The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

More than half a year after President Trump announced his decision to exclude transgender people from military service, the government continues to cling to the fiction that it has no policy on the issue. The millions who have seen President Trump's Twitter feed would disagree. So has this Court. According to the government, however, its policy is only ready for judicial review when it has finished manufacturing the factual defense for the decision that President Trump announced back on July 26, 2017. Indeed, the government has already devised a strategy to disguise the *post hoc* nature of this evidence: the government will describe the current policy as "superseded." But a plan to implement a policy does not create a "new" policy; it is a continuation of the same unconstitutional action. Regardless of how it is packaged or repackaged, President Trump's policy of excluding transgender people from military service (the "Ban") is squarely before the Court, and its constitutionality is ripe for final resolution.

Defendants premise their opposition on the theory that they may re-litigate *already decided legal* issues in order to generate disputes of material *fact*. But "a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda." *S.A. Empresa v. Walter Kidde & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982). This Court has already held that the Ban rather than the Interim Guidance constitutes the relevant policy at issue, that Plaintiffs suffer myriad injuries under the Ban that confer standing, and that military deference cannot save the government's naked discrimination from heightened scrutiny. While the federal machinery surrounding President Trump concocts the imagined reasons for the Ban, the transgender men and women who are willing to put themselves at risk for the rest of us are entitled to judgment based on the reality of what actually transpired.

I. DEFENDANTS' ATTEMPTS TO RE-LITIGATE LEGAL ISSUES ALREADY DECIDED BY THIS COURT DO NOT GIVE RISE TO GENUINE DISPUTES OF MATERIAL FACT.

Defendants contend that "whether Plaintiffs have suffered a cognizable injury . . . sufficient to support Article III standing"; "which is the current applicable military policy"; and "whether there has been a final decision concerning the military policy" are factual disputes precluding summary judgment. Defs.' Opp. to Mot. for Summ. J., Dkt. 194 ("Opp."), at 2. Underlying all of these contentions is the theory that, "when the evidence is viewed in the light

most favorable to Defendants, the Interim Guidance provides the terms and operation of the applicable policy." *Id.* at 4; *see also id.* at 9-11.

But whether "the Interim Guidance provides the terms and operation of the applicable policy" is a legal issue, not a factual dispute over "credibility determinations, weighing of the evidence," or "drawing of legitimate inferences" appropriately reserved for trial. *Anderson v. Liberty Lobby*, 477 U.S. 242, 265 (1986); *see also Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 973 (9th Cir. 2017) (interpretation of written law is a legal function). None of the underlying facts—the sequencing of the tweets, Presidential Memorandum, and Interim Guidance, and Secretary Mattis' position as an official without power to overturn the President's controlling orders—are actually in dispute. Where "the only disputes relate to the legal significance of underlying facts," the issue is one of "law suitable to disposition on summary judgment." *Blue Lake Rancheria v. United States*, 653 F.3d 1112, 1115 (9th Cir. 2011).

The legal question of which policy controls, moreover, has already been decided by this Court: it is "the policy of prohibiting transgender individuals from serving openly in the military"—not the Interim Guidance. Dkt. 103 ("PI Order") at 22; *see also id.* at 9 (concluding that any protections afforded by the Interim Guidance are necessarily limited). Defendants offer no basis to re-litigate that issue. They also cannot credit the Interim Guidance for curing the Ban's injuries, given that they have thus far refrained from discriminating against transgender recruits only because this and other courts have preliminarily *enjoined* that discrimination.

Defendants' promised "superseding" policy also does not create any dispute as to the legally relevant policy challenged here. For avoidance of doubt, Plaintiffs' constitutional challenge is to the government's underlying policy of exclusion—regardless of whether it is reflected in President Trump's tweets, the Presidential Memorandum, or a supposedly "superseding" document with new window dressing. Plaintiffs' requested injunctive relief has always been tethered to enjoining *any* government action discriminating against transgender people regarding military service. First Am. Compl., Dkt. 30, Prayer for Relief ¶ 2. And that the Ban may be under some unspecified "study," Opp. at 10, is likewise no reason to withhold constitutional review. The government cannot run roughshod over critical constitutional

protections and yet avoid judicial remedy merely by continuing to "study" discriminatory policies.

There also is no genuine material dispute that the Ban injures Plaintiffs in myriad cognizable ways. This Court has already repeatedly rejected Defendants' standing arguments, PI Order at 6-11, Dkt. 189 ("56(d) Order") at 3-4, and Defendants present no new arguments to upend these holdings. True, standing on summary judgment requires evidence of "specific facts" showing injury, Opp. at 3, but Plaintiffs have met that standard throughout this litigation, and in support of summary judgment have tendered sworn declarations detailing the specific facts of the harm that the Ban imposes on them. As demonstrated by this undisputed evidence, Plaintiffs continue to be injured by each of the accessions, medical, and retention bans.[1]

Accessions Ban. The accessions ban, for example, injures Plaintiffs Karnoski, D.L., and Callahan. It flatly orders the military to "maintain the currently effective policy regarding accession . . . into the military service beyond January 1, 2018," Newman Decl., Ex. 2, Dkt. 149-2, at § 2(a), and thereby deprives Plaintiffs of "opportunities to compete for accession on equal footing with non-transgender individuals," 56(d) Order at 3 (quoting PI Order at 7-8). Defendants argue that the Ban may not injure Plaintiffs if they have not met certain medical requirements for accession. Opp. at 4. But this Court has rightly rejected that argument already, as "the injury lies in the denial of an equal *opportunity* to compete, not the denial of the job itself," and the "the Court need not 'inquire into the plaintiffs' qualifications (or lack thereof) when assessing standing." 56(d) Order at 3 (quoting *Shea v. Kerry*, 796 F.3d 42, 50 (D.C. Cir. 2015)); *see also* Pls.' Opp. to Defs.' Mot. to Dismiss, Dkt. 84, at 9.

There is thus no dispute of material fact that Karnoski, D.L., and Callahan, who wish to pursue military careers, are injured, much less that they face the mere "credible threat" of injury needed to establish standing. *Nat. Res. Def. Council v. EPA*, 735 F.3d 873, 878 (9th Cir. 2013); *see also* Decl. of D.L., Dkt. 132, ¶ 5 (actively preparing to join upon meeting 18-month requirement); Decl. of Ryan Karnoski, Dkt. 130, ¶ 22 (ready to join the military once certain "the

[1] Even one Plaintiff with standing, moreover, is enough for this litigation to go forward. *See* 56(d) Order at 4 ("If one plaintiff has standing it does not matter whether the others do.").

rug will not be pulled out from under me again"); Decl. of Connor Callahan, Dkt. 137, at ¶¶ 15-20 (actively seeking enlistment in Air Force Reserve). Nor is there any material dispute of fact that, although Plaintiff Schmid's Warrant Officer application was initially denied after this Court's preliminary injunction led to its evaluation, she faces a credible threat of injury again, as her application may be reconsidered. Decl. of Maria Martinez, Dkt. 195, ¶ 4.

Medical Ban. Plaintiffs likewise have standing to challenge the ban on medical treatment. They have "identified concrete interests in . . . medical treatment," PI Order at 10, and indeed face an imminent, credible threat from the Ban's impending March 23, 2018 prohibition on funding for surgical care. Plaintiffs Winters, Lewis, and Stephens all anticipate needing surgery after that date. Decl. of Megan Winters, Dkt. 136, ¶ 32; Decl. of Terece Lewis, Dkt. 134, ¶ 17; Decl. of Philip Stephens, Dkt. 135, ¶ 16.[2] While Defendants speculate that they might qualify under the exception for surgery "to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex," Dkt. 149-2, § 2(b), they provide no evidence to show that any Plaintiff will benefit from the exception. There thus remains a "credible threat" that Plaintiffs will be denied needed and planned medical treatment solely because of their transgender status. *Nat. Res. Def. Council*, 735 F.3d at 878.

In addition, there is a credible threat that Plaintiff Jane Doe, who has not yet begun a course of treatment to reassign her sex, will not qualify for any exception. Decl. of Jane Doe, Dkt. 138, ¶ 12. Defendants protest that Doe is not a medical expert, Opp. at 7, but a plaintiff "has personal knowledge of [her] own medical conditions." *See Gossett v. Stewart*, No. CV 08-2120, 2012 WL 845588, at *3 n.3 (D. Ariz. Mar. 13, 2012). There is no dispute that Doe intends to seek transition-related surgical care, and that the Ban facially precludes her from receiving such care. Because the Ban would deny Doe and other service members medical treatment solely on the basis of their transgender status, Plaintiffs face a credible threat that needed surgery will be denied and thus have standing to challenge the medical ban.

Retention Ban. All presently-serving Plaintiffs similarly have standing to challenge the

[2] Plaintiff Muller noted that, as of January 23, 2018, she was also pursuing surgical treatment, Decl. of Lindsey Muller, Dkt. 133, ¶ 37, and she has since been able to obtain aspects of that care to date.

retention ban. Defendants' standing arguments on this issue are again premised on the theory that the Interim Guidance prevents Plaintiffs' involuntary discharge and constitutes the operative policy, Opp. at 5-8, a legal argument thoroughly rejected by this and other courts, *e.g.*, PI Order at 9. The Ban unambiguously makes Plaintiffs subject to discharge. *See* Dkt. 149-2, §§ 1(a), (b) (noting that "until June 2016," military policy "authorized the discharge of [transgender individuals]," and directing the military "to return to th[at] longstanding policy and practice on military service by transgender individuals"). Speculation that President Trump may reverse his July 2017 proclamation that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military" does not change that present reality, Dkt. 149-1, and indeed, cannot cure the Ban's immediate and tangible harms to service members.

Those harms include, first, the inability to serve under equal terms and conditions as other service members. PI Order at 9; *compare* Decl. of Mark J. Eitelberg, Dkt. 147, ¶¶ 6-7 (policy imposes "substantial limitations" on opportunities within the military, including because of reluctance to invest resources in those subject to discharge), *and* Muller Decl. ¶ 31 ("It is challenging to perform to standards when I am afraid of losing my job at any moment."), *with Ariz. Dream Act. Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) ("diminished opportunity" to pursue career goals constitutes injury). Second, the retention ban chills Plaintiffs' self-expression and burdens their liberty interests. *Compare* Doe Decl. ¶ 10 ("Because of this change in policy, I have not come out to anyone in my chain of command."), *with* PI Order at 8-9 ("Plaintiff Doe's self-censorship is a constitutionally sufficient injury.") (quotations omitted). And finally, the retention ban, like the accessions and medical bans, stigmatizes Plaintiffs as inferior. PI Order at 9.[3] Because the individual Plaintiffs have standing to challenge the Ban, the organizational Plaintiffs, through them, do too. *See* PI Order at 10.

Defendants' judicial economy arguments, moreover, do not justify delaying constitutional review. The threat of the Ban's implementation continues to inflict harm and

[3] Defendants argue that stigmatic injury does not support standing where persons are not themselves denied equal treatment. Opp. at 3 n.2. But, as this Court has already held, "Plaintiffs have identified concrete interests in accession, career advancement, and medical treatment, and have demonstrated that they are 'personally denied equal treatment by the challenged discriminatory conduct.'" PI Order at 10 (quotations omitted).

demands final resolution. *See, e.g.*, Karnoski Decl. ¶ 22. Furthermore, as noted above, Plaintiffs challenge Defendants' underlying policy of excluding transgender people from military service, regardless of how it is implemented or what document houses its most recent incarnation. In any event, "all laws are subject to change," *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000), and the fact that the Ban might be altered or narrowed in some way "has nothing to do with whether it is subject to judicial review at the moment." *Id.* This Court should proceed to the merits and permanently enjoin this unconstitutional policy.

II. THE BAN VIOLATES PLAINTIFFS' CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION, DUE PROCESS, AND FREEDOM OF EXPRESSION.

Like their standing arguments, Defendants' arguments on the constitutionality of the Ban revisit well-trodden ground, but fail to demonstrate any genuine dispute of material fact to preclude summary judgment. Defendants argue again that the Ban is entitled to "substantial deference," that it is not subject to heightened constitutional scrutiny,[4] and that it does not violate equal protection, substantive due process, or the First Amendment. Opp. at 14-21. Each of these arguments fails as a matter of law and, as a result, Plaintiffs are entitled to summary judgment.

A. The Defendants' Ban on Military Service by Transgender Individuals Is Not Entitled to Deference.

Defendants assert once again that the Ban is entitled to "substantial deference" because it pertains to "military personnel decisions." Opp. at 13; *see also id.* at 14-15. But, as the Court already held, the undisputed facts here do not call for any deference since the Ban was enacted "abruptly and without any evidence of considered reason or deliberation." PI Order at 18. None of the facts or law underpinning that conclusion has changed, so neither should the result.

Recognizing this, Defendants shift focus and for the first time seek to justify the Ban by referencing Secretary Mattis' June 30, 2017 announcement that the Department of Defense

[4] Defendants put up no fight against Plaintiffs' argument that the Ban must be analyzed under heightened scrutiny, *i.e.* strict scrutiny or, at a minimum, intermediate scrutiny. *See* Dkt. 129 at 10-13; *see also* Mem. Decision & Order, *F.V. v. Barron*, No. 17-CV-170, Dkt. 39, at 20-25 (D. Idaho Mar. 5, 2018) (discrimination based on transgender status demands heightened scrutiny), *available at* https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/msj_order.pdf. Instead, they merely reiterate their disagreement "for purposes of preserving the issue." Opp. at 15.

would defer accession of transgender applicants until January 1, 2018. But Plaintiffs did not challenge that decision; they challenged the Ban. A six-month *pause* on *accessions* cannot conceivably justify the indefinite and sweeping scope of the Ban. There remains no evidence that the Ban was based on any considered reason and deliberation. To the contrary, all available evidence shows that the Ban was the result of abrupt, unthinking, and reflexive action, exactly the type of actions excepted from judicial deference. PI Order at 18 (citing *Rostker v. Goldberg*, 453 U.S. 57, 71-72 (1981)). This conclusion is underscored by Secretary Mattis' subsequent post-Ban announcement that the Department of Defense would comply with instructions to design and undertake a study on the issues identified by the President's tweets and Presidential Memorandum. The need for study *after* the Ban was announced confirms that there was no actual military judgment underpinning the policy at the time it was announced. *Doe 1 v. Trump*, 2017 WL 4873042, at *29.

Defendants cannot obtain judicial deference merely by invoking military buzzwords like "unit cohesion" or "lethality" at the time they issue a policy; rather, there must be reasoned and substantive military judgment to warrant any deference. *Stone v. Trump*, 2017 WL 5589122, at *15 (President's tweets did not "emerge from a policy review" and Presidential Memorandum failed to "identify any policymaking process"). The undisputed record shows that the only "studies, conclusions, and judgment of the military itself" at the time "actually *contradicted*" the stated reasons for the Ban. PI Order at 16 (quoting *Doe*, 2017 WL 4873042, at *30).

Because the Ban is unmoored from any reasoned consideration or deliberation, the line of authority on which Defendants rely holds no sway.[5] Indeed, when juxtaposed here, Defendants' case law reinforces the Court's prior conclusion. For example, *Goldman* involved the Air Force's promulgation of a 190-page uniform regulation that "describe[d] in minute detail all of the

[5] Defendants' reliance on *Orloff v. Willoughby*, 345 U.S. 83 (1953), is also misplaced, but for a different reason. Unlike here, the *Orloff* Court found an adequate justification for the intrusion on a constitutional right—the executive's interest in the loyalty of its commissioned military officers. 345 U.S. at 90-91. *Orloff* has also been narrowly read to pertain to the military's internal duty orders. It does not shield from judicial review "constitutional wrongs suffered in the course of military service." *Chappell v. Wallace*, 462 U.S. 296, 304 (1983); *see also Emory v. Sec'y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987) ("Where . . . the armed forces have trenched upon constitutionally guaranteed rights through the promotion and selection process, the courts are not powerless to act. The military has not been exempted from constitutional provisions that protect the rights of individuals."); *Denton v. Sec'y of Air Force*, 483 F.2d 21, 24 (9th Cir. 1973) (no deference to military actions that "deprive [a party] of his livelihood").

various items of apparel that must be worn as part of the Air Force Uniform." 475 U.S. 503, 509 (1986). And *Rostker v. Goldberg*, 453 U.S. 57 (1981)—on which the Court relied in granting a preliminary injunction—deferred to military policy born out of "extensive review of legislative testimony, floor debates, and committee reports." PI Order at 17-18 (citing 453 U.S. at 71-72). Put simply, unlike these authorities, there were no "complex[,] subtle, and professional" military judgments here that merit judicial deference. Opp. at 13 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)). And even if any deference were appropriate (it is not), that would not spare the Ban from heightened constitutional scrutiny under which it would still fail on the merits. *Witt v. Dept. of Air Force*, 527 F.3d 806, 811 (9th Cir. 2008) (applying heightened scrutiny to substantive due process claim where challenged anti-gay policy concerned "management of the military").

B. The Ban Violates Plaintiffs' Rights to Equal Protection and Substantive Due Process Because It Fails to Advance Any Proffered Government Interest.

Defendants effectively concede that their equal protection and substantive due process arguments rise and fall together. Opp. at 20. On both scores, Defendants have failed to meet their "demanding" burden to prove an "exceedingly persuasive" and "genuine" justification for the Ban. *United States v. Virginia ("VMI")*, 518 U.S. 515, 533 (1996); *see also Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1696-97 (2017). Instead, at every turn, they offer the sort of overbroad, factually unsupported, and *post hoc* rationalizations that do not pass muster. They also offer no evidence to rebut the military and medical professional testimony submitted by Plaintiffs.

Notably, Defendants do not even attempt to offer any justification for the retention and medical bans beyond their erroneous contention that the Interim Guidance constitutes the operative policy. Opp. at 16-17. At best, Defendants attempt to characterize the medical ban as "a matter of line-drawing" compared to the preexisting policy, Opp. at 17, but the contrast between the two could not be more stark: the preexisting policy provided for transition-related care where it was medically necessary; the Ban expressly denies care even in situations where (as here) medical necessity is undisputed. Dkt. 149-2, § 2(b) (prohibiting surgical care unless it is *both* "necessary to protect the health of an individual" *and* the individual "has already begun a

course of treatment to reassign his or her sex"). In other words, under the Ban, medical necessity is an insufficient basis for medical care.

Readiness, Deployability, and Lethality. With respect to the accessions ban, Defendants assert that "some" transgender individuals may experience unspecified "medical conditions" or might have undergone treatments that "could" affect performance. Opp. at 17-18. This well-worn speculation still suffers from an incurable defect: "*all* service members might suffer from medical conditions that could impede performance." PI Order at 17. Indeed, since "it is common for service members to be non-deployable for periods of time due to an array of [] conditions," there is no basis to selectively bar transgender individuals from military service. *Id.* Furthermore, this argument is factually unsupported by record evidence,[6] and it is particularly inapposite to the accessions policy currently in effect. Transgender applicants must not only pass the military's rigorous and individualized accessions process, which assesses all applicants' fitness to serve, but, on top of that, they must also generally have completed transition-related medical treatment 18 months before joining the military.

Defendants' response tacitly admits that their argument is a justification still in search of support. Though they rely on Secretary Mattis' June 30, 2017 announcement pausing accessions for six months, Plaintiffs did not challenge that action, which "in no way presuppose[d] the outcome of the review." Decl. of Ryan Parker, Ex. 4. Instead, Plaintiffs challenged President Trump's Ban, which was announced less than a month later, notwithstanding the military's earlier determination that permitting open service would not undermine military effectiveness and lethality and that "*prohibiting* open service would have negative impacts." PI Order at 16. President Trump did not "maintain" the status quo pending the outcome of a study; he *changed* the status quo—which had permitted open service—without regard to the outcome of any study.

Unit Cohesion. Defendants offer no evidence to show that the Ban advances the government's interest in unit cohesion, nor do they explain how discriminating against transgender people is "substantially related to the achievement of those objectives." *VMI*, 518

[6] Although Defendants seek to re-litigate the Court's denial of their Rule 56(d) request, their inability to come forward with their own affirmative evidence to defend the Ban's constitutionality is a problem of their own making. Citing testimony presented in other cases, Opp. at 18, does not satisfy Defendants' burden on summary judgment.

U.S. at 533. Instead, they assert that the RAND Report actually lends credence to their policy because it "did not appear to consider whether an impact on deployability in itself would affect unit cohesion." Opp. at 19. On its face, this argument defies logic: the study reached the opposite conclusion of what Defendants urge. *See Doe*, 275 F. Supp. 3d at 212 (describing the RAND Report as "largely debunking any potential concerns about unit cohesion"). Indeed, the RAND Report explicitly found that preventing open service would actually cause "erosion of unit cohesion." PI Order at 16. Defendants' more fundamental problem, however, is that deployability issues affect *all* service members. Singling out transgender individuals for a reason that affects all service members is a quintessential equal protection violation.

Cost. Defendants again cite cost as a justification for the Ban. As a legal matter, they fail to rebut that cost savings standing alone cannot justify discrimination. Ptfs' Mot. at 19-21. As a factual matter, they do not contest that the RAND Report concluded that the costs for transition-related care are exceedingly minimal. Instead, they argue that there are unaccounted administrative costs "associated with [Plaintiffs'] desired policy change." Opp. at 19. Those costs, however, are completely undefined and hypothetical; they relate to implementation efforts that have now already occurred to facilitate the open service policy; and they previously failed to persuade this Court to stay the preliminary injunction as to accessions. *See* Dkt. 121 at 4-5. Defendants' arguments provide no stronger basis for denying permanent relief.

Defendants also have failed to present any evidence to show that the President was concerned with administrative costs when he decided to implement and announce the Ban and issued the Presidential Memorandum. President Trump's July 2017 tweets mentioned only "medical costs"—a justification that this Court concluded was inadequate to survive heightened scrutiny. PI Order at 17-18. Defendants' new hypothetical, *post hoc* rationalization of administrative costs also fails. *VMI*, 518 U.S. at 533; *see also Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (holding that purported administrative costs could not justify discrimination).

C. The Ban Violates Plaintiffs' Right to Freedom of Expression.

Defendants present no new arguments relating to Plaintiffs' First Amendment claim. They protest that the Ban does not "regulate[] speech at all, much less on the basis of its

content," Opp at. 20, but this Court already rejected that argument, holding that the Ban constitutes a content-based regulation of speech, because it "penalizes transgender service members—but not others—for disclosing their gender identity." PI Order at 19-20.

Defendants also seek deference under *Brown v. Glines*, 444 U.S. 348, 355 (1980), arguing that the Interim Guidance "does not impede expression by current transgender service members or those seeking accession into the military." Opp. at 21. But they wholly ignore that viewpoint discrimination, as a particularly egregious form of content discrimination, requires strict scrutiny, including in the military context. Mot. at 23. In any event, even affording Defendants deference under *Brown*, this Court has already concluded that the Ban does not withstand scrutiny because Defendants are unable to demonstrate an important government interest that is furthered by intrusion upon protected expression. PI Order at 20. Because nothing has changed, Plaintiffs are entitled to summary judgment on their First Amendment claim.

III. THE COURT SHOULD ENTER A PERMANENT INJUNCTION THAT PREVENTS DEFENDANTS FROM ENFORCING THE BAN AGAINST ANY TRANSGENDER INDIVIDUAL.

Defendants challenge as overbroad Plaintiffs' request for a permanent injunction precluding enforcement of the Ban against all transgender people. They insist that the Court should not grant relief to individuals who are not parties before it and, instead, that such individuals should be forced to "bring their own challenges" if they "believe they are injured by the policies at issue." Opp. at 22. These same arguments were all presented—and all rejected—in the context of the preliminary injunction.

First, the appropriate scope of an injunction is determined by the "extent of the violation established, not by the geographic extent of the plaintiff[s]." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). Where, as here, "a law is unconstitutional on its face, and not simply in its application to certain plaintiffs," broad injunctive relief is warranted. *Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017); *see also Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017) ("Narrowing the injunction to apply only to Plaintiffs would not cure the statutory violations identified, which in all applications would violate provisions of the INA."), *vacated as moot*, 874 F.3d 1112 (9th Cir. 2017).

Second, the breadth of Plaintiffs' requested relief is necessary to provide them the relief to which they are entitled. *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987) (emphasis removed). As the Court already recognized, the Ban threatens irreparable harm including stigmatic injuries that devalue all transgender troops. PI Order at 20-21. Granting injunctive relief solely as to the parties before the Court would not remedy these injuries nor prevent them from recurring. Even if individual and organizational Plaintiffs were spared from discrimination, it would not blunt the invidiousness of the policy. If the Ban is permitted to be enforced at all, the stigma it creates for all transgender individuals, including Plaintiffs, would persist.

Defendants also contend that transgender individuals not before the Court can file suit on their own if they so desire. Opp. at 22. But it would make no sense to force transgender individuals to attack the Ban in piecemeal fashion when the policy is unconstitutional as a matter of law at its broadest level. Placing the burden on other transgender individuals to seek injunctive relief against policies that have already been determined to be facially unconstitutional would not serve the public interest and would "result in a waste of judicial resources." *Am. Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d 1000, 1022 (E.D. Cal. 2002). For the same reason, Plaintiffs' request would not constitute a "premature intrusion in military affairs" by "subvert[ing] a carefully delineated administrative framework." Opp. at 22. To the contrary, a permanent injunction would appropriately restore the *status quo* to the June 2016 policy, "which was voluntarily adopted by DoD after extensive study and review, and which [was] in place for over a year without documented negative effects." PI Order at 22. The Court should grant Plaintiffs' request for the appropriate and necessary remedy to fully vindicate their constitutional rights.

CONCLUSION

Defendants have presented no genuine dispute of material fact. Accordingly, this Court should issue declaratory relief holding the Ban unconstitutional, and permanently enjoin Defendants and those acting in concert with them or subject to their control from taking any action relative to transgender individuals that is inconsistent with the *status quo* that existed on July 25, 2017, prior to the Ban.

Respectfully submitted on March 7, 2018.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on March 7, 2018.

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