No. 17-36009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYAN KARNOSKI, et al.,

Plaintiffs-Appellees,

STATE OF WASHINGTON,

Plaintiff-Intervenor-Appellee,

v.

DONALD TRUMP, President of the United States, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Western District of Washington
Case No. 2:17-cv-01297-MJP
The Honorable Marsha J. Pechman, District Judge.

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR ADMINISTRATIVE STAY AND MOTION FOR STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee Human Rights Campaign hereby files its corporate disclosure statement and certifies that Human Rights Campaign does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee Gender Justice League hereby files its corporate disclosure statement and certifies that Gender Justice League does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock. Gender Justice League further certifies that Gay City Health Project serves as the fiscal sponsor for Gender Justice League.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee American Military Partner Association hereby files its corporate disclosure statement and certifies that American Military Partner Association does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock.

INTRODUCTION

The thrust of the government's motion is that it will supposedly suffer irreparable harm if it is not permitted to continue discriminating against transgender people who wish to join the military. That claim is belied by the facts. After commencing an extensive process of deliberative review in July 2015, the military concluded in June 2016 that there was no basis for excluding transgender people from its ranks. The military then took steps over the course of the next year to prepare for the accession of transgender people by July 1, 2017, which was subsequently extended another six months to January 1, 2018. The military has thus collectively spent *years* studying the end of its policy of overt discrimination against transgender people who merely wish to serve their country on equal terms as others. As confirmed by military leaders directly involved in preparing for accessions, Defendants' belated claim that the most sophisticated military in the world cannot stop discriminating against a small minority group rings hollow.

The premise of Defendants' motion also hinges on another factual assumption never proven: that Secretary of Defense James Mattis would have deferred the accession of transgender people even if President Trump had never acted to purge them from the military. That factual showing is a necessary predicate for Secretary Mattis to exercise authority that is *independent* of President

Trump's action—which three federal district courts have enjoined as incurably tainted with profound constitutional violations. Defendants have failed to make any such showing. Whether because the government wishes to carry out the *post hoc* "study" mandated by President Trump, or because it improperly delayed implementation of January 1 accessions based on the study's preordained outcome, the motion reveals that the government's desired deferral of accessions is directly tied to the enjoined action by the President. Granting the motion would defeat the constitutional remedy required here: a preliminary injunction that returns Plaintiffs to the position they would have been in but for President Trump's exclusion of transgender people from military service ("the Ban"). In any event, the constitutional defects in the accession ban cannot be cured by merely having another government official re-authorize its extension, even if acting on a supposedly independent basis.

Defendants also fail to show any of the other requirements for a stay. The government cannot show that the district court abused its discretion in concluding that Plaintiffs were likely to succeed on the merits of their equal protection, due process, and First Amendment claims. Defendants wholly failed to carry their burden below of substantiating their proffered justifications for the Ban, and they cannot cure that deficiency by introducing evidence *after* the preliminary injunction has issued. A stay would also deny an entire class of Americans the

ability to serve their country on equal terms as others, a harm of enormous constitutional significance.

FACTUAL BACKGROUND

I. Background on Military Service by Transgender People

Transgender people have always served in the military, although they have had to serve in silence in the past. In July 2015, Secretary of Defense Ashton Carter ordered a working group of senior Department of Defense (DoD) personnel to identify practical issues related to transgender Americans serving openly and to develop a plan to address those issues and maximize military readiness ("Working Group"). SA28.[1] The Working Group considered the comprehensive advice of medical, personnel, and readiness experts, and a range of other individuals. SA28. The Working Group also commissioned the RAND Corporation to study the impact of allowing transgender individuals to serve openly. RAND found "no evidence" that allowing transgender people to serve openly would negatively impact unit cohesion, operational effectiveness, or readiness. SA30.

The Working Group concluded that barring service by transgender people "would harm the military by excluding qualified individuals based on a characteristic with no relevance to a person's fitness to serve." SA32. The Working Group, along with reviewing senior DoD personnel, ultimately concluded

[1] "SA" refers to Plaintiffs-Appellees' Supplemental Addendum.

that transgender individuals should be permitted to serve openly. SA32, 41.

On June 30, 2016, Secretary Carter issued a formal directive setting forth the policy "that service in the United States military should be open to all who can meet the rigorous standards for military service and readiness" and that "transgender individuals shall be allowed to serve in the military." Add. 32. The prior accession ban had treated transgender people irrationally (by excluding them from service based on a treatable condition that some transgender people experience) and inconsistently compared to non-transgender people with other curable conditions (who were not categorically barred from service). SA9-10. The military had thus excluded all transgender people from service even if they were mentally and physically capable of serving. *Id*. Secretary Carter's directive concluded that service by transgender people "is consistent with military readiness" and required that medical standards be updated to prevent disqualification solely based on transgender status. Add. 34. The standards require that the applicant demonstrate stability for 18 months following any medical treatment associated with gender transition. Add. 34-35.

The policy was designed to be implemented over the course of a year, with accessions of transgender troops to begin on July 1, 2017, which was subsequently extended on the eve of that deadline by six months to January 1, 2018. Add. 34. Each of the military services took steps to begin implementing the policy. SA23,

41-44, 58. Military leaders who oversaw the implementation of this policy attest that the services had nearly completed their preparation by January 2017, and that the military could readily have met the initial deadline of July 1, 2017, and certainly by the current date of January 1, 2018. SA23-25, 55-56, 58-59. Many medical personnel were trained for the accessions policy implementation on May 2, 2017. SA23.

II. President Trump's Ban on Military Service by Transgender People

On July 26, 2017, President Trump unexpectedly announced through a series of tweets that he would "not accept or allow transgender individuals to serve in any capacity in the U.S. Military." Add. 3. On August 25, 2017, the President issued a memorandum implementing this discriminatory policy (together with tweets, "the Ban"). Add. 24. In a complete reversal of the military's considered review and judgment, and Secretary Carter's directive, the Ban indefinitely bars the accession of transgender people into the military. The Ban also provides for the discharge of openly transgender service members and singles out the health care needs of transgender service members for adverse, discriminatory treatment.

III. Plaintiffs' Injuries from the Accessions Ban

Plaintiffs include nine individuals, three organizations, and the State of Washington. Add. 5. Of particular relevance to the proceedings here, Plaintiffs Ryan Karnoski, D.L., and Conner Callahan, united by their common desire to serve

our country, seek to pursue a military career. Add. 44, 56, 61. The accessions ban indefinitely closes their path forward to join the military. Plaintiff Staff Sergeant Catherine Schmid has served for twelve years in the Army and applied to become a warrant officer, but her application has been put on hold because of the accession ban, which not only excludes transgender people from enlistment but also from becoming officers. Add. 53.

IV. Procedural Background

On December 11, 2017, the district court enjoined the Ban in its entirety, including with regard to accessions. *See* Add. 22-23. The district court ruled that absent a preliminary injunction, Plaintiffs would continue to suffer injuries including deprivation of their constitutional rights, whereas Defendants "will face no serious injustice in maintaining the June 2016 Policy pending resolution of this action on the merits." *Id*. at 21. In opposing Plaintiff's preliminary injunction motion, Defendants did not argue or offer any evidence that they would be unprepared to meet the January 1 accessions deadline. On December 15, 2017, Defendants filed a motion for clarification or, alternatively, for a partial stay in the district court as to the accessions ruling. Mot. 1. Without awaiting the district court's ruling, Defendants filed the instant "emergency motion" with this Court.

ARGUMENT

I. Defendants Fail Meet the High Standard for a Stay Pending Appeal of a Preliminary Injunction.

Defendants' burden on this motion is heavy, both because they request the extraordinary remedy of a stay pending appeal, and because their appeal is of a preliminary injunction, which is subject to review for abuse of discretion.

A stay pending appeal "is an intrusion into the ordinary processes of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009). It is therefore "not a matter of right, even if irreparable injury might otherwise result." *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017). In determining whether to grant a stay, this Court considers (1) whether the government "has made a *strong showing* that [it] is likely to succeed on the merits, (2) whether the [government] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* (emphasis added).

The government's burden to show that it is likely to succeed on the merits of its appeal is in turn made higher by the standard of review this Court applies to orders granting preliminary injunctions. A district court order granting preliminary relief "will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982). Rather, "unless

the district court's decision relies on erroneous legal premises," "the appellate court will reverse only if the district court abused its discretion." *Id.* "Review of an order granting or denying a preliminary injunction is therefore much more limited than review of an order involving a permanent injunction where all conclusions of law are freely reviewable." *Id.*

Defendants' burden to make a "strong showing" that its appeal is likely to succeed under these standards is thus a heavy one. Because the district court did not err in any event, Defendants' motion for stay should be denied.

II. Defendants Fail to Make the Required Strong Showing of a Likelihood of Success on the Merits to Justify a Stay.

A. Defendants Fail to Show an Independent Basis for Deferring Accessions, Which Would Be Unconstitutional In Any Event.

The premise of Defendants' motion is that Secretary Mattis retains authority independent of the Ban to defer the accession of transgender people into the military beyond January 1, 2018. But their motion and accompanying declaration make clear that that the deferral they seek grows directly out of the Ban, which the district court correctly enjoined. Their declaration reveals that a deferral would not serve the purpose of preparing for accessions but instead serve the "study" mandated by President Trump. Add. 39 (requesting delay because "the study directed by the President remains ongoing"). Similarly, any supposed administrative inconvenience to the government from proceeding with accessions

is a product of the Ban itself. Add. 42 (admitting that the government deferred preparing for accessions because of President Trump's actions on August 25, 2017). Because Plaintiffs are entitled to a preliminary injunction that returns them to the status quo ante, Defendants cannot rely on President Trump's actions—directly or indirectly—as a basis for perpetuating discrimination in accessions.

Furthermore, no government official has the authority to perpetuate an unconstitutional policy. Certainly, if the President lacks that authority, so too do his subordinates, including the Secretary of Defense. The district court correctly held that the exclusion of transgender Americans from military service is subject to—and fails—heightened scrutiny under Plaintiffs' equal protection, due process, and First Amendment claims. Add. 15-20; *see infra* Section II.C. Indeed, the district court held that the Ban could not survive even rational basis review. Add. 18. Other federal district courts have come to the same conclusion, holding that the Ban, including its discriminatory accession policy, is unconstitutional. *See Doe v. Trump*, No. 17-1597, 2017 WL 4873042, at *28-30 (D.D.C. Oct. 30, 2017) (holding that the Ban fails intermediate scrutiny); *Stone v. Trump*, No. 17-2459, 2017 WL 5589122, at *15-16 (D. Md. Nov. 21, 2017) (holding that the Ban is "unlikely to survive even a rational review").

The policy against accessing transgender troops would be no less unconstitutional were it to derive from Secretary Mattis, rather than the President

himself. Although Defendants attempt to cast the district court's decision as revolving solely around the President's tweets announcing the Ban, the district court held that the reasons offered by the government for "excluding transgender individuals from the military are not merely unsupported, but are actually contradicted by the studies, conclusions, and judgment of the military itself." Add. 16 (brackets omitted). Those defects run to the policy itself. For instance, the findings and conclusions of the Working Group and the RAND study would remain unchanged, even if the accessions ban were simply re-adopted under the authority of another government official. This undermines Defendants' assertion that the district court's "justifications for enjoining the accession directive concern the President and his memorandum *alone*." Mot. 8 (emphasis added). Defendants' argument that the status quo ante would constitutionally permit Secretary Mattis to continue extending the accessions ban, even if he were exercising "independent" authority, is therefore meritless.

B. The District Court Correctly Held That Plaintiffs Have Standing to Challenge the Accessions Ban.

Defendants also argue that Plaintiffs lack standing to challenge the accessions ban. But, as the district court correctly recognized, Plaintiffs Karnoski, D.L., and Callahan all face "a credible threat of being denied opportunities to compete for accession on equal footing with non-transgender individuals," and Plaintiff Schmid has likewise "been refused consideration for appointment as a

warrant officer and faces a credible threat of being denied opportunities for career advancement." Add. 7-8.

Defendants speculate that none of the individual Plaintiffs would be able to meet proposed criteria for accession, including that an applicant have completed medical treatment associated with gender transition 18 months before joining the military, unless a waiver is granted. First, courts have long recognized that loss of the ability to compete on equal terms as others constitutes injury. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("denial of equal treatment results from the imposition of the barrier, not the ultimate inability to obtain the benefit"). Thus, the ultimate outcome of Plaintiff Schmid's application to become a warrant officer, for example, does not defeat standing. Second, even if it were relevant, Defendants' claim that none of the Plaintiffs could satisfy the proposed accession criteria is plainly refuted by the record. For instance, Plaintiff Callahan testified that he "[took] clinically appropriate steps to transition, which were completed in 2015." Add. 62.

Defendants also argues that Plaintiffs lack standing to the extent that any of them have not formally applied to join the military. But the law does not require a futile gesture. That is why a potential job applicant suffers cognizable harm from a discriminatory hiring practice even if the applicant does not apply for the job in

question. *See Int'l Broth. of Teamsters v. U.S.*, 431 U.S. 324, 366 (1977) (loss of ability to compete on equal footing constitutes injury, even if individuals do not apply and "subject[] themselves to personal rebuffs"); *Gratz v. Bollinger*, 539 U.S. 244, 261 (2003) (finding injury in fact to challenge affirmative action policy even where plaintiff had not yet applied to university). Indeed, some of the Plaintiffs have even approached military recruiters—only to be rebuffed. For instance, Plaintiff D.L. previously contacted a recruiter, but when D.L. disclosed that he was transgender, the recruiter stopped communicating with him. Add. 57.

Furthermore, independent of any particular Plaintiff's ultimate accession into the military, Plaintiffs also suffer injuries from being branded and stigmatized as presumptively unfit to serve their country, as well as from being penalized for expressing their gender identity. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 482-83 (9th Cir. 2014) (recognizing dignitary injury as "itself a harm of great constitutional significance"); *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) (loss or chilling of First Amendment rights "for even minimal periods of time unquestionably constitutes irreparable injury"). Defendants insist that stigmatic harms are only cognizable for those personally denied equal treatment; but that precisely describes the Plaintiffs, whose paths into the military have been blocked by Defendants' actions. Defendants' cited authority is not to the contrary. *Cf. Allen v. Wright*, 468 U.S. 737, 755 (1984)

(holding that parents of children attending *public* schools could not challenge tax treatment of *private* schools with racially discriminatory practices). Indeed, the Supreme Court has recognized that stigmatic injury caused by unequal treatment is "one of the most serious consequences of discriminatory government action." *Id.*

C. Defendants Fail to Make a Strong Showing They Are Likely to Succeed in Defending the Constitutionality of the Accession Ban.

Remarkably, even though Defendants failed to offer a shred of factual support to justify any aspect of the Ban in opposing a preliminary injunction, they nonetheless insist the district court abused its discretion and that they have demonstrated a strong showing of succeeding on the merits of their appeal. To the contrary, the district court correctly found that Plaintiffs showed a likelihood of success on the merits of their equal protection, due process, and First Amendment claims, each of which independently requires heightened scrutiny.

First, the district court correctly held that discrimination against transgender individuals requires heightened scrutiny because it necessarily discriminates based on sex, requiring intermediate scrutiny at a minimum. Add. 15; *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (holding that an attack against a transgender individual was based on sex, and that discrimination based on a perceived failure "to conform to socially-constructed gender expectations" is sex

discrimination).[2] The government thus had the burden of demonstrating an "exceedingly persuasive justification," which it failed to carry. *United States v. Virginia*, 518 U.S. 515, 531 (1996).

Second, Defendants pay short shrift to the district court's substantive due process ruling, merely asserting that there is no fundamental right to serve in the military. But that is a straw man argument because the right at issue relates to the liberty and autonomy all individuals enjoy to define who they are on matters central to a person's identity, without undue government interference. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) ("The Constitution promises liberty to all within its reach, a liberty . . . to define and express their identity."). As the district court explained, the Ban "directly interferes" with this right by penalizing Plaintiffs for living openly as the men and women that they are and "depriving them of employment and career opportunities." Add. 19. This Court has similarly recognized that the discharge of a lesbian service member impermissibly burdened her liberty interest in having an intimate relationship with a person of the same sex and thus required heightened scrutiny. *Witt v. Dept. of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008).

Third, Defendants deny that the accessions ban is a content-based regulation

[2] Defendants attempt to distinguish *Schwenk* as involving a statutory claim, but statutory discrimination claims and equal protection claims "address the same wrong: discrimination." *Bator v. State of Hawaii*, 39 F.3d 1021, 1028 n.7 (9th Cir. 1994); *see also Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (applying *Schwenk* to equal protection claim).

of speech and insist that it merely requires disclosure of medical information. But that is belied by plain language of President Trump's memorandum, which specifically prohibits "*openly* transgender individuals from accession." Add. 24 (emphasis added); *cf. Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 926 (C.D. Cal. 2010) (holding that "Don't Ask, Don't Tell" facially discriminated against speech based on content, because "[h]eterosexual members are free to state their sexual orientation . . . while gay and lesbian members of the military are not."), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011). Because the Ban facially discriminates against speech based on its content, the district court did not err in holding that the First Amendment claim also required heightened scrutiny.

The district court correctly found that Defendants failed to show that there was even a rational, let alone substantial, relationship between the Ban and the government's asserted interests. Add. 16-18. Defendants failed to offer any evidence whatsoever in support of their asserted justifications based on military readiness, cost, or cohesion, and they cannot rectify that factual deficiency on appeal. Indeed, Defendants even recognize that the RAND study found any effects on these interests to be "negligible," yet inexplicably contend this somehow supports their position. Defendants also attempt to characterize the proposed accessions policy as simply "drawing the line" at a different place than the current

accessions ban, from which waivers are purportedly available, Mot. 17-18, but the two policies could not be further apart. The record shows that the current accessions ban is categorical in practice, because such waivers are never actually granted. SA9, 53.

The district court also did not err in holding that the Ban was not entitled to deference merely because it pertained to military affairs. The government is not "free to disregard the Constitution when it acts in the area of military affairs." *Rostker v. Goldberg,* 453 U.S. 57, 67 (1981). The district court specifically examined and rejected Defendants' reliance on *Rostker*, where the Supreme Court upheld a policy requiring only male citizens to register for the draft, which was adopted after extensive hearings, testimony, and debate. *Rostker v. Goldberg,* 453 U.S. 57, 73-74 (1981). The district court correctly found that such considered review did not precede this policy change. Add. 18. Indeed, the military's considered judgment is that a discriminatory policy actually *undermines* readiness. Add. 16 ("prohibiting open service would have negative impacts including loss of qualified personnel, erosion of unit cohesion, and erosion of trust in command").

Furthermore, even in cases where deference is warranted, deference does not suspend the application of heightened scrutiny. *See Rostker*, 453 U.S. at 69 (declining "any further 'refinement' in the applicable tests" for sex discrimination based on the military context); *Witt*, 527 F.3d at 821 (noting that "deference does

not mean abdication," and holding that even congressional findings failed to show that application of "Don't Ask, Don't Tell" satisfied heightened scrutiny). In sum, the district court correctly applied heightened scrutiny and found that Defendants failed to meet its burden under that standard.

D. The District Court Did Not Abuse Its Discretion in Granting Facial Relief to Redress a Facially Unconstitutional Policy.

Next, Defendants argue that the district court erred in facially enjoining the accessions ban, rather than enjoining its enforcement only as to the individual Plaintiffs. However, the district court had both the authority and obligation to afford relief commensurate to the full scope of the constitutional injuries at issue.

"[T]he scope of injunctive relief is dictated by the extent of the violation established." *Hawaii v. Trump*, 859 F.3d 741, 786 (9th Cir. 2017) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)), *vacated as moot*, No. 16-1540 (Oct. 24, 2017). When confronted with a facially unconstitutional scheme like the Ban, the appropriate remedy is not merely to surgically excise a handful of individuals from its reach; it is to enjoin enforcement of the scheme as a whole. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (refusing to stay injunctions to the extent they "covered not just [plaintiffs], but parties similarly situated to them" with a bona fide relationship to person or entity in the U.S.); *Hawaii*, 859 F.3d at 787-88 (rejecting attempt to limit injunctive relief to only the named plaintiffs); *Latta*, *v. Otter*, 771 F.3d 456, 476-77 (9th Cir. 2014)

(requiring injunctive relief for all otherwise qualified same-sex couples wishing to marry, not merely the named plaintiffs); *Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981) (recognizing that challenged provisions "were not unconstitutional as to [plaintiff] alone, but as to any to whom they might be applied"); *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017) (preliminarily enjoining executive action regarding sanctuary jurisdictions that is "unconstitutional on its face, and not simply in its application to certain plaintiffs"); *Ariz. Dream Act Coal. v. Brewer*, 81 F. Supp. 3d 795, 810 (D. Ariz. 2015) (granting injunctive relief to all DACA recipients—particularly given harms faced by members of an organizational plaintiff—and rejecting the government's attempt to narrow relief to the named plaintiffs), *aff'd*, 855 F.3d 957 (9th Cir. 2017). To require otherwise would not only result in needless judicial inefficiency but also leave pervasive constitutional violations unremedied.

Defendants also argue that "standing is not dispensed in gross," and that parties must establish standing "separately for each form of relief sought." Mot. 9 (quoting *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017)). But *Town of Chester* held only that "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint," *e.g.*, damages or injunctive relief, 137 S. Ct. at 1650-51, and did not purport to limit district courts' authority to fully enjoin unconstitutional policies.

The fact that the constitutional violation here occurs in the military context does not warrant narrowing the scope of the preliminary injunction. Defendants' cited authority is not to the contrary, because the plaintiff there "sought only to have *his discharge* voided and to be reinstated," whereas Plaintiffs here seek facial relief. *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994) (emphasis added); *cf. Log Cabin Republicans*, 716 F. Supp. 2d at 888 (granting facial relief in facial challenge to "Don't Ask, Don't Tell" Act). The district court did not abuse its discretion in enjoining the Ban in full.

III. Defendants Fail to Show Irreparable Harm to the Government, While A Stay Would Harm Plaintiffs and the Public Interest.

Defendants cannot meet their burden of showing that they will suffer irreparable harm absent a stay of the preliminary injunction as to accessions. Meanwhile, a stay would harm Plaintiffs and the public interest.

First, Defendants claim that an accessions implementation date of January 1 would impose unspecified burdens on the military, but Defendants concede that "implementation efforts" have already been made. Mot. 13. Indeed, Defendants have studied this issue since 2015, and they have had since June 2016 to undertake preparation, training, and implementation of the proposed accession policy.[3] Defendants' last-minute claim to be unprepared—nearly 18 months after the policy

[3] Defendants have thus already incurred implementation costs, a purported "harm" they face. Their claim regarding "'duplicative' implementation costs" if the military implements an unspecified "new policy" is unavailing, Mot. 14, as Defendants have not shown what that new policy would be.

at issue was announced—is contradicted by the testimony of former service secretaries and a psychiatrist who directly trained medical personnel on the accession policy; they attest that the services had nearly completed preparation to access transgender service members as of January 2017. SA23-25, 55-56, 58-59, 70-84. Tellingly, in a recent statement, DoD publicly announced that "it will begin processing transgender applicants for military service on January 1, 2018." SA69. The military is thus preparing for accessions by January 1 and is able to do so.

Defendants' sole declaration in support of a stay (Add. 37)—which they failed to submit when opposing the preliminary injunction motion—is a far cry from evidence "sufficient to establish a likelihood of irreparable harm." *Herb Reed Enterprises, LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1251 (9th Cir. 2013). To begin, the district court cannot have abused its discretion by failing to consider an argument or evidence that Defendants never timely presented—and therefore waived. *See K.W. ex. rel. D.W. v. Armstrong*, 789 F.3d 962, 974 (9th Cir. 2015) (holding that Defendant waived irreparable harm argument "by failing to raise it before the District Court"). Furthermore, the declaration ignores the fact that substantial implementation has taken place and fails to explain what work remains in order to begin accessions by January 1. The declaration includes speculative assertions about the "possibility" of harm—and, even then, only if the government *chooses* not to devote adequate "guidance, resources, and training" to

accessions—which does not establish the requisite *likelihood* of harm.[4] Add. 42. The district court in *Doe* identified many of these same shortcomings in the government's declaration when denying Defendants' motion to stay the preliminary injunction as to accessions. SA62-63.

Second, Defendants' attempt to portray accession screening for transgender troops as "multifaceted" and involving "a complex medical condition" is unfounded. Mot. 14. The "accessions criteria for transgender people are straightforward" and "no more complex than other accessions criteria." SA23-24. The proposed accession policy—approximately one page long—sets forth the requirement that transgender individuals must demonstrate that they have been stable for 18 months following medical treatment associated with gender transition. Add. 34-35. Gender dysphoria is also a medical diagnosis that "medical professionals should already be familiar" with given the military training already provided, and it thus involves no "unique complexities or burdens." SA23-24.

Third, under the accessions policy, military service is open to "all who can meet the rigorous standards for military service and readiness." Add. 32. There is accordingly no permissible basis for excluding transgender people who can already meet these "rigorous" standards. Of course, as the district court found, "*all* service members might suffer from medical conditions," but this does not justify excluding

[4] Similarly, Defendants' claim that staff rotations in "the past several months" prevent implementation of the accessions policy is a non-starter, Add. 42, as the military system "anticipates routine staff turnover," SA24.

all transgender people from military service. Add. 17 (italics in original).

In stark contrast to Defendants' bare assertions of harm, the district court found that Plaintiffs face a variety of irreparable harms, including "denial of career opportunities," "stigmatic injury, and impairment of self-expression." Add. 12. Plaintiff Schmid has been refused consideration for appointment as a warrant officer. Add. 7. Plaintiffs Karnoski, D.L., and Callahan are also denied opportunities to compete for accession on equal footing with others. *Id*. These are not "abstract" injuries for Plaintiffs, but rather injuries that "deprive[] them of dignity," label them as "innately inferior," "marginalize" and stigmatize them, and communicate to them (and everyone else) that transgender Americans are "second-class citizens." Mot. 15; Add. 8; Add. 47; SA56.

These irreparable injuries cannot outweigh any purported administrative burden that compliance with the injunction could impose upon Defendants. Add. 12. If a stay is granted, Plaintiffs will continue to suffer injuries, including deprivation of their constitutional rights. Add. 21. "[I]t 'is always in the public interest to prevent the violation of a party's constitutional rights." Add. 22 (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)); *see also Hernandez v. Sessions*, 872 F.3d 976, 1000 (9th Cir. 2017) (irreparable harm "through a likely unconstitutional process far outweighs the minimal administrative burdens to the government of complying with the injunction while

this case proceeds"). For all these reasons, the balance of equities and public interest tips decidedly in Plaintiffs' favor and against a stay.

CONCLUSION

The motion should be denied.

Dated: December 19, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,196 words. This brief complies with the typeface and the type style requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(5)-(6) because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

s/ Peter C. Renn
Peter C. Renn

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 19, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Peter C. Renn
Peter C. Renn

No. 17-36009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYAN KARNOSKI, et al.,

Plaintiffs-Appellees,

STATE OF WASHINGTON,

Plaintiff-Intervenor-Appellee,

v.

DONALD TRUMP, President of the United States, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Western District of Washington
Case No. 2:17-cv-01297-MJP
The Honorable Marsha J. Pechman, District Judge.

SUPPLEMENTAL ADDENDUM TO PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' EMERGENCY MOTION FOR ADMINISTRATIVE STAY AND MOTION FOR STAY PENDING APPEAL

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SUPPLEMENTAL ADDENDUM TABLE OF CONTENTS

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†*Exhibits omitted*

**Declaration filed for the first time with the Court of Appeals*

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

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

Defendants.

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

DECLARATION OF GEORGE R. BROWN, M.D., D.F.A.P.A. IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

NOTE ON MOTION CALENDAR:
October 6, 2017
ORAL ARGUMENT REQUESTED

I, George R. Brown, M.D., D.F.A.P.A., declare as follows:

1. I have been retained by counsel for Plaintiffs as an expert in connection with the above-captioned litigation.

2. The purpose of this declaration is to offer my expert opinion on: (1) the medical condition known as gender dysphoria; (2) the prevailing treatment protocols for gender dysphoria; (3) the United States military's pre-2016 ban on the enlistment and retention of men and women who are transgender; (4) the subsequent lifting of that ban; and (5) the unfounded medical justifications for banning individuals who are transgender from serving in the United States military.

3. I have knowledge of the matters stated in this declaration and have collected and cite to relevant literature concerning the issues that arise in this litigation.

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PROFESSIONAL BACKGROUND

4. I am a Professor of Psychiatry and the Associate Chairman for Veterans Affairs in the Department of Psychiatry at the East Tennessee State University, Quillen College of Medicine. My responsibilities include advising the Chairman; contributing to the administrative, teaching, and research missions of the Department of Psychiatry; consulting on clinical cases at the University and at Mountain Home Veterans Health Administration ("VHA") Medical Center, where I also hold an appointment; and acting as a liaison between the VHA Medical Center and the East Tennessee State University Department of Psychiatry. The majority of my work involves researching, teaching, and consulting about health care in military and civilian transgender populations.

5. I also hold a teaching appointment related to my expertise with health care for transgender individuals and research at the University of North Texas Health Services Center ("UNTHSC"). My responsibilities include teaching and consultation with UNTHSC and the Federal Bureau of Prisons staff regarding health issues for transgender individuals.

6. In 1979, I graduated *Summa Cum Laude* with a double major in biology and geology from the University of Rochester in Rochester, New York. I earned my Doctor of Medicine degree with Honors from the University of Rochester School of Medicine in 1983. From 1983-1984, I served as an intern at the United States Air Force Medical Center at Wright-Patterson Air Force Base in Ohio. From 1984-1987, I worked in and completed the United States Air Force Integrated Residency Program in Psychiatry at Wright State University and Wright-Patterson Air Force Base in Dayton, Ohio. A true and correct copy of my Curriculum Vitae is attached hereto as Exhibit A.

7. I first began seeing patients in 1983. I have been a practicing psychiatrist since 1987, when I completed my residency. From 1987-1991, I served as one of the few U.S. Air Force teaching psychiatrists. In this capacity, I performed more than 200 military disability evaluations and served as an officer on medical evaluation boards at the largest hospital in the Air Force.

8. During the last 33 years, I have evaluated, treated, and/or conducted research in person with 600-1,000 individuals with gender disorders, and during the course of research, conducted chart reviews of more than 5,100 additional patients with gender dysphoria. The vast majority of the patients I have worked with have been active duty military personnel or veterans.

9. For three decades, my research and clinical practice has included extensive study of the health care for transgender individuals, including three of the largest studies focused on the health care needs of transgender service members and veterans. Throughout that time, I have done research with, taught on, and published peer-reviewed professional publications specifically addressing the needs of transgender military service members. *See* Brown Ex. A (CV).

10. I have authored or coauthored 38 papers in peer-reviewed journals and 19 book chapters on topics related to gender dysphoria and health care for transgender individuals, including the chapter concerning gender dysphoria in Treatments of Psychiatric Disorders (3d ed. 2001), a definitive medical text published by the American Psychiatric Association.

11. In 2014, I coauthored a study along with former Surgeon General Joycelyn Elders and other military health experts, including a retired General and a retired Admiral. The study was entitled "Medical Aspects of Transgender Military Service." *See* Elders J, Brown GR, Coleman E, Kolditz TA, *Medical Aspects of Transgender Military Service*. ARMED FORCES AND SOCIETY, 41(2): 199-220, 2015; published online ahead of print, DOI: 10.1177/0095327X1454 5625 (Aug. 2014) (the "Elders Commission Report"). The military peer-reviewed journal, Armed Forces and Society, published the Elders Commission Report. A true and correct copy of that report is attached hereto as Exhibit B.

12. I have served for more than 15 years on the Board of Directors of the World Professional Association for Transgender Health ("WPATH"), the leading international organization focused on health care for transgender individuals. WPATH has more than 2,000 members throughout the world and is comprised of physicians, psychiatrists, psychologists, social workers, surgeons, and other health professionals who specialize in the diagnosis and treatment of gender dysphoria.

13. I was a member of the WPATH committee that authored and published in 2011 the current version of the WPATH Standards of Care ("SoC") (Version 7). The SoC are the operative collection of evidence-based treatment protocols for addressing the health care needs of transgender individuals. I also serve on the WPATH committee that will author and publish the next edition, the Standards of Care (Version 8).

14. Without interruption, I have been an active member of WPATH since 1987. Over the past three decades, I have frequently presented original research work on topics relating to gender dysphoria and the clinical treatment of transgender people at the national and international levels.

15. I have testified or otherwise served as an expert on the health issues of transgender individuals in numerous cases heard by several federal district and tax courts. A true and correct list of federal court cases in which I have served as an expert is contained in the "Forensic Psychiatry Activities" section of my Curriculum Vitae, which is attached hereto as Exhibit A.

16. I have conducted and continue to provide trainings on transgender health issues for the VHA as well as throughout the Department of Defense ("DoD"). After the DoD announced the policy that allowed for transgender individuals to serve openly in the Armed Forces in 2016, I conducted the initial two large military trainings on the provision of health care to transgender service members. The first training in Spring 2016 was for the Marine Corps. The second training in Fall 2016 was for a tri-service (Army, Navy, and Air Force) meeting of several hundred active duty military clinicians, commanders, and Flag officers.

17. Since the issuance of DoD Instruction ("DoDI") 1300.28 in October 2016, I have led trainings for a national group of military examiners (MEPCOM) in San Antonio, Texas and for Army clinicians at Fort Knox, Kentucky. Among other things, DoDI 1300.28 implemented the policies and procedures in Directive-type Memorandum 16-005, established a construct by which transgender service members may transition gender while

serving, and required certain trainings for the military.

18. I have been centrally involved in the development, writing, and review of all national directives in the VHA relating to the provision of health care for transgender veterans. I also coauthored the national formulary that lists the medications provided by the VHA for the treatment of gender dysphoria in veterans. Finally, I regularly consult with VHA leadership regarding the training of VHA clinicians on transgender clinical care of veterans nationally.

GENDER DYSPHORIA

19. The term "transgender" is used to describe someone who experiences any significant degree of misalignment between their gender identity and their assigned sex at birth.

20. Gender identity describes a person's internalized, inherent sense of who they are as a particular gender (*i.e.*, male or female). For most people, their gender identity is consistent with their assigned birth sex. Most individuals assigned female at birth grow up, develop, and manifest a gender identity typically associated with girls and women. Most individuals assigned male at birth grow up, develop, and manifest a gender identity typically associated with boys and men. For transgender people, that is not the case. Transgender women are individuals assigned male at birth who have a persistent female identity. Transgender men are individuals assigned female at birth who have a persistent male identity.

21. Experts agree that gender identity has a biological component, meaning that each person's gender identity (transgender and non-transgender individuals alike) is the result of biological factors, and not just social, cultural, and behavioral ones.

22. Regardless of the precise origins of a person's gender identity, there is a medical consensus that gender identity is deep-seated, set early in life, and impervious to external influences.

23. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (2013) ("DSM-5") is the current, authoritative handbook on the diagnosis of mental disorders. Mental health professionals in the United States, Canada, and other countries

throughout the world rely upon the DSM-5. The content of the DSM-5 reflects a science-based, peer-reviewed process by experts in the field.

24. Being transgender is not a mental disorder. *See* DSM-5. Men and women who are transgender have no impairment in judgment, stability, reliability, or general social or vocational capabilities solely because of their transgender status.

25. Gender dysphoria is the diagnostic term in the DSM-5 for the condition that can manifest when a person suffers from clinically significant distress or impairment associated with an incongruence or mismatch between a person's gender identity and their assigned sex at birth.

26. The clinically significant emotional distress experienced as a result of the incongruence of one's gender with their assigned sex and the physiological developments associated with that sex is the hallmark symptom associated with gender dysphoria.

27. Only the *subset* of transgender people who have clinically significant distress or impairment qualify for a diagnosis of gender dysphoria.

28. Individuals with gender dysphoria may live for a significant period of their lives in denial of these symptoms. Some transgender people may not initially understand the emotions associated with gender dysphoria and may not have the language or resources for their distress to find support until well into adulthood.

29. Particularly as societal acceptance towards transgender individuals grows and there are more examples of high-functioning, successful transgender individuals represented in media and public life, younger people in increasing numbers have access to medical and mental health resources that help them understand their experience and allow them to obtain medical support at an earlier age and resolve the clinical distress associated with gender dysphoria.

TREATMENT FOR GENDER DYSPHORIA

30. Gender dysphoria is a condition that is amenable to treatment. *See* WPATH SoC (Version 7); Elders Commission Report at 9-16; Agnes Gereben Schaefer et al., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, RAND Corporation (2016) at 7 ("RAND Report") (a true and correct copy of the report is attached hereto as Exhibit C).

31. With appropriate treatment, individuals with a gender dysphoria diagnosis can be fully cured of *all* symptoms.

32. Treatment of gender dysphoria has well-established community standards and is highly effective.

33. The American Medical Association ("AMA"), the Endocrine Society, the American Psychiatric Association, and the American Psychological Association all agree that medical treatment for gender dysphoria is medically necessary and effective. *See* American Medical Association (2008), Resolution 122 (A-08); American Psychiatric Association, Position Statement on Discrimination Against Transgender & Gender Variant Individuals (2012); Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline (2009); American Psychological Association Policy Statement on Transgender, Gender Identity and Gender Expression Nondiscrimination (2009). Additional organizations that have made similar statements include the American Academy of Child & Adolescent Psychiatry, American Academy of Family Physicians, American Academy of Nursing, American College of Nurse Midwives, American College of Obstetrics and Gynecology, American College of Physicians, American Medical Student Association, American Nurses Association, American Public Health Association, National Association of Social Workers, and National Commission on Correctional Health Care.

34. The protocol for treatment of gender dysphoria is set forth in the WPATH SoC and in the Endocrine Society Guidelines.[1] First developed in 1979 and currently in their seventh version, the WPATH SoC set forth the authoritative protocol for the evaluation and treatment of gender dysphoria. This approach is followed by clinicians caring for individuals with gender dysphoria, including veterans in the VHA. As stated above, I was a member of the WPATH committee that authored the SoC (Version 7), published in 2011. A true and correct copy of that document is attached hereto as Exhibit D.

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[1] *Available at* https://academic.oup.com/jcem/article/94/9/3132/2596324/Endocrine-Treatment-of-Transsexual-Persons-An.

35. Depending on the needs of the individual, a treatment plan for persons diagnosed with gender dysphoria may involve components that are psychotherapeutic (*i.e.*, counseling as well as social role transition – living in accordance with one's gender in name, dress, pronoun use); pharmacological (*i.e.*, hormone therapy); and surgical (*i.e.*, gender confirmation surgeries, like hysterectomy for those transitioning to the male gender and orchiectomy for those transitioning to the female gender). Under each patient's treatment plan, the goal is to enable the individual to live all aspects of one's life consistent with his or her gender identity, thereby eliminating the distress associated with the incongruence.

36. There is a wide range in the treatments sought by those suffering from gender dysphoria. For example, some patients need both hormone therapy and surgical intervention, while others need just one or neither. Generally, medical intervention is aimed at bringing a person's body into some degree of conformity with their gender identity.

37. As outlined further below, treatment protocols for gender dysphoria are comparable to those for other mental health and medical conditions, including those regularly treated within the United States military. *See* RAND Report at 8-9; Elders Commission Report at 13 ("the military consistently retains non-transgender men and women who have conditions that may require hormone replacement").

PRE-2016 MILITARY POLICY

38. Prior to 2016, military policy treated transgender individuals with gender dysphoria differently than people with other curable conditions.

Former Enlistment Policy

39. DODI 6130.03 established the medical standards for accession/entry into military service. Enclosure 4 of the enlistment instruction contains an extensive list of physical and mental conditions that disqualify a person from enlisting in the military. For instance, persons with autism, schizophrenia, or delusional disorders (or a history of treatment for these conditions) are excluded from enlistment. Prior to 2016, that list also contained "change of sex"

and "transsexualism," which were outdated references to transgender individuals and individuals with gender dysphoria. *See* Elders Commission Report at 7.

40. The enlistment policy allows for the possibility of waivers for a variety of medical conditions. The instruction, however, specifies that entry waivers will not be granted for conditions that would disqualify an individual from the possibility of retention. As discussed further below, because certain conditions related to being transgender ("change of sex") were formerly grounds for discharge from the military, men and women who are transgender could not obtain medical waivers to enter the military. *Id.* at 7-8.

41. Under military instructions, the general purpose of disqualifying applicants based on certain physical and mental conditions is to ensure that service members are: (1) free of contagious diseases that endanger others, (2) free of conditions or defects that would result in excessive duty-time lost and would ultimately be likely to result in separation, (3) able to perform without aggravating existing conditions, and (4) capable of completing training and adapting to military life. *Id.* at 7.

42. Because gender dysphoria, as described above, is a treatable and curable condition, unlike other excluded conditions, its inclusion on the list of disqualifying conditions was inappropriate. Individuals with gender dysphoria (or under the language at the time – those who had a "change of sex") were disqualified from joining the military, despite having a completely treatable, or already treated, condition.

43. The enlistment policy treated transgender individuals in an inconsistent manner compared with how the military addressed persons with other curable medical conditions. The result of this inconsistency was that transgender personnel were excluded or singled out for disqualification from enlistment, even when they were mentally and physically healthy.

44. For example, persons with certain medical conditions, such as Attention Deficit Hyperactivity Disorder ("ADHD") and simple phobias, could be admitted when their conditions could be managed without imposing undue burdens on others. Individuals with ADHD are prohibited from enlisting unless they meet five criteria, including documenting that they

maintained a 2.0 grade point average after the age of 14. Similarly, individuals with simple phobias are banned from enlisting, unless they meet three criteria including documenting that they have not required medication for the past 24 continuous months.

45. In short, even though the DoD generally allowed those with manageable conditions to enlist, the former regulation barred transgender service without regard to the condition's treatability and the person's ability to serve.

Former Separation Policy

46. The medical standards for retiring or separating service members who have already enlisted are more accommodating and flexible than the standards for new enlistments.

47. Until recently, the medical standards for separation were set forth in DoDI 1332.38. On August 5, 2014, the DoD replaced DoDI 1332.38 with DoDI 1332.18, which permits greater flexibility for the service branches to provide detailed medical standards.

48. The separation instructions divide potentially disqualifying medical conditions into two different tracks. Service members with "medical conditions" are placed into the medical system for disability evaluation. Under this evaluation system, a medical evaluation board ("MEB") conducts an individualized inquiry to determine whether a particular medical condition renders a service member medically unfit for service. If a service member is determined to be medically unfit, the service member may receive benefits for medical separation or retirement, or may be placed on the Temporary Duty Retirement List with periodic reevaluations for fitness to return to duty. While in the U.S. Air Force, I served as an officer on at least two hundred of these MEBs.

49. Under the separation instruction, service members with genitourinary conditions, endocrine system conditions, and many mental health conditions are all evaluated through the medical disability system. *See* DoDI 1332.38 §§ E4.8, E4.11, E4.13; AR 40-501 §§ 2-8, 3-11, 3-17, 3-18, 3-31, 3-32; SECNAVIST 180.50_4E §§ 8008, 8011, 8013; U.S. Airforce Medical Standards Directory §§ J, M, Q.

50. By contrast, under the separation instructions, a small number of medical and psychiatric conditions are not evaluated through the medical evaluation process. Instead, these conditions are deemed to render service members "administratively unfit." Service members with "administratively unfit" conditions do not have the opportunity to demonstrate medical fitness for duty or eligibility for disability compensation.

51. Under DoDI 1332.38, the "administratively unfit" conditions were listed in Enclosure 5 of the instruction. Since August 5, 2014, when DoDI 1332.18 replaced 1332.38, the "administratively unfit" conditions are determined by the service branches, as set forth in AR 40-501 § 3-35; SECNAVIST § 2016; and AFI36-3208 § 5.11.

52. Enclosure 5 of DoDI 1332.38 included, among other conditions, bed-wetting, sleepwalking, learning disorders, stuttering, motion sickness, personality disorders, mental retardation, obesity, shaving infections, certain allergies, and repeated infections of venereal disease. It also included "Homosexuality" and "Sexual Gender and Identity Disorders, including Sexual Dysfunctions and Paraphilias." *See* Elders Commission Report at 8.

53. Similarly, the "administratively unfit" conditions in the service branches included "psychosexual conditions, transsexual, gender identity disorder to include major abnormalities or defects of the genitalia such as change of sex or a current attempt to change sex," AR 40-501 § 3-35(a); "Sexual Gender and Identity Disorders and Paraphilias," SECNAVIST § 2016(i)(7); and "Transsexualism or Gender Identity Disorder of Adolescence or Adulthood, Nontranssexual Type (GIDAANT)," AFI36-3208 § 5.11.9.5. The service branches retained these bars to service by transgender individuals after DoDI 1332.18 replaced DoDI 1332.38.

54. DoDI 1332.14 controlled administrative separations for enlisted persons. Under the instruction, a service member may be separated for the convenience of the government and at the discretion of a commander for "other designated physical or mental conditions." Before 2016, this particular separation category included "sexual gender and identity disorders." *Id.*

55. Because service members with gender dysphoria were deemed to be "administratively unfit," they were not evaluated by MEBs and had no opportunity to

demonstrate that their condition did not affect their fitness for duty. They were disqualified from remaining in the military despite having a completely treatable condition.

56. This was inconsistent with the treatment of persons with other curable medical conditions, who are given the opportunity to demonstrate medical fitness for duty or eligibility for disability compensation. For example, mood and anxiety disorders are not automatically disqualifying for retention in military service. Service members can receive medical treatment and obtain relief in accordance with best medical practices. Mood and anxiety disorders result in separation only if they significantly interfere with duty performance and remain resistant to treatment. In contrast, transgender individuals were categorically disqualified from further service without consideration of their clinical symptoms and any impact on their service.

57. The result of this inconsistency was that transgender personnel were singled out for separation, even when they were mentally and physically healthy, solely because they were transgender.

OPEN SERVICE DIRECTIVE

58. The DoD lifted the ban on open service by transgender military personnel following a June 30, 2016 announcement made by then-Secretary of Defense Ash Carter ("Open Service Directive").

59. Based on my extensive research and clinical experiences treating transgender individuals over decades, the Open Service Directive is consistent with medical science.

60. The Open Service Directive also aligns with the conclusions reached by the RAND National Defense Research Institute, the Elders Commission, and the AMA.

61. The RAND Report concluded that the military already provides health care comparable to the services needed to treat transgender individuals: "Both psychotherapy and hormone therapies are available and regularly provided through the military's direct care system, though providers would need some additional continuing education to develop clinical and cultural competence for the proper care of transgender patients. Surgical procedures quite similar

to those used for gender transition are already performed within the [Medical Health System] for other clinical indications." *See* RAND Report at 8.

62. The earlier Elders Commission, on which I served, concluded that "[t]ransgender medical care should be managed in terms of the same standards that apply to all medical care, and there is no medical reason to presume transgender individuals are unfit for duty. Their medical care is no more specialized or difficult than other sophisticated medical care the military system routinely provides." *See* Elders Commission Report at 4.

63. Additionally, in a unanimous resolution published on April 29, 2015, the AMA announced its support for lifting the ban on open transgender service in the military, based on the AMA's conclusion that there is no grounding in medical science for such a ban.[2]

Enlistment Policy for Transgender Individuals

64. The Open Service Directive's enlistment procedures – which were adopted but not yet put into effect – are carefully designed to ensure that transgender individuals who enlist in the military do not have any medical needs that would make them medically unfit to serve or interfere with their deployment.

65. Under these standards, transgender individuals whose condition was stable for 18 months at the time of enlistment would be eligible to enlist, assuming a licensed medical provider certified that they met certain conditions. DTM-16-005 Memorandum and Attachment (June 30, 2016). For example, those seeking to enlist who had been treated with any counseling, cross-sex hormone therapy, or gender confirmation surgeries must have medical confirmation that they have been stable for the last 18 months. Similarly, those applicants taking maintenance cross-sex hormones as follow-up to their transition would also need certification that they had been stable on such hormones for 18 months.

Retention Policy for Transgender Individuals

66. Under the Open Service Directive, gender dysphoria is treated like other curable

[2] *Available at* http://archive.palmcenter.org/files/A-15%20Resoultion%20011.pdf.

medical conditions. Individuals with gender dysphoria receive medically necessary care. Service members who are transgender are subject to the same standards of medical and physical fitness as any other service member.[3]

67. The Open Service Directive also permits commanders to have substantial say in the timing of any future transition-related treatment for transgender service members. The needs of the military can also take precedence over an individual's need to transition, if the timing of that request interferes with critical military deployments or trainings.

MEDICAL JUSTIFICATIONS FOR BANNING TRANSGENDER SERVICE MEMBERS ARE UNFOUNDED

68. Based upon: (1) my extensive research and experience treating transgender people, most of whom have served this country in uniform, (2) my involvement reviewing the medical implications of a ban on transgender service members, and (3) my participation in implementing the Open Service Directive allowing transgender individuals to serve openly, it is my opinion that any medical objections to open service by transgender service members are wholly unsubstantiated and inconsistent with medical science and the ways in which other medical conditions are successfully addressed within the military.

Mental Health

69. Arguments based on the mental health of transgender persons to justify prohibiting individuals from serving in the military are wholly unfounded and unsupported in medical science. Being transgender is not a mental defect or disorder. Scientists have long abandoned psychopathological understandings of transgender identity, and do not classify the incongruity between a person's gender identity and assigned sex at birth as a mental illness. To the extent the misalignment between gender identity and assigned birth sex creates clinically significant distress (gender dysphoria), that distress is curable through appropriate medical care.

[3] *Available at* https://www.defense.gov/Portals/1/features/2016/0616_policy/Guidance_for_Treatment_of_Gender_Dysphoria_Memo_FINAL_SIGNED.pdf.

70. Sixty years of clinical experience have demonstrated the efficacy of treatment of the distress resulting from gender dysphoria. *See* Elders Commission Report at 10 ("a significant body of evidence shows that treatment can alleviate symptoms among those who do experience distress"). Moreover, "empirical data suggest that many non-transgender service members continue to serve despite psychological conditions that may not be as amenable to treatment as gender dysphoria." *Id.* at 11.

71. The availability of a cure distinguishes gender dysphoria from other mental health conditions, such as autism, bipolar disorder, or schizophrenia, for which there are no cures. There is no reason to single out transgender personnel for separation, limitation of service, or bars to enlistment, based only on the diagnosis or treatment of gender dysphoria. Determinations can and should be made instead on a case-by-case basis depending on the individual's fitness to serve, as is done with other treatable conditions.

72. The military already provides mental health evaluation services and counseling, which is the first component of treatment for gender dysphoria. *See* RAND Report at 8.

73. Concerns about suicide and substance abuse rates among transgender individuals are also unfounded when it comes to military policy. At enlistment, all prospective military service members undergo a rigorous examination to identify any pre-existing mental health diagnoses that would preclude enlistment. Once someone is serving in the military, they must undergo an annual mental and physical health screen, which includes a drug screen. If such a screening indicates that a person suffers from a mental illness or substance abuse, then that would be the potential impediment to retention in the military. The mere fact that a person is transgender, however, does not mean that person has a mental health or substance abuse problem or is suicidal.

Hormone Treatment

74. The argument that cross-sex hormone treatment should be a bar to service for transgender individuals is not supported by medical science or current military medical protocols.

75. Hormone therapy is neither too risky nor too complicated for military medical personnel to administer and monitor. The risks associated with use of cross-sex hormone therapy to treat gender dysphoria are low and not any higher than for the hormones that many non-transgender active duty military personnel currently take. There are active duty service members currently deployed in combat theaters who are receiving cross-sex hormonal treatment, following current DoD instructions, without reported negative impact upon readiness or lethality.

76. The military has vast experience with accessing, retaining, and treating non-transgender individuals who need hormone therapies or replacement, including for gynecological conditions (*e.g.*, dysmenorrhea, endometriosis, menopausal syndrome, chronic pelvic pain, male hypogonadism, hysterectomy, or oophorectomy) and genitourinary conditions (*e.g.*, renal or voiding dysfunctions). Certain of these conditions are referred for a fitness evaluation only when they affect duty performance. *See* Elders Commission at 13.

77. In addition, during service when service members develop hormonal conditions whose remedies are biologically similar to cross-sex hormone treatment, those members are not discharged and may not even be referred for a MEB. Examples include male hypogonadism, menstrual disorders, and current, or history of, pituitary dysfunction. *Id.*

78. Military policy also allows service members to take a range of medications, including hormones, while deployed in combat settings. Id. Under DoD policy only a "few medications are inherently disqualifying for deployment," and none of those medications are used to treat gender dysphoria. *Id.* (quoting Dept. of Defense, Policy Guidance for Deployment-Limiting Psychiatric Conditions and Medications, 2006 at para. 4.2.3). Similarly, Army regulations provide that "[a] psychiatric condition controlled by medication should not automatically lead to non-deployment." *See* AR 40-501 § 5-14(8)(a).

79. Access to medication is predictable, as "[t]he Medical Health Service maintains a sophisticated and effective system for distributing prescription medications to deployed service members worldwide." *See* Elders Commission at 13. At least as to cross-sex hormones, clinical monitoring for risks and effects is not complicated, and with training and/or access to

consultations, can be performed by a variety of medical personnel in the DoD, just as is the case in the VHA. This is the military services' current practice in support of the limited medical needs of their transgender troops in CONUS (Continental United States) and in deployment stations worldwide.

80. The RAND Corporation confirms the conclusions I draw from my experience with the military and the Elders Commission. Specifically, the RAND Report notes that the Medical Health System maintains and supports all of the medications used for treatment of gender dysphoria and has done so for treatment of non-transgender service members. In other words, all of the medications utilized by transgender service members for treatment of gender dysphoria are used by other service members for conditions unrelated to gender dysphoria. *See* RAND Report at 8 ("Both psychotherapy and hormone therapies are available and regularly provided through the military's direct care system, though providers would need some additional continuing education to develop clinical and cultural competence for the proper care of transgender patients"). Part of my role with the DoD over the past 18 months has been to provide this continuing education.

Surgery

81. Nor is there any basis in science or medicine to support the argument that a transgender service member's potential need for surgical care to treat gender dysphoria presents risks or burdens to military readiness. The risks associated with gender-confirming surgery are low, and the military already provides similar types of surgeries to non-transgender service members. *See* Elders Commission Report at 14; RAND Report at 8-9.

82. For example, the military currently performs reconstructive breast/chest and genital surgeries on service members who have had cancer, been in vehicular and other accidents, or been wounded in combat. *See* RAND Report at 8. The military also permits service members to have elective cosmetic surgeries, like LeFort osteotomy and mandibular osteotomy, at military medical facilities. *See* Elders Commission Report at 14. The RAND Report notes that the "skills and competencies required to perform these procedures on transgender patients are

often identical or overlapping. For instance, mastectomies are the same for breast cancer patients and female-to-male transgender patients." *See* RAND Report at 8.

83. There is no reason to provide such surgical care to treat some conditions and withhold identical care and discharge individuals needing such care when it is provided to treat gender dysphoria. Based on risk and deployability alone, there is no basis to exclude transgender individuals from serving just because in some cases they may require surgical treatment that is already provided to others.

84. The RAND Report also notes the benefit of military medical coverage of transgender-related surgeries because of the contribution it can make to surgical readiness and training. *Id.* ("performing these surgeries on transgender patients may help maintain a vitally important skill required of military surgeons to effectively treat combat injuries during a period in which fewer combat injuries are sustained").

85. The suggestion by some critics that when it comes to enlistment, individuals would join the military just to receive surgical care, is completely unfounded. The level of commitment and dedication to service makes it unlikely that someone would enlist and complete a years-long term of initial service simply to access health care services. Moreover, because medically-necessary care for gender dysphoria is now increasingly available in the civilian context, there would be limited need to join the military in order to obtain treatment.

Deployability

86. Critics have also cited non-deployability, medical readiness, and constraints on fitness for duty as reasons to categorically exclude transgender individuals from military service. Such arguments are unsubstantiated and illogical.

87. Transgender service members – including service members who receive hormone medication – are just as capable of deploying as service members who are not transgender. DoD rules expressly permit deployment, without need for a waiver, for a number of medical conditions that present a much more significant degree of risk in a harsh environment than being transgender. For example, hypertension is not disqualifying if controlled by medication, despite

the inherent risks in becoming dehydrated in desert deployment situations. Heart attacks experienced while on active duty or treatment with coronary artery bypass grafts are also not disqualifying, if they occur more than a year preceding deployment. Service members may deploy with psychiatric disorders, if they demonstrate stability under treatment for at least three months. *See* DoDI 6490.07, Enclosure 3.

88. Moreover, although a service member undergoing surgery may be temporarily non-deployable, that is not a situation unique to people who are transgender. Numerous non-transgender service members are temporarily or permanently non-deployable, including pregnant individuals, who are not separated as a result. *See* Elders Commission Report at 17.

89. Finally, the RAND Report ultimately concluded that the impact of open service of men and women who are transgender on combat readiness would be "negligible." *See* RAND Report at 70. Based on the available evidence of over 18 foreign militaries, RAND found that open service has had "no significant effect on cohesion, operational effectiveness, or readiness." *Id.* at 60. This includes the experience of Canada, which has permitted open service for over 20 years. *Id.* at 52.

CONCLUSION

90. There is no evidence that being transgender alone affects military performance or readiness. There is no medical or psychiatric justification for the categorical exclusion of transgender individuals from the Armed Forces.

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

Executed on September 12, 2017

George R. Brown, M.D., D.F.A.P.A.

NEWMAN DU WORS LLP
2101 Fourth Avenue, Suite 1500
Seattle, Washington 98121
(206) 274-2800

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that on September 14, 2017, I caused true and correct copies of the foregoing documents to be served by the method(s) listed below on the following interested parties:

By Hand Delivery:

US Attorney's Office
700 Stewart St., Suite 5220
Seattle, WA 98101-1271

By Registered or Certified Mail:

Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Department of Defense
1400 Defense Pentagon
Washington, DC 20301-1400

Secretary of Defense James N. Mattis
1000 Defense Pentagon
Washington, DC 20301-1000

President Donald J. Trump
1600 Pennsylvania Ave. NW
Washington, DC 20500

I hereby certify under the penalty of perjury that the foregoing is true and correct. Executed on September 14, 2017 at Seattle, Washington.

s/Rachel Horvitz
Rachel Horvitz, *Paralegal*

No. 17-36009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYAN KARNOSKI, et al.,

Plaintiffs-Appellees,

STATE OF WASHINGTON,

Plaintiff-Intervenor-Appellee,

v.

DONALD TRUMP, President of the United States, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Western District of Washington
Case No. 2:17-cv-01297-MJP
The Honorable Marsha J. Pechman, District Judge.

EXPERT DECLARATION OF GEORGE RICHARD BROWN, MD, DFAPA IN SUPPORT OF PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR ADMINISTRATIVE STAY AND MOTION FOR STAY PENDING APPEAL

I, George R. Brown, MD, DFAPA, declare as follows:

1. I make this declaration based on my own personal knowledge.

2. As set forth in my previous declaration, executed by me on September 12, 2017 and submitted in support of Plaintiffs' motion for preliminary injunctive relief, I am a Professor of Psychiatry and the Associate Chairman for Veterans Affairs in the Department of Psychiatry at the East Tennessee State University, Quillen College of Medicine. My responsibilities include advising the Chairman; contributing to administrative, teaching, and research missions of the Department of Psychiatry; consulting on clinical cases at the University and at Mountain Home Veterans Health Administration ("VHA") Medical Center, where I also hold an appointment; and acting as a liaison between the VHA Medical Center and the East Tennessee State University Department of Psychiatry. I served as a psychiatrist on active duty in the United States Air Force. The majority of my work involves research, teaching, and consulting about health care in the military and civilian transgender populations. My CV is attached to my earlier declaration.

3. I reviewed the declaration submitted in the case by Lernes Hebert, and I am responding to the statements set forth therein.

4. On June 30, 2016, the military changed its policy from one that categorically excluded transgender people from enlistment to one that authorizes the enlistment of qualified transgender individuals. The policy the military adopted

and set forth in DTM 16-005 authorizes enlistment for individuals who have a diagnosis of gender dysphoria upon a demonstration that they have completed gender transition and have been stable in the newly assigned gender for 18 months. The target effective date for that policy was originally one year from the date of its announcement, or July 1, 2017. The day before July 1, 2017, that date was moved to January 1, 2018.

5. Following the adoption of DTM 16-005, the military began training throughout the branches to meet the target date of July 1, 2017 for implementation. As a contractor for the Department of Defense, I was part of that process and trained approximately 250 medical personnel working in Military Entrance Processing Stations ("MEPS") throughout the military, including medical division personnel, chief and assistant chief medical officers, and fee-based medical providers on the accessions policy. That training took place in San Antonio, Texas on May 2, 2017.

6. I have in-depth familiarity both with the transgender enlistment policy and military enlistment policies as they relate to medical clearances and reviews for enlistees.

7. I do not agree that implementing the accessions policy in DTM 16-005 by January 1, 2018 will impose extraordinary burdens on the military. The implementation of accessions criteria for transgender enlistees is no more complex

than other accessions criteria on which MEPS personnel are knowledgeable and regularly trained.

8. The accessions criteria for transgender people are straightforward and do not require extensive or detailed knowledge. To the contrary, it simply requires MEP personnel to identify applicants who have a diagnosis of gender dysphoria—a diagnosis with which medical professionals should already be familiar. It also involves review of the individual's substantiating and supporting medical documentation to confirm that the period of stability (18 months) has been met. This process does not involve any unique complexities or burdens and is well within the capacity of military personnel involved in the enlistment review process.

9. Acting Deputy Assistant Secretary Hebert's statement that "personnel involved in that accession enterprise have rotated in the past several months" is not a legitimate reason to delay implementing the accessions policy for transgender people. Military personnel rotations are ordinary shifts that are expected and anticipated throughout the military. The military system anticipates routine staff turnover. Nothing about routine staff turnover should justify a delay of enlistment policy implementation.

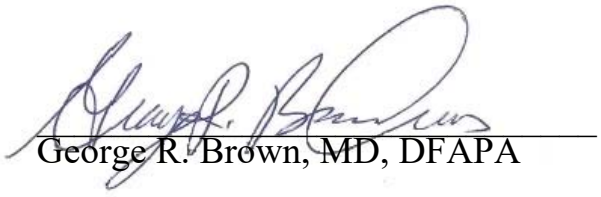
10. Any minimal burden imposed on MEPS as a result of implementing the accessions policy for transgender people will be further reduced by the small number of transgender people who are likely to seek enlistment. Based on decades

of medical experience and research, it is clear that only a very small percentage of the overall population is transgender. There is no reason to expect MEPS to receive a large number of enlistment applications from transgender enlistees on or after January 1. I personally have trained hundreds of MEPS personnel. The military system ensures backup availability to review enlistment materials should any ever be needed.

11. Based on my knowledge and experience, I do not agree that the military will be unprepared on January 1, 2018 to implement the transgender enlistment policy set forth in DTM 16-005.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct.

Dated: December 17, 2017



George R. Brown, MD, DFAPA

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

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

Defendants.

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

DECLARATION OF BRAD R. CARSON IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

NOTE ON MOTION CALENDAR:
October 6, 2017
ORAL ARGUMENT REQUESTED

I, Brad R. Carson, declare as follows:

1. I served as the Acting Under Secretary of Defense for Personnel and Readiness ("USD P&R") from April 2, 2015 to April 8, 2016. In that capacity, and at the direction of the Secretary of Defense, I led a group of senior personnel drawn from all of the armed services to develop, over many months of information collection and analysis, a Department-wide policy regarding service by transgender people, all as more fully described below.

PROFESSIONAL BACKGROUND

2. I attended Baylor University and obtained an undergraduate degree in history in 1989. After college, I attended Trinity College in Oxford, England on a Rhodes Scholarship and earned a Master's degree in Politics, Philosophy, and Economics. When I returned to the United States, I attended the University of Oklahoma College of Law, graduating with a law degree in

1994.

3. After I graduated law school, I practiced as an attorney at the law firm Crowe & Dunlevy. From 1997 to 1998 I served as a White House Fellow, where I worked as a Special Assistant to the Secretary of Defense. From 2001 to 2005, I served in Congress as the Representative for the State of Oklahoma's 2nd District.

4. In addition to my civilian career, I am also a commissioned officer in the United States Navy Reserve. I currently serve in the Individual Ready Reserve. I deployed to Iraq in 2008 as Officer-in-Charge of intelligence teams embedded with the U.S. Army's 84th Explosive Ordnance Disposal Battalion. In Iraq, our teams were responsible for investigation of activities relating to improvised explosive devices and the smuggling of weapons and explosives. For my service in Iraq, I was awarded the Bronze Star Medal and other awards.

5. I have held several leadership positions within the Department of Defense ("DoD"). In 2011, I was nominated by the President to serve as General Counsel to the United States Army and unanimously confirmed by the U.S. Senate. As General Counsel, my duties included providing legal advice to the Secretary, Under Secretary, and Assistant Secretaries of the Army regarding the regulation and operation of the U.S. Army. I also assisted in the supervision of the Office of the Judge Advocate General. I served as General Counsel to the United States Army until March 2014.

6. In late 2013, while serving in that position, I was nominated by the President to serve as Under Secretary of the Army. I was unanimously confirmed by the U.S. Senate in February 2014 and sworn in on March 27, 2014. As Under Secretary of the Army, I was the second ranking civilian official in the Department of the Army. My responsibilities included the welfare of roughly 1.4 million active and reserve soldiers and other Army personnel, as well as a variety of matters relating to Army readiness, including oversight of installation management and weapons and equipment procurement. With the assistance of two Deputy Under Secretaries, I directly supervised the Assistant Secretaries of the Army for Manpower and Reserve Affairs; Acquisition, Logistics and Technology; Financial Management and Comptroller; Installations, Energy and Environment; and Civil Works. My responsibilities involved the management and

allocation of an annual budget amounting to almost $150 billion.

7. I was appointed by the President to serve as acting USD P&R in April 2015. In that capacity, I functioned as the principal staff assistant and advisor to the Secretary and Deputy Secretary of Defense for Total Force Management with respect to readiness; National Guard and Reserve component affairs; health affairs; training; and personnel requirements and management, including equal opportunity, morale, welfare, recreation, and quality of life matters. My responsibilities over these matters extended to more than 2.5 million military personnel.

DEVELOPMENT OF POLICY REGARDING TRANSGENDER SERVICE MEMBERS

8. On July 28, 2015, then-Secretary of Defense Ashton B. Carter ordered me, in my capacity as USD P&R, to convene a working group to formulate policy options for DoD regarding transgender service members (the "Working Group"). Secretary Carter ordered the Working Group to present its recommendations within 180 days. In the interim, transgender service members were not to be discharged or denied reenlistment or continuation of service on the basis of gender identity without my personal approval. A true and accurate copy of the July 28, 2015 order is attached hereto as Exhibit A.

9. The Working Group included roughly twenty-five members. Each branch of military service was represented by a senior uniformed officer (generally a three-star admiral or general), a senior civilian official, and various staff members. The Surgeons General and senior representatives of the Chaplains for each branch of service also attended the Working Group meetings.

10. The Working Group formulated its recommendations by collecting and considering evidence from a variety of sources, including a careful review of all available scholarly evidence and consultations with medical experts, personnel experts, readiness experts, health insurance companies, civilian employers, and commanders whose units included transgender service members.

THE FINDINGS OF THE RAND REPORT

11. On behalf of the Working Group, I requested that RAND, a nonprofit research

institution that provides research and analysis to the Armed Services, complete a comprehensive study of the health care needs of transgender people, including potential health care utilization and costs, and to assess whether allowing transgender service members to serve openly would affect readiness.

12. In 2016, RAND presented the results of its exhaustive study in a report entitled Assessing the Implications of Allowing Transgender Personnel to Serve Openly ("RAND Report"), a true and accurate copy of which is attached as Exhibit B.

13. The RAND Report explained that according to the American Psychiatric Association, the term transgender refers to "the broad spectrum of individuals who identify with a gender different from their natal sex." The RAND Report also explained that "transgender status alone does not constitute a medical condition," and that "only transgender individuals who experience significant related distress are considered to have a medical condition called gender dysphoria (GD)." For those individuals, the recognized standard of care includes some combination of psychosocial, pharmacological, and/or surgical care. "Not all patients seek all forms of care." "While one or more of these types of treatments may be medically necessary for some transgender individuals with GD, the course of treatment varies and must be determined on an individual basis by patients and clinicians."

14. The RAND Report evaluated the capacity of the military health system (MHS) to provide necessary care for transgender service members. The RAND Report determined that necessary psychotherapeutic and pharmacological care are available and regularly provided through the MHS, and that surgical procedures "quite similar to those used for gender transition are already performed within the MHS for other clinical indications." In particular, the MHS already performs reconstructive surgeries on patients who have been injured or wounded in combat. "The skills and competencies required to perform these procedures on transgender patients are often identical or overlapping." In addition, the RAND Report noted that "performing these surgeries on transgender patients may help maintain a vitally important skill required of military surgeons to effectively treat combat injuries."

15. The RAND Report also examined all available actuarial data to determine how

many transgender service members are likely to seek gender transition-related medical treatment. The RAND Report concluded that "we expect annual gender transition-related health care to be an extremely small part of overall health care provided to the AC [Active Component] population."

16. The RAND Report similarly concluded that the cost of extending health care coverage for gender transition-related treatments is expected to be "an exceedingly small proportion of DoD's overall health care expenditure."

17. The RAND Report found no evidence that allowing transgender people to serve openly would negatively impact unit cohesion, operational effectiveness, or readiness.

18. The RAND Report found that the estimated loss of days available for deployment due to transition-related treatments "is negligible." Based on estimates assuming the highest utilization rates, it concluded that the number of nondeployable man-years due to gender transition-related treatments would constitute 0.0015 percent of all available deployable labor-years across both the Active Component and Select Reserves.

19. The RAND Report also found no evidence that permitting openly transgender people to serve in the military would disrupt unit cohesion. The RAND Report noted that while similar concerns were raised preceding policy changes permitting open service by gay and lesbian personnel and allowing women to serve in ground combat positions, those concerns proved to be unfounded. The RAND Report found no evidence to expect a different outcome for open service by transgender persons.

20. The RAND Report examined the experience of eighteen other countries that permit open service by transgender personnel—including Israel, Australia, the United Kingdom, and Canada. The Report found that all of the available research revealed no negative effect on cohesion, operational effectiveness, or readiness. Some commanders reported that "increases in diversity led to increases in readiness and performance."

21. The Rand Report also identified significant costs associated with separation and a ban on open service, including "the discharge of personnel with valuable skills who are otherwise qualified."

ISSUES CONSIDERED BY THE WORKING GROUP

22. The Working Group sought to identify and address all relevant issues relating to service by openly transgender persons, including deployability. In addition to taking into consideration the conclusions of the RAND Report, the Working Group discussed that while some transgender service members might not be deployable for short periods of time due to their treatment, this is not unusual, as it is common for service members to be non-deployable for periods of time due to medical conditions such as pregnancy, orthopedic injuries, obstructive sleep apnea, appendicitis, gall bladder disease, infectious disease, and myriad other conditions. For example, the RAND Report estimated that at the time of the report, 14 percent of the active Army personnel—or 50,000 active duty soldiers—were ineligible to deploy for legal, medical, or administrative reasons.

23. The Working Group also addressed the psychological health and stability of transgender people. In addition to taking into account the conclusions of the RAND Report, the Working Group concluded, based on discussions with medical experts and others, that being transgender is not a psychological disorder. While some transgender people experience gender dysphoria, that condition is resolved with appropriate medical care. In addition, the Working Group noted the positive track record of transgender people in civilian employment, as well as the positive experiences of commanders with transgender service members in their units.

24. The Working Group also concluded that transgender service members would have ready access to any relevant necessary medication while deployed in combat settings. It determined that military policy and practice allows service members to use a range of medications, including hormones, while in such settings. The MHS has an effective system for distributing prescribed medications to deployed service members across the globe, including those in combat settings.

25. The Working Group also concluded that banning service by openly transgender persons would require the discharge of highly trained and experienced service members, leaving unexpected vacancies in operational units and requiring the expensive and time-consuming recruitment and training of replacement personnel.

26. The Working Group also concluded that banning service by openly transgender persons would harm the military by excluding qualified individuals based on a characteristic with no relevance to a person's fitness to serve.

27. I concluded my service as USD P&R on April 8, 2016. By that time, the Working Group was unanimously resolved that transgender personnel should be permitted to serve openly in the military.

RECENT REVERSAL OF POLICY

28. On July 26, 2017, President Donald Trump issued a statement that transgender individuals will not be permitted to serve in any capacity in the Armed Forces. On August 25, 2017, President Trump issued a memorandum to the Secretary of Defense and the Secretary of Homeland Security to reverse the policy adopted in June 2016 that permitted military service by openly transgender persons. That memorandum stated: "In my judgment, the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources, and there remain meaningful concerns that further study is needed to ensure that continued implementation of last year's policy change would not have those negative effects."

29. President Trump's stated rationale for a ban on military service by openly transgender service members is unfounded and refuted by the comprehensive investigation and review performed by the Working Group.

30. In addition to contravening the Working Group's conclusions and the exhaustive supporting evidence that was collected, I believe that prohibiting transgender individuals from serving openly in the military is harmful to the public interest for several reasons. My belief is based on my experience as USD P&R and in other leadership positions within DoD, and upon my active duty experience in Iraq.

31. First, a prohibition on service by openly transgender individuals would degrade military readiness and capabilities. Many military units include transgender service members who are highly trained and skilled and who perform outstanding work. Separating these service

members will deprive our military and our country of their skills and talents.

32. Second, banning military service by openly transgender persons would impose significant costs that far outweigh the minimal cost of permitting them to serve. A study authored in August 2017 by the Palm Center and professors associated with the Naval Postgraduate School estimated that separating transgender service members currently serving in the military would cost $960 million, based on the costs of recruiting and training replacements. A true and correct copy of the August 2017 Palm Center study is attached hereto at Exhibit C.

33. Third, the sudden and arbitrary reversal of the DoD policy allowing openly transgender personnel to serve will cause significant disruption and thereby undermine military readiness and lethality. This policy bait-and-switch, after many service members disclosed their transgender status in reliance on statements from the highest levels of the chain of command, conveys to service members that the military cannot be relied upon to follow its own rules or maintain consistent standards.

34. Fourth, in addition to the breach of transgender service members' trust resulting in the deprivation of their careers and livelihood, the President's policy reversal will cause other historically disadvantaged groups in the military, including women and gay and lesbian service members, to question whether their careers and ability to serve as equal members of the military may also be sacrificed.

35. Fifth, those serving in our Armed Forces are expected to perform difficult and dangerous work. The President's reversal of policy puts tremendous additional and unnecessary stress on transgender service members, their command leaders, and those with whom they serve.

36. In short, the President's reversal of the policy permitting military service by openly transgender individuals has had, and will continue to have, a deleterious effect on readiness, force morale, and trust in the chain of command in the Armed Services.

37. I have reviewed and am familiar with the declarations by my colleagues – Former Secretary of the Army Eric Fanning, Former Secretary of the Navy Raymond Mabus, Former Secretary of the Air Force Deborah Lee James, and Former Deputy Surgeon General Margaret Chamberlain Wilmoth – that were submitted in *Doe v. Trump*, Case Number 1:17-cv-01597

(District Court for the District of Columbia). I also submitted a declaration in that case. There is nothing in any of the declarations by my colleagues, filed in *Doe v. Trump*, with which I disagree.

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

DATED: September 13, 2017

Brad R. Carson

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that on September 14, 2017, I caused true and correct copies of the foregoing documents to be served by the method(s) listed below on the following interested parties:

By Hand Delivery:

US Attorney's Office
700 Stewart St., Suite 5220
Seattle, WA 98101-1271

By Registered or Certified Mail:

Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Department of Defense
1400 Defense Pentagon
Washington, DC 20301-1400

Secretary of Defense James N. Mattis
1000 Defense Pentagon
Washington, DC 20301-1000

President Donald J. Trump
1600 Pennsylvania Ave. NW
Washington, DC 20500

I hereby certify under the penalty of perjury that the foregoing is true and correct. Executed on September 14, 2017 at Seattle, Washington.

s/Rachel Horvitz
Rachel Horvitz, *Paralegal*

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

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

Defendants.

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

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

NOTE ON MOTION CALENDAR:
October 6, 2017
ORAL ARGUMENT REQUESTED

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

Background and Experience

1. I served as the United States Secretary of the Navy from May 19, 2009 to January 20, 2017.

2. Prior to serving as Secretary of the Navy, I earned a Bachelor's degree in English and Political Science from the University of Mississippi in 1969, a Master's Degree in political science from Johns Hopkins University in 1970, and a J.D. from Harvard Law School in 1976. Prior to attending law school, I served from 1970 until 1972 in the Navy aboard the cruiser USS Little Rock, achieving the rank of Lieutenant, junior grade. Following law school, I worked as a law clerk in the United States Court of Appeals for the Fifth Circuit. From 1977 until 1978, I worked as legal counsel for the Cotton Subcommittee of the Agriculture Committee of the United States House of Representatives. From 1979 to 1980, I was an associate at the law firm of

Fried, Frank, Harris, Shriver and Kampleman in Washington, D.C. and from 1980 to 1983, I was Legal Counsel and Legislative Assistant to the Governor of Mississippi. From 1984 to 1988, I served as Mississippi State Auditor (an elected position), and from 1988 to 1992 as Governor of Mississippi. From 1994 to 1996 I served as the United States Ambassador to Saudi Arabia. From 1998 to 2000 I served as President of Frontline Global Services, a consulting company. From 2003-2007 I served as Chairman of Foamex, Incorporated, a public manufacturing company, and from 2006 to 2007 as Foamex's Chief Executive Officer as well.

3. As Secretary of the Navy, I functioned as the chief executive of the Department of the Navy, with the authority to conduct all of its affairs. As Secretary, I had comprehensive oversight responsibility for (i) the Department of the Navy's annual budget, (ii) overseeing the recruitment, organization, training, supplying, equipping, mobilizing, and demobilizing of Navy personnel, and (iii) overseeing the construction, outfitting, and repair of naval equipment, ships, and facilities. I was also responsible for the formulation and implementation of policies and programs that are consistent with the national security policies and objectives established by the President and the Secretary of Defense.

4. In connection with my personnel-related oversight responsibilities, I oversaw the administration of recruitment, retention, and medical policies for active duty and reserve Navy personnel. As Secretary, I performed these duties before, during, and after the end of the "Don't Ask, Don't Tell" ban on gay service members serving openly in the military in 2011.

5. Also during this period, I oversaw the Navy and the Marine Corps through the end of United States military operations in Iraq and the surge of tens of thousands of United States troops in Afghanistan. I am keenly aware that the recruitment and retention of capable and qualified service members is of critical importance to the readiness of the Navy and the Marines.

The Navy

6. The Department of the Navy comprises two uniformed Services of the United States Armed Forces: the United States Navy and the United States Marine Corps. It is one of the three military departments of the Department of Defense ("DoD"). The Navy, with an annual budget of more than $160 billion, maintains more than 270 deployable battle force ships,

operates more than 3,700 military aircraft, and employs nearly 900,000 active duty, reserve, and civilian employees.

7. The mission of the Navy is to maintain, train and equip combat-ready Naval forces capable of winning wars, deterring aggression and maintaining freedom of the seas.

Development of DoD Policy Relating to Service by Openly Transgender Persons

8. On July 28, 2015, Secretary of Defense Ashton Carter ordered Brad Carson, Acting Undersecretary of Defense for Personnel and Readiness, to convene a working group to identify and address the practical issues related to transgender Americans serving openly in the Armed Forces, and to develop an implementation plan that addressed those issues with the goal of maximizing military readiness (the "Working Group"). A true and accurate copy of this order is attached hereto as Exhibit A. The Working Group was ordered to present its findings and recommendations to the Secretary of Defense within 180 days. In the interim, pursuant to the July 28, 2015 order, no service member could "be involuntarily separated or denied reenlistment or continuation of active or reserve service on the basis of their gender identity, without the personal approval of the Under Secretary of Defense for Personnel and Readiness."

9. As Secretary of the Navy, I was responsible for supervising the Department of the Navy's participation in the Working Group. The Working Group met as a whole and also assigned various sub-groups to research and analyze discrete issues and report their findings. I met multiple times per week with my deputy to the Working Group, the Navy General Counsel, who would update me on the progress of the Working Group and the Navy's positions on the issues discussed.

10. The Working Group was tasked with evaluating the hurdles, impediments, and concerns potentially raised by open service of transgender service members. They sought to identify all potential impacts on the Services and develop recommendations to address them.

11. The Working Group met and engaged in a detailed, deliberative, carefully run process. The goal was to ensure that the input of the Services would be fully considered before any changes in policy were made and that the Services were on board with those changes.

12. The Working Group conducted a comprehensive review of relevant evidence,

including: research and data; information obtained from medical, personnel, and readiness experts; and information obtained from discussions with transgender service members and commanders who supervised transgender service members. The Working Group also considered the experiences of civilian employers and insurance companies.

13. The Working Group also considered a study that the DoD commissioned from the RAND Corporation. That study examined all of the available research about the healthcare needs of transgender service members, the anticipated costs of providing healthcare coverage for transition-related treatments, and the potential readiness implications of allowing transgender service members to serve openly. A true and accurate copy of the report, entitled Assessing the Implications of Allowing Transgender Personnel to Serve Openly ("RAND Report"), is attached as Exhibit B.

14. The RAND Report concluded that the cost of caring for the medical needs of transgender personnel would be extremely small and that there was no evidence that allowing transgender people to serve openly would negatively impact unit cohesion, operational effectiveness, or readiness. The RAND Report also concluded that the Military Health Service could provide appropriate transition-related healthcare to transgender persons. The RAND Report also identified various DoD policies that would need to be changed to permit transgender service members to serve openly, including "transgender-specific DoD instructions that may contain unnecessarily restrictive conditions and reflect outdated terminology and assessment processes."

15. Members of the Working Group discussed the full range of considerations relevant to assessing the potential impacts of permitting transgender service members to serve openly, including evidence relating to the costs of providing appropriate healthcare and evidence relating to the impact of service by transgender people on operational effectiveness and readiness. For example, the Working Group considered that while some transgender service members might be undeployable for short periods due to medical treatments, the overall loss of deployable time would not be significant and was consistent with the standard applied to other service members, who may take time off due to comparable medical treatments.

16. The Working Group also noted that many private and public health insurance plans now cover transition-related care and that all civilian federal employees have access to a health insurance plan that provides comprehensive coverage for such care. This was helpful to ascertain both the costs of providing such care and utilization rates, as well as to demonstrate the need for the military to keep pace with contemporary medical science and practice in the provision of healthcare to our service members.

17. The Working Group also consulted with representatives from the Armed Forces of other nations that permit openly transgender persons to serve. Those consultations confirmed that permitting such service is not disruptive to military readiness and has not led to significantly increased costs or posed any other significant problems. The RAND Report considered the experiences of other countries as well and found no evidence of any adverse impacts. Noting the most extensive research on how a policy of open service affects readiness and unit cohesion has been conducted in Canada, the RAND Report noted that "the researchers heard from commanders that the increased diversity improved readiness."

18. The Working Group considered that banning service by openly transgender people has numerous negative impacts, including requiring the discharge of highly trained and experienced service members, causing unexpected vacancies in operational units, and requiring the expensive and time-consuming recruitment and training of replacement personnel.

19. The Working Group also recognized that despite a ban on transgender service members, transgender persons continued to serve in the military, but were forced to lie about and hide their identities, to the detriment both of those service members and of the military as a whole. As a result, the Working Group recognized that the primary impact of the policy was to cause harms similar to those caused by "Don't Ask, Don't Tell."

20. During the period in which the Working Group was in operation, the proceedings of the Working Group were reported to and reviewed by upper level Department of Defense personnel at meetings attended by the Joint Chiefs of Staff, the Chairman, the Vice Chairman, the Service Secretaries, the Secretary of Defense, and the Assistant Secretary of Defense. At these meetings, the activities of the Working Group would be shared along with their preliminary

views. The meeting attendees would then discuss any comments they may have had on those views.

21. By the conclusion of its discussions and analysis, all members of the Working Group (including the senior uniformed military personnel) expressed their agreement that transgender people should be permitted to serve openly in the United States Armed Forces.

22. In or around April 2016, the Working Group communicated its view to the Secretary of Defense along with detailed recommendations regarding the full range of relevant policies and practical concerns, such as guidelines involving access to healthcare, housing and uniform standards, and when a transitioning service member should be authorized to conform to the standard of the gender to which they were transitioning.

23. On June 30, 2016, Secretary of Defense Ashton Carter accepted the recommendations of the Working Group, and issued Directive-type Memorandum (DTM) 16-005, entitled "Military Service of Transgender Service Members" ("DTM 16-005"), a true and accurate copy of which is attached as Exhibit C.

Change, Development, and Implementation of Navy Policy

24. Following the Secretary of Defense's announcement, the Navy's implementation of the new policy was straightforward. We focused on the administrative tasks of promulgating and implementing the appropriate processes. Having presided over the Navy during the rollout of prior policy changes such as the repeal of "Don't Ask, Don't Tell" and the complete integration of women into ground combat, I can confirm that the implementation of open service for transgender service members was relatively low-key, triggered fewer emotional responses, and was viewed as "no big deal."

25. To implement DTM 16-005 as applied to the Navy, on November 4, 2016, I issued SECNAV Instruction 1000.11 concerning Service of Transgender Sailors and Marines (the "Instruction"). A true and accurate copy of the Instruction is attached hereto as Ex. D.

26. The policy and guidance in the Instruction, which was effective immediately for all Department of Navy ("DON") personnel, established "policy for the accession and service of transgender Sailors and Marines, to include the process for transgender Service Members to

transition to transgender in-service." The policies and procedures in the Instruction "are based on the premise that open service by transgender persons who are subject to the same medical, fitness for duty, physical fitness, uniform and grooming, deployability, and retention standards and procedures is consistent with military service and readiness." The Instruction provides that "transgender individuals shall be allowed to serve openly in the DON," and that any "discrimination based on gender identity is a form of sex discrimination."

27. Pursuant to the Instruction, on November 7, 2016, Chief of Naval Personnel, Vice Admiral R. P. Burke, issued interim guidance in NAVADMIN 248/16 (the "Policy") regarding "policy, regulations and procedures related to the service of transgender Navy personnel." The Policy, which "applies to all Navy military personnel," remains in effect "until superseded or cancelled." A true and accurate copy of the Policy is attached hereto as Ex. E.

28. As with the Instruction, the Policy provides that "transgender individuals shall be allowed to serve openly in the Navy. The Policy was "premised on the conclusion that transgender persons are fully qualified and are subject to the same standards and procedures as other Service Members with regard to their medical fitness for duty, physical fitness, uniform and grooming standards, deployability, and retention." The Policy thus declares that "[n]o otherwise qualified Service Member may be involuntarily separated, discharged, or denied reenlistment or continuation of service solely on the basis of gender identity or an expressed intent to transition gender."

29. With respect to individuals serving in the Navy or Marine Corps, the Instruction and Policy state that transgender Sailors and Marines will be responsible to meet all standards for uniforms and grooming, body composition assessment, physical readiness testing, Military Personnel Drug Abuse Testing Program participation and other military standards according to their gender marker in DEERS, subject to the approval of an Exception to Policy ("ETP") request.

30. To allow DON commanders to address medical needs in a manner consistent with military mission and readiness, the Policy sets forth detailed procedures concerning medical treatment for transgender service members with a diagnosis from a medical military provider

indicating that gender transition is medically necessary. Service members with such a diagnosis must notify their commanding officer and request commanding officer approval for the timing of medical treatment associated with gender transition. The commanding officer is the final approval authority for a transition plan. Commanding officers must respond to a gender transition request "within a framework that ensures readiness by minimizing impacts to the mission (including deployment, operational, training, exercise schedules, and critical skills availability), as well as the morale, welfare, and good order and discipline of the command." Furthermore, the Policy provides that timing of a medical treatment plan "should consider the individual's planned rotation date (PRD), deployment or other operational schedules, and potential impact on major career milestones, whenever possible."

31. The Policy further provides detailed instructions regarding an in-service transition. The transition plan is considered complete once (1) a military medical provider documents that the service member has completed the care outlined in a medical treatment plan; (2) the service member obtains an appropriate document showing legal proof of gender change; (3) the service member's commanding officer provides written permission to change the gender marker in the Navy Personnel Administrative Systems/DEERS; (4) the service member submits for the gender marker change; and (5) the gender marker is changed in the Navy Personnel Administrative Systems/DEERS.

32. As set forth in the Policy, in order to have a gender marker changed in the Navy Personnel Administrative Systems/DEERS, the service member must submit the required documentation showing legal proof of gender change and the commanding officer's written approval to Navy Personnel Command.

33. The Policy also provides that "[a]ll Service Members are world-wide assignable as their medical fitness for duty permits." "Any determination that a transgender Sailor or Marine is non-deployable at any time will be consistent with established DON standards, as applied to other Sailors and Marines whose deployability is similarly affected in comparable circumstances unrelated to gender transition."

34. Both the Instruction and Policy provide that effective July 1, 2017, the Navy and

Marine Corps will begin accessing transgender applicants who meet all standards.

35. In addition, the Policy included policy changes related to: (1) privacy in berthing and showering facilities as set forth in OPNAVINST 3120,32D, Standard Organization Regulations of the U.S. Navy; (2) drug testing and urinalysis as set forth in OPNAVINST 5350.4D, Navy Alcohol and Drug Abuse Prevention and Control Program; and (3) physical fitness assessment standards as set forth in OPNAVINST 6110.1J, Physical Readiness Program.

36. On September 30, 2016, the Department of Defense issued Transgender Service in the Military, An Implementation Handbook ("DoD Handbook"). A true and accurate copy of the DoD Handbook is attached hereto at Exhibit F. The DoD Handbook is intended as a practical day-to-day guide to assist all service members in understanding the Department of Defense's policy of allowing the open service of transgender service members. To that end, the DoD Handbook instructs all service members:

> The cornerstone of DoD values is treating every Service member with dignity and respect. Anyone who wants to serve their country, upholds our values, and can meet our standards, should be given the opportunity to compete to do so. Being a transgender individual, in and of itself, does not affect a Service member's ability to perform their job.

The Impact of Reversing the Policy Permitting Service by Openly Transgender People

37. Numerous military personnel disclosed their transgender status to the military in 2016 and 2017 in reliance upon the Department of Defense's statements that it would not discharge them on that basis, as articulated in DTM 16-005 and other documents. I did not receive any reports that such disclosures harmed the operational effectiveness of any Navy units.

38. On July 26, 2017, President Donald Trump issued a statement that transgender individuals will not be permitted to serve in any capacity in the Armed Forces due to "the tremendous medical costs and disruption that transgender in the military would entail."

39. On August 25, 2017, President Trump issued a memorandum to the Secretary of Defense and the Secretary of Homeland Security to reverse the policy adopted in June 2016 that permitted military service by openly transgender persons. That memorandum stated: "In my judgment, the previous Administration failed to identify a sufficient basis to conclude that

terminating the Departments' longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources, and there remain meaningful concerns that further study is needed to ensure that continued implementation of last year's policy change would not have those negative effects."

40. President Trump's stated rationales for reversing the policy and banning military service by transgender people make no sense. They have no basis in fact and are refuted by the comprehensive analysis of relevant data and information that was carefully, thoroughly, and deliberately conducted by the Working Group.

41. As discussed above, the RAND Report concluded that any costs associated with providing appropriate healthcare to transgender service members would be "exceedingly small." In fact, the maximum financial impact estimated by the RAND Report is an amount so small it was considered to be "budget dust," hardly even a rounding error, by military leadership.

42. The claim that permitting transgender people to serve openly would be "disruptive" has no foundation. The same claim was used to oppose racial integration of the military in the 1940s, the increased recruiting of women in the 1970s, and the repeal of "Don't Ask Don't Tell." In each case, the prediction that disruption would ensue has not been borne out. Studies have shown that diversity actually improves unit cohesion. Units become closer when individual service members are respected for who they are.

43. Any evidence that permitting such service would be disruptive is entirely lacking. Since the policy permitting open service went into effect, transgender service members have been able to serve openly and have caused no disruption.

44. In addition to being contrary to the overwhelming weight of the evidence considered by the Working Group and the Secretary of Defense, a reversal of the DoD policy permitting open service and the banning of accessions by transgender people, in my assessment, based on my experience as Secretary of the Navy, disserves the public interest, for several reasons.

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45. **Loss of Qualified Personnel**. First, banning transgender service members will produce vacancies in the Services, creating an immediate negative impact on readiness. The United States Armed Forces rely on an all-volunteer force, some portion of which are transgender service members. The impact of the loss of those individuals, who serve at all levels of service, is significant. Banning transgender service members will cause the loss of competent and experienced individuals, who will be difficult to replace. The Navy has invested in their education, and training. In addition to losing any return on that investment, taxpayers will bear the cost of identifying, recruiting, and training replacement personnel. Our ability to replace those individuals will also be hampered by the parallel reduction in the size of our potential recruiting pool. Artificial exclusionary barriers like this weaken the military.

46. **Unit Cohesion**. Second, banning transgender service members negatively impacts unit cohesion, a fundamental component of readiness. The only relevant qualification for the job of serving in the Armed Forces is whether an individual is capable of performing the job. Diversity in the form of nationality, religion, race, who one loves, gender, or gender identity only strengthens the force. Conversely, when the military asks people to lie about who they are in order to enlist or remain in the military, it weakens the military and has a negative impact on unit cohesion. Members of units know each other well and develop strong bonds. Unit members can tell when other unit members are lying. A policy that forces unit members to be dishonest with one another, including a ban on service by openly transgender people, weakens these bonds.

47. **Erosion of Trust in Command**. Third, arbitrary decisionmaking erodes trust in military leadership. I was dismayed by the abrupt reversal, because so much careful thought had gone into development of the policy, with consensus at the highest levels of military leadership. Furthermore, the initial directive to reverse policy through the Twitter medium was delivered entirely outside the normal pathway of legitimate orders issued through the chain of command, and the most recent memorandum of August 25, 2017 was also issued in a highly unusual manner. It is also unprecedented to reverse policy in such an abrupt manner. I cannot recall another instance in United States military history of such a stark and unfounded reversal of

policy, or of any example in our nation's history in which a minority group once permitted to serve has been excluded from the military after its members had been allowed to serve openly and honestly.

48. Even individuals who had reservations at the time the Working Group was announced trusted in the process and believed it was a fair and deliberative process that met the high standards of the military. This abrupt reversal leaves the impression among service members that military decision making is instead arbitrary and subject to political whims.

49. For transgender service members themselves, the reversal represents the ultimate mistreatment and breach of trust. In DTM-005 and in other documents issued by the Department of Defense, the military informed transgender service members that they could come forward to disclose their transgender status and serve openly, rather than facing discharge. Many transgender service members came forward based on those statements. They risked their jobs, housing, and progress towards retirement benefits in reliance on our word that we would treat their disclosures fairly and in good faith. Using that information now as a basis for separating these soldiers from their service is an unprecedented betrayal of the trust that is so essential to achieving the mission of all of the armed forces. The reversal penalizes transgender service members for doing what DoD encouraged them to do. Transgender service members, their chain of command, and their colleagues who may lose people on whom they rely, must now deal with this enormous distraction, thus detracting from military readiness.

50. This sudden reversal also undermines the morale and readiness of other groups who must now deal with the stress and uncertainty created by this dangerous precedent, which represents a stark departure from the foundational principle that military policy will be based on military, not political, considerations. In 2011, the "Don't Ask, Don't Tell" policy prohibiting gay, lesbian, and bisexual people from openly serving in the military (Department of Defense Directive 1304.26) was repealed. More recently, DoD also removed remaining barriers for women serving in certain ground combat positions. The sudden reversal of the DoD's policy with respect to transgender service members sets a precedent suggesting that these policies may

be abruptly reversed for baseless reasons as well.

51. This sudden reversal may also have a chilling effect on the confidence of other service members that they will continue to be able to serve. Religious and ethnic minorities who have seen an increase in discrimination under the current administration may fear that the military may seek to ban them next, creating a culture of fear that is anathema to the stability and certainty that makes for an effective military.

52. This sudden reversal undermines the confidence of all service members that important military policy decisions will be made under careful review and consistent with established process. Rational decisionmaking in the adoption of and change to policy impacts the military's ability to recruit and retain competent, high-performing people. The sudden reversal of policy makes recruitment and retention more difficult, as does the damage done to the military's image and reputation as promoting fairness and equality and of being open to all qualified Americans. That image and reputation are critical to the military's ability to attract talented and idealistic young people. Actions that tarnish that reputation cause real harm.

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

DATED: September 13, 2017

Raymond Edwin Mabus, Jr.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that on September 14, 2017, I caused true and correct copies of the foregoing documents to be served by the method(s) listed below on the following interested parties:

By Hand Delivery:

US Attorney's Office
700 Stewart St., Suite 5220
Seattle, WA 98101-1271

By Registered or Certified Mail:

Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Department of Defense
1400 Defense Pentagon
Washington, DC 20301-1400

Secretary of Defense James N. Mattis
1000 Defense Pentagon
Washington, DC 20301-1000

President Donald J. Trump
1600 Pennsylvania Ave. NW
Washington, DC 20500

I hereby certify under the penalty of perjury that the foregoing is true and correct. Executed on September 14, 2017 at Seattle, Washington.

s/Rachel Horvitz
Rachel Horvitz, *Paralegal*

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

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

Defendants.

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

DECLARATION OF RAYMOND EDWIN MABUS, JR. IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

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

1. As set forth in my earlier declaration signed and dated September 13, 2017, I was part of a Working Group that comprehensively reviewed military policy with regard to transgender people serving across the service branches. It was based upon that review and the recommendations of that group that the Department of Defense announced in June 2016 that it would begin allowing transgender people to serve openly in the military.

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

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transgender individuals are subject to discharge upon disclosure of their transgender status.

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

4. Consideration of the ways in which deployment decisions are made highlights the current limitations and lost opportunities being experienced by transgender service members. Consistent with naval operations, ships may deploy for up to 9 months at a time. Commanders making decisions about how to staff naval operations must consider the length of time that a sailor will be available for a deployment. If a sailor may not be available for the full length of a deployment, command knows that they will have to expend significant resources to backfill staffing needs in order to address the diminishment of resources. Rather than face those challenges, command will predictably make assignments based on certainty about sailors' ability to serve the full length of deployment.

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

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

7. As a result of the announced ban, transgender service members are losing

opportunities for assignments that they are capable of doing. These include lost opportunities for deployment, training, and assignments. These lost opportunities are based not on individual assessment of the service member's merit but rather based on whether the person is transgender. These lost opportunities, in addition to depriving transgender members of the military of the ability to serve on equal footing with their peers, hinder transgender service members opportunities for advancement and promotions as well.

8. The impact of this immediate harm reaches beyond the individual service member and affects the institution of the military as a whole. The military is designed to be a meritocracy where individuals receive opportunities and tackle assignments based on their ability to do the job. The institution is weakened when people are denied the ability to serve not because they are unqualified or because they cannot do the job but because of who they are.

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

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

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

DATED: October 23, 2017

Raymond E. Mabus, Jr.

NEWMAN DU WORS LLP
2101 Fourth Avenue, Suite 1500
Seattle, Washington 98121
(206) 274-2800

No. 17-36009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYAN KARNOSKI, et al.,

Plaintiffs-Appellees,

STATE OF WASHINGTON,

Plaintiff-Intervenor-Appellee,

v.

DONALD TRUMP, President of the United States, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Western District of Washington
Case No. 2:17-cv-01297-MJP
The Honorable Marsha J. Pechman, District Judge.

DECLARATION OF RAYMOND EDWIN MABUS, JR. IN SUPPORT OF PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR ADMINISTRATIVE STAY AND MOTION FOR STAY PENDING APPEAL

RAYMOND EDWIN MABUS, JR. declares as follows:

1. I served as the United States Secretary of the Navy from May 19, 2009 to January 20, 2017.

2. As set forth in my previous declaration in this case executed on September 13, 2017, I was part of a Working Group that comprehensively reviewed military policy with regard to transgender people serving across the service branches. It was based upon that review and the recommendations of that group that the Department of Defense announced in June 2016 that it would begin allowing transgender people to serve openly in the military and would begin on July 1, 2017 also allowing accession by transgender people.

3. Based on my experience in military personnel and operations, allowing transgender candidates to apply for military service was not a complicated process to begin with, especially in light of the highly complex strategic, technical, personnel and medical issues that the military addresses day in and day out.

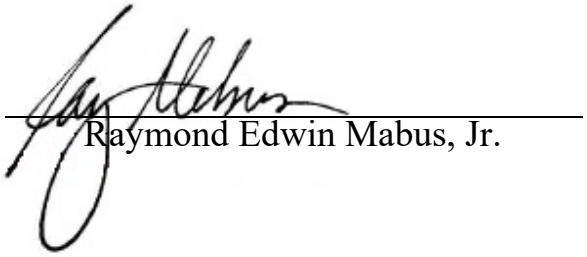
4. Based on my personal knowledge, the Services had already completed almost all of the necessary preparation for lifting the accession ban when I left office almost a year ago. It is inconsistent with my understanding of the status of those efforts and the workings of military personnel to conclude that the military would not be prepared almost a year later—and six months after the date on which

the policy was originally scheduled to take effect—to permit accessions by transgender people.

5. As set forth in my previous declaration, it is not the lifting of the ban on accession by qualified transgender individuals that will compromise military readiness, good order, and discipline; it is the sudden reversal of military policy and the treatment of loyal transgender Americans as second-class citizens that are the true sources of disruption.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 17, 2017



Raymond Edwin Mabus, Jr.

No. 17-36009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYAN KARNOSKI, et al.,

Plaintiffs-Appellees,

STATE OF WASHINGTON,

Plaintiff-Intervenor-Appellee,

v.

DONALD TRUMP, President of the United States, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Western District of Washington
Case No. 2:17-cv-01297-MJP
The Honorable Marsha J. Pechman, District Judge.

DECLARATION OF DEBORAH LEE JAMES IN SUPPORT OF PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR ADMINISTRATIVE STAY AND MOTION FOR STAY PENDING APPEAL

I, Deborah Lee James, declare as follows:

1. I served as the Secretary of the United States Air Force ("USAF") from December 20, 2013 to January 20, 2017. As Secretary, I was responsible for supervising the Department of the Air Force's participation in a working group convened by the Department of Defense in 2015 to identify the practical issues related to transgender Americans serving openly in the Armed Forces, and to develop an implementation plan that addressed those issues with the goal of maximizing military readiness (the "Working Group"). On June 30, 2016, then Secretary of Defense Ashton Carter announced that the military would allow transgender people to openly serve. Included within that announcement and change of policy was a direction that the military would adopt changes to the accessions policy to begin allowing accession by transgender people starting on July 1, 2017.

2. Based on my personal knowledge, the USAF had nearly completed the necessary preparations for implementing the change in accessions policy when I left office in January 2017.

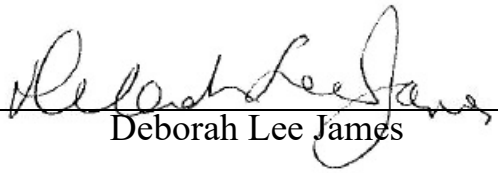
3. The change in accessions to authorize transgender people to serve was consistent with the approach generally for authorizing people to serve with curable or treatable medical conditions. It included notifying and training medical personnel across the services regarding information relating to the underlying medical condition associated with some transgender individuals and the period of

stability after treatment necessary for enlistment.

4. The preparations for implementing the change in policy could readily have been completed by the initial target date of July 1, 2017, well within the current target date of January 1, 2018.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct.

Dated: December 18, 2017



Deborah Lee James

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, *et al.*,
Plaintiffs
v.
DONALD J. TRUMP, *et al.*,
Defendants

Civil Action No. 17-1597 (CKK)

ORDER
(December 11, 2017)

Presently before the Court is Defendants' Motion for a Partial Stay of the Court's Preliminary Injunction Pending Appeal. ECF No. 73 ("Defs.' Mot."). Defendants request a partial stay of the Court's October 30, 2017 preliminary injunction pending the outcome of their recently filed appeal to the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). Specifically, Defendants request that the Court stay the part of the injunction that prevents Defendants from enforcing the "Accession Directive" in President Donald J. Trump's August 25, 2017 Presidential Memorandum ("Presidential Memorandum"). Plaintiffs oppose Defendants' motion on various grounds.[1]

In summary form, the Accession Directive indefinitely extended a prohibition against transgender individuals entering the military (a process formally referred to as "accession"). As relevant to this motion, the effect of the Court's October 30, 2017 preliminary injunction was to revert to the *status quo* with regard to accession that existed before the issuance of the

[1] The Court's consideration has focused on the following documents: Defs.' Mot. for Partial Stay of Preliminary Injunction Pending Appeal and the attached Declaration of Lernes J. Hebert, ECF No. 73 (filed on December 6, 2017); Pls.' Opp'n to Defs.' Mot. for Partial Stay of Preliminary Injunction Pending Appeal and the attached Declarations of George Richard Brown, MD, DFAPA and Raymond Edwin Mabus, Jr., ECF No. 74 (filed on December 8, 2017).

Presidential Memorandum—that is, the accession policy established in a June 30, 2016 Directive-type Memorandum ("DTM"), as modified by Secretary of Defense James Mattis on June 30, 2017. That policy allowed for the accession of transgender individuals into the military beginning on January 1, 2018.[2]

The Court will not stay its preliminary injunction pending Defendants' appeal. "In the D.C. Circuit, a court assesses four factors when considering a motion to stay an injunction pending appeal: (1) the moving party's likelihood of success on the merits of its appeal, (2) whether the moving party will suffer irreparable injury, (3) whether issuance of the stay would substantially harm other parties in the proceeding, and (4) the public interest." *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 12 (D.D.C. 2014) (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)). None of these factors justifies staying the Court's preliminary injunction.

[2] As the Court understands it, the policy that will go into effect on that date states:

> (1) A history of gender dysphoria is disqualifying, unless, as certified by a licensed medical provider, the applicant has been stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months;
>
> (2) A history of medical treatment associated with gender transition is disqualifying, unless, as certified by a licensed medical provider: (a) the applicant has completed all medical treatment associated with the applicant's gender transition; and (b) the applicant has been stable in the preferred gender for 18 months; and (c) If the applicant is presently receiving cross-sex hormone therapy post-gender transition, the individual has been stable on such hormones for 18 months;
>
> (3) A history of sex reassignment or genital reconstruction surgery is disqualifying, unless, as certified by a licensed medical provider: (a) a period of 18 months has elapsed since the date of the most recent of any such surgery; and (b) no functional limitations or complications persist, nor is any additional surgery required.

Decl. of Deborah Lee James, ECF No. 13-5 ("James Decl."), Ex. B. Transgender applicants will also be subject to all of the same medical and physical requirements as all other applicants.

1. Irreparable Injury

The Court begins with the main focus of Defendants' motion: their argument that they will be "irreparably harmed" if they begin to accept transgender individuals into the military on January 1, 2018. In support of their motion, Defendants have submitted a declaration from Lernes J. Hebert, the Acting Deputy Assistant Secretary of Defense for Military Personnel Policy in the Office of the Under Secretary of Defense for Personnel and Readiness. *See* Decl. of Lernes J. Hebert, ECF No. 73-1 ("Hebert Decl."). Mr. Hebert states that "[i]mplementing the Court's orders with respect to the accessions policy . . . by January 1, 2018, will impose extraordinary burdens on the Department and the military services." *Id.* ¶ 5. This statement is apparently based on Mr. Hebert's assertions that "there are considerable requirements associated with implementing this significant and complex policy change," that "implementation of a new accession policy necessitates preparation, training, and communication to ensure those responsible for application of the accession standards are thoroughly versed in the policy and its implementation procedures," and that "the implementation of accessions criteria is . . . a complex undertaking." *Id.* ¶¶ 5-6. Mr. Hebert represents that "notwithstanding the implementation efforts made to date, the Department still would not be adequately and properly prepared to begin processing transgender applicants for military service by January 1, 2018." *Id.* ¶ 9.

The Court is not convinced by Mr. Hebert's declaration that Defendants will be irreparably harmed in the absence of a stay. Although Mr. Hebert's declaration contains a lengthy discussion of the administrative difficulties associated with implementing a new accession policy in general, it fails to acknowledge the considerable amount of time Defendants have already had to prepare for the implementation of this particular policy. The directive from the Secretary of Defense requiring the military to prepare to begin allowing accession of

transgender individuals was issued on June 30, 2016—nearly one and a half years ago. For more than a year preceding the summer of 2017, it was the policy and intention of the military that transgender individuals would soon begin to accede. Moreover, the Court issued the preliminary injunction in this case approximately six weeks ago, and since then Defendants have been on notice that they would be required to implement the previously established policy of beginning to accept transgender individuals on January 1, 2018. In other words, with only a brief hiatus, Defendants have had the opportunity to prepare for the accession of transgender individuals into the military for nearly one and a half years.

Moreover, Mr. Hebert's declaration glosses over the fact that considerable work has been done already during this lengthy period. With their opposition to Defendants' motion to stay, Plaintiffs have submitted the declaration of Dr. George Richard Brown, who has been part of the military's training program for the implementation of its transgender accession policy. Dr. Brown states that he "trained approximately 250 medical personnel working in Military Entrance Processing Stations (MEPS) throughout the military." Decl. of George Richard Brown, MD, DFAPA, ECF No. 74-1, ¶ 5. Plaintiffs have also submitted the declaration of former Secretary of the Navy Raymond Edwin Mabus, Jr., who states that nearly a year ago "the Services had already completed almost all of the necessary preparation for lifting the accession ban." *See* Decl. of Raymond Edwin Mabus, Jr., ECF No. 74-2 ("Mabus Decl."), ¶ 3.

The record that was before the Court when it considered Plaintiffs' motion for a preliminary injunction also demonstrates that considerable work has already been done to prepare for transgender accession. For example, that record shows that the Acting Under Secretary of Defense for Personnel and Readiness, Peter Levine, published an "implementation handbook" in 2016 entitled "Transgender Service in the U.S. Military." Decl. of Raymond

Edwin Mabus, Jr., ECF No. 13-9, Ex. F. That document is a lengthy, exhaustive "practical day-to-day guide" prepared to assist Service members and commanders in understanding and implementing the policy of open transgender military service. James Decl., ¶ 34. The record also indicates that each branch of the Armed Forces issued memoranda in 2016 for implementing the transgender accession policy.

Instead of acknowledging what has already been done, Mr. Hebert's declaration uses sweeping and conclusory statements to support his assertion that there is an unmanageable amount of work left to do. He states that Defendants "would not be adequately and properly prepared" to accept transgender individuals by January 1, 2018. Hebert Decl. ¶ 9. But Mr. Hebert fails to explain what *precisely* needs to be completed by this date in order for Defendants to be prepared to begin transgender accessions.[3] Especially in light of the record evidence showing, with specifics, that considerable work has already been done, the Court is not convinced by the vague claims in Mr. Hebert's declaration that a stay is needed.

Finally, Defendants also complain that they may suffer unnecessary costs and confusion by allowing transgender individuals to accede on January 1, only to later change to some other accession policy that they have indicated they are in the process of preparing. Mr. Hebert states that "the Department will be twice burdened if it is required to implement [the June 30, 2016 DTM] by January 1, 2018, and then potentially a different policy after the Department concludes its study and finalizes a policy." Hebert Decl. ¶ 10. Although they hint in their most recent pleading that a new policy proposal is forthcoming in the next few weeks, Defendants fail to

[3] There is no evidence in the record that would suggest that the number of transgender individuals who might seek to accede on January 1, 2018 would be overwhelmingly large. To the contrary, although the Court understands that there may be some dispute as to the amount of transgender individuals in the general population and in the military, the record thus far suggests that the number is fairly small.

provide the Court with any insight at all into what the policy might be. The Court is left to speculate. On the one hand, to the extent the policy Defendants foresee adopting in the future is a *ban* on accessions—which the Court has already concluded is likely to be proven unconstitutional—this is clearly not a reason to stay the injunction in this case. On the other hand, as the Court has already explained, there is no reason to conclude on the present record that Defendants intend to implement any sort of policy *allowing* for the accession of transgender individuals. Defendants have never given the Court any reason to conclude that this would be the case.

In sum, having carefully considered all of the evidence before it, the Court is not persuaded that Defendants will be irreparably injured by allowing the accession of transgender individuals into the military beginning on January 1, 2018.

2. Likelihood of Success on the Merits

The remaining factors that the Court assesses when considering whether to stay an injunction pending an appeal also weigh against Defendants' motion. Unsurprisingly, the Court does not agree with Defendants that they are likely to prevail on the merits of their appeal. All of Defendants' arguments on this factor have already been raised and rejected by the Court. Defendants argue that the Court erred by entering a "worldwide injunction," by finding that Plaintiffs had established standing and irreparable injury, by not allowing Secretary of Defense Mattis to violate the Court's injunction by "exercising his independent authority" to preclude transgender individuals from the military, by not applying the "appropriate level of deference" to the Presidential Memorandum, and by finding that the equities favored an injunction. Defs.' Mot. at 7-8. The Court has already explained its reasons for rejecting most of these arguments in its 76-page Memorandum Opinion granting Plaintiffs' motion for a preliminary injunction. *See*

Oct. 30, 2017 Mem. Op., ECF No. 61. It will not repeat those reasons again here, but instead incorporates the analysis in its previous Opinion into this Order as though restated in full.

The record before the Court has not changed in any significant way since it issued its preliminary injunction. The Court previously held that Plaintiffs are likely to succeed on their claim that the Accession Directive violates the Fifth Amendment based on a number of factors, "including the sheer breadth of the exclusion ordered by the directive[ ], the unusual circumstances surrounding the President's announcement of [it], the fact that the reasons given for [it] do not appear to be supported by any facts, and the recent rejection of those reasons by the military itself." Oct. 30, 2017 Mem. Op. at 3. These factors support enjoining the Accession Directive today as much as they did when the Court issued its injunction on October 30, 2017.

Finally, the Court notes that there was nothing improper about the scope of the preliminary injunction. Plaintiffs presented facial constitutional challenges to several directives in the Presidential Memorandum. The Court found that Plaintiffs were likely to succeed in demonstrating that some of those directives were unconstitutional, and accordingly barred Defendants from enforcing them. There was nothing improper about this course of action. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016) ("[I]f the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is 'proper.'"); *Harmon v. Thornburgh*, 878 F.2d 484, 495 (D.C. Cir. 1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.").

3. Harm to Plaintiffs

Defendants' cursory argument that "Plaintiffs will not be harmed by a stay" is also unpersuasive. As the Court has already held, Plaintiffs were being injured every day the

Presidential Memorandum's directive preventing accession was in force. That directive "stigmatizes Plaintiffs as less capable of serving in the military, reduces their stature among their peers and officers, stunts the growth of their careers, and threatens to derail their chosen calling or access to unique educational opportunities." Oct. 30, 2017 Mem. Op. at 73. It also subjects them to a continuing alleged violation of their rights under the Fifth Amendment. *Id.* Moreover, there is evidence in the record suggesting that if the Accession Directive remains in effect, it would render Plaintiff Regan Kibby ineligible to attend the Naval Academy and prevent Plaintiff Dylan Kohere from enrolling as a cadet in his university's ROTC program. Mabus Decl. ¶ 5; Decl. of Mr. Robert O. Burns, ECF No. 45-3, ¶ 6. Put simply, the notion that Plaintiffs will suffer no harm by allowing the Accession Directive to remain in force pending Defendants' appeal is simply wrong.

4. Public Interest

Finally, Defendants' one-sentence argument about the "public interest" effectively restates their argument regarding irreparable injury. That argument has already been rejected above. The Court has previously explained why the public interest favors preliminary injunctive relief in this case. *See* Oct. 30, 2017 Mem. Op., at 74-75. To the extent Defendants argue that accepting transgender individuals on January 1, 2018 would harm military readiness, the Court directs Defendants to the Court's finding in its October 30, 2017 Memorandum Opinion that, on the record before the Court, there is absolutely no support for the claim that service of transgender individuals would have any negative effect on the military at all. *Id.* at 75. The factual record has not changed in any material way since the Court issued its prior Opinion.

5. Conclusion

For all of the above reasons, Defendants' motion for a partial stay of its preliminary injunction pending appeal is **DENIED**. As a final point, the Court notes that Defendants' portrayal of their situation as an emergency is belied by their litigation tactics. The Court issued its preliminary injunction requiring Defendants to comply with the January 1, 2018 deadline on October 30, 2017. Defendants did not file an appeal of that decision until November 21, 2017, and did not file the current motion for a stay of that deadline until December 6, 2017, requesting a decision by noon today, December 11, 2017. There is also no indication that Defendants have sought any sort of expedited review of their appeal, the first deadlines in which are not until January, 2018. If complying with the military's previously established January 1, 2018 deadline to begin accession was as unmanageable as Defendants now suggest, one would have expected Defendants to act with more alacrity.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

IMMEDIATE RELEASE

DoD Complying with Court Orders to Access Transgender Persons into the Military

Press Operations

Release No: NR-417-17
Dec. 11, 2017

As required by recent federal district court orders, the Department of Defense recently announced it will begin processing transgender applicants for military service on January 1, 2018. This policy will be implemented while the Department of Justice appeals those court orders.

The United States District Court for the District of Columbia ordered DoD to implement, effective January 1, 2018, the accession policy issued by former Secretary Carter in 2016. DoD and the Department of Justice are actively pursuing relief from those court orders in order to allow an ongoing policy review scheduled to be completed before the end of March.

Under the 2016 Carter policy, a history of gender dysphoria is disqualifying unless, as certified by a licensed medical provider, the applicant has been stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months. Additionally, a history of medical treatment associated with gender transition is disqualifying unless, as certified by a licensed medical provider, the applicant has completed all medical treatment associated with the applicant's gender transition, the applicant has been stable in the preferred gender for 18 months, and if presently receiving cross-sex hormone therapy post-gender transition, the individual has been stable on such hormones for 18 months.

Guidance also includes specific details for recruits with a history of sex reassignment or genital reconstruction surgery. Under the updated standards, these procedures would be disqualifying unless, as certified by a licensed medical provider, a period of 18 months has elapsed since the date of the most recent surgery, no functional limitations or complications persist, and no additional surgeries are required.

DECEMBER 7, 2017

Former Army Secretary Questions Trump Administration Claim that Military Is Not Ready to Accept Transgender Applicants

SAN FRANCISCO, CA – Eric Fanning, former Secretary of the U.S. Army, questioned the Trump administration's claim yesterday that the military is not ready to accept transgender applicants. According to Fanning, **"the Department of Defense was on track to lift the accession ban for transgender service effective July 1, 2017. This was one year after Secretary Carter ordered the Services to ensure that all Americans who could meet the standards should be afforded the opportunity to serve. I can see no reason why the Department should not be fully prepared to execute Secretary Carter's policy change, particularly after being afforded an extra six months due to the Department's delay earlier this year."** Fanning served as U.S. Army Secretary under President Obama.

Fanning's comments follow Brad Carson's observation yesterday that the military had already prepared for the lifting of the enlistment ban before President Trump took office. Carson, who served as acting Under Secretary of Defense for Personnel and Readiness in the Obama administration, said that, **"the Pentagon had already done most of the preparation and training in anticipation of the lifting of the accession ban before the presidential transition, so to claim that the military is not ready to lift the ban now seems a stretch."** Carson was responsible for personnel policy for all service members, and deployed to Iraq as a U.S. Navy officer. Both Fanning and Carson offered their remarks to Palm Center researchers in response to a Trump administration affidavit claiming that the military is not ready to accept transgender troops. A federal court has ordered the military to lift its enlistment ban by January 1, 2018.

According to Aaron Belkin, processing transgender applicants does not require anything different from what recruiters and examiners do every day. Belkin said that, **"there is nothing special about evaluating a transgender applicant for military service, as recruiters and examiners deal with medical documents for every candidate, and handle the confirmation of identity documents, name changes and the like on a regular basis."** Belkin is director of the Palm Center.

A comprehensive 2016 RAND Corporation study found that lifting the enlistment ban would require only minor regulatory revisions, which were finalized in June 2016. Belkin added that, **"The military was ready to lift the enlistment ban one year ago and it is ready to do so today."**

Transgender troops have served openly in the U.S. military for the past 18 months, and have been widely praised by commanders. Eighteen foreign militaries allow transgender troops to serve openly, and none have reported any compromise to readiness.

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ABOUT THE PALM CENTER

The Palm Center is an independent research institute committed to sponsoring state-of-the-art scholarship to enhance the quality of public dialogue about critical and controversial issues of the day.

For the past decade, the Palm Center's research on sexual minorities in the military has been published in leading social scientific journals. The Palm Center seeks to be a resource for university-affiliated as well as independent scholars, students, journalists, opinion leaders, and members of the public. For more information, see palmcenter.org

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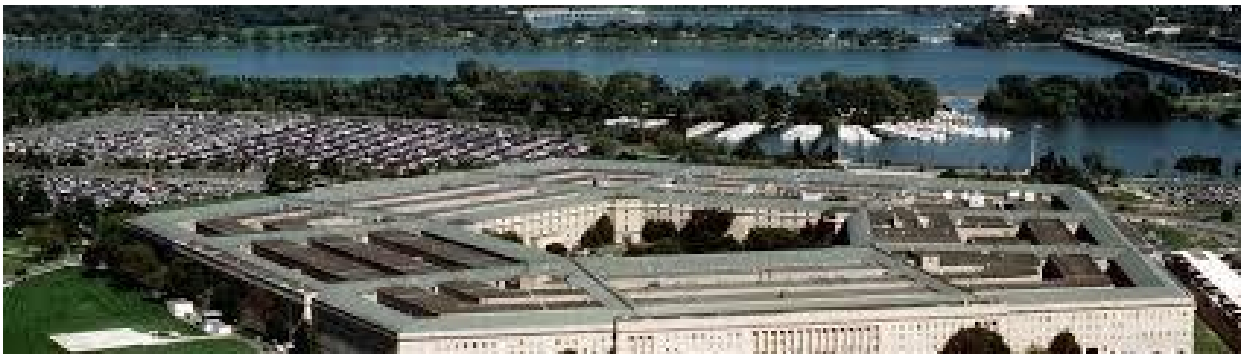
DECEMBER 6, 2017

Former Senior Pentagon Official Disputes Trump Administration Claim That Military Is Not Ready for Transgender Applicants



SAN FRANCISCO, CA – Brad Carson, a former senior Pentagon official, refuted the Trump administration's claim today that allowing transgender applicants to enlist in the military would compromise readiness. According to Carson, **"the Pentagon had already done most of the preparation and training in anticipation of the lifting of the accession ban before the presidential transition, so to claim that the military is not ready to lift the ban now seems a stretch."**

Carson, who served as acting Under Secretary of Defense for Personnel and Readiness in the Obama administration, was in charge of personnel policy for all service members, and deployed to Iraq as a U.S. Navy officer.

According to Aaron Belkin, processing transgender applicants does not require anything different from what recruiters and examiners do every day. Belkin said that, **"there is nothing special about evaluating a transgender applicant for military service, as recruiters and examiners deal with medical documents for every candidate, and handle the confirmation of identity documents, name changes and the like on a regular basis."** Belkin is director of the Palm Center.

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ABOUT THE PALM CENTER

The Palm Center is an independent research institute committed to sponsoring state-of-the-art scholarship to enhance the quality of public dialogue about critical and controversial issues of the day.

For the past decade, the Palm Center's research on sexual minorities in the military has been published in leading social scientific journals. The Palm Center seeks to be a resource for university-affiliated as well as independent scholars, students, journalists, opinion leaders, and members of the public. For more information, see palmcenter.org

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DoD Is Ready to Accept Transgender Applicants

Alan Bishop, PhD*
Former Professor, U.S. Military Academy

Martin L. Cook, PhD*
Professor Emeritus, U.S. Naval War College

Mark J. Eitelberg, PhD*
Professor Emeritus, Naval Postgraduate School

George R. Lucas, PhD*
Professor, Naval Postgraduate School

Mark V. Mayer*
U.S. Air Force Academy, Transgender Veteran

Tammy S. Schultz, PhD*
Professor, U.S. Marine Corps War College

Marc J. Ventresca, PhD*
Former Research Associate Professor,
Graduate School of Business and Public Policy, Naval Postgraduate School

December 2017

EXECUTIVE SUMMARY

1) On December 6, the Department of Justice submitted a written Declaration claiming that Pentagon compliance with a Court's order to allow transgender candidates to apply for enlistment as of January 1 would "impose extraordinary burdens" on a military that "would not be adequately and properly prepared to begin processing transgender applicants."

2) The Declaration, however, rewrites the history of transgender military policy and distorts the evidence, disregarding that the Court's order did not create new military policy, but only directed the military to return to its own policy on transgender enlistment as defined by the current Secretary of Defense.

3) Three former Service Secretaries and one former Acting Under Secretary of Defense for Personnel and Readiness have confirmed that the military had already completed many of the necessary preparations for the lifting of the enlistment ban by the time of the Presidential transition in January, 2017.

4) The Declaration's assertion that implementing the Court's order will impose "extraordinary burdens" because the military "would not be adequately and properly prepared" is incorrect.

5) The Declaration's assertion that transgender applicants for military service are uniquely complicated and difficult to evaluate is incorrect.

6) The Declaration's assertions that recruiters will not understand government identification documents that reflect changes in gender, and are not prepared to obtain supporting medical documents, are incorrect.

7) The Declaration's assertion that the Court's order will result in transgender applicants not receiving "the appropriate medical and administrative accession screening" is incorrect.

8) The Declaration's assertion that "key personnel" have "rotated" into different duties, therefore setting back the pace of implementation and requiring more time, is not a reason for delay.

On December 6, the Trump administration asked a federal court to stay its order that the military begin to accept qualified transgender applicants on January 1, 2018. This action came shortly after a Pentagon spokesperson stated that the military "is taking steps to be prepared to initiate accessions of transgender applicants for military service." In support of its motion for stay, the Department of Justice (DOJ) submitted a written declaration from a civilian defense official asserting that compliance with the Court's order would "impose extraordinary burdens" on a military that "would not be adequately and properly prepared to begin processing transgender applicants."

The Declaration, however, rewrites the history of transgender military policy and distorts the evidence. It disregards the fact that the Court's order did not create new military policy, but only directed the military to return to its own policy on transgender enlistment ("accession," in military personnel terms), as defined by the current Secretary of Defense prior to President Trump's tweets and directive reinstating the transgender ban.

This policy memo highlights assertions from the Declaration that run counter to the military's deliberation, policy, and experience, and it supplies evidence to correct those misleading statements.

1. The assertion that implementing the Court's order will impose "extraordinary burdens" because the military "would not be adequately and properly prepared" is incorrect.

The military has been preparing for accession of transgender Americans for more than two years. The Department of Defense (DOD) began a comprehensive study of transgender service in July 2015. In June 2016, DOD adopted fully inclusive policy that prohibited discrimination against transgender Americans in military service. It also published a detailed standard for evaluation of transgender applicants on the same day, to take effect a year later on July 1, 2017. But one day before the accession policy was to take effect—after two years of combined study and preparation—Defense Secretary James Mattis delayed implementation for another six months, setting January 1, 2018 as the date to begin transgender accession. This is the date the Court is enforcing, and the date that DOJ is attempting to avoid.

An order to follow the military's own plan for accession cannot impose "extraordinary burdens," particularly after 2.5 years of study and preparation. Former Secretary of the Army Eric Fanning stated this week that "the Department of Defense was on track to lift the accession ban" by July 2017, and he "can see no reason" why it isn't ready now, "particularly after being afforded an extra six months" this year. Brad Carson, a former Acting Under Secretary of Defense for Personnel and Readiness, added that "the Pentagon had already done most of the preparation and training in anticipation of the lifting of the accession ban before the presidential transition."

Former Secretary of the Air Force Deborah James spoke directly to the military's readiness to move forward with transgender accessions: "It is time to get on with it." Her comments in full show why:

> The Services were originally given one year to prepare for the enlistment of transgender applicants, and were then provided with another six months to get the job done. It took less than a year for the Services to successfully prepare for DADT repeal, and they have now had 18 months to get ready for transgender enlistment. When I left office in January, we had already done most of the work to prepare for this policy change, which is no more complicated than the myriad of issues that the military manages successfully every day. It is time to get on with it.

Former Secretary of the Navy Ray Mabus seconded his fellow Service Secretaries:

> Secretaries James and Fanning are correct. Allowing transgender candidates to apply for military service was not a complicated process to begin with, especially in light of the highly complex strategic, technical, personnel and medical issues that we address day in and day out. The Services had already completed almost all of the necessary preparation for the lifting of the enlistment ban when we left office almost a year ago. It's not the lifting of the ban that compromises readiness, good order and discipline. It's the Trump administration's whipsawing of military policy and its treatment of loyal transgender Americans as second-class citizens that are the true sources of disruption.

While the Declaration relies on assertions about a "large" and "complex" Defense Department, the difficulties of "significant" and "complex" personnel policy, and the burden of a "geographically dispersed" force as reasons to delay implementation, none of this distinguishes transgender policy from other personnel policies the military routinely implements. The military has had 2.5 years to study and prepare, and it is ready to implement the policy it established.

2. <u>The assertion that transgender applicants for military service are uniquely complicated and difficult to evaluate is incorrect.</u>

In June 2016, the military established specific qualification standards for applicants who have a history of gender dysphoria or treatment for gender dysphoria. Much of the standard was redundant to existing enlistment policy, as all applicants must demonstrate fitness under standards that assess all aspects of medical history. Yet the Declaration argues that transgender accession is unique: "No other accession standard has been implemented that presents such a multifaceted review of an applicant's medical history."

This assertion is wrong. Every applicant, transgender or not, undergoes the same multifaceted review of prior mental health care, medications, and surgical treatment. Under DOD Instruction 6130.03, which is organized by various body systems and functions, every applicant for military service must meet the standards set for each system and function. Accession examiners are not being asked to evaluate anything for transgender candidates that is different from what they evaluate for all candidates. Using a history of hormone medication as an example, if female candidates who are not

transgender have taken, or are taking, hormones to control various gynecological conditions, enlistment standards only require medical examiners to assess whether the condition is responsive to hormone treatment and unlikely to interfere with routine activities. The standard for evaluating hormone use in transgender candidates requires a stricter but similar assessment of whether hormone therapy has been stable for 18 months prior to accession.

Medical evaluation of transgender candidates is not novel or complex. Gender dysphoria is not new to enlistment examiners, because they have been identifying and excluding candidates on that basis. Any potential fitness concerns arising from gender dysphoria or its treatment are also not new to enlistment examiners, because those concerns are not unique to transgender people and are routinely assessed in non-transgender people during the accession process. Examiners will be making the same medical judgments they already make. The only difference is that now examiners will be applying existing standards and evaluation tools to people who used to be disqualified automatically. DOD has already conducted training for enlistment examiners on the transgender accession standard published 18 months ago in DTM 16-005, *Military Service of Transgender Service Members*.

3. The assertions that recruiters will not understand government identification documents that reflect changes in gender, and are not prepared to obtain supporting medical documents, are incorrect.

Recruiters are responsible for confirmation of information in identity documents, including immigration status, name changes, and similar issues more complicated than gender change. Recruiters also work with all applicants to disclose and document medical history. Nothing has changed.

4. The assertion that "key personnel" have "rotated" into different duties, therefore setting back the pace of implementation and requiring more time, is not a reason for delay.

Rotation into different duties is an inescapable aspect of military service. It is not an excuse for delay in policy implementation. People may rotate into different duties, retire, or separate, but the mission goes on.

5. The assertion that the Court's order will result in transgender applicants not receiving "the appropriate medical and administrative accession screening" is incorrect.

The only way to ensure transgender applicants are appropriately screened is to implement the June 30, 2016 accession policy that includes a screening standard. The transgender ban has never been effective in preventing transgender people from serving in the military. Under a ban, no screening at all takes place, and applicants are discouraged from making candid disclosures to enlistment examiners. In contrast, the military's accession standard set to go into effect January 1, 2018 will directly assess fitness and screen out those individuals whose medical needs would affect duty performance. DOJ is

working against the military's best interest by preventing enlistment examiners from openly evaluating transgender applicants and separating the medically fit from the unfit. For purposes of effective screening, continuing the ban is far worse than implementing a screening standard.

A recent Government Accountability Office (GAO) Report, *Military Personnel: Improvements Needed in the Management of Enlistees' Medical Early Separation and Enlistment Information* (GAO-17-527, July 2017), found that active screening of medical history produces better fitness decisions. GAO found that lack of disclosure by applicants is a significant problem, and verification by medical records encourages disclosure. The transgender accession standard DOJ is attempting to delay is consistent with these GAO recommendations: it encourages disclosure, it requires verification, and it establishes detailed and rigorous standards of fitness that must be met to qualify for service.

Continuation of the accession ban will result in "don't ask, don't tell" for transgender applicants and service members. It will discourage transgender applicants from being forthcoming at accession. It will also discourage candor after accession by putting personnel who require transition-related care after enlistment in the uncomfortable position of having to explain why they did not identify themselves at accession, even if at that time they did not identify as transgender. This, in turn, will encourage them to hide health conditions that, while not incompatible with military service, may require treatment. Like DADT, the effect would be to suppress the truth, raising Admiral Mike Mullen's concern about the gay ban, namely that he was "troubled by the fact that we have in place a policy which forces young men and women to lie about who they are in order to defend their fellow citizens."

It lacks credibility to argue that we have the most professional military force in the world, yet our service members cannot handle transgender integration as well as the eighteen foreign militaries that have done so, including some of our closest allies.

*The views and findings expressed here are those of the authors and should not be assumed to reflect an official policy, position or decision of the U.S. Military Academy, U.S. Air Force Academy, U.S. Marine Corps War College, U.S. Naval Postgraduate School or the U.S. Government. A previous version of this policy memo incorrectly omitted one of the co-authors.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 19, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Peter C. Renn
Peter C. Renn