

**COMMITTEE ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER RIGHTS
AND COMMITTEE ON MILITARY AFFAIRS AND JUSTICE**

**STATEMENT IN SUPPORT OF THE DEPARTMENT OF DEFENSE’S DIRECTIVE
AND ASSOCIATED POLICIES PERMITTING THE OPEN SERVICE OF
TRANSGENDER SERVICE MEMBERS IN THE U.S. MILITARY**

Transgender people have served in the U.S. military “since the nation’s inception.”¹ Until recently, however, they had to serve “clandestinely” because military policies prohibited transgender people from serving.² On June 30, 2016, the United States Department of Defense (“DOD”) announced a change in policy permitting the open service of transgender Service members in the U.S. military (the “Policy”).³ The announcement set forth a timeline whereby the DOD would issue related training handbooks, medical guidance, and policies and procedures by fall 2016, and by July 2017 the DOD would complete associated training of the military branches on the Policy. Pursuant to that directive, the DOD, on September 30, 2016, issued a 71 page implementation handbook detailing how implementation of the transgender inclusive policy should be handled from the perspectives of both Service members and their commanders.

However, Defense Secretary Jim Mattis approved a six-month delay in allowing transgender recruits to enlist in the military.⁴ In light of this disappointing decision and other precipitous changes in the administration’s positions with respect to transgender people’s civil rights, the New York City Bar Association believes it is important to issue a public statement in support of the Policy allowing for the full open service of transgender Service members in the U.S. military. In February 2017, the U.S. Departments of Justice and Education revoked federal guidelines on discrimination on the basis of gender identity issued by the prior administration specifying, *inter alia*, that transgender students have the right to use public school restrooms that

¹ Ender, Morton, *et al.*, *Dinner and a Conversation: Transgender Integration at West Point and Beyond*, Soc. Sci. (2017) at 1-2.

² *Id.*

³ *Secretary of Defense Ash Carter Announces Policy for Transgender Service Members*, DEP’T DEF. (June 30, 2016), <https://www.defense.gov/News/News-Releases/News-Release-View/Article/821675/secretary-of-defense-ash-carter-announces-policy-for-transgender-service-members>.

⁴ *Statement by Chief Pentagon Spokesperson Dana W. White on Transgender Accessions (June 30, 2017)*, <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1236145/statement-by-chief-pentagon-spokesperson-dana-w-white-on-transgender-accessions/>; *Pentagon Delays Decision on Transgender Recruits*, <http://www.cnn.com/2017/06/30/politics/pentagon-transgender-recruits/index.html>.

match their gender identity.⁵ The Association's support is based both on the fact that the Policy corrects an extensive history of discrimination against transgender Americans, and the fact that the DOD issued the Policy after a comprehensive review process which concluded that a policy of open service is consistent with military readiness and strengthens the U.S. military. Implementation of the Policy will also avoid constitutional problems and bring the DOD in line with current civil legal standards for sex discrimination.

A. TRANSGENDER AMERICANS: A HISTORY OF DISCRIMINATION IN MILITARY AND CIVILIAN LIFE.

Transgender people have long been subject to pervasive, invidious, and longstanding discrimination in virtually every aspect of their daily lives.

1. Discrimination in Civilian Life.

Detailed data regarding the extent and impact of discrimination against transgender people does not appear to exist before the mid-1990s, although the criminalization of being transgender in public space dates back to the mid-nineteenth century.⁶ Anecdotal evidence further indicates pervasive discrimination in the experiences of transgender people.⁷

In six studies conducted between 1996 and 2006, "20 to 57 percent of transgender respondents said they experienced employment discrimination, including being fired, denied a promotion or harassed. Though even more difficult to measure, transgender people also face incredible barriers as job applicants."⁸ The National Center for Transgender Equality ("NTCE") and the National Gay and Lesbian Task Force conducted a survey of the U.S. transgender population in 2011, which detailed more extensive data about the discrimination suffered by

⁵ Jeremy W. Peters, Jo Becker and Julie Hirschfeld Davis, *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html>.

⁶ The codification of government-mandated discrimination against transgender people dates back to at least the mid-19th century in the United States. "Between 1848 and 1900 thirty-four cities in twenty-one states passed prohibitions against cross-dressing, as did eleven more cities before World War I." Clare Sears, *ARRESTING DRESS: CROSS-DRESSING, LAW AND FASCINATION IN NINETEENTH CENTURY SAN FRANCISCO* (Duke University Press 2015). Most of these laws criminalized "wearing the apparel of the other sex." Other cities banned "indecent dress" or "disguises." Although neither they nor the federal government enacted laws banning cross-dressing, both California and New York passed state laws criminalizing "disguise" or "masquerade," which were used to arrest transgender people. *Id.* These laws, in effect, criminalized being transgender in public. Although now rarely enforced, many jurisdictions still have these laws on their books, representing vestiges of government-sponsored discrimination.

⁷ Lynn Conway, for example, underwent sex-reassignment surgery in 1968 and was promptly fired by IBM for being transsexual. Conway was terminated even though, prior to her transition, she had made valuable contributions to IBM's business by inventing "a method by which computer processors make multiple calculations simultaneously and dynamically, which consequently led to the creation of supercomputers that can take enormous amounts of data and compile them to look for patterns." *Discrimination Against Transgender Workers*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/discrimination-against-transgender-workers>.

⁸ *Id.*

transgender people (the “2011 Report”).⁹ NCTE updated and expanded this data in a survey conducted in 2015, and released a new report in 2016 (the “2016 Report” and with the 2011 Report, the “Reports”).¹⁰

These Reports paint a picture of extensive discrimination transgender people face in essentially all aspects of life, from employment to housing to education to health care. The 2011 Report found that ninety percent of those surveyed had either been harassed, mistreated or discriminated against in employment.¹¹ The 2016 Report found that, in the last year alone, sixteen percent of respondents reported losing a job because of their gender identity, fifteen percent were harassed on the job by being either physically or sexually assaulted, and twenty-nine percent said they had been mistreated in the workplace.¹² The 2011 Report found nineteen percent of the respondents had been denied housing based on their gender identity, while the 2016 Report determined that twenty-three percent of respondents had been discriminated against in housing in the last year, and they were four times less likely to be a homeowner than members of the general population.¹³ A recent study conducted by the Suffolk University School of Law, using a tester methodology, determined that transgender and gender non-conforming people experienced housing discrimination at an astounding rate of sixty-one percent of the time in the Boston rental housing market.¹⁴

In education (kindergarten through high school), the 2011 Report found that seventy-eight percent of respondents reported being harassed, thirty-five percent being physically assaulted, and twelve percent being sexually assaulted, with harassment so severe that fifteen percent reported being forced to drop out. The 2016 Report shows little improvement in these numbers. In the last year, seventy-seven percent of respondents reported being harassed, twenty-four percent being physically assaulted, and thirteen percent were sexually assaulted, with the harassment so severe as to cause seventeen percent to dropout.¹⁵

In healthcare, the 2011 Report found that nineteen percent of respondents had been denied care because of their gender identity, and twenty-eight percent said they had postponed care out of fear of discrimination while forty-eight percent could not afford care. HIV rates among the respondents were four times the national average. The 2016 Report determined that

⁹ J.M. Grant, L. Mottet, J.Tanis, J. Harrison, J.L. Herman & M. Keisling, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT’L CTR. TRANSGENDER EQUAL. & NAT’L GAY & LESBIAN TASK FORCE (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

¹⁰ S.E. James, J.L. Herman, S. Rankin, M. Keisling, L. Mottet & M. Anafi, *The Report of the 2015 U.S. Transgender Survey*, NAT’L CTR. TRANSGENDER EQUAL. (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>.

¹¹ 2011 Report at 3.

¹² 2016 Report at 10.

¹³ 2011 Report at 4; 2016 Report at 11.

¹⁴ J. Langowski, W. Berman, R. Holloway & C. McGion, *Transcending Prejudice: Gender Identity and Expression-Based Discrimination in the Metro Boston Rental Housing Market*, 29.2 YALE J. LAW & FEMINISM (forthcoming 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2941810 (examining the Suffolk University Law School Housing Discrimination Testing Program from December 2015 through June 2016).

¹⁵ 2011 Report at 3; 2016 Report at 9.

one-quarter of respondents had insurance coverage denied, twenty-three percent did not seek medical care for fear of mistreatment, and one-third could not afford care.¹⁶

Finally, violence against transgender people continues to be a significant problem. The 2016 National Coalition of Anti-Violence Programs report found that two-thirds of the LGBT victims of hate violence-related homicides were transgender.¹⁷ Moreover, the FBI's hate crime statistics show more than a ten-fold increase in reported hate crimes against transgender people from 2013 to 2015.¹⁸

2. Discrimination in the Military.

Prior to June 30, 2016 the U.S. Military barred transgender people from serving openly. Even so, transgender people are more likely than the U.S. population as a whole to have served in the armed forces.¹⁹

The ban on transgender service was implemented through multiple regulations and policies that prevented enlistment of people and ostensibly required their discharge from the military regardless of fitness for duty. These regulations used definitions from the American Psychiatric Association's (the "APA") *Diagnostic and Statistical Manual of Mental Disorders* (DSM) to exclude transgender individuals from service. Until May 2013, the DSM classified transgender persons as suffering from "Gender Identity Disorder," under an umbrella of "mental disorders" called "paraphilia." The military held that all "paraphilias" were incompatible with military service.²⁰ The modern psychiatric understanding of transgender people is that being transgender is not a mental health disorder. In May 2013, the APA issued DSM-V, which eliminated Gender Identity Disorder as a mental disorder and added "Gender Dysphoria," which is not a "paraphilia" or sexual dysfunction. The change reflects the fact that being transgender is not a mental illness but that the significant distress some transgender people experience as a result of the incongruity between their gender and their body and how others perceive their gender is a diagnosable condition that can be alleviated by treatment. Gender Dysphoria is included in the DSM-V to ensure that transgender individuals are able to access medically-necessary gender-affirming medical and psychological care (and that such care could be covered by insurance).²¹

¹⁶ 2011 Report at 6; 2016 Report at 8.

¹⁷ E. Waters, C. Jindasurat & C. Wolfe, *Lesbian, Gay, Bisexual, Transgender Queer and HIV-Affected Hate Violence in 2015* (National Coalition of Antiviolence Programs 2016)

http://www.avp.org/storage/documents/ncavp_hvreport_2015_final.pdf

¹⁸ *Compare Uniform Crime Report, Hate Crime Statistics, 2015*, FBI (fall 2016), https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses_final.pdf with *Uniform Crime Report, Hate Crime Statistics, 2013*, FBI (fall 2014), https://ucr.fbi.gov/hate-crime/2013/topic-pages/location-type/locationtype_final.pdf.

¹⁹ Ender, *supra n. 1*.

²⁰ T. Witten, *Gender Identity and the Military – Transgender, Transsexual, and Intersex-Identified Individuals in the U.S. Armed Forces*, at 5 (2007), www.palmcenter.org/wp-content/uploads/2007/05/TransMilitary2007.pdf; DoDI 6130.03(29r), April 28, 2010, incorporating Change 1, September 13, 2011.

²¹ American Psychiatric Association, *What Is Gender Dysphoria?*, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (a "gender dysphoria diagnosis involves a difference between

The DOD's policies and the respective services' regulations banning service in the military by transgender people did not contain any rationale for the prohibition. "Scholars have been unable to uncover any documentation on the history of the rules or the reasons why they were enacted. Hence, the [record from three court cases] offer the only available official rationales for U.S. military policies banning transgender Service members."²²

These cases suggest that the prohibitions were justified based on an idea that the medical procedures transgender people sometimes undergo to live consistently with their gender identity (i.e., to transition) called into question their medical fitness for military service. In all three of these cases,²³ transgender Service members challenged their discharges, or denial of reinstatement, based on service regulations setting forth basic health standards for determining fitness to serve. The services pointed to language in their regulations that provided that "major abnormalities and defects of the genitalia such as change of sex ..." constitute disqualifying defects.²⁴ In all three cases, the transgender Service member had undergone gender confirmation surgery, and military doctors testified that complications or side effects of gender confirmation surgery and hormone therapy could affect the health of the transgender Service member. In *DeGroat v. Townsend*, the Air Force doctor stated:

The known and potential complications of sex change operations are many and varied and can affect the long term health and duty performance of the individual. Additionally, many of these patients are maintained on hormone therapy which independently has potential side effects. . . . Air Force duties require individuals from all career fields to serve in a variety of locations around the globe, often changing assignments on short-term notice. Military medical providers in the field are not familiar with the problems these patients may encounter. Individuals who have undergone sex change procedures would not be qualified for world-wide service and if the Air Force assigned them even to remote domestic locations they would be without access to potentially acute specialized tertiary medical care, which would only be available at major medical centers.²⁵

one's experienced/expressed gender and assigned gender, and significant distress or problems functioning"); C. Beredjick, "DSM-V To Rename Gender Identity Disorder 'Gender Dysphoria'", *The Advocate* (July 23, 2012), <https://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria>.

²² *Report of the Military Transgender Commission*, PALM CTR. (2014), http://archive.palmcenter.org/files/Transgender%20Military%20Service%20Report_0.pdf, at 7.

²³ *DeGroat v. Townsend*, 495 F. Supp. 2d 845 (S.D. Ohio 2007); *Leyland v. Orr*, 828 F.2d 584 (9th Cir. 1987); *Doe v. Alexander*, 510 F. Supp. 900 (D. Minn. 1981).

²⁴ *Doe*, 510 F. Supp. at 902.

²⁵ *DeGroat*, 495 F. Supp. 2d at 850-51.

The court's opinion in *DeGroat* does not include what the foundation was for admitting the doctor's expert opinion other than his positions and specialties. For instance, the opinion is bereft of any evidence that the doctor had ever treated a transgender person or had studied the effects of transitioning on the medical fitness of transgender people.

The available record provided scant justification for a sweeping prohibition on service by transgender people. The ban was at odds with military regulations allowing non-transgender people with medical and mental health conditions to serve within certain parameters. It was "arbitrary" in that, unlike other gender related medical conditions it required discharge of transgender people "irrespective of fitness for duty."²⁶ It is unclear why the impact of transition related medical care was not evaluated in the same manner as the impacts on non-transition related medical care, even when the same procedures were at issue.²⁷

Whatever foundation the ban may have had, it has since been debunked by modern medical science:²⁸

"While personnel policy must of course be designed to promote deployability and medical readiness, arguments invoked to oppose transgender service on [the grounds of non-deployability, medical readiness, and fitness for duty] do not withstand scrutiny."²⁹

The increasingly apparent lack of justification for excluding transgender people from military service made the DOD's 2015 decision to reexamine its policies a logical and timely one. Indeed, the American Medical Association adopted a formal policy that there is no medical rationale for excluding transgender individuals from openly serving in the U.S. military in June, 2015. Defense Secretary Ashton Carter announced the study that led to the DOD's change in policy the next month.³⁰

Taken together, the APA's removal of Gender Identity Disorder from the DSM-V and the AMA's conclusion that there is no medical basis to exclude transgender individuals from military service remove any purportedly objective justifications for banning transgender service members from full and open service.

²⁶ Elders, Jocelyn, et al. *Report of the Transgender Military Service Commission*, at 3 Palm Center (2014) available at http://archive.palmcenter.org/files/Transgender%20Military%20Service%20Report_0.pdf.

²⁷ For example, in *DeGroat*, the military physician testified that undergoing transition-related surgery was a categorical bar to service but that non-transgender people who lost their penis or testicles might be, but were not necessarily, disqualified from service. *De Groat*, 495 F. Supp. 2d. at 850-52.

²⁸ See generally *Transgender Military Commission*, *supra* n. 26, at 9-19 (concluding that based on current medical science, the mental health, cross-sex hormone therapies, and gender confirmation surgeries of transgender Service members should not materially affect their deployability).

²⁹ *Id.* at 16.

³⁰ B. Hill, et al., *Fit to Serve? Exploring Mental and Physical Health and Well-Being Among Transgender Active-Duty Service Members and Veterans in the U.S. Military*, at 1-2 (2016), <http://online.liebertpub.com/doi/10.1089/trgh.2015.0002>.

B. THE DOD’S CONCLUSION THAT TRANSGENDER PEOPLE CAN SERVE OPENLY IS ROOTED IN EVIDENCE, REASONED EVALUATION AND IS CONSISTENT WITH MILITARY READINESS.

After over a year of evaluation, the DOD concluded “that open service by transgender Service members while being subject to the same standards and procedures as other members . . . is consistent with military readiness and with strength through diversity.”³¹ The level of research and evaluation the DOD devoted to the adoption and implementation of the Policy lends support to its powerful conclusions that (a) the DOD can and should meet the needs of transgender Service members, and (b) open service by transgender Service members is consistent with, not detrimental to, military readiness.

1. The DOD’s Policy of Allowing Open Service by Transgender People Is Being Carefully Implemented After Thorough Research.

The DOD adopted the Policy after more than a year of carefully considered research and evaluation. In its own words, the DOD developed the Policy “through a comprehensive and inclusive process that included the leadership of the Armed Services, medical and personnel experts across the Department, transgender Service members, outside medical experts, advocacy groups, and the RAND Corporation.”³² A chronology of the DOD’s adoption of the Policy, set forth below, demonstrates the level of consideration the DOD brought to bear on this personnel change.

On July 28, 2015, DOD Secretary Ash Carter issued a memorandum stating that, effective as of July 13, 2015, no Service member would be involuntarily separated or denied reenlistment or continuation of active or reserve service on the basis of their gender identity, without the personal approval of the Under Secretary of Personnel and Readiness. This interim measure ensured that such involuntary separation from service could not occur without a high-level personal determination made by an official reporting directly to the Secretary of Defense. The memorandum also tasked the Under Secretary with chairing a working group drawn from “senior representatives from each of the Military Departments, Joint Staff, and relevant components from the Office of the Secretary of Defense to formulate policy options for the DOD regarding the military service of transgender Service members,” with options and recommendations to be presented to the Secretary within 180 days, or late January 2016.³³

³¹ United States Secretary of Defense, *Memorandum for Secretaries of the Military Departments, Subject: Directive-type Memorandum (DTM) 16-005, “Military Service of Transgender Service Members,”* DEP’T DEF. (June 30, 2016), https://www.defense.gov/Portals/1/features/2016/0616_policy/DTM-16-005.pdf (accessed May 8, 2017) (hereinafter “DTM 16-005”).

³² Policy Highlights, *Transgender Policy*, DEP’T DEF., https://www.defense.gov/News/Special-Reports/0616_transgender-policy (last visited April 2, 2017).

³³ United States Secretary of Defense, *Memorandum for Secretaries of the Military Departments, Subject: Transgender Service Members*, DEP’T DEF. (July 28, 2015), https://www.defense.gov/Portals/1/features/2016/0616_policy/memo-transgender-service-directive-28-July-2015.pdf.

On June 30, 2016, the DOD adopted the Policy and formally ended the ban on open service of transgender Service members through Secretary Carter’s issuance of Directive-type Memorandum 16-005, “Military Service of Transgender Service Members.”³⁴ Pursuant to this memorandum, the Secretary stated that it is the policy of the DOD to allow service in the U.S. military to any individual who can meet the rigorous standards for service and readiness, and that “transgender individuals shall be allowed to serve in the military.”³⁵

The June 2016 memorandum also required the secretaries of all military departments to identify all procedures relating to or affecting the open service of transgender Service members, and to draft revisions to those procedures for submission to the Under Secretary of Defense for Personnel and Readiness. Pursuant to the memorandum, the Under Secretary would, no later than October 1, 2016, “implement a construct by which transgender Service members may transition gender while serving,” and would “issue further guidance on the provision of necessary medical care and treatment to transgender Service members.” Similarly, by November 1, 2016, each military department would “issue implementing guidance and a written force training and education plan” covering how each department would train its members on the new Policy.³⁶

The Policy’s announcement followed the release of a 91-page report by the RAND Corporation’s National Defense Research Institute, which described the results of its study aimed at (1) identifying health needs of transgender individuals, and costs associated with extending coverage to transition-related treatments for transgender Service members; (2) assessing potential readiness implications of allowing transgender Service members to serve openly; and (3) reviewing the experiences of foreign militaries that permit the open service of transgender individuals.³⁷

Following the RAND report and the June 2016 memorandum, on September 30, 2016 the DOD issued a 71-page document entitled “Transgender Service in the Military: An Implementation Handbook.” The handbook was “designed to assist our transgender Service members in their gender transition, help commanders with their duties and responsibilities, and help all Service members understand the new policies enabling the open service of transgender Service members.”³⁸ Like the RAND report, the handbook is the comprehensive result of months of work conducted by the DOD. The handbook specifically addresses issues that may arise for transgender Service members, their commanders, and cisgender troops that will interact with transgender Service members. With respect to transgender Service members, the handbook sets out a road map for transitioning while on active duty, elaborating on issues such as steps to

³⁴ See DTM 16-005, *supra* note 31.

³⁵ *Id.* at 2.

³⁶ *Id.* at Attachment, Section 6(b).

³⁷ Agnes Gerebin Schaefer et al., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, RAND CORP. (2016), http://www.rand.org/pubs/research_reports/RR1530.html (hereinafter “RAND report”).

³⁸ United States Department of Defense, *Transgender Service in the Military: An Implementation Handbook*, DEP’T DEF. (Sept. 30, 2016), https://www.defense.gov/Portals/1/features/2016/0616_policy/DoDTGHandbook_093016.pdf?ver=2016-09-30-160933-837.

take to seek approval for medical procedures related to gender transition, addressing when gender transition is complete, and how to change gender markers within the Service Personnel Data System.³⁹ Regarding commanders, the handbook addresses a host of topics, including commander responsibilities to transgender Service members, military personnel uniform and grooming standards, deployment, physical fitness, and privacy accommodations.⁴⁰ Finally, with respect to cisgender Service members serving alongside their transgender counterparts, the handbook provides information on understanding gender transition, addresses the harassment and bullying of transgender Service members, and offers tips on respecting personal information and Service member privacy.⁴¹ Pursuant to the June 2016 memorandum, training within the military departments – using the handbook and other tools – is ongoing and scheduled to complete by summer 2017.

The process by which the DOD adopted the Policy, and the policies and materials the DOD has developed to implement it, reflect a data-driven, methodical approach that draws upon numerous experts, stakeholders, and international examples. The DOD invested substantial resources and time to reach the conclusion – discussed further below – that the Policy would have no negative effect upon military readiness, while ensuring that “barriers unrelated to a person’s qualification to service” do not prevent the DOD “from recruiting or retaining the Soldier, Sailor, Airman, or Marine who can best accomplish the mission.”

C. THE DOD CONCLUDED THAT MEETING THE NEEDS OF TRANSGENDER SERVICE MEMBERS IS CONSISTENT WITH MILITARY READINESS.

As discussed above, in deciding to implement the Policy and developing materials in furtherance of the change, the DOD relied upon the extensive research conducted by RAND. Among its significant conclusions, the RAND report determined that (1) the DOD can and should meet the needs of transgender Service members, and (2) open service by transgender Service members is consistent with, not detrimental to, military readiness.

1. The Military Is Capable of Meeting the Needs of Transgender People.

The RAND report estimated that there are approximately 2,450 transgender personnel in active military components and 1,510 in reserve components.⁴² These estimates translate into an extremely small number of anticipated requests for transition-related medical care in the active components, with an approximate upper limit of 130 annual requests for transition-related surgeries and 140 requests for hormone therapies, out of a total force of over 1.3 million active Service members. Such approximate anticipated requests of the Military Health System would have little impact on, and represent an extremely small portion of, total DOD health care expenditures.⁴³

³⁹ *See id.* at 17-24, 42-47.

⁴⁰ *See id.* at 25-30.

⁴¹ *See id.* at 31-33.

⁴² *See* RAND report, *supra* note 37, at 11-32.

⁴³ *See id.* at 33-38. This is consistent with the findings of civilian employers that the cost of including coverage for transition-related health care in employer-provided health insurance is negligible. *See, e.g.,* Jody L. Herman, *Costs*

Moreover, the military’s medical care system can provide transgender health care and would likely benefit from adapting to do so. It already “regularly” provides hormone therapy and psychotherapy, and, with “continuing education,” it can also provide that care to transgender people.⁴⁴ The “surgical skills and competencies” required to treat combat injuries and gender dysphoria are quite similar.⁴⁵ As a result, military surgeons may already have capacity to perform gender affirming surgery. In any case, “performing these surgeries on transgender patients may help maintain a vitally important skill . . . to effectively treat combat injuries.”⁴⁶

2. Open Service by Transgender Service Members Is Consistent with, Not Detrimental to, Military Readiness.

Perhaps most significant, given the prior rationale supporting the ban on open service, the RAND report found that allowing transgender Service members to serve openly would have only minimal implications on military readiness. With respect to transgender Service members themselves, the report observed that even at the approximated upper limits of requests, less than 0.1 percent of total military Service members would seek transition-related care that could limit their ability to deploy. The report expressly noted that, in prior legal challenges to the ban on open service by transgender Service members, the DOD had “expressed concern that the medical needs of these Service members would affect military readiness and deployability.”⁴⁷ To address these concerns, the report analyzed gender dysphoria in the same manner as the DOD analyzes other “significant medical treatment[s]” required by personnel, i.e., as requiring periods of “medical leave” or “medical disability.”⁴⁸ The report considered the various stages of treatment required for personnel transitioning gender. Using the same method by which the DOD analyzed other significant medical treatments needed by personnel, the report found that the medical needs of those transitioning gender would have a negligible effect upon “available deployable labor-years” in the DOD’s active and reserve populations.⁴⁹

Furthermore, drawing upon the experience of foreign militaries, data from the general civilian population, and the prior integration experiences of female and gay/lesbian Service members, the report found only a minimal impact on unit cohesion would result from allowing transgender Service members to serve openly.⁵⁰ The report noted that 18 other countries—including Canada, Australia, Israel, the United Kingdom, and numerous other European allies—

and Benefits of Providing Transition-Related Health Care Coverage in Employee Health Benefits Plans, WILLIAMS INST. (Sept. 9, 2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Cost-Benefit-of-Trans-Health-Benefits-Sept-2013.pdf>.

⁴⁴ RAND report, *supra note 37*, at 8.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 39.

⁴⁸ *Id.* at 42-43.

⁴⁹ *Id.* at 42.

⁵⁰ *See id.* at 39-48.

allow the open military service of transgender individuals, and the report found no evidence that this policy has had any effect on operational effectiveness, military readiness, or unit cohesion.⁵¹

D. PREVENTING TRANSGENDER PEOPLE FROM SERVING IN THE MILITARY RAISES CONSTITUTIONAL CONCERNS.

Preventing otherwise qualified people from serving in the armed forces because they are transgender raises concerns under the U.S. Constitution's Fifth Amendment. Military affairs are subject to the limitations of the Due Process Clause.⁵² Courts are increasingly acknowledging that the Fourteenth Amendment's Equal Protection Clause prohibits discrimination against transgender people as a form of prohibited sex discrimination.⁵³ By definition, transgender people are people whose gender identity or expression is different than the sex that they were assigned at birth. It is impossible to understand someone as transgender, or to discriminate against someone on that basis, without taking sex into account. Thus, discrimination against someone for being transgender or having transitioned is unavoidably discrimination because of sex.⁵⁴

Government actions that discriminate because of sex are generally subject to heightened scrutiny. The Supreme Court has held that sex-based discrimination must be based on an "exceedingly persuasive justification" to comply with the demands of the Equal Protection Clause.⁵⁵ Federal courts have increasingly subjected claims of discrimination against transgender people to heightened scrutiny, whether out of acknowledgment that they are fundamentally sex discrimination claims, or because classifications based on transgender status independently meet the criteria for heightened scrutiny.⁵⁶ Such classifications are unlawful unless grounded in an "exceedingly persuasive" justification that is "substantially related" to "important governmental objectives."⁵⁷ The last time the Supreme Court decided a Fifth Amendment sex discrimination claim against the military, the Court applied the heightened scrutiny test, even though it ultimately found the government had shown a sufficiently compelling reason to justify the sex-based classification.⁵⁸

⁵¹ See *id.* at 49-64. On this point, the report aggregated numerous research articles and policies from the various countries and also drew upon a report from the Hague Center for Security Studies.

⁵² *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981).

⁵³ See e.g., *Whitaker, v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 2017 WL 2331751 (7th Cir. May 30, 2017); *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011); *Evancho v. Pine-Richland Sch. Dist.*, 2017 WL 770619 (W.D. Pa. Feb. 27, 2017); *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio, Sept. 26, 2016); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015).

⁵⁴ *Glenn v. Brumby*, 663 F.3d at 1316-17.

⁵⁵ *United States v. Virginia*, 518 U.S. 515, 534 (1996).

⁵⁶ See, e.g., *Whitaker, v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 2017 WL 2331751 (7th Cir. May 30, 2017); *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011); *Evancho v. Pine-Richland Sch. Dist.*, 2017 WL 770619 (W.D. Pa. Feb. 27, 2017); *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015).

⁵⁷ *Virginia*, 518 U.S. at 533 (citations and internal quotation marks omitted).

⁵⁸ *Rostker*, 453 U.S. at 69-72, 79. The Supreme Court also applied heightened scrutiny to strike down sex-based classifications that required only female service members to prove their spouses depended upon them financially in

Even discrimination not subject to heightened scrutiny must be rationally related to a legitimate government objective.⁵⁹ Classifications rooted in “irrational prejudice” cannot survive even a more deferential rational basis review.⁶⁰ Exclusion of people from military service simply for being transgender could not survive any level of judicial review. The DOD itself concluded that service by transgender people “is consistent with military readiness.”⁶¹ After reasoned analysis by itself and competent third parties, the DOD concluded that allowing transgender people to serve openly would not negatively impact the armed services as a whole, be it in terms of finances, unit cohesion, or combat readiness.⁶² It also concluded that the medical procedures transgender people undergo to affirm their genders are compatible with military service.⁶³ These findings are based on studies of the U.S. Armed Forces themselves and are supported by the examples of numerous other countries that already allow transgender people to serve openly in the armed forces.⁶⁴ In the wake of these findings, a ban on transgender people serving could not have rational relation to any legitimate government interest, let alone withstand heightened scrutiny.

Finally, the Supreme Court gives considerable deference to Congress and military commanders’ judgments in the area of military affairs.⁶⁵ The DOD’s current Policy and the comprehensive process by which it concluded that open service by transgender individuals is consistent with military readiness is likely to be very persuasive to the Supreme Court if it ever faces a constitutional question on this issue.

E. THE POLICY COMPORTS WITH RECENT DEVELOPMENTS IN CIVIL ANTI-DISCRIMINATION LAW.

Finally, in addition to the history of discrimination and comprehensive review process underlying the Policy, the City Bar further notes that the Policy is in line with recent developments in civil anti-discrimination law concerning gender identity and expression. Specifically, the Policy is firmly in line with an increasing awareness among the courts that discrimination against transgender individuals is a form of sex discrimination, and is similarly illegal. Since a plurality of the Supreme Court in *Price Waterhouse v. Hopkins*⁶⁶ held that “sex” under Title VII of the Civil Rights Act of 1967 encompassed discrimination based on stereotypes about sex, courts have repeatedly acknowledged that such stereotypes are also the basis for

order to receive certain service-connected benefits for married couples. *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973).

⁵⁹ *Romer v. Evans*, 517 U.S. 620, 632 (1996).

⁶⁰ *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-50 (1985).

⁶¹ DTM 16-005, *supra* note 31.

⁶² *See* Section B, *supra*.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See Rostker*, 453 U.S. at 66-67.

⁶⁶ *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (plurality opinion).

discrimination against transgender individuals, and that discrimination based on gender identity is in and of itself a form of sex discrimination.

Title VII does not apply to uniformed military personnel, although it does apply to civilian employees of the military departments.⁶⁷ However, courts routinely find Title VII cases helpful in analyzing definitions of sex discrimination under other laws, including constitutional cases brought under the Equal Protection Clause of the Fourteenth Amendment.⁶⁸

Relying on *Price Waterhouse*, the Ninth Circuit in *Schwenk v. Hartford* was the first to recognize that discrimination on the basis of gender identity constitutes sex discrimination. Recognizing that “[t]he initial judicial approach taken in [prior case law] has been overruled by the logic and language of *Price Waterhouse*,”⁶⁹ and applying that binding precedent, the court found that “under *Price Waterhouse*, ‘sex’ under Title VII encompasses both sex—that is, the biological differences between men and women—and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.”⁷⁰

Following *Schwenk*, other courts have overwhelmingly adopted the same reasoning to protect transgender plaintiffs on the basis of sex discrimination.⁷¹ The Sixth Circuit held in *Smith v. City of Salem* that “[t]he Supreme Court made clear that in the context of Title VII, discrimination because of ‘sex’ includes gender discrimination.”⁷² The court went on to explain that the legal analysis taken by courts coming to a contrary conclusion “ha[d] been eviscerated by *Price Waterhouse*,”⁷³ and that this logic also applied to the Equal Protection Clause.⁷⁴ The United States District Court for the District of Columbia held that a transgender plaintiff who was denied a job at the Library of Congress had proven that she was discriminated against, both based on sex stereotypes⁷⁵ and directly on the basis of sex.⁷⁶ “Even if the decisions that define

⁶⁷ 42 U.S.C. § 2000e-16.

⁶⁸ See, e.g., *Glenn v. Brumby*, 663 F.3d 1312.

⁶⁹ *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (Gender Motivated Violence Act).

⁷⁰ *Id.* at 1202.

⁷¹ See, e.g., *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 2017 WL 2331751 (Equal Protection Clause and Title IX); *Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed. Appx. 883 (11th Cir. Jan. 14, 2016); *Glenn*, 663 F.3d at 1320 (Equal Protection Clause); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (Equal Credit Opportunity Act); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (Title VII and Equal Protection Clause); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (Title VII); *Evancho v. Pine-Richland Sch. Dist.*, 2017 WL 770619 (Equal Protection Clause and Title IX); *Roberts v. Clark County Sch. Dist.*, 2016 WL 8543046 (D. Nev. Oct. 4, 2016) (Title VII); *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850 (Equal Protection Clause and Title IX); *Adkins v. City of New York*, 143 F. Supp. 3d at 139 (Equal Protection Clause); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008) (Title VII).

⁷² 378 F.3d at 572.

⁷³ *Id.* at 573.

⁷⁴ *Id.* at 576-78. See also *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (transgender plaintiff stated claim of sex discrimination).

⁷⁵ *Schroer*, 577 F. Supp. 2d at 305-06 (“Ultimately, I do not think that it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine

the word ‘sex’ in Title VII as referring only to anatomical or chromosomal sex are still good law—after that approach ‘has been eviscerated by *Price Waterhouse, Smith*, 378 F.3d at 573—the Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination ‘because of . . . sex.’”⁷⁷ Following *Schwenk, Smith*, and *Schroer*, the First⁷⁸ and Eleventh⁷⁹ Circuits adopted this logic to hold that transgender plaintiffs were entitled to protection under laws outlawing sex discrimination, as did the Equal Opportunity Employment Commission.⁸⁰

Though not all circuits have adopted this point of view, that is due to their reliance on outdated case law rather than a valid difference of opinion. “The contrary Seventh and Tenth Circuit decisions provide no cogent analysis of Title VII’s language or Supreme Court caselaw. They rely heavily on *Ulane v. Eastern Airlines*,⁸¹ a case that predates *Price Waterhouse* and which the Ninth Circuit recognized in *Schwenk* retains questionable precedential value.⁸² Indeed, rather than leaving transgender plaintiffs unprotected, “the decisional law has developed further, and has done so rather swiftly.”⁸³ The Seventh Circuit recently issued a preliminary

man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual. . . . While I would therefore conclude that Schroer is entitled to judgment based on a *Price Waterhouse*-type claim for sex stereotyping, I also conclude that she is entitled to judgment based on the language of the statute itself.”)

⁷⁶ *Id.* at 306-308.

⁷⁷ *Id.* at 308.

⁷⁸ *Rosa*, 214 F.3d at 215-16 (reinstating claim by transgender plaintiff against defendant bank under Equal Credit Opportunity Act).

⁷⁹ *Glenn*, 663 F.3d at 1316-18 (collecting cases and holding that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”)

⁸⁰ *Macy v. Holder*, No. 0120120821, 2012 EEOPUB LEXIS 1181, 2012 WL 1435995, at *19 (E.E.O.C. Apr. 20, 2012) (“When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment ‘related to the sex of the victim.’ This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person.”) (internal citation omitted). See also *Lusardi v. McHugh*, 2015 EEOPUB LEXIS 896, at *20-21 (E.E.O.C. Apr. 1, 2015) (“An agency may not condition access to facilities—or to other terms, conditions, or privileges of employment—on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual’s gender identity.”); *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 386 (2d Cir. 2015) (noting shift in EEOC policy and reinstating Title VII claim of transgender plaintiff).

⁸¹ 742 F.2d 1081 (7th Cir. 1984).

⁸² See *Roberts v. Clark Cnty Sch. Dist.*, 2016 U.S. Dist. LEXIS 138329 (D. Nev. Oct. 4, 2016) (transgender plaintiff stated claim for sex discrimination under Title VII and Equal Credit Opportunity Act).

⁸³ *Evancho*, 2017 U.S. Dist. LEXIS at *33 n.33 (applying heightened scrutiny to sex discrimination claim by transgender high school students denied equal access to facilities, and granting preliminary injunction under the Equal Protection Clause).

injunction decision that further indicates that *Ulane* has no precedential value after *Price Waterhouse*.⁸⁴

The Policy is well in line with the rapid, widespread adoption of case law finding that transgender plaintiffs have the right to be free from discrimination on the basis of their gender identity. Such discrimination is indisputably sex discrimination, based on the plain language of numerous laws and on the sex stereotyping theory of *Price Waterhouse*. The Policy, therefore, brings the DOD into the modern era of federal civil anti-discrimination law.

CONCLUSION

The U.S. Military's Policy allowing the open service of transgender Service members is legally, financially, and ethically sound. Transgender Service members are legally and morally entitled to the same rights as other Service members, and the DOD, RAND, and comparisons to foreign military services have shown that recognizing those rights will have no serious impact on the U.S. Military, its finances, its readiness, or on unit cohesion. The prior ban on open service was morally and legally wrong. It cannot withstand scrutiny. Rather, the DOD should continue the integration of transgender Service members to make the Military, and the country, stronger and more American.

Lesbian, Gay, Bisexual & Transgender Rights Committee
Anna M. Pohl, Chair

Military Affairs & Justice Committee
Michael P. Richter, Chair

July 2017

⁸⁴ *Whitaker, v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 2017 WL 2331751 (7th Cir. May 30, 2017) (transgender student entitled to preliminary injunction because he demonstrated a likelihood of succeeding on his sex discrimination claims under Title IX and the Equal Protection Clause).