IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHELSEA ELIZABETH MANNING,	)	
	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:14-cv-1609 (CKK)
	)	
ASHTON CARTER, *et al.*,	)	**REDACTED – ORIGINAL FILED UNDER SEAL**
	)	
Defendants.	)	
_____	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Plaintiff Chelsea Manning is a transgender female currently confined at the United States Disciplinary Barracks (USDB), which is a maximum-security military prison for men, located in Fort Leavenworth, Kansas. Manning filed this lawsuit against Defendants—the Department of Defense (DOD) and several DOD/Army officials—originally alleging only a single claim for medical care under the Eighth Amendment, but now alleging a claim under the Fifth Amendment's guarantee of equal protection as well.

As described in Manning's Amended Complaint, Manning is currently receiving a significant amount of medical treatment for her gender dysphoria. *See* Am. Compl. (ECF No. 41) ¶¶ 72, 77, 93-98. Specifically, Manning is receiving weekly psychotherapy, including psychotherapy specific to gender dysphoria, the provision of female undergarments, permission to wear prescribed cosmetics in her daily life at the USDB, speech therapy, and cross-sex hormone therapy. *Id.* Notwithstanding all of these treatments, Manning claims that Defendants have violated the Eighth Amendment by not permitting her to wear a feminine hairstyle—*i.e.*, hair longer than two inches that may fall over her ears—which would be different from what is permitted for Manning's fellow inmates, but consistent with what is permitted for inmates at the military's female prison. Separately, Manning also claims that the USDB's enforcement of its hair restriction violates the Fifth Amendment's guarantee of equal protection, because inmates in the military's female prison are permitted to have longer hair.

The issue before this Court is thus quite narrow—whether the USDB, a military prison for men, is required to stop enforcing its military grooming standards and allow Manning, an incarcerated transgender female, to grow her hair longer than what is permitted for the rest of her fellow prisoners. This narrow issue is fundamentally intertwined, however, with preserving core prison-security and military values at the UDSB, such as uniform treatment and good order and

discipline. Manning asks this Court to second-guess the considered determinations of military and corrections professionals as to how best to protect those interests. Such judicial intervention is unwarranted here, and Manning's Amended Complaint should be dismissed for several independent reasons.

First, Manning's claims are procedurally improper. This Court must abstain from ruling on her Eighth Amendment claim because Manning is required to pursue that claim first before the military courts. Military courts, like state courts, are not subordinate to federal civilian courts, and the Supreme Court therefore has made clear that federal courts are largely precluded from intervening in pending military court proceedings. *See Schlesinger v. Councilman*, 420 U.S. 738 (1975). Here, Manning is currently appealing her court-martial conviction, and she may raise Eighth Amendment conditions-of-confinement claims as part of that appeal. Thus, this Court may not intervene in that proceeding by deciding the Eighth Amendment issue now, without first allowing military courts the opportunity to apply their expertise and address Manning's claim.

Furthermore, both Manning's Eighth Amendment and equal protection claims are barred by the Prison Litigation Reform Act (PLRA), which requires inmates to administratively exhaust their claims before filing a lawsuit. 42 U.S.C. § 1997e(a). Manning did not exhaust all available remedies in connection with her Eighth Amendment claim, and never before has raised her equal protection claim in any administrative channel. Both claims therefore must be dismissed as unexhausted.

Second, Manning does not state a cognizable Eighth Amendment claim. To establish such a claim, Manning must satisfy two elements, one objective and one subjective. For the objective requirement, Manning must show that the failure to provide her requested treatment

"result[s] in the denial of the minimal civilized measure of life's necessities." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Yet Manning has not shown (and cannot show) that restricting her hair length comes even close to meeting this level of extreme deprivation required to state an Eighth Amendment violation.

As for the subjective requirement, Manning must show that the officials responsible for her deprivation "have a sufficiently culpable state of mind"—here, that they exhibit "deliberate indifference to [Manning's] serious medical needs[.]" *Id.* at 834-35. But Manning has not plausibly alleged that the Defendants are *actually aware* that Manning's treatment is inadequate, and yet are *deliberately indifferent* to that need. To the contrary, the significant amount of treatment provided to Manning for her gender dysphoria is the very opposite of deliberate indifference. Furthermore, Defendants' decision-making regarding Manning's treatment is motivated by significant and legitimate security, military, and penal concerns—which likewise preclude a finding of deliberate indifference.

Third, Manning's equal protection claim must also be dismissed. As a threshold matter, Manning is not similarly situated to the female military inmates to which Manning compares herself. *See* Am Compl. ¶ 130. Those female inmates are confined in different facilities with different grooming standards, whereas Manning is confined at the USDB, a military prison for men that has a uniform rule of no hair longer than two inches. Making an exception to the USDB's generally applicable hair restriction would pose a significant security risk, and would undermine the USDB's important military mission. Furthermore, even assuming this claim is analyzed under intermediate scrutiny as Manning proposes, *see* Am. Compl. ¶ 134, any alleged discrimination is justified as substantially related to important governmental interests. Specifically, permitting Manning to follow different grooming standards within the USDB would

PA/HIPAA; LES thereby undermining the USDB's important interests in prison security and military discipline. For all of these reasons, Manning's Amended Complaint should be dismissed.

BACKGROUND

I. THE MILITARY AS DISTINCT FROM CIVILIAN SOCIETY

Courts have "long recognized that the military is, by necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974). Manning's lawsuit involves two of the ways in which the military is distinct from civilian society: (1) the military's unique justice system; and (2) the military's grooming standards related to hair.

A. The Military Justice System

The Constitution grants Congress the authority "to make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14. Congress therefore has "plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline[.]" *Chappell v. Wallace*, 462 U.S. 296, 301 (1983). Consistent with that authority, Congress has established a separate criminal justice and corrections system for military members. *See generally id.* at 300-04; *United States v. Joshua*, 607 F.3d 379, 382-84 (4th Cir. 2010).

1. Military Courts

Congress has established "a comprehensive internal system of justice to regulate military life," *United States v. Stanley*, 483 U.S. 669, 679 (1987), that is "markedly different" from its civilian counterpart, *Joshua*, 607 F.3d at 383, but that "tak[es] into account the special patterns that define the military structure." *Stanley*, 483 U.S. at 679; *see also Chappell*, 462 U.S. at 300. Specifically, Congress has established a separate military legal code, the Uniform Code of

Military Justice (UCMJ), along with special military courts to handle cases arising thereunder. *See generally Parker*, 417 U.S. at 749.

Violations of the UCMJ are prosecuted in courts-martial, which, unlike standing civilian courts, are not "independent instruments of justice." *Williams v. Sec'y of Navy*, 787 F.2d 552, 561 (Fed. Cir. 1986). The "trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function." *Middendorf v. Henry*, 425 U.S. 25, 46 (1976).

After a court-martial conviction with a sufficiently serious sentence (such as Manning's), servicemembers are provided an automatic appeal to one of the military's several courts of criminal appeals (*e.g.*, the Army Court of Criminal Appeals), which are comprised of military servicemembers. *See* 10 U.S.C. § 866. Further appeal may then be made to the Court of Appeals for the Armed Forces, *id.* § 867, which "consists of civilian judges free from military influence," *Lawrence v. McCarthy*, 344 F.3d 467, 473 (5th Cir. 2003), who "gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces." *Noyd v. Bond*, 395 U.S. 683, 694 (1969). Following review by the Court of Appeals for the Armed Forces, parties may also petition for certiorari to the United States Supreme Court. *See* 10 U.S.C. § 867a(a); 28 U.S.C. § 1259.

Like state courts, these military tribunals "are not subordinate to the federal courts[.]" *Williams*, 787 F.2d at 561. "Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Burns v. Wilson*, 346 U.S. 137, 140 (1953); *Chappell*, 462 U.S. at 303-04. Nonetheless, "[t]he military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." *Burns*, 346 U.S. at 142; *see also United States v. Denedo*, 556 U.S. 904, 917 (2009); *Hennis v. Hemlick*, 666 F.3d 270, 278 (4th Cir. 2012).

One unique feature of the military judicial system is that a military court, when hearing the direct appeal of a criminal conviction, is also permitted to address any conditions-of-confinement claims—arising under the Eighth Amendment, or the military's equivalent codified in Article 55 of the UCMJ. *See, e.g.*, *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001) ("We now expressly hold that we have jurisdiction under Article 67(c) to determine on direct appeal if the adjudged and approved sentence is being executed in a manner that offends the Eighth Amendment or Article 55."); *see also* 10 U.S.C. § 855 (Article 55). Prospective relief is available through military courts' authority under the All Writs Act. *See United States v. Miller*, 46 M.J. 248, 251 (C.A.A.F. 1997); *see also Clinton v. Goldsmith*, 526 U.S. 529, 536 (1999). And a successful Eighth Amendment claim on direct review can even lead to the reduction of a servicemember's term of confinement. *See, e.g.*, *United States v. Kinsch*, 54 M.J. 641, 649 (A. Ct. Crim. App. 2000) (granting servicemember "one month of confinement relief" based on post-conviction Eighth Amendment violation), abrogated on other grounds, *United States v. Bright*, 63 M.J. 683 (A. Ct. Crim. App. 2006).

2. Military Prisons

In addition to creating a separate judiciary, Congress has also authorized the Department of Defense to establish military correctional facilities to confine those who violate the UCMJ. *See* 10 U.S.C. § 951(a). Again, the purpose of the military corrections system is different from that of the civilian system: military corrections facilities must not only "provide for the education, training, rehabilitation, and welfare of offenders," *id.* § 951(b)(2), but must also be operated "with a view to [offenders'] restoration to duty, enlistment for future service, or return to civilian life as useful citizens." *Id.* § 951(c); *see also id.* § 953.

Accordingly, military prisons are organized on military principles. *See generally* Army Regulation 190-47, *The Army Corrections System*, ch. 01-5 (June 15, 2006) ("The [Army

Corrections System] is an integral part of the military justice system and assists commanders in the maintenance of discipline and law and order by providing a uniform system of incarceration and correctional services for those who have failed to adhere to legally established rules of discipline.") (excerpt attached hereto as Exh. A, *available at* http://www.apd.army.mil/pdffiles/r190_47.pdf). Many inmates within military prisons are still classified as active-duty servicemembers; even if an inmate is convicted and sentenced to be discharged, that discharge generally does not occur until after direct appeals are exhausted and the conviction becomes final. *See generally* 10 U.S.C. §§ 871(c), 876.

Within DOD's corrections system, its facilities are categorized based on security level, with Level III being maximum security. *See* Department of Defense Instruction 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Authority*, encl. 2, § 4 ("Classification and Use of Facilities") (excerpt attached hereto as Exh. B, *available at* http://www.dtic.mil/whs/directives/corres/pdf/132507p.pdf). For convicted offenders who warrant Level III facilities, male inmates are confined at the United States Disciplinary Barracks (USDB) in Fort Leavenworth, Kansas, which is an Army facility. *See* SECNAV Instruction 1640.9C, *Department of the Navy Corrections Manual*, art. 7407, ¶ 1(a) ("Consolidation of Corrections Within DOD") (excerpt attached hereto as Exh. C, *available at* http://www.marines.mil/Portals/59/Publications/SECNAVINST%201640.9C.pdf). Convicted female inmates of varying security levels are confined at the military's female prison—the Naval Consolidated Brig Miramar in San Diego, California, which is a Navy facility. *Id.*

B. Military Grooming Standards

Members of the military are subject to far greater restrictions on their conduct and appearance than exist in civilian settings. *See Chappell*, 462 U.S. at 300 ("[N]o military organization can function without strict discipline and regulation that would be unacceptable in a

civilian setting."). One of those restrictions relates to personal grooming and uniform standards. *See generally Goldman v. Weinberger*, 475 U.S. 503, 507-10 (1986) (discussing the Air Force's need for standardized uniforms).

Because most USDB inmates, including Manning, are still soldiers and military prisons are part of the military structure, military grooming restrictions continue to apply within those military correctional facilities. As relevant here, the USDB's grooming restrictions are based on Army Regulation 670-1, *Wear and Appearance of Army Uniforms and Insignia*, ch. 3-2 ("Hair and fingernail standards and grooming policies") (excerpt attached hereto as Exh. D, *available at* http://www.apd.army.mil/pdffiles/r670_1.pdf). Specifically, USDB Regulation 600-1, the Manual for the Guidance of Inmates (MGI), requires that "[i]nmate hair will be [in accordance with] AR 670-1," and that "[a]ll inmates are required to receive haircuts every two weeks." USDB MGI (excerpts attached hereto as Exh. E), ch. 4-4. The USDB MGI also provides that inmates' hair cannot "fall over the ears, eyebrows or touch the collar" when combed down, and that inmates' hair "cannot exceed two inches in height or length." *Id.*; *see also* Am. Compl. ¶ 20. These grooming restrictions are enforced uniformly against all inmates at the USDB, but different grooming standards are enforced for female inmates at the Naval Consolidated Brig Miramar. *See* Am. Compl. ¶¶ 18-19.

II. FACTUAL AND PROCEDURAL HISTORY

Plaintiff Chelsea Elizabeth Manning, formerly known as Bradley Edward Manning, is currently a Private in the United States Army and is incarcerated at the USDB. *See* Am. Compl. ¶ 7. Manning was assigned the sex of male at birth, *id.* ¶ 16, but in 2009 Manning "came to terms with the fact that she is a transgender woman and could no longer suppress her female identity." *Id.* ¶ 41.

In May 2010, while Manning was stationed in Iraq, Manning was arrested "for unlawful disclosure of classified information." Am. Compl. ¶ 43. Manning was tried and convicted by court-martial on several offenses, including unlawfully causing United States intelligence to be published on the internet. On August 21, 2013, Manning was sentenced to serve thirty-five years in prison, and she was transferred to the USDB the next day. *Id.* ¶ 46. Manning, who has not been discharged, remains an active-duty military member, *see id.* ¶ 7, and she is currently appealing her court-martial conviction to the Army Court of Criminal Appeals. *Cf. id.* ¶ 46.

A. Manning's Requests for a Treatment Plan

At the USDB, inmates are permitted to submit requests using a Military Correctional Complex (MCC) Form 510. *See* USDB MGI (Exh. E), ch. 2-4 ("Inmates communicate with staff by using an MCC Form 510, Inmate Request Slip. The MCC Form 510 is the only written format authorized for inmate communication with staff."). On August 28, 2013—shortly after Manning's arrival at the USDB—she submitted a Form 510 PA/HIPAA PA/HIPAA PA/HIPAA PA/HIPAA *See* Am. Compl. ¶ 51; Exh. F (attached hereto) at 1.[1] PA/HIPAA PA/HIPAA *See* Am. Compl. ¶ 48; Exh. F at 2-3.

USDB officials conducted a mental health assessment in September 2013, and on September 30, 2013 diagnosed Manning with gender dysphoria. *See* Am. Compl. ¶¶ 52-53. The USDB then began developing a treatment plan for Manning. *See id.* ¶¶ 53-56. On January 5, 2014, Manning submitted another Form 510 PA/HIPAA

[1] Exhibit F contains only the relevant Form 510s submitted by Manning; it does not contain all submitted Form 510s.

PA/HIPAA *See id.* ¶ 57; Exh. F at 4. Several weeks later, on January 21, 2014, Manning submitted a request to the Inspector General (IG), PA/HIPAA; IG PA/HIPAA; IG *See* Am. Compl. ¶ 68; Exh. G (attached hereto). The IG responded on April 4, 2014, PA/HIPAA; IG PA/HIPAA; IG PA/HIPAA; IG Am. Compl. ¶ 70; Exh. G at 2.

Two days prior to the IG's response, Manning submitted another Form 510 to USDB officials— PA/HIPAA PA/HIPAA PA/HIPAA *See* Am. Compl. ¶ 58; Exh. F at 5-9. Manning renewed that request on July 23, 2014. *See* Am. Compl. ¶ 59; Exh. F at 10. And on August 21, 2014, Manning submitted a Form 510 PA/HIPAA PA/HIPAA PA/HIPAA Am. Compl. ¶ 60; Exh. F at 11-13.

B. Manning's Receipt of Treatments for Gender Dysphoria

In August 2014, Manning, through her legal counsel, sent a letter to Defendants (and others) demanding treatment for her gender dysphoria. *See* Am. Compl. ¶ 76; attached hereto as Exh. H. Col. Nelson, the USDB Commandant, responded by letter on behalf of all addressees on September 2, 2014. Am. Compl. ¶ 78; attached hereto as Exh. I. Col. Nelson stated that "[t]he Army recognizes and fully accepts its responsibility to provide medically necessary care for each inmate at the USDB, based on an individualized assessment of each inmate's medical needs balanced against the Army's penological, security and disciplinary interests." Exh. I. At that

point, Manning was receiving weekly psychotherapy sessions and had been issued female underwear and sports bras as part of the real-life experience treatment. Am. Compl. ¶¶ 77-79.

Manning filed this lawsuit on September 23, 2014. *See* Compl. (ECF No. 1). The Complaint contained a single claim, alleging inadequate medical treatment in violation of the Eighth Amendment to the United States Constitution. *See, e.g., id.* ¶¶ 2, 83. Manning also filed a motion for preliminary injunction that day. *See* ECF No. 2. Due to evolving factual circumstances related to Manning's medical care, briefing and consideration of Manning's motion for preliminary injunction were postponed multiple times. *See* ECF Nos. 21, 32, 36.

The USDB provided Manning with additional gender dysphoria treatments throughout the Fall and Winter of 2014-15. In October 2014 Manning was approved to wear subdued cosmetics as part of her real-life experience. *See* ECF No. 30-2 at 3; *see also* Am. Compl. ¶ 93; Memorandum for Record, *Identifying and Mitigating Risk for Transgender Inmates within the USDB, Fort Leavenworth, Kansas* (Oct. 20, 2014) (attached hereto as Exh. J, hereafter "Oct. 2014 Risk Assessment"). Manning was issued the approved cosmetics in December 2014. *See* Am. Compl. ¶ 93; ECF Nos. 30-2 at 3, 34-1 at 1. PA/HIPAA PA/HIPAA PA/HIPAA PA/HIPAA *See* ECF No. 34. Manning's cross-sex hormone therapy began on February 11, 2015. *See* ECF No. 37 at 2; Am. Compl. ¶¶ 96-98; Memorandum for Record, *Inmate Manning Treatment Plan Approvals* (Feb. 5, 2015) (attached hereto as Exh. K, hereafter "Feb. 2015 Risk Assessment"). During this same time period, the USDB also approved adding speech therapy to Manning's treatment plan. *See* ECF No. 34 at 3.

In March 2015, the parties filed a status report clarifying that Manning "does not dispute the adequacy of the following treatments (assuming that they continue): the provision of female undergarments, cosmetics, speech therapy, and cross-sex hormone therapy." ECF No. 37 at 1. But Manning continued to dispute, *inter alia*, "Defendants' failure to permit Manning to grow longer hair[.]" *Id.* Regarding the issue of hair length, the USDB determined that it would "re-evaluate whether Manning may be permitted to grow longer hair consistent with the USDB's safety and security concerns within seven months of the commencement of cross-sex hormone therapy." *Id.* at 2; *see also* Am. Compl. ¶ 97; Feb. 2015 Risk Assessment (Exh. K) ¶ 19.

The USDB completed its re-evaluation on September 18, 2015, when Col. Nelson, Commandant of the USDB, approved the recommendation contained in a memorandum to her from Deputy Commandant Thomas Schmitt. Am. Compl. ¶ 100 (quoting Memorandum for Record, *Inmate Manning Request for Exception to Policy (Male Hair and Grooming Standards)* (Sept. 18, 2015) (attached hereto as Exh. L, hereafter "Sept. 2015 Risk Assessment")); *see also* ECF No. 39. PA/HIPAA PA/HIPAA PA/HIPAA; LES PA/HIPAA; LES PA/HIPAA; LES Exh. J at ¶ 17; *see also* Sept. 2015 Risk Assessment (Exh. L) at ¶¶ 1(c), 15 PA/HIPAA In the Sept. 2015 Risk Assessment, the USDB further explained that, PA/HIPAA PA/HIPAA PA/HIPAA PA/HIPAA; LES PA/HIPAA; LES Exh. L ¶¶ 12(c)-(d). Furthermore, the Sept. 2015 Risk Assessment discussed PA/HIPAA

PA/HIPAA

PA/HIPAA *See id.* ¶ 12(c).

Based on these factors, the Sept. 2015 Risk Assessment concluded that PA/HIPAA; LES

PA/HIPAA; LES

PA/HIPAA; LES

PA/HIPAA; LES

PA/HIPAA; LES *Id.* ¶¶ 14, 14(a). In addition:

PA/HIPAA; LES

Id. ¶ 14(b). Based upon this recommendation, and after "carefully considering the recommendation that the wear of a feminine hairstyle is medically appropriate, and weighing all associated safety and security risks presented," Col. Nelson determined that "[p]ermitting Inmate Manning to wear a feminine hairstyle is not supported by the risk assessment and potential risk mitigation measures at this time." *Id*. at pg. 1; *see also* Am. Compl. ¶ 100; ECF No. 39.

C. Filing of the Amended Complaint

Based on the USDB's decision not to permit Manning to wear a feminine hairstyle, the parties agreed that, given the factual developments since the filing of the original Complaint, this case should proceed by: (1) Manning withdrawing her motion for preliminary injunction; (2) Manning filing an Amended Complaint; and then (3) Defendants responding to that Amended Complaint with an Answer or other responsive motion. *See id.* The Court granted the parties' request. *See* ECF No. 40.

On October 5, 2015, Manning filed her Amended Complaint. *See* ECF No. 41. In addition to addressing the past year's factual developments with respect to Manning's medical

care, *see id.* ¶¶ 85-100, Manning's Amended Complaint also added a new claim—alleging that "Defendants have engaged in impermissible sex discrimination in violation of the equal protection guarantees of the Fifth Amendment's Due Process Clause," *id.* ¶ 133, based on Defendants' alleged "refus[al] to permit Plaintiff to follow the hair length and grooming standards followed by other female prisoners[.]" *Id.* ¶ 132.

Defendants now move to dismiss the Amended Complaint in its entirety.

STANDARD OF REVIEW

Defendants move to dismiss Manning's Amended Complaint for failure to state a claim upon which relief may be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. "In deciding a Rule 12(b)(6) motion, a court may consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, or documents upon which the plaintiff's complaint necessarily relies," *Sheikh v. Dist. of Columbia*, 77 F. Supp. 3d 73, 79 (D.D.C. 2015) (Kollar-Kotelly, J.), as well as documents "appended to [a] motion to dismiss and whose authenticity is not disputed" if they are "referred to in the complaint and are integral" to a plaintiff's claim. *Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004); *see also EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997).

To survive a Rule 12(b)(6) motion, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Although a court must accept all factual allegations as true, the court is "not bound to accept as true a legal conclusion couched as a

factual allegation[.]" *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 679 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

ARGUMENT

For several reasons, Manning's Amended Complaint should be dismissed. First, Manning's claims are procedurally improper. This Court must abstain from deciding the Eighth Amendment claim because Manning has not yet provided the military courts an opportunity to apply their special expertise to her claim. Furthermore, Manning failed to properly exhaust the military's administrative remedies available on both her Eighth Amendment and equal protection claims. The PLRA, therefore, requires that both claims be dismissed as unexhausted.

Second, Manning fails to state a cognizable Eighth Amendment claim. Manning has not established, and cannot establish, that the alleged wrongdoing here—enforcing the grooming standard that prevents Manning from growing her hair longer than two inches—constitutes "the denial of 'the minimal civilized measure of life's necessities[.]'" *Brennan*, 511 U.S. at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).[2] Manning also has not plausibly alleged that the Defendants here are *actually aware* of an objectively serious inadequacy in her treatment, and yet are deliberately indifferent to that inadequacy. To the contrary, Manning's allegations establish that Defendants are acting appropriately—providing sufficient and appropriate medical treatment, while also ensuring that any treatment is provided safely and securely within the military correctional environment in which Manning lives.

[2] Restricting hair length to two inches is not the only applicable grooming standard contained within AR 670-1 and the USDB MGI. *See* Background, Section I.B. For ease of reference, however, Defendants refer to the length restriction as shorthand for all such standards.

Third, Manning also has failed to state a cognizable equal protection claim. As a threshold matter, Manning's claim is premised on the allegation that she is similarly situated to other female military inmates. *See* Am. Compl. ¶ 130. But Manning is incarcerated at the USDB, a military prison for men, and is subject to the USDB's policy governing hair length. Thus, Manning is not similarly situated to those female inmates confined at the military's female prison, who are subject to different grooming standards. And Manning's claim must be evaluated in this context—whereby she is seeking application of a different grooming standard than the one applied to the rest of her fellow prisoners—given that the Amended Complaint does not challenge Manning's housing placement at the USDB.[3] Furthermore, even assuming intermediate scrutiny applies to Manning's claim as she proposes, *see* Am. Compl. ¶ 134, the decision not to permit Manning to follow the female grooming standards is substantially related to important governmental interests—*i.e.*, ensuring safety and security within a military prison environment. Manning's Amended Complaint should therefore be dismissed in its entirety.

I. PLAINTIFF'S CLAIMS ARE NOT PROPERLY BEFORE THIS COURT

Both of Manning's claims must be dismissed on threshold procedural grounds. Manning's claims were not properly exhausted, and alternative avenues remain available for Manning to obtain redress, including Manning's pending court-martial appeal.

Dismissal on these grounds is compelled by several different doctrines. First, civilian courts generally are not permitted to interfere with pending court-martial proceedings. *See Schlesinger*, 420 U.S. 738. Second, the PLRA prohibits any action related to prison conditions "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). And third, it is a "well-established principle that a court should not review internal military affairs in

[3] Indeed, earlier in this litigation, Manning's counsel stated explicitly that Manning took no position on her housing situation. *See* Status Conf. Tr. (ECF No. 15) at 21.

the absence of exhaustion of available intraservice corrective measures." *Bois v. Marsh*, 801 F.2d 462, 468 (D.C. Cir. 1986) (modification omitted). Manning's claims here should be dismissed under all three doctrines.

A. Manning's Eighth Amendment Claim Must Be Dismissed Because This Court May Not Interfere With a Pending Military Proceeding

The Supreme Court has held unequivocally that, even if jurisdiction exists, civilian courts must abstain from interfering with a pending military proceeding. *Councilman*, 420 U.S. at 754-61. Military courts "are not subordinate to the federal courts," *Williams*, 787 F.2d at 561, and therefore the same considerations "barring intervention into pending state criminal proceedings" apply "in equal measure" with respect to intervention in pending court-martial proceedings. *Councilman*, 420 U.S. at 756.

The Court's decision in *Councilman* sets forth two rationales for why abstention is generally necessary. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 586 (2006); *New v. Cohen*, 129 F.3d 639, 643 (D.C. Cir. 1997); *Hennis*, 666 F.3d at 276-77. First, "[t]he military is a specialized society separate from civilian society with laws and traditions of its own developed during its long history." *Councilman*, 420 U.S. at 757 (quoting *Parker*, 417 U.S. at 743, modifications omitted). Thus, military courts should be given an opportunity to address "matters as to which the[ir] expertise . . . is singularly relevant, and their judgments indispensable to inform any eventual review in Art. III courts." *Councilman*, 420 U.S. at 760; *see also Hamdan*, 548 U.S. at 586. Second, "federal courts should respect the balance that Congress struck between military preparedness and fairness to individual service members when it created an integrated system of military courts and review procedures," *Hamdan*, 548 U.S. at 586, particularly because "it must be assumed that the military court system will vindicate servicemen's constitutional rights." *Councilman*, 420 U.S. at 758.

Here, abstention is required given that Manning is permitted to raise her Eighth Amendment claim in her direct appeal before the Army Court of Criminal Appeals. *See White*, 54 M.J. at 472. Even if Article III jurisdiction is eventually available, Manning must still exhaust the claim first within the military judicial system. *See Councilman*, 420 U.S. at 758 ("[I]mplicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task.").

Abstention is particularly appropriate here for two reasons. First, the nature of Manning's claim implicates core military interests, such as uniformity and good order and discipline among soldiers. *Cf. Goldman*, 475 U.S. at 507-10; *see also* Sections II.B.3, III.B, *infra*. Indeed, Manning's claim relates to the application of military regulations, by military personnel, to a military inmate, at a military facility, incident to a military conviction. Thus, military courts should have the first opportunity to address the claim given those courts' superior knowledge of the military's "laws and traditions" and their "thorough familiarity with military problems." *Councilman*, 420 U.S. at 757-58. Military courts are best positioned not only to address and evaluate Manning's claim, but also to ensure that an adequate record exists for any eventual Article III judicial review. *See Hennis*, 666 F.3d at 278 ("[F]ederal courts benefit from looking to the special competence of the military in which Congress has reposed the duty to perform particular tasks. The military courts can then develop the facts, apply the law in which they are peculiarly expert, and correct their own errors." (modifications omitted)).[4]

[4] Notably, military appellate courts possess greater fact-finding power than civilian appellate courts. *See* 10 U.S.C. § 866(c). And to the extent additional factual material is necessary for an appellate court's resolution of an issue, the appellate court may order that an evidentiary hearing be conducted. *See generally United States v. DuBay*, 37 C.M.R. 411 (1967); *Cothran v. Dalton*, 83 F. Supp. 2d 58, 69 (D.D.C. 1999), *aff'd*, 6 F. App'x 9 (D.C. Cir. 2001).

Second, the resolution of Manning's Eighth Amendment claim could affect the ultimate length of her confinement. Military courts may reduce the length of an inmate's incarceration based on a post-conviction Eighth Amendment violation. *See, e.g.*, *Kinsch*, 54 M.J. at 649. Review of the length and manner of sentence is a fundamental duty of the military courts of appeals, *see* 10 U.S.C. § 866(c), and therefore a civilian court should be particularly loath to decide an issue that could affect a military tribunal's ongoing review of a term of confinement. Given the availability of review through the military courts, therefore, Manning's Eighth Amendment claim (Count I) must be dismissed as improperly before this Court.

B. Both of Manning's Claims Must Be Dismissed as Unexhausted

Independent of the abstention issue, both of Manning's claims must also be dismissed as improperly exhausted. Both parties agree that Manning's lawsuit is subject to the PLRA's exhaustion requirement. *See* ECF No. 15 at 7. And exhaustion of intra-military remedies would be required even absent the PLRA. *See Bois*, 801 F.2d at 468. Here, Manning did not complete all available remedies for an express request to wear a feminine hairstyle for medical reasons. And with respect to the equal protection claim, Manning has *never* raised that issue internally within the USDB or the Army. Thus, both claims should be dismissed.

1. The PLRA Requires Exhaustion on a Claim-By-Claim Basis

The PLRA provides that "[n]o action shall be brought with respect to prison conditions . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Exhaustion is required for all "available" remedies; "those remedies need not meet federal standards, nor must they be plain, speedy, and effective." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Prisoners are required to exhaust their remedies before filing suit, even if the prisoner later files an Amended Complaint. *See Jackson v. Dist. of Columbia*, 254 F.3d 262, 269 (D.C. Cir. 2001). If a

Complaint contains some exhausted claims and some non-exhausted claims, only the exhausted claims may proceed. *See Jones v. Bock*, 549 U.S. 199, 219-24 (2007).

The purpose of exhaustion is to "afford[] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter*, 534 U.S. at 525. The facility may take corrective action "thereby obviating the need for litigation," or at the very least the facility's response will create "an administrative record that clarifies the contours of the controversy." *Id.*

The adequate level of detail in a grievance "will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Jones*, 549 U.S. at 218. "Even so, there is undoubtedly a threshold level of information an inmate must provide in the administrative process in order to meet the federal exhaustion requirement." *Goldsmith v. White*, 357 F. Supp. 2d 1336, 1339 (N.D. Fla. 2005). Thus, "a grievance should be considered sufficient to the extent that the grievance gives officials a fair opportunity to address the problem that will later form the basis of the lawsuit." *Johnson v. Johnson*, 385 F.3d 503, 517 (5th Cir. 2004); *see also Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004); *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002); *Smith-Bey v. CCA/CTF*, 703 F. Supp. 2d 1, 7 (D.D.C. 2010); *Goldsmith*, 357 F. Supp. 2d at 1339.

2. Manning Did Not Exhaust All Available Remedies Expressly Requesting a Feminine Hairstyle As Part of Her Medical Treatment

As discussed above, USDB inmates are required to submit their complaints or grievances through Form 510s. *See* USDB MGI (Exh. E), ch. 2-4; *see also* AR 190-47 (Exh. A), ch. 10-14. Inmates "shall clearly state the problem" on the form, USDB MGI ch. 2-4(f), and the form itself requires inmates to "[g]ive a clear, full explanation" as to what they are requesting. *See, e.g.*, Exh. F. In the case of medical issues, inmates may also submit grievances to the IG: PA/ HIPAA

[redacted] Memorandum For Receptee Inmates, USDB, *Access to Medical Care/Inmate Grievance Procedure* (Feb. 1, 2013) (attached hereto as Exh. M) (signed by Manning upon her arrival); *see also* AR 190-47, ch. 10-14(a) ("Prisoners will be advised at the time of their incarceration of their rights to submit complaints and grievances to the facility commander or a designated representative and the inspector general under provisions of AR 20–1."); *cf.* Am. Compl. ¶¶ 68-69.

Here, Manning did not complete the grievance process for an explicit request to wear a feminine hairstyle as part of her medical treatment. Although Manning submitted both Form 510s and an IG request in January 2014, [redacted] *See, e.g.*, Exh. F at 1 (Aug. 28, 2013 Form 510, [redacted] *id.* at 4 (Jan. 5, 2014 Form 510, [redacted] Manning's IG request [redacted]. *See* Exh. G at 1. Thus, these earlier grievance submissions did not exhaust any express request for permission to wear a feminine hairstyle as part of her medical treatment.

Manning later submitted Form 510s that [redacted] *See, e.g.*, Exh. F at 5-13 (Form 510s dated Apr. 2, 2014; July 23, 2014; and Aug. 21, 2014). But those Form 510s were submitted well after the January 2014 IG request, and [redacted]

PA/HIPAA; IG PA/HIPAA; IG Manning never completed the exhaustion process for the particular Eighth Amendment claim she seeks to bring here—*i.e.*, an express request for a feminine hairstyle as part of her medical treatment. *See Woodford v. Ngo*, 548 U.S. 81, 100 (2006) (interpreting the PLRA as saying that "if the party never pursues all available avenues of administrative review, the person will never be able to sue in federal court"). Even if Manning believed such exhaustion with the IG was pointless or futile, she was still required to pursue that available grievance process. *See Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001) (PLRA case stating that "we will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise").

3. Manning Did Not Exhaust Any Administrative Channels In Connection With Her Sex Discrimination Claim

Manning also failed to exhaust her Fifth Amendment equal protection claim. At no point has Manning raised this sex discrimination claim before the USDB or the Army—either through a Form 510, or through any other administrative process. *See*, *e.g.*, Army Regulation 600-20, *Army Command Policy* (Nov. 6, 2014), ch. 6-2 ("Equal Opportunity Policy," including prohibitions on gender discrimination) & App. C (setting forth the Equal Opportunity complaint processing system) (available at http://www.apd.army.mil/pdffiles/r600_20.pdf, excerpts attached hereto as Exh. N).[5] Manning's sex-discrimination claim is plainly unexhausted.

Manning's prior grievances PA/HIPAA are not sufficient to exhaust the sex-discrimination claim because they uniformly were framed as complaints about the lack of medical care. *See* Exhs. F, G. A complaint about inadequate medical care (*e.g.*, that a

[5] Although Manning's Amended Complaint alleges that she "is a woman and has been recognized as such by Defendants," Am. Compl. ¶ 129, aside from legally changing her name, *id.* ¶ 46, Manning has not sought to change the gender listed in any of her military records, nor has she asserted a right to be treated as a woman for all purposes. Most notably, she has not contested her placement at the USDB, a male facility. *See also* note 3, *supra*.

person's treatment does not conform to the required medical standards) is very different than a complaint about sex discrimination (*e.g.*, that a person is unfairly being treated differently than other similarly situated men/women). *Compare, e.g.*, Am. Compl. ¶ 115, *with id.* ¶ 132. Manning's prior grievances about medical care did not put Defendants on notice of any claim involving unlawful sex discrimination. *Cf. Johnson v. Johnson*, 385 F.3d at 518 (an inmate's grievances regarding "protection from sexual assaults" cannot "be read to give notice that there was a race-related problem"). Nor did the original Complaint ever put Defendants, or this Court, on notice that sex discrimination was also at issue. *See, e.g.*, ECF No. 38 at 2 (Plaintiff noting that "the single claim asserted in the Complaint" was based on "denying Plaintiff medically necessary treatment for her diagnosed gender dysphoria"). Thus, even Manning herself—along with Defendants and the Court—appears to have understood her claim as one of inadequate medical care, rather than one of discrimination. The equal protection claim should therefore be dismissed for failure to exhaust.

II. MANNING FAILS TO STATE AN EIGHTH AMENDMENT CLAIM

Under the Eighth Amendment, prison conditions may be "restrictive and even harsh," as long as they do not "deprive inmates of the minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *see also Brennan*, 511 U.S. at 834; *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) ("The Constitution . . . does not mandate comfortable prisons[.]"). A prison's failure to provide adequate medical treatment amounts to cruel and unusual punishment only when prison officials are deliberately indifferent to a prisoner's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

To establish a claim for inadequate medical treatment, Manning must satisfy both an objective and a subjective element. For the objective requirement, Manning must show that the failure to provide her requested treatment "result[s] in the denial of the minimal civilized

measure of life's necessities." *Brennan*, 511 U.S. at 834. For the subjective requirement, Manning must show that the officials responsible for her deprivation "have a sufficiently culpable state of mind"—*i.e.*, that they exhibit "deliberate indifference to [Manning's] serious medical needs[.]" *Id.* at 834-35.

Manning cannot make either showing here. First, Manning cannot establish that her alleged deprivation—the prohibition on growing longer hair—is objectively serious, equivalent to "the denial of the minimal civilized measure of life's necessities." *Brennan*, 511 U.S. at 834. Quite simply, the Eighth Amendment does not require that prisoners be permitted to grow hair longer than two inches, especially in a military setting. In light of all the other treatments she is currently receiving, Manning cannot establish an objectively serious deprivation as a matter of law, and the Amended Complaint does not sufficiently allege otherwise.

With respect to the subjective element, Manning has not plausibly alleged that the Defendants here are *actually aware* that Manning's treatment is inadequate, and yet are *deliberately indifferent* to that need. Manning's current treatment plan demonstrates careful attention to her medical needs, the very opposite of deliberate indifference. Indeed, with respect to hair specifically, Defendants have determined that security concerns prevent provision of that treatment, which is entirely appropriate (if not required). *See Kosilek v. Spencer*, 774 F.3d 63, 83 (1st Cir. 2014) (en banc). The Amended Complaint expressly acknowledges these security concerns, as it must. Am. Compl. ¶ 123. Thus, no Eighth Amendment claim exists here.

A. Manning Cannot Establish that the Failure to Permit Longer Hair Is an Objectively Serious Deprivation Under the Eighth Amendment

Defendants do not dispute that gender dysphoria, in many circumstances, amounts to an objectively serious medical condition that requires appropriate treatment under the Eighth Amendment. But Manning is receiving significant treatment for her gender dysphoria: regular

psychotherapy, cross-sex hormone therapy, speech therapy, and the provision of female undergarments and cosmetics. *See* ECF No. 39 at 1. Thus, the question here is whether, in light of all of these treatments, the failure to permit longer hair nonetheless constitutes a denial of the "minimal civilized measures of life's necessities." *Brennan*, 511 U.S. at 834; *see, e.g.*, *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (stating that the objective prong asks whether "the alleged wrongdoing was objectively harmful enough to establish a constitutional violation"); *Kosilek*, 774 F.3d at 89; *Smith v. Carpenter*, 316 F.3d 178, 185-86 (2d Cir. 2003). Denying Manning permission to grow longer hair is not an objectively serious deprivation under the Eighth Amendment, both as a matter of law and based on Manning's own allegations.

1. As a Matter of Law, Denying Permission to Grow Longer Hair Is Not an Objectively Serious Deprivation

Even outside the military context, numerous prison facilities impose grooming standards of some variety upon inmates. *See, e.g.*, 28 C.F.R. § 551.4 (BOP regulation, stating that inmates can have long hair "if the inmate keeps it neat and clean"); *see generally* Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 964-72 (2012) (Appendix B: Federal and State Inmate Grooming Policies). Courts routinely hold that such policies do not deny prisoners the "minimal civilized measures of life's necessities." *See, e.g.*, *LaBranch v. Terhune*, 192 F. App'x 653, 653 (9th Cir. 2006) (rejecting an Eighth Amendment claim against "new grooming standards establishing limits on hair length and requiring that inmates remain clean-shaven" because the plaintiff "has not shown that [the grooming standards] deny him the minimal civilized measures of life's necessities"); *DeBlasio v. Johnson*, 128 F. Supp. 2d 315, 326 (E.D. Va. 2000), *aff'd*, 13 F. App'x 96 (4th Cir. 2001); *Rose v. Terhune*, 10 F. App'x 466, 467 (9th Cir. 2001); *Larkin v. Reynolds*, 39 F.3d 1192 (10th Cir. 1994) (table); *Hill v. Estelle*, 537 F.2d 214, 215 (5th Cir. 1976); *Blake v. Pryse*, 444 F.2d 218, 219 (8th Cir. 1971);

Daugherty v. Reagan, 446 F.2d 75, 75 (9th Cir. 1971); *cf. Shabazz v. Barnauskas*, 790 F.2d 1536, 1538 (11th Cir. 1986). As this overwhelming caselaw reflects, as a general rule, the enforcement of grooming policies does not violate the Eighth Amendment.

That conclusion is further confirmed by courts' decisions related to medical care for gender dysphoria. Although this caselaw is developing, it is clear that an inmate is not constitutionally entitled to every single component of his or her preferred treatment plan, and courts have rejected Eighth Amendment claims brought by inmates receiving far fewer treatments than Manning. For example, the D.C. Circuit has held that prisons are not always required to provide cross-sex hormone therapy. *See Farmer v. Hawk*, 991 F. Supp. 19, 29 (D.D.C.) ("[T]he BOP's refusal to provide Farmer with female hormone therapy does not, in and of itself, constitute cruel and unusual punishment."), *aff'd in relevant part sub nom., Farmer v. Moritsugu*, 163 F.3d 610 (D.C. Cir. 1998); *see also, e.g.*, *Praylor v. Tex. Dep't of Criminal Justice*, 430 F.3d 1208, 1209 (5th Cir. 2005) (plaintiff was not entitled to the specific treatment requested); *Supre v. Ricketts*, 792 F.2d 958, 963 (10th Cir. 1986); *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) (noting that the plaintiff "does not have a right to any particular type of treatment"); *White v. Farrier*, 849 F.2d 322, 327 (8th Cir. 1988). If hormone therapy is not always required under the Eighth Amendment, neither would the provision of any particular personal grooming standard—especially for inmates who are already receiving other significant treatments such as hormone therapy. Given the extensive treatments that Manning is receiving, she cannot reasonably claim that denying her permission to grow longer hair, by itself, constitutes a denial of the "minimal civilized measures of life's necessities." Whatever the constitutional floor may be for gender dysphoria treatments, the Army currently stands well above it.

Finally, Manning's challenge to the enforcement of the hair restriction must be viewed in the appropriate context. Manning is in a posture notably distinct from that of a typical prisoner, who is subject to a grooming standard solely by virtue of his or her incarceration. Manning is subject to grooming standards not solely by virtue of her incarceration, however, but because of her enlistment in the military. *See* Background, Section I.B, *supra*. Thus, in this context, it is doubtful that the grooming standards can even be considered "punishment" subject to Eighth Amendment scrutiny, at least while Manning remains an active-duty servicemember. *See Brennan*, 511 U.S. at 837 ("The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'"). But at the very least, the widespread enforcement of the Army's grooming restrictions—to both incarcerated and non-incarcerated servicemembers alike—highlights why such restrictions are not objectively serious deprivations within the meaning of the Eighth Amendment.

2. Manning's Complaint Does Not Plausibly Allege an Objectively Serious Deprivation

Even if the desire for longer hair could qualify for Eighth Amendment scrutiny in some circumstances, Manning's allegations here do not rise to that level. Manning's current conditions of confinement may be "restrictive and even harsh," but they do not constitute deprivations "of the minimal civilized measure of life's necessities." *Rhodes*, 452 U.S. at 347.

The Amended Complaint appears to suggest that the denial of longer hair is causing Manning psychological harm, as well as increasing her risk of potential future self-harm. *See, e.g.*, Am. Compl. ¶¶ 106, 111. Both of these harms may be cognizable under the Eighth Amendment, but the bar for each is exceedingly high. First, with respect to psychological harm, the distress must be extreme. *See Doe v. Welborn*, 110 F.3d 520, 524 (7th Cir. 1997) (holding that a claim "to have lived in fear of assault" was not "the kind of extreme and officially

sanctioned psychological harm" that would "reflect the deprivation of the minimal civilized measures of life's necessities"). With respect to potential future harm, the inmate must "show that he is incarcerated under conditions posing a substantial risk of serious harm." *Brennan*, 511 U.S. at 834. The inmate must demonstrate that he is currently facing the risk, and that "society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Helling v. McKinney*, 509 U.S. 25, 36 (1993). "In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate." *Id.*

Here, Manning's allegations are insufficient to establish either harm as objectively serious under the Eighth Amendment. First, Manning alleges generally that "[e]very day that goes by without appropriate treatment, Plaintiff experiences anxiety, distress, and depression." Am. Compl. ¶ 106. Later in the Amended Complaint, when elaborating on the psychological effect of being unable to grow longer hair, Manning alleges that it "causes her to feel hurt and sick," Am. Compl. ¶ 107, and that she "feels like a freak and a weirdo – not because having short hair makes a person a less of a woman – but because for her, it [] undermines specifically recommended treatment and sends the message to everyone that she is not a 'real' woman." *Id.* ¶ 110. These allegations are far from the type of extreme psychological distress necessary to state an objectively serious Eighth Amendment claim. *See, e.g.*, *Hudson v. McMillian*, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring) (citing a case involving a "guard placing a revolver in inmate's mouth and threatening to blow prisoner's head off"); *Chandler v. D.C. Dep't of Corrs.*, 145 F.3d 1355, 1361 (D.C. Cir. 1998) (permitting Eighth Amendment claim for psychological harm to proceed based on allegations that "a guard threatened to have [the plaintiff] killed and that prison officials ignored his consequent administrative complaints"). Indeed, Manning's

acknowledgement that many women wear short hair, *see* Am. Compl. ¶ 110, further highlights why permission to grow long hair does not constitute one of the "minimal civilized measures of life's necessities."

Furthermore, nowhere does Manning allege that she is currently facing a substantial risk of serious harm. At most, Manning alleges that she might face such a risk at some point in the future, perhaps within the next several years. *See* Am. Compl. ¶ 111 ("Plaintiff fears that . . . her anguish will only escalate and she will not be able to survive the 35 years of her sentence, let alone the next few years."). This vague allusion to a potential future risk of harm is insufficient to establish that Manning is currently suffering an objectively serious deprivation under the Eighth Amendment—*i.e.*, that she is *currently* exposed to a risk "so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Helling*, 509 U.S. at 36.[6]

Similarly, Manning's other allegations regarding her medical need are not specific to her hair length and are significantly outdated. Manning does not allege that any medical provider has determined that the inability to grow longer hair, standing alone, amounts to an objectively serious medical need. The closest Manning comes to such an allegation is citing Dr. Ettner's statement that "the refusal to permit Plaintiff to consolidate her female gender through the outward expression of her femininity causes her to suffer extreme pain, depression, and anxiety." Am. Compl. ¶ 109. But Dr. Ettner evaluated Manning in August 2014, *id.* ¶ 81—which is now over fourteen months ago, and well before Manning received many of her other forms of treatment. *See generally id.* ¶¶ 87-98. This allegation is thus irrelevant to the issue of Manning's

[6] Were Manning to reach the point of potential self-harm, Defendants would, of course, take appropriate action. For purposes of the Eighth Amendment, however, Manning cannot bring a claim unless there is currently a substantial risk of self-harm, and Manning has not plausibly alleged as much.

present treatment; and on that issue, Manning's allegations are insufficient.[7] Even assuming that the hair restriction could constitute an objectively serious deprivation, therefore, Manning has not plausibly alleged as much here.

B. Manning Has Not Plausibly Alleged Deliberate Indifference

Manning's allegations also do not state a claim as to the subjective prong of the Eighth Amendment analysis. As discussed above, in addition to the objective component, the Eighth Amendment is violated only upon showing "a sufficiently culpable state of mind" by the offending official, *Wilson*, 501 U.S. at 298, which requires "obduracy and wantonness" not mere "inadvertence or error in good faith[.]" *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

In the medical context, "[i]t is well-established that mere disagreement over the proper treatment does not create a constitutional claim." *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998); *see also Banks v. York*, 515 F. Supp. 2d 89, 103 (D.D.C. 2007). Because "[p]risoners do not have a constitutional right to any particular type of treatment," there is no Eighth Amendment violation when prison officials "in the exercise of their professional judgment . . . refuse to implement a prisoner's requested course of treatment." *Long v. Nix*, 86 F.3d 761, 765 (8th Cir. 1996). Indeed, even "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Estelle*, 429 U.S. at 106.

To the extent Manning is alleging that she is currently at risk of harm, a prison official is deliberately indifferent only if "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be

[7] Furthermore, even if Dr. Ettner's statement were current, it is far from clear that her reference to Manning "consolidat[ing] her female gender through the outward expression of her femininity," Am. Compl. ¶ 109, refers specifically to the hair restriction, as opposed to other aspects of military prison life that prevent Manning from outwardly expressing her femininity. And even if so, it is not clear that such an allegation would be sufficient to demonstrate extreme psychological distress.

drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Brennan*, 511 U.S. at 837. The "deliberate indifference" inquiry is "an appropriate vehicle to consider arguments regarding the realities of prison administration." *Helling*, 509 U.S. at 37.

As described in further detail below, the allegations of the Amended Complaint do not state a claim that any of the named Defendants has a sufficiently culpable state of mind as to the decision on Manning's hair length. On the contrary, Defendants already have provided significant treatment, while appropriately taking into account military and prison security concerns, as they must.

1. The Army's Actions Demonstrate Their Commitment to Providing Appropriate Treatment

The Amended Complaint does not allege, nor could it, that Defendants have ignored or denied their obligation to provide Manning with appropriate medical treatment for her gender dysphoria. On the contrary, Defendants affirmatively have committed to creating and implementing a treatment plan for this diagnosis. As Col. Nelson stated over a year ago in a letter to Manning: "The Army recognizes and fully accepts its responsibility to provide medically necessary care for each inmate at the USDB, based on an individualized assessment of each inmate's medical needs balanced against the Army's penological, security and disciplinary interests." Exh. I. And as the Amended Complaint itself demonstrates, the USDB has implemented extensive treatment for Manning's gender dysphoria, including psychotherapy, real life experience in the form of permission to wear female underwear, sports bras and cosmetics, speech therapy, and cross-sex hormone therapy. *See* Am. Compl. ¶¶ 77, 79, 98, 104. Manning does not, therefore, allege facts supporting the conclusion that Defendants have acted with the "obduracy and wantonness" necessary to state a claim for deliberate indifference. *Whitley*, 475 U.S. at 319.

Consistent with Col. Nelson's letter, treatment for Manning's gender dysphoria has been phased in based on the facility's ongoing assessment of Manning's medical needs and the potential risks to prison security that any particular form of treatment poses. *See generally* Oct. 2014 Risk Assessment (Exh. J); Feb. 2015 Risk Assessment (Exh. K); Sept. 2015 Risk Assessment (Exh. L). For example, the initial treatments provided to Manning—psychotherapy and permission to wear female undergarments and sports bras—were relatively private, imposing relatively small risk within the prison. After permission to wear cosmetics, a more public form of treatment, was medically recommended, the USDB phased that into her treatment while monitoring the inmate population for potential security concerns. The USDB permitted hormone therapy to begin a few months later, shortly after being medically recommended, again following an evaluation of the security concerns. *See* Am. Compl. ¶ 97. And although the USDB recently determined that Manning could not safely be permitted to grow longer hair, *id.* ¶ 100, that occurred only after a careful review and consideration of the possible risks involved—*i.e.*,

PA/HIPAA; LES

PA/HIPAA; LES

This history of treatment confirms that Defendants are acting in good faith, and not with deliberate indifference. Defendants currently are treating Manning's gender dysphoria diagnosis with much, but not all, of her preferred course of treatment. This considered judgment is constitutionally permissible. *See Chance*, 143 F.3d at 703 (a "mere disagreement over the proper treatment" which "does not create a constitutional claim"); *Estelle*, 429 U.S. at 107. As discussed above, courts have frequently determined that a considered judgment not to provide all forms of treatment for gender dysphoria does not show deliberate indifference. *See* Section II.A.1, *supra*. Nor is there a basis in the Amended Complaint from which to conclude

that Defendants have not acted in good faith with regard to Manning's treatment, even though Manning complains about the pace of treatment. *See Scott v. Dist. of Columbia*, 139 F.3d 940, 944 (D.C. Cir. 1998) (good faith, but imperfect, effort to keep prison smoke free does not establish deliberate indifference); *Arnold v. Wilson*, No. 1:13-CV-900, 2014 WL 7345755, at *6 (E.D. Va. Dec. 23, 2014) (holding that "the two-year delay in prescribing plaintiff with hormones was not the result of deliberate indifference" because "defendants were aware of plaintiff's concerns, and were working, albeit slower than she liked, to help her").

The allegations of the Amended Complaint simply do not state a claim that Defendants are deliberately indifferent based solely on their decision not to allow Manning to grow longer hair. The history of careful consideration of Manning's treatment needs and risks within the USDB demonstrates that Manning's treatment decisions, including the decision on hair length, have been made thoughtfully and in good faith—the very opposite of the "obduracy and wantonness" characteristic of deliberate indifference. *Scott*, 139 F.3d at 944.

2. Manning Has Not Plausibly Alleged Deliberate Indifference By Any of the Defendants

The Amended Complaint should also be dismissed because it fails to adequately allege deliberate indifference as to any of the particular Defendants. As to the four individual Defendants, the Amended Complaint is devoid of specific factual allegations regarding the requisite mental state. Nor does suing the Department of Defense as an entity save the Amended Complaint from dismissal.

The Amended Complaint names four individual Defendants: Ashton Carter, the Secretary of Defense; Maj. Gen. David E. Quantock, the former Provost Marshal General of the United States Army (who was in charge of the Army Corrections Command); Col. Erica Nelson, the Commandant of the USDB; and Lt. Col. Nathan Keller, the Director of Treatment Programs at

the USDB. *See* Am. Compl. ¶¶ 8-11. Even assuming that Manning has an objectively serious need for longer hair, *see* Section II.A, *supra*, the Amended Complaint does not plausibly allege that any of the four individual Defendants has "a sufficiently culpable state of mind" regarding this need. *Wilson*, 501 U.S. at 298.

First, Manning has sued the individual Defendants apparently based on their supervisory roles over medical care within the USDB. *See* Am. Compl. ¶¶ 8-11 (alleging that each of the individual Defendants "is among those responsible for denying Plaintiff medically necessary treatment for gender dysphoria"). Absent additional factual allegations, however, this theory of pleading is impermissible in the D.C. Circuit. *See Moritsugu*, 163 F.3d at 615 (rejecting an Eighth Amendment claim against the Bureau of Prisons (BOP) medical director because he was "not the person within the BOP who determines whether psychotherapy is required in a given case" and thus the lawsuit was based "on the mistaken assumption that the boss can cure all ills"); *see also Arnold v. Moore*, 980 F. Supp. 28, 35 (D.D.C. 1997) (rejecting Eighth Amendment claims against individual defendants premised on theory of *respondeat superior*).[8]

In addition, while the Sept. 2015 Risk Assessment, incorporated by reference into the Amended Complaint, *see* Am. Compl. ¶ 100, demonstrates that Col. Nelson was the official responsible for deciding whether Manning should be permitted to grow longer hair, the Amended Complaint nowhere alleges that Col. Nelson (or any of the other individual Defendants for that

[8] Manning's lawsuit against Maj. Gen. Quantock should be dismissed for still another reason: Maj. Gen. Quantock was not the Provost Marshal General at the time Manning filed her lawsuit on September 23, 2014. He was replaced by Maj. Gen. Inch on September 12, 2014, a fact of which the Court may take judicial notice. *See United States Army, Brig Gen. Mark S. Inch Takes Over as Provost Marshall General, CID, ACC Commander* (Sept. 15, 2014), http://www.army.mil/article/133730/Brig__Gen__Mark_S__Inch_Takes_Over_as_Provost_Marshal_General__CID__ACC_Commander/. Although the Federal Rules provide for automatic substitution of public officials, *see* Fed. R. Civ. P. 25(d), that Rule does not provide for substitution when the originally named official was not in office at the time of filing.

matter) has a "sufficiently culpable state of mind." *Brennan*, 511 U.S. at 834. In particular, the Amended Complaint does not allege that any of the Defendants actually knows that, even though Manning already has received extensive gender dysphoria treatments, she still has an objectively serious medical need to grow longer hair. Indeed, as discussed above, Manning has not alleged that any of her medical providers has in fact reached that conclusion.[9] Nor does the Amended Complaint allege that any of these Defendants actually has "draw[n] the inference" that in light of the extensive treatment that Manning is now receiving for gender dysphoria, the decision not to permit longer hair, on its own, creates "a substantial risk of serious harm." *Brennan*, 511 U.S. at 837; *see also id.* at 838 ("[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment."). Manning therefore has failed to plausibly allege an Eighth Amendment violation by the individual Defendants. *See Mowatt v. U.S. Parole Comm'n*, 815 F. Supp. 2d 199, 208 (D.D.C. 2011) (dismissing an Eighth Amendment claim because "Plaintiff does not make any allegation concerning Warden Grayer's state of mind"); *see also Jackson v. Corr. Corp. of Am.*, 564 F. Supp. 2d 22, 28 (D.D.C. 2008) (Kollar-Kotelly, J.).

Furthermore, while Manning has also named the Department of Defense as a Defendant, *see* Am. Compl. ¶ 12, that does not save Manning's Complaint from dismissal. It is at best unclear how a federal agency could have the subjective deliberate indifference necessary for

[9] As to the three individual Defendants who are not medical officials (Col. Nelson, Maj. Gen. Quantock, and Secretary Carter), Manning's Amended Complaint requires the Court to assume that these senior DOD/Army officials, none of whom have medical training, have personal knowledge of the inadequacy of Manning's current course of treatment, and yet are deliberately indifferent to their knowledge of this inadequacy. This assumption is simply not plausible. *See Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004) (affirming dismissal of Eighth Amendment claim because "[i]f a prisoner is under the care of medical experts . . . , a non-medical prison official will generally be justified in believing that the prisoner is in capable hands"); *Miltier v. Beorn*, 896 F.2d 848, 854 (4th Cir. 1990).

Eighth Amendment liability. *Cf. Brennan*, 511 U.S. at 841 (noting that "considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official"). Any theory holding the agency responsible based on the collective facts and knowledge of all of its employees would threaten to eliminate the subjective "deliberate indifference" standard, contrary to the Supreme Court's consistent holdings. *See, e.g.*, *Wilson*, 501 U.S. at 300 ("If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify."); *see also Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 670 n.6 (D.C. Cir. 1996) ("Individual acts of negligence on the part of employees—without more—cannot, however, be combined to create a wrongful corporate intent."). In any event, there are no allegations in the Amended Complaint suggesting that the agency itself could be imputed to have a more culpable mental state than that of its decision-makers. Accordingly, for the same reasons that Manning has not stated a claim as to deliberate indifference by the individual Defendants, she has not stated a claim with regard to the Department of Defense.

3. Defendants Cannot Be Deliberately Indifferent Because They Have Appropriately Relied on Security and Military Concerns

In addition, Defendants have not been deliberately indifferent to the treatment recommendation for Manning to grow longer hair because they have considered how this treatment would affect the USDB and determined, appropriately, that such treatment "was not supported by the risk assessment and potential risk mitigation measures at this time." Am. Compl. ¶ 100. Denial of a medical treatment based upon legitimate security and military concerns is not deliberate indifference.

As the Supreme Court has stated, "[i]t bears repetition . . . that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this

area." *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005). In particular, prison officials are entitled to deference about how to administer medical care in light of their legitimate security concerns. The First Circuit recently explained:

> When evaluating medical care and deliberate indifference, security considerations inherent in the functioning of a penological institution must be given significant weight. "Wide-ranging deference" is accorded to prison administrators "in the adoption and execution of policies and practices that in their judgement are needed to maintain institutional security." In consequence, even a denial of care may not amount to an Eighth Amendment violation if that decision is based in legitimate concerns regarding prisoner safety and institutional security.

Kosilek, 774 F.3d at 83 (quoting *Whitley*, 475 U.S. at 321-22) (internal modifications, citations omitted); *see also Battista v. Clarke*, 645 F.3d 449, 454 (1st Cir. 2011) ("Medical 'need' in real life is an elastic term: security considerations also matter at prisons . . . and administrators have to balance conflicting demands."); *cf. Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (penological concerns may be considered in reviewing an Eighth Amendment claim); 18 U.S.C. § 3626(a)(1)(A) (PLRA provision requiring the Court to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief").

The deference to officials' decision-making about how to run a prison is even stronger in a military setting. The USDB has a unique, military mission, *see* 10 U.S.C. § 951, which makes it fundamentally different from civilian prisons. The USDB has a distinct inmate population, governed by distinct military norms, customs, and regulations. *See* Background, Section I. The Court therefore should evaluate the USDB's restriction on hair with appropriate deference to the USDB's military judgments, *see Orloff v. Willoughby*, 345 U.S. 83 (1953), *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), *Goldman*, 475 U.S. at 507, as well as to the USDB officials' operational judgments particular to their facility, *see Bell v. Wolfish*, 441 U.S. 520, 540 (1979).

As the Amended Complaint alleges, the USDB's decision on Manning's hair length was based on security concerns. *See* Am. Compl. ¶¶ 100, 123-25. Nowhere does Manning allege

that these concerns were illegitimate or pretextual. In light of the deference appropriate here, the Amended Complaint should be dismissed on this ground alone. *See, e.g.*, *Fields v. Smith*, 653 F.3d 550, 557-58 (7th Cir. 2011) (prison officials entitled to deference related to security concerns unless the actions are "taken in bad faith and for no legitimate purpose" (quoting *Whitley*, 475 U.S. at 322)).

Moreover, the analysis contained in the Sept. 2015 Risk Assessment, which is quoted in the Amended Complaint and thereby incorporated into the pleading, provides further detail about the USDB's decision. *See* Am. Compl. ¶ 100. Col. Nelson decided that permitting Manning to wear a feminine hairstyle presented unacceptable risk [redacted] *See* Exh. L at pg. 1 & ¶ 14. [redacted] *Id*. at ¶ 12. [redacted] *Id.* at ¶ 12(d). [redacted] *See id*. at ¶ 14 [redacted]; *see also* Oct. 2014 Risk Assessment (Exh. J) at ¶¶ 14, 17. The Sept. 2015 Risk Assessment shows that the USDB made a careful and considered judgment that its particular security concerns prevented allowing Manning to wear longer hair, a decision to which deference to both its military and prison security expertise is due.

While Manning may disagree with the risk perceived by the USDB, the prison officials are entitled to deference in this decision-making, especially where, as here, there is no allegation of pretext. Further, even if Manning herself is unconcerned about this risk, her view does not reduce the USDB's responsibility to guard her safety, much less to guard the safety of others. *See Brennan*, 511 U.S. at 833 ("[P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." (quotation omitted)); *Battista*, 645 F.3d at 454. Because the hair length decision was made based upon legitimate security concerns, as her own Amended Complaint acknowledges, *see* Am. Compl. ¶ 123, Manning cannot state a claim that Defendants were deliberately indifferent.

III. MANNING FAILS TO STATE AN EQUAL PROTECTION CLAIM

Finally, Manning's equal protection claim must also be dismissed. As a threshold matter, Manning, who is housed in a facility for male military inmates, is not similarly situated to female inmates who are housed in facilities for female military inmates, which are governed by different grooming policies. A female inmate's permission to grow longer hair in a female facility, consistent with that facility's standards, says nothing about whether Manning ought to be granted an exception to the restrictions in force at the USDB. Furthermore, even if equal protection scrutiny were available, and even if intermediate scrutiny applied, the Army's decisions here are substantially related to important government interests—prison security and military discipline.

A. Manning, Who Is Housed in a Military Facility for Men, Is Not Similarly Situated to Inmates Housed in All-Female Facilities

Manning's equal protection claim is premised on the allegation that she is similarly situated to other female prisoners incarcerated in military correctional facilities. *See* Am. Compl. ¶ 130. But that is plainly not correct. Manning is housed at the USDB, a military prison for men, whereas those prisoners are housed in different facilities. And unlike those other facilities,

the USDB has a two-inch restriction on hair length, and any exception to that uniform restriction creates safety and security concerns. Thus, Manning cannot be similarly situated to female prisoners incarcerated in facilities without that same restriction—particularly given that Manning does not challenge her placement at the USDB. *See* ECF No. 15 at 21; note 3, *supra*.

As the D.C. Circuit has explained, the "similarly situated" inquiry is a threshold one that must be proven as part of any equal protection claim:

> The Fourteenth Amendment's Equal Protection Clause requires States to treat similarly situated persons alike. . . . The Constitution, however, does not require things which are different in fact or opinion to be treated in law as though they were the same. Thus, the dissimilar treatment of dissimilarly situated persons does not violate equal protection. The threshold inquiry in evaluating an equal protection claim is, therefore, to determine whether a person is similarly situated to those persons who allegedly received favorable treatment.

Women Prisoners of the D.C. Dep't of Corrs. v. Dist. of Columbia, 93 F.3d 910, 924 (D.C. Cir. 1996) (internal citations and quotations omitted). A distinction in treatment between or among different prison facilities does not itself create an equal protection claim. *See Koyce v. U.S. Bd. of Parole*, 306 F.2d 759, 762 (D.C. Cir. 1962) ("In determining whether [a prisoner] is being denied equal protection of the laws the class to which he belongs consists of the persons confined as he was confined, subject to the same conditions to which he was subject."). Indeed, courts often find that prisoners incarcerated in different facilities are not similarly situated for purposes of equal protection analysis. *See Noble v. United States Parole Comm'n*, 194 F.3d 152, 154-155 (D.C. Cir. 1999) (prisoners in the custody of different government agencies are not similarly situated); *see also, e.g.*, *Klinger v. Dep't of Corrs.*, 31 F.3d 727, 732 (8th Cir. 1994) (male and female prisoners housed at different prisons were not similarly situated for Equal Protection purposes, because the prisons were "different institutions with different inmates each operating with limited resources to fulfill different specific needs"); *Pargo v. Elliott*, 894 F. Supp. 1243,

1290 (S.D. Iowa), *aff'd*, 69 F.3d 208 (8th Cir. 1995); *Marshall v. Fed. Bureau of Prisons*, 518 F. Supp. 2d 190, 196 (D.D.C. 2007).

Here, Manning is not similarly situated because, unlike inmates housed at the military's female prison, Manning is housed in a military prison for men with grooming restrictions requiring short hair. *See* Am. Compl. ¶ 19. From the face of the Amended Complaint it is apparent that *unlike* female prisoners in a women's prison where female grooming standards are applied, if Manning were allowed to wear medium or long hair, she would stand out as unique from the rest of the USDB inmate population. Manning certainly has not pled any facts that would allow the Court to reach the opposite conclusion. Moreover, as the USDB's Risk Assessments have discussed, PA/HIPAA; LES PA/HIPAA; LES PA/HIPAA; LES *See* Section II.B.3, *supra*. This effect simply would not occur in an all-female prison where, as the Amended Complaint alleges, female prisoners are permitted additional grooming options. *See* Am. Compl. ¶ 19. Thus, contrary to Manning's allegations, she is not similarly situated to other female military prisoners in different facilities. *See Koyce*, 306 F.2d at 762 ("[T]he class to which [a prisoner] belongs consists of the persons confined as he was confined, subject to the same conditions to which he was subject.").[10]

[10] Furthermore, even if Manning could overcome this obvious distinction between the USDB and a military prison for women, the Amended Complaint still does not contain sufficient factual allegations to establish that Manning is "similarly situated" to other female military inmates. The Amended Complaint does not identify a specific military correctional facility for comparison, nor does it plead facts such as the prison's security level, size, and other relevant attributes about the prison or prisoners. *See Tanner v. Fed. Bureau of Prisons*, 433 F. Supp. 2d 117, 124 (D.D.C. 2006) (discussing the characteristics necessary for determining whether prisoners are similarly situated); *see also Boulware v. Fed. Bureau of Prisons*, 518 F. Supp. 2d 186, 190 (D.D.C. 2007) (plaintiff's alleged comparison to BOP prisoners nationwide insufficient to state an equal protection claim); *BEG Invs., LLC v. Alberti*, 85 F. Supp. 3d 13, 33-35 (D.D.C. 2015).

At bottom, Manning simply has alleged a legal conclusion that she is "similarly situated" to female prisoners. *See Kelley v. FBI*, 67 F. Supp. 3d 240, 258 (D.D.C. 2014) ("[A]lthough the Court must accept plaintiffs' factual allegations as true for purposes of the motion to dismiss, it need not accept legal conclusions cast in the form of factual allegations."). Such allegations are insufficient, and the claim therefore should be dismissed.

B. The Army's Actions Substantially Serve Important Government Interests

Even assuming that intermediate scrutiny applies to Manning's equal protection claim, and that she adequately has alleged that she is similarly situated to other female prisoners, the Amended Complaint should be dismissed because the alleged unequal treatment—the USDB requiring Manning to comply with male grooming standards in a prison for men—is substantially related to the important government interests of prison security and military discipline. *See Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1153 (D.C. Cir. 2004) ("Intermediate scrutiny requires that classifications be substantially related to important governmental interests."); *see also Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

As an initial matter, it is unnecessary to decide whether Manning's claim should be subject to intermediate scrutiny as Manning suggests, *see* Am. Compl. ¶ 134, or reviewed under a lesser standard. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 89 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").[11] Defendants are entitled to dismissal even under the intermediate scrutiny framework that Manning proposes.

[11] Several courts have treated discrimination claims similar to Manning's (but raised outside the prison and military contexts) as warranting intermediate scrutiny. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1317-18 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004); *but see Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227-28 (10th Cir. 2007). Although the D.C. Circuit has held that the *Turner* standard does not apply at least to some

In reviewing Manning's claim, the Court must grant substantial deference to Defendants' military and corrections judgments. *See Goldman*, 475 U.S. at 507 ("[W]hen evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."). This deference is no less applicable even under heightened scrutiny:

> Heightened scrutiny does not eliminate appreciation of both the difficulties confronting prison administrators and the considerable limits of judicial competency, informed by basic principles of separation of powers. . . . [T]hat inquiry must still acknowledge the importance of the state's interest in the prison context. Similarly, the scrutiny to find a direct and substantial relation between the government's means and ends must not substitute the court's presumed expertise for that of prison administrators as the court evaluates administrators' choices of one course over others.

Pitts, 866 F.2d at 1455; *see also Johnson v. California*, 543 U.S. at 515 ("Prisons are dangerous places, and the special circumstances they present may justify racial classifications in some contexts. Such circumstances can be considered in applying strict scrutiny, which is designed to take relevant differences into account."). Thus, deference to Defendants' military and corrections judgments is required even under heightened scrutiny.

Here, Defendants' decision on Manning's hair length was based on its effect on security within the USDB, as the Amended Complaint itself acknowledges. *See* Am. Compl. ¶¶ 100, 123-125. There can be no dispute that prison security is an important—indeed, compelling—

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gender-based discrimination claims under the Equal Protection Clause, it is not clear whether *Turner* would apply to a claim (like Manning's) "involving regulations that govern the day-to-day operation of prisons." *Pitts v. Thornburgh*, 866 F.2d 1450, 1453-54 (D.C. Cir. 1989); *but cf. Johnson v. California*, 543 U.S. 499 (2005) (applying strict scrutiny to race-based classifications in prison policies). Manning's claim arising in the military context would also weigh in favor of the *Turner* standard. *See Hatim v. Obama*, 760 F.3d 54, 58 (D.C. Cir. 2014) (construing a prior D.C. Circuit decision as establishing that "in the military context, the government is permitted to balance constitutional rights against institutional efficiency in a manner similar to the *Turner* test"); *cf. Goldman*, 475 U.S. at 507.

governmental interest. *See Johnson v. California*, 543 U.S. at 512 ("The necessities of prison security and discipline are a compelling government interest[.]"); *Harrington v. Scribner*, 785 F.3d 1299, 1308 (9th Cir. 2015) ("Penological interests may still factor into the analysis of an equal protection claim. The necessities of prison security and discipline are a compelling government interest."). This is especially true in maximum-security facilities such as the USDB. *See Harris v. Chapman*, 97 F.3d 499, 504 (11th Cir. 1996) (finding state's "compelling interest in security and order within their prisons" especially applies "in 'close custody' facilities . . . which contain extremely violent offenders").

Nowhere does the Amended Complaint allege that the hair length decision is not substantially related to security risks or that the USDB's assessment of the risk imposed by Manning's wearing longer hair is pretextual. Indeed, aside from legal conclusions relating to the equal protection claim, the Amended Complaint does not allege *any* facts supporting the conclusion that the USDB's decision on hair length was made for any reason other than meaningful security concerns. *See, e.g.*, Am. Compl. ¶ 100. Moreover, the Sept. 2015 Risk PA/HIPAA PA/HIPAA *See* Section II.B.3, *supra*; *see also* Exh. L at ¶¶ 12-15. Courts frequently defer to similar determinations by prisons that grooming restrictions are necessary to maintain security. *See, e.g.*, *Knight v. Thompson*, 797 F.3d 934, 947 (11th Cir. 2015) (refusing to second-guess prison's determination regarding grooming standards); *Fegans v. Norris*, 537 F.3d 897, 902 (8th Cir. 2008); *Jackson v. Dist. of Columbia*, 89 F. Supp. 2d 48, 63-69 (D.D.C. 2000), *vacated on other grounds*, 254 F.3d 262 (D.C. Cir. 2001).[12]

[12] Many of these cases arise as challenges to the free exercise of religion and were therefore considered under the more stringent requirements of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1 *et seq.*, or its predecessor, the

Moreover, the Sept. 2015 Risk Assessment PA/HIPAA PA/HIPAA. *See* Section II.B.3, *supra*. There can be no dispute that military discipline, like prison security, is a compelling government interest. *See, e.g.*, *Brown v. Glines*, 444 U.S. 348, 354 (1980); *Rigdon v. Perry*, 962 F. Supp. 150, 162 (D.D.C. 1997); *Bitterman v. Sec'y of Defense*, 553 F. Supp. 719, 724-25 (D.D.C. 1982). And as the Sept. 2015 Risk Assessment explains, PA/HIPAA PA/HIPAA PA/HIPAA *See* Exh. L at ¶¶ 11-14. Further, as the Supreme Court has stated, and as discussed above, deference to military judgment in military matters is appropriate. *See Gilligan*, 413 U.S. at 10; *Orloff*, 345 U.S. at 93-94 ("[J]udges are not given the task of running the Army. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."); *see also Singh v. McHugh*, --- F. Supp. 3d ----, 2015 WL 3648682, at *12-13 (D.D.C. June 12, 2015) (same). Regardless of whether intermediate scrutiny applies as Manning proposes, the USDB's decision not to permit longer hair is fully consistent with equal protection, and Manning's claim thus should be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff's Amended Complaint.

Religious Freedom Restoration Act ("RFRA"). Even under those more stringent standards, courts must still "respect th[e] expertise" of prison officials, except when asked to apply "a degree of deference that is tantamount to unquestioning acceptance." *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015). Unlike the distinct factual scenario presented in *Holt v. Hobbs*, which involved an implausible assertion that a half-inch beard could be used to conceal contraband, no such unquestioning acceptance is sought or required here. *Id*.

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Respectfully submitted,

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