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UNFINISHED BUSINESS OF REPEALING “DON’T ASK, DON’T TELL”: THE MILITARY’S UNCONSTITUTIONAL BAN ON TRANSGENDER INDIVIDUALS

Kayla Quam*

I. INTRODUCTION

To mark the one-year anniversary of the repeal of “Don’t Ask, Don’t Tell” (“DADT”),¹ President Barack Obama tweeted, “All Americans can now serve their country without hiding who they are.”² While the repeal of DADT was a major victory for lesbian, gay, and bisexual (“LGB”) service members, the repeal did not apply to transgender individuals.³ In order to join the military, individuals need to meet the physical and psychological standards listed in the Department of Defense’s Medical Standards for Appointment, Enlistment, or Induction in the Military Services (“DoDI 6130.03”).⁴ If an individual cannot meet the physical and psychological standards listed in DoDI 6130.03, he or she is barred from entering into military service.⁵ As a result, if a transgender individual undergoes sex

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¹ Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

² Barack Obama, TWITTER (Sept. 20, 2012, 6:27 PM), <https://twitter.com/BarackObama/status/248941554599854081>, archived at <http://perma.cc/NTE4-GDU7>.

³ DADT was codified at 10 U.S.C. § 654 (2006) (repealed 2010). Subsection (f)(1) defined “homosexual” as LGB individuals, without mention of “transgender.” *Id.* The repeal of DADT, then, was silent as to transgender individuals’ rights to serve. *See id.*

Transgender individuals are those who feel a disconnect between their gender identity and their sex assigned at birth. Stephanie Markowitz, *Change of Sex Designation on Transsexuals’ Birth Certificates: Public Policy and Equal Protection*, 14 CARDOZO J.L. & GENDER 705, 709 (2008). The terms “gender” and “sex” refer to two distinct concepts. The term “sex” refers to biological descriptors, such as genitalia or reproductive organs. Whitney E. Smith, *In the Footsteps of Johnson v. California: Why Classification and Segregation of Transgender Inmates Warrants Heightened Scrutiny*, 15 J. GENDER RACE & JUST. 689, 692–93 (2012). In contrast, the term “gender” refers to “society’s social categorization of maleness or femaleness through traits, social roles, and appearance, regardless of actual genitalia.” *Id.* at 693. Gender identity, then, is defined as an “internal sense of one’s own gender.” Barb J. Burdge, *A Phenomenology of Transgenderism as a Valued Life Experience Among Transgender Adults in the Midwestern United States* 4 (July 2013) (unpublished Ph.D. dissertation, Indiana University), available at https://scholarworks.iupui.edu/bitstream/handle/1805/4026/Dissertation_Burdge_FINAL.pdf?sequence=1, archived at <http://perma.cc/3XYV-MND7>.

⁴ Department of Defense Instruction No. 6130.03 (Sept. 13, 2011) [hereinafter DoDI 6130.03], available at <http://www.dtic.mil/whs/directives/corres/pdf/613003p.pdf>, archived at <http://perma.cc/T2JC-8YD5>.

⁵ *See* Matthew F. Kerrigan, *Transgender Discrimination in the Military: The New Don’t Ask, Don’t Tell*, 18 PSYCHOL. PUB. POL’Y & L. 500, 506–07 (2012). While DoDI 6130.03

reassignment surgery (“SRS”) and/or hormone therapy to physically present as his or her gender identity, that individual is excluded from the military under the physical health provision of DoDI 6130.03 (the SRS and hormone therapy being the disqualifying factors). On the other hand, if one merely identifies himself or herself as a transgender individual, that individual is excluded from the military under the psychological provision of DoDI 6130.03 (the transgender identification being the disqualifying factor). For transgender individuals seeking to join the military, it is the proverbial Catch-22. While there are an estimated 15,450 transgender individuals serving in the military and an estimated 134,350 transgender veterans,⁶ had the military known these service members were transgender, they would have been prohibited from serving.

This Note argues that DoDI 6130.03’s blanket ban on transgender individuals is unconstitutional because it violates the Due Process Clause of the Fifth Amendment. Part II of this Note provides background information on DoDI 6130.03. Part III analyzes a circuit split to determine whether discrimination based on gender identity is discrimination based on sex. Part III concludes that discrimination against transgender individuals is inherently a form of sex discrimination and that intermediate scrutiny should apply in analyzing the constitutionality of DoDI 6130.03. Part IV, in applying intermediate scrutiny, considers three potential governmental interests for DoDI 6130.03: (1) unit cohesion, (2) maintaining physical health within the military, and (3) maintaining psychological health within the military. This Note concludes that while these governmental interests are important, DoDI 6130.03 is not substantially related to these interests, and, therefore, DoDI 6130.03 fails intermediate scrutiny.

II. THE MILITARY’S BAN ON TRANSGENDER SERVICE MEMBERS

The physical health provision of DoDI 6130.03 banning transgender individuals from enlisting provides that a “[h]istory of major abnormalities or defects of the genitalia[,] including but not limited to change of sex,” is a disqualifying condition to military entrance.⁷ The psychological health provision of DoDI 6130.03 banning transgender individuals from enlisting provides that a “current or history of psychosexual conditions, . . . including but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias,” is a disqualifying condition to military entrance.⁸ Therefore, the “prohibition against transgender service includes a physical component (‘change of sex’) and a

applies to all military branches, each individual branch of the military also has its own regulations that ban transgender individuals from serving. *Id.*

⁶ JOYCELYN ELDERS & ALAN M. STEINMAN, PALM CTR., REPORT OF THE TRANSGENDER MILITARY SERVICE COMMISSION 5 (2014), *available at* <http://www.palmcenter.org/files/Transgender%20Military%20Service%20Report.pdf>, *archived at* <http://perma.cc/KBQ8-TBTK>.

⁷ See DoDI 6130.03, *supra* note 4, §§ E4.14(f), E4.15(r) (stating standards for female and male genitalia, respectively).

⁸ *Id.* § E4.29(r).

psychological component ('transsexualism').⁹ The military conducts periodic physical examinations, so if a transgender individual transitions physically to the sex not assigned at birth *after* enlisting, such changes would not go unnoticed.¹⁰

Medical regulations generally allow for waivers of accession standards, or military entrance standards, such as DoDI 6130.03. These regulations "specify, however, that waivers will not be granted for conditions that would disqualify an individual for the possibility of retention."¹¹ Until recently, the relevant retention standard, the Department of Defense's Physical Disability Evaluation Instruction ("DoDI 1332.38") specifically listed "Sexual Gender and Identity Disorders" as a condition that rendered one ineligible for a physical disability evaluation, meaning the military conclusively presumed transgender individuals were unfit for service.¹² While DoDI 1332.38 was replaced in 2014 by the Department of Defense's Disability Evaluation System ("DoDI 1332.18"),¹³ even under this new regulation, "some conditions related to transgender identity are grounds for discharge, and because recruiters cannot waive a condition upon enlistment that would be disqualifying for retention, transgender individuals cannot obtain medical waivers for entrance into the military."¹⁴

To determine the constitutionality of DoDI 6130.03, this Note considers the Due Process Clause of the Fifth Amendment. The Due Process Clause requires that the federal government treat all persons who are similarly situated alike.¹⁵ The Due Process Clause has an implied equal protection requirement, similar to the Equal Protection Clause of the Fourteenth Amendment,¹⁶ in which the government must

⁹ GALE S. POLLOCK & SHANNON MINTER, PALM CTR., REPORT OF THE PLANNING COMMISSION ON TRANSGENDER MILITARY SERVICE 8 (2014), available at <http://www.palmcenter.org/files/Report%20of%20Planning%20Commission%20on%20Transgender%20Military%20Service.pdf>, archived at <http://perma.cc/Y33A-KQ9Y>.

¹⁰ Allison Ross, Note, *The Invisible Army: Why the Military Needs to Rescind Its Ban on Transgender Service Members*, 23 S. CAL. INTERDISC. L.J. 185, 191 (2014).

¹¹ POLLOCK & MINT, *supra* note 9, at 8.

¹² See Department of Defense Instruction No. 1332.38, § E5.1.2.9.7 (Nov. 14, 1996), available at <http://www.goodasyou.org/DODInstruction.pdf>, archived at <http://perma.cc/HPR5-Z4TW>; see also ELDERS & STEINMAN, *supra* note 6, at 8–9 (stating that DoDI 1332.38 implies that "sexual gender and identity disorders" interfere with assignment or performance of duty").

¹³ See Department of Defense Instruction No. 1332.18 (Aug. 5, 2014), available at <http://www.dtic.mil/whs/directives/corres/pdf/133218p.pdf>, archived at <http://perma.cc/A5UV-H4WC>.

¹⁴ POLLOCK & MINTER, *supra* note 9, at 8.

¹⁵ U.S. CONST. amend. V; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

¹⁶ See *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (per curiam) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("But the concepts of equal protection and due process, both stemming from our

avoid arbitrary classifications that are based on a “bare congressional desire to harm a politically unpopular group.”¹⁷ Because the analysis is the same for the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment,¹⁸ this Note will analyze case law under both clauses.

In order for DoDI 6130.03 to meet constitutional muster, the governmental interest in passing the law or policy must be justified by a sufficient purpose.¹⁹ What constitutes a sufficient purpose depends on the type of discrimination and the class of persons toward whom the discrimination is directed.²⁰ The Supreme Court has held that sex discrimination is subject to intermediate scrutiny.²¹ The question remains whether discrimination based on gender identity is a form of discrimination based on sex.

III. THE CIRCUIT SPLIT ON DISCRIMINATION BASED ON GENDER IDENTITY

The Tenth and Eleventh Circuits have reached opposite conclusions on the issue of whether discrimination based on gender identity is a form of sex discrimination. The Tenth Circuit held that discrimination based on gender identity is not a form of sex discrimination because of the binary nature of sex (male or female genitalia), but the Eleventh Circuit held that discrimination based on gender identity is a form of sex discrimination. For the reasons explained below, this Note finds the Eleventh Circuit’s analysis more persuasive.

A. *The Tenth Circuit: Discrimination Based on Gender Identity Is Not a Form of Sex Discrimination*

In *Etsitty v. Utah Transit Authority*,²² the Tenth Circuit held that discrimination based on gender identity does not constitute sex discrimination.²³ In *Etsitty*, the plaintiff, Krystal Etsitty, was assigned male at birth, but identified as a woman.²⁴ Outside of work, Etsitty lived as a woman, and she²⁵ eventually began taking hormones to prepare for SRS.²⁶ Four years after starting hormone therapy, Etsitty

American ideal of fairness, are not mutually exclusive.”).

¹⁷ U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

¹⁸ See *supra* note 16 and accompanying text.

¹⁹ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 685 (4th ed. 2011).

²⁰ *Id.* at 686–87.

²¹ See *Craig v. Boren*, 429 U.S. 190, 197 (1976). For the law to be upheld under intermediate scrutiny, the governmental interest for the law must be important and substantially related to the law. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985).

²² 502 F.3d 1215 (10th Cir. 2007).

²³ *Id.* at 1221.

²⁴ See *id.* at 1218–20.

²⁵ This Note uses the gender pronoun in accordance with one’s gender identity.

²⁶ *Etsitty*, 502 F.3d at 1218.

was hired by Utah Transit Authority (“UTA”).²⁷ During her training at UTA, Etsitty presented herself as male, which included using the men’s restroom.²⁸ Soon after she was hired, Etsitty informed her supervisor that she was transgender and that she would soon be appearing as a female.²⁹ Soon thereafter, Etsitty was fired.³⁰ Etsitty filed suit against UTA for gender discrimination in violation of Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.³¹

Etsitty argued she was discriminated against based on sex because (1) she was a transsexual³² and (2) she failed to conform to expectations of stereotypical male behavior.³³ The Tenth Circuit rejected Etsitty’s first argument, holding that “discrimination against a transsexual because she is a transsexual is not ‘discrimination because of sex.’”³⁴ The court further stated, “In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual.”³⁵ In support of this binary concept of sex, the Tenth Circuit relied on *Ulane v. Eastern Airlines, Inc.*,³⁶ *Sommers v. Budget Marketing, Inc.*,³⁷ and *Holloway v. Arthur Andersen & Co.*³⁸ These three cases held that the definition of sex should be given its traditional interpretation based on which genitalia was assigned at birth.³⁹ Hence, Etsitty’s claim of Title VII protection because of her status as a transsexual was rejected.⁴⁰

²⁷ *Id.* at 1218–19.

²⁸ *Id.* at 1219.

²⁹ *Id.*

³⁰ *Id.*

³¹ This Note considers the Title VII claim in *Etsitty* because the Title VII analysis is similar to the equal protection analysis. *Id.* at 1227 (“In disparate-treatment discrimination suits, the elements of a plaintiff’s case are the same whether that case is brought under §§ 1981 or 1983 or Title VII.” (quoting *Maldonado v. City of Altus*, 433 F.3d 1294, 1307 (10th Cir. 2006) (internal quotation marks omitted), *overruled on other grounds by Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006))). The *Etsitty* court split the opinion into two parts: the Title VII claim and the equal protection claim. *Id.* at 1220, 1227. Most of the analysis occurred under the Title VII claim, but the court stated the equal protection claim failed for the same reasons discussed in the Title VII section. *Id.* at 1227–28.

³² The term transsexual is a “subset of persons who fall under the larger umbrella of transgender.” Adrien Fox, *The Military Hierarchy as a Means to Demystify Gender Non-Conformance and Promote Social Acceptance*, 7 CRIT 30, 32 (2014). Transsexual individuals generally present in a gender different from their gender at birth, or they desire to do so. *Id.*

³³ *Etsitty*, 502 F.3d at 1218.

³⁴ *Id.* at 1222.

³⁵ *Id.*

³⁶ 742 F.2d 1081 (7th Cir. 1984).

³⁷ 667 F.2d 748 (8th Cir. 1982) (per curiam).

³⁸ 566 F.2d 659 (9th Cir. 1977), *overruled by Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by Civil Rights Act of 1991*, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in Burrage v. United States*, 134 S. Ct. 881 (2014).

³⁹ *Etsitty*, 502 F.3d at 1221.

⁴⁰ *Id.* at 1227.

Etsitty then argued that even if transsexuals were not entitled to Title VII protection, she was entitled to protection as a biological male who was discriminated against for failure to conform to sex stereotypes—that is, her failure to act and appear according to expectations defined by gender.⁴¹ To support this argument, Etsitty cited the Supreme Court’s holding in *Price Waterhouse v. Hopkins*.⁴² In *Price Waterhouse*, Ann Hopkins, a female senior manager, was denied partnership in an accounting firm because she was considered “macho.”⁴³ One partner at the firm advised her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁴⁴ The Supreme Court noted Hopkins was not overlooked for the partnership because she was a female but because she was not appearing and behaving femininely enough.⁴⁵ In so noting, the Supreme Court held sex discrimination did not refer exclusively to discrimination based on biological sex but that sex discrimination could also encompass discrimination based on sex stereotypes.⁴⁶ Specifically, the Court stated, “[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group”⁴⁷

In response to Etsitty’s argument that her employment termination was sex discrimination under *Price Waterhouse*, the Tenth Circuit stated, “[We] need not decide whether discrimination based on an employee’s failure to conform to sex stereotypes always constitutes discrimination ‘because of sex’ [W]e assume, without deciding, that such a claim is available and that Etsitty has satisfied her prima facie burden.”⁴⁸ The court then looked to whether UTA could offer a legitimate, nondiscriminatory reason for Etsitty’s termination.⁴⁹ UTA stated the reason for Etsitty’s employment termination was UTA’s fear of liability, owing to Etsitty’s use of the female restroom.⁵⁰ Etsitty, however, argued that terminating her employment because she intended to use the women’s restroom is “essentially another way of stating that she was terminated for failing to conform to sex stereotypes.”⁵¹ Without much explanation, the Tenth Circuit rejected Etsitty’s argument: “However far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women’s restrooms.”⁵² Without specifying what would constitute sex-stereotype discrimination under *Price*

⁴¹ *Id.* at 1222–23.

⁴² 490 U.S. 228 (1989) (plurality opinion), *superseded by* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *Burrage v. United States*, 134 S. Ct. 881 (2014).

⁴³ *Id.* at 235.

⁴⁴ *Id.* (citations omitted).

⁴⁵ *Id.* at 250–51.

⁴⁶ *Id.* at 251.

⁴⁷ *Id.*

⁴⁸ *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

Waterhouse, the Tenth Circuit concluded UTA’s proffered reasons of concern over Etsitty’s restroom usage was not discriminatory on the basis of sex.⁵³

B. The Eleventh Circuit: Discrimination Based on Gender Identity Is a Form of Sex Discrimination

In *Glenn v. Brumby*,⁵⁴ by contrast, the Eleventh Circuit held discrimination based on gender identity, or failure to conform to sex stereotypes, constituted discrimination based on sex.⁵⁵ In that case, plaintiff Vandiver Elizabeth Glenn was assigned male at birth but in 2005, she began transitioning to a female under the supervision of health care providers and was planning on undergoing SRS.⁵⁶ During the relevant time period, Glenn was working for the Georgia General Assembly’s Office of Legislative Counsel.⁵⁷ In 2007, Glenn was fired after her boss, Sewell Brumby, learned Glenn would begin coming to work as a woman.⁵⁸ Thereafter, Glenn sued Brumby, alleging she was discriminated against because of her sex—including her gender identity and her failure to conform to sex stereotypes associated with the male sex—in violation of the Equal Protection Clause.⁵⁹

Agreeing with Glenn’s contention, the Eleventh Circuit held discrimination against someone on the basis of his or her failure to conform to sex stereotypes constitutes sex discrimination under the Equal Protection Clause.⁶⁰ In so holding, the Eleventh Circuit relied on *Price Waterhouse*. The *Glenn* court stated, “Prior to the Supreme Court’s decision in *Price Waterhouse*, several courts concluded that Title VII afforded no protection to transgender victims of sex discrimination,” and cited to *Holloway*, *Sommers*, and *Ulane*.⁶¹ The Eleventh Circuit, however, rejected this line of analysis, stating, “[F]ederal courts have recognized with near-total uniformity that ‘the approach in *Holloway*, *Sommers*, and *Ulane* . . . has been eviscerated’ by *Price Waterhouse*’s holding that ‘Title VII’s reference to “sex” encompasses . . . discrimination based on a failure to conform to stereotypical gender norms.’”⁶² In recognizing that sex discrimination encompasses failure to conform to sex stereotypes, the Eleventh Circuit noted, “[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”⁶³ Therefore, “discrimination against a transgender individual because

⁵³ *Id.*

⁵⁴ 663 F.3d 1312 (11th Cir. 2011).

⁵⁵ *Id.* at 1320.

⁵⁶ *Id.* at 1314.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 1316.

⁶¹ *Id.* at 1318 n.5.

⁶² *Id.* (quoting *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004)); see *infra* notes 73–74 and accompanying text.

⁶³ *Glenn*, 663 F.3d at 1316.

of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."⁶⁴

After holding the termination of Glenn's employment was a type of sex discrimination, the Eleventh Circuit applied intermediate scrutiny to determine if the termination was substantially related to important governmental interests.⁶⁵ The sole justification Brumby advanced for Glenn's termination was that other women might object to Glenn's use of the women's restroom, resulting in lawsuits.⁶⁶ The Eleventh Circuit rejected Brumby's advanced justification because there was insufficient evidence to show the termination was motivated by the purported concern.⁶⁷ First, the workplace had single-occupancy restrooms, which mitigated concern that women would feel uncomfortable and protest such restroom usage.⁶⁸ Second, Brumby testified that he thought the possibility of a lawsuit by a coworker was unlikely but that it was a "conceivable" explanation for the firing.⁶⁹ As a hypothetical justification does not survive intermediate scrutiny, the Eleventh Circuit declared, "Brumby has advanced no other reason that could qualify as a governmental purpose, much less an 'important' governmental purpose"⁷⁰ Therefore, the Eleventh Circuit concluded the termination of Glenn's employment failed to satisfy intermediate scrutiny.⁷¹

C. *Discrimination Based on Gender Identity Is a Form of Sex Discrimination*

The Eleventh Circuit's analysis is more persuasive than the Tenth Circuit's because under *Price Waterhouse*, the concept of "sex" encompasses more than one's genitalia. If one scrutinizes the underlying rationale for discrimination against transgender individuals, it becomes apparent that the discrimination is based on either one's sex or one's failure to conform to traditional sex stereotypes. Either way, post-*Price Waterhouse*, intermediate scrutiny should apply to discrimination based on gender identity.

First, in *Etsitty*, the Tenth Circuit cited *Holloway*, *Sommers*, and *Ulane*, all of which were decided by 1984.⁷² The Tenth Circuit failed to recognize that *Price Waterhouse*, decided in 1989, implicitly overruled these three cases. As the Eleventh Circuit explained, the approaches in *Holloway*, *Sommers*, and *Ulane* have been "eviscerated" by *Price Waterhouse*'s holding that sex discrimination encompasses

⁶⁴ *Id.* at 1317.

⁶⁵ *Id.* at 1320.

⁶⁶ *Id.* at 1321.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* The Eleventh Circuit affirmed the judgment of the district court granting summary judgment in favor of Glenn on her sex discrimination claim. *Id.*

⁷² *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007); see *supra* notes 36–38 (*Holloway* was decided in 1977, *Sommers* in 1982, and *Ulane* in 1984).

discrimination based on one's failure to conform to sex stereotypes.⁷³ *Price Waterhouse* and its progeny recognize that "sex" encompasses more than one's genitalia.⁷⁴ Furthermore, the *Etsitty* court looked solely at the statutory language of Title VII's use of "sex" and concluded that the definition of sex should be given its traditional meaning—male if born with male genitalia, female if born with female genitalia.⁷⁵ Yet the Supreme Court has explicitly stated sex discrimination includes discrimination based on sex stereotypes.⁷⁶ This expands the traditional statutory definition of "sex." Anne Hopkins was not denied partnership because she was female; she was denied partnership because she was not acting feminine enough.⁷⁷ The *Etsitty* court ignored this expanded definition of sex when it looked exclusively to the traditional definition of sex.

Although *Price Waterhouse* was based on an interpretation of Title VII, there is no reason to think the concept of sex discrimination is narrower under the Supreme Court's interpretations of the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment. On the contrary, the Court has repeatedly held the Constitution's prohibitions against sex discrimination prevent the government from relying on sex stereotypes. In *United States v. Virginia*,⁷⁸ for example, the Court observed that in order to justify discrimination based on sex, the government "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."⁷⁹

Second, if one scrutinizes the rationale underlying DoDI 6130.03, it becomes apparent that such discrimination is either sex discrimination based on one's genitals or discrimination based on one's failure to conform to sex stereotypes. Consider a

⁷³ *Glenn*, 663 F.3d at 1318 n.5 (quoting *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004)).

⁷⁴ See, e.g., Laura Anne Taylor, Note, *A Win for Transgender Employees: Chevron Deference for the EEOC's Decision in Macy v. Holder*, 2013 UTAH L. REV. 1165, 1176 ("Despite the negative treatment of transgender sex discrimination claims by the *Ulane* court, the general trend is toward the recognition of some Title VII protection for transgender plaintiffs."). Similar to the Eleventh Circuit and *Price Waterhouse*, other circuits and courts have recognized that sex discrimination encompasses discrimination based on one's failure to conform to traditional sex stereotypes. See, e.g., *Smith*, 378 F.3d at 575; *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 214–15 (1st Cir. 2000); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 667–68 (S.D. Tex. 2008); *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *5–6 (E.E.O.C. Apr. 20, 2012).

⁷⁵ *Etsitty*, 502 F.3d at 1222.

⁷⁶ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (plurality opinion), *superseded by* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *Burrage v. United States*, 134 S. Ct. 881 (2014).

⁷⁷ *Id.* at 235 ("[I]n order to improve her chances for partnership . . . Hopkins [was advised to] 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'" (citations omitted)).

⁷⁸ 518 U.S. 515 (1996).

⁷⁹ *Id.* at 533.

female-to-male individual⁸⁰ who undergoes SRS: the only barrier to his entry in the military is the sex assigned at birth (or, depending on how you look at it, the genitalia post-surgery). After *Price Waterhouse*, courts are “recognizing that if it is wrong to discriminate against a person because she is [a] woman, it is also wrong to discriminate against a person for becoming a woman.”⁸¹ As one court explained, this principle is clear when sex is analogized to religion:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only “converts.” That would be a clear case of discrimination “because of religion.” No court would take seriously the notion that “converts” are not covered by the statute. Discrimination “because of religion” easily encompasses discrimination because of a *change* of religion. But in cases where the plaintiff has changed her sex, . . . courts have traditionally carved such persons out of the statute by concluding that “transsexuality” is unprotected⁸²

Similarly, consider a transgender individual who foregoes SRS but instead dresses as his or her gender identity. The ban on military enlistment is based solely on the individual’s failure to conform to sex stereotypes. If an employer cannot discriminate against a woman for failing to appear femininely, an employer likewise cannot discriminate against a male for appearing femininely:

After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.⁸³

As the Eleventh Circuit court noted in *Glenn*, a person is defined as transgender precisely because his or her behavior transgresses gender norms.⁸⁴ Indeed, one definition of transgenderism is “behavior [that] does not conform to that typically associated with the sex to which they were assigned at birth.”⁸⁵ But, as laid out in

⁸⁰ A transgender individual who was born with female genitalia but who identifies as a male is referred to as a female-to-male. ELDERS & STEINMAN, *supra* note 6, at 5. A transgender individual who was born with male genitalia but who identifies as a female is referred to as a male-to-female. *Id.*

⁸¹ Smith, *supra* note 3, at 719.

⁸² Schroer v. Billington, 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008).

⁸³ Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004).

⁸⁴ Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011).

⁸⁵ Ross, *supra* note 10, at 188 (citations omitted).

Price Waterhouse, an employer cannot discriminate against an employee based on the employee's failure to adhere to sex stereotypes.⁸⁶

Transgender individuals are either excluded from the military under DoDI 6130.03 because of the genitalia they are assigned at birth (discrimination based on sex) or because they are acting against the typical gender norms applied to either or both sexes (discrimination based on sex stereotypes). In either case, they are discriminated against based on sex, and therefore, intermediate scrutiny applies.⁸⁷

IV. THE MILITARY'S BAN VIOLATES THE DUE PROCESS CLAUSE

This Part applies intermediate scrutiny to DoDI 6130.03. It analyzes three possible governmental interests for DoDI 6130.03: (1) unit cohesion, (2) physical health, and (3) psychological health.⁸⁸ This Part concludes that while unit cohesion and maintaining physical and psychological health within the military are important governmental interests, DoDI 6130.03 is not substantially related to them. Therefore, DoDI 6130.03 fails intermediate scrutiny.

A. First Governmental Interest: Unit Cohesion

The first potential government justification for the exclusion of transgender individuals is ensuring unit cohesion.⁸⁹ Unit cohesion is defined as “the bonds of trust among individual service members.”⁹⁰ The fear is that inclusion of transgender individuals would (1) disrupt morale and good order⁹¹ and (2) make nontransgender personnel uncomfortable due to the nonprivate environment of the military.⁹² While unit cohesion is an important governmental interest, for the reasons listed below, DoDI 6130.03 is not substantially related to it.

⁸⁶ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion), *superseded by* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *Burrage v. United States*, 134 S. Ct. 881 (2014).

⁸⁷ *See supra* notes 21, 74–79 and accompanying text.

⁸⁸ ELDERS & STEINMAN, *supra* note 6, at 6 (“US military policies that ban transgender service members do not include rationales that explain why the armed forces prohibit them from serving, although the policies are embedded in comprehensive medical and other regulations that are designed, broadly speaking, to preserve health and good order.”).

⁸⁹ Ross, *supra* note 10, at 203.

⁹⁰ *See, e.g.*, 10 U.S.C. § 654(a)(7) (2006) (repealed 2010) (“One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members . . .”).

⁹¹ *See, e.g., id.* § 654(a)(14) (“The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces’ high standards of morale, good order and discipline . . .”).

⁹² *See, e.g., id.* § 654(a)(12) (“The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are . . . characterized by forced intimacy with little or no privacy.”).

First, other countries have included transgender individuals in their militaries, so examining the effect of such inclusion can provide insight into the effect it would have in the United States. Openly transgender service members are accepted by eighteen countries: Australia, Austria, Belgium, Bolivia, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Israel, Netherlands, New Zealand, Norway, Spain, Sweden, and United Kingdom.⁹³ For these countries, there have been few reports on the impact of the inclusion of transgender personnel, and none have reversed their inclusion policy.⁹⁴ The United States should adopt an inclusive policy that allows for openly transgender service members, just as eighteen other countries have. As “the U.S. military has previously compared itself to foreign countries in order to justify its bans on [LGB individuals] in the military, it seems equally appropriate that the United States compare itself to foreign countries as a way of justifying the removal of the ban on transgender service members.”⁹⁵

Additionally, research focusing on the effects of the military’s inclusion of openly LGB individuals provides insight into the likely impact of the military’s inclusion of transgender individuals, as the previous justifications for exclusion of openly LGB individuals were the same as the current justifications for the exclusion of transgender individuals.⁹⁶ While the effects of the repeal of DADT are inchoate, several studies suggest allowing openly LGB members in the military has not had any negative impact on unit cohesion.⁹⁷ One study conducted by the Palm Center⁹⁸ surveyed over 200 active-duty troops, before and after repeal of DADT, regarding the effect on unit cohesion, and also analyzed data from two other surveys regarding the same.⁹⁹ The Palm Center concluded the repeal of DADT had no overall negative

⁹³ M. Joycelyn Elders et al., *Medical Aspects of Transgender Military Service*, 41 *ARMED FORCES & SOC’Y* 199, 200 & 212 n.1 (2015); see Ross, *supra* note 10, at 206. Several of these countries are part of the U.S. Army NATO Brigade, suggesting U.S. service members have already been serving alongside transgender service members in NATO missions. *U.S. Army NATO Brigade*, U.S. ARMY EUR., <http://www.usanato.army.mil/>, archived at <http://perma.cc/GT36-3BQQ> (last visited Nov. 15, 2014).

⁹⁴ See Ross, *supra* note 10, at 207.

⁹⁵ *Id.* at 208 (emphasis omitted) (citation omitted).

⁹⁶ See *supra* notes 90–92 and accompanying text.

⁹⁷ See Ross, *supra* note 10, at 204.

⁹⁸ The Palm Center is “a research initiative of the Department of Political Science at San Francisco State University [and] is committed to sponsoring state-of-the-art scholarship to enhance the quality of public dialogue about critical and controversial issues of the day.” Joycelyn Elders & Alan M. Steinman, *Report of the Transgender Military Commission*, PALM CENTER (Mar. 13, 2014), http://www.palmcenter.org/publications/dadt/former_surgeon_general_faults_militarys_transgender_ban, archived at <http://perma.cc/P4UQ-K9RA>. Congress, in repealing DADT, relied on reports by the Palm Center. See Nathaniel Frank, *Op-ed: How Facts and Figures Led to the End of DADT*, *ADVOCATE.COM* (Feb. 19, 2013, 5:25 AM), <http://www.advocate.com/commentary/2013/02/19/op-ed-how-facts-and-figures-led-end-dadt>, archived at <http://perma.cc/QHH2-WE2M>.

⁹⁹ Nathaniel Frank, *The Last Word on “Don’t Ask, Don’t Tell”: A New Study Shows Repealing It Helped the Military*, *SLATE MAG.* (Sept. 20, 2012, 7:45 AM), http://www.slate.com/articles/news_and_politics/politics/2012/09/study_of_don_t_ask_don

impact on unit cohesion—in fact, greater openness and honesty resulting from the repeal promoted increased understanding, respect, and acceptance.¹⁰⁰ Several other studies buttress the claim that allowing openly LGB individuals into the military had no deleterious effect on unit cohesion,¹⁰¹ and by extension, these same findings should be applied to transgender individuals.¹⁰² Further, allowing transgender individuals into the military may even strengthen unit cohesion because openness, candor, and transparency within the military strengthen the bonds of trust. Indeed, one study focused on the effect on unit cohesion in the Israeli military, which has a non-exclusionary policy.¹⁰³ This study not only concluded that unit cohesion was not negatively affected, it also found that “[c]ommunication of personal information is associated with and facilitated by the experience of high levels of emotions and intimacy.”¹⁰⁴

Second, because some transgender individuals present as their gender identity, it is possible military personnel would be unaware a transgender personnel was born as a different sex than being presented, making the concern for unit cohesion irrelevant. To illustrate, the article, *Doing Gender, Doing Heteronormativity*, analyzed a study in which fifty-four female-to-male individuals socially transitioned in the workplace between 2003 and 2007.¹⁰⁵ In that study, fourteen coworkers were interviewed and asked to discuss how they felt about the transition.¹⁰⁶ After compiling and analyzing the coworkers’ responses, the article found transgender individuals’ bodies mattered little if they present as their gender identity—“their appearance is taken to be proof of their biological sex.”¹⁰⁷ While some transgender individuals do not desire to present as their gender identity, the military should not automatically assume a transgender individual will not successfully do so. This is particularly poignant when one considers the physical, emotional, and financial

[_t_tell_repeal_helped_the_military_single.html](http://perma.cc/2RMZ-S88U), archived at <http://perma.cc/2RMZ-S88U>.

¹⁰⁰ AARON BELKIN ET AL., PALM CTR., ONE YEAR OUT: AN ASSESSMENT OF DADT REPEAL’S IMPACT ON MILITARY READINESS 4 (2012), available at http://www.palmcenter.org/files/One%20Year%20Out_0.pdf, archived at <http://perma.cc/L9TY-52AY>.

¹⁰¹ See generally Nathaniel Frank, *What Does the Empirical Research Say About the Impact of Openly Gay Service on the Military?*, PALM CENTER (Mar. 3, 2010), http://www.palmcenter.org/publications/dadt/what_does_empirical_research_say_about_impact_openly_gay_service_military, archived at <http://perma.cc/GG77-T8TP> (“The U.S. military’s own researchers have consistently found that openly gay service does not undermine cohesion [N]o research has ever shown that open homosexuality impairs military readiness. This fact has been acknowledged by the Government Accountability Office and by the Pentagon”).

¹⁰² See *supra* notes 90–92 and accompanying text.

¹⁰³ Danny Kaplan & Amir Rosenmann, *Unit Social Cohesion in the Israeli Military as a Case Study of “Don’t Ask, Don’t Tell,”* 33 POL. PSYCHOL. 419, 424 (2012).

¹⁰⁴ *Id.* at 430 (citations omitted).

¹⁰⁵ Kristen Schilt & Laurel Westbrook, *Doing Gender, Doing Heteronormativity: “Gender Normals,” Transgender People, and the Social Maintenance of Heterosexuality*, 23 GENDER & SOC’Y 440, 444 (2009).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 443.

sacrifices that transgender individuals often endure to have one's physical appearance conform with one's gender identity.¹⁰⁸

B. Second Governmental Interest: Maintaining Physical Health in the Military

While former Defense Secretary Chuck Hagel said he was “open” to reviewing the military prohibition on transgender service members, he stated the issue was “a bit more complicated because it has a medical component to it.”¹⁰⁹ Similarly, Eileen Lainez, a spokeswoman for the Department of Defense, has said the military's regulations do not allow transgender individuals to serve in the military “based upon medical standards for military service.”¹¹⁰ These comments highlight another possible justification for DoDI 6130.03—that SRS and hormone therapy would compromise the service member's physical health, thereby affecting military readiness.¹¹¹ DoDI 6130.03, however, is not substantially related to this interest.

As a preliminary matter, it is important to recognize that the Transgender Military Service Commission, co-chaired by former United States Surgeon General, Dr. Joycelyn Elders, and sponsored by the Palm Center, released a report in March 2014 (the “March 2014 Palm Center Report”)¹¹² that examined all medical and psychological aspects of transgender military service to determine if the blanket ban was based on sound medical reasoning.¹¹³ The March 2014 Palm Center Report concluded that there is no compelling medical rationale for the blanket ban and that the ban is inconsistent with how the military regulates other medical and psychological conditions.¹¹⁴

¹⁰⁸ See Markowitz, *supra* note 3, at 709.

¹⁰⁹ Helene Cooper, *Hagel ‘Open’ to Reviewing Military’s Ban on Transgender People*, N.Y. TIMES, May 11, 2014, http://www.nytimes.com/2014/05/12/us/hagel-open-to-review-of-military-policy-on-transgender-people.html?_r=0, archived at <http://perma.cc/XMH7-W749>; Katy Steinmetz, *America’s Transition*, TIME, June 9, 2014, at 38, 46.

¹¹⁰ Adam Klasfeld, *Transgenderism More Likely in Military, Study Finds*, COURTHOUSE NEWS SERVICE (July 24, 2012, 5:11 AM), <http://www.courthousenews.com/2012/07/24/48664.htm>, archived at <http://perma.cc/JN88-G2VU>.

¹¹¹ See ELDERS & STEINMAN, *supra* note 6, at 6–7.

¹¹² ELDERS & STEINMAN, *supra* note 6, at 2. A second Palm Center Report on transgender military service released in August 2014 provides a roadmap for the “inclusion of openly-serving transgender personnel in the US military.” POLLOCK & MINTER, *supra* note 9, at 2.

¹¹³ ELDERS & STEINMAN, *supra* note 6, at 4.

¹¹⁴ *Id.* at 3–5.

1. *Sex Reassignment Surgery*

One possible justification for the physical health provision of DoDI 6130.03 is that SRS causes medical complications, and the military is unwilling to gamble with service members' health and military readiness.¹¹⁵ Although this governmental interest is important, DoDI 6130.03 is not substantially related to it because the regulation is underinclusive and overinclusive.¹¹⁶

First, DoDI 6130.03 is substantially underinclusive because other types of nontransgender surgeries and medical conditions are just as likely, if not more likely, as SRS to result in medical complications. However, these nontransgender surgeries and medical conditions do not, per se, affect a nontransgender individual's ability to serve. For example, there are 313 elective cosmetic procedures that do not affect a nontransgender individual's ability to enlist.¹¹⁷ Some of these procedures are substantially more likely to result in complications than SRS, such as craniofacial surgery¹¹⁸ and mandibular osteotomies.¹¹⁹ When a service member undergoes one of

¹¹⁵ See *id.* at 6.

¹¹⁶ See CHEMERINSKY, *supra* note 19, at 690 (stating a law is not necessarily invalidated if the governmental interests are underinclusive or overinclusive; rather, based on the level of scrutiny, a closer fit is required). In evaluating whether the law is justified by a sufficient governmental purpose, courts focus "on the degree to which a law is underinclusive and/or overinclusive." *Id.* at 689. "A law is underinclusive if it does not apply to individuals who are similar to those to whom the law applies A law is overinclusive if it applies to those who need not be included in order for the government to achieve its purpose." *Id.* at 689–90.

¹¹⁷ ELDERS & STEINMAN, *supra* note 6, at 25 n.56 (noting there are "313 allowable, elective cosmetic procedures"); TRICARE MGMT. ACTIVITY, UNIF. BUS. OFFICE, PROVIDER'S GUIDE TO THE ELECTIVE COSMETIC SURGERY SUPERBILL (2013) (outlining the types of elective procedures available in the Military Health System).

¹¹⁸ Craniofacial surgery is defined as "[h]ead and face reconstruction . . . to repair or reshape deformities of the head and face." See John A. Daller, *Head and Face Reconstruction*, MEDLINEPLUS (May 5, 2013), <http://www.nlm.nih.gov/medlineplus/ency/article/002980.htm>, archived at <http://perma.cc/C2YF-3EQY> (listing potential complications such as bleeding, infection, nerve or brain damage, "[n]eed for follow-up surgery," "[p]artial or total loss of bone grafts," and "[p]ermanent scarring").

¹¹⁹ Mandibular osteotomy is a cosmetic jaw surgery in which:

[t]he back of the lower jaw is split bilaterally under general anesthetic in the region of the wisdom teeth, which are generally removed in a separate operation at least 6 [sic] months prior to corrective surgery. . . . The bone is fixed in its new position by screws which are inserted through tiny external skin incisions which are located at the angle of the jaw.

Cosmetic Jaw Surgery, MAXFAC.COM, <http://www.maxfac.com/facial/jaw.html>, archived at <http://perma.cc/8L6F-37LM> (last visited Nov. 15, 2014) (mentioning several complications associated with mandibular osteotomy, including nerve damage and limited movement of the lower lip).

these cosmetic procedures, it is the service member's responsibility to alert their unit commander of any health complications that arise.¹²⁰ If such complications do arise, the service member's ability to serve is addressed on an individualized, case-by-case basis, potentially allowing for a waiver of the accession standards.¹²¹ Another example of how DoDI 6130.03 is underinclusive is pregnancy. Pregnancy "accounts for 58% of hospitalizations among active-duty" women¹²² and can cause serious medical complications.¹²³ Nevertheless, pregnancy is not a disqualifying condition: the military policies stress that it is a woman's responsibility to plan her pregnancy around her military duties and to alert her superiors if medical complications arise.¹²⁴ An individual-assessment policy should be applied to transgender individuals because such a policy would accomplish the governmental interest of maintaining physical health in the military without prohibiting an entire class of people from serving their country.

Second, DoDI 6130.03 is overinclusive with respect to the potential governmental concern that SRS would compromise physical health within the military, because the majority of transgender individuals do not undergo SRS, and of the ones who undergo SRS, the rate of medical complications that would interfere with military readiness is low. According to a recent study, only one-third of transgender individuals seek SRS.¹²⁵ As a result, the blanket ban improperly excludes two-thirds of transgender individuals whose health is not compromised by SRS surgery. Of the one-third of transgender individuals who undergo SRS, the risks of complications from the surgery remain considerably low.¹²⁶ In fact, the March 2014 Palm Center Report analyzed several studies on the potential complications following SRS and applied the findings of the studies to the current figures for the military.¹²⁷ The March 2014 Palm Report concluded that of the estimated 15,450

¹²⁰ See, e.g., U.S. Dep't of Army, Army Regulation 600-20, Army Command Policy 6 (2012) ("Soldiers are responsible to ensure that the commander is made aware of problems that affect discipline, morale, and mission effectiveness . . .").

¹²¹ See ELDERS & STEINMAN, *supra* note 6, at 8; see also *supra* notes 11–14 and accompanying text.

¹²² Mark Thompson, *Women in Combat: Vive a Différence*, TIME, Jan. 25, 2013, <http://nation.time.com/2013/01/25/women-in-combat-vive-a-difference/>, archived at <http://perma.cc/VK6U-URP9>.

¹²³ Some of the pregnancy complications include hypertension, gestational diabetes mellitus, and anemia. *Pregnancy Complications*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregcomplications.htm>, archived at <http://perma.cc/GEC7-NAP8> (last updated Jan. 22, 2014). Women may die as a result of complications during and following pregnancy. In 2013, the maternal mortality ratio was "16 per 100,000 live births in developed countries." *Maternal Mortality*, WORLD HEALTH ORG., <http://www.who.int/mediacentre/factsheets/fs348/en/>, archived at <http://perma.cc/XK9S-VNJM> (last updated May 2014).

¹²⁴ See, e.g., Dep't of the Navy, Marine Corps Order 5000.12E W/CH 1–2, §§ 4(a)(1), 4(a)(5) (Dec. 8, 2004).

¹²⁵ Steinmetz, *supra* note 109, at 42.

¹²⁶ ELDERS & STEINMAN, *supra* note 6, at 15.

¹²⁷ *Id.* at 15 & nn.64–65.

transgender service members, only ten male-to-female and six female-to-male service members would be unfit for duty each year.¹²⁸

Even if complications arise from SRS, they likely would not impact service duty, although they might be uncomfortable for the transgender individual. For example, some surgical complications for a male-to-female individual include complete or partial necrosis¹²⁹ of the vagina and labia, or a vagina that is “too short or too small for coitus.”¹³⁰ Surgical complications for a female-to-male individual include urinary tract infections, site scarring, and the inability to urinate while standing.¹³¹ These complications, while certainly uncomfortable, are unlikely to affect the ability to serve as none of these conditions are listed as disqualifying conditions under DoDI 6130.03.¹³²

Additionally, there are other surgeries that would exclude transgender individuals from serving in the military, but if a nontransgender individual underwent the same surgery, the ability to serve would be unimpaired. Breast surgery (either augmentation or reduction), for example, is considered a low-complication procedure.¹³³ A nontransgender woman could undergo breast augmentation surgery without affecting her enlistment eligibility. If a male-to-female individual received that same surgery, that individual would be prohibited from joining the military,¹³⁴ despite the fact that the surgery for the male-to-female patient does not differ from that being performed on a nontransgender woman.¹³⁵

2. *Hormone Therapy*

Another potential governmental concern for DoDI 6130.03 is the argument that hormone therapy will interfere with physical health in the military. This concern is two-fold: (1) that hormone therapy will deleteriously impact transgender service members' health, and (2) that transgender personnel undergoing hormone therapy will be unable to access the necessary medication while deployed.¹³⁶

First, DoDI 6130.03 is substantially underinclusive with respect to the governmental concern that hormone therapy would negatively impact service

¹²⁸ *Id.* at 5, 15–16.

¹²⁹ Necrosis is defined as “the death of living tissue.” *Necrosis Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/medical/necrosis>, archived at <http://perma.cc/889R-NJXS> (last visited Nov. 15, 2014).

¹³⁰ See E. Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, 13 INT’L J. TRANSGENDERISM 165, 204 (2011).

¹³¹ *Id.*

¹³² See DoDI 6130.03, *supra* note 4 (failing to list necrosis, urinary tract infection, genital site scarring, or the inability to urinate while standing as disbaring medical conditions).

¹³³ ELDERS & STEINMAN, *supra* note 6, at 15.

¹³⁴ See DoDI 6130.03, *supra* note 4, § E4.14(f).

¹³⁵ See Coleman et al., *supra* note 130, at 203.

¹³⁶ See Kerrigan, *supra* note 5, at 506–16.

members' physical health because nontransgender individuals are allowed to ingest hormones without their ability to serve being impacted. The number of nontransgender individuals who take hormones while serving in the military is extensive: 1.4% of all service members (approximately 31,700)¹³⁷ are taking anabolic steroids.¹³⁸ In addition, 34% of all servicewomen (approximately 72,000) take hormones in the form of oral contraceptives.¹³⁹ If ingesting hormones is a concern for military readiness, it would be more efficacious to target the 100,000 nontransgender individuals taking hormones. Even assuming, *arguendo*, that every single transgender individual in the military undergoes hormone therapy, that amount is still less than one-sixth of the nontransgender individuals who are currently taking hormones in the military. Alternatively, if the hormones utilized in hormone therapy are problematic, the government could accomplish its interest by targeting the usage of specific hormones.

Additionally, DoDI 6130.03 is not substantially related to the ability to dispense hormones if a transgender individual is deployed. A current deployment policy already requires that a minimum of 180-day supply of medications for chronic conditions be dispensed to all deployed soldiers.¹⁴⁰ If other medications—including hormones—can be dispensed to soldiers who are serving in remote locations, it is unclear why hormones could not be dispensed to transgender individuals serving in remote locations. Even assuming, *arguendo*, that dispensing of necessary medical treatment in a remote location is problematic, the military could promulgate regulations that limit the geographic locations to which service members with medical conditions are deployed. This is already being done for diabetics: service members who take insulin cannot be deployed to areas where insulin cannot be stored.¹⁴¹ Similarly, pregnant women can only serve in remote areas if they are within six hours of emergency medical care.¹⁴²

One way to ameliorate the above cited concern about a transgender person undergoing hormone therapy, without impeding on transgender personnel's ability

¹³⁷ FRANCES M. BARLAS ET AL., DEP'T OF DEF., 2011 HEALTH RELATED BEHAVIORS SURVEY OF ACTIVE DUTY MILITARY PERSONNEL, at ES-8 (2013), *available at* http://www.murray.senate.gov/public/_cache/files/889efd07-2475-40ee-b3b0-508947957a0f/final-2011-hrb-active-duty-survey-report.pdf, *archived at* <http://perma.cc/5NHN-VNY5>.

¹³⁸ An anabolic steroid is a "substance[] related to male sex hormones . . . [that is used] to treat some hormone problems in men." *Anabolic Steroids*, MEDLINEPLUS, <http://www.nlm.nih.gov/medlineplus/anabolicsteroids.html>, *archived at* <http://perma.cc/VN E3-TAZW> (last updated Nov. 15, 2014).

¹³⁹ Lindsey Enewold et al., *Oral Contraceptive Use Among Women in the Military and the General U.S. Population*, 19 J. WOMEN'S HEALTH 839, 840 (2010). Modern oral contraceptives "contain low doses of both estrogen and progestin." *Id.* at 839.

¹⁴⁰ ELDERS & STEINMAN, *supra* note 6, at 13.

¹⁴¹ U.S. Dep't of Army, Army Regulation 40-501, Standards of Medical Fitness 60 (2011), *available at* http://www.apd.army.mil/pdffiles/r40_501.pdf, *archived at* <http://perma.cc/A5QK-B2T8>.

¹⁴² *Pregnancy and Military Operations*, ALLIANCE FOR NAT'L DEF., <http://www.4militarywomen.org/Pregnancy.htm>, *archived at* <http://perma.cc/8BDH-TGVP> (last visited Nov. 14, 2014).

to serve, is to defer to medical professionals who are well-versed in the Standards of Care (“SOC”) promulgated by the World Professional Association for Transgender Health (“WPATH”).¹⁴³ This would allow the professionals to determine if, and when, a transgender individual’s health would impede military readiness. Indeed, WPATH has already addressed the standards of care for transgender individuals who are undergoing hormone therapy while serving in remote locations.¹⁴⁴ This alternative is effective because deferring to knowledgeable, qualified medical health professionals who are well-versed in WPATH’s SOC would accomplish the governmental interest of maintaining a level of physical health in the military, while maintaining continuity of care for transgender individuals.

C. Third Governmental Interest: Maintaining Psychological Health in the Military

The third possible governmental interest for DoDI 6130.03’s blanket ban is that being transgender equates to psychological health issues, making transgender personnel unfit for military service.¹⁴⁵ While maintaining a level of psychological health within the military is an important governmental interest, DoDI 6130.03 is not substantially related to such an interest.

First, transgenderism is not a mental disorder. In May of 2013, the American Psychiatric Association (“APA”) noted this when it revised the Diagnostic and Statistical Manual (“DSM”) to replace “gender identity disorder” with “gender dysphoria,” confirming that transgenderism is not a mental disorder.¹⁴⁶ While the military often defers to the APA by updating its military regulations to reflect revisions in the DSM, such has not been the case with DoDI 6130.03.¹⁴⁷ The APA is not the only voice urging that transgenderism not be seen as a mental disorder: WPATH has also urged the de-psychopathologization of transgenderism, stressing that gender nonconformity “should not be judged as inherently pathological or negative,”¹⁴⁸ especially in light of research suggesting that transgenderism is a

¹⁴³ WPATH is an “international, multidisciplinary, professional association whose mission is to promote evidence-based care, education, research, advocacy, public policy, and respect in transsexual and transgender health.” Coleman et al., *supra* note 130, at 166. The SOC aim is to help mental health professionals, surgeons, and others provide healthcare support to transgender individuals and to ensure “safe and effective pathways to achieving lasting personal comfort with their gendered selves, in order to maximize their overall health, psychological well-being, and self-fulfillment.” *Id.*

¹⁴⁴ *See id.* at 193 (describing the various methods that can be employed for those in “geographically remote or resource-poor areas”).

¹⁴⁵ *See* ELDER & STEINMAN, *supra* note 6, at 7 & n.18.

¹⁴⁶ Compare AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013) (describing gender dysphoria), with AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 576 (4th ed., text. rev. 2000) (describing gender identity disorder). Gender dysphoria is broadly defined as discomfort or distress caused by a discrepancy between a person’s gender identity and that person’s sex assigned at birth. Coleman et al., *supra* note 130, at 166.

¹⁴⁷ Coleman et al., *supra* note 130, at 208.

¹⁴⁸ *Id.* at 168 (citation omitted).

biological condition that cannot be cured.¹⁴⁹ All of this makes clear that transgenderism is not a mental disorder.

If anything, discriminatory provisions, such as DoDI 6130.03, negatively impact transgender individuals' mental health, as discrimination can cause minority stress. Minority stress is a socially-based condition that makes "gender-nonconforming individuals more vulnerable to developing mental health problems such as anxiety and depression" because of the prejudice and discrimination directed towards them.¹⁵⁰ In contrast, treatment that works to mitigate a transgender individual's feelings of incongruence alleviates mental distress. Indeed, a meta-analysis of more than 2,000 patients found that 87% of male-to-female patients and 97% of female-to-male patients had improved psychosocial outcomes after undergoing such therapies.¹⁵¹ This suggests that a transgender individual's mental distress is likely socially based, as opposed to pathological.

Second, even if a transgender individual experiences minority stress, DoDI 6130.03 is still substantially underinclusive. The military currently allows individuals with certain forms of mental illness to serve, provided certain criteria are satisfied, yet that allowance is not offered to transgender individuals.¹⁵² For example, nontransgender individuals suffering from Attention Deficit Hyperactivity Disorder (ADHD), depressive disorders, anxiety disorders, or phobias, are allowed to enlist provided certain criteria are met.¹⁵³ Individuals in the military who suffer from mood or anxiety disorders are disqualified from serving only if their condition interferes with duty performance or requires extended or recurrent hospitalization.¹⁵⁴ In fact, there were approximately 89,000 antipsychotic pills prescribed to military personnel heading overseas in 2008;¹⁵⁵ thus, not only was the military aware of these mental health conditions, the military played an active role in trying to mitigate such

¹⁴⁹ See Sam Winter, *Transgender Science: How Might It Shape the Way We Think About Transgender Rights?*, 41 HONG KONG L.J. 139, 145, 149–50 (2011) (noting there is accumulating evidence suggesting a biological basis, or a "hard-wiring," for transgender identity, and including studies that found transgender individuals' brains resemble those who share their gender identity, rather than their sex assigned at birth). This article also noted studies that show transgender individual's performance on sex-differentiated cognitive tests resemble that of their gender identity rather than their birth-assigned sex. *Id.*; see also Jiang-Ning Zhou et al., *A Sex Difference in the Human Brain and Its Relation to Transsexuality*, 378 NATURE 68, 68–70 (1995) (arguing that the brain structure of transsexuals "supports the hypothesis that gender identity develops as a result of an interaction between the developing brain and sex hormones").

¹⁵⁰ Coleman et al., *supra* note 130, at 168.

¹⁵¹ ELDERS & STEINMAN, *supra* note 6, at 10.

¹⁵² See DoDI 6130.03, *supra* note 4.

¹⁵³ *Id.* § E4.29(a), (g), (p). As an example of such criteria, an individual with ADHD must maintain a 2.0 grade point average after the age of fourteen to be eligible to enlist. *Id.*

¹⁵⁴ ELDERS & STEINMAN, *supra* note 6, at 11.

¹⁵⁵ Andrew Tilghman, 'Any Soldier Can Deploy on Anything': Pentagon Rules Bar Some Drugs from Combat Zone, but Oversight Is Suspect, ARMY TIMES (Mar. 17, 2010, 12:11 PM), <http://www.armytimes.com/article/20100317/NEWS/3170310/-8216-Any-soldier-can-deploy-on-anything->, archived at <http://perma.cc/LL4M-HZ95>.

ailments. If the military has a genuine concern for a transgender individual's mental health, it is unclear why an entire class of people are banned from enlisting based on a condition that is no longer considered a mental illness, while individuals with proven cases of actual mental illnesses are allowed to enlist. Hence, DoDI 6130.03 is not substantially related to the proffered psychological health concerns in support of the blanket ban.

V. CONCLUSION

Discrimination based on gender identity is a form of sex discrimination. In *Price Waterhouse*, the Supreme Court clarified that “sex” encompasses more than biological genitalia. That ruling eviscerated the holding of *Holloway*, *Sommers*, and *Ulane*—the three cases the Tenth Circuit relied on in declaring that sex discrimination did not encompass gender nonconformity. At least since *Price Waterhouse*, discrimination against someone because of that individual's failure to conform to sex stereotypes must be considered a form of sex discrimination.¹⁵⁶ As transgenderism is defined as nonconformity “to that typically associated with the sex . . . assigned at birth,”¹⁵⁷ discrimination based on gender identity is a form of discrimination based on sex. Furthermore, transgender individuals are either excluded from the military under DoDI 6130.03 because of the genitalia assigned at birth (which is discrimination based on sex), or because they are acting against the typical gender mores assigned to the sexes (which is discrimination based on sex stereotypes). Regardless, intermediate scrutiny applies.

While maintaining unit cohesion and physical and psychological health within the military are important governmental interests, DoDI 6130.03 is not substantially related to these interests. Rather than banning all transgender individuals from serving, the military could conduct individualized assessments of transgender individuals' physical and psychological health, as the military often does with others. This would accomplish the governmental interests without banning an entire class of people from serving their country.

A blanket ban on transgender individuals, based on fallacious assumptions and arbitrary provisions, denies transgender individuals the right to serve in the armed forces. The military should welcome transgender individuals who are willing to risk their lives to defend this country. If, and when, DoDI 6130.03 is rescinded or ruled unconstitutional, a new tweet from the President will be in order. Then, and only then, would the President be correct in stating, “All Americans can now serve their country without hiding who they are.”¹⁵⁸

¹⁵⁶ While *Price Waterhouse* addressed this issue directly, equal protection and due process analysis also restricts discrimination based on sex stereotypes. See *supra* notes 78–79 and accompanying text.

¹⁵⁷ Ross, *supra* note 10, at 188 (citations omitted).

¹⁵⁸ Obama, *supra* note 2.