

No. 17-2398

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BROCK STONE, Petty Officer First Class, et al.,
Plaintiffs-Appellees,

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

**APPELLANTS' EMERGENCY MOTION FOR ADMINISTRATIVE
STAY AND PARTIAL STAY PENDING APPEAL**

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INTRODUCTION

For decades, the military has presumptively barred transgender individuals from accession into the armed forces. Last year, however, then-Secretary of Defense Ashton Carter ordered the revision of this accession policy to allow some transgender individuals to enter the military starting on July 1, 2017. On June 30, 2017, Secretary of Defense James Mattis deferred that revision until January 1, 2018, so that the services could assess the Carter policy's effect on military readiness. The President then issued a memorandum on August 25, 2017, directing Secretary Mattis to maintain the current accession policy past January 1, in order to study whether the Carter policy would harm military readiness and to provide the President with an independent recommendation. Consistent with that directive, the military is studying the issue and will make its recommendation by February 21, 2018.

The court below ended this orderly process. On November 21, 2017, it issued a preliminary injunction barring the military from implementing the President's directive to defer revising the accession policy past January 1, as well as separate directives concerning the retention of transgender service members and funding for their sex-reassignment surgeries. The Carter accession policy thus will take effect on January 1.

The government has recently asked the district court to clarify that its injunction does not prohibit Secretary Mattis from exercising his independent discretion to defer the January 1 effective date for a limited time to further study the issue or to implement the Carter policy. Add. 87-95. In the alternative, the government requested a stay

pending appeal of the portion of the injunction concerning accessions. *Id.* Although that motion remains pending in district court, *see* Add. 103-04, a similar request for clarification was recently denied in *Doe v. Trump*, No. 17-cv-1597, Doc. 75 (D.D.C. Dec. 11, 2017), *appeal pending*, No. 17-5267 (D.C. Cir.). In light of the impending January 1 deadline, and to give this Court adequate time to consider these issues, the government asks this Court for a stay pending appeal of the portion of the injunction concerning accessions and an administrative stay until the Court resolves this motion. *See* Fed. R. App. P. 8(a)(2)(A); Fourth Cir. R. 8; *see also infra* pp. 6, 20.¹

Absent further relief from this Court (or the court below), the military will be forced to implement a significant change to its accession standards before it decides how to resolve this issue. As military leadership has explained, this timetable will place extraordinary burdens on our armed forces and may harm military readiness. Conversely, the two plaintiffs who claim that the accession directive will affect them will suffer no irreparable injury from a stay.

The simplest way for this Court to prevent the looming irreparable harm to the government is through a stay that narrows the scope of the injunction in one of two respects. First, it could stay the order to the extent that the district court construes it

¹The government does not seek a stay with respect to the retention directive or the sex-reassignment directive, neither of which takes effect until March 23, 2018. The military is not taking any action against current service members (nor does it have any immediate plans to do so), and it is continuing to fund their sex-reassignment surgeries. Add. 58. The military is currently determining its policy on these issues, and may seek a stay of these aspects of the injunction at a later date after a final policy determination.

to constrain Secretary Mattis from exercising his own discretion to defer implementation of the Carter policy. Second, it could hold that the nationwide scope of the injunction is inappropriate, and stay its prohibition on enforcing the accession directive to individuals other than the one plaintiff the district court found to have standing to challenge that order. Of course, the Court could also stay the entire portion of the injunction precluding enforcement of the accession directive pending appeal, as that order rests on legal errors concerning jurisdiction, the equities, and the merits.²

Without a stay, the military will, at the risk of harming its readiness posture, have to rush to provide the requisite training to the tens of thousands of service members across the country responsible for implementing accession standards. The government therefore respectfully asks this Court to issue an immediate administrative stay pending consideration of this motion or issue a decision as soon as possible.

BACKGROUND

1. To ensure that service members are “capable of performing duties,” are free of conditions that “may require excessive time lost from duty for necessary treatment or hospitalization,” and are “adaptable to the military environment without the necessity of geographical area limitations,” the military maintains accession standards that presumptively exclude individuals with certain medical conditions from serving, subject to an individualized waiver process. Dep’t of Defense Instruction 6130.03, at

² Under Fourth Circuit Rule 27(a), the government contacted counsel for plaintiffs, who intend to oppose this motion.

2, 7 (Apr. 28, 2010). For decades, these standards have presumptively barred transgender individuals from entering the military. *Id.* at 27, 48.

In June 2016, then-Secretary Carter ordered the Defense Department to revise its accession standards by July 1, 2017. Add. 65. Under this revision, a history of “gender dysphoria,” “medical treatment associated with gender transition,” or “sex reassignment or genital reconstruction surgery” would be disqualifying unless an applicant could obtain a certificate from a licensed medical provider that the applicant had been stable or free from associated complications for 18 months. Add. 68-69.

2. The Carter policy was never implemented because on June 30, 2017, Secretary Mattis “approved a recommendation by the services to defer” the revision until January 1, 2018. Add. 64. The deferral was to allow the branches to “review their accession plans and provide input on the impact to the readiness and lethality of our forces.” *Id.*

On July 26, 2017, the President stated on Twitter that the government “will not accept or allow ... Transgender individuals to serve in any capacity in the U.S. Military.” Add. 13. The President issued an official memorandum on August 25 addressing the accession and retention of transgender service members as well as government funding for their sex-reassignment surgeries. Add. 61. With respect to accession standards, the President found that former-Secretary Carter had “failed to identify a sufficient basis to conclude” that his revision “would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources.” Add. 61, § 1(a). In the President’s view, “further study is needed to ensure that continued implementation of last year’s

policy change would not have those negative effects.” *Id.* Accordingly, the President directed the Secretaries of Defense and Homeland Security to “maintain the currently effective policy regarding accession of transgender individuals” past January 1, 2018, until the Secretary of Defense, after consultation with the Secretary of Homeland Security, “provides a recommendation to the contrary that I find convincing.” Add. 62, § 2(a). The President also ordered Secretary Mattis to submit an implementation plan to him by February 21, 2018. Add. 62, § 3.

In response, Secretary Mattis promised to “develop a study and implementation plan” that will address, *inter alia*, “accessions of transgender individuals.” Add. 59. In the meantime, the rule “generally prohibit[ing] the accession of transgender individuals” would “remain in effect because current or history of gender dysphoria or gender transition does not meet medical standards.” Add. 58.

3. Plaintiffs—six currently serving transgender individuals and the American Civil Liberties Union—sought a preliminary injunction of the memorandum’s various directives. Two of the plaintiffs, Seven Ero George and Teagan Gilbert, claimed the accession directive would bar them from commissioning as officers. Add. 35.

The district court granted plaintiffs’ request. Add. 1-2, 55. As relevant here, it held that one plaintiff, George, has standing to challenge the accession directive; that intermediate scrutiny applies; and that plaintiffs’ equal protection challenge is likely to succeed, adopting the reasoning of the district court in *Doe, v. Trump*, 2017 WL 4873042 (D.D.C. Oct. 30, 2017). Add. 35-36, 46-47. It further held that the challenge is likely

to succeed even under rational-basis review and that the remaining factors counsel in favor of a preliminary injunction. Add. 47-49. The court therefore ordered that the government “shall not enforce or implement the ... policies and directives encompassed in President Trump’s Memorandum” concerning accession, retention, and sex-reassignment surgery. Add. 1-2.

4. After noticing an appeal on December 5, Doc. 86, the government asked the district court on December 12 to clarify that its injunction does not prohibit Secretary Mattis from exercising his independent discretion to defer implementing the Carter policy past January 1, for a limited time, to study the policy change further or to implement the revision, Add. 88. In the alternative, the government moved to stay the accessions portion of the preliminary injunction pending appeal. *Id.* In an accompanying declaration, the Acting Deputy Assistant Secretary of Defense for Military Personnel Policy explained that complying with the court’s January 1 deadline would “impose extraordinary burdens” on the Defense Department and have a “harmful impact” on “the military, its missions, and readiness.” Add. 97-98.

At a scheduling conference on December 13, the district court requested a response to the government’s motion by December 15. The government advised the court that to give this Court sufficient time to issue a decision, the government would file an emergency stay motion in this Court on December 14. In a letter filed December 14, the district court confirmed this discussion. Add. 103-04. The

government will promptly notify this Court when the district court rules on the motion below.

ARGUMENT

This Court should stay the portion of the district court's injunction requiring the military to alter its accession policy by January 1, 2018. In considering whether to grant a stay pending appeal, a court must balance four factors: (1) the applicant's likelihood of success on the merits; (2) whether the applicant will suffer irreparable injury; (3) the balance of hardships to other parties interested in the proceeding; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). This Court reviews a grant of a preliminary injunction for abuse of discretion, but legal conclusions are reviewed de novo. *West Virginia Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009). Here, the government is likely to establish that the district court abused its discretion, as that court's analysis was infected by a number of serious legal errors. And unless stayed (or clarified), that injunction will irreparably harm the government, and the public, by, *inter alia*, compelling the military to scramble to revise its policies at the risk of harming readiness and disrupting an ongoing process that is only a few months away from completion. A stay, by contrast, would preserve the status quo and not irreparably harm the two plaintiffs who claim to be affected by the accession directive.

I. The Government Is Likely To Succeed On The Merits.

A. Secretary Mattis Has Independent Authority To Defer Revising The Accession Policy.

The district court in *Doe v. Trump* held its injunction prohibits Secretary Mattis from exercising his independent discretion to defer the January 1 deadline for a limited time to study the issue further or to implement the Carter policy. In the event that the district court here follows suit, and construes its injunction in a similar manner, this Court should stay that aspect of the injunction.

The Secretary of Defense has independent authority to delay policy changes regarding the composition of the armed forces. *See, e.g.*, 10 U.S.C. § 136(b) (recognizing his authority over “the areas of military readiness, total force management, [and] military and civilian personnel requirements”). In the present suit, plaintiffs therefore never sought to limit Secretary Mattis’s discretion to defer implementation of the Carter policy, even though he had previously done so in June, but instead challenged the President’s Memorandum alone. Doc. 39, at 4, 39-40. Indeed, plaintiffs argued there was a “stark” difference between the President’s directive and the independent determination made by Secretary Mattis in June to undertake an “evidence-based assessment of the military’s enlistment policies.” Doc. 40-2, at 26-27.

Because plaintiffs challenged the President’s directives alone, it is unsurprising that the preliminary injunction is limited to the “policies and directives encompassed in President Trump’s Memorandum” and never addresses Secretary Mattis’s authority to

delay revising accessions standards. *See* Add. 1-2. Likewise, the district court's justifications for enjoining the accession directive concern the President and his memorandum alone. In refusing to apply the usual deference that is owed to military decisions, the court emphasized "the circumstances surrounding the President's announcement" and the purported "absence of any considered military policymaking process." Add. 46. This reasoning does not support enjoining Secretary Mattis from making an independent decision to defer implementing the Carter policy for a limited time to study the issue further or to avoid the harms of rushing to comply with the January 1 deadline. *See infra* Part I.C.2.

An injunction that restricts Secretary Mattis's authority would dramatically alter the status quo, under which he could exercise his independent authority to delay implementation of the Carter policy. Under the injunction, the Carter accession policy is set to take effect on January 1—a date that reflects Secretary Mattis's deferral of the policy implementation. There is no meaningful difference between the decision of June 30, 2017, and a renewed, independent decision by Secretary Mattis to extend the deadline for a limited period past January 1. Thus, if the district court concludes that its injunction prohibits or limits Secretary Mattis's independent authority to defer the Carter accession policy, this Court should grant a stay of this aspect of the injunction.

B. This Court Should Stay The Preliminary Injunction Insofar As It Grants Nationwide Relief.

Only two plaintiffs claim that the accession directive might affect them, and the district court addressed the standing of only one. Nevertheless, the court entered a preliminary injunction categorically barring implementation of the accession directive nationwide. In doing so, it gave no explanation for why such broad relief was necessary to redress those alleged injuries. Nor could it. That injunction violates principles of Article III and exceeds the court's equitable authority.

To establish standing, a plaintiff “must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). “[S]tanding is not dispensed in gross,” and a plaintiff must establish standing “separately for each form of relief sought.” *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). “The remedy” sought therefore must “be limited to the inadequacy that produced the injury in fact that the plaintiff has established.” *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

Equitable principles likewise require that an injunction “be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994); *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 163 (2010) (narrowing injunction in part because the plaintiffs “do not represent a class, so they could not seek to enjoin such an order on the ground that it might cause harm to other parties”). And these constitutional and equitable limits

apply with special force to injunctions concerning military policies. *See U.S. Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993) (staying injunction against Defense Department policy to the extent it conferred relief on anyone other than plaintiff).

Here, the district court concluded that one of the plaintiffs, George, has standing to challenge the accession directive. Add. 35-36. But in entering its preliminary injunction, the court did not limit its remedy to that litigant's injuries; instead, it barred application of the accession directive nationwide. Such wide-ranging relief cannot be reconciled with constitutional or equitable principles, nor is it necessary to remedy the alleged injuries of a single individual.

A limited stay pending appeal, by contrast, would pose no harm to plaintiffs. A narrow injunction barring the government from applying the accession directive to George—or at most, to both plaintiffs who claim harm from the policy—would provide plaintiffs with full relief. And to the extent that other applicants believe they have cognizable injuries, they are free to bring their own challenges—as some have done. *See, e.g., Doe*, 2017 WL 4873042.

C. The Injunction Of The Accession Directive Should Be Vacated.

Finally, the injunction of the accession directive rests on several legal errors.

1. To start, neither of the two plaintiffs who claim they will be affected by the accession directive has standing to challenge that order. Where, as here, a challenge would require this Court “to decide whether an action taken by one of the other two

branches of the Federal Government was unconstitutional,” its “standing inquiry [must be] especially rigorous.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013).

The district court erred in finding that plaintiff George, who is currently serving in the Air National Guard and allegedly desires to pursue an active commission in the Army, has standing to challenge the accession directive. Add. 35-36; *see also* Add. 71-79. To begin, any future injury remains speculative, as George has never applied to become a commissioned officer. And even if such an application would fail to meet current medical standards, waivers are available under the Interim Guidance. Add. 58.

In any event, even if a waiver were unavailable, this claim suffers from a more fundamental problem: Contrary to the district court’s conclusion, George has not demonstrated “eligib[ility] to commission as an officer.” Add. 36. Instead, George underwent transition-related surgery in August 2016, *see* Add. 72, and thus would not be eligible to accede in January 2018 even under the Carter policy, which prohibits accession for 18 months after surgery, absent a waiver, Add. 69. Nor are there allegations that a medical provider would certify that George has “completed all medical treatment” and “has been stable in the preferred gender for 18 months.” Add. 68; *see also* Add. 71-79.

At such time as George could demonstrate medical eligibility, the current accession policy might no longer be in effect. The military is currently studying this issue and will present the President with a recommendation early next year. It is possible that, following this review, Secretary Mattis will recommend ending the current

policy and the President will find that proposal convincing, Add. 62, § 2(a), thereby eliminating the only threatened injury. Moreover, because it is not clear that George would be eligible for a commission even under the Carter policy, any injury is neither “fairly traceable to the challenged action” of the President, nor is it “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (alterations and quotation marks omitted).³

2. The district court also abused its discretion in weighing the equities—*i.e.*, the balance of hardships, the public interest, and the likelihood of irreparable harm—to conclude that a preliminary injunction was warranted. Even though “great deference” is owed “to the professional judgment of military authorities concerning the relative importance of a particular military interest” in weighing these factors, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), that court significantly discounted the hardship to the military imposed by its injunction.

As military leadership has explained, compliance with the district court’s January 1 deadline “will impose extraordinary burdens” on the military and have a “harmful

³ The district court did not rely on plaintiff Gilbert for standing purposes, Add. 35, and for good reason: Gilbert must earn a bachelor’s degree to be eligible for commission, but is not scheduled to graduate until Spring 2019. Add. 85. The risk that the accession directive will injure Gilbert at that time is not sufficiently imminent for purposes of Article III. *Clapper*, 568 U.S. at 410. Additionally, there is no basis to assume that this litigant, who plans to seek “treatment, including gender confirmation surgery,” will be eligible to commission even under the Carter policy. Add. 81.

impact” on “its missions[] and readiness.” Add. 97-98. Despite the “implementation efforts made to date,” the military will “not be adequately and properly prepared to begin processing transgender applicants” by January 1. Add. 101. Specifically, it will have to ensure that the “tens of thousands” of service members “dispersed across the United States” responsible for implementing accession policies “have a working knowledge or in-depth medical understanding of the standards.” Add. 99. These service members include over 1,000 medical personnel, officers and providers; personnel at nine military entrance training locations; and 20,367 recruiters who assist applicants in completing their medical history forms. Add. 99-100. And their training will be complicated, as “[n]o other accession standard has been implemented that presents such a multifaceted review of an applicant’s medical history” as the Carter policy. Add. 100. Thus, if the military is “compelled to execute transgender accessions by January 1,” then “applicants may not receive the appropriate medical and administrative accession screening necessary for someone with a complex medical condition” and thereby enter the military even though they are “not physically or psychologically equipped to engage in combat/operational service.” Add. 101.

The preliminary injunction further harms the military by forcing it to implement a significant change to its accession standards before it even completes its study of the issue. Forcing the military to accept some applicants it might otherwise have rejected had it been given more time to complete its study and implement its final policy is a significant injury in itself. Add. 101-02. And, of course, an erroneous accession

decision as to an individual could adversely affect the other members of his unit. Add. 100. But beyond that, short-circuiting the deliberative process both undercuts the ongoing work of the leadership studying the issue and threatens the military with two burdensome implementation processes—one to comply with the district court’s order and another to execute a new policy (if the military adopts a new one following the study) or return to the old one (if the military adheres to its standards and the injunction is set aside on appeal). Add. 100-01. Imposing “duplicative” implementation costs, “sowing confusion in the ranks,” and mandating personnel policy while military experts are still studying the issue are all significant harms. Add. 102. And because these injuries—whether to the fisc or to the defense of the nation—will be passed on to citizens more generally, a stay would be in the public interest.

Against those serious harms to the government and the public, plaintiffs cannot show that “irreparable injury is *likely* in the absence of an injunction.” *Winter*, 555 U.S. at 22. Even assuming that at least one plaintiff’s speculative, future injury is sufficient for Article III standing, it would not rise to the level of irreparable harm. Instead, a “higher requirement of irreparable injury should be applied in the military context[,] given the federal courts’ traditional reluctance to interfere with military matters.” *Guerra v. Scruggs*, 942 F.2d 270, 274 (4th Cir. 1991). Plaintiff George has failed to demonstrate that it is likely that a preliminary injunction will prevent irreparable harm. As discussed in Part I.C.1, there is no reason to assume that George would be denied a waiver under the Interim Guidance or the final implementation plan, but nevertheless would be

medically eligible to commission under the Carter policy—much less be eligible to commission “before a decision on the merits can be rendered.” *Winter*, 555 U.S. at 22 (quotation marks omitted). Plaintiff Gilbert’s asserted injury is even more speculative, *supra* p. 13 n.3, and even less likely to occur before the court decides the merits, *Winter*, 555 U.S. at 22. In any event, this sort of employment-related harm is not irreparable, particularly in the military context. *See, e.g., Guerra*, 942 F.2d at 271, 274 (holding that general discharge from the military does not constitute irreparable injury, even where plaintiff alleged that discharge procedures were unconstitutional).

3. On the merits, the district court further erred by failing to apply the appropriately deferential standard of review. Although the armed forces are subject to constitutional constraints, “the tests and limitations to be applied may differ because of the military context.” *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). For instance, judicial “review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.” *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). The same is true for “decisions as to the composition ... of a military force.” *Rostker*, 453 U.S. at 65; *see also, e.g., Thomasson v. Perry*, 80 F.3d 915, 927 (4th Cir. 1996) (en banc) (“Ultimately, ‘the special status of the military has required, the Constitution has contemplated, Congress has created, and the Supreme Court has long recognized’ that constitutional challenges to military personnel policies and decisions face heavy burdens.”) (brackets and citation omitted). Thus, even when military regulations trigger heightened scrutiny, courts have

upheld them in light of the significant deference due to the political branches' judgments in this area. *See, e.g., Rostker*, 453 U.S. at 69–72 (excluding women from having to register for the draft).

The accession directive easily survives this deferential form of review. Given the President's concerns that departing from the military's longstanding accession policy without "further study" risked, among other things, harm to "military effectiveness," he ordered the armed forces to retain this standard while Secretary Mattis and his team conducted their own review of the issue. Add. 61-62, §§ 1, 2(a)). A decision to maintain the status quo for several months while the military conducts an additional study of a policy change of this magnitude survives any standard of review. Indeed, Secretary Mattis made a similar decision in June 2017 by delaying the Carter policy until January 1, 2018, while the military continued to examine the issue, and neither the court below nor plaintiffs have ever suggested that his decision was unconstitutional.

The district court never grappled with this problem, other than to assume (incorrectly) that the current accession policy would necessarily remain. *See* Add. 53; *supra* Part I.C.1. But even if that were true, the President's directive would still be constitutional given the deference due his assessment as Commander in Chief that abandoning that policy could "hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." Add. 61, § 1(a); *see, e.g., Department of Navy v. Egan*, 484 U.S. 518, 529–30 (1988) ("courts have traditionally shown the utmost deference to

Presidential responsibilities’ ... in military and national security affairs” (citation omitted)).

The district court reached a different judgment only because it refused to apply the deference traditionally afforded to military decisions. It justified this approach by adopting the *Doe* court’s explanation that former-Secretary Carter and his team had already “studied and rejected” the “military concerns” raised by the President. 2017 WL 4873042, at *30; Add. 46-47. But even outside the military, the government must review “the wisdom of its policy on a continuing basis, for example, in response to ... a change in administrations.” *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citation and quotation marks omitted).

In any event, the suggestion that the President’s concerns were baseless withers under scrutiny. The study underlying the Carter policy explicitly concluded that allowing transgender individuals to serve would limit deployability, impede readiness, and impose costs on the military; it simply dismissed these burdens as “negligible.” Doc. 1-2, at 39–42, 46, 69, 70. Indeed, the Carter policy itself implicitly acknowledged that gender dysphoria or gender transition could impede military readiness by requiring applicants to demonstrate that they had been stable or had avoided complications for an 18-month period. Add. 68-69. In other words, the key difference between the longstanding accession policy and the Carter policy is the scope of the exception to the presumptive ban on accession by transgender individuals. Under the former, a transgender individual was presumptively disqualified absent a waiver. Under the latter,

a transgender individual was presumptively disqualified absent a demonstration of stability or avoidance of complications for 18 months. Plaintiffs' objection here thus reduces to a preference for one exception over another; put differently, they disagree with where the military "has drawn the line." *Goldman*, 475 U.S. at 510. But such policy decisions as to how to best ensure that medical standards are met, and where to draw the appropriate line, are matters for military discretion.

Finally, even if dispensing with deference were justified, the district court erred in applying intermediate scrutiny, *see, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227-28 (10th Cir. 2007) (heightened scrutiny does not apply to civilian classifications based on transgender status), and in holding that the accession directive is unlikely to survive even rational-basis review. If the directive can withstand intermediate scrutiny with deference, it can easily satisfy this lenient form of review.

II. The Remaining Factors Favor A Stay.

As explained, there is no basis for enforcing a preliminary injunction against the accession directive when plaintiffs are not likely to face irreparable injury and, absent a stay, the government (and the public) will suffer serious harm. *See supra* Part I.C.2. And although "[t]he principal function of a preliminary injunction is to maintain the status quo," *Di Biase v. SPX Corp.*, 872 F.3d 224, 231 (4th Cir. 2017), the district court's order does no such thing. Instead, the current accession policy—and Secretary Mattis's independent authority to defer revisions to that policy—is the status quo, and it has been for decades. The injunction here upends that state of affairs by compelling the

military to alter its longstanding policy without sufficient time for either thorough study or proper implementation. This is precisely the kind of situation where a stay is warranted to allow for effective appellate review *before* such drastic changes must occur.

Finally, and contrary to plaintiffs' claims, government officials have not "sat on their hands" since the district court issued a preliminary injunction on November 21. Doc. 92, at 1. The Department of Justice has been consulting with the Department of Defense to determine its approach with respect to each individual case. Following the district court's decision in *Doe*, the government had to make a collective decision regarding Secretary Mattis's independent authority to defer the January 1 deadline, seek clarification regarding that authority, and request a stay in the district court and in the D.C. Circuit. After undertaking an independent evaluation of the district court's decision in this case, the government determined that a similar course was warranted here. In the interests of time, the government combined its motion for clarification and its motion for a partial stay pending appeal in district court, which it filed on December 12, and filed this motion two days later.

CONCLUSION

The government respectfully requests that this Court enter a partial stay pending appeal of the preliminary injunction. Because that injunction commands the military to revise its accession policy by January 1, 2018, the government also requests that the Court enter an immediate administrative stay pending consideration of this motion or, in the alternative, issue a decision as soon as possible.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,194 words. This Motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

s/ Tara S. Morrissey
Tara S. Morrissey

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2017, I filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Tara S. Morrissey
Tara S. Morrissey

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PortalId=1&ModuleId=764&Article=1236145](https://www.defense.gov/DesktopModules/ArticleCS/Print.aspx?PortalId=1&ModuleId=764&Article=1236145) 64
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Certificate of Service

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al.

*

Plaintiffs

*

vs.

*

CIVIL ACTION NO. MJG-17-2459

DONALD J. TRUMP et al.

*

Defendants

*

* * * * *

PRELIMINARY INJUNCTION

For reasons stated in the Memorandum And Order Re: Motions issued herewith,

Defendants, Donald J. Trump, in his official capacity as President of the United States, James Mattis, in his official capacity as Secretary of Defense, Ryan McCarthy, in his official capacity as Acting Secretary of the U.S. Department of the Army, Richard Spencer, in his official capacity as Secretary of the U.S. Department of the Navy, and Heather Wilson in her official capacity as Secretary of the U.S. Department of the Air Force,

Are hereby enjoined and shall not enforce or implement the following policies and directives encompassed in President Trump's Memorandum for the Secretary of Defense and the Secretary of Homeland Security, dated August 25, 2017, and entitled "Military Service by Transgender Individuals:"

I am directing the Secretary of Defense, and the Secretary of Homeland Security with

respect to the U.S. Coast Guard, to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have the negative effects discussed above.

Presidential Memorandum § 1(b).

The Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, shall:

- (a) maintain the currently effective policy regarding accession of transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the contrary that I find convincing; and
- (b) halt all use of DoD or DHS resources to fund sex-reassignment surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex.

Presidential Memorandum § 2.

This preliminary injunction shall remain in effect until such time, if ever, that this Preliminary Injunction is rescinded or modified by further Order of this Court.

Plaintiffs are not required to provide any security in compliance with Rule 65(c) of the Federal Rules of Civil Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al.	*	
		*
Plaintiffs	*	
		*
vs.	*	CIVIL ACTION NO. MJG-17-2459
		*
DONALD J. TRUMP et al.	*	
		*
Defendants	*	

* * * * *

MEMORANDUM AND ORDER RE: MOTIONS

The Court has before it Plaintiffs' Motion for Preliminary Injunction [ECF No. 40], Defendants' Motion to Dismiss [ECF No. 52], and the materials submitted relating thereto. The Court has reviewed the exhibits, considered the declarations submitted by the parties, held a hearing, and has had the benefit of the arguments of counsel. Any findings of facts stated herein are based upon the Court's evaluation of the evidence and the inferences that the Court has found it reasonable to draw from the evidence.

I. INTRODUCTION

In June 2015, then-Secretary of Defense Ashton Carter issued a statement characterizing the regulations that were in effect at that time relating to transgender¹ individuals serving

¹ Men and women who are transgender have a gender different

in the military as “an outdated, confusing, inconsistent approach that’s contrary to our value of service and individual merit causing uncertainty that distracts commanders from our core missions.” Statement by Secretary of Defense Ash Carter on DoD² Transgender Policy (July 13, 2015), Pls.’ Mot. Ex. 28, ECF No. 40-31. Secretary Carter created a working group to study “the policy and readiness implications of welcoming transgender persons to serve openly.” Id. The working group included representatives of the leadership of the Armed Forces; the Joint Chiefs of Staff; the service secretaries; and personnel, training, readiness, and medical specialists from across the Department. See id.; Carson ¶¶ 1, 8-10, ECF No. 40-37.³ The working group performed a systematic review including commissioning studies⁴ and meetings with transgender service members, outside experts, medical personnel, military leaders, allied militaries, and others. Carson ¶¶ 1, 8-27. After the year-long study, the working group ultimately concluded that “[o]pen service by transgender service members would not impose

from the one assigned to them at birth. See, e.g., Brown Decl. ¶¶ 20-23, ECF No. 40-32; Pls.’ Mot. Ex. C (“the RAND Report”) 5-6, 75, ECF No. 40-35.

² Department of Defense.

³ The Hon. Brad R. Carson served as the Acting Under Secretary of Defense for Personnel and Readiness from April 2, 2015 to April 8, 2016. Carson ¶ 1, ECF No. 40-37.

⁴ Including a study conducted by the RAND Corporation—a nonpartisan, nonprofit military think tank founded by the U.S. Air Force. Rand Report, ECF No. 40-35.

any significant burdens on readiness, deployability, or unit cohesion." Wilmoth ¶ 23, ECF No. 40-38.

On June 30, 2016, then-Secretary of Defense Carter issued a directive rescinding the policy of discriminating against men and women who are transgender. Open Serv. Dir., Pls.' Mot. Ex. 1, ECF No. 40-4. The Open Service Directive provided that "no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity." Id. at Attach. § 1(a). Men and women who are transgender are "subject to the same standards as any other Service member of the same gender." Id. at Attach. § 1(b). The Directive further provided that medical conditions affecting transgender service members would be treated "in a manner consistent with a Service member whose ability to serve is similarly affected for reasons unrelated to gender identity or gender transition." Id. at Attach. § 1(c). These medical services included medical treatment necessary to transition gender while serving. Id. at Attach. § 3(a). The Directive also announced that individuals wishing to join the military would not be prohibited from doing so solely because they are transgender, although there were additional stringent medical requirements to ensure fitness for

duty. Id. at Attach. § 2. The implementation of the accession⁵ policy was scheduled to begin “[n]ot later than July 1, 2017.”⁶ Id. at Attach. § 2(a).

On June 30, 2017, the day before new enlistments of transgender persons were scheduled to begin, current Secretary of Defense Jim Mattis announced that it was necessary to defer new transgender enlistments for an additional six months to January 1, 2018, while he reviewed the policy. Mattis Mem., Pls.’ Mot. Ex. 8, ECF No. 40-11. He added that his announcement did not otherwise change the Open Service Directive and that “we will continue to treat all Service members with dignity and respect.” Id.

Shortly thereafter, on July 26, 2017, President Trump precipitated a change to the policy in force by announcing on Twitter⁷ that “the United States will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military.” Pls.’ Mot. Ex. 19, ECF No. 40-22. President Trump

⁵ Accession refers to the process of bringing new enlisted recruits and officer candidates into the military.

⁶ The deadline allowed the DoD a year to prepare for implementation. Given that the pre-established date for the Presidential election was November 8, 2016, it was understood that the deadline extended into a new Administration.

⁷ President Trump later claimed that his Twitter announcement did the military a “great favor” by ending the “confusing issue” of transgender service. Cooper, Trump Says Transgender Ban Is a ‘Great Favor’ for the Military, N.Y. Times (Aug. 10, 2017), Pls’. Mot. Ex. 9, ECF No. 40-12.

formalized the transgender service member ban on August 25, 2017, in a Memorandum ("the President's Memorandum") stating that in his judgment, the DoD had "failed to identify a sufficient basis to conclude" that the Open Service Directive "would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." President's Mem. § 1(a), Pls.' Mot. Ex. 18, ECF No. 40-21. The memorandum addressed, and rescinded, each component of the Open Service Directive. Id. at §§ 1(b), 2.

The instant lawsuit was filed on August 8, 2017, and three others⁸ have been filed in response to the President's policy change. Plaintiffs here seek declaratory and injunctive relief (including a Motion for Preliminary Injunction). Defendants seek dismissal of the Amended Complaint [ECF No. 39] pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and denial of Plaintiffs' Motion for Preliminary Injunction.

For reasons as stated herein, the Court GRANTS Plaintiffs' Motion for Preliminary Injunction [ECF No. 40], and GRANTS IN

⁸ Doe 1 v. Trump, No. 17-cv-0159-CKK, filed Aug. 9, 2017 in the United States District Court for the District of Columbia; Karnoski v. Trump, No. 17-cv-01297-MJP, filed Aug. 28, 2017 in the United States District Court for the Western District of Washington at Seattle; Stockman v. Trump, No. 17-cv-1799-JGB-KK, filed on Sept. 5, 2017 in the United States District Court for the Central District of California.

PART and DENIES IN PART Defendants' Motion to Dismiss [ECF No. 52].

II. BACKGROUND

A. Transgender Military Policy Prior to June 2016

"On September 20, 2011, the military policy known as 'Don't Ask, Don't Tell' (DADT) ended, allowing gay, lesbian and bisexual service members to serve openly." Gates & Herman, Transgender Military Service in the United States (May 2014), ECF No. 40-7. However, until June 2016, military policies continued to exclude transgender people from serving openly. Id. Transgender individuals wanting to join the military were prohibited from doing so, and transgender individuals already serving were subject to discharge if their condition became known. Id. See also Brown Decl. 9-14, ECF No. 40-32 (noting that pre-2016 military policy listed "Sexual Gender and Identity Disorders" among conditions that rendered a service member unfit and subject to discharge).

B. Transgender Open Service Directive

On June 30, 2016, after a year-long study, then-Secretary of Defense Carter issued a Directive-type Memorandum ("DTM") mandating the establishment of policy and procedures for "the

retention, accession, separation, in-service transition, and medical coverage for transgender personnel serving in the Military Services." Open Serv. Dir., Pls.' Mot. Ex. 1, ECF No.

40-4. The DTM stated:

The policy of the Department of Defense is that service in the United States military should be open to all who can meet the rigorous standards for military service and readiness. Consistent with the policies and procedures set forth in this memorandum, transgender individuals shall be allowed to serve in the military.

Id. at 2.

The DTM procedures included three main components.

First, retention. Effective June 30, 2016, "no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity." Id. at Attach. § 1(a). Transgender service members became subject to the same standards as any other service member of the same gender. Id. at Attach. § 1(b).

Second, accession. Not later than July 1, 2017, the DoD Instruction 6130.03 was to be updated to reflect changed policies and procedures related to medical standards for entry into the military. Id. at Attach. § 2(a). A history of gender

dysphoria⁹ continued to be disqualifying unless the applicant was medically-certified as having been "stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months." Id. Also, a history of medical treatment with gender transition continued to be disqualifying unless the applicant had completed medical treatment and had been stable in the preferred gender for 18 months, and if the applicant was receiving hormone treatment, the individual had been stable on such treatment for 18 months. Id. Further, a history of sex-reassignment surgery continued to be disqualifying unless a period of 18 months had passed since the most recent surgery, no additional surgeries were required, and the applicant had no functional limitations or complications persisting from the surgery. Id. The Secretaries of the Military Departments and Commandant of the United States Coast Guard could waive the 18-month period in individual cases. Id. at Attach. § 2(b).

Third, sex reassignment surgery. Effective October 1, 2016, the DTM procedures allowed for in-service gender transition and

⁹ Transgender status alone does not constitute a medical condition; some transgender individuals experience significant distress due to the gender-sex mismatch and are considered to have a medical condition called gender dysphoria. RAND Report 5-6, 75, ECF No. 40-35. This condition can be medically treated with some combination of psychosocial, pharmacological (mainly hormonal), or surgical care. Id. at 6.

provided for further guidance on the provision of necessary medical care and treatment to transgender service members. Id. at Attach. §§ 3, 4.

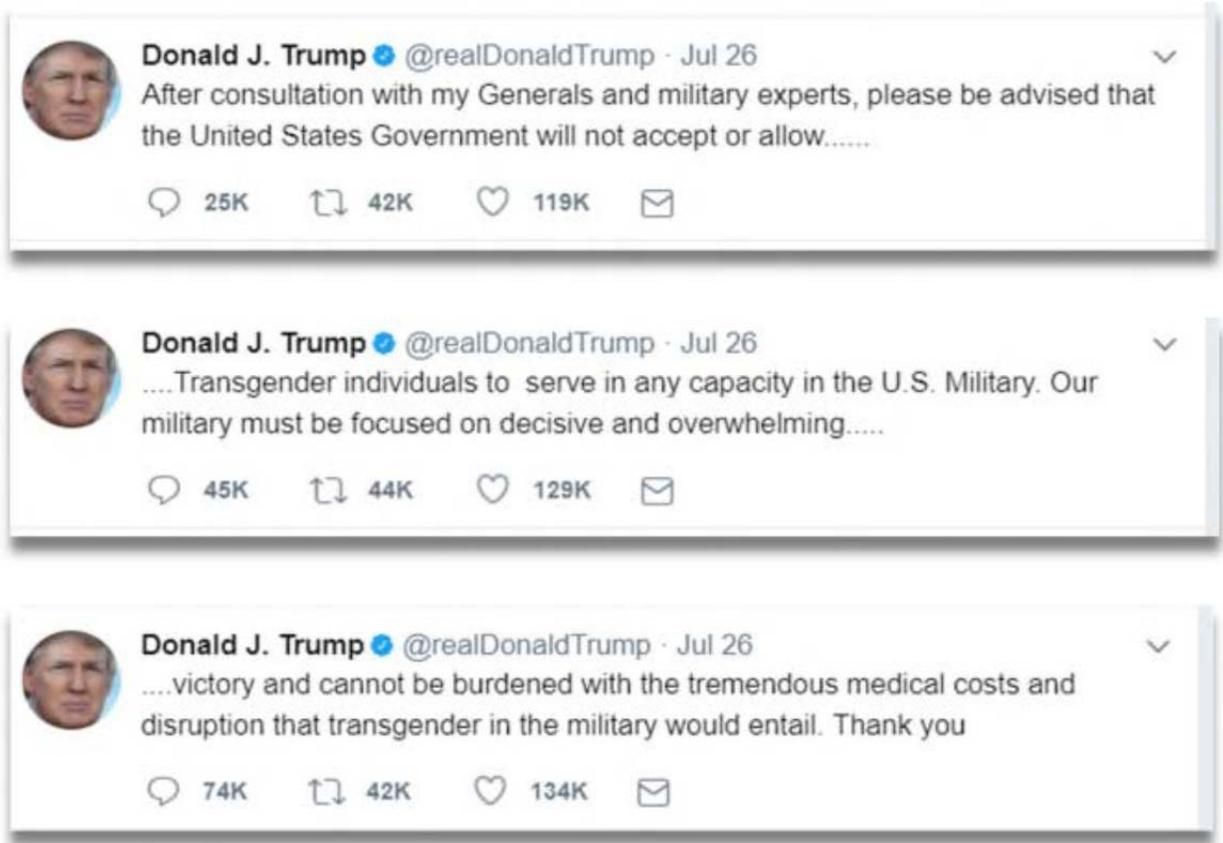
In addition, the DTM included an equal opportunity statement and clarified the DoD's position, "consistent with the U.S. Attorney General's opinion, that discrimination based on gender identity is a form of sex discrimination." Id. at Attach. § 5(a). Education and training materials were to be developed and disseminated to each Military Department by no later than October 1, 2016, and each Military Department was directed to issue implementing guidance and a written training and education plan by November 1, 2016. Id. at Attach. §§ 6, 7.

Consistent with the DTM directives, the DoD issued an Implementation Handbook on September 30, 2016. DoD, Transgender Service in the U.S. Military: An Implementation Handbook, ECF No. 40-9.

C. President's Memorandum and Interim Guidance

On June 30, 2017, Secretary of Defense James Mattis deferred implementation of the DTM's directive regarding accession until January 1, 2018. Mattis Mem., Pls.' Mot. Ex. 8, ECF No. 40-11.

On July 26, 2017, President Trump published three tweets under the handle @realDonaldTrump:



Pls.' Mot. Ex. 19, ECF No. 40-22.

Approximately a month later, on August 25, 2017, President Trump issued a memorandum entitled "Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security." President's Mem., Pls.' Mot. Ex. 18, ECF No. 40-21. In the first section, President Trump stated:

Until June 2016, the Department of Defense (DoD) and the Department of Homeland Security (DHS) (collectively, the Departments) generally prohibited openly transgender individuals from accession into

the United States military and authorized the discharge of such individuals.

Id. at § 1.

President Trump directed the Departments' Secretaries "to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016" Id. at § 1(b) ("the Retention Directive"). He further directed the Secretaries to "maintain the currently effective policy regarding accession of transgender individuals into military service beyond January 1, 2018" Id. at § 2(a) ("the Accession Directive"). President Trump also directed the Secretaries to "halt all use of DoD or DHS resources to fund sex-reassignment surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex." Id. at § 2(b) ("the Sex Reassignment Surgery Directive").

The Accession Directive is to take effect on January 1, 2018; the Retention Directive and the Sex Reassignment Surgery Directive are to take effect on March 23, 2018. Id. at § 3.

President Trump further directed:

By February 21, 2018, the Secretary of Defense, in consultation with the Secretary of Homeland Security, shall submit to me a plan for implementing both the general policy set forth in section 1(b) of this

memorandum and the specific directives set forth in section 2 of this memorandum.

Id. He added that “no action may be taken” under the Retention Directive against transgender individuals currently serving in the United States military until the Secretary of Defense has determined how to address such individuals. Id.

On September 14, 2017, Secretary of Defense James Mattis issued a memorandum establishing an interim policy until the directives take effect. Defs.’ Mem., ECF No. 45, Ex. 1 (“Interim Guidance”). Under the Interim Guidance policy, there is no immediate effect on individual service members pending the implementation plan. Id. The Interim Guidance states that “[n]ot later than February 21, 2018, [Secretary Mattis] will present the President with a plan to implement the policy and directives in the Presidential Memorandum.” Id. at 1.

D. The Instant Lawsuit

The individual plaintiffs¹⁰ and the American Civil Liberties Union of Maryland, Inc. (“ACLU”) (collectively, “the Plaintiffs”) have sued Donald J. Trump in his official capacity as the President of the United States, James Mattis in his official capacity as Secretary of Defense, Ryan McCarthy in his official capacity as Acting Secretary of the U.S. Department of

¹⁰ Described individually herein in Section II.E.

the Army, Richard Spencer in his official capacity as Secretary of the U.S. Department of the Navy, and Heather Wilson in her official capacity as Secretary of the U.S. Department of the Air Force (collectively, "the Defendants") for declaratory and injunctive relief. Am. Compl., ECF No. 39.

Plaintiffs seek a declaratory judgment that the policies and directives encompassed in President Trump's Memorandum dated August 25, 2017, violate the Fifth Amendment's guarantee of equal protection and substantive due process and are invalid on their face and as applied to Plaintiffs. The Amended Complaint asserts three causes of action:

- Count I - Violation of the Equal Protection Component of the Fifth Amendment's Due Process Clause
- Count II - Violation of Substantive Due Process
- Count III - Violation of 10 U.S.C. § 1074.

Plaintiffs' Motion for Preliminary Injunction [ECF No. 40] seeks to bar Defendants from enforcing the policies and directives encompassed in President Trump's August 25, 2017, Memorandum until such time as the Court renders a final judgment on the merits of this action.

On October 12, 2017, Defendants filed a Motion to Dismiss [ECF No. 52], seeking dismissal pursuant to Rules¹¹ 12(b)(1) and

¹¹ All "Rule" references cited herein are to the Federal Rules

12(b)(6) and denial of any Preliminary Injunction. Defendants assert that this Court does not have jurisdiction over this action because Plaintiffs have not suffered an injury sufficient to establish standing and because the issues presented are not ripe for review. Defendants contend that "Plaintiffs have not stated plausible claims that the President's decision to maintain the status quo while Secretary Mattis studies military service by transgender individuals violates equal protection, due process, or Federal statutes." Reply 14, ECF No. 77.

In addition to the parties' briefs and arguments, the Court has received and considered the following briefs from Amicus Curiae in support of Plaintiffs' Motion for Preliminary Injunction:

- The Trevor Project¹² [ECF No. 62],
- Retired Military Officers and Former National Security Officials [ECF No. 71], and
- Amici States Massachusetts, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and the District of Columbia [ECF No. 73].

of Civil Procedure.

¹² Described as "the nation's largest lesbian, gay, bisexual, transgender, queer, and questioning ("LGBTQ") youth crisis intervention and suicide prevention organization." Trevor Project Amicus Brief 1, ECF No. 62.

E. The Individual Plaintiffs¹³

1. Petty Officer First Class Brock Stone

Brock Stone ("Stone") is 34 years old and has served 11 years in the United States Navy, including a 9-month deployment to Afghanistan. Stone is currently assigned, until August 2020, to a unit at Fort Meade in Maryland, where he works as a computer analyst. Stone was awarded an achievement medal in connection with his deployment, and he has received multiple other commendations, including the Joint Commendation Medal, the Navy Commendation Medal, the Afghan Campaign Medal, a flag letter of commendation, and multiple recommendations for early promotion. He is currently eligible for promotion to Chief Petty Officer. Stone's goal is to serve for at least 20 years and qualify for retirement benefits. His current contract runs until 2023, which would end three years short of his achieving enough years in service to meet his retirement goal.

Stone has been undergoing hormone therapy as a medically-necessary part of his gender transition. Since arriving at Fort Meade in July 2017, he has received medically-necessary treatment related to his gender transition at Walter Reed National Military Medical Center in Bethesda, Maryland. Prior to

¹³ Plaintiffs' genders are referred to herein by the gender as recognized by the Defense Enrollment Eligibility Report System ("DEERS"), except in one case as noted where the formal changed gender remains pending.

his transfer to Fort Meade, Stone was close to finalizing a medical treatment plan that included surgery. After the transfer in July 2017, he had to restart the treatment plan, but it is now in the final approval stage. The treatment plan will be sent to the medical review board at Walter Reed in November 2017 and thereafter will be submitted to Navy Medical East for final medical approval. Plaintiffs assert that it is "highly likely that Petty Officer Stone will not receive one or both of his medically-necessary surgeries before March 23[, 2018]." Opp. Dismiss 11, ECF No. 66.

2. Staff Sergeant Kate Cole

Kate Cole ("Cole") is 27 years old and has served in the United States Army for almost ten years, including a one-year deployment to Afghanistan where she served as a team leader and designated marksman. Cole is currently stationed at Fort Polk, Louisiana, working as a Cavalry Scout, where she operates with a tank unit. Since enlisting at age 17, Cole has received seven achievement medals and two Army commendation medals. She recently received orders to enroll in Drill Sergeant School starting on January 3, 2018, with an anticipated graduation date of March 7, 2018. Following her return from Drill Sergeant

School, she is scheduled to change station from Fort Polk, Louisiana to Fort Benning, Georgia.

Cole has been undergoing hormone therapy and was scheduled to receive medically-necessary surgery related to her gender transition in or around September 2017. On September 8, 2017, she was informed that her surgical treatment was denied and her pre-surgical consultation was cancelled. Cancellation has been remedied, but "Cole's treatment plan calls for two additional surgeries, neither of which she will be able to undergo before March 23[, 2018], and one of which she is not even eligible for until after that date." Opp. Dismiss 11, ECF No. 66.

3. Senior Airman John Doe

John Doe ("Doe") is 25 years old and has served for approximately six years on active duty in the United States Air Force, during which he was awarded "airman of the year." Doe also served in Qatar for a six-month deployment. Doe is currently stationed at Little Rock Air Force Base, Arkansas and serves as the suicide prevention and interpersonal violence instructor for the base and is pursuing cryogenics certification. Doe reenlisted on September 9, 2017.

In 2014, Doe began his gender transition, including undergoing certain surgeries, for which he paid out-of-pocket.

He has been undergoing hormone therapy as a medically-necessary part of his gender transition and planned to receive an additional medically-necessary surgery in August 2017. Doe was informed by email from the medical command at the base where he was scheduled to undergo the surgery that all gender-transition-related surgeries were on hold. Defendants assure that, pursuant to the Interim Guidance, the surgery was not deleted from Doe's treatment plan and can be rescheduled at his request.

4. Airman First Class Seven Ero George

Seven Ero George ("George") is 41 years old and has been enlisted in the Air National Guard since 2015. George is currently stationed at the Selfridge Air National Guard Base, Michigan and serves in the base security force, where he is a member of the base Honor Guard. He performs military funeral honors for deceased veterans, retirees, and active duty members; provides dignified transfers, and performs color guard details. George has a Bachelor's Degree in General Studies from the University of Michigan and is currently taking additional training as a nurse. He is scheduled to complete his Associate's Degree in nursing in December 2017 and plans to pursue a program to earn his Bachelor's Degree in nursing, which he expects to be able to complete in 12-18 months.

George intends to seek a commission, which subjects him to the Army's accession policies. He has been unable to pursue a commission to date because the historical ban has not yet expired and because his gender has not yet been updated in the Defense Enrollment Eligibility Report System ("DEERS"), which still lists him as female. George believes all required paperwork has been submitted to update his DEERS gender, his letters of recommendation are lined up, and he expects to be ready to commission immediately upon the lift of the ban in January 2018.

As a medically-necessary part of his gender transition, George has been undergoing hormone therapy and has undergone a medically-necessary surgery, but no further surgeries are required under his medical treatment plan.

5. Petty Officer First Class Teagan Gilbert

Teagan Gilbert ("Gilbert") is 31 years old and has served in the United States Navy for 13 years, including a one-year deployment to Afghanistan. Gilbert is currently serving as an information and space systems technician in the Naval Reserve stationed in Phoenix, Arizona. She has been pursuing an undergraduate degree as a prerequisite to commission as an officer and is scheduled to complete her Bachelor's Degree in

Earth and Space Exploration in the Spring of 2019, as well as an undergraduate certificate in Geographic Information Systems. Gilbert's current term of service expires in February 2018, and she is in the process of reenlisting in the Navy for another six-year term.

Gilbert has been undergoing hormone therapy as a medically-necessary part of her gender transition. She has a medical appointment scheduled for January 2018 to update her treatment plan to include medically-indicated surgical treatment.

6. Technical Sergeant Tommie Parker

Tommie Parker ("Parker") is 54 years old and has served in the Marine Corps for four years and has served in the Air National Guard for 26 years. During her sixteen plus years of active duty, she has had deployments to Okinawa with the Marine Corps and Germany with the Air National Guard. She is currently stationed at Stewart Air National Guard Base, New York, working as a fuel technician.

Parker's current term of service expires in January 2018. Her commanding officer informed her that he would recommend her for active duty reenlistment for an additional term of three years thereafter. Parker is eligible for retirement in three-and-a-half years, and her goal is to serve until retirement.

Parker is undergoing hormone therapy as a medically-necessary part of her gender transition and is currently paying out-of-pocket while waiting for her transition plan to be fully approved. She does not intend to have any transition-related surgeries.

F. The D.C. Court Decision

On Monday, October 30, 2017, a memorandum and order was issued in a related case, Doe 1 v. Trump, in the United States District Court for the District of Columbia ("D.C. Court"). The D.C. Court preliminarily enjoined implementation of the Retention Directive and the Accession Directive but not the Sex Reassignment Surgery Directive. Doe 1 v. Trump, --- F. Supp. 3d ----, No. CV 17-1597 (CKK), 2017 WL 4873042 (D.D.C. Oct. 30, 2017).

In Doe 1, current and aspiring transgender service members challenged the Accession, Retention, and Sex Reassignment Surgery Directives on the grounds that the Directives violated plaintiffs' Fifth Amendment equal protection and due process rights. Id. at *1. The Doe 1 plaintiffs also argued that the defendants were estopped from rescinding the rights, benefits, and protections promised to the plaintiffs. Id. at *2.

The D.C. Court held that the Doe 1 plaintiffs had standing to challenge the Accession and Retention Directives but lacked standing to challenge the Sex Reassignment Surgery Directive. Id. The court found that the Presidential Memorandum unequivocally directed the military to prohibit indefinitely the accession of transgender individuals and to authorize their discharge and that there was no reason to believe that these directives would not be executed. Id. at *1. The court held that the plaintiffs had established that they would be injured by these directives, "due both to the inherent inequality they imposed, and the risk of discharge and denial of accession that they engender. Further delay would only serve to harm the Plaintiffs." Id.

The D.C. Court also found that the Doe 1 plaintiffs were likely to prevail on their Fifth Amendment challenge of the Accession and Retention Directives. Id. at *2. First, the court found that "[a]s a form of government action that classifies people based on their gender identity, and disfavors a class of historically persecuted and politically powerless individuals, the President's directives are subject to a fairly searching form of scrutiny." Id. at *2. The Directives could not survive such scrutiny because they were not "genuinely based on legitimate concerns regarding military effectiveness or

budget constraints, but [we]re instead driven by a desire to express disapproval of transgender people generally.” Id.

More specifically, the court found that a number of factors—including the breadth of the exclusion, the unusual circumstances surrounding the President’s announcement, the reasons given for the Directives not appearing to be supported by any facts, and the recent rejection of those reasons by the military itself—“strongly suggest that plaintiffs’ Fifth Amendment claim is meritorious.” Id. Finally, the court dismissed without prejudice Plaintiffs’ estoppel claim, because the complaint “lack[ed] allegations of the sort of particularized representations, reliance, or government misconduct that could justify estoppel against the government.” Id.

The D.C. Court granted in part and denied in part the Doe 1 plaintiffs’ motion for a preliminary injunction, enjoining the enforcement of the Accession and Retention Directives and reverting the policy to the status quo that had existed before the Presidential Memorandum. Id. The court also granted in part and denied in part the defendants’ motion to dismiss the lawsuit, thus dismissing plaintiffs’ estoppel challenge and dismissing the plaintiffs’ challenge of the Sex Reassignment Surgery Directive for lack of jurisdiction. Id. The D.C. Court

found that none of the plaintiffs in that case could demonstrate a non-speculative injury-in-fact with respect to the Sex Reassignment Surgery Directive. Id. at *51.

III. DISCUSSION

A. The Court's Jurisdiction

1. Legal Standard

a. Standing

The issue of plaintiff standing presents a threshold jurisdictional question because "Article III of the U.S. Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" Beck v. McDonald, 848 F.3d 262, 269 (4th Cir. 2017), cert. denied sub nom. Beck v. Shulkin, 137 S. Ct. 2307 (2017) (quoting U.S. Const. art. III, § 2). "The core goal of the standing inquiry is to ensure that a plaintiff bringing an action has enough of a stake in the case to litigate it properly." Pye v. United States, 269 F.3d 459, 466 (2001). The plaintiff bears the burden of proving jurisdiction by establishing the three "irreducible minimum requirements" of standing:

- (1) an injury-in-fact (i.e., a concrete and particularized invasion of a legally protected interest);
- (2) causation (i.e., a fairly traceable connection between the alleged injury

in fact and the alleged conduct of the defendant); and

- (3) redressability (i.e., it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit).

Id. (quoting David v. Alphin, 704 F.3d 327, 333 (4th Cir. 2013)); Spokeo, Inc. v. Robins, --- U.S. ----, 136 S. Ct. 1540, 1547, as revised (May 24, 2016).

At the pleading stage, plausible factual allegations may suffice to demonstrate that each element of standing has been adequately pleaded. Spokeo, 136 St. Ct. at 1547; Beck, 848 F.3d at 270 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992)). However, the standing analysis is "especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013).

A defendant may challenge standing at the motion to dismiss stage either facially or factually. Wikimedia Found. v. Nat'l Sec. Agency, 857 F.3d 193, 208 (4th Cir. 2017)(quoting Beck, 848 F.3d at 270). "In a facial challenge, the defendant contends that the complaint 'fails to allege facts upon which [standing] can be based,' and the plaintiff 'is afforded the same procedural protection' that exists on a motion to dismiss." Id.

(quoting Adams, 697 F.2d at 1219). In a factual challenge, however, a trial court may look beyond the complaint to determine if there are facts to support the jurisdictional allegations. Id. "Unless the jurisdictional facts are intertwined with the facts central to the merits of the dispute, the district court may . . . resolve the jurisdictional facts in dispute by considering evidence outside the pleadings, such as affidavits." U.S. ex rel. Vuyyuru v. Jadhav, 555 F.3d 337, 348 (4th Cir. 2009) (citations omitted).

b. Ripeness

A second Article III threshold inquiry is whether the dispute is ripe for adjudication. Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC, 713 F.3d 187, 198 (4th Cir. 2013). The requirement that a case be ripe for decision is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." Reno v. Catholic Soc. Servs., 509 U.S. 43, 57 n. 18 (1993).

To determine if a case is ripe, the Fourth Circuit balances "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." Cooksey v. Futrell, 721 F.3d 226, 2226 (4th Cir. 2013) (quoting

Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003)); Lansdowne, 713 F.3d at 198.

"[A] case is 'fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties.'" Lansdowne, 713 F.3d at 198 (quoting Miller v. Brown, 462 F.3d 312, 319 (4th Cir. 2006)).

"The hardship prong is measured by the immediacy of the threat and the burden imposed on the [plaintiff]." Id. at 199 (quoting Charter Fed. Sav. Bank v. Office of Thrift Supervision, 976 F.2d 203, 208-09 (4th Cir. 1992)).

2. Injury-in-fact

There is no dispute that the Plaintiffs have satisfied the causation and redressability elements of standing. While the matter is disputed, the Court finds that Plaintiffs have met their burden to satisfy the need for an injury-in-fact.

An injury-in-fact is the "[f]irst and foremost" of standing's three elements. Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 103 (1998). To suffer an injury-in-fact, the plaintiff must have suffered "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Spokeo, 136 S. Ct. at 1548 (quoting Lujan, 504 U.S. at 560). The Spokeo

court stated that to constitute a concrete injury, an injury “must be ‘de facto’; that is, it must actually exist . . . [that is] ‘real,’ and not ‘abstract.’” Id.

“This does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness.” Id. at 1549. A court may find standing based on a threatened injury that is “certainly impending” or if there is a “substantial risk” that the harm will occur. Beck, 848 F.3d at 275 (quoting Clapper, 568 U.S. at 409, 414 n.5).

Defendants contend that the Interim Guidance maintains the status quo while the military studies the “President’s policy directive,” and therefore, they contend that none of the Plaintiffs face a current or imminent threat of injury. Defs.’ Mot. 12, ECF No. 52-1. Defendants state that “it is unclear whether those currently serving members will be affected by the future policy regarding service by transgender individuals once it is finalized and implemented.” Id. at 2.

When reviewing the effect of the directives in the President’s Memorandum, the Court finds persuasive and agrees with the D.C. Court’s analysis of the import of the President’s Memorandum. See Doe 1, 2017 WL 4873042 at *16-18 (“there is a substantial likelihood that transgender individuals will be indefinitely prevented from acceding to the military as of

January 1, 2018, and that the military shall authorize the discharge of current service members who are transgender as of March 23, 2018.”). As Plaintiffs allege, the result of the President’s Memorandum, once implemented, constitutes a return to the policy in place prior to June 2016 “until President Trump is personally persuaded that a change is warranted.” Am. Compl. ¶ 107. Although there is no immediate implementation pending the provision of the requested plan, the Interim Guidance states that “[n]ot later than February 21, 2018, [Secretary Mattis] will present the President with a plan to implement the policy and directives in the Presidential Memorandum.” Interim Guidance 1, ECF No. 45, Ex. 1. “The Court must and shall assume that the directives of the Presidential Memorandum will be faithfully executed.” Doe 1, 2017 WL 4873042, at *17. Therefore, the protections of the Interim Guidance expire on February 21, 2018.

The Court cannot interpret the plain text of the President’s Memorandum as being a request for a study to determine whether or not the directives should be implemented. Rather, it orders the directives to be implemented by specified dates. President’s Mem. § 3, Pls.’ Mot. Ex. 18, ECF No. 40-21 (“shall take effect on January 1, 2018 [and] March 23, 2018”).

a. Retention Directive Injury

The Retention Directive, which authorizes the discharge of service members from the military on the basis of transgender status alone, subjects all of the individual Plaintiffs¹⁴ to the threat of discharge as administratively unfit even if they meet the military's demanding medical fitness standards. While it is possible, as Defendants contend, that none of the Plaintiffs will be discharged on March 23, 2018, they certainly face a substantial risk of being discharged solely on the basis of being transgender.

Importantly, Plaintiffs allege that becoming "subject to discharge" solely for being transgender is a loss of a right they have had since June 2016, withdrawing the guarantee that protects their ability to serve on terms equal to those applied to others. Am. Compl. Count I, ECF No. 39. The Retention Directive effectively constitutes a revocation of rights that transgender people had been given. This revocation of equal protection is an injury. See, e.g., Planned Parenthood Of S.C. Inc. v. Rose, 361 F.3d 786, 790 (4th Cir. 2004) ("Discriminatory treatment is a harm that is sufficiently particular to qualify as an actual injury for standing purposes.").

¹⁴ Plaintiff Stone is a member of the ACLU of Maryland, which gives the ACLU associational standing on the basis of the injuries experienced by Stone. Am. Compl. ¶ 18; Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977).

Further, Plaintiffs allege that they are now suffering from the uncertainty, the destabilization of their lives and careers, and the stigma associated with being singled out as unfit for service. Am. Compl. ¶¶ 142-143. Stigmatic injury can be held sufficient to support standing. See Allen v. Wright, 468 U.S. 737, 755 (1984) (finding that "stigmatizing injury often caused by racial discrimination" is a type of "noneconomic injury" that is "sufficient in some circumstances to support standing"). In the instant case, the Court finds that Plaintiffs' stigmatization is an additional alleged harm that provides support to Plaintiffs' standing arguments, but the Court need not, and does not, address whether it would be sufficient on its own.

In sum, the Court finds that Plaintiffs have met their burden to demonstrate standing to challenge the Retention Directive.

b. Accession Directive Injury

The Accession Directive prohibits transgender individuals from entering or seeking a commission in the military solely on the basis of their transgender status. The current prohibition is set to expire on December 31, 2017, but the directive in the President's Memorandum extends the prohibition indefinitely.

Defendants contend that Plaintiffs have not been injured by the Accession Directive because no one has applied for accession into the military and been denied. Defendants assert that Plaintiffs George and Gilbert's plans to apply for a commission are too speculative and that they could apply for a waiver to allow their accession into the military under the Interim Guidance.

Plaintiffs George and Gilbert allege that they face imminent harm because they will be denied accession into the military as commissioned officers. Am. Compl. ¶¶ 40, 47, ECF No. 39; Decl. George, ECF No. 40-42; Suppl. Decl. George, ECF No. 66-9; Suppl. Decl. Gilbert, ECF No. 66-11. Plaintiff Gilbert has one year of coursework left in her degree before she plans to apply to Officer Candidate School and return to "active duty" status. However, Plaintiff George expects to be ready to commission immediately upon the lift of the ban in January 2018. Plaintiffs clarified at the hearing that George

is ready, willing, and able to apply to directly commission as an officer as soon as he can. All he's been waiting for is for the final change in his gender market in the [DEERS] system to go through. He submitted all that paperwork. It should go through any minute. He wants to apply the first day that he can.

. . . .

[H]is ability to commission and his desire to commission are not contingent on him completing that nursing program.

As soon as he can commission, he will. And he would do it on January 1st if he were allowed to do so.

Hr'g Tr. 48:4-17.

George has demonstrated that he is eligible to commission as an officer. He met with a recruiter in October 2016 to pursue an active duty commission. Suppl. Decl. George, ECF No. 66-9. George's plan and efforts to implement his plan are not speculative. The Court finds that Plaintiff George is subject to a substantial risk that his attempt to accede into the military as a commissioned officer will be prohibited solely on the basis of his transgender status.

Accordingly, the Court finds that Plaintiffs have met their burden to demonstrate standing to challenge the Accession Directive.

c. The Sex Reassignment Surgery Directive

The Sex Reassignment Surgery Directive prohibits the expenditure of military resources on sex-reassignment surgical procedures. President's Mem. § 2(b), ECF No. 40-21. This section takes effect on March 23, 2018. Id. § 3.

Defendants contend that no Plaintiff can demonstrate injury-in-fact because the military is continuing to provide transition-related medical care under the Interim Guidance. Any cancellations that occurred after the President's Memorandum have subsequently been remedied, so no one has been denied transition-related medical care. Defendants assert that the Plaintiffs in the instant case, like the plaintiffs in Doe 1, have not "demonstrated that they are substantially likely to be impacted' by the relevant portion of the [President's] Memorandum." Defs.' Reply 8, ECF No. 77 (quoting 2017 WL 4873042, at *24).

In Doe 1, the D.C. Court held that the Doe 1 plaintiffs did not have standing to challenge the Sex Reassignment Surgery Directive because none of them had demonstrated an injury-in-fact with respect to that Directive. 2017 WL 4873042 at *51. First, the court noted that, for the two Doe 1 plaintiffs who were implicated by the provision, the risk of being impacted was not sufficiently great to confer standing. Id.

One of the Doe 1 plaintiffs alleged that her scheduled transition-related surgery had been canceled. However, the defendants submitted a declaration, which revealed that her application for supplemental health care waiver was currently being processed, and her transition related-surgery had been

rescheduled for January 4, 2018. Id. at *52. The defendants represented that this date remained unaffected by the Presidential Memorandum. Id. Therefore, the D.C. Court concluded that this plaintiff had failed to show that "she will not receive the surgery prior to the effective date of the Sex Reassignment Surgery Directive." Id.

A second Doe 1 plaintiff had developed a transition treatment plan but was not planning to begin her treatment until after a long-term deployment in Iraq. Id. The D.C. Court concluded that "[g]iven the possibility of discharge, the uncertainties attended by the fact that she has yet to begin any transition treatment, and the lack of certainty on when such treatment will begin, the prospective harm engendered by the Sex Reassignment Surgery Directive is too speculative" Id.

In the instant case, Plaintiffs Cole, Doe, Gilbert, and Stone are potentially impacted by the Sex Reassignment Surgery Directive. At the hearing, Plaintiffs asserted that they would rely on Plaintiffs Cole and Stone for standing to challenge the Sex Reassignment Surgery Directive. Hr'g Tr. 62:7-8.

Plaintiff Cole has a final, approved medical plan that calls for two additional surgeries. Suppl. Decl. Cole, ECF No. 66-8. Because Cole will be attending Drill Sergeant School from

January 3, 2018 until March 7, 2018, it is impossible for her to have both surgeries before the March 23rd deadline. Id.

Plaintiff Stone has a near-final treatment plan that calls for two surgeries, needing only a final stamp of approval, which is not in doubt. Suppl. Decl. Stone, ECF No. 66-13. The plan calls for the first of the surgeries in April 2018. Hr'g Tr. 63:15-17. Although Stone is trying to move the first surgery up to February in an attempt to meet the deadline, it seems unlikely, and the second surgery still needs to be scheduled. Id. at 18-22, Suppl. Decl. Stone, ECF No. 66-13.

Unlike the first plaintiff in Doe 1, Stone and Cole are highly unlikely to complete their medically-necessary surgeries before the effective date of the Directive. Unlike the second plaintiff in Doe 1, there is no lack of certainty regarding when transition treatment will begin for Stone and Cole since treatment has already begun, and Stone and Cole's surgeries are endangered by the Directive's deadline.

Plaintiffs also seek to assert a statutory claim in support of their challenge to the Directive. Am. Compl. ¶¶ 163-169, ECF No. 39.¹⁵ However, the Court does not find the Amended Complaint

¹⁵ Pursuant to 10 U.S.C. § 1074(a), active duty and reserve members of the United States armed services are entitled to medical and dental care in military treatment facilities. Plaintiffs claim that medically-necessary surgery indicated for the treatment of a gender dysphoria diagnosis is "medical care"

to present factual allegations sufficient to present a plausible statutory claim.

Defendants argue that the exception in the Directive will "cover" the Plaintiffs who will not have completed all of their approved and medically-required sex-reassignment surgeries by the effective date. Section 2(b) directs the Secretaries to "halt all use of DoD or DHS resources to fund sex reassignment surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex."

President's Mem. § 2(b), ECF No. 40-21 (emphasis added).

Defendants assert that because "Plaintiffs have in fact started a course of treatment to reassign their sex, and have transition plans either submitted or already in place, the exception may in fact apply to them." Defs.' Reply 9, ECF No. 77 (emphasis added). At the hearing, however, Defendants' counsel could not commit that the exception would apply to Plaintiffs. Hr'g Tr. 18:22-19:17, 20:11-19.

Plaintiffs contend that the exception seems to refer to "situations in which complications arise from surgery performed

that is covered by the statutory right under § 1074(a)(1). Am. Compl. ¶ 165, ECF No. 39. As a result, Plaintiffs allege that the Directive will cause them to imminently suffer a violation of a statutory right. Id. at ¶¶ 165, 167.

before March 23.” Pls.’ Opp’n 12, ECF No. 66. Plaintiffs add that it is not clear that “any service member with a medical need for surgery will receive that surgery—even if he or she received no surgical treatment before March 23.” Id.

Plaintiffs argue that if the exception were to be interpreted under the broad terms proposed by Defendants, the “exception” would essentially nullify the Directive and contravene President Trump’s premise about the cost of surgical care, adding that Defendants “may not evade judicial review by advancing (or, in this case, weakly suggesting) an interpretation of the challenged action that both is implausible and would fatally undercut the President’s announced policy.” Id. At the hearing, Plaintiffs added that “the Government, as far as we’re aware, is not scheduling anything for after March 22nd.” Hr’g Tr. 28:17-19; 29:8-9.

The Court finds that it is at the very least plausible that the exception would not apply to Stone and Cole’s scheduled post-March-23rd surgeries. That conclusion is sufficient at this juncture to raise Plaintiffs’ right to relief above the speculative and to the plausible level.

Accordingly, the Court finds that Plaintiffs have met their burden to demonstrate standing to challenge the Sex Reassignment Surgery Directive.

3. Ripe for Review

Defendants assert that the Court is being asked to prematurely judge the constitutionality of a future Government policy. The Defendants' argument based on alleged uncertainty of military policy is not supported by the record before the Court. The President has expressly directed the military to "return to the longstanding policy that was in place prior to June 2016" that "prohibit[s] openly transgender individuals from accession into the United States military and authorize[s] the discharge of such individuals." President's Mem. § 1, ECF No. 40-21. The President directed that the military stop using military resources to fund sex-reassignment surgical procedures for military personnel. Id. at § 2(b). The President ordered an implementation plan and set definite implementation dates. Id. at § 3. The only uncertainties are how, not if, the policy will be implemented and whether, in some future context, the President might be persuaded to change his mind and terminate the policies he is now putting into effect. Id. at § 1. The validity of the Directives in the President's Memorandum is fit for review.

Further, withholding review would impose hardship on the Plaintiffs. The hardship inquiry has largely been addressed in the standing discussion. Plaintiffs have demonstrated to the

Court's satisfaction that they are likely to suffer imminent harm as a result of the Directives in the President's Memorandum. They have further demonstrated that they are already suffering harmful consequences such as the cancellation and postponements of surgeries, the stigma of being set apart as inherently unfit, facing the prospect of discharge and inability to commission as an officer, the inability to move forward with long-term medical plans, and the threat to their prospects of obtaining long-term assignments. Waiting until after the Directives have been implemented to challenge their alleged violation of constitutional rights only subjects them to substantial risk of even greater harms.

Accordingly, the Court finds that this case is ripe for review.

B. Preliminary Injunction

1. Legal Standard

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." United States v. South Carolina, 720 F.3d 518, 524 (4th Cir. 2013) (quoting Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981)).

To obtain a preliminary injunction, a plaintiff must show

that:

1. It will likely succeed on the merits;
2. It is likely to suffer irreparable harm absent preliminary relief;
3. The balance of equities tips in its favor; and
4. An injunction is in the public interest.

Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008); Centro Tepeye v. Montgomery Cty., 722 F.3d 184, 188 (4th Cir. 2013)(en banc). The plaintiff has the burden of establishing that it meets the Winter factors. Dewhurst v. Century Aluminum Co., 649 F.3d 287, 293 (4th Cir. 2011).

Statements contained in an uncontroverted affidavit may be accepted as true. See, e.g., Elrod v. Burns, 427 U.S. 347, 350 n. 1 (1976) ("For purposes of our review . . . uncontroverted affidavits filed in support of the motion for a preliminary injunction are taken as true."). The weight to be accorded to affidavit testimony is within the discretion of the court, and statements based on belief rather than personal knowledge may be discounted. Federal Practice & Procedure § 2949 (collecting authority).

2. Likely Success on the Merits

Plaintiffs assert that the Directives in the President's Memorandum violate the equal protection and substantive due

process guarantees of the United States Constitution, as well as service members' statutory right to medical care. The Court finds that Plaintiffs are likely to succeed on their Equal Protection claim, as discussed below. Therefore, the Court finds it unnecessary to analyze separately the merits of the Substantive Due Process claim and the Violation of Statute claim.

The men and women who serve in the Armed Forces are "protected by the Fifth Amendment's Due Process Clause[,which] contains within it the prohibition against denying to any person the equal protection of the laws." United States v. Windsor, -- U.S. ----, 133 S. Ct. 2675, 2695 (2013); Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973). To succeed on an equal protection claim, Plaintiffs must demonstrate that they have been treated differently from others who are similarly situated and also show that the unequal treatment was the result of "intentional or purposeful discrimination." Morrison v. Garraghty, 239 F.3d 648, 654 (4th Cir. 2001). If Plaintiffs can make this showing, the court must then determine "whether the disparity in treatment can be justified under the requisite level of scrutiny." Id.

There is no doubt that the Directives in the President's Memorandum set apart transgender service members to be treated

differently from all other military service members. Defendants argue that deference is owed to military personnel decisions and to the military's policymaking process. The Court does not disagree. However, the Court takes note of the Amici of retired military officers and former national security officials, who state "this is not a case where deference is warranted, in light of the absence of any considered military policymaking process, and the sharp departure from decades of precedent on the approach of the U.S. military to major personnel policy changes." Amicus Br. 6, ECF No. 65-1. President Trump's tweets did not emerge from a policy review, nor did the Presidential Memorandum identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest. Based on the circumstances surrounding the President's announcement and the departure from normal procedure, the Court agrees with the D.C. Court that there is sufficient support for Plaintiffs' claims that "the decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy." Doe 1, 2017 WL 4873042, at *30.

The Court finds persuasive the D.C. Court's reasons for applying intermediate scrutiny: transgender individuals appear to satisfy the criteria of at least a quasi-suspect

classification, and the Directives are a form of discrimination on the basis of gender. Id. at *27-28. The Court also adopts the D.C. Court's reasoning in the application of intermediate scrutiny to the Directives and finds that the Plaintiffs herein are likely to succeed on their Equal Protection claim. See id. at *29-32.

Moreover, the Court finds that, based on the exhibits and declarations currently on the record, the Directives are unlikely to survive a rational review. The lack of any justification for the abrupt policy change, combined with the discriminatory impact to a group of our military service members who have served our country capably and honorably, cannot possibly constitute a legitimate governmental interest. See U. S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

3. Irreparable Harm

Plaintiffs must also make a clear showing that they are likely to be irreparably harmed absent preliminary relief. Winter, 555 U.S. at 20.

Plaintiffs' injuries as described above are the result of alleged violations of their rights to equal protection of the laws under the Fifth Amendment. In the context of an alleged violation of constitutional rights, a plaintiff's claimed

irreparable harm is inseparably linked to the likelihood of success on the merits. See Centro, 722 F.3d at 190.

Accordingly, the Court's finding that Plaintiffs are likely to succeed on the merits of their constitutional claim counsels in favor of finding that, in the absence of an injunction, they will suffer irreparable harm.

4. Balance of Equities and Public Interest

Courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." Winter, 555 U.S. at 24. The Court agrees with the D.C. Court "that Plaintiffs have shown that the public interest and the balance of hardships weigh in favor of granting injunctive relief." Doe 1, 2017 WL 4873042, at *33. As stated:

A bare invocation of "national defense" simply cannot defeat every motion for preliminary injunction that touches on the military. On the record before the Court, there is absolutely no support for the claim that the ongoing service of transgender people would have any negative effective on the military at all. In fact, there is considerable evidence that it is the discharge and banning of such individuals that would have such effects. . . . Moreover, the injunction that will be issued will in no way prevent the government from conducting studies or gathering advice or recommendations on transgender service.

Id.

Further, this Court has also received an Amici brief from 15 States, urging the Court to enjoin the Directives because a reinstatement of the pre-June 2016 policies will harm the Amici States and their residents. Amici Br. 13, ECF No. 63-1.

5. Summary

In summary, all the Winter factors weigh in favor of granting a preliminary injunction. The Court shall enjoin the enforcement of the Retention, Accession, and Sex Reassignment Surgical Directives pending the final resolution of this lawsuit.

C. Dismissal Under Rule 12(b)(6)

1. Legal Standard

A motion to dismiss filed pursuant to Rule 12(b)(6) tests the legal sufficiency of a complaint. A complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)(citations omitted).

When evaluating a 12(b)(6) motion to dismiss, a plaintiff's well-pleaded allegations are accepted as true, and the complaint is viewed in the light most favorable to the plaintiff. However, conclusory statements or a "formulaic recitation of the elements of a cause of action" will not suffice. Id. A complaint must allege sufficient facts to "cross 'the line between possibility and plausibility of entitlement to relief.'" Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009)(quoting Twombly, 550 U.S. at 557).

2. Plaintiffs Present Plausible Claims

Defendants have moved to dismiss Plaintiffs' claims under Rule 12(b)(6). For the same reasons as the Court has concluded that Plaintiffs are likely to succeed on the merits of the Equal Protection claim, as discussed above, the Court holds that the allegations are adequate and present plausible claims. The Court shall address separately the plausibility of the Substantive Due Process claim and the Violation of Statute claim.

a. Substantive due process

The Supreme Court has stated that "the Due Process Clause was intended to prevent government officials from abusing

[their] power, or employing it as an instrument of oppression.”
Cty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998)(citations
omitted). Substantive due process claims deal with the
reasonableness, or arbitrariness, of the governmental decision.
Kerr v. Marshall Univ. Bd. of Governors, 824 F.3d 62, 80 (4th
Cir. 2016). “Where executive action is concerned, a violation
of an individual’s substantive due process rights exists only
when the official action is so egregious, so outrageous, that it
may fairly be said to shock the contemporary conscience.” Id.
(citations omitted).

What rises to the level of conscience-shocking?

[N]egligently inflicted harm is
categorically beneath the threshold of
constitutional due process. It is, on the
contrary, behavior at the other end of the
culpability spectrum that would most
probably support a substantive due process
claim; conduct intended to injure in some
way unjustifiable by any government interest
is the sort of official action most likely
to rise to the conscience-shocking level.
Historically, this guarantee of due process
has been applied to deliberate decisions of
government officials to deprive a person of
life, liberty, or property.

. . . .

Rules of due process are not, however,
subject to mechanical application in
unfamiliar territory. Deliberate
indifference that shocks in one environment
may not be so patently egregious in another,
and our concern with preserving the
constitutional proportions of substantive

due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.

Lewis, 523 U.S. at 849, 850 (citations omitted).

Plaintiffs assert that President Trump's arbitrary decision, plainly inconsistent with all available data, to exclude men and women who are transgender from military service serves no legitimate interest and cannot be reconciled with the liberty and equality protected by the Constitution. Pls.' Mot. 28, ECF No. 40-2. Plaintiffs also argue that it is egregiously offensive to actively encourage transgender service members to reveal their status and serve openly, only to use the revelation to destroy those service members' careers. Id. at 29; see also Pls.' Reply 30, ECF No. 66 (referring to the maneuver as a "bait and switch").

"[T]he Fifth Amendment itself withdraws from Government the power to degrade or demean" Windsor, 133 S. Ct. at 2695. An unexpected announcement by the President and Commander in Chief of the United States via Twitter that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military" certainly can be considered shocking under the circumstances. Am. Compl. ¶¶ 94-95. According to news reports provided by Plaintiffs, the Secretary of Defense and other military

officials were surprised by the announcement. Id. ¶¶ 96-97, 104. The announcement also drew swift criticism from retired generals and admirals, senators, and more than 100 Members of Congress. Id. at ¶¶ 100-102. A capricious, arbitrary, and unqualified tweet of new policy does not trump the methodical and systematic review by military stakeholders qualified to understand the ramifications of policy changes.

Defendants argue that the President did not actually announce a policy decision, and it was rational for the President to order the military to study the issue further. The Court agrees that it could find an order for further study to be rational, but as already discussed, the Court finds that the President's Memorandum is not a request for a study but an order to implement the Directives contained therein.

Courts are reminded to be "reluctant to expand the concept of substantive due process" and "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of [judges]." Hawkins v. Freeman, 195 F.3d 732, 738 (4th Cir. 1999). Proceeding with full recognition of that caution, the Court finds that Plaintiffs have stated a plausible claim sufficient to withstand a motion to dismiss.

b. Violation of Statute

Pursuant to 10 U.S.C. § 1074(a)(1), members of the United States armed services, including active duty and reserve members, are entitled to medical care in military treatment facilities. Plaintiffs allege that the President cannot override a duly-enacted statute by denying necessary medical care to a group of service members he happens to disfavor. Am. Compl. ¶ 169, ECF. No. 39. Plaintiffs also allege that the DoD's actions in implementing and enforcing the Sex Reassignment Surgery Directive are not in accordance with law under the Administrative Procedure Act, 5 U.S.C. § 706(2). Id.

Defendants do not dispute that the military has a statutory obligation to provide medically-necessary treatment, nor that surgical procedures are sometimes necessary to treat transgender individuals who have been diagnosed with gender dysphoria. Defendants argue, however, that the Interim Guidance, which is the operative policy at this point in time, is consistent with the statutory provision and that the exception to the surgical ban may mean that the statute will not be contravened after the Sex Reassignment Surgical Directive is implemented on March 23, 2018. Defendants assert that the statute does not create a private cause of action to sue the military in civilian court over the denial of medical treatment. Further Defendants assert

that the DoD has broad discretion to shape the scope of services provided at military facilities, citing 10 U.S.C. § 1074(a)(1) and § 1073(a)(b).

Plaintiff's allegations in support of their statutory claim are conclusory. They alleged that "DoD's actions in implementing and enforcing the ban are not in accordance with law under the Administrative Procedure Act, 5 U.S.C. § 706(2)." Am. Compl. ¶ 168. And that "Defendants, including the President, cannot act in contravention of a validly enacted statute. Their actions in establishing, implementing, and enforcing the ban on surgical care are ultra vires." Am. Compl. ¶ 169.

Perhaps Plaintiffs could assert an adequate and plausible statutory claim. They have not done so here. The Court shall dismiss the statutory claim without prejudice to the ability of Plaintiffs to seek to file an amendment that adequately asserts such a claim if they can do so.

IV. CONCLUSION

For the foregoing reasons:

1. Plaintiffs' Motion for Preliminary Injunction [ECF No. 40] is GRANTED.
2. By separate Order, the Court shall issue a Preliminary Injunction.
3. Defendants' Motion to Dismiss [ECF No. 52] is GRANTED IN PART and DENIED IN PART.



SECRETARY OF DEFENSE
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9/14/17

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
COMMANDANT, U.S. COAST GUARD
DEPUTY CHIEF MANAGEMENT OFFICER
CHIEF, NATIONAL GUARD BUREAU
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF COST ASSESSMENT AND PROGRAM
EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF OPERATIONAL TEST AND EVALUATION
CHIEF INFORMATION OFFICER OF THE DEPARTMENT OF
DEFENSE
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE
AFFAIRS
ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC
AFFAIRS
DIRECTOR OF NET ASSESSMENT
DIRECTOR, STRATEGIC CAPABILITIES OFFICE
DIRECTORS OF DEFENSE AGENCIES
DIRECTORS OF DOD FIELD ACTIVITIES

SUBJECT: Military Service by Transgender Individuals - Interim Guidance

The Department of Defense ("DoD") has received the Presidential Memorandum, *Military Service by Transgender Individuals*, dated August 25, 2017 ("Presidential Memorandum"). DoD will carry out the President's policy and directives in consultation with the Department of Homeland Security ("DHS") with respect to the U.S. Coast Guard. Not later than February 21, 2018, I will present the President with a plan to implement the policy and directives in the Presidential Memorandum. Consistent with military effectiveness and lethality, budgetary constraints, and applicable law, the implementation plan will establish the policy, standards and procedures for transgender individuals serving in the military. The Deputy Secretary of Defense and the Vice Chairman of the Joint Chiefs of Staff, supported by a panel of experts ("Panel"), shall propose for my consideration recommendations supported by appropriate evidence and information.

To comply with the Presidential Memorandum, ensure the continued combat readiness of the force, and maximize flexibility in the development of the implementation plan, the attached Interim Guidance takes effect immediately and will remain in effect until I promulgate DoD's final policy in this matter. By agreement with the Acting Secretary of Homeland Security, this Interim Guidance also applies to the U.S. Coast Guard.

Attachment:
As stated

Jan M. Mattis

cc:
Secretary of Homeland Security



Interim Guidance

First and foremost, we will continue to treat every Service member with dignity and respect.

Accessions: The procedures set forth in Department of Defense Instruction (DoDI) 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services*, dated April 28, 2010 (Change 1), which generally prohibit the accession of transgender individuals into the Military Services, remain in effect because current or history of gender dysphoria or gender transition does not meet medical standards, subject to the normal waiver process.

Medical Care and Treatment: Service members who receive a gender dysphoria diagnosis from a military medical provider will be provided treatment for the diagnosed medical condition. As directed by the Memorandum, no new sex reassignment surgical procedures for military personnel will be permitted after March 22, 2018, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex.

In-Service Transition for Transgender Service Members: The policies and procedures set forth in DoDI 1300.28, *In-Service Transition for Transgender Service Members*, dated July 1, 2016, remain in effect until I promulgate DoD's final guidance in this matter.

Separation and Retention of Transgender Service members:

Service members who have completed their gender transition process and whose gender marker has been changed in DEERS will continue to serve in their preferred gender while this Interim Guidance remains in effect.

An otherwise qualified transgender Service member whose term of service expires while this Interim Guidance remains in effect, *may*, at the Service member's request, be re-enlisted in service under existing procedures.

As directed by the Memorandum, no action may be taken to involuntarily separate or discharge an otherwise qualified Service member solely on the basis of a gender dysphoria diagnosis or transgender status. Transgender Service members are subject to the same standards as any other Service member of the same gender; they may be separated or discharged under existing bases and processes, but not on the basis of a gender dysphoria diagnosis or transgender status.

Reestablishment of the Office of the Under Secretary of Defense for Personnel and Readiness (OUSDP&R) Central Coordination Cell: The OUSDP&R will reestablish the Central Coordination Cell (CCC) to provide expert advice and assistance to the Military Departments and Services and to commanders with regard to this Interim Guidance. The CCC may be reached at <https://ra.sp.pentagon.mil/DoDCCC/SitePages/HomePage.aspx>.

IMMEDIATE RELEASE

Statement by Secretary of Defense Jim Mattis on Military Service by Transgender Individuals

Press Operations

Release No: NR-312-17

Aug. 29, 2017

The Department of Defense has received the Presidential Memorandum, dated August 25, 2017, entitled "Military Service by Transgender Individuals." The department will carry out the president's policy direction, in consultation with the Department of Homeland Security. As directed, we will develop a study and implementation plan, which will contain the steps that will promote military readiness, lethality, and unit cohesion, with due regard for budgetary constraints and consistent with applicable law. The soon arriving senior civilian leadership of DOD will play an important role in this effort. The implementation plan will address accessions of transgender individuals and transgender individuals currently serving in the United States military.

Our focus must always be on what is best for the military's combat effectiveness leading to victory on the battlefield. To that end, I will establish a panel of experts serving within the Departments of Defense and Homeland Security to provide advice and recommendations on the implementation of the president's direction. Panel members will bring mature experience, most notably in combat and deployed operations, and seasoned judgment to this task. The panel will assemble and thoroughly analyze all pertinent data, quantifiable and non-quantifiable. Further information on the panel will be forthcoming.

Once the panel reports its recommendations and following my consultation with the secretary of Homeland Security, I will provide my advice to the president concerning implementation of his policy direction. In the interim, current policy with respect to currently serving members will remain in place. I expect to issue interim guidance to the force concerning the president's direction, including any necessary interim adjustments to procedures, to

ensure the continued combat readiness of the force until our final policy on this subject is issued.

THE WHITE HOUSE

WASHINGTON

August 25, 2017

MEMORANDUM FOR THE SECRETARY OF DEFENSE
THE SECRETARY OF HOMELAND SECURITY

SUBJECT: Military Service by Transgender Individuals

Section 1. Policy. (a) Until June 2016, the Department of Defense (DoD) and the Department of Homeland Security (DHS) (collectively, the Departments) generally prohibited openly transgender individuals from accession into the United States military and authorized the discharge of such individuals. Shortly before President Obama left office, however, his Administration dismantled the Departments' established framework by permitting transgender individuals to serve openly in the military, authorizing the use of the Departments' resources to fund sex-reassignment surgical procedures, and permitting accession of such individuals after July 1, 2017. The Secretary of Defense and the Secretary of Homeland Security have since extended the deadline to alter the currently effective accession policy to January 1, 2018, while the Departments continue to study the issue.

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.

(b) Accordingly, by the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States under the Constitution and the laws of the United States of America, including Article II of the Constitution, I am directing the Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis exists

upon which to conclude that terminating that policy and practice would not have the negative effects discussed above. The Secretary of Defense, after consulting with the Secretary of Homeland Security, may advise me at any time, in writing, that a change to this policy is warranted.

Sec. 2. Directives. The Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, shall:

(a) maintain the currently effective policy regarding accession of transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the contrary that I find convincing; and

(b) halt all use of DoD or DHS resources to fund sex-reassignment surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex.

Sec. 3. Effective Dates and Implementation. Section 2(a) of this memorandum shall take effect on January 1, 2018. Sections 1(b) and 2(b) of this memorandum shall take effect on March 23, 2018. By February 21, 2018, the Secretary of Defense, in consultation with the Secretary of Homeland Security, shall submit to me a plan for implementing both the general policy set forth in section 1(b) of this memorandum and the specific directives set forth in section 2 of this memorandum. The implementation plan shall adhere to the determinations of the Secretary of Defense, made in consultation with the Secretary of Homeland Security, as to what steps are appropriate and consistent with military effectiveness and lethality, budgetary constraints, and applicable law. As part of the implementation plan, the Secretary of Defense, in consultation with the Secretary of Homeland Security, shall determine how to address transgender individuals currently serving in the United States military. Until the Secretary has made that determination, no action may be taken against such individuals under the policy set forth in section 1(b) of this memorandum.

Sec. 4. Severability. If any provision of this memorandum, or the application of any provision of this memorandum, is held to be invalid, the remainder of this

memorandum and other dissimilar applications of the provision shall not be affected.

Sec. 5. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

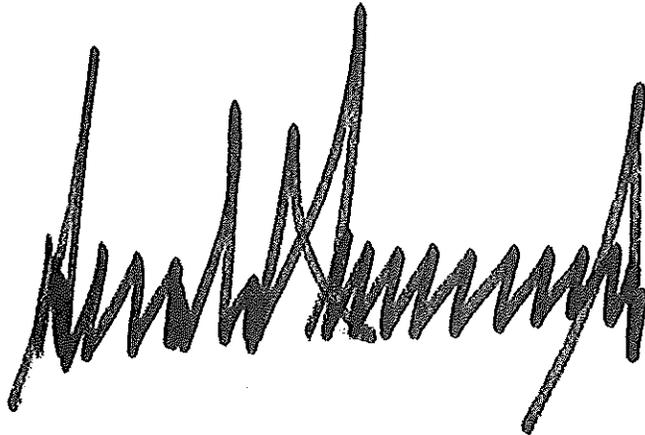
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of Defense is authorized and directed to publish this memorandum in the *Federal Register*.

A large, stylized handwritten signature in black ink, appearing to be the signature of the Secretary of Defense, is centered on the page below the text.

IMMEDIATE RELEASE

Statement by Chief Pentagon Spokesperson Dana W. White on Transgender Accessions

Press Operations

Release No: NR-250-17

June 30, 2017

Secretary Mattis today approved a recommendation by the services to defer accessing transgender applicants into the military until Jan. 1, 2018.

The services will review their accession plans and provide input on the impact to the readiness and lethality of our forces.



SECRETARY OF DEFENSE
 1000 DEFENSE PENTAGON
 WASHINGTON, DC 20301-1000

JUN 30 2016

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
 CHAIRMAN OF THE JOINT CHIEFS OF STAFF
 UNDER SECRETARIES OF DEFENSE
 DEPUTY CHIEF MANAGEMENT OFFICER
 CHIEF OF THE NATIONAL GUARD BUREAU
 GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
 DIRECTOR, COST ASSESSMENT AND PROGRAM
 EVALUATION
 INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
 DIRECTOR, OPERATIONAL TEST AND EVALUATION
 DEPARTMENT OF DEFENSE CHIEF INFORMATION OFFICER
 ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE
 AFFAIRS
 ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC
 AFFAIRS
 DIRECTOR, NET ASSESSMENT
 DIRECTORS OF THE DEFENSE AGENCIES
 DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Directive-type Memorandum (DTM) 16-005, "Military Service of Transgender Service Members"

References: DoD Directive 1020.02E, "Diversity Management and Equal Opportunity in the DoD," June 8, 2015
 DoD Directive 1350.2, "Department of Defense Military Equal Opportunity (MEO) Program," August 18, 1995
 DoD Instruction 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services," April 28, 2010, as amended

Purpose. This DTM:

- Establishes policy, assigns responsibilities, and prescribes procedures for the standards for retention, accession, separation, in-service transition, and medical coverage for transgender personnel serving in the Military Services.
- Except as otherwise noted, this DTM will take effect immediately. It will be converted to a new DoDI. This DTM will expire effective June 30, 2017.

Applicability. This DTM applies to OSD, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the

Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD.

Policy.

- The defense of the Nation requires a well-trained, all-volunteer force comprised of Active and Reserve Component Service members ready to deploy worldwide on combat and operational missions.
- The policy of the Department of Defense is that service in the United States military should be open to all who can meet the rigorous standards for military service and readiness. Consistent with the policies and procedures set forth in this memorandum, transgender individuals shall be allowed to serve in the military.
- These policies and procedures are premised on my conclusion that open service by transgender Service members while being subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability, and retention, is consistent with military readiness and with strength through diversity.

Responsibilities

- The Secretaries of the Military Departments will:
 - Take immediate action to identify all DoD, Military Department, and Service issuances, the content of which relate to, or may be affected by, the open service of transgender Service members.
 - Draft revisions to the issuances identified, and, as necessary and appropriate, draft new issuances, consistent with the policies and procedures in this memorandum.
 - Submit to the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) the text of any proposed revisions to existing Military Department and Service regulations, policies, and guidance, and of any proposed new issuance, no later than 30 days in advance of the proposed publication date of each.
- The USD(P&R) will:
 - Take immediate action to identify all DoD, Military Department, and Service issuances, the content of which relate to, or may be affected by, the open service of transgender Service members.

- Draft revisions to the issuances identified in this memorandum and, as necessary and appropriate, draft new issuances consistent with the policies and procedures in this memorandum.

Procedures. See Attachment.

Releasability. **Cleared for public release.** This DTM is available on the DoD Issuances Website at <http://www.dtic.mil/whs/directives>.

A handwritten signature in black ink that reads "Ash Carter". The signature is written in a cursive, flowing style.

Attachment:

As stated

cc:

Secretary of Homeland Security

Commandant, United States Coast Guard

ATTACHMENT

PROCEDURES

1. SEPARATION AND RETENTION

a. Effective immediately, no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity.

b. Transgender Service members will be subject to the same standards as any other Service member of the same gender; they may be separated, discharged, or denied reenlistment or continuation of service under existing processes and basis, but not due solely to their gender identity or an expressed intent to transition genders.

c. A Service member whose ability to serve is adversely affected by a medical condition or medical treatment related to their gender identity should be treated, for purposes of separation and retention, in a manner consistent with a Service member whose ability to serve is similarly affected for reasons unrelated to gender identity or gender transition.

2. ACCESSIONS

a. Medical standards for accession into the Military Services help to ensure that those entering service are free of medical conditions or physical defects that may require excessive time lost from duty. Not later than July 1, 2017, the USD(P&R) will update DoD Instruction 6130.03 to reflect the following policies and procedures:

(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.

b. The Secretaries of the Military Departments and the Commandant, United States Coast Guard, may waive or reduce the 18-month periods, in whole or in part, in individual cases for applicable reasons.

c. The standards for accession described in this memorandum will be reviewed no later than 24 months from the effective date of this memorandum and may be maintained or changed, as appropriate, to reflect applicable medical standards and clinical practice guidelines, ensure consistency with military readiness, and promote effectiveness in the recruiting and retention policies and procedures of the Armed Forces.

3. IN-SERVICE TRANSITION

a. Effective October 1, 2016, DoD will implement a construct by which transgender Service members may transition gender while serving, in accordance with DoDI 1300.28, which I signed today.

b. Gender transition while serving in the military presents unique challenges associated with addressing the needs of the Service member in a manner consistent with military mission and readiness needs.

4. MEDICAL POLICY. Not later than October 1, 2016, the USD(P&R) will issue further guidance on the provision of necessary medical care and treatment to transgender Service members. Until the issuance of such guidance, the Military Departments and Services will handle requests from transgender Service members for particular medical care or to transition on a case-by-case basis, following the spirit and intent of this memorandum and DoDI 1300.28.

5. EQUAL OPPORTUNITY

a. All Service members are entitled to equal opportunity in an environment free from sexual harassment and unlawful discrimination on the basis of race, color, national origin, religion, sex, or sexual orientation. It is the Department's position, consistent with the U.S. Attorney General's opinion, that discrimination based on gender identity is a form of sex discrimination.

b. The USD(P&R) will revise DoD Directives (DoDDs) 1020.02E, "Diversity Management and Equal Opportunity in the DoD," and 1350.2, "Department of Defense Military Equal Opportunity (MEO) Program," to prohibit discrimination on the basis of gender identity and to incorporate such prohibitions in all aspects of the DoD MEO program. The USD(P&R) will prescribe the period of time within which Military Department and Service issuances implementing the MEO program must be conformed accordingly.

6. EDUCATION AND TRAINING

a. The USD(P&R) will expeditiously develop and promulgate education and training materials to provide relevant, useful information for transgender Service members, commanders, the force, and medical professionals regarding DoD policies and procedures on transgender service. The USD(P&R) will disseminate these training materials to all Military Departments and the Coast Guard not later than October 1, 2016.

b. Not later than November 1, 2016, each Military Department will issue implementing guidance and a written force training and education plan. Such plan will detail the Military Department's plan and program for training and educating its assigned force (to include medical professionals), including the standards to which such education and training will be conducted, and the period of time within which it will be completed.

7. IMPLEMENTATION AND TIMELINE

a. Not later than October 1, 2016, the USD(P&R) will issue a Commander's Training Handbook, medical guidance, and guidance establishing procedures for changing a Service member's gender marker in DEERS.

b. In the period between the date of this memorandum and October 1, 2016, the Military Departments and Services will address requests for gender transition from serving transgender Service members on a case-by-case basis, following the spirit and intent of this memorandum and DoDI 1300.28.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

Brock Stone, et al.,

Plaintiffs,

v.

Donald J. Trump, et al.,

Defendants.

Case No. 1:17-cv-02459

DECLARATION OF SEVEN ERO GEORGE
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, SEVEN ERO GEORGE, hereby declare:

1. The facts set forth in this declaration are based on my personal knowledge.

Personal Background Information

2. I am a 41-year-old Airman First Class (E-3) in the Air National Guard. I have served in the United States military for over three years total, including ten months in the U.S. Marine Corps and two-and-a-half years in the Air National Guard. I currently work in Security Forces at Selfridge Air National Guard Base in Michigan. I also serve as a member of the Base Honor Guard, where my job includes performing military funeral honors for deceased veterans, retirees, and active duty members; providing dignified transfers; and performing color guard details.

3. I am a man, and I am transgender. I began transitioning within the military in 2016. In reliance upon the upcoming 2016 Open Service Directive (which I had heard would be coming), I began meeting with a civilian healthcare provider and was diagnosed with gender dysphoria in May 2016. After the Open Service Directive was issued I thereafter

disclosed my transgender status to military personnel in September 2016, in reliance on the directive. I have since updated my driver's license and passport to indicate that I am a man, and in December 2016 I requested that my gender marker in the Defense Enrollment Eligibility Reporting System (DEERS) be changed. That change is still pending.

4. Following evaluation and recommendation by medical personnel, I began to undergo hormone therapy. My health care provider determined that this therapy was a medically-necessary part of my transition to the male gender. In August 2016 I underwent a double mastectomy and chest reconstruction surgery. This treatment was documented and submitted to military medical personnel when I disclosed that I was transgender in September 2016. The Air National Guard accepted the paperwork and confirmed that I was still deployable pursuant to DoD standards and Air Force Instructions (AFI), and that I met all other criteria for service.

5. I intend to remain in military service for my entire career. I am currently pursuing a nursing degree, and my goal is to work in the military as a nurse. Upon completion of my degree, I intend to pursue a commission in the U.S. Army Nursing Corps so I can serve on active duty. Through such a position I hope to continue serving others while working as a part of something larger than myself.

Effect of Transgender Service Member Ban

6. On the morning of July 26, 2017, the President posted on Twitter that transgender service members would no longer be allowed to serve in the military "in any capacity."

7. I was severely taken aback by this news. I had relied on the Open Service Directive when I informed military personnel that I am transgender. I was confused and shocked

by the sudden reversal in course. After being told I could serve publicly as a transgender member of the military, now I suddenly stood to lose my entire military career.

8. Later I was informed that on August 25, 2017 President Trump sent a memorandum to the Secretary of Defense ordering him to withdraw the policy allowing transgender people to serve openly in the military (Transgender Service Member Ban).

9. Since the Transgender Service Member Ban issued I am extremely worried and uncertain about my future in the military. I planned to go on active duty and commission in the U.S. Army. The ban on accessions and enlistment contained in the Transgender Service Member Ban may make both of those things impossible.

10. I am financially dependent on my military income and other military benefits. I am worried I may lose my employment benefits including tuition assistance benefits for my nursing school education if I am removed from the military due to the Transgender Service Member Ban. This would make it challenging or even impossible for me to complete my degree and begin my chosen career as a military nurse.

11. I am also highly concerned about my medical benefits. Currently I am on Tricare/Reserve Select coverage, which means that my medically-indicated gender transition treatment is not covered. I pay out of pocket for my hormone therapy, and paid out of pocket for my surgeries. However if the Transgender Service Member Ban were fully implemented, I could potentially face diminished access to Tricare, and lose what medical benefits I do have.

12. I have also faced significant uncertainty and delay in the process of changing my gender marker in the Defense Enrollment Eligibility Reporting System (DEERS). I began that process in December 2016. Every month until May 2017, the military requested more and more paperwork, and each month I provided it. Since May 2017, I have been in limbo

awaiting word on this change. Before President Trump sent his tweets, I had heard the orders to be evaluated in order to change my gender marker had been written, but had not yet been signed or issued. Then I heard there was to be a delay. Since then I have heard absolutely nothing. I have followed up repeatedly and even asked my Lieutenant Colonel to follow up with the National Guard Bureau on my behalf, but even she says she cannot get an answer on what is happening. She told me they will not even return her calls on the subject.

13. This delay has been very problematic for my career. I had been delaying commissioning in the Army until after my gender marker was updated, so that I could complete this component of my transition within my current command, which is highly supportive of me. Now I do not know when or if my gender marker will be changed, or if I will be able to commission to active duty if it is changed.

14. I am slated to enroll in Technical School in connection with a potential promotion to Senior Airman (E-4). I am concerned that this promotion and additional training, too, could be jeopardized by the Transgender Service Member Ban.

15. I come from a military family. My father served in the U.S. Navy in Vietnam, and two of my aunts retired as Commanders after 20 years in the Navy Nurse Corps. My aunts are my inspiration to become a military nurse. I have hoped to serve my country all my life. I originally enlisted in the Marine Corps in 2005, during the age of Don't Ask, Don't Tell. The stress of having to hide who I am was tremendous, and I was ultimately medically discharged. I was overjoyed when the Open Service Directive issued, permitting me to at last serve my country openly. Now, the President's actions make it seem that my military service to the United States is not wanted, and I am faced with the same anxiety as before.

16. Fortunately, my command continues to support me. Nonetheless, I have felt a sense of stigma since the Transgender Service Member Ban. My dream is to be a nurse in the military, and I am willing to go wherever it takes to make that happen. Even if the Transgender Service Member Ban were to prevent me from commissioning as a nurse I would remain committed to continuing to serve in the military in some other medical capacity. But it seems like my commitment and service are no longer valued. It is extremely stressful simply not knowing what my future might hold.

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

Executed on the 13 day of September, 2017 in Warren, MI.



Seven Ero George

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

Brock Stone, et al.,

Plaintiffs,

v.

Donald J. Trump, et al.,

Defendants.

Case No. 1:17-cv-02459 (MJG)

**SUPPLEMENTAL DECLARATION OF SEVEN ERO GEORGE
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, SEVEN ERO GEORGE, hereby declare:

1. The facts set forth in this declaration are based on my personal knowledge.
2. In October 2016 I met with an army recruiter in Eastpointe, Michigan to pursue an active duty commission in the United States Army through the direct commissioning program, pursuant to the applicable references: Army Regulation 135-101 (the regulation governing appointment of officers in the Army Medical Department); and Army Regulation 601-100 (governing appointment of commissioned officers generally). I have a bachelor's degree in General Studies from the University of Michigan, Ann Arbor, so I understood that I would be eligible to commission as an officer at that time, and I began completing application paperwork to do so. My understanding is based on (and consistent with) the requirements of the references listed above. I was also stable in my gender transition, with no further surgeries required under my medical treatment plan. A true and correct copy of the Request For Conditional Release form I subsequently completed, and which was signed by the General in command of the 127th Wing of the Air National Guard, is attached hereto as **Exhibit 1**.

3. However, based on conversations with the recruiter and other research I conducted, I came to understand that I would not be able to commission until the military's historical ban on transgender servicemember accessions officially expired. Additionally, my gender marker in the Defense Enrollment Eligibility Report System (DEERS) still listed me as female. Faced with those two barriers, I was forced to hold off on commissioning until I could at least update my gender in the DEERS system. During this time, I would diligently work to get my gender marker updated to accurately reflect my male gender. I believed that the gender marker process could be completed relatively quickly and simply, and that it would be easier to do in my current command, which was and continues to be supportive of me.

4. Unfortunately, the process of updating my gender marker was anything but quick or simple. It has been so complicated that I have had to engage a lawyer to assist me. As described in my prior declaration, I submitted paperwork in connection with that process from December 2016 until May 2017. I heard nothing further until September 2017, subsequent to the filing of my prior declaration, when I was informed that I once again needed to provide additional paperwork, which I submitted to my command on October 19, 2017. It is my present understanding that I have submitted all requisite paperwork for the processing of my gender marker update. I have now been working with my lawyer on this process for approximately a year and while I expect it will be completed by the end of the year, given the delays by the military thus far I cannot say that for certain.

5. Because the ban on transgender servicemember accessions has not yet expired and because of the repeated delays in updating my gender marker, I have had to adjust my career plans. I am currently focusing on my education so that when I am able to commission, I will be closer to my ultimate goal of becoming an Army nurse. I am currently on track to

graduate from Henry Ford College in December 2017 with an Associate's Degree in Nursing. Thereafter, I plan to attend the University of Michigan, Flint, where I have been accepted into an RN-to-BSN (Registered Nurse to Bachelor's of Science in Nursing) completion program for a Bachelor's Degree in Nursing starting in January. This is usually a two-year program, but because I already have a Bachelor's Degree in another discipline, I expect to be able to complete the degree in 12-18 months.

6. If I were free to commission in the army, I would do so immediately. The only reasons I have not done so already is the protracted delay in the processing of my DEERS gender marker update and the military's historical ban on transgender servicemember accessions.

7. I have continued to prepare myself to commission immediately in the event that my gender marker is updated and the policy barriers are removed. This includes speaking to multiple individuals about recommending me for the direct commissioning program listed above. One of my teachers at Henry Ford College, Julie Powell, is a former Navy Nurse, and she has agreed to write me a letter of recommendation.

8. My recently-retired former commander, Lieutenant Colonel Richard T. Walmsley (Ret.) has also agreed to write me a letter of recommendation. As reflected on Exhibit 1, he also endorsed my request for "conditional release," one of the required pieces of my application for Army direct commissioning (in accordance with the reference, AR 135-101, paragraph 1-10(a)(4)).

9. Throughout this process I have also attempted to continue to improve my military record.

10. Contrary to Paragraph 3 of the Declaration of Helen Harris, which I have read, I have in fact requested to attend Technical Training School on multiple occasions. The

first time was in March 2015, but I was informed that my request could not be approved. I was next scheduled to attend Technical Training School in March 2016, but that assignment was postponed and eventually cancelled. In August 2017 I began preparing another Technical Training School application package. This time, I was told that my request could not be approved while my gender marker change was pending.

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

Executed on the 26 day of October, 2017 in Warren, MI.



SEVEN ERO GEORGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

Brock Stone, et al.,

Plaintiffs,

v.

Donald J. Trump, et al.,

Defendants.

Case No. 1:17-cv-02459 (MJG)

DECLARATION OF TEAGAN GILBERT
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Teagan Gilbert, hereby declare:

1. The facts set forth in this declaration are based on my personal knowledge.

Personal Background Information

2. I am a 31-year-old Petty Officer First Class in the U.S. Navy. I have served in the U.S. Navy for more than 13 years, including a one-year deployment to Afghanistan.

3. At age 17, I joined the Navy through the Delayed Entry Program (DEP). My family inspired me to join the military. My father was in the Air Force. Both of my grandfathers served in the Army.

4. I have received specialized military training and education, including experience with Department of Defense (DoD) space systems. I am currently serving in the Naval Reserve working as an information and space systems technician.

5. I am transgender. I revealed my transgender status to military personnel following, and relying on, the DoD's June 2016 Open Service Directive.

6. Pursuant to an evaluation and recommendation by DoD medical personnel, I am currently undergoing hormone therapy deemed a medically-necessary part of transition to the female gender and plan to seek approval of medically-indicated surgical treatment, including gender confirmation surgery.

7. I look forward to continuing to serve my country honorably in the U.S. Armed Forces, including through future overseas deployments. Since joining the military, it has been my goal to serve for at least 20 years. With only one year of coursework left in my undergraduate geology degree at Arizona State University, I plan to apply to Officer Candidate School (OCS) and return to “active duty” status.

Effect of Transgender Service Member Ban

8. On July 26, 2017, the President tweeted that transgender service members would no longer be allowed to serve in the military “in any capacity.”

9. I was extremely upset at this news. Fellow service members and I had not received any indication that the military planned to change its Open Service Directive. Relying on this very directive, I had revealed my transgender status to military personnel. When I read the President’s tweets, I felt that I had been misled and betrayed.

10. On August 25, 2017, I learned that President Trump sent a memorandum to the Secretary of Defense ordering him to reverse the policy allowing transgender people to serve openly in the military (Transgender Service Member Ban).

11. I feel the Transgender Service Member Ban has made it harder for me to receive reservist assignments. I am worried about finding reservist work next summer and earning enough money to continue to take courses and earn my degree at Arizona State University.

12. I planned to serve in the Armed Forces for the rest of my career. Now, I fear being discharged. I will be denied the opportunity to continue to pursue my chosen, honorable profession. I will also be deprived of \$400 per month of wages during the academic year and thousands of dollars during the summer. If discharged, I will lose not only my own health care but also health care for my six-year-old son. I have sole custody of my son, and I am his only financial provider. Any loss of wages and other military benefits will result in financial hardship for me and my family.

13. Since the Transgender Service Member Ban, I have experienced intense uncertainty, stress, and psychological harm. The day the President tweeted I immediately took paid time-off from my civilian job. I rushed to complete outstanding civilian and military name change and gender marker paperwork. Since I returned to my civilian job, my supervisor has told me that my productivity has decreased. While I am at work, I am stressed. I worry about my career and how I will afford health care and tuition if I am discharged based on my open transgender status. I worry about how I will provide for my son. As a result of this relentless uncertainty and stress, I have recently begun to receive poor performance evaluations through verbal feedback at my civilian job. My prior evaluations for this job were positive.

14. I have experienced stigma since the Transgender Service Member Ban. The President's statements and actions have signaled to me that my military service to the United States is not valued or wanted. After 13 years in the military, including a deployment to Afghanistan, I never expected such treatment. Since the Ban, I have become a second-class citizen.

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

Executed on the 11th day of September, 2017 in Peoria, Arizona.



Teagan Gilbert

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

Brock Stone, et al.,

Plaintiffs,

v.

Donald J. Trump, et al.,

Defendants.

Case No. 1:17-cv-02459 (MJG)

**SUPPLEMENTAL DECLARATION OF TEAGAN GILBERT
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, TEAGAN GILBERT, hereby declare:

1. The facts set forth in this declaration are based on my personal knowledge.

2. On October 20, 2017, I was informed that my formal application to have the gender marker in my official Navy personnel files and the Defense Enrollment Eligibility Report System (DEERS) changed to female had been approved, and my gender marker had been updated. I had been readying my paperwork for this application since approximately September 2016.

3. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

4. [REDACTED]

[REDACTED]

5. [REDACTED]

[REDACTED]

6. I am scheduled to resume classes at Arizona State University in January of 2018, and expect to graduate in the Spring of 2019 with a bachelor's degree in Earth and Space Exploration, with a concentration in Geological Sciences and an undergraduate certificate in Geographic Information Systems.

7. I am obtaining my bachelor's degree because it is a requirement to commission as an officer.

8. Once I have received my bachelor's degree, I intend to apply to commission as an officer in the Navy. In preparation for that, while finishing my degree, I have worked to locate mentors within my unit who would be willing to recommend me in connection with my application to commission. Earlier this month, I discussed my candidacy with Captain Colin Campbell, and he said that he would write me a letter of recommendation when I intend to apply.

9. In preparation for commissioning I am also in the process of re-enlisting in the Navy for another six-year term. My term of service runs out in February 2018 and I want to make sure my re-enlistment is completely finalized well before then so that I am on track to commission, as I have been planning since approximately 2011.

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

Executed on the 26 day of October, 2017 in Peoria, Arizona.



TEAGAN GILBERT

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND**

BROCK STONE, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case 1:17-cv-02459-MJG

Hon. Marvin J. Garbis

**DEFENDANTS' MOTION FOR CLARIFICATION AND, IF NECESSARY,
A PARTIAL STAY OF PRELIMINARY INJUNCTION PENDING APPEAL**

On November 21, 2017, the Court entered an Order granting in part and denying in part Defendants' motion to dismiss and granting Plaintiffs' motion for a preliminary injunction. ECF No. 85. The Court preliminarily enjoined Defendants from enforcing or implementing certain "policies and directives" in the President's August 25, 2017 Memorandum regarding military service by transgender individuals (the "Presidential Memorandum"). ECF No. 84. One aspect of the Court's injunction barred the Secretary of Defense from carrying out the President's direction to delay the effective date of changes to the accession policy for military service by transgender individuals that are scheduled to take effect on January 1, 2018. *See id.* at 2. That policy is set forth in Defense Department Directive-Type Memorandum ("DTM") 16-005, issued on June 30, 2016, ECF No. 85 at 6-8. On June 30, 2017, prior to the issuance of the Presidential Memorandum, Secretary of Defense Mattis exercised his independent authority to delay the effective date of DTM 16-005 to January 1, 2018. *Id.* at 9.

For the following reasons, Defendants seek clarification that the Preliminary Injunction does not prohibit the Secretary of Defense from again exercising his independent discretion to defer the January 1, 2018 effective date for the accessions provisions of DTM 16-005 for a limited period of time to further study whether the policy will impact military readiness and lethality or to complete further steps needed to implement the policy.

Alternatively, in the event the Court clarifies that the meaning of its Order is that the Secretary of Defense is preliminarily enjoined from exercising his own authority to defer the January 1, 2018 effective date, Defendants move to stay the accessions portion of the Preliminary Injunction pending a decision from the Fourth Circuit on their appeal of the Court's Preliminary Injunction.

I. Motion to Clarify Scope of Preliminary Injunction

Prior to and wholly apart from the directives in the Presidential Memorandum, the Secretary of Defense exercised his independent authority to defer the effective date of the accessions provisions of DTM 16-005, for the purpose of further studying whether the DTM will impact military readiness and lethality. Specifically, as the Court noted in its order, *see* ECF No. 85 at 9, Secretary Mattis exercised his authority on June 30, 2017, to defer the effective date for the accessions provisions of DTM 16-005 from July 1, 2017, to January 1, 2018. *See* Department of Defense, Release No. NR-250-17 (June 30, 2017).¹ Plaintiffs did not challenge the Secretary's exercise of that authority, nor have they suggested that the Secretary's action was unlawful in any respect. Instead, Plaintiffs have only sought prospective relief to enjoin the

¹ The Department of Defense Release is available online at: <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1236145/statement-by-chief-pentagon-spokesperson-dana-w-white-on-transgender-accessions/> (last visited December 12, 2017).

Secretary from implementing the Presidential Memorandum, which the President issued subsequent to the Secretary's exercise of his independent authority.

Accordingly, Defendants believe that the Court's November 21, 2017 Order does not prohibit the Secretary of Defense from again exercising his discretion to defer the January 1, 2018 effective date for the accessions provisions of DTM 16-005 for a limited period of time, in order to further study whether the policy will impact military readiness and lethality, or to complete further steps needed to implement the policy. Nor could the Court have enjoined the Secretary of Defense from exercising such discretion because, as noted, the Plaintiffs have not challenged the Secretary's exercise of his independent authority to study whether the DTM 16-005 will impact military readiness and lethality. Notwithstanding these facts, and out of an abundance of caution, Defendants seek clarification of the Court's preliminary injunction order on this point.²

Accordingly, Defendants respectfully request that this Court clarify that its preliminary injunction does not prohibit the Secretary of Defense from exercising his discretion to defer the January 1, 2018 effective date for the accessions provisions of DTM 16-005 for a limited period of time to further study whether the policy will impact military readiness and lethality or to complete further steps needed to implement the policy.

² Defendants sought a similar clarification of the preliminary injunction entered in the related case of *Doe v. Trump*, No. 17-cv-1596 (CKK) (D.D.C.). *Id.*, 2017 WL 4873042 (D.D.C. Oct. 20, 2017). The *Doe* Court rejected the government's proposed clarification of its injunction, stating that the referenced "*status quo*" in its injunction should be read to mean "the retention and accession policies established in the June 30, 2016 Directive-type Memorandum as modified by Secretary of Defense James Mattis on June 30, 2017.," *Id.*, Doc. No. 70 at 2, and that defendants were enjoined from altering that status quo. Defendants respectfully disagree with the *Doe* Court's clarification order because it is inconsistent with the status quo that existed prior to the Presidential Memorandum, under which the Secretary had independent discretion and authority to extend the effective date of the new policy in DTM 16-005. In any event, that clarification order is irrelevant to determining the meaning of this Court's preliminary injunction.

II. Motion to Stay Preliminary Injunction Pending Appeal

If the Court clarifies that, under the terms of its preliminary injunction, the Secretary of Defense is enjoined from exercising his discretion to defer the January 1, 2018 effective date of the new accessions policy, Defendants move to stay the accessions portion of the preliminary injunction pending appeal. The Court should grant Defendants' motion for several reasons.

STANDARD OF REVIEW

In deciding a motion to stay pending appeal, courts consider four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant 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.” *Nken v. Holder*, 556 U.S. 418, 434 (2009).³

ARGUMENT

In this case, the four factors weigh heavily in favor of a stay of the accession portion of the Court's preliminary injunction until the Fourth Circuit decides Defendants' appeal.

A. Defendants Will Be Irreparably Harmed If They Are Forced to Implement a New Accessions Policy by January 1, 2018.

Defendants have submitted a declaration from Lernes J. Hebert (“Hebert Decl.”), Acting Deputy Assistant Secretary of Defense for Military Personnel Policy, explaining that, in order to

³ Although a party seeking a stay pending appeal must make a strong showing of likely success on the merits of the appeal, “this standard does not require the trial court to change its mind or conclude that its determination on the merits was erroneous.” *St. Agnes Hosp. of City of Baltimore, Inc. v. Riddick*, 751 F. Supp. 75, 76 (D. Md. 1990). “Rather, a stay may be appropriate in a case where the threat of irreparable injury to the applicant is immediate and substantial, the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear and the interests of the other parties and the public are not harmed substantially.” *Id.* (citation omitted).

adequately prepare to access transgender individuals, the military will need to promulgate new, complex, and interdisciplinary medical standards that will necessarily require evaluation across several medical specialties, including behavior and mental health, surgical procedures, and endocrinology. Hebert Decl. ¶6. The military must then train “tens of thousands” of geographically dispersed personnel on the application of those complex medical standards. *Id.* ¶5. These personnel include 20,367 recruiters, 2,785 employees across 65 Military Entrance Processing Stations, 32 Service Medical Waiver Authorities, and personnel at nine (9) initial military entrance locations (“boot camps”) and the associated medical hospitals that support them. *Id.*

Moreover, given the complexity of the interdisciplinary medical standards that need to be issued and the number of geographically dispersed individuals that need to be carefully trained on those standards, the Department would not be adequately and properly prepared to begin processing transgender applicants on January 1, 2018. *Id.* ¶¶6, 9. Thus, if the military is “compelled to execute transgender accessions by January 1,” then “applicants may not receive the appropriate medical and administrative accession screening necessary for someone with a complex medical condition” and thereby enter the military even though they are “not physically or psychologically equipped to engage in combat/operational service.” *Id.* ¶8. Put simply, compliance with the district court’s January 1 deadline “will impose extraordinary burdens” on the military and have a “harmful impact” on “its missions[] and readiness.” *Id.* ¶¶3, 5. Because Defendants are likely to suffer serious and irreparable harms if they are forced to begin accessing transgender individuals beginning on January 1, 2018, the Court should stay the accessions portion of its preliminary injunction until the Fourth Circuit decides Defendants’ appeal.

The Department is also in the process of a high-level review of military service by transgender individuals that is scheduled to conclude in the next few weeks and could result in an accessions policy that differs from the one that the Court has ordered the military to implement by January 1, 2018. *Id.* ¶4, 10. In these circumstances, implementing a new accessions policy that would permit the accession of transgender individuals while the Department is in the process of concluding a comprehensive study that may ultimately lead to the implementation of a different policy would present not only the prospect of significant duplicative costs and administrative burdens but the high potential for sowing confusion in the ranks as well. *Id.* ¶10. Moreover, the military will be significantly harmed if it is required by the Court to access individuals that it would have rejected had it been permitted to complete its study and implement its final policy.

II. Plaintiffs Will Not Be Harmed by a Stay of the Accession Provision of the Court's Preliminary Injunction.

Plaintiffs will not be harmed by a stay of the accessions portion of the Court's preliminary injunction pending the outcome of Defendants' appeal. Only two of the Plaintiffs allege that they will be affected by the accessions provision of the August 25, 2017 Presidential Memorandum. But Plaintiff Gilbert must complete her undergraduate degree before she is eligible to accept a commission and is not schedule to graduate until the Spring 2019. ECF No. 66-11 ¶¶ 6-8. Similarly, Plaintiff George is scheduled to complete his associate's degree in nursing in December 2017, and then plans to begin a program to earn his bachelor's degree in nursing, which he expects to be able to complete "in 12-18 months," ECF No. 66-9 ¶ 5. Even assuming (as the district court did) that George will forego those educational plans if permitted to commission, ECF No. 85 at 32-33, plaintiff George has never even sought a waiver to accede under the longstanding policy, and it is unclear that the preliminary injunction would even allow

him to accede under the medical requirements of DTM 16-005. In any event, this sort of employment-related harm is not irreparable, particularly in light of the “higher requirement of irreparable injury [that] appli[es] in the military context.” *Guerra v. Scruggs*, 942 F.2d 270, 271, 274 (4th Cir. 1991) (holding that general discharge of military employee “does not rise to the . . . level of irreparable injury justifying an injunction,” even where employee alleged that discharge procedures violated the Due Process Clause and the Equal Protection Clause).

III. A Stay of the Accession Provision of the Court’s Preliminary Injunction Is in the Public Interest.

In these circumstances, it is not in the public interest for the Court to compel the military to begin accessing transgender individuals before it has had an opportunity to issue the necessary medical standards and train its personnel on those standards to ensure that military applicants are properly screened. *See Gilligan v. Morgan*, 413 U.S. 1 at 10 (“The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.”).

III. Defendants Are Likely to Prevail on the Merits of Their Appeal.

Defendants can also show a likelihood of success on the merits of their appeal of the preliminary injunction. First, the Court will have erred if it enjoins the Secretary of Defense from exercising his independent authority to extend the effective date of the new accessions policy when the Secretary’s authority has not been challenged in this case and was not properly before the Court.

Second, the Court erred by entering a worldwide injunction, particularly in light of the fact that only two Plaintiffs are challenging the accession provision of the Presidential Memorandum and their alleged injuries could be remedied by an injunction that applies only to them. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (explaining that equitable relief should “be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”).

Third, the Court erred by concluding that at least one Plaintiff has established standing and a likelihood of irreparable harm from the accessions provision of the Presidential Memorandum. As discussed above, the impact of the policy on Plaintiff George is speculative; George has never sought a waiver, the details of the final policy have yet to be developed, and it is not clear that George would be eligible to accede even under DTM 16-005. Any harm to Plaintiff Gilbert is even more speculative, as Gilbert will not be eligible to commission until at least Spring 2019. *See* ECF No. 66-11 ¶¶ 6-8. In any event, as discussed above, any harm is not irreparable. *Guerra*, 942 F.2d at 274. These Plaintiffs’ allegations of speculative, future harm do not outweigh the hardship that the injunction will impose on the military.

Fourth, the Court erred on the merits, in particular by reaching substantial constitutional questions and not applying the appropriate level of deference when the military is presently examining the policy at issue.

Fifth, for the reasons given above, the Court abused its discretion in weighing the equities to decide that a preliminary injunction was warranted.

Accordingly, Defendants are likely to succeed on these issues in their appeal and have, at the very least, presented serious and difficult questions of law that are sufficient in light of the other factors to warrant a stay. *Riddick*, 751 F. Supp. 75, 76 (D. Md. 1990)

III. Request for Expedited Ruling

Because the January 1, 2018 deadline for complying with the accessions portion of the Court's preliminary injunction is quickly approaching, Defendants waive their right to file a reply to any opposition that Plaintiffs may file to this motion and respectfully request a decision on their motion by 12:00 PM on Thursday, December 14, so they may have sufficient time to seek an emergency stay from the Court of Appeals prior to January 1, 2018, if the Court denies the motion. Defense counsel has conferred with Plaintiffs' counsel, and Plaintiffs oppose this motion.

Date: December 12, 2017

Respectfully submitted,

CHAD A. READLER
Principal Deputy Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
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/s/ Ryan B. Parker
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Counsel for Defendants

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

**Civil Action No. 17-cv-2459
(MJG)**

DECLARATION OF LERNES J. HEBERT

I, Lernes J. Hebert, do hereby declare as follows:

1. I am currently the Acting Deputy Assistant Secretary of Defense, Military Personnel Policy, in the Office of the Under Secretary of Defense for Personnel and Readiness. In that capacity, I am responsible for overseeing the human resource policies impacting the sustainment of the all-volunteer-force for the Department of Defense (“DoD” or “the Department”), which consists of 1.4 million active duty military personnel and 1.1 million Guard and Reserve personnel. I have served in Military Personnel Policy since August 2003 and have led the Department through a number of major personnel initiatives and policy changes. Prior to my retirement from the United States Air Force in the rank of Colonel after 24 years of active service, I served at every level of the field of personnel management to include key assignments in the Office of the Secretary of Defense, the Air Staff, at the Air Force Personnel Center, and with Air Combat Command. I hold a Master of Science Degree in

National Security Strategy from the National War College and a Master of Arts degree in Management and Computer Resource Management from Webster University.

2. In the exercise of my official duties, I have been made aware of the above-referenced litigation pending in the U.S. District Court for the District of Maryland, as well as three additional suits by transgender individuals pending in other jurisdictions, including *Jane Doe I v. Trump*, pending in the District of Columbia, in which I have submitted a declaration similar to the one here. Specifically, I am aware of the preliminary injunction entered by the Court in this action on November 21, 2017, with respect to three aspects of the Presidential Memorandum of August 25, 2017, including the provision directing DoD to maintain the Department's longstanding policy which generally prohibits accession of transgender individuals into military service. My understanding is that the Court's injunction resets an effective date of January 1, 2018, for the accessions provisions of Defense Department Directive-Type Memorandum ("DTM") 16-005, issued on June 30, 2016, which allows for the accession of transgender individuals into the military.

3. I submit this declaration in support of Defendants' Motion for a Partial Stay of the Court's Preliminary Injunction Orders Pending Appeal. The purpose of this declaration is to provide the Court with my assessment, based on my experience and professional judgment, regarding the feasibility of implementing the court's orders by January 1, 2018, and the harmful impact to the military, its missions, and readiness if it is required to comply with the Court's orders that mandate the January 1, 2018 effective date for the accessions policy in DTM 16-005. The statements made herein are based on my personal knowledge and information available to me in the course of my official duties.

4. Secretary of Defense Mattis exercised his authority on June 30, 2017, to defer the effective date for the accessions provisions of DTM 16-005 from July 1, 2017, to January 1, 2018. *See* Department of Defense, Release No. NR-250-17 (June 30, 2017). Subsequently, the Presidential Memorandum of August 25, 2017, directed the Secretary of Defense (and the Secretary of Homeland Security with respect to the U.S. Coast Guard) to maintain the then-currently effective policy restricting accession by transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the President. The Presidential Memorandum also directed the Secretary of Defense to submit an implementation plan to the President by February 21, 2018, with respect to the policy set forth in the memorandum concerning accession and service by transgender individuals in the military. The Presidential Memorandum further directed that the implementation plan shall adhere to the determinations made by the Secretary as to what steps are appropriate and consistent with military effectiveness, lethality, budgetary constraints, and existing law. The review being undertaken by the Panel of Experts appointed by the Secretary on September 14, 2017, to carry out the study directed by the President remains ongoing. The Panel's work is expected to result in recommendations to the Secretary of Defense early next year. The Department would also establish the policy, standards, and procedures to support those Panel recommendations adopted by the Secretary. Thus, at present, the Department is studying revisions to policy concerning military service by transgender individuals, to be completed in early 2018, while at the same time preparing to operate under a judicial order to implement DTM 16-005 by January 1, 2018.

5. Implementing the Court's orders with respect to the accessions policy in DTM 16-005 by January 1, 2018, will impose extraordinary burdens on the Department and the

military services. For organizations as large and as complex as DoD and the military services, the study, development, and implementation of significant personnel policies is necessarily a substantial undertaking. As set forth below, there are considerable requirements associated with implementing this significant and complex policy change across the Department, considering that those personnel directly responsible for execution number in the tens of thousands and are geographically dispersed across the United States. Specifically, 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. This requires that the following personnel have a working knowledge or in-depth medical understanding of the standards and identity validation requirements associated with processing an applicant under new requirements:

- 20,367 recruiters (responsible for resolving any gender identity conflict between an applicant's government identification documents and the gender in which they present themselves and assisting the applicant in completing the Accession Medical Prescreen Report (DD Form 2807-2), including by providing substantiating and supporting medical documents);
- 2,785 employees across 65 geographically dispersed Military Entrance Processing Stations (MEPS), including 568 medical division personnel, 102 Chief and Assistant Chief Medical Officers, and approximately 375 fee-based medical providers, all necessitating in-depth knowledge of the standards;
- 32 Service Medical Waiver Authorities authorized to grant medical waiver requests following a thorough evaluation of the applicant's medical history and recommendation from the MEPS Chief Medical Officer; and

- Personnel at the nine initial military entrance training locations (“boot camps”) and the associated military hospitals that support them.

6. Beyond the sheer number of components and personnel involved, the implementation of accessions criteria is itself a complex undertaking. Accession criteria are based on service needs and are designed to ensure that those individuals accepted are “qualified, effective, and able-bodied persons” (10 U.S.C. § 505) who are capable of successfully performing military duties. Such duties involve a wide range of demands including exposure to danger, emotional stress, harsh environments, and the operation of dangerous, sensitive or classified equipment. Such demands are not normally found in civilian occupations. Further, all military members must be available for worldwide duty 24 hours a day without restriction or delay. This duty may be in remote areas lacking immediate and comprehensive medical support. An important objective of this thorough applicant screening is to ensure that persons accepted for the military are physically and psychologically qualified to withstand such isolation and rigors. These policies exist to protect both the individuals concerned, as well as members of their units and the overall readiness of the force. The accession screening process requires military and medical professionals well versed in the standards, and their applicability to military readiness, to ensure both the individual and the Department’s best interests are served. In the case of the transgender accession standards, the standards themselves are complex, interdisciplinary standards necessitating evaluation across several systems of the body, to include behavioral and mental health (e.g. diagnosis of gender dysphoria or related comorbidities), surgical procedures (particularly thoracic and genital), and endocrinology (for the purposes of cross-sex hormone therapy). No other accession standard has been implemented that presents such a multifaceted review of an applicant’s medical history.

7. It is also important to remember that this court-mandated policy change comes at a time when the military's operational tempo remains high and DoD's primary focus is on ongoing combat and contingency operations overseas.

8. Accordingly, if the Department is compelled to execute transgender accessions by January 1 absent sufficient guidance, resources, and training, the possibility exists that transgender applicants may not receive the appropriate medical and administrative accession screening necessary for someone with a complex medical condition. As a result, an applicant may be accessed for military service who is not physically or psychologically equipped to engage in combat/operational service.

9. Although the Department was in the process of implementing DTM 16-005 after its issuance in June 2016, that process was first extended by the Secretary in June 2017, and then deferred further pending completion of the study directed by the President on August 25, 2017. In addition, key personnel involved in that accession enterprise have rotated in the past several months, necessitating additional preparation, training, and communication to ensure those responsible for application of the accession standards are thoroughly prepared. Thus, 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.

10. Finally, especially given that this extensive and elaborate process for implementing the DTM 16-005 accessions policy is time-consuming and costly, the Department will be twice burdened if it is required to implement DTM 16-005 by January 1, and then potentially a different policy after the Department concludes its study and finalizes a policy. It is possible that the accession standards and the implementing procedures that result from that

ongoing policy review could be different from those that the Court has directed DoD to implement on January 1, 2018. Carrying out the implementation enterprise again, after the ongoing policy review is completed, would not only present the prospect of significant duplicative costs and administrative burdens, but the high potential for sowing confusion in the ranks as to the applicable policy.

Pursuant to 28 U.S.C. § 1746(2), I declare under the penalty of perjury that the foregoing is true and correct.

Executed on 12/06/17



Lernes J. Hebert



Chambers of
Hon. Marvin J. Garbis
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201

December 13, 2017

ALL COUNSEL OF RECORD

Re: Stone v. Trump, MJG-17-2459

Dear Counsel:

I write to confirm the conference held this date.

Defendants, by Defendants' Motion for Clarification and, If Necessary, A Partial Stay of Preliminary Injunction Pending Appeal [ECF No. 91] specifically seek a stay pending appeal of the portion of the Preliminary Injunction that states that

James Mattis, in his official capacity as Secretary of Defense . . . shall not enforce or implement the following polic[y:] . . . [To} maintain the currently effective policy regarding accession of transgender individuals into military service beyond January 1, 2018

Preliminary Injunction 2-3, ECF No. 84 (quoting President Trump's Memorandum for the Secretary of Defense and the Secretary of Homeland Security, dated August 25, 2017, and entitled "Military Service by Transgender Individuals").

Defendants seek clarification that the Preliminary Injunction does not prevent Secretary Mattis from deciding, independently of the said policy, that the policy cannot be carried out and that there is a necessity to continue the denial of transgender accession into the military beyond January 1, 2018, and from acting upon that decision.

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2017, I filed the foregoing addendum with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Tara S. Morrissey
Tara S. Morrissey