Sexual pain disorders has been proposed. Where possible, categories in the proposed classification of sexual dysfunctions apply to both men and women, emphasizing commonalities in sexual response^{12,13} (e.g., Hypoactive sexual desire dysfunction, Orgasmic dysfunction), without ignoring established sex differences in the nature of these experiences¹⁴. Men and women exhibit similar central nervous system pathways of activation and deactivation and similar neurotransmitter activity related to sexual desire. Dynamic alterations of sexual response are similarly modulated and reinforced by behaviour, experience and neuroplasticity. Separate sexual dysfunctions categories for men and women are provided where sex differences are related to distinct clinical presentations (e.g., Female sexual arousal dysfunction in women as compared to Erectile dysfunction in men).

The proposed guidelines indicate that, in order to be considered a sexual dysfunction, the problem or difficulty should generally: a) have been persistent or recurrent over a period of at least several months; b) occur frequently, although it may fluctuate in severity; and c) be associated with clinically significant distress. However, in cases where there is an immediate acute cause of the sexual dysfunction (e.g., a radical prostatectomy or injury to the spinal cord in the case of Erectile dysfunction; breast cancer and its treatment in Female sexual arousal dysfunction), it may be appropriate to assign the diagnosis even though the duration requirement has not been met, in order to initiate treatment.

The proposed diagnostic guidelines make clear that there is no normative standard for sexual activity. "Satisfactory" sexual functioning is defined as being satisfying to the individual, i.e. the person is able to participate in sexual activity and in a sexual relationship as desired. If the individual is satisfied with his/her pattern of sexual experience and activity, even if it is different from what may be satisfying to other people or what is considered normative in a given culture or subculture, a sexual dysfunction should not be diagnosed. Unrealistic expectations on the part of a partner, a discrepancy in sexual desire between partners, or inadequate sexual stimulation are not valid bases for a diagnosis of sexual dysfunction.

The proposed ICD-11 classification uses a system of harmonized qualifiers that may be applied across categories to identify the important clinical characteristics of the sexual dysfunctions. A *temporal qualifier* indicates whether the sexual dysfunction is *lifelong*, i.e. the person has always experienced the dysfunction from the time of initiation of relevant sexual activity, or *acquired*, i.e. the onset of the sexual dysfunction has followed a period of time during which the person did not experience it. A *situational qualifier* is used to indicate whether the dysfunction is *generalized*, i.e. the desired response is absent or diminished in all circumstances, including masturbation, or *situational*, i.e. the desired response is absent or diminished in some circumstances but not in others (e.g., with some partners or in response to some stimuli).

An innovative feature of the proposed ICD-11 classification of Sexual dysfunctions and Sexual pain disorders, and an

Table 1 Classification of Sexual dysfunctions in ICD-11 (proposed), ICD-10 and DSM-5

Proposed ICD-11	ICD-10	DSM-5	Comments
<p>Chapter: Conditions Related to Sexual Health</p> <p>Grouping: Sexual dysfunctions</p>	<p>Chapter: Mental and Behavioural Disorders</p> <p>Grouping: Behavioural syndromes associated with physiological disturbances and physical factors</p> <p>Subgrouping: Sexual dysfunction, not caused by organic disorder or disease</p> <p>Chapter: Diseases of the Genitourinary System</p> <p>Grouping: Diseases of male genital organs</p> <p>Subgrouping: Other disorders of penis</p> <p>Grouping: Noninflammatory disorders of female genital tract</p> <p>Subgrouping: Pain and other conditions associated with female genital organs and menstrual cycle</p>	<p>Grouping: Sexual dysfunctions</p>	<ul style="list-style-type: none"> • In ICD-11, Sexual dysfunctions have been included in a new chapter called Conditions Related to Sexual Health. • ICD-11 Sexual dysfunctions proposals represent an integrated classification, including conditions listed in Mental and Behavioural Disorders chapter in ICD-10 and many of those currently found in Diseases of the Genitourinary System. • In ICD-11, there are four main groupings of sexual dysfunctions: Sexual desire and arousal dysfunctions; Orgasmic dysfunctions; Ejaculatory dysfunctions; and Other specified sexual dysfunctions. There is another separate grouping of Sexual pain disorders. • DSM-5 classification of Sexual dysfunctions excludes those caused by a nonsexual medical disorder, by the effects of a substance or medication, or by a medical condition. ICD-11 classification allows for a diagnosis of Sexual dysfunction when it represents an independent focus of treatment; contributory factors may be coded using etiological qualifiers.
<p>Category: Hypoactive sexual desire dysfunction</p>	<p>Category: Lack or loss of sexual desire</p>	<p>Category: Female sexual interest/arousal disorder; Male hypoactive sexual desire disorder</p>	<ul style="list-style-type: none"> • In ICD-11, Hypoactive sexual desire dysfunction can be applied to both men and women; In DSM-5, Female sexual interest/arousal disorder is separated from Male hypoactive sexual desire disorder.
<p>Category: Recommended for deletion</p>	<p>Category: Sexual aversion</p>	<p>Category: Not included</p>	<ul style="list-style-type: none"> • In ICD-11, the ICD-10 category Sexual aversion would be classified under Sexual pain-penetration disorder or under Specific phobia, depending on specific nature of symptoms. • In DSM-5, that category would similarly be classified as Genital-pelvic pain/penetration disorder or under Specific phobia.
<p>Category: Female sexual arousal dysfunction</p>	<p>Category: Failure of genital response; Lack of sexual enjoyment</p>	<p>Category: Female sexual interest/arousal disorder</p>	<ul style="list-style-type: none"> • In ICD-11, separate categories are provided for men and women to replace ICD-10 Failure of genital response, because of anatomical and physiological differences that underlie distinct clinical presentations. • In ICD-11, the psychological component of arousal involved in ICD-10 Lack of sexual enjoyment is also subsumed in women under Female sexual arousal dysfunction.
<p>Category: Erectile dysfunction</p>	<p>Category: Failure of genital response; Impotence of organic origin</p>	<p>Category: Erectile disorder</p>	<ul style="list-style-type: none"> • In ICD-11, separate categories are provided for men and women to replace ICD-10 Failure of genital response, because of anatomical and physiological differences that underlie distinct clinical presentations. • ICD-11 includes “organic” Erectile dysfunctions.
<p>Category: Orgasmic dysfunction</p>	<p>Category: Orgasmic dysfunction</p>	<p>Category: Female orgasmic disorder</p>	<ul style="list-style-type: none"> • In ICD-11, Orgasmic dysfunction can be applied to both men and women. • In ICD-11, there is a distinction between subjective experience of orgasm in men and ejaculation.

Table 1 Classification of Sexual dysfunctions in ICD-11 (proposed), ICD-10 and DSM-5 (*continued*)

Proposed ICD-11	ICD-10	DSM-5	Comments
<i>Category:</i> Early ejaculation	<i>Category:</i> Premature ejaculation	<i>Category:</i> Premature (early) ejaculation	<ul style="list-style-type: none"> Terminology in ICD-11 changed from Premature ejaculation to Early ejaculation.
<i>Category:</i> Delayed ejaculation	<i>Category:</i> Orgasmic dysfunction	<i>Category:</i> Delayed ejaculation	<ul style="list-style-type: none"> DSM-5 does not distinguish between subjective experience of orgasm and ejaculation in men.
<i>Category:</i> Other specified sexual dysfunction	<i>Category:</i> Other sexual dysfunction, not caused by organic disorder or disease; Other specified disorders of penis; Other specified conditions associated with female genital organs and menstrual cycle	<i>Category:</i> Other specified sexual dysfunction	<ul style="list-style-type: none"> DSM-5 classification of Sexual dysfunctions excludes those caused by a nonsexual medical disorder, by the effects of a substance or medication, or by a medical condition. ICD-11 classification allows for a diagnosis of Sexual dysfunction when it represents an independent focus of treatment; contributory factors may be coded using etiological qualifiers.
<i>Category:</i> Unspecified sexual dysfunction	<i>Category:</i> Unspecified sexual dysfunction, not caused by organic disorder or disease; Disorder of penis, unspecified; Unspecified condition associated with female genital organs and menstrual cycle	<i>Category:</i> Unspecified sexual dysfunction	<ul style="list-style-type: none"> DSM-5 classification of Sexual dysfunctions excludes those caused by a nonsexual medical disorder, by the effects of a substance or medication, or by a medical condition. ICD-11 classification allows for a diagnosis of Sexual dysfunction when it represents an independent focus of treatment; contributory factors may be coded using etiological qualifiers.
<i>Category:</i> Sexual pain-penetration disorder (in separate grouping of Sexual pain disorders)	<i>Category:</i> Nonorganic vaginismus; Vaginismus (organic)	<i>Category:</i> Genito-pelvic pain/penetration disorder	<ul style="list-style-type: none"> In ICD-11, Sexual pain penetration disorder includes Vaginismus and excludes Dyspareunia and Vulvodynia, which are classified in the Genitourinary chapter. In DSM-5, Genito-pelvic pain/penetration disorder groups includes Dyspareunia and Vulvodynia if it occurs during penetration attempts or vaginal intercourse.

important one for a system that does not attempt to divide “organic” and “non-organic” dysfunctions, is a system of *etiological qualifiers* that may be applied to these categories. These qualifiers are not mutually exclusive, and as many may be applied as are considered to be relevant and contributory in a particular case. Proposed qualifiers include the following:

- *Associated with disorder or disease classified elsewhere, injury or surgical treatment* (e.g., diabetes mellitus, depressive disorders, hypothyroidism, multiple sclerosis, female genital mutilation, radical prostatectomy)¹⁵⁻¹⁹;
- *Associated with a medication or substance* (e.g., selective serotonin reuptake inhibitors, histamine-2 receptor antagonists, alcohol, opiates, amphetamines)^{20,21};
- *Associated with lack of knowledge* (e.g., about the individual’s own body, sexual functioning, and sexual response)²²;
- *Associated with psychological or behavioural factors* (e.g., negative attitudes toward sexual activity, adverse past sexual experiences, poor sleep hygiene, overwork)^{23,24};
- *Associated with relationship factors* (e.g., relationship conflict, lack of romantic attachment)^{25,26};
- *Associated with cultural factors* (e.g., culturally-based inhibitions about the expression of sexual pleasure, the belief that loss of semen can lead to weakness, disease or death)^{27,28}.

Other changes that have been proposed include the elimination of the ICD-10 category F52.7 Excessive sexual drive from the classification of Sexual dysfunctions. The ICD-10 category F52.0 Loss or lack of sexual desire is more specifically categorized in ICD-11 as Hypoactive sexual desire dysfunction in women and men, Female sexual arousal dysfunction in women, or Erectile dysfunction in men. The ICD-10 category F52.10 Sexual aversion is classified in ICD-11 under Sexual pain-penetration disorder or under the grouping of Anxiety and fear-related disorders if it is used to describe a phobic response. The ICD-10 category F52.11 Lack of sexual enjoyment, which the ICD-10 indicates is more common in women, is captured primarily in the ICD-11 under Female sexual arousal dysfunction. Other possible reasons for lack of sexual enjoyment, including hypohedonic orgasm and painful orgasm²⁹, would be classified under Other specified sexual dysfunctions. The ICD-10 category F52.2 Failure of genital response is separated into two categories: Female sexual arousal dysfunction in women, and Erectile dysfunction in men.

Comparison with DSM-5

The proposed classification of sexual dysfunctions in ICD-11 is different from the DSM-5 in its attempt to integrate

dysfunctions that may have a range of etiological or contributory dimensions. The DSM-5 acknowledges that an array of factors may be relevant to etiology and treatment and may contribute to sexual dysfunctions; these include partner, relationship, individual vulnerability, cultural, religious, and medical factors. At the same time, the DSM-5 indicates that, if a sexual dysfunction is caused by a nonsexual medical disorder, the effects of a substance or medication, or a medical condition, a diagnosis of Sexual dysfunction would not be assigned. This is logical given the DSM-5's purpose as a classification of mental and behavioural disorders (even though it differs from the approach that DSM-5 has taken to Sleep-wake disorders and Neurocognitive disorders). Because ICD-11 is a classification of all health conditions, it provides the possibility for greater integration. The proposed ICD-11 classification allows for assigning a Sexual dysfunction diagnosis in situations in which this is an independent focus of treatment, regardless of presumed etiology. The presence of a variety of contributory factors may be recorded using the etiological qualifiers.

The DSM-5 has combined dysfunctions of sexual desire and sexual arousal in women in the category Female sexual interest/arousal disorder³⁰, which has proved to be quite controversial³¹⁻³⁵. In contrast, the proposed ICD-11 category Hypoactive sexual desire dysfunction can be applied to both men and women, while Female sexual arousal dysfunction is classified separately. The separation of desire and arousal in women into distinct dysfunctions is supported by several lines of evidence, including genetic evidence from twin studies³⁶, studies of specific single nucleotide polymorphisms and the use of serotonergic antidepressant medications^{37,38}, and neuroimaging studies³⁹. There is also evidence that Hypoactive desire disorder in women and men respond to similar treatments⁴⁰, and that these are different from treatments that are effective for Female sexual arousal disorder⁴¹⁻⁴³. Although there is significant comorbidity between desire and arousal dysfunction, the overlap of these conditions does not mean that they are one and the same; research suggests that management should be targeted toward their distinct features⁴⁴.

The proposed classification of sexual pain in ICD-11 provides the possibility of identifying specific types of pain syndromes without excluding those in which another medical condition is considered to be contributory. The DSM-5 category Genito-pelvic pain/penetration disorder includes vaginismus, dyspareunia and vulvodynia not completely attributable to other medical conditions. A similar category of Sexual pain-penetration disorder has been proposed for ICD-11, but it does not include dyspareunia and vulvodynia, which have been retained as separate categories in the ICD-11 genitourinary chapter. These syndromes are characterized by different etiologies, occur in different populations, and have distinct treatment approaches⁴⁵⁻⁴⁷.

Finally, the DSM-IV-TR category Male orgasmic disorder has been replaced in DSM-5 by Delayed ejaculation. This decision seems to have been largely based on a Medline search that indicated infrequent usage of terminology including or-

gasm as opposed to terminology specifying ejaculation for male disorders⁴⁸. Another rationale for DSM-5 to modify the term was the small number of cases of male orgasmic disorder seen in clinical practice⁴⁹. However, this was not only a modification of terminology but rather the lumping of two separate phenomena into a single category. The proposed ICD-11 classification of Sexual dysfunctions emphasizes the subjective experience of orgasm and separates it from the ejaculatory phenomenon, consistent with available research⁵⁰.

PROPOSED CHANGES TO F64 GENDER IDENTITY DISORDERS

Over the past several years, a range of civil society organizations as well as the governments of several Member States and the European Union Parliament have urged the WHO to remove categories related to transgender identity from its classification of mental disorders in the ICD-11⁵¹⁻⁵³.

One impetus for this advocacy has been an objection to the stigmatization that accompanies the designation of any condition as a mental disorder in many cultures and countries. The WHO Department of Mental Health and Substance Abuse is committed to a variety of efforts to reduce the stigmatization of mental disorders⁵⁴. However, the stigmatization of mental disorders *per se* would not be considered a sufficient reason to eliminate or move a mental disorder category. The conditions listed in the ICD Mental and Behavioural Disorders chapter are intended to assist in the identification of people who need mental health services and in the selection of appropriate treatments¹, in fulfillment of WHO's public health objectives.

Nevertheless, there is substantial evidence that the current nexus of stigmatization of transgender people and of mental disorders has contributed to a doubly burdensome situation for this population, which raises legitimate questions about the extent to which the conceptualization of transgender identity as a mental disorder supports WHO's constitutional objective of "the attainment by all peoples of the highest possible level of health"⁵⁵. Stigma associated with the intersection of transgender status and mental disorders appears to have contributed to precarious legal status, human rights violations, and barriers to appropriate health care in this population⁵⁶⁻⁵⁸.

The WHO's 2015 report on *Sexual health, human rights, and the law*⁵⁸ indicates that, in spite of recent progress, there are still very few non-discriminatory, appropriate health services available and accessible to transgender people. Health professionals often do not have the necessary competence to provide services to this population, due to a lack of appropriate professional training and relevant health system standards⁵⁹⁻⁶¹. Limited access to accurate information and appropriate health services can contribute to a variety of negative behavioural and mental health outcomes among transgender people, including increased HIV-related risk behaviour, anxiety, depression, substance abuse, and suicide⁶²⁻⁶⁵. Additionally,

Table 2 Classification of conditions related to gender identity in ICD-11 (proposed), ICD-10 and DSM-5

Proposed ICD-11	ICD-10	DSM-5	Comments ^{71,72}
<p>Chapter: Conditions Related to Sexual Health</p> <p>Grouping: Gender incongruence</p> <p>Category: Gender incongruence of adolescence and adulthood</p>	<p>Chapter: Mental and Behavioural Disorders</p> <p>Grouping: Disorders of adult personality and behaviour</p> <p>Subgrouping: Gender identity disorders</p> <p>Category: Transsexualism</p>	<p>Grouping: Gender dysphoria</p> <p>Category: Gender dysphoria in adolescents and adults</p>	<ul style="list-style-type: none"> • ICD-11 does not classify Gender incongruence as a mental and behavioural disorder; Gender dysphoria is listed as a mental disorder in DSM-5. • ICD-11's primary focus is experience of incongruence between experienced gender and assigned sex; DSM-5 emphasizes distress related to gender identity through name of category and criteria. • ICD-11 contains four broad essential features and two are required for diagnosis; DSM-5 contains six criteria and two are required for diagnosis. • In ICD-11, distress and functional impairment are described as common associated features, particularly in disapproving social environments, but are not required; DSM-5 requires clinically significant distress or impairment for diagnosis. • ICD-11 requires a duration of several months; DSM-5 requires six months.
<p><i>Recommended for deletion</i></p> <p>Category: Gender incongruence of childhood</p>	<p>Category: Dual-role transvestism</p> <p>Category: Gender identity disorder of childhood</p>	<p><i>Not included</i></p> <p>Category: Gender dysphoria in children</p>	<ul style="list-style-type: none"> • Recommended for deletion from ICD-11 due to lack of public health or clinical relevance (not in DSM-5). • ICD-11 contains three essential features, all of which are required for diagnosis; DSM-5 contains eight diagnostic criteria, six of which must be present. • In ICD-11, distress and functional impairment are described as common associated features, particularly in disapproving social environments, but are not required; DSM-5 requires clinically significant distress or impairment for diagnosis. • ICD-11 requires a duration of two years, suggesting that the diagnosis cannot be made before approximately age 5; DSM-5 requires six months and does not set a lower age limit.
<p><i>Recommended for deletion</i></p>	<p>Category: Other gender identity disorders</p>	<p>Category: Other specified gender dysphoria</p>	<ul style="list-style-type: none"> • Recommended for deletion in ICD-11 to prevent misuse for clinical presentations involving only gender variance.
<p><i>Recommended for deletion</i></p>	<p>Category: Gender identity disorder, unspecified</p>	<p>Category: Unspecified gender dysphoria</p>	<ul style="list-style-type: none"> • Recommended for deletion in ICD-11 to prevent misuse for clinical presentations involving only gender variance.

many transgender people self-administer hormones of dubious quality obtained through illicit markets or online without medical supervision^{66,67}, with potentially serious health consequences⁶⁸⁻⁷⁰. For example, in a recent study of 250 transgender people in Mexico City, nearly three-quarters of participants had used hormones, and nearly half of these had begun using them without medical supervision⁷¹.

In spite of WHO's concerted advocacy for mental health parity⁵⁴, a primary mental disorder diagnosis can exacerbate problems for transgender people in accessing health services, particularly those that are not considered to be mental health services. Even in countries that recognize the need for transgender-related health services and where professionals with relevant expertise are relatively available, private and public insurers often specifically exclude coverage for these

services⁵⁸. Classification as a mental disorder has also contributed to the perception that transgender people must be treated by psychiatric specialists, further restricting access to services that could reasonably be provided at other levels of care.

In most countries, the provision of health services requires the diagnosis of a health condition that is specifically related to those services. If no diagnosis were available to identify transgender people who were seeking related health services, these services would likely become even less available than they are now^{72,73}. Thus, the Working Group on Sexual Disorders and Sexual Health has recommended retaining gender incongruence diagnoses in the ICD-11 to preserve access to health services, but moving these categories out of the ICD-11 chapter on Mental and Behavioural Disorders (see Table 2). After consideration of a variety of placement options⁷², these

categories have been provisionally included in the proposed new ICD-11 chapter on Conditions Related to Sexual Health.

The Working Group has recommended reconceptualizing the ICD-10 category F64.0 Transsexualism as Gender incongruence of adolescence and adulthood⁷² and the ICD-10 category F64.2 Gender identity disorder of childhood as Gender incongruence of childhood⁷³. The proposed diagnostic requirements for Gender incongruence of adolescence and adulthood include the continuous presence for at least several months of at least two of the following features: a) a strong dislike or discomfort with primary or secondary sex characteristics due to their incongruity with the experienced gender; b) a strong desire to be rid of some or all of one's primary or secondary sex characteristics (or, in adolescence, anticipated secondary sex characteristics); c) a strong desire to have the primary or secondary characteristics of the experienced gender; and d) a strong desire to be treated (to live and be accepted as) a person of the experienced gender. As in the ICD-10, the diagnosis of Gender incongruence of adolescence and adulthood cannot be assigned before the onset of puberty. The duration requirement is reduced from two years in ICD-10 to several months in ICD-11.

The ICD-11 abandons ICD-10 terms such as "opposite sex" and "anatomic sex" in defining the condition, using more contemporary and less binary terms such as "experienced gender" and "assigned sex". Unlike ICD-10, the proposed ICD-11 diagnostic guidelines do not implicitly presume that all individuals seek or desire full transition services to the "opposite" gender. The proposed guidelines also explicitly pay attention to the anticipated development of secondary sex characteristics in young adolescents who have not yet reached the last physical stages of puberty, an issue that is not addressed in ICD-10.

The proposed ICD-11 diagnostic requirements for Gender incongruence of childhood are considerably stricter than those of ICD-10, in order to avoid as much as possible the diagnosis of children who are merely gender variant. All three of the following essential features must be present: a) a strong desire to be, or an insistence that the child is, of a different gender; b) a strong dislike of the child's own sexual anatomy or anticipated secondary sex characteristics, or a strong desire to have the sexual anatomy or anticipated secondary sex characteristics of the desired gender; and c) make believe or fantasy play, toys, games, or activities and playmates that are typical of the experienced gender rather than the assigned sex. The third essential feature is not meaningful without the other two being present; in their absence it is merely a description of gender variant behaviour. These characteristics must have been present for at least two years in a prepubertal child, effectively meaning that the diagnosis cannot be assigned prior to the age of approximately 5 years. The ICD-10 does not mention a specific duration requirement or a minimum age at which it is appropriate to assign the diagnosis.

The proposed diagnostic guidelines for both Gender incongruence of adolescence and adulthood and Gender incongruence of childhood indicate explicitly that gender variant behaviour and preferences alone are not sufficient for making a diagnosis;

some form of experienced anatomic incongruence is also necessary. Importantly, the diagnostic guidelines for both categories indicate that gender incongruence may be associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning, particularly in disapproving social environments and where protective laws and policies are absent, but that neither distress nor functional impairment is a diagnostic requirement.

The area of transgender health is characterized by calls for change in health system responses^{58,74,75}, by rapid change in social attitudes in some countries, and by controversy. As a part of this work, the Working Group on Sexual Disorders and Sexual Health received proposals and opinions from a wide range of civil societies, professional organizations, and other interested parties^{72,73}. The most controversial issue has been the question of whether the childhood diagnostic category should be retained⁷³. The main argument advanced against retaining the category is that stigmatization associated with being diagnosed with *any* health condition – not just a mental disorder diagnosis – is potentially harmful to children who will in any case not be receiving medical interventions before puberty⁷⁶. A more substantive critique is that, if it is the case that the problems of extremely gender-variant children arise primarily from hostile social reactions and victimization, assigning a diagnosis to the child amounts to blaming the victim⁷⁷. This latter concern suggests a need for further research as well as a broader social conversation. The Working Group has recommended retaining the category based on the rationale that it will preserve access to treatment for this vulnerable and already stigmatized group. Treatment most often consists of specialized supportive mental health services as well as family and social (e.g., school) interventions⁷³, while treatments aimed at suppressing gender-variant behaviours in children are increasingly viewed as unethical.

The diagnosis also serves to alert health professionals that a transgender identity in childhood often does not develop seamlessly into an adult transgender identity. Available research instead indicates that the majority of children diagnosed with DSM-IV Gender identity disorder of childhood, which was not as strict in its requirements as those proposed for ICD-11, grow up to be cisgender (non-transgender) adults with a homosexual orientation⁷⁸⁻⁸⁰. In spite of the claims of some clinicians to be able to distinguish between children whose transgender identity is likely to persist into adolescence and adulthood and those likely to be gay or lesbian, there is considerable overlap between these groups in all predictors examined⁸⁰, and no valid method of making a prediction at an individual level has been published in the scientific literature. Therefore, while medical interventions are not currently recommended for prepubertal gender incongruent children, psychosocial interventions need to be undertaken with caution and based on considerable expertise so as not to limit later choices^{59,81,82}. The inclusion of the category in the ICD-11 is intended to provide better opportunities for much-needed education of health professionals, the development of stand-

ards and pathways of care to help guide clinicians and family members, including adequate informed consent procedures, and future research efforts.

Finally, the ICD-10 category F64.1 Dual-role transvestism – occasionally dressing in clothing typical of another gender in order to “enjoy the temporary experience of membership of the opposite sex, but without any desire for a more permanent sex change”⁴ or accompanying sexual arousal – has been recommended for deletion from the ICD-11, due to its lack of public health or clinical relevance.

Comparison with DSM-5

The most important difference between the proposals for ICD-11 and the DSM-5 is that the latter has retained the categories related to gender identity as a part of its classification of mental disorders. Both childhood and adult forms of Gender identity disorder in DSM-IV have been renamed in DSM-5 as Gender dysphoria, defined by “marked incongruence between one’s experienced/expressed gender and assigned gender of at least 6 months’ duration” and “clinically significant distress or impairment in social, school, or other important areas of functioning”³. Both the name of the DSM-5 condition – dysphoria – and the diagnostic criteria, therefore, emphasize distress and dysfunction as integral aspects of the condition. They are also the central rationale for classifying these conditions as mental disorders; without distress or dysfunction, gender dysphoria would not fulfill the requirements of DSM-5’s own definition of a mental disorder.

In contrast, the proposal for ICD-11 is to include child and adult Gender incongruence categories in another chapter that explicitly integrates medical and psychological perspectives, Conditions Related to Sexual Health. The proposed ICD-11 diagnostic guidelines indicate that distress and dysfunction, although not necessary for a diagnosis of Gender incongruence, may occur in disapproving social environments and that individuals with gender incongruence are at increased risk for psychological distress, psychiatric symptoms, social isolation, school drop-out, loss of employment, homelessness, disrupted interpersonal relationships, physical injuries, social rejection, stigmatization, victimization, and violence. At the same time, particularly in countries with progressive laws and policies, young transgender people living in supportive environments still seek health services, even in the absence of distress or impairment. The ICD-11 approach provides for this.

A challenge to DSM-5 conceptualization of Gender dysphoria is, therefore, the question of whether distress and dysfunction related to the social consequences of gender variance (e.g., stigmatization, violence) can be distinguished from distress related to transgender identity itself^{83,84}. A recent study of 250 transgender adults receiving services at the only publicly funded clinic in Mexico City providing comprehensive services for transgender people⁷¹ found that distress and dysfunction associated with emerging transgender identity were very

common, but not universal. However, more than three-quarters of participants reported having experienced social rejection and nearly two-thirds had experienced violence related to their gender identity during childhood or adolescence. Distress and dysfunction were more strongly predicted by experiences of social rejection and violence than by features related to gender incongruence. These data provide further support for ICD-11’s conceptualization and the removal of gender incongruence from the classification of mental disorders.

Finally, there are several technical differences between the proposals for ICD-11 and DSM-5 in relation to these categories. The most substantive is that the DSM-5 diagnosis of Gender dysphoria of childhood requires a duration of only six months, in contrast to two years in the ICD-11 proposal, and does not specify a lower age limit at which the diagnosis can be applied.

PROPOSED CHANGES TO F65 DISORDERS OF SEXUAL PREFERENCE

From WHO’s perspective, there is an important distinction between conditions that are relevant to public health and indicate the need for health services versus those that are simply descriptions of private behaviour without appreciable public health impact and for which treatment is neither indicated nor sought. This distinction is based on the ICD’s central function as a global public health tool that provides the framework for international public health surveillance and health reporting. It is also related to the increasing use of the ICD over the past several decades by WHO Member States to structure clinical care and define eligibility for subsidized health services¹. The regulation of private behaviour without health consequences to the individual or to others may be considered in different societies to be a matter for criminal law, religious proscription, or public morality, but is not a legitimate focus of public health or of health classification.

This requirement is particularly pertinent to the classification of atypical sexual preferences commonly referred to as paraphilias. The Working Group on Sexual Disorders and Sexual Health noted that the diagnostic guidelines provided for ICD-10’s classification of Disorders of sexual preference often merely describe the sexual behaviour involved. For example, the ICD-10 diagnostic guidelines define F65.1 Fetishistic transvestism as “the wearing of clothes of the opposite sex principally to obtain sexual excitement”⁴, without requiring any sort of distress or dysfunction and without reference to the public health or clinical relevance of this behaviour. This is at odds with ICD-10’s general guidance for what constitutes a mental disorder and contradicts ICD-10’s own statement that “social deviance or conflict alone, without personal dysfunction, should not be included in mental disorder”⁴. According to this principle, specific patterns of sexual arousal that are merely relatively unusual^{85,86}, but are not associated with distress,

dysfunction or harm to the individual or to others^{87,88}, are not mental disorders. Labeling them as such does not contribute meaningfully to public health surveillance or to the design of health services, and may create harm to individuals so labeled⁸⁹. Thus, a major consideration for the recommended revisions for ICD-11 in this area was whether an atypical sexual arousal pattern represented a condition of public health significance and clinical importance.

The Working Group recommended that Disorders of sexual preference be renamed as Paraphilic disorders to reflect the terminology used in the current scientific literature and in clinical practice⁹⁰. The Group proposed that the paraphilic disorders included in ICD-11 consist primarily of patterns of atypical sexual arousal that focus on non-consenting others, as these conditions could be considered to have public health implications (see Table 3). The core proposed diagnostic requirements for a Paraphilic disorder in ICD-11 are: a) a sustained, focused and intense pattern of sexual arousal – as manifested by persistent sexual thoughts, fantasies, urges, or behaviours – that involves others whose age or status renders them unwilling or unable to consent (e.g., pre-pubertal children, an unsuspecting individual being viewed through a window, an animal); and b) that the individual has acted on these thoughts, fantasies or urges or is markedly distressed by them. There is no requirement in the proposed ICD-11 diagnostic guidelines that the relevant arousal pattern be exclusive or preferential.

This conceptualization has resulted in the recommendation to retain three ICD-10 categories in this section, each labeled specifically as a disorder rather than simply naming or describing the behaviour involved. These include Exhibitionistic disorder, Voyeuristic disorder, and Pedophilic disorder. In addition, two new named categories have been proposed: Coercive sexual sadism disorder and Frotteuristic disorder.

Coercive sexual sadism disorder is defined by a sustained, focused and intense pattern of sexual arousal that involves the infliction of physical or psychological suffering on a non-consenting person. This arousal pattern has been found to be prevalent among sex offenders treated in forensic institutions⁹²⁻⁹⁶ and among individuals who have committed sexually motivated homicides⁹⁷. The new proposed nomenclature of Coercive sexual sadism disorder was selected to clearly distinguish this disorder from consensual sadomasochistic behaviours that do not involve substantial harm or risk.

Frotteuristic disorder is defined by a sustained, focused and intense pattern of sexual arousal that involves touching or rubbing against a non-consenting person in public places. Frotteurism has been found to be among the most common of paraphilic disorders⁹⁸⁻¹⁰² and is a significant problem in some countries¹⁰³. It was also included in DSM-IV and has been retained in DSM-5.

In addition, the category Other paraphilic disorder involving non-consenting individuals is proposed for use when the other diagnostic requirements for a paraphilic disorder are met but the specific pattern of sexual arousal does not fit into any of the available named categories and is not sufficiently

common or well researched to be included as a named category (e.g., arousal patterns involving corpses or animals).

Based on the concerns described above, the Working Group proposed that three named ICD-10 categories – F65.0 Fetishism, F65.1 Fetishistic transvestism, and F65.5 Sadomasochism – be removed from the classification. Indeed, several countries (Denmark, Sweden, Norway and Finland) have already removed these categories from their national lists of accepted ICD-10 diagnoses, in response to similar concerns¹⁰⁴. Instead, the proposed additional category Other paraphilic disorder involving solitary behaviour or consenting individuals may be used when the pattern of sexual arousal does not focus on non-consenting individuals but is associated with marked distress or significant risk of injury or death (e.g., asphyxophilia, or achieving sexual arousal by restriction of breathing).

One additional requirement in the proposed diagnostic guidelines is that, when a diagnosis of Other paraphilic disorder involving solitary behaviour or consenting individuals is assigned based on distress, the distress should not be entirely attributable to rejection or feared rejection of the arousal pattern by others (e.g., a partner, family, society). In these cases, codes related to counselling interventions from the ICD-11 chapter on Factors Influencing Health Status and Contact with Health Services may be considered. These are non-disease categories that indicate reasons for clinical encounters and include Counselling related to sexual knowledge and sexual attitude, Counselling related to sexual behaviour and sexual relationships of the patient, and Counselling related to sexual behaviour and sexual relationship of the couple. These categories recognize the need for health services, including mental health services, that may be legitimately provided in the absence of diagnosable mental disorders¹¹.

The proposed diagnostic guidelines make clear that the mere occurrence or a history of specific sexual behaviours is insufficient to establish a diagnosis of a Paraphilic disorder. Rather, these sexual behaviours must reflect a sustained, focused, and intense pattern of paraphilic sexual arousal. When this is not the case, other causes of the sexual behaviour need to be considered. For example, many sexual crimes involving non-consenting individuals reflect actions or behaviours that may be transient or occur impulsively or opportunistically rather than reflecting either a persistent pattern of sexual arousal or any underlying mental disorder. However, sexual behaviours involving non-consenting individuals may also occur in the context of some mental and behavioural disorders, such as manic episodes or dementia, or in the context of substance intoxication. These do not satisfy the definitional requirements of a Paraphilic disorder.

The Working Group on Sexual Disorders and Sexual Health has also recommended that the proposed ICD-11 grouping of Paraphilic disorders be retained within the chapter on Mental and Behavioural Disorders rather than being moved to the proposed new chapter on Conditions Related to Sexual Health, for two main reasons. First, the assessment and treatment of Paraphilic disorders, which often takes place in forensic con-

Table 3 Classification of Paraphilic disorders in ICD-11 (proposed), ICD-10 and DSM-5

Proposed ICD-11	ICD-10	DSM-5	Comments ⁹⁰
Chapter: Mental and Behavioural Disorders Grouping: Paraphilic disorders	Chapter: Mental and Behavioural Disorders Grouping: Disorders of adult personality and behaviour Subgrouping: Disorders of sexual preference	Grouping: Paraphilic disorders	<ul style="list-style-type: none"> • ICD-11 name changed to be consistent with current scientific literature and clinical practice; brings it in line with DSM-5. • ICD-11 distinguishes between conditions that are relevant to public health and clinical psychopathology on the one hand and private behaviours that are not a legitimate focus of health classification on the other. • Requirements for named Paraphilic disorders in ICD-11 are: a) a sustained, focused and intense pattern of sexual arousal that involves others whose age or status renders them unwilling or unable to consent; and b) that the individual has acted on the arousal patterns or is markedly distressed by it.
Category: Exhibitionistic disorder	Category: Exhibitionism	Category: Exhibitionistic disorder	<ul style="list-style-type: none"> • DSM-5 diagnosis may be assigned based on functional impairment, though without specification of how impairment is to be evaluated or based on whose perspective. ICD-11 guidelines require either action or distress; not including functional impairment is consistent with overall guidance for ICD-11 Mental and Behavioural Disorders.
Category: Voyeuristic disorder	Category: Voyeurism	Category: Voyeuristic disorder	<ul style="list-style-type: none"> • DSM-5 diagnosis may be assigned based on functional impairment, though without specification of how impairment is to be evaluated or based on whose perspective. ICD-11 guidelines require either action or distress; not including functional impairment is consistent with overall guidance for ICD-11 Mental and Behavioural Disorders.
Category: Pedophilic disorder	Category: Paedophilic disorder	Category: Pedophilic disorder	<ul style="list-style-type: none"> • DSM-5 diagnosis may be assigned based on functional impairment, though without specification of how impairment is to be evaluated or based on whose perspective. ICD-11 guidelines require either action or distress; not including functional impairment is consistent with overall guidance for ICD-11 Mental and Behavioural Disorders. • In DSM-5, diagnosis may be assigned based on the presence of “interpersonal difficulty” due to the arousal pattern, in the absence of action, distress, or functional impairment. • DSM-5 includes a variety of specifiers, which have been criticized for lack of consistency and questionable validity⁹¹.
Category: Coercive sexual sadism disorder	<i>Not included</i>	<i>Not included</i>	<ul style="list-style-type: none"> • Defined by sustained, focused and intense pattern of sexual arousal that involves the infliction of physical or psychological suffering on a non-consenting person. • Not equivalent to DSM-5 Sexual sadism disorder or ICD-10 Sado-masochism, which do not distinguish between arousal patterns involving consenting and non-consenting others.
Category: Frotteuristic disorder	<i>Not included</i>	Category: Frotteuristic disorder	<ul style="list-style-type: none"> • DSM-5 diagnosis may be assigned based on functional impairment, though without specification of how impairment is to be evaluated or based on whose perspective. ICD-11 guidelines require either action or distress; not including functional impairment is consistent with overall guidance for ICD-11 Mental and Behavioural Disorders.
<i>Recommended for deletion</i>	Category: Sadomasochism	Category: Sexual masochism disorder	<ul style="list-style-type: none"> • If consensual behaviour is involved, may be classified as in ICD-11 as Other paraphilic disorder involving solitary behaviour or consenting individuals, if accompanied by marked distress that is not entirely attributable to rejection or feared rejection of the arousal pattern by others (e.g., a partner, family, society) or by significant risk of injury or death. • If arousal pattern focuses on the infliction of suffering on non-consenting individuals, may be classified in ICD-11 as Coercive sexual sadism disorder.
<i>Not included</i>	<i>Combined with Sexual masochism</i>	Category: Sexual sadism disorder	<ul style="list-style-type: none"> • In ICD-11, may be classified as Other paraphilic disorder involving solitary behaviour or consenting individuals, if accompanied by marked distress that is not entirely attributable to rejection or feared rejection of the arousal pattern by others (e.g., a partner, family, society) or by significant risk of injury or death.

Table 3 Classification of Paraphilic disorders in ICD-11 (proposed), ICD-10 and DSM-5 (*continued*)

Proposed ICD-11	ICD-10	DSM-5	Comments ⁹⁰
<i>Recommended for deletion</i>	Category: Fetishism	Category: Fetishistic disorder	<ul style="list-style-type: none"> In ICD-11, may be classified as Other paraphilic disorder involving solitary behaviour or consenting individuals, if accompanied by marked distress that is not entirely attributable to rejection or feared rejection of the arousal pattern by others (e.g., a partner, family, society) or by significant risk of injury or death.
<i>Recommended for deletion</i>	Category: Fetishistic transvestism	Category: Transvestic disorder	<ul style="list-style-type: none"> In ICD-11, may be classified as Other paraphilic disorder involving solitary behaviour or consenting individuals, if accompanied by marked distress that is not entirely attributable to rejection or feared rejection of the arousal pattern by others (e.g., a partner, family, society) or by significant risk of injury or death.
<i>Recommended for deletion</i>	Category: Multiple disorders of sexual preference	<i>Not included</i>	<ul style="list-style-type: none"> This ICD-10 category was not considered to be clinically informative. Multiple paraphilic disorder diagnoses may be assigned in both ICD-11 and DSM-5.
Category: Other paraphilic disorder involving non-consenting individuals	<i>Not included</i>	<i>Not included</i>	<ul style="list-style-type: none"> May be used when the diagnostic requirements for a Paraphilic disorder are met but the specific pattern of sexual arousal does not fit into available named categories (e.g., arousal patterns involving corpses or animals).
Category: Other paraphilic disorder involving solitary behaviour or consenting individuals	<i>Not included</i>	<i>Not included</i>	<ul style="list-style-type: none"> May be used when the pattern of sexual arousal does not focus on non-consenting individuals but is associated with marked distress or significant risk of injury or death.
<i>Recommended for deletion</i>	Category: Other disorders of sexual preference	Category: Other specified paraphilic disorder	<ul style="list-style-type: none"> Replaced in ICD-11 by above two “Other paraphilic disorder” categories, which specify whether arousal pattern involves: a) non-consenting individuals; or b) consenting individuals or solitary behaviour.
<i>Recommended for deletion</i>	Category: Disorder of sexual preference, unspecified	Category: Unspecified paraphilic disorder	<ul style="list-style-type: none"> Recommended for deletion in ICD-11 to prevent misuse for clinical presentations involving only relatively unusual patterns of sexual arousal that are not associated with distress, dysfunction, or harm to the individual or to others.

texts, requires specialized mental health expertise. Evidence-based treatments for Paraphilic disorders are almost entirely psychological and psychiatric in nature and require substantial mental health expertise to administer. When adjunctive somatic treatments are used (e.g., anti-androgen drugs), they are controversial and legally and clinically complex and must be administered within a psychiatric framework.

Second, a substantial portion of the assessment and treatment of Paraphilic disorders relates to the civil commitment, mitigation, and treatment of specific classes of sex offenders. This is a complex and controversial legal area that must be considered in defining how Paraphilic disorders should be classified. In many countries – including the US, Germany, the UK, Canada, and other countries whose legal systems are based on the British or German systems – there are laws that allow for the civil commitment and preventive detention of certain sexual offenders who are sometimes termed sexually violent predators. These laws permit involuntary commitment of such individuals to psychiatric facilities after they have completed mandatory prison sentences, to allow for continued treatment and minimization of risk to the community where these offenders are to be released.

In countries where the constitutionality of such laws has been challenged, they have been upheld¹⁰⁵. However, crucial to the finding of constitutionality has been the determination

by relevant courts that a risk of dangerousness by itself is not sufficient grounds for civil commitment under such statutes. Rather, the constitutional requirement specifically rests on a finding of the presence of a mental disorder as the basis for civil commitment because it “narrows the class of persons eligible for confinement to those who are unable to control their dangerousness”¹⁰⁶.

Although there are continuing controversies about the application of these laws in many countries^{107,108}, the Working Group on Sexual Disorders and Sexual Health did not consider that moving Paraphilic disorders out of the Mental and Behavioural Disorders chapter would be an appropriate or helpful way to address these concerns.

Comparison with DSM-5

The changes proposed for Paraphilic disorders in ICD-11 represent a major departure from ICD-10, which was developed during the late 1980s. In many ways, these changes align the ICD-11 more closely with the DSM-5. At the same time, there are substantive differences between the two systems. Sexual masochism disorder, Fetishistic disorder, and Transvestic disorder are included as named mental disorders in DSM-

5, while in ICD-11 these phenomena can be diagnosed under Other paraphilic disorder involving solitary behaviour or consenting individuals only if they are associated with significant distress or significant risk of injury or death.

The duration requirement proposed for Paraphilic disorders in ICD-11 is more flexible than the six-month requirement in DSM-5, which does not appear to have specific empirical support¹⁰⁹. The ICD-11 guidelines require a clinical judgment that the arousal pattern is sustained, focused, and intense, making clear that a single instance of behaviour or criminal act does not meet this requirement. Functional impairment is included relatively automatically in diagnostic criteria for DSM-5, but has not been included as a part of the proposed ICD-11 diagnostic guidelines for Paraphilic disorders, in keeping with the general principle for ICD-11 Mental and Behavioural Disorders that impairment should only be used when necessary to distinguish a disorder from normality¹.

PROPOSED CHANGES TO F66 PSYCHOLOGICAL AND BEHAVIOURAL DISORDERS ASSOCIATED WITH SEXUAL DEVELOPMENT AND ORIENTATION

The ICD-10 explicitly states that “sexual orientation by itself is not to be considered a disorder”⁴. Nevertheless, the ICD-10 grouping of Psychological and behavioural disorders associated with sexual development and orientation suggests that there do exist mental disorders uniquely linked to sexual orientation. These categories include F66.0 Sexual maturation disorder, F66.1 Egodystonic sexual orientation, and F66.2 Sexual relationship disorder (see Table 4).

The Working Group on Sexual Disorders and Sexual Health emphasized that, although the ICD-10 F66 categories mention gender identity in their definitions, historically they emerged from concerns related to sexual orientation⁸⁹. Over the last half century, international classification systems of mental disorders, including the ICD and the DSM, but also various national and regional classifications, have gradually removed diagnostic categories that defined homosexuality *per se* as a mental disorder. This reflects emerging human rights standards^{56,110}, the recognition that homosexual behaviour is a widely prevalent aspect of human behaviour¹¹¹, and the lack of empirical evidence to support pathologization and medicalization of variations in sexual orientation expression^{112,113}.

As noted earlier, the ICD-10 also indicates that “social deviance or conflict alone, without personal dysfunction, should not be included in mental disorder”⁴. The Working Group viewed this exclusion as essential to the consideration of diagnostic categories linked to sexual orientation⁸⁹. Given that expression of same-sex orientation continues to be heavily stigmatized in parts of the world^{56,110}, psychological and behavioural symptoms seen in non-heterosexual individuals may be products of persistently hostile social responses rather than expressions of inherent psychopathology. This perspective is supported by

robust empirical evidence from international studies¹¹⁴⁻¹¹⁶. Violence, stigma, exclusion and discrimination linked to same-sex orientations is a worldwide phenomenon and has been documented as especially vicious, often showing a high degree of brutality¹¹⁷. In some countries, criminal law is still applied to consensual same-sex sexual activity, though international, regional and national human rights bodies have explicitly called for States to end this practice⁵⁶. Thus, the Working Group concluded that, if a disease label is to be attached to a social condition, it is essential that the condition have demonstrable public health and clinical utility, for example by identifying a legitimate mental health need.

The core diagnostic features of F66.0 Sexual maturation disorder in the ICD-10 are: a) uncertainty about one’s gender identity or sexual orientation and b) distress *about the uncertainty* rather than about the particular gender identity or sexual orientation. Research has repeatedly demonstrated that same-sex sexual orientation emerges over time¹¹⁸, with the process typically beginning in late childhood or early adolescence. Often there is a substantial level of anti-gay stigma in the individual’s social environment that creates stress for the individual. As distress arising from stigma cannot be considered as indicative of a mental disorder under the ICD-10 social conflict exclusion, the Working Group considered that this category conflates normative developmental patterns observed in gay, lesbian, bisexual, and transgender people with psychopathological processes.

The concept of egodystonic homosexuality (F66.1 Egodystonic sexual orientation in ICD-10) first entered mental disorders classifications in DSM-III, as part of a negotiation related to removing homosexuality *per se* from that diagnostic system¹¹⁹. The compromise was that, while homosexuality itself might not be a disorder, homosexuality could still provide the basis for a psychiatric diagnosis, but only if the individual was distressed about it. This construction was dropped from American Psychiatric Association’s classification in 1987¹¹³. In what appears to have been a parallel process in the subsequent revisions leading to ICD-10, the concept of Egodystonic sexual orientation was incorporated in the ICD-10, approved in 1990, when the ICD-9 diagnostic category for homosexuality *per se* was removed. According to the ICD-10, it is theoretically possible to apply this category to individuals with a heterosexual orientation who wish it were otherwise, but is hard to see this as anything other than an attempt to deflect criticism regarding the purpose of the category¹²⁰.

Lesbian, gay, and bisexual individuals often report higher levels of distress than their heterosexual counterparts in international surveys, but this has been linked strongly to experiences of social rejection and stigmatization¹¹⁴⁻¹¹⁶. Because distress related to social adversity cannot be considered as indicative of a mental disorder, any more than can distress related to other socially stigmatized conditions such as poverty or physical illness, the Working Group considered the existence of this distress as lacking in evidentiary value.

F66.2 Sexual relationship disorder in ICD-10 describes a situation in which the individual’s sexual orientation (or gender

Table 4 Classification of disorders related to sexual orientation in ICD-11 (proposed), ICD-10 and DSM-5

Proposed ICD-11	ICD-10	DSM-5	Comments ⁸⁹
<i>Recommended for deletion</i>	Chapter: Mental and Behavioural Disorders Grouping: Disorders of adult personality and behaviour Subgrouping: Psychological and behavioural disorders associated with sexual development and orientation	<i>Not included</i>	<ul style="list-style-type: none"> • All categories in this ICD-10 grouping have been recommended for deletion. • These categories or their equivalents are not included in DSM-5, and were not included in DSM-IV. • No scientific interest in these conditions since ICD-10 was published. • No evidence-based treatments. • Working Group determined that these categories confound responses to adverse social circumstances, normal developmental patterns, and psychopathology. • If requirements for depression, anxiety, or another disorder are met, that diagnosis should be used. These diagnoses do not depend on thematic content of associated concerns. • Otherwise, Counselling related to sexuality codes from ICD-11 chapter on Factors Influencing Health Status and Contact with Health Services are more appropriate.
<i>Recommended for deletion</i>	Category: Sexual maturation disorder	<i>Not included</i>	<ul style="list-style-type: none"> • ICD-10 defines category based on uncertainty about gender identity or sexual orientation, which causes anxiety or depression.
<i>Recommended for deletion</i>	Category: Egodystonic sexual orientation	<i>Not included</i>	<ul style="list-style-type: none"> • According to ICD-10, should be used when the gender identity or sexual preference is not in doubt, but the individual wishes it were different because of associated psychological and behavioural disorders.
<i>Recommended for deletion</i>	Category: Sexual relationship disorder	<i>Not included</i>	<ul style="list-style-type: none"> • According to ICD-10, should be used when the gender identity or sexual preference abnormality is responsible for difficulties in forming or maintaining a relationship with a sexual partner. • Difficulties in intimate relationships are common, occur for many reasons, and are dyadic. Working Group concluded that there was no justification for category based on the co-occurrence of an issue related to sexual orientation or gender identity with a relationship problem.
<i>Recommended for deletion</i>	Category: Other psychosexual development disorder	<i>Not included</i>	<ul style="list-style-type: none"> • This is a residual category for the ICD-10 grouping, which is recommended for deletion in ICD-11.
<i>Recommended for deletion</i>	Category: Psychosexual development disorder, unspecified	<i>Not included</i>	<ul style="list-style-type: none"> • This is a residual category for the ICD-10 grouping, which is recommended for deletion in ICD-11.
<i>Recommended for deletion</i>	Qualifiers: (<i>May be applied to all categories in grouping</i>) <ul style="list-style-type: none"> • <i>Heterosexual</i> • <i>Homosexual</i> • <i>Bisexual</i> • <i>Other, including prepubertal</i> 	<i>Not included</i>	<ul style="list-style-type: none"> • These categories specify sexual orientation of individual receiving any of the above ICD-10 diagnoses, which are recommended for deletion.

identity) has created a disturbance in a primary sexual relationship. Difficulties in intimate relationships are common, occur for many reasons, and are, by their nature, dyadic. The Working Group concluded that there was no justification for creating a mental disorder category specifically based on the co-occurrence of an issue related to sexual orientation or gender identity with a relationship problem.

The Working Group's review concluded that gay, lesbian, and bisexual people receive mental health services for the same reasons that heterosexual people do, and also could find no evidence that concerns about sexual orientation that accompany other mental disorders such as depression or anxiety require different methods of treatment¹²¹. Further, there

are no evidence-based practices related to the F66 categories, and therapeutic attempts to change sexual orientation are considered to be outside the scope of ethical practice¹²². There is also a risk that misattributing symptoms of other mental disorders to conflicts about sexual orientation may interfere with appropriate treatment selection⁸⁹.

Moreover, the F66 categories have attracted no scientific interest since the ICD-10 was published. The Working Group conducted a search of Medline, Web of Science, and PsycINFO, and failed to find a single reference to Sexual maturation disorder or Sexual relationship disorder. The last peer-reviewed, indexed reference to "egodystonic homosexuality" was published more than two decades ago. The F66 categories do not

contribute meaningfully to public health surveillance, are not routinely reported by any country, and are not used in WHO's calculation of disease burden. At the same time, they selectively target individuals with same-sex orientation or gender nonconformity, with no apparent justification. Individuals with needs for information or who experience distress specifically related to sexual orientation that is not diagnosable as another disorder (e.g., Adjustment disorder) can still receive services through the use of codes related to counselling interventions from the ICD-11 chapter on Factors Influencing Health Status and Contact with Health Services described earlier in this paper.

The Working Group has therefore proposed the elimination of the entire grouping of F66 disorders from the ICD-11.

Comparison with DSM-5

The proposed changes for ICD-11 in this area bring it in line with DSM-5. No equivalent to any of the ICD-10 F66 categories is included in DSM-5 or was included in DSM-IV.

CONCLUSIONS

In the more than quarter century since the approval of the ICD-10, there have been substantial gains in scientific, clinical, social, and human rights understandings relevant to diagnostic categories related to sexuality and gender identity. These different streams of evidence have been considered in the development of a set of proposals for ICD-11 that departs markedly from the descriptions of categories related to sexuality and gender identity in the ICD-10. The inclusion of mental and behavioural disorders alongside all other diagnostic entities in health care is a central feature of the ICD, and has uniquely positioned the current revision effort to contemplate a broader and more integrative set of classification options with respect to these categories.

The ICD-10 classification of Sexual dysfunctions was substantially outdated in its view of psychological and physical causes of sexual dysfunction as separable and separate, making it inconsistent with current evidence regarding the etiology and treatment of these conditions. For the ICD-11, an innovative, integrated system has been proposed, including a set of qualifiers to indicate the range of factors that the clinician considers to be contributory. It must be emphasized that the WHO does not consider the ICD-11 chapters to constitute scope of practice boundaries between medical specialties, but intends and expects that psychiatrists and other mental health professionals with appropriate training will continue to engage in the treatment of these common and costly conditions and that the reformulated classification of these conditions will encourage broader availability of treatment.

The role of psychiatry in many countries is likely to evolve in substantive ways with respect to the evaluation and treatment of Gender incongruence, proposed to replace Gender identity

disorders in the ICD-10. The best health care services for transgender people are by definition multidisciplinary⁵⁹. But psychiatrists in some countries have been unfortunately positioned as gatekeepers to enforce elaborate and burdensome requirements in order to access these services⁸³, ostensibly in order to verify that transgender people are certain about their decision to seek health services to make their bodies align with their experienced identity. However, in the recent Mexican study described above⁷¹, the average delay between reported awareness of transgender identity and initiation of hormones – by far the most common treatment received – was found to be more than 12 years, and nearly half of participants had initiated hormones without medical supervision, exposing themselves to serious health risks. While these figures are not broadly generalizable, they are likely more reflective of the situation in most of the world than those reported in available studies from the US or Western Europe, given that more than 80% of the global population lives in low- and middle-income countries. Psychiatrists and other mental health professionals have a major role to play in improving the health status of this often mistreated population^{58,74,75}.

With respect to the classification of Paraphilic disorders, the Working Group on Sexual Disorders and Sexual Health has attempted to grapple with thorny issues related to how best to distinguish between conditions that are relevant to public health and clinical psychopathology on the one hand and private behaviours that are not a legitimate focus of health classification on the other. At the same time, proposals in this area affirm the status of persistent and intense sexual arousal patterns focusing on individuals who do not or cannot consent as psychiatric in their nature and management⁹⁰. In contrast, the Working Group concluded that there are no legitimate public health or clinical objectives served by mental disorder categories uniquely linked to sexual orientation⁸⁹.

In summary, the Working Group on Sexual Disorders and Sexual Health has proposed changes in the classification of these conditions that it considers to be: a) more reflective of current scientific evidence and best practices; b) more responsive to the needs, experience, and human rights of vulnerable populations; and c) more supportive of the provision of accessible and high-quality health care services. Proposed diagnostic guidelines for the disorders described in this paper will be made available for review and comment by members of WHO's Global Clinical Practice Network (<http://gcp.network>)¹²³, and subsequently for public review prior to finalization of the ICD-11. We hope that this paper will serve to encourage further scientific and professional discussion.

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REFERENCES

- International Advisory Group for the Revision of ICD-10 Mental and Behavioural Disorders. A conceptual framework for the revision of the ICD-10 classification of mental and behavioural disorders. *World Psychiatry* 2011;10:86-92.
- First MB, Reed GM, Hyman SE et al. The development of the ICD-11 clinical descriptions and diagnostic guidelines for mental and behavioural disorders. *World Psychiatry* 2015;14:82-90.
- American Psychiatric Association. *Diagnostic and statistical manual of mental disorders*, 5th ed. Arlington: American Psychiatric Association, 2013.
- World Health Organization. *The ICD-10 classification of mental and behavioural disorders: clinical descriptions and diagnostic guidelines*. Geneva: World Health Organization, 1992.
- Perelman MA. The sexual tipping point: a mind/body model for sexual medicine. *J Sex Med* 2009;6:29-32.
- Lewis RW, Fugl-Meyer KS, Corona G et al. Definitions/epidemiology/risk factors for sexual dysfunction. *J Sex Med* 2010;7:1598-607.
- McCabe MP, Sharlip ID, Atalla E et al. Definitions of sexual dysfunctions in women and men: a consensus statement from the Fourth International Consultation on Sexual Medicine 2015. *J Sex Med* 2016;13:135-43.
- McCabe MP, Sharlip ID, Lewis R et al. Risk factors for sexual dysfunction among women and men: a consensus statement from the Fourth International Consultation on Sexual Medicine 2015. *J Sex Med* 2016;13:153-67.
- Carvalho J, Nobre P. Biopsychosocial determinants of men's sexual desire: testing an integrative model. *J Sex Med* 2011;8:754-63.
- Chou D, Cottler S, Khosla R et al. Sexual health in the International Classification of Diseases (ICD): implications for measurement and beyond. *Reprod Health Matters* 2015;23:185-92.
- World Health Organization. *International statistical classification of diseases and related health problems, 10th revision (ICD-10)*. Geneva: World Health Organization, 1992.
- Pfaus JG. Pathways of sexual desire. *J Sex Med* 2009;6:1506-33.
- Kingsberg SA, Clayton AH, Pfaus JG. The female sexual response: current models, neurobiological underpinnings and agents currently approved or under investigation for the treatment of Hypoactive Sexual Desire Disorder. *CNS Drugs* 2015;29:915-33.
- Basson R. The female sexual response: a different model. *J Sex Marital Ther* 2000;26:51-65.
- Hackett G, Krychman M, Baldwin D et al. Coronary heart disease, diabetes, and sexuality in men. *J Sex Med* 2016;13:887-904.
- Atlantis E, Sullivan T. Bidirectional association between depression and sexual dysfunction: a systematic review and meta-analysis. *J Sex Med* 2012;9:1497-507.
- El Miedany Y, El Gaafary M, El Arousy N et al. Sexual dysfunction in rheumatoid arthritis patients: arthritis and beyond. *Clin Rheumatol* 2012;31:601-6.
- Mohammadi K, Rahnama P, Mohseni SM et al. Determinants of sexual dysfunction in women with multiple sclerosis. *BMC Neurol* 2013;13:83.
- Catania L, Abdulcadir O, Puppo V et al. Pleasure and orgasm in women with female genital mutilation/cutting (FGM/C). *J Sex Med* 2007;4:1666-78.
- Johnson SD, Phelps D, Cottler LB. The association of sexual dysfunction and substance use among a community epidemiological sample. *Arch Sex Behav* 2004;33:55-63.
- Clayton AH, Croft HA, Handiwala L. Antidepressants and sexual dysfunction: mechanisms and clinical implications. *Postgrad Med* 2014;126:91-9.
- Nobre PJ, Pinto-Gouveia J. Dysfunctional sexual beliefs as vulnerability factors to sexual dysfunction. *J Sex Res* 2006;43:68-75.
- Dunn KM, Croft PR, Hackett GI. Association of sexual problems with social, psychological, and physical problems in men and women: a cross-sectional populations survey. *J Epidemiol Community Health* 1999;53:144-8.
- Öberg K, Fugl-Meyer KS, Fugl-Meyer AR. On sexual well being in sexually abused Swedish women: epidemiological aspects. *Sex Relation Ther* 2002;17:329-41.
- Brotto LA, Atallah S, Johnson-Agbakwu C et al. Psychological and interpersonal dimensions of sexual function and dysfunction. *J Sex Med* 2016;13:538-71.
- Laumann EO, Nicolosi A, Glasser DB et al. Sexual problems among women and men aged 40-80 y: prevalence and correlates identified in the Global Study of Sexual Attitudes and Behaviors. *Int J Impot Res* 2005;17:39-57.
- Atallah S, Johnson-Agbakwu C, Rosenbaum T et al. Ethical and sociocultural aspects of sexual function and dysfunction in both sexes. *J Sex Med* 2016;13:591-606.
- Oniz A, Keskinoglu P, Bezircioglu I. The prevalence and causes of sexual problems among premenopausal Turkish women. *J Sex Med* 2007;4:1575-81.
- Laan E, Rellini AH, Barnes T. Standard operating procedures for female orgasmic disorder: consensus of the International Society for Sexual Medicine. *J Sex Med* 2013;10:74-82.
- Brotto LA. The DSM diagnostic criteria for hypoactive sexual desire disorder in women. *Arch Sex Behav* 2010;39:221-39.
- Parish SJ, Hahn SR. Hypoactive sexual desire disorder: a review of epidemiology, biopsychology, diagnosis, and treatment. *Sex Med Rev* 2016;4:103-20.
- DeRogatis LR, Clayton AH, Rosen RC et al. Should sexual desire and arousal disorders in women be merged? *Arch Sex Behav* 2011;40:217-9.
- Sungur MZ, Gündüz A. A comparison of DSM-IV-TR and DSM-5 definitions for sexual dysfunctions: critiques and challenges. *J Sex Med* 2014;11:364-73.
- Sarin S, Amsel RM, Binik YM. Disentangling desire and arousal: a classificatory conundrum. *Arch Sex Behav* 2013;42:1079-100.
- Balon R, Clayton AH. Female sexual interest/arousal disorder: a diagnosis out of thin air. *Arch Sex Behav* 2014;43:1227-9.
- Burri A, Greven C, Leupi M et al. A multivariate twin study of female sexual dysfunction. *J Sex Med* 2012;9:2671-81.
- Bishop JR, Moline J, Ellingrod VL et al. Serotonin 2A-1438 G/A and G-protein Beta3 subunit C825T polymorphisms in patients with depression and SSRI-associated sexual side-effects. *Neuropsychopharmacology* 2006;31:2281-8.
- Bishop JR, Ellingrod VL, Akroush M et al. The association of serotonin transporter genotypes and selective serotonin reuptake inhibitor (SSRI)-associated sexual side effects: possible relationship to oral contraceptives. *Hum Psychopharmacol* 2009;24:207-15.
- Arnow BA, Millheiser L, Garrett A et al. Women with hypoactive sexual desire disorder compared to normal females: a functional magnetic resonance imaging study. *Neuroscience* 2009;158:484-502.
- Pyke RE, Clayton AH. Psychological treatment trials for hypoactive sexual desire disorder: a sexual medicine critique and perspective. *J Sex Med* 2015;12:2451-8.
- Berman JR, Berman LA, Toler SM et al. Safety and efficacy of sildenafil citrate for the treatment of female sexual arousal disorder: a double-blind, placebo controlled study. *J Urology* 2003;170:2333-8.
- Brotto LA, Basson R, Luria M. A mindfulness-based group psychoeducational intervention targeting sexual arousal disorder in women. *J Sex Med* 2008;5:1646-59.
- Brotto LA, Chivers ML, Millman RD et al. Mindfulness-based sex therapy improves genital-subjective arousal concordance in women with sexual desire/arousal difficulties. *Arch Sex Behav* (in press).
- Maserejian NN, Shifren J, Parish SJ et al. Sexual arousal and lubrication problems in women with clinically diagnosed hypoactive sexual desire disorder: preliminary findings from the hypoactive sexual desire disorder registry for women. *J Sex Marital Ther* 2012;38:41-62.
- Binik YM. Should dyspareunia be retained as a sexual dysfunction in DSM-V? A painful classification. *Arch Sex Behav* 2005;34:11-21.
- Pukall CF, Goldstein AT, Bergeron S et al. Vulvodynia: definition, prevalence, impact, and pathophysiological factors. *J Sex Med* 2016;13:291-304.
- Bornstein J, Goldstein AT, Stockdale CK et al. 2015 ISSVD, ISSWSH, and IPPS consensus terminology and classification of persistent vulvar pain and vulvodynia. *J Sex Med* 2016;127:745-51.

48. Segraves RT. Considerations for a better definition of male orgasmic disorder in DSM V. *J Sex Med* 2010;7:690-9.
49. Waldinger M. Male ejaculation and orgasm disorders. In: Balon R, Segraves R (eds). *Handbook of sexual dysfunction*. Boca Raton: Taylor and Francis, 2005:215-48.
50. Wylie K, Ralph D, Levin RJ et al. Comments on "Considerations for a better definition of male orgasmic disorder in DSM V". *J Sex Med* 2010;7:695-9.
51. Global Action for Trans* Equality. It's time for reform. *Trans health issues in the International Classification of Diseases*. Report on the GATE Experts Meeting, The Hague, November 2011.
52. European Commission. *Trans and intersex people: discrimination on the grounds of sex, gender identity and gender expression*. Luxembourg: European Union, 2012.
53. European Parliament. *Resolution of 28 September 2011 on human rights, sexual orientation and gender identity at the United Nations*. Strasbourg: European Parliament, 2011.
54. World Health Organization. *Mental health action plan 2013-2020*. Geneva: World Health Organization, 2013.
55. World Health Organization. *Basic documents, 48th ed*. Geneva: World Health Organization, 2014.
56. United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*. New York: United Nations General Assembly, 2011.
57. Council of Europe. *Discrimination on grounds of sexual orientation and gender identity in Europe, 2nd ed*. Strasbourg: Council of Europe Publishing, 2011.
58. World Health Organization. *Sexual health, human rights and the law*. Geneva: World Health Organization, 2015.
59. World Professional Association for Transgender Health. *Standards of care for the health of transsexual, transgender and gender non-conforming people, version 7*. World Professional Association for Transgender Health, 2011.
60. United Nations Development Programme. *Discussion paper: Transgender health and human rights*. New York: United Nations Development Programme, 2013.
61. Sood N. *Transgender people's access to sexual health and rights: a study of law and policy in 12 Asian countries*. Kuala Lumpur: Asian-Pacific Resource and Research Centre for Women, 2009.
62. Nuttbrock L, Hwahng S, Bockting W et al. *Psychiatric impact of gender-related abuse across the life course of male-to-female transgender persons*. *J Sex Res* 2010;47:12-23.
63. Grossman AH, D'Augelli AR. *Transgender youth: invisible and vulnerable*. *J Homosex* 2006;51:111-28.
64. Sugano E, Nemoto T, Operario D. *The impact of exposure to transphobia on HIV risk behavior in a sample of transgendered women of color in San Francisco*. *AIDS Behav* 2006;10:217-25.
65. Grossman AH, D'Augelli AR, Salter NP. *Male-to-female transgender youth: gender expression milestones, gender atypicality, victimization, and parents' responses*. *J GLBT Fam Stud* 2006;2:71-92.
66. Rotondi NK, Bauer GR, Scanlon K et al. *Nonprescribed hormone use and self-performed surgeries: "do-it-yourself" transitions in transgender communities in Ontario, Canada*. *Am J Public Health* 2013;103:1830-6.
67. Sanchez NF, Sanchez JP, Danoff A. *Health care utilization, barriers to care, and hormone usage among male-to-female transgender persons in New York City*. *Am J Public Health* 2009;99:713-9.
68. Asscheman H, Giltay EJ, Megens JA et al. *A long-term follow-up study of mortality in transsexuals receiving treatment with cross-sex hormones*. *Eur J Endocrinol* 2011;164:635-42.
69. Hembree WC, Cohen-Kettenis P, Delemarre-van de Waal HA et al. *Endocrine treatment of transsexual persons: an Endocrine Society clinical practice guideline*. *J Clin Endocrinol Metab* 2009;94:3132-54.
70. Mueller A, Gooren L. *Hormone-related tumors in transsexuals receiving treatment with cross-sex hormones*. *Eur J Endocrinol* 2008;159:197-202.
71. Robles R, Fresán A, Vega-Ramírez H et al. *Removing transgender identity from the classification of mental disorders: a Mexican field study for ICD-11*. *Lancet Psychiatry* 2016;3:850-9.
72. Drescher J, Cohen-Kettenis P, Winter S. *Minding the body: situating gender identity diagnoses in the ICD-11*. *Int Rev Psychiatry* 2012;24:568-77.
73. Drescher J, Cohen-Kettenis PT, Reed GM. *Gender incongruence of childhood in the ICD-11: controversies, proposal, and rationale*. *Lancet Psychiatry* 2016;3:297-304.
74. Lo S, Horton R. *Transgender health: an opportunity for global health equity*. *Lancet* 2016;388:316-8.
75. Reisner SL, Poteat T, Keatley J et al. *Global health burden and needs of transgender populations: a review*. *Lancet* 2016;388:412-36.
76. Winter S, Settle E, Wylie K et al. *Synergies in health and human rights: a call to action to improve transgender health*. *Lancet* 2016;388:318-21.
77. Cabral M, Suess A, Ehrt J et al. *Removal of gender incongruence of childhood diagnostic category: a human rights perspective*. *Lancet Psychiatry* 2016;3:405-6.
78. Drescher J, Byne W. *Gender dysphoric/gender variant (GD/GV) children and adolescents: summarizing what we know and what we have yet to learn*. *J Homosex* 2012;59:501-10.
79. Drescher J, Byne W. *Treating transgender children and adolescents: an interdisciplinary discussion*. New York: Routledge, 2013.
80. Steensma TD, McGuire JK, Kreukels BP et al. *Factors associated with desistance and persistence of childhood gender dysphoria: a quantitative follow-up study*. *J Am Acad Child Adolesc Psychiatry* 2013;52:582-90.
81. Steensma TD, Biemond R, de Boer F et al. *Desisting and persisting gender dysphoria after childhood: a qualitative follow-up study*. *Clin Child Psychol Psychiatry* 2011;16:499-516.
82. Byne W, Bradley SJ, Coleman E, et al. *Report of the APA Task Force on Treatment of Gender Identity Disorder*. *Arch Sex Behav* 2012;41:759-96.
83. Bouman WP, Bauer GR, Richards C et al. *World Professional Association for Transgender Health consensus statement on considerations of the role of distress (Criterion D) in the DSM diagnosis of gender identity disorder*. *Int J Transgend* 2010;12:100-6.
84. Ehrbar RD, Wittig MC, Ehrbar HG et al. *Clinician judgment in the diagnosis of gender identity disorder in children*. *J Sex Marital Ther* 2008;34:385-412.
85. Joyal CC. *How anomalous are paraphilic interests?* *Arch Sex Behav* 2014;43:1241-3.
86. Joyal CC. *Defining "normophilic" and "paraphilic" sexual fantasies in a population-based sample: on the importance of considering subgroups*. *Sex Med* 2015;3:321-30.
87. Richters J, de Visser RO, Rissel CE et al. *Demographic and psychosocial features of participants in bondage and discipline, "sadosomochism" or dominance and submission (BDSM): data from a national survey*. *J Sex Med* 2008;5:1660-8.
88. Reiersøl O, Skeid S. *The ICD diagnoses of fetishism and sadosomochism*. *J Homosex* 2006;50:243-62.
89. Cochran SD, Drescher J, Kismödi E et al. *Proposed declassification of disease categories related to sexual orientation in the International Statistical Classification of Diseases and Related Health Problems (ICD-11)*. *Bull World Health Organ* 2014;92:672-9.
90. Krueger RB, Reed GM, First MB et al. *Paraphilic disorders in the International Classification of Disease and Related Health Problems, Eleventh Revision (ICD-11)*. *Arch Sex Behav* (in press).
91. Briken P, Fedoroff JP, Bradford JW. *Why can't pedophilic disorder remit?* *Arch Sex Behav* 2014;43:1237-9.
92. Becker JV, Stinson J, Tromp S et al. *Characteristics of individuals petitioned for civil commitment*. *Int J Offend Ther* 2003;47:185-95.
93. Berner W, Berger P, Hill A. *Sexual sadism*. *Int J Offend Ther* 2003;47:383-95.
94. Briken P, Bourget D, Dufour M. *Sexual sadism in sexual offenders and sexually motivated homicide*. *Psychiatr Clin North Am* 2014;37:215-30.
95. Elwood RW, Doren DM, Thornton D. *Diagnostic and risk profiles of men detained under Wisconsin's sexually violent person law*. *Int J Offend Ther* 2010;54:187-96.
96. Packard, RL, Levenson JL. *Revisiting the reliability of diagnostic decisions in sex offender civil commitment*. *Sexual Offender Treatment* 2006;1:1-15.
97. Krueger RB. *The DSM diagnostic criteria for sexual sadism*. *Arch Sex Behav* 2010;39:325-45.
98. Abel GG, Becker JV, Mittelman M et al. *Self-reported sex crimes of nonincarcerated paraphiliacs*. *J Interpers Violence* 1987;2:3-25.
99. Ahlers CJ, Schaefer GA, Mundt IA et al. *How unusual are the contents of paraphilias? Paraphilia-associated sexual arousal patterns in a community-based sample of men*. *J Sex Med* 2011;8:1362-70.
100. Bradford JMW, Boulet J, Pawlak A. *The paraphilias: a multiplicity of deviant behaviors*. *Can J Psychiatry* 1992;37:104-8.
101. Långström N. *The DSM diagnostic criteria for exhibitionism, voyeurism, and frotteurism*. *Arch Sex Behav* 2010;39:317-24.

102. Templeman TL, Stinnett RD. Patterns of sexual arousal and history in a "normal" sample of young men. *Arch Sex Behav* 1991;20:137-50.
103. Johnson RS, Ostermeyer B, Sikes KA et al. Prevalence and treatment of frotteurism in the community: a systematic review. *J Am Acad Psychiatry Law* 2014;42:478-83.
104. Nordic Centre for Classifications in Health Care. Removed ICD-10 codes in categories F64 and F65 in the Nordic Countries. Helsinki: Nordic Centre for Classifications in Health Care, 2015.
105. First MB, Halon RL. Use of DSM paraphilia diagnoses in sexually violent predator commitment cases. *J Am Acad Psychiatry Law* 2008;36:443-54.
106. US Supreme Court. *Kansas v. Hendricks*, 521 U.S. 346 (1997).
107. Janus E. Sexually violent predator laws: psychiatry in service to a morally dubious enterprise. *Lancet* 2004;364:50-1.
108. Zonana H. The civil commitment of sex offenders. *Science* 1997;278:1248-9.
109. First MB. DSM-5 and paraphilic disorders. *J Am Acad Psychiatry Law* 2014;42:191-201.
110. O'Flaherty M, Fisher J. Sexual orientation, gender identity and international human rights law: contextualising the Yogyakarta Principles. *Human Rights Law Rev* 2008;8:207-48.
111. Caceres CF, Konda K, Segura ER et al. Epidemiology of male same-sex behaviour and associated sexual health indicators in low- and middle-income countries: 2003-2007 estimates. *Sex Transm Infect* 2008;84(Suppl. 1):i49-56.
112. Hooker E. Reflections of a 40-year exploration: a scientific view on homosexuality. *Am Psychol* 1993;48:450-3.
113. Drescher J. Queer diagnoses: parallels and contrasts in the history of homosexuality, gender variance, and the Diagnostic and Statistical Manual. *Arch Sex Behav* 2010;39:427-60.
114. King M, McKeown E, Warner J et al. Mental health and quality of life of gay men and lesbians in England and Wales: controlled, cross-sectional study. *Br J Psychiatry* 2003;183:552-8.
115. Mays VM, Cochran SD. Mental health correlates of perceived discrimination among lesbian, gay, and bisexual adults in the United States. *Am J Public Health* 2001;91:1869-76.
116. Meyer IH. Prejudice, social stress, and mental health in lesbian, gay, and bisexual populations: conceptual issues and research evidence. *Psychol Bull* 2003;129:674-97.
117. Organization for Security and Cooperation in Europe/Office for Democratic Institutions and Human Rights. Hate crimes in the OSCE region – incidents and responses. Annual report for 2006. Warsaw: Organization for Security and Cooperation in Europe/Office for Democratic Institutions and Human Rights, 2007.
118. Calzo JP, Antonucci TC, Mays VM et al. Retrospective recall of sexual orientation identity development among gay, lesbian, and bisexual adults. *Dev Psychol* 2011;47:1658-73.
119. Spitzer RL. The diagnostic status of homosexuality in DSM-III: a reformulation of the issues. *Am J Psychiatry* 1981;138:210-5.
120. van Drimmelen-Krabbe JJ, Ustun TB, Thompson DH et al. Homosexuality in the International Classification of Diseases: a clarification. *JAMA* 1994; 272:1660.
121. American Psychological Association. Guidelines for psychological practice with lesbian, gay, and bisexual clients. *Am Psychol* 2012;67:10-42.
122. Pan American Health Organization. "Cures" for an illness that does not exist. Washington, DC: Pan American Health Organization, 2012.
123. Reed GM, First MB, Medina-Mora ME et al. Draft diagnostic guidelines for ICD-11 mental and behavioural disorders available for review and comment. *World Psychiatry* 2016;15:112-3.

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UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

AIDEN STOCKMAN; NICOLAS
 TALBOTT; TAMASYN REEVES;
 JAQUICE TATE; JOHN DOES 1-2;
 JANE DOE; and EQUALITY
 CALIFORNIA,

Plaintiffs,

v.

DONALD J. TRUMP, et al.

Defendants.

CASE NO. 5:17-cv-01799-JGB-KKx

DECLARATION OF MARK J.
 EITELBERG IN SUPPORT OF
 PLAINTIFFS' MOTION FOR
 PRELIMINARY INJUNCTION

Hearing

Date: November 20, 2017
 Time: 9:00 a.m.
 Courtroom: 1

1 I, Mark J. Eitelberg, declare as follows:

2 1. I am a Professor Emeritus at the Naval Postgraduate School in
3 Monterey, California. I have personal knowledge of the matters stated in this
4 declaration and can competently testify to these facts.

5 2. I received a Master of Public Administration degree from New York
6 University in 1973 and a Ph.D. in Public Administration in 1979, also from New
7 York University. I joined the faculty of the Naval Postgraduate School as an
8 Adjunct Research Associate Professor in 1982. I was tenured as an Associate
9 Professor in 1995 and promoted to Professor of Public Policy in 1999. I retired
10 from federal service in April 2017. Upon retirement, in recognition of my
11 distinguished service, I was designated Emeritus Professor of the Naval
12 Postgraduate School. I served with the New Jersey Army National Guard and the
13 U.S. Army Reserve from 1970 to 1976, the last two years as Staff Sergeant.

14 3. My teaching and research at the Naval Postgraduate School focused
15 on military manpower and personnel policy analysis and military
16 sociology/psychology. Among my research interests are the following: population
17 participation (“representation”) in the military; the All-Volunteer Force; military
18 force management and manpower policy; military manpower selection,
19 classification, and utilization; and equal opportunity and diversity management.
20 My honors include the Robert M. Yerkes Award (for outstanding contributions to
21 military psychology by a non-psychologist) from the Society for Military
22 Psychology, a division of the American Psychological Association, and the
23 Department of the Navy Superior Civilian Service Award. I have served on the
24 Board of Editors of the journals *Armed Forces & Society* and *Military Psychology*.
25 I was Editor-in-Chief of *Armed Forces & Society* from 1998 through 2001. A true
26 and correct copy of my curriculum vitae and a list of my publications are attached
27 to this declaration as Exhibit A.

28

1 4. I am aware that, on June 30, 2016, the Department of Defense
2 announced it would begin allowing transgender persons to serve openly in the
3 military. As stated in the official announcement and news release (NR-246-16):
4 “Effective immediately, service members may no longer be involuntarily
5 separated, discharged or denied reenlistment solely on the basis of gender identity.
6 Service members currently on duty will be able to serve openly.” This change in
7 policy followed a careful review by a comprehensive working group that included
8 high-ranking uniformed and civilian personnel as well as medical experts and other
9 highly knowledgeable persons. The new policy assured current service members
10 that they could reveal their gender identity if they chose to do so. The policy also
11 established procedures for transgender service members to receive appropriate
12 medical care for gender transition. Subsequently, many transgender service
13 members informed their chain of command and their peers that they are
14 transgender.

15 5. I am also aware that, in a series of informal comments on July 26,
16 2017, and later in a formal memorandum on August 25, 2017, President Donald
17 Trump directed that the policy allowing transgender individuals to serve openly in
18 the military “return to the longstanding policy and practice” that prohibited
19 transgender persons from serving in any capacity. Up to this point, for over one
20 year previously, transgender service members were told that the Department of
21 Defense had “ended” its ban on transgender Americans serving in the U.S.
22 military. Under this policy and a forthcoming implementation plan, transgender
23 service members will once again be subject to discharge by the Department of
24 Defense on March 23, 2018.

25 6. Based on my knowledge, experience, and research in the fields of
26 military manpower and personnel policy, military sociology, and military
27 psychology, the newly announced policy is significantly harming service members
28 who have disclosed they are transgender. This is not merely a potential problem or

1 future hardship due to the scheduled March 23, 2018 date on which they will
2 become subject to being separated. The new policy prevents transgender service
3 members from serving equally with their peers; it imposes substantial limitations
4 on their opportunities within the military; and it negatively impacts their day-to-
5 day relationships with co-workers and other service members.

6 7. Military service opportunities are generally structured through career
7 tracking by occupational area within each separate service, with scheduled training
8 and skill-level assessments, operational assignments (or tours) and deployments,
9 windows for advancement, and increased responsibilities based on experience,
10 time-in-service, conduct, and performance. At the same time, as with any
11 occupation, discretionary judgments or decisions within a service member's chain
12 of command can have a strong impact on one's job opportunities or daily life.
13 Naturally, these decisions are influenced by expectations regarding a service
14 member's future in the military. From an operational perspective, commanders
15 understandably are reluctant to invest significant resources in the training or
16 development of individuals who might leave military service in the near future, or
17 to entrust them with important assignments. This dynamic is similar to what
18 occurs in other large organizations when an employee is known to be departing
19 several months in advance. Transgender service members who informed others of
20 their gender identity based on the government's pledge that they could serve
21 openly as of June 30, 2016, believing that "ending the ban" would not be
22 temporary, have no secure future in the military beyond March 23, 2018.

23 8. Transgender service members leaving military service would likely be
24 held in their present duty location, pending a confirmed date of their involuntary
25 separation. Lost opportunities and personal problems would ensue, particularly if
26 the service member has a family, children in school, or other dependents.
27 Previously scheduled training, deployment, change of duty station, or other
28 planned career events would be canceled by the military to save related costs,

1 minimize organizational disruption, and simplify discharge. Some of these service
2 members would continue to work in their present positions until separation; others
3 would be temporarily “stashed” in another work unit; and some might be placed in
4 a “make-work” situation or “holding pattern” while awaiting separation. If the
5 person has a particularly important skill, knowledge, or expertise, she or he may be
6 asked to train a replacement. In other cases, an individual scheduled for discharge
7 may be gradually relieved of duties or assignments as their responsibilities are
8 delegated to others. Depending on the supervisor's views and management style,
9 this might mean the person slated for discharge will be required to perform tasks
10 no one else wants or be assigned less challenging, repetitive tasks that do not
11 enhance their skill development.

12 9. Such reductions in responsibility have an impact even on service
13 members whose departure from the military is voluntary and who have begun to
14 make plans for their post- military life. The impact is much more severe for those
15 who had been planning to remain in the military but are unexpectedly facing the
16 prospect of involuntary separation, because their accumulated efforts to excel or
17 advance and their career aspirations essentially disappear upon discharge. The
18 potential harm to these women and men economically is undeniable; added to this
19 is the psychological distress of being told that their performance in service to the
20 nation is meaningless when measured against their gender identity. They had
21 volunteered to serve their country, to accept the associated risks, and to perform
22 well and honorably. The military considered them qualified to serve when they
23 joined. Surely, many would want to understand why their gender identity now
24 makes them unqualified to serve their country, and to such a degree that they
25 should be removed from the military.

26 10. The President’s memorandum also harms transgender service
27 members in another way. According to the memorandum, “the previous
28 Administration failed to identify a sufficient basis to conclude” that terminating the

1 ban on transgender persons “would not hinder military effectiveness and lethality,
2 disrupt unit cohesion, or tax military resources.” Consequently, “meaningful
3 concerns” remain regarding the “negative effects” of removing a ban on
4 transgender persons. In essence, the President’s directive reestablishes the reasons
5 for prohibiting military service by transgender persons prior to the policy change
6 of June 30, 2016, negating the conclusions of the comprehensive working group
7 that supported removing the ban as well as any training, guidance, regulations and
8 forms, protocols, and supporting networks developed by the military to facilitate
9 transition.

10 11. In reversing the previous policy, the President’s directive instructs
11 commanders and other service members that transgender individuals are
12 detrimental to the military. No further explanation is provided, merely a statement
13 that the present basis for concluding otherwise is insufficient. Although
14 commanders would attempt to ensure that transgender personnel continue to be
15 treated with dignity and respect, as emphasized in training, the President’s
16 directive to discharge transgender personnel erodes the value that members serving
17 with them place on their contributions or performance. Reestablishing reasons for
18 discharging transgender personnel legitimizes any bias or prejudice that may have
19 existed among non- transgender members prior to training. As a result, the
20 directive harms transgender personnel and restricts them artificially from being
21 able to serve as equals with their peers.

22 12. In previous cases of involuntary discharge, service members slated for
23 separation are viewed commonly as a nuisance and may be harassed by co-workers
24 or treated differently by commanders prior to the member’s departure.
25 Additionally, as a service member approaches involuntary discharge, documented
26 cases indicate that superiors may be less than complimentary in evaluating the
27 member’s performance, perhaps motivated to confirm the basis for separation. For
28 transgender personnel facing involuntary discharge under the new policy, this

1 could mean an unfairly low or negative performance rating rather than one based
2 solely on merit. Consequently, the announced ban has the current effect of
3 inducing conscious and unconscious bias among peers and commanders that
4 ultimately harms transgender personnel by limiting their service opportunities and
5 chances for advancement and promotion.

6 13. The President’s memorandum identifies the potential disruption of
7 unit cohesion as a key factor in reversing the policy of June 2016 and discharging
8 transgender service members. Clearly, unit cohesion is a critical element in the
9 military. Historically, this purported concern has been used to justify U.S. military
10 policies of racial and gender segregation. More recently, unit cohesion served as a
11 reason for the policy known as “Don’t Ask, Don’t Tell” (DADT). DADT itself
12 stimulated considerable research by scholars to better understand unit cohesion and
13 how it can be improved in the military. Previous studies have identified “task
14 cohesion” (compared with “social cohesion”) as most important in accomplishing a
15 military mission. Strong bonds among service members are important in
16 undertaking a mission and are particularly apparent in smaller military units,
17 among persons on deployments, and among those who serve under dangerous
18 conditions.

19 14. As noted, the President’s directive places transgender personnel in a
20 “holding pattern,” subject to involuntary discharge on March 23, 2018. Knowing
21 this, military commanders and co-workers are obviously less likely to bond with
22 transgender service members and more inclined to keep them at a distance.
23 Transgender personnel are thus more prone to be viewed as unimportant to a unit’s
24 cohesiveness and treated as such when working with their peers. Mutual trust and
25 respect erode as co-workers see transgender personnel as “them,” on the way out.
26 Clearly, working relationships, as well social relationships, will suffer.
27 Transgender personnel may feel isolated and alone. Added to this is the
28 understanding among co-workers and commanders alike that transgender

1 personnel are identified by the new policy as a potential detriment to military
2 effectiveness and unit cohesion. Based upon current understanding of unit
3 cohesion, the President’s directive will damage the bond between transgender
4 personnel and their co-workers and thus disrupt the very unit cohesion that it seeks
5 to protect. It also puts transgender troops in harm’s way while serving, especially
6 when deployed in active combat.

7 15. Being branded as disruptive or unworthy of service also carries
8 consequences that are unique to the military context and differ from the dignitary
9 harms suffered by those who face discrimination in civilian life. Military service is
10 widely understood as an integral element of citizenship, and many regard it as a
11 civic duty. Historically, the military has served as a path for members of minority
12 groups, immigrants, and social outcasts to gain recognition as true and loyal
13 citizens. When the military adopts a policy that degrades or demeans a group of
14 service members, the message goes out to the larger society that such treatment is
15 acceptable. This is especially observable during times when the military is held in
16 high esteem by the general public. Indeed, according to annual Gallup polling, the
17 U.S. military is “the most trusted institution” in the country. This has been true
18 from 1989 to 1996 and from 1998 to 2017, with 72 percent of adult Americans
19 presently expressing “a great deal” or “quite a lot” of confidence in the military.
20 Barring individuals who are physically, medically, intellectually, educationally,
21 emotionally, and morally qualified to serve based on a personal characteristic that
22 is irrelevant to their ability sends a powerful message that the government distrusts
23 or disapproves of the excluded group or sees them as unfit. African-Americans,
24 Japanese-Americans, women, and gay and lesbian people once faced such official
25 disapproval. Barring demographic groups from equal service gives them the overt
26 stigma of civic inferiority.

27 16. Being labeled unworthy to serve also impairs service members’ ability
28 to carry out their duties safely and effectively. Since people serving in the military

1 depend upon each other so much, particularly under life-threatening circumstances,
2 being isolated or mistrusted can have enormous consequences. If personnel see
3 certain members in the unit as not being as of equal value, they may not work as
4 effectively with them or protect them as well as they would other unit members.
5 And, unlike in civilian life, it is often difficult to escape the military workplace,
6 which may be on a ship at sea, deployed overseas, or living on a base in close
7 quarters with one's peers.

8 17. One final harm should be mentioned. The President's memorandum
9 brands transgender personnel in a way that will follow them well into the future.
10 Stained by the claim they are disruptive or damaging to a working unit's
11 effectiveness—followed by their consequent separation from the military—
12 transgender personnel may be irreparably harmed in finding post-service
13 employment. Military recruiting advertisements often say that "it's a great place to
14 start" and that military training and experience are invaluable to those seeking
15 employment in the civilian job market. A natural result of the ban for transgender
16 personnel is to diminish their opportunities for civilian employment following
17 military service.

18 I declare under the penalty of perjury that the foregoing is true and correct.
19

20 Dated: November 2, 2017



Mark J. Eitelberg

Exhibit A

Mark Jan Eitelberg, Ph.D.

Biographical Summary

Dr. Mark J. Eitelberg is an internationally recognized authority on military human resources policy and America's All-Volunteer Force. In April 2017, he retired from federal service as Professor of Public Policy in the Graduate School of Business and Public Policy, Naval Postgraduate School (NPS), Monterey, California. Upon his retirement, he was designated Emeritus Professor of the Naval Postgraduate School. In nearly 35 years at NPS, he taught courses in policy analysis, military sociology/psychology, and research methods. He advised over 250 Master's theses along with several doctoral dissertations. He held a number of administrative positions, founded and directed a research center, and served on the school's Institutional Review Board for thirteen years. Prior to joining the faculty at NPS in 1982, Dr. Eitelberg was a Senior Scientist with the Human Resources Research Organization (HumRRO), where he directed numerous studies, co-designed a GI Bill educational benefits program, and conducted groundbreaking research for the Department of Defense. Between 1976 and 2017, he directed more than 34 research projects for the Office of the Secretary of Defense and U.S. Defense agencies.

Dr. Eitelberg is the author or co-author of approximately 120 publications and professional papers. Over the past several years, his research and writing have focused on issues related to population participation in the American military, a subject treated in several works: *Military Representation* (1979), *Blacks and the Military* (1982), *Screening for Service* (1984), *Manpower for Military Occupations* (1988), *Becoming Brass* (1991), and *Marching Toward the 21st Century* (edited, 1994). More recently, he coauthored *Profiles of American Youth* (2013), a book on the results of a nationwide administration of the military's enlistment test.

Dr. Eitelberg has been a consultant with a number of government agencies, commissions, and private organizations. These include the Brookings Institution, the RAND Corporation, the Atlantic Council of the United States, The Technical Cooperation Program (TTCP, an international consortium of defense scientists), the Defense Equal Opportunity Management Institute, the National Defense University, the Center for Strategic and International Studies, UC-Berkeley's National Commission on Testing and Public Policy, Grey Advertising, Campbell-Ewald, and several publishers, among many others. He has served on two committees of the National Research Council (National Academy of Sciences). He is the former Editor-in-Chief of *Armed Forces & Society*, a leading scholarly publication and the official journal of the Inter-University Seminar on Armed Forces and Society. He is a recipient of the U.S. Navy Superior Civilian Service Award and the Robert M. Yerkes Award of the American Psychological Association (Division 19), for outstanding contributions to military psychology by a non-psychologist. In 2001-2002, he was a Visiting Scholar with the Office of Population Research, Woodrow Wilson School of Public and International Affairs, Princeton University.

Dr. Eitelberg is a graduate of Franklin and Marshall College, where he majored in Government and in Religious Studies. He holds an M.P.A. and a Ph.D. in Public Administration from New York University. He is a former professional artist and metal sculptor. He served with the New Jersey Army National Guard and the U.S. Army Reserve; his final assignment was senior training coordinator with a basic training battalion of the US Women's Army Corps (WAC), where he gained the distinction of being one of few "male WACs" in U.S. history.

Mark Jan Eitelberg

Selected Career Highlights

- ❖ Early in his career at HumRRO, the Office of the Secretary of Defense (OSD) identified him as one of the nation's leading authorities on "GI Bill" educational benefits, including their importance to the continued success of the All-Volunteer Force (AVF). In May 1976, after President Ford proposed eliminating all GI Bill benefits for new service members, Eitelberg and two associates developed a compromise program to replace the GI Bill (on a napkin in the John Bull Restaurant in Alexandria, Virginia). The U.S. Senate Committee on Veterans' Affairs and OSD were chief advocates of the plan, which became the Post-Vietnam Era Veterans Educational Assistance Program (also known as VEAP). VEAP replaced the GI Bill for new recruits in January 1977; since then, nearly 800,000 veterans have participated in the program. Eitelberg subsequently assisted OSD in further defining its educational benefits policy; he also developed and co-authored four OSD reports to Congress on VEAP, an experimental program with several innovative features.
- ❖ In 1976-1977, the US Army Research Institute for the Behavioral and Social Sciences (ARI) asked Dr. Eitelberg to study population representation in the military, a subject of heated debate prior to the end of the draft. Within a year, he became a national authority on the topic. Bernard Rostker, in his epic history of the AVF (*I Want You!*, RAND, 2006), writes: "Possibly the most rigorous assessment of representativeness came in a 1977 report by Mark Eitelberg of the Human Resources Research Organization for the Army Research Institute." This assessment laid the foundation for Eitelberg's doctoral dissertation at New York University (1979). The Brookings Institution subsequently hired Eitelberg for its Associated Staff, and his dissertation research contributed importantly to a Brookings Study in Defense Policy, *Blacks and the Military* (Binkin & Eitelberg, 1982).
- ❖ *Blacks and the Military*, by Martin Binkin and Mark J. Eitelberg, became an instant "best-seller" for Brookings, since it was the first study of its type and it addressed a topic that was of increasing interest to many. The day after publication, the book's major findings appeared in well over 350 newspapers and other periodicals throughout the world—as well as in all US television network news shows. A *Washington Post* Sunday Book Review featured the book. Coverage later appeared in newspaper editorials, syndicated columns, and in various news and opinion magazines. Binkin was interviewed on NBC's *Today Show* and on several other national television news outlets, such as CNN. Eitelberg, the shy one, declined numerous invitations to appear on popular network television and radio talk shows, including *The Larry King Show*. Many now refer to the groundbreaking book as a "classic" of its genre.
- ❖ Eitelberg's work on population representation in the military led to many other opportunities. By the early 1980s, OSD considered Eitelberg their "go-to authority." He presented papers and wrote extensively on the subject. He ghost-wrote reports to Congress, including several of OSD's annual reports to Congress on population representation in the AVF. In the mid-1980s, OSD asked him to redesign the annual representation report. He developed new statistical indicators and recommended that women be included as a primary focus in the report; apparently, no one had noticed that women were missing entirely from the document up to that point. Soon after Operations Desert Storm/Desert Shield concluded, OSD commissioned Eitelberg to write the official history of population participation in the first Gulf War. Many of Eitelberg's innovations and approaches to studying representation are still used by DoD and continue to appear in their annual report decades later. His expertise on population participation in the military also led to extensive research and writing over the years on equal opportunity, population diversity, gender and minority integration, and other related topics. He consulted

Mark Jan Eitelberg

often with the Defense Equal Opportunity Management Institute and with a number of organizations in OSD. He worked closely with the Defense Advisory Committee on Women in the Services and with various government commissions on integration and equal opportunity. He advised over 100 Master's theses, a few doctoral dissertations, as well as dozens of student projects on population diversity themes. He was also the only person invited to present a paper (later two book chapters) at both DoD conferences celebrating anniversaries of America's All-Volunteer Force (convened at the US Naval Academy in 1983 and in 1993).

- ❖ In the 1980s, Eitelberg also established himself as a national authority on the selection and screening of applicants for military enlistment and commissioning in the officer corps. He was a primary author of DoD's study of national testing data. Publication of the final report, titled *Profile of American Youth: 1980 Nationwide Administration of the Armed Services Vocational Aptitude Battery* (1982), was covered widely by the national media, including *The Washington Post*, where it became the lead story on the front page of a Sunday edition. Eitelberg used Profile of American Youth data for a co-authored book, *Screening for Service* (1984), and a single-authored book, *Manpower for Military Occupations* (1988), which became a "minor classic" among scholars in the field. In 1989, with funding from the National Commission on Testing and Public Policy (UC-Berkeley), Eitelberg led a team of researchers in studying the testing and selection of U.S. military officers. He produced the first (and only) study using the SAT scores of military officers. When the results were published initially in *Becoming Brass*, the *Navy Times* reported the findings in a cover story, "Brains on Board," along with several related articles. Years later, Eitelberg was invited to coauthor a DoD study of the second Profile of American Youth, administered to establish new scoring norms for the military's enlistment test. This resulted in a 300-page, book-length manuscript, *Profiles of American Youth: Generational Changes in Cognitive Ability* (2013), after years of effort.
- ❖ Many scientists and policy analysts over the years have used Dr. Eitelberg's "Population Representation Model," which he developed in the late 1970s. This includes scholars and practitioners from around the world (including the governments of Australia, Canada, New Zealand, and the United Kingdom), the Congressional Budget Office, the Government Accountability Office, the U.S. military services and DoD, among many others. Most recently, his model has served as a central organizing theme in several Master's theses at NPS: two students (individually) from Turkey and students from Greece, the Republic of Korea, and Germany. The model holds a universal appeal for scholars internationally, and Eitelberg often presented seminars on the model for visiting international dignitaries and defense leaders through the NPS Center for Civil-Military Relations (CCMR).
- ❖ In 1992, as part of the "Army Futures" project, Dr. Eitelberg and his colleague, Dr. Stephen Mehay, organized a two-day, major conference in Arlington, Virginia. The conference, chaired by Dr. Eitelberg, featured over 20 speakers, including senior officials from the U.S. Army and Department of Defense, distinguished scholars, and subject area experts from several government agencies. The conference resulted in a book, *Marching Toward the 21st Century*, edited by Eitelberg and Mehay for Greenwood Press (1994).
- ❖ Eitelberg has assisted many organizations and groups, as noted elsewhere. Among the most significant are ten years of service (several appointments from 1990 to 2001) as a DoD representative on The Technical Cooperation Program (TTCP), an international consortium of defense scientists. Additionally, he served on two committees of the prestigious National Academy of Sciences, both of which resulted in the publication of a committee-authored book.

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Dr. Eitelberg also served for nearly 13 years on the NPS Institutional Review Board (IRB). No one has served longer on the NPS IRB.

- ❖ In 1998, Eitelberg was Faculty Team Leader and U.S. Chair for a two-day conference in Moscow. Over 100 senior leaders from Russia's military, civilian defense establishment, and legislature attended the conference. The conference was sponsored jointly by the Council on Foreign and Defense Policy (Russia), the *Independent Military Review* (Russia), and CCMR (NPS). Russian newspapers covered the entire conference and published excerpts from recorded transcripts. The U.S. team was there to assist Russia in determining the feasibility of ending its military draft, and the conference became a significant event in U.S.-Russian relations and military cooperation relatively soon after the end of the long Cold War.
- ❖ In 1999, Eitelberg founded the NPS Center for Recruiting Innovation with significant funding from OSD and the Department of Navy (DoN). The Center's research and development activities supported the Navy's modernization of recruiting with an online presence and improved use of technology. "America's Army," the widely popular U.S. Army interactive game, is based on a concept developed originally for OSD and DoN by Dr. Eitelberg and his associates. Additionally, Dr. Eitelberg co-created the Navy's "Life Accelerator" (an interest inventory similar to DoD's "Interest Finder"), launched on Navy.com in March 2001. He updated the award-winning feature on his own in 2005. The very same interest inventory that Dr. Eitelberg produced in 2005 is still used today as the Navy "Life Ops Test" on Navy.com. It is estimated that well over 8 million young men and women, potential Navy recruiting prospects, have taken the "Life Accelerator" or "Life Ops Test" since it was first introduced in 2001.
- ❖ From 1998 through 2001, Dr. Eitelberg served as Editor-in-Chief of *Armed Forces & Society*, a highly respected, interdisciplinary scholarly journal with subscribers in over 55 countries. The primary editorial office was located at NPS during this time. Eitelberg supervised an editorial assistant, funded by NPS, three book review editors from the NPS faculty, 25 associate editors, and a copy editor who resided in Baltimore, Maryland. Each issue of the quarterly journal typically included six double-blind, peer-reviewed articles and ten book reviews. Eitelberg was invited to continue as editor for another term, but NPS declined to provide the required editorial support.
- ❖ From 1993 through 2014, Eitelberg directed an NPS study of the controversial DoD policy known as "Don't Ask, Don't Tell." A survey of NPS students was developed and first administered in 1994. Thereafter, for the next 20 years, the same survey was re-administered periodically and reported in seven NPS Master's theses. These surveys were sanctioned, yet unique, due to a longstanding DoD prohibition on surveys of active-duty personnel regarding the policy. The last administration of the survey occurred in 2013 to study changing attitudes after removal of the policy. The results are reported in two separate theses by teams of two students on each study. During the 20-year period, Eitelberg advised a number of other Master's theses related to the policy. He served on a University of California Blue Ribbon Commission to estimate the costs of the policy. He also wrote published reviews of two books on the policy, presented conference papers, assisted researchers at several universities, sponsored a speaker's program at NPS, and assisted the DoD Comprehensive Review Working Group, which developed a phased plan to remove the policy.
- ❖ In Dr. Eitelberg's 34+ years at NPS, he advised about 250 Master's theses and taught roughly 3,000 students in resident courses, amassing over 12,000 student-contact hours. He

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created two popular resident courses, MN4114 Foundations of Military Sociology/Psychology and GB4044 Defense-Focused Managerial Inquiry. He created a LEAD Curriculum Course (distance learning at the U.S. Naval Academy), MN4113 Leadership Dimensions of Military Psychology/Sociology. He completely redesigned two other courses at NPS, GB3041 Analytical Tools for Managerial Decisions and MN4106 Military Manpower Policy Analysis, the capstone course in the Manpower Systems Analysis Curriculum. He served as Principal Investigator on many NPS research projects with considerable funding from external sponsors. From 1983-1990, he also served as Contracting Officer's Technical Representative (COTR) for NPS on research contracts worth several million dollars.

- ❖ Trivia: He was hired by NPS in 1982 as an Adjunct Research Associate Professor of Public Administration and the very first member of the newly formed Manpower Research Center. In 1986, the research center disbanded and transformed into the Department of Defense Personnel Security Research and Education Center (PERSEREC), still located in Monterey as part of the Office of Personnel Analytics under the Office of the Under Secretary of Defense (Personnel and Readiness). Eitelberg maintained joint offices in PERSEREC and in NPS for some years thereafter.
- ❖ Trivia: In August 2000, Dr. Eitelberg received the American Psychological Association's (Division 19/Society for Military Psychology) Robert M. Yerkes Military Psychology Award for outstanding contributions to military psychology by a non-psychologist. Yerkes is the "founding father" of military psychology. Other recipients of the annual award include General Maxwell Thurman, Senator Daniel Inouye, Senator Elizabeth Dole, and Senator Kay Bailey Hutchison.
- ❖ Trivia: He developed and supervised the first M-16 rifle training and qualification program for women reservists while serving with the 1st U.S. Women's Army Corps (WAC) Basic Training Battalion, 80th Division (Training), U.S. Army Reserve, Alexandria, Virginia.
- ❖ Trivia: He is a graduate of Columbia High School in Maplewood, New Jersey, where he was School President in his senior year. A large, regional public school (over 2,000 students) with a rich history, Columbia is well-known for its *many* notable alumni: [https://en.wikipedia.org/wiki/Columbia_High_School_\(New_Jersey\)](https://en.wikipedia.org/wiki/Columbia_High_School_(New_Jersey))
- ❖ Trivia: As a junior in high school, he painted a large mural that was placed on permanent display in the New Jersey State Fire Museum.

Education

Ph.D.	1979	New York University (Public Administration: Public Policy and National Security)
M.P.A.	1973	New York University, Wagner School of Public Service (Public Administration Theory and Practice)
A.B.	1970	Franklin and Marshall College (Government and Religious Studies)

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Professional Experience

*Graduate School of Business and Public Policy
U.S. Naval Postgraduate School
Monterey, California*

2017-Present	Emeritus Professor of the Naval Postgraduate School
1999-2017	Professor of Public Policy
1989-1999	Associate Professor of Public Administration and Associate Chair for Research (Tenured, 1995)
1982-1989	Adjunct Research Associate Professor of Public Administration

Major Activities:

- Associate Dean for Faculty Affairs. (2007-2008)
- Founding Director, Center for Recruiting Innovation. (1999-2004)
- Associate Chair (Research), Department of Systems Management, and Charter Member, Naval Postgraduate School Research Board. (1995-1999)
- Academic Associate (Program Director) for the Manpower, Personnel, and Training Analysis Curriculum. (1990-1993)
- Director of research projects for the Office of the Secretary of Defense, the Department of the Army, the Department of the Navy, and other government agencies. (1982-Present)
- Teaching professor (Introduction to Manpower, Personnel, and Training Analysis; Manpower/Personnel Policy Analysis; Manpower/Personnel Seminar; Selected Topics in Management Science; Foundations in Military Sociology and Military Psychology; Research Methods; Defense-Focused Managerial Inquiry). Recognized as among “Top Five Percent” in Award for Teaching Excellence, 1997. (1983-Present)
- Faculty Team Leader, Russia Seminar (Moscow), Center for Civil-Military Relations. (1997-1998)
- Faculty, Center for Civil-Military Relations. Lecturer in several seminar programs. (1997-2005)
- Faculty, Leadership Development and Education Program, United States Naval Academy and Naval Postgraduate School. (1997-1999)
- Thesis advisor in the Manpower Systems Analysis Curriculum. (Over 250 Master’s theses, 1983-Present)

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- Contracting Officer's Technical Representative (COTR) on research contracts totaling several million dollars. (1983-1990)
- Author; consultant in military manpower policy and national security; frequent contributor to national news media; manuscript reviewer for commercial publishers; and reviewer for academic journals in national security and military psychology.

Human Resources Research Organization

Alexandria, Virginia

1979-1982	Senior Scientist
1976-1979	Research Scientist
1975-1976	Research Associate
1975	Research Assistant

Major Activities:

- Research project director and principal investigator; author of numerous technical reports, papers, and government documents. Recipient of Professional Performance Merit Award, "HumRRO Researcher of the Year" (1982).
- Consultant to Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics). Recipient of Office of the Secretary of Defense Certificate of Appreciation for "valuable contributions to military manpower research" (1982).
- Deputy Director of Management Sciences Group. (1976-1979)

Other Positions (Selected)

- Visiting Research Collaborator, Office of Population Research, Woodrow Wilson School of Public and International Affairs, Princeton University. (Sabbatical, 2001-2002)
- U.S. Department of Defense representative on The Technical Cooperation Program (TTCP), an international, cooperative program in the defense sciences and technologies. Member of HUM-TP3 (formerly UTP-3), panel on "Military Human Resource Issues." (1990-2001)
- Editor-in-Chief, *Armed Forces & Society*, the official journal of the Inter-University Seminar on Armed Forces and Society (IUS). Founded in 1974 (the original Board of Editors included Morris Janowitz, Raymond Aron, Samuel E. Finer, and Jacques Van Doorn), *AF&S* now reaches scholars from many disciplines in over 50 countries. The editor supervises an editorial assistant, a managing editor, and three book review editors, and is assisted by 25 associate editors as well as numerous manuscript reviewers from around the world. (1998-2001)
- Member and Contributing Author, Committee on the Youth Population and Military Recruitment: Physical, Medical, and Mental Health Standards, National Research Council of the National Academies. (2004-2005)

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- Member and Contributing Author, Committee on Techniques for the Enhancement of Human Performance, National Research Council, National Academy of Sciences. (1997-2000)
- Consultant, RAND Corporation. (1998-2000)
- Consultant, Campbell-Ewald, Warren, Michigan. (2000-2010)
- Consultant and Author, National Commission on Testing and Public Policy, University of California, Berkeley. (1988-1989)
- Consultant and Author, Global Demographic Trends Group, President's Commission on Integrated Long-Term Strategy, National Defense University, Washington, DC. (1987-1988)
- Consultant, Human Resources Research Organization (HumRRO). (1983-1986; 2005-2010)
- Associated Staff, Foreign Policy Studies Program, Brookings Institution, Washington, DC. (1980-1982)
- Member and Contributing Author, Military Service Working Group, The Atlantic Council of the United States, Washington, DC. (1980-1981)
- Personnel Analyst, State of New Jersey. (1975)

Board and Other Commission Memberships

- Board of Editors, *Armed Forces & Society*. (2001-Present)
- Board of Editors, *Military Psychology*. (2001-2005)
- Board of Directors, Toro Little League and Board of Directors, Toro Pony League (Toro Park, Corral de Tierra, and Salinas, California). (1997-2001)
- University of California Blue Ribbon Commission on Estimating the Costs of Excluding Homosexuals from the US Military. (2005-2006)
- Institutional Review Board, Naval Postgraduate School. (2004-2017)

Current Professional Affiliations and Selected Awards

Department of the Navy Superior Civilian Service Award, April 2017.

Elected Member (formerly, four terms) of Governing Council and Fellow, Inter-University Seminar on Armed Forces and Society, Chicago, Illinois. Founder and Chair of the Pacific Coast Chapter.

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American Psychological Association, Division 19 (Society for Military Psychology), Washington, DC. Recipient of “Robert M. Yerkes Award” for outstanding contributions to military psychology by a non-psychologist, August 2000.

International Military Testing Association, Washington, DC.

Military Service

Honorable Discharge, United States Army (Reserve), 1976.

Staff Sergeant, Command Group, 1st U.S. Women’s Army Corps Basic Training Battalion, 80th Division (Training), U.S. Army Reserve, Alexandria, Virginia. (1975-1976)

From Private to Staff Sergeant, Headquarters and Headquarters Troop, 5th Squadron, 117th Cavalry, 50th Armored Division, New Jersey Army National Guard, Westfield, New Jersey. (1970-1975)

Selected Publications and Presentations

Books

Sackett, Paul R., Eitelberg, Mark J., and Sellman, W.S. *Profiles of American Youth: Generational Changes in Cognitive Ability* (Under Review for Publication).

Committee on the Youth Population and Military Recruitment, National Research Council, *Assessing Fitness for Military Enlistment: Physical, Medical, and Mental Health Standards*. Washington, DC: The National Academies Press, 2006.

Committee on Techniques for the Enhancement of Human Performance, National Research Council, *The Changing Nature of Work: Implications for Occupational Analysis*. Washington, DC: National Academy Press, 1999.

Eitelberg, Mark J. and Mehay, Stephen L., eds. *Marching Toward the 21st Century: Military Manpower and Recruiting*. Westport, CT: Greenwood Press, 1994.

Eitelberg, Mark J., Laurence, Janice H., and Brown, Dianne C. *Becoming Brass*. (See same title under “Chapters in Books.” Subject of cover story, “Brains on Board,” *Navy Times*, 14 August 1989, pp. 14-16.)

Eitelberg, Mark J. *Manpower for Military Occupations*. Washington, DC: Office of the Assistant Secretary of Defense (Force Management and Personnel), April 1988. (Monograph Series)

Eitelberg, Mark J., Laurence, Janice H., and Waters, Brian K. (with Perelman, Linda S.). *Screening for Service*. Washington, DC: Office of the Assistant Secretary of Defense (Manpower, Installations, and Logistics), September 1984. (Monograph Series)

Binkin, Martin and Eitelberg, Mark J. *Blacks and the Military*. Washington, DC: The Brookings Institution, 1982.

Mark Jan Eitelberg

Doctoral Dissertation

Eitelberg, Mark J. *Military Representation: The Theoretical and Practical Implications of Population Representation in the American Armed Forces*. Doctoral Dissertation. New York University, October 1979. (Principal Advisor: Frank N. Trager.) Summarized in *Dissertation Abstracts International*, Volume 40, No. 11, May 1980, p. 6000-A. (Order No. 8010342.)

Chapters in Books

Eitelberg, Mark J. "Women and Minorities in the Military: Charting a Course for Research," in *Managing Diversity in the Military*. Edited by Mickey R. Dansby, James B. Stewart, and Schuyler C. Webb. New Brunswick, NJ: Transaction Publishers, 2001.

Eitelberg, Mark J. "The All-Volunteer Force after Twenty Years," in *Professionals on the Front Line: Two Decades of the All-Volunteer Force*. Edited by J. Eric Fredland, Curtis L. Gilroy, Roger D. Little, and W.S. Sellman. Washington, DC.: Brassey's, 1996.

Eitelberg, Mark J. and Little, Roger D. "Influential Elites and the American Military after the Cold War," in *US Civil-Military Relations: In Crisis or Transition?* Edited by Don M. Snider and Miranda A. Carlton-Carew. Washington, DC: The Center for Strategic and International Studies, 1995).

Eitelberg, Mark J. and Mehay, Stephen L. "The Shape of Things to Come," in *Marching Toward the 21st Century: Military Manpower and Recruiting*. Edited by Mark J. Eitelberg and Stephen L. Mehay. Westport, Connecticut: Greenwood Press, 1994.

Eitelberg, Mark J. and Mehay, Stephen L. "Demographics and the American Military at the End of the Twentieth Century," in *U.S. Domestic and National Security Agendas: Into the 21st Century*. Edited by Sam C. Sarkesian and John Flanagan. Westport, Connecticut: Greenwood Press, 1994.

Eitelberg, Mark J. "Military Manpower and the Future Force," in *American Defense Annual, 1993*. Edited by Joseph Kruzel. New York: Lexington Books, 1993.

Eitelberg, Mark J., Laurence, Janice H. and Brown, Dianne C. "Becoming Brass: Issues in the Testing, Recruiting, and Selection of American Military Officers" in *Testing Policy in Defense: Lessons from the Military for Education, Training and Employment*. Edited by Bernard Gifford and Linda Wing. Boston, MA: Kluwer Academic Publishers, 1991, pp. 1-141.

Binkin, Martin and Eitelberg, Mark J. "Women and Minorities in the All-Volunteer Force," in *The All-Volunteer Force After a Decade*. Edited by William Bowman, Roger Little, and G. Thomas Sicilia. Elmsford, New York: Pergamon-Brassey's, 1986.

Eitelberg, Mark J. and Binkin, Martin. "Military Service in American Society," in *Toward a Consensus on Military Service*. Edited by Andrew J. Goodpaster, Lloyd H. Elliott, and J. Allen Hovey, Jr. Elmsford, New York: Pergamon Press, 1982.

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Journal Articles and Reviews

Eitelberg, Mark J. "Review of *I Want You! The Evolution of the All-Volunteer Force*," *Armed Forces & Society* (Summer 2010): 571-579.

Eitelberg, Mark J. "Review of *Don't Ask, Don't Tell: Debating the Gay Ban in the Military*," *Armed Forces & Society* (Spring 2004): 488-491.

Eitelberg, Mark J. "Review of *Gays and Lesbians in the Military: Issues, Concerns, Contrasts*," *Armed Forces & Society* (Winter 1996): 314-316.

Foster, Gregory D. et al., "Global Trends to the Year 2010: Implications for U.S. Security," *The Washington Quarterly* (Spring 1989): 5-24.

Eitelberg, Mark J. "American Youth and Military Representation: In Search of the Perfect Portrait," *Youth and Society* 10 (September 1978): 5-31.

Notes and Other Short Pieces

Eitelberg, Mark J. "Barbie Selected for QM1 as Role Models Change," *Navy Times*, 10 June 1991, p. 23.

Eitelberg, Mark J. "AVF's Success In War Will Generate Praise and Appraisal," *Navy Times*, 11 March 1991, p. 25.

Eitelberg, Mark J. "Gulf Victory Proves All-Volunteer Force Works," *Air Force Times*, 8 April 1991, p. 23.

Eitelberg, Mark J. "U.S. Military is a Mean Machine, But is it Fit to Fight?" *Air Force Times*, 1 August 1988, pp. 21, 34.

Eitelberg, Mark J. "Fatal Weakness May be Lurking in Our National Armor," *Navy Times*, 25 July 1988, p. 27.

Eitelberg, Mark J. "Test-Scoring Errors May Have Saved All-Volunteer Force," *Navy Times*, 12 September 1988, p. 25.

Eitelberg, Mark J. "'Misnormed' Test Helped Volunteer System Succeed," *Army Times*, 12 September 1988, pp. 25, 50.

Eitelberg, Mark J. "Test 'Misnorming' Helped All-Volunteer Force Succeed," *Air Force Times*, 12 September 1988, pp. 25, 36.

Eitelberg, Mark J. "For Military Manpower, Tough Times Ahead," *Wings of Gold*, Summer 1988, pp. 27-29.

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Conference Papers, Proceedings, and Presentations

- Eitelberg, Mark J. "Confessions of a Cranky Journal Editor," Panel on Tips for Academic Writers, Biennial Conference of the Inter-University Seminar on Armed Forces & Society, Chicago, IL, October 2003.
- Eitelberg, Mark J. "Spacemen, Scholars, and Sailors: Another Look at the Military's Treatment of Gays." Paper presented at Annual Conference of the American Psychological Association, Toronto, Canada, August 2003.
- Eitelberg, Mark J. "America's All-Volunteer Force: Who Serves and Why Should We Care?" Invited paper presented at "Notestein Seminar," Office of Population Research, Woodrow Wilson School of Public and International Affairs, Princeton University, December 2001.
- Eitelberg, Mark J. "Bridging the Gap Between Defense and Public Administration." Remarks presented at the Annual Meeting of the American Society for Public Administration, Newark, NJ, March 2001.
- Eitelberg, Mark J. "Military Recruiting for the 21st Century: Where Do We Go From Here?" Paper presented at *Symposium on Strategic Approaches to Military Recruiting: An International Perspective*, 41st Annual Conference of the International Military Testing Association, Monterey, CA, November 1999.
- Eitelberg, Mark J. "The Demography of Diversity." Paper presented at "Managing Diversity Workshop" for newly-selected Admirals (US Navy) and Generals (US Marine Corps), Washington, DC, January 1999.
- Eitelberg, Mark J. "The All-Volunteer Force and Society." Paper presented at *Seminar on Transition to an All-Volunteer Force*, sponsored jointly by the Council on Foreign and Defense Policy (Russia), the *Independent Military Review* (Russia), and the Center for Civil-Military Relations (Naval Postgraduate School), Moscow, Russia, January 1998.
- Eitelberg, Mark J. "Women and Minorities in the Military: Research Trends and Future Directions." Invited paper presented at the Equal Opportunity Research Symposium, Defense Equal Opportunity Management Institute (DEOMI), Cocoa Beach, FL, December 1997. In *DEOMI, 1997 EO/EEO Research Symposium Proceedings*, Patrick AFB: DEOMI, April 1998.
- Eitelberg, Mark J. "Selected Issues in Defense Human Resources." Series of presentations for HUM-TP3, Panel on Military Human Resource Issues, The Technical Cooperation Program (TTCP), Portsmouth, United Kingdom, July 1997.
- Eitelberg, Mark J. "Selected Issues in Defense Human Resources." Series of presentations for UTP-3, Panel on Military Human Resource Issues, The Technical Cooperation Program (TTCP), Victoria, British Columbia, Canada, July 1996.
- Eitelberg, Mark J. "Women in the Military: Trends and Data Resources." Presented at Defense Advisory Committee on Women in the Services, Subcommittee on Forces

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Development and Utilization, Joint-Service Working Group, Monterey, CA, August 1996.

Eitelberg and Mehay, Stephen L. "NPS Study of Minority Officers: Promotion Outcomes During the Pre-Drawdown and Drawdown Periods." Paper presented at the Biennial Conference of the Inter-University Seminar on Armed Forces and Society, Baltimore, MD, October 1995. (Part of panel, "Minority Officers in the Military: Current Issues and Trends," organized and chaired by the authors.)

Eitelberg, Mark J. and Little, Roger D. "Influential Elites and the American Military After the Cold War." Paper presented at the Biennial Conference of the Inter-University Seminar on Armed Forces and Society, Baltimore, MD, October 1995. (Part of panel, "The Military, the Media, and Congress: Tensions and Resolve in the Post-Cold War Era," organized and chaired by the authors.)

Eitelberg, Mark J. "Population Participation in the American Military." Series of presentations for UTP-3, Panel on Military Human Resources Issues, The Technical Cooperation Program (TTCP), Portland, OR, July 1995.

Eitelberg, Mark J. and Little, Roger D. "Influential Elites and the American Military." Paper presented at conference on "Civil-Military Relations," hosted by the Center for Strategic and International Studies, U.S. Army War College, Carlisle, PA, September 1994.

Eitelberg, Mark J. "Population Participation in the American Military: Current Issues." Paper presented at international meeting on "Defense Human Resources," Shelly Bay Air Force Base, Wellington, New Zealand, July 1994.

Eitelberg, Mark J. "The All-Volunteer Force After Twenty Years." Paper presented at *A Military of Volunteers: Yesterday, Today, and Tomorrow*, a conference commemorating the twentieth anniversary of the All-Volunteer Force, U.S. Naval Academy, Annapolis, Maryland, September 1993.

Eitelberg, Mark J. "A Presidential Politician's Guide to the Defense Downsizing." Paper presented at the Annual Meeting of the Military Testing Association, San Diego, California, October 1992.

Eitelberg, Mark J. and Mehay, Stephen L. "The Shape of Things to Come." Paper presented at "Workshop on Sociocultural Designs for the Future Army," University of Maryland, March 1992.

Eitelberg, Mark J. and Mehay, Stephen L. "Demographics and the American Military at the End of the Twentieth Century." Paper presented at "Workshop on U.S. Domestic and National Security Agendas," Cantigny, Illinois, September 1992. (Sponsored by the U.S. Army War College, the National Strategy Forum, and the Robert R. McCormick Tribune Foundation.)

Eitelberg, Mark J. "Opening Remarks" and "Marching Toward the 21st Century: A Conference on Manpower and Recruiting Issues for the Future," Arlington, Virginia, January 1992. (Conference Chair and Co-Director.)

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- Eitelberg, Mark J. "The Effects of Military Downsizing on Opportunities for Minorities." Paper presented at the Department of Education Conference on "The Role of Education in Restructuring Defense and Other Industries," Washington, DC, May 1991.
- Eitelberg, Mark J. "Preliminary Assessment of Population Representation in Operations Desert Shield and Desert Storm." Paper presented at the Biennial Conference of the Inter-University Seminar on Armed Forces and Society, Baltimore, Maryland, October 1991.
- Eitelberg, Mark J. "Preliminary Assessment of Population Representation in Operations Desert Shield and Desert Storm." Paper presented at the 99th Annual Meeting of the American Psychological Association, San Francisco, California, August 1991. (Appears on "Current Events and Social Representation in the Military," Audiotape No. APA-91-039, Sound Images, Inc., Aurora, Colorado, 1991.)
- Eitelberg, Mark J. "Increased Use of Women and Minorities in Military Aviation," in *Proceedings of the Fourth Federal Aviation Administration Meeting on Human Factors Issues in Aircraft Maintenance and Inspection*. Washington, DC: Office of Aviation Medicine, Federal Aviation Administration, June 1991, pp. 154–178.
- Eitelberg, Mark J. "Your Mother Wears Combat Boots . . . But Should She Pack A Gun?" Paper presented at the 98th Annual Meeting of the American Psychological Association, Boston, Massachusetts, August 1990.
- Eitelberg, Mark J. "Marginal Man and the Military: Past, Present, and Prospects." Paper presented at the 98th Annual Meeting of the American Psychological Association, Boston, Massachusetts, August 1990.
- Eitelberg, Mark J. "A Review of American Military Manpower Issues." Seminar papers presented at the Australian Defence Force Academy, Canberra, Australia, October 1990.
- Eitelberg, Mark J. "War or Welfare: The Military as an Agent of Social Change." Paper presented at the Biennial Conference of the Inter-University Seminar on Armed Forces and Society, Baltimore, Maryland, October 1989.
- Eitelberg, Mark J. "Military Representation: Reflections and Random Observations." Paper presented at the Biennial Conference of the Inter-University Seminar on Armed Forces and Society, Baltimore, Maryland, October 1989.
- Eitelberg, Mark J. "Military Representation: Reflections and Random Observations." Paper presented at the 97th Annual Convention of the American Psychological Association, New Orleans, Louisiana, August 1989. (Appears on "Social Representation in the Military," Audiotape No. APA-89-190, Sound Images, Inc., Aurora, Colorado, 1989.)
- Eitelberg, Mark J. "Aptitude Test Scores of Military Personnel Assigned to C³I Jobs: Trends and Prospects." Presented at the Forty-Third International Convention and Exposition of the Armed Forces Communications and Electronics Association, Washington, DC, June 1989. Summarized in "How to Acquire and Train Skilled Personnel to Employ and Maintain Complex Developing C3I Systems," *Signal*, September 1989, pp. 101–103.
- Eitelberg, Mark J. "Job Placement in Today's Military: Who Gets What and Why (and, Boy,

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- Have Times Changed).” Paper presented at the 94th Annual Convention of the American Psychological Association, Washington, DC, August 1986.
- Eitelberg, Mark J. “And They Shall Turn Their Guns into Umbrellas: Today’s High-Tech Military and Its Changing Workforce.” Paper presented at the Forty-Seventh National Conference of the American Society for Public Administration, Anaheim, California, April 1986.
- Eitelberg, Mark J. “The Implications of Changing Military Enlistment Test Norms in 1985.” Paper presented at the 93rd Annual Convention of the American Psychological Association, Los Angeles, California, August 1985. Also in Department of Defense, *Implications of New Reference Population on Military Manpower: Symposium Proceedings*. Technical Memorandum 84-2. Washington, DC: Directorate for Accession Policy, September 1985.
- Eitelberg, Mark J. “Evaluation of Education Standards for Military Enlistment.” Research paper prepared for Joint-Service Working Group on Enlistment Standards, Directorate for Accession Policy, Office of the Secretary of Defense, November 1983.
- Eitelberg, Mark J. “Population Representation and Military Manpower Policy.” Seminar paper presented at General and Flag Officer Orientation, Institute of Higher Defense Studies, National Defense University, Washington, DC, March 1983.
- Eitelberg, Mark J. “Enlistment Eligibility and Participation in the All-Volunteer Force: Follow the Yellow Brick Road.” Paper presented at the Annual Conference of the Military Testing Association, San Antonio, Texas, November 1982.
- Eitelberg, Mark J., and Doering, Zahava D. “Profile in Perspective: Policy and Research Implications of the ‘Profile of American Youth.’” Paper presented at the Annual Meeting of the American Psychological Association, Washington, DC August 1982. Also in Department of Defense, *The Profile of American Youth: Results and Implications*, Technical Memorandum 82-2. Washington, DC: Office of the Secretary of Defense, September 1982.
- Eitelberg, Mark J., Doering, Zahava D., and Sellman, Wayne S. “Government Scientists Meet the Press: Reactions to the Release of the ‘Profile of American Youth.’” Paper presented at the 90th Annual Convention of the American Psychological Association, Washington, DC, August 1982.
- Doering, Zahava D., Eitelberg, Mark J., and Sellman, Wayne S. “Uniforms and Jeans: A Comparison of 1981 Military Recruits with 1980 National Youth Population.” Paper presented at the 90th Annual Convention of the American Psychological Association, Washington, DC, August 1982.
- Eitelberg, Mark J. and Waters, Brian K. “Relatively Bright and Ready to Fight: A Qualitative Comparison of Military Recruits and American Youth.” Paper presented at the Annual Meeting of the American Educational Research Association, New York, New York, March 1982.

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- Laurence, Janice H. and Eitelberg, Mark J. "Subpopulation Analyses of 1980 Youth Population Aptitudes." Paper presented at the Annual Meeting of the American Educational Research Association, New York, New York, March 1982.
- Eitelberg, Mark J., Laurence, Janice H., Waters, Brian K., and Sellman, Wayne S. "Subpopulation Analyses of Current Youth Aptitudes." Paper presented at the Annual Conference of the Military Testing Association, Arlington, Virginia, October 1991.
- Waters, Brian K., Sellman, Wayne S., and Eitelberg, Mark J. "Military and Civilian Test Score Trends." Paper presented at the Annual Conference of the Military Testing Association, Arlington, Virginia, October 1981.
- Eisenman, Richard L., Eitelberg, Mark J., and Hunter, Richard W. "GI Bill Program Analysis." Paper presented at the National Meeting of the Operations Research Society of America and The Institute of Management Sciences (ORSA/TIMS), Philadelphia, Pennsylvania, 1976.

Reports and Selected Research Papers

[Two NPS technical reports in progress for publication in late 2017.]

- Belkin, Aaron, Barrett, Frank J., Eitelberg, Mark J., and Ventresca, Marc J. *Discharging Transgender Troops Would Cost \$960 Million*. San Francisco, CA: Palm Center, August 2017.
- Eitelberg, Mark J., Aten, Kathryn J., and Smith, Michael K. *Comparison of Women's Policies in Six International Navies*. NPS-GSBPP-15-001. Monterey, CA: Naval Postgraduate School, December 2014.
- Sackett, Paul R., Eitelberg, Mark J., and Sellman, W.S. *Profiles of American Youth: Generational Changes in Cognitive Ability*. FR-09-22. Alexandria, VA: Human Resources Research Organization, July 2013 (Revised).
- Eitelberg, Mark J. and Flyer, Eli S. "Tobacco Use: A Powerful Predictor of First-Term Attrition." Working Paper Prepared for the National Research Council, June 2005.
- Flyer, Eli S. and Eitelberg, Mark J. "Pre-service Cigarette Smoking and Behavioral Adjustment of Navy Recruits." Research Note. Monterey, CA: Naval Postgraduate School, October 2004.
- Eitelberg, Mark J. "Evaluation of the Active-Duty Military Officer Cohort File." Report Prepared for the Office of the Undersecretary of Defense for Personnel and Readiness. Monterey, CA: Naval Postgraduate School, December 2003.
- Eitelberg, Mark J., Kamel, Magdi, Crawford, Alice, Carney, Diane, and Roberts, Benjamin. *The Online Recruiting Station: Vision, Planning, and Preliminary Requirements*. Monterey, CA: Naval Postgraduate School, August 2000. (Limited Distribution.)

Mark Jan Eitelberg

Eitelberg, Mark J. "A Military of Volunteers: Yesterday, Today, and Tomorrow: Report of a Conference Held at the U.S. Naval Academy." Monterey, CA: Naval Postgraduate School, January 1994.

Eitelberg, Mark J. and Mehay, Stephen L. *The Shape of Things to Come: Trends and Projections Affecting Military Recruiting and Manpower in the 21st Century*. NPS-AS92-023. Monterey, California: Naval Postgraduate School, 1992. Also appears in *Sociological Designs for the Future Army: Workshop Proceedings*. Edited by David R. Segal. ARI Research Note 93-14. Alexandria, Virginia: U.S. Army Research Institute for the Behavioral and Social sciences, March 1993, pp. 67-114.

Wilson, F.P., Eitelberg, M.J., and Fodor, D.B. *Ethnic Participation in the Militaries of TTCP Countries*. Ontario, Canada: The Technical Cooperation Program (TTCP) and the Canadian Forces Personnel Applied Research Unit, July 1993.

Eitelberg, Mark J. *American Demographic Trends and National Security: Issues for the 21st Century*, NPS-54-88-001. Monterey, CA: Naval Postgraduate School, February 1988.

Eitelberg, Mark J. *Representation and Race in America's All-Volunteer Military*. NPS-54-85010. Monterey, California: Naval Postgraduate School, September 1986.

Eitelberg, Mark J. "Historical Data on Hispanics in the U.S. Military," in *Hispanic Subpopulations and Naval Service*, SI/MRAS/TR-11. Edited by H. Wallace Sinaiko et al. Washington, DC: Smithsonian Institution, May 1985.

Lee, Gus C., Flyer, Eli S., Eitelberg, Mark J., and Orend, Richard. *Trends in the DoD High School Testing Program and the Supplementary Use of Commercial Test Information*. FR-MPAD-82-2. Alexandria, VA: Human Resources Research Organization, 1982.

Eitelberg, Mark J. "Characteristics of the Enlisted Force." Background paper for Office of the Secretary of Defense and Interagency Working Group, President's Task Force on Military Manpower, April 1982.

Eitelberg, Mark J. *Subpopulation Differences in Performance on Tests of Mental Ability: Historical Review and Annotated Bibliography*. Technical Memorandum 81-3, Washington, DC: Office of the Secretary of Defense, August 1981.

Eitelberg, Mark J. "The Attitudes, Experiences, and Expectations of VEAP Participants." Paper presented at the Congressional Budget Office Seminar on "Educational Assistance for the Military," Senate Office Building, Washington, DC, October 1980.

Eitelberg, Mark J. and Richards, John A. *Survey of Participants and Inactive/ Former Participants in the Post-Vietnam Era Veterans' Educational Assistance Program: Results and Conclusions*. FR-ETSD-80-11. Alexandria, VA: Human Resources Research Organization, 1980.

Eitelberg, Mark J., Richards, John A., and Rosenblatt, Richard D. *The Post-Vietnam Era Veterans' Educational Assistance Program: Participation during the First Year*. FR-ED78-12. Alexandria, VA: Human Resources Research Organization, 1978.

Mark Jan Eitelberg

Eitelberg, Mark J. *Evaluation of Army Representation*. SR-ED-76-45. Alexandria, VA: Human Resources Research Organization, 1976.

Eitelberg, Mark J. *Evaluation of Army Representation*. TR-77-A9. Alexandria, VA: U.S. Army Research Institute for the Behavioral and Social Sciences, August 1977.

Purcell, Agnes C., Eisenman, Richard L., and Eitelberg, Mark J. *Army Representativeness: The National Longitudinal Study*. SR-ED-76-1. Alexandria, VA: Human Resources Research Organization, 1976.

Eisenman, Richard L., Eitelberg, Mark J., Purcell, Agnes C., Richmond, Barry M. and Wagner, Curtis L. III. *Educational Benefits Analysis*. SR-ED-75-25. Alexandria, VA: Human Resource Research Organization, 1975. Also in U.S. Senate, Committee on Veterans' Affairs, "Veterans Education and Employment Assistance Act of 1976" (Part 3), Hearings on S969 and Related Bills, 94th Congress, 1st Session, October 1 and 2, 1975. Washington, DC: Government Printing Office, 1977, pp. 2155–2306.

Eisenman, Richard L. and Eitelberg, Mark J. *Conclusions and Implications from the Analysis of Educational Benefits*. Special Report. Alexandria, VA: Human Resources Research Organization, 1976. Also in U.S. Senate Committee on Veterans' Affairs, *op. cit.*, pp. 2307–2343.

Government Documents

Department of Defense. *Career Progression of Minority and Women Officers*. Washington, DC: Office of the Under Secretary of Defense for Personnel and Readiness, August 1999. (Contributing Author.)

Department of Defense, "Defense Advisory Committee on Women in the Services: Utilization of Women Indicator Report." Monterey, CA: Defense Manpower Data Center/Naval Postgraduate School, September 1996. (Contributing Author and Editor.)

Department of Defense. "Evolution of Policy and Programs," Chapter 2 in *Family Status and Initial Term of Service, Volume II - Trends and Indicators*. Washington, DC: Office of the Assistant Secretary of Defense (Personnel and Readiness), December 1993. (Sole Author.)

Department of Defense, *Human Resource Development in the Department of Defense: Issues and Initiatives for Military Selection*. Washington, DC: Office of the Assistant Secretary of Defense (Force Management and Personnel), September 1991. (Contributing Author and Editor.)

Department of Defense. "A Preliminary Assessment of Population Representation in Operations Desert Shield and Desert Storm," Appendix D in *Population Representation in the Military Services, Fiscal 1990*. Washington, DC: Office of the Assistant Secretary (Force Management and Personnel), August 1991. (Sole Author.)

Department of Defense. *Human Resource Development in the Department of Defense: Issues and Initiatives for Military Selection and Classification*. Washington, DC: Office of the

Mark Jan Eitelberg

Assistant Secretary of Defense (Force Management and Personnel), *July 1990*.
(Contributing Author and Editor.)

Department of Defense. *A Comparison of Current Army and Marine Corps Recruit Quality Requirements*. Washington, DC: Office of the Assistant Secretary of Defense (Force Management and Personnel), May 1986. (Sole Author.)

Department of Defense. *Population Representation in the Active Duty Military Services*. Washington, DC: Office of the Assistant Secretary of Defense (Manpower, Installations, and Logistics), *June 1985, June 1986, and August 1987* editions. (Contributing Author and Editor.)

Department of Defense. "ASVAB Testing in Languages Other Than English." Information Paper. Washington, DC: Office of the Assistant Secretary of Defense (Manpower, Installations, and Logistics), 1985. (Sole Author.)

Department of Defense. *Profile of American Youth: 1980 Nationwide Administration of the Armed Services Vocational Aptitude Battery*. Washington, DC: Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics), March 1982. (Principal Author and Editor.)

Department of Defense. *Third Annual Report to Congress on the Post-Vietnam Era Veterans' Educational Assistance Program*. Washington, DC: Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics), June 1980. (Principal Author and Editor.)

Department of Defense. *Educational Incentives Study*. Washington, DC: Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics), February 9, 1980. (Principal Author.)

Department of Defense. *First Annual Report to Congress on the Post-Vietnam Era Veterans' Educational Assistance Program*. Washington, DC: Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics), May 1978. (Principal Author and Editor.)

Department of Defense. *The Post-Vietnam Era Veterans' Educational Assistance Program: Implementation Report*. Washington, DC: Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics), April 1977. (Principal Author and Editor.)

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20 UNITED STATES DISTRICT COURT
21 CENTRAL DISTRICT OF CALIFORNIA

22 AIDEN STOCKMAN; NICOLAS
23 TALBOTT; TAMASYN REEVES;
24 JAQUICE TATE; JOHN DOES 1-2;
JANE DOE; and EQUALITY
CALIFORNIA,

25 Plaintiffs,

26 v.

27 DONALD J. TRUMP, et al.

28 Defendants.

CASE NO. 5:17-CV-01799-JGB-KK

SUPPLEMENTAL DECLARATION
OF JOHN DOE 1 IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION

Hearing

Date: November 20, 2017
Time: 9:00 a.m.
Courtroom: 1

1 I, John Doe 1, declare as follows:

2 1. I submit this declaration as a further supplement to the declaration I
3 signed on September 28, 2017 and filed in support of Plaintiffs’ Motion for
4 Preliminary Injunction.

5 2. In Spring 2017, I met with my military doctor and received a
6 diagnosis of “gender dysphoria.” My doctor and I worked together to create a
7 medical transition plan.

8 3. My transition plan includes Hormone Replacement Therapy (“HRT”).
9 I expect to begin receiving HRT later this year, once I receive final approvals from
10 the Medical Multidisciplinary Team and my commander.

11 4. My medical transition plan also includes chest surgery, sometimes
12 called “top surgery.” My transition plan contemplates top surgery in mid-2018.

13 5. I also intend to have “bottom surgery,” which includes procedures
14 related to one’s sex organs. My transition plan, created with my doctors,
15 contemplates bottom surgery in or about 2020.

16 6. I have heard from other Airmen that the Air Force is not approving
17 gender-confirming surgeries at this time, at least in part because of the Ban.

18

19 I declare under the penalty of perjury that the foregoing is true and correct.

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22 Dated: November 5, 2017

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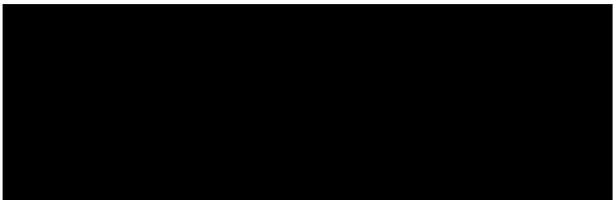
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UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

AIDEN STOCKMAN; NICOLAS
 TALBOTT; TAMASYN REEVES;
 JAQUICE TATE; JOHN DOES 1-2;
 JANE DOE; and EQUALITY
 CALIFORNIA,

Plaintiffs,

v.

DONALD J. TRUMP, et al.

Defendants.

CASE NO. 5:17-CV-01799-JGB-KK
 SUPPLEMENTAL DECLARATION
 OF JOHN DOE 2 IN SUPPORT OF
 PLAINTIFFS' MOTION FOR
 PRELIMINARY INJUNCTION

Hearing

Date: November 20, 2017
 Time: 9:00 a.m.
 Courtroom: 1

1 I, John Doe 2, declare as follows:

2 1. I submit this declaration as a further supplement to the declaration I
3 signed on September 21, 2017 and filed in support of Plaintiffs’ Motion for
4 Preliminary Injunction.

5 2. In 2016, I learned about the new policies regarding transition-related
6 medical services for active servicemembers. I was advised that the first step
7 toward transition-related medical treatment was to receive a formal diagnosis of
8 “gender dysphoria.” In October 2016, I met with my mental health evaluator, who
9 diagnosed me with gender dysphoria. Together with my Army doctor, we
10 developed my medical transition plan.

11 3. The first treatment in my medical transition plan was Hormone
12 Replacement Therapy (“HRT”). I began taking testosterone in March 2017, and
13 continue with HRT today.

14 4. The next medical step as part of my transition plan will be chest
15 surgery, which is also called “top surgery.” My transition plan currently includes a
16 projected top surgery date of April 2018, on a specific date selected based on
17 surgeon availability. Until the Ban was issued, I understood that I would receive
18 this surgery in April 2018 as contemplated in my transition plan. However, I now
19 expect that I will be denied transition-related surgical proceedings after the Ban
20 goes into effect in March 2018.

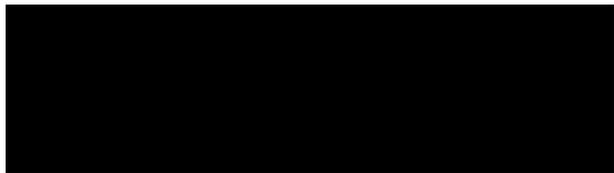
21 5. I also intend to have “bottom surgery,” which may include
22 metoidioplasty among other surgical procedures. I have discussed this with my
23 doctors, and I had expected that such procedures would be completed no later than
24 the end of 2021.

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I declare under the penalty of perjury that the foregoing is true and correct.

Dated: November 4, 2017



Specialist
United States Army