The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Case No. 2:17-cv-01297-MJP **DECLARATION OF SAMANTHA EVERETT IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR CLARIFICATION AND, IF NECESSARY, A PARTIAL STAY OF PRELIMINARY INJUNCTION PENDING APPEAL** NOTE ON MOTION CALENDAR: December 29, 2017

I, Samantha Everett, affirm under penalty of perjury under the laws of the United States to the following:

1. I am counsel of record for Plaintiffs in this action, am over age 18, and competent to be a witness. I am making this declaration based on facts within my own personal knowledge. I provide this declaration in support of Plaintiffs' opposition to Defendants' motion for clarification and, if necessary, a partial stay of preliminary injunction pending appeal.

2. Attached hereto as **Exhibit 1** is a true and correct copy of *Doe v. Trump*, No. 17-1597, Dkt. 75 (D.D.C. Dec. 11, 2017).

3. Attached hereto as **Exhibit 2** is a true and correct copy of *Doe v. Trump*, No. 17-5267, Doc. #1710359 (D.C. Cir. Dec. 22, 2017).

4. Attached hereto as **Exhibit 3** is a true and correct copy of *Stone v. Trump*,

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No. 17-2398, Dkt. 31 (4th Cir. Dec. 21, 2017).

5. Attached hereto as **Exhibit 4** is a true and correct copy of *Stockman v. Trump*, No. 5:17-cv-1799, Dkt. 79 (C.D. Cal. Dec. 22, 2017).

6. Attached hereto as **Exhibit 5** is a true and correct copy of a Department of Defense memorandum titled, "Policy Memorandum 2-5, Transgender Applicant Processing," dated December 8, 2017, which was filed with the State of Washington's addendum in the Ninth Circuit appeal of the preliminary injunction.

7. Attached hereto as **Exhibit 6** is a true and correct copy of Department of Defense Release No. NR-417-17, DOD Complying with Court Orders to Access Transgender Persons into the Military (Dec. 11, 2017), *available at* https://www.defense.gov/News/News-Releases/News-Release-View/Article/1393719/dod-complying-with-court-orders-to-access-transgender-persons-into-the-military/.

8. Attached hereto as **Exhibit 7** is a true and correct copy of a Palm Center article, Former Army Secretary Questions Trump Administration Claim that Military Is Not Ready to Accept Transgender Applicants (Dec. 7, 2017), *available at* http://www.palmcenter.org/former-senior-pentagon-official-disputes-trump-administration-claim-military-not-ready-for%E2%80%8B-transgender-applicants-2/.

9. Attached hereto as **Exhibit 8** is a true and correct copy of a Palm Center article, Former Senior Pentagon Official Disputes Trump Administration Claim That Military Is Not Ready for Transgender Applicants (Dec. 6, 2017), *available at* http://www.palmcenter.org/former-senior-pentagon-official-disputes-trump-administration-claim-military-not-ready-for%E2%80%8B-transgender-applicants/.

10. Attached hereto as **Exhibit 9** is a true and correct copy of a Palm Center publication, DoD Is Ready to Accept Transgender Applicants (Dec. 2017), *available at* http://www.palmcenter.org/wp-content/uploads/2017/12/DOD-Is-Ready-to-Accept-Transgender-Applicants-2.pdf..

Dated: December 27, 2017

s/ Samantha Everett
Samantha Everett

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on December 27, 2017.

s/ Chy Eaton
Chy Eaton

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Exhibit 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, *et al.*, Plaintiffs v. DONALD J. TRUMP, *et al.*, Defendants	Civil Action No. 17-1597 (CKK)

ORDER
(December 11, 2017)

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

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

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

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

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

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

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

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

1. Irreparable Injury

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

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

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

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

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

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

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

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

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

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

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

2. Likelihood of Success on the Merits

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

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

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

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

3. Harm to Plaintiffs

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

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

4. Public Interest

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

5. Conclusion

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

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

Exhibit 2

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5267 **September Term, 2017**

1:17-cv-01597-CKK

Filed On: December 22, 2017

Jane Doe 1, et al.,

Appellees

v.

Donald J. Trump, in his official capacity as President of the United States, et al.,

Appellants

BEFORE: Rogers, Tatel, and Millett, Circuit Judges

O R D E R

Upon consideration of the emergency motion for an administrative stay and partial stay pending appeal, the response thereto, and the reply; Citizens United, et al.'s motion for leave to file an amicus brief in support of Appellants, the lodged amicus brief; and the amicus brief of retired military officers and former national security officials in support of Appellees; and the Rule 28(j) letters, it is

ORDERED that the motion for leave to file an amicus brief in support of Appellants be granted. The Clerk is directed to file the lodged amicus brief. It is

FURTHER ORDERED that the emergency motion for an administrative stay and partial stay pending appeal be denied, as Appellants have not satisfied the stringent requirements for a stay pending appeal. See Nken v. Holder, 556 U.S. 418, 434 (2009); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2017).

At issue in this motion is the district court's decision to preliminarily enjoin Sections 1(b) and 2(a) of the August 25, 2017, Presidential Memorandum. When considering whether to grant a stay pending appeal, courts traditionally consider: "(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

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proceeding; and (4) where the public interest lies." Nken, 556 U.S. at 426 (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)). "We review a district court decision regarding a preliminary injunction for abuse of discretion, and any underlying legal conclusions de novo." Katz v. Georgetown University, 246 F.3d 685, 688 (D.C. Cir. 2001) (quoting CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995)).

First, Appellants have not shown a strong likelihood that they will succeed on the merits of their challenge to the district court's order. As the district court explained, "the sheer breadth of the exclusion ordered by the [Memorandum], the unusual" and abrupt "circumstances surrounding the President's announcement of [the exclusion], the fact that the reasons given for [it] do not appear to be supported by any facts, and the recent rejection of those reasons by the military itself," taken together, "strongly suggest that Plaintiffs' Fifth Amendment claim is meritorious." Memorandum Opinion Granting Preliminary Injunction, Doe 1 v. Trump, No. 17-1597, at 3 (Oct. 30, 2017) (Addendum (Add.) 14).

Appellants' argument that operation of the district court's injunction should be stayed is particularly flawed as to plaintiff Midshipman Regan Kibby and other transgender individuals who, like Midshipman Kibby, are enrolled in the United States Naval Academy, the United States Military Academy or the United States Air Force Academy. That is because Appellants explicitly do not seek a stay of that portion of the preliminary injunction enforcing the Retention Directive, which governs transgender individuals currently serving within the military. But under federal law, those individuals "serv[ing] as a cadet at the United States Military, Air Force, or Coast Guard Academy, or as a midshipman at the United States Naval Academy" are as a matter of statutory law on "active duty" and in the "active military, naval, or air service," 38 U.S.C. §§ 101(21)(D) & (24)(A); see also 38 U.S.C. § 1965(1)(D). In addition, federal law generally accords Cadets and Midshipmen the same process as other active duty personnel in the event the service moves to separate them for physical and/or medical reasons. See 10 U.S.C. §§ 1217-1218. Federal law identifies Midshipman and Cadet as a rank with its own pay rate, 37 U.S.C. § 203(c), and individuals attending the military academies are appointed by the President, inducted into the military, have a service obligation, swear an oath to protect and defend the United States, wear military uniforms, receive military pay and allowances, and are subject to the Uniform Code of Military Justice during their service. 10 U.S.C. §§ 801, 802, 4346, 6959; 37 U.S.C. §§ 203, 422. Cadets and Midshipmen may be awarded and wear the National Defense

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Service Medal, which is awarded for "honorable active service." SECNAVINST 1650.1H(8)(b)(1), (4) (emphasis added); see also 32 C.F.R. § 578.23(a) (2006); 10 U.S.C. § 6264 (eligibility for Navy and Marine Corps Medal). Because Appellants do not seek a stay of the retention provision of the preliminary injunction and, in arguing that Midshipman Kibby is subject to the Accession Directive, have failed to address federal statutes bearing on the active military status of Cadets and Midshipmen, Appellants have as yet offered no rational explanation for treating United States military academy Midshipmen and Cadets differently from those others on active duty who fall within the unchallenged (at this stage) Retention Directive. Granting a stay as to transgender individuals within the United States military academies would directly impede and impair their advancement through the Midshipman and Cadet ranks towards commissioning as officers and their current and immediate career and educational progression.

Second, Appellants have also failed to demonstrate that allowing the accession of transgender troops on January 1, 2018, will cause them irreparable harm. As the district court observed in declining to grant a stay, Appellants rely on "sweeping and conclusory statements" without "explain[ing] what precisely needs to be completed by [January 1, 2018,] in order for [Appellants] to be prepared to begin transgender accessions." Order Denying a Stay, Doe 1 v. Trump, No. 17-1597, at 5 (Dec. 11, 2017) (Add. 5). With respect to implementation of transgender accession into the military, Appellants did not even inform this court of a Defense Department memorandum issued December 8, 2017, that provides detailed directions and guidance governing "processing transgender applicants for military service," directions that the Secretary of Defense's Department commanded "shall remain in effect until expressly revoked." See Department of Defense, United States Military Entrance Processing Command, Policy Memorandum 2-5, Transgender Applicant Processing, at 1 (Dec. 8, 2017). That open-ended directive documenting concrete plans already in place to govern accession was issued before the district court ruled on the motion for a stay pending appeal.

Moreover, transgender people are already serving openly in the military. See DODI 1300.28(1.2)(a) (premising Carter policy "on the conclusion that open service by transgender persons . . . is consistent with military service and readiness"); ALNAV 053/16(2), (5)(a)(1)-(4), (7)(a)(5) (permitting transgender Sailors and Marines to serve openly, effective August 5, 2016). And Appellants have not shown that any training or medical demands associated with the accession of transgender troops—all of whom must be medically stable for 18 months before entry (absent a waiver)—are different in kind or degree from the demands associated with the retention of existing troops. To

the extent Appellants argue that "[t]he preliminary injunction . . . harms the military by forcing it to implement a significant change to its accession standards before it even completes its study of the issue," Appellants' Mot. at 15, Appellants have failed to demonstrate that the study they wish to undertake is motivated by any necessity separate and apart from compliance with the Presidential Memorandum. Nor do they identify what further information is needed beyond the extensive study already undertaken and the steps already completed for the accession of transgender individuals. Appellants, in other words, have provided no non-conclusory factual basis or military justification for their apparent position that the extensive study already conducted prior to President Trump's policy shift was inadequate or otherwise in need of supplementation.

Appellants argue that a partial stay should be granted to permit Secretary of Defense James N. Mattis to "exercis[e] his own discretion to defer adopting the Carter policy for a limited time." Appellants' Mot. at 2. But nowhere in the filings or record before this court have Appellants advised that Secretary Mattis actually desires to or, absent the district court injunction, would make a decision, wholly independent of the Presidential Memorandum or directive, to extend the January 1, 2018, deadline for accession. Nor have Appellants identified anywhere in their stay papers or the record before this court any proposed independent grounds on which Secretary Mattis would extend the deadline, or the scope of Secretary Mattis's asserted authority to act in this matter entirely independently of the specific directions of the Commander in Chief. Cf. 10 U.S.C. § 113(b) ("The Secretary is the principal assistant to the President in all matters relating to the Department of Defense. Subject to the direction of the President and to this title and section 2 of the National Security Act of 1947 (50 U.S.C. 3002), he has authority, direction, and control over the Department of Defense." (emphases added)). Appellants cite to no relevant delegations of authority within any federal statute, regulation, or other legal source that could assist this court in understanding the nature and scope of the asserted independent legal authority. Nor have they proffered any factual or legal basis on which Secretary Mattis might determine that such an extension is warranted. Appellants argue instead that Secretary Mattis extended the compliance deadline from July 1, 2017 until January 1, 2018. But nothing in that two-sentence press release says or even suggests that the decision was made independently of the President's direction. See Statement by Chief Pentagon Spokesperson Dana W. White on Transgender Accessions, Release No: NR-250-17 (June 30, 2017) (Add. 96). And the Secretary's August 29, 2017 statement makes clear that his actions are being undertaken to "carry out the president's policy direction." See

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Statement by Secretary of Defense James Mattis on Military Service by Transgender Individuals, Release No: NR-312-17 (Aug. 29, 2017) (Add. 95).

Third, Appellants have failed to show that issuance of the stay will not substantially injure the other parties to the proceeding. Appellants argue that Plaintiffs Kibby and Kohere will not be eligible to accede until, at the earliest, 2020, but in addition to ignoring the active-duty military status of Midshipmen and Cadets, that argument also fails to recognize that Plaintiffs' inability to accede in the future or to progress through higher Midshipman ranks within the Naval Academy disqualifies them from educational opportunities now. Plaintiff Kohere is currently ineligible to contract as a cadet in the ROTC, Add. 115-16, and Appellants have not shown that Plaintiff Kibby will be allowed to remain in the Navy and continue his education at the Naval Academy if he is ineligible to receive a commission upon graduation, see Supplemental Addendum 98.

Fourth, given that the enjoined accession ban would directly impair and injure the ongoing educational and professional plans of transgender individuals and would deprive the military of skilled and talented troops, allowing it to take effect would be counter to the public interest.

Finally, in the balancing of equities, it must be remembered that all Plaintiffs seek during this litigation is to serve their Nation with honor and dignity, volunteering to face extreme hardships, to endure lengthy deployments and separation from family and friends, and to willingly make the ultimate sacrifice of their lives if necessary to protect the Nation, the people of the United States, and the Constitution against all who would attack them.

For those reasons, Appellants have not met their burden of demonstrating that a stay pending appeal is warranted. Given Appellants' failure to make a compelling case on the current record that any of the stay factors weigh in their favor, the court denies the stay. It is

FURTHER ORDERED, on the court's own motion, that the parties brief the merits of this appeal pursuant to the following briefing schedule:

Appellants' Brief	January 5, 2018
Appendix	January 5, 2018
Appellees' Brief	January 16, 2018

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Reply Brief January 19, 2018

It is

FURTHER ORDERED that oral argument be scheduled before this panel on Friday, January 26, 2018, at 10:00 a.m. in Courtroom 31.

To enhance the clarity of their briefs, the parties are urged to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statutes with widely recognized initials, briefs should not contain acronyms that are not widely known. See D.C. Circuit Handbook of Practice and Internal Procedures 41 (2017); Notice Regarding Use of Acronyms (D.C. Cir. Jan. 26, 2010).

Parties are directed to hand deliver the paper copies of their briefs to the Clerk's office on the date due. All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

Exhibit 3

FILED: December 21, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-2398
(1:17-cv-02459-MJG)

BROCK STONE, Petty Officer First Class; KATE COLE, Staff Sergeant; JOHN DOE, Senior Airman; SEVEN ERO GEORGE, Airman First Class; TEAGAN GILBERT, Petty Officer First Class; TOMMIE PARKER, Technical Sergeant; AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, INCORPORATED

Plaintiffs - Appellees

v.

DONALD J. TRUMP, in his official capacity as President of the United States; JAMES N. MATTIS, in his official capacity as Secretary of Defense, U.S. Department of Defense; RYAN D. 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; HEATHER WILSON, in her official capacity as Secretary of the U.S. Department of the Air Force

Defendants - Appellants

RETIRED MILITARY OFFICERS AND FORMER NATIONAL SECURITY OFFICIALS

Amicus Supporting Appellees

O R D E R

Upon consideration of appellants' emergency motion for administrative stay and partial stay pending appeal, appellees' response to the motion, appellants' reply, the parties' supplemental authorities, and the amicus brief in support of appellees, the court denies the motion for administrative stay and partial stay pending appeal.

Entered at the direction of the panel: Judge Motz, Judge Diaz, and Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk

Exhibit 4

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 17-1799 JGB (KKx)**	Date	December 22, 2017
Title	***Aiden Stockman et al. v. Donald J. Trump et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: **Order (1) DENYING Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure (Dkt. No. 36); and (2) GRANTING Plaintiffs' Motion for Preliminary Injunction (Dkt. No. 15)**

Two motions are before the Court. First, Plaintiffs Aiden Stockman, Nicolas Talbott, Tamasyn Reeves, Jaquice Tate, John Doe 1, John Doe 2, Jane Doe, and Equality California (collectively, "Plaintiffs") have filed a Motion for Preliminary Injunction. ("MPI," Dkt. No. 15.) Second, Defendants Donald J. Trump ("President Trump"), in his official capacity as President of the United States; James N. Mattis, in his official capacity as Secretary of Defense; Joseph F. Dunford, Jr., in his official capacity as Chairman of the Joint Chiefs of Staff; Richard V. Spencer, in his official capacity as Secretary of the Navy; Ryan D. McCarthy, in his official capacity as Acting Secretary of the Army; Heather A. Wilson, in her official capacity as Secretary of the Air Force; and Elaine C. Duke, in her official capacity as Acting Secretary of Homeland Security (collectively, "Defendants,") have filed a Motion to Dismiss Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. ("MTD," Dkt. No. 36.)

The Court held a hearing on these matters on December 11, 2017. After considering the issues raised in oral argument, the papers filed supporting and opposing these motions, and the amici briefs, the Court DENIES Defendants' Motion to Dismiss. Additionally, the Court GRANTS Plaintiffs' Motion for Preliminary Injunction.

I. BACKGROUND

A. Procedural History

On September 5, 2017, Plaintiffs filed a complaint against Defendants, asserting four causes of action: (1) Fifth Amendment equal protection; (2) Fifth Amendment due process; (3) Fifth Amendment right to privacy; and (4) First Amendment retaliation for free speech and expression. ("Complaint," Dkt. No. 1 ¶¶ 49–77.) Plaintiffs seek declaratory relief.

Plaintiffs filed their MPI on October 2, 2017. (Dkt. No. 15.) Defendants filed their MTD and Opposition to Plaintiffs' MPI on October 23, 2017. (Dkt. No. 36.) Plaintiffs filed a Reply for their Motion to Preliminary Injunction and an Opposition to Defendants' Motion to Dismiss on November 6, 2017. ("MPI Reply," Dkt. No. 47.) Defendants filed their MTD reply on November 13, 2017. ("MTD Reply," Dkt. No. 61.)

B. Factual History

The parties do not dispute the basic facts in this case. In June 2016, after multiple years of data review, the Department of Defense ("DOD") announced it would implement a new policy allowing transgender people to serve openly in the United States military ("June 2016 Policy"). (See generally Dkt. No. 28, Exh. C.) In reliance on this policy change, many transgender individuals came out to their chain of command without incident. On July 26, 2017, President Trump changed course, tweeting:

> After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.

("President Trump's Twitter Proclamation," Dkt. No. 28, Exh. F.)

On August 25, 2017, President Trump issued a memorandum ("Presidential Memorandum") formalizing the policy he announced via Twitter. (Dkt. No. 28, Exh. G.) The Presidential Memorandum contains several operative prongs: (1) it indefinitely extends the prohibition preventing transgender individuals from entering the military (the "Accession Directive"); (2) it requires the military to authorize the discharge of transgender service members (the "Retention Directive"); and (3) it largely halts the use of DOD or Department of Homeland Security ("DHS") resources to fund sex reassignment surgical procedures for current military members ("Sex Reassignment Surgery Directive") (collectively, "Directives"). (Id. at 47.) The DOD must submit a plan implementing the Presidential Memorandum by February 2018. (Id.)

On September 14, 2017, Defendant Secretary of Defense James Mattis ("Defendant Mattis") issued an "Interim Guidance"[1] which established the temporary DOD policy regarding transgender persons. (MTD at 7). While the Interim Guidance is in effect, no current transgender service member will be discharged or denied reenlistment solely based on their transgender status. Id. Defendant Mattis must present a plan to implement the Presidential Memorandum to President Trump by February 21, 2018. (Id.)

1. Military Transgender Policy before July 2017

In August 2014, the DOD removed references to mandatory exclusion based on gender and identity disorders from its physical disability policy. ("Declaration of Eric K. Fanning," Dkt. No. 22 ¶¶ 12–13.) Additionally, the DOD directed each branch of the armed forces to assess whether there remained any justification to prohibit service by openly transgender individuals. (Id. at 13.)

In July 2015, then-Secretary of Defense Ashton B. Carter created a group to begin comprehensively analyzing whether any justification remained validating the ban on open service by transgender individuals. ("Declaration of Brad Carson," Dkt. No. 26 ¶¶ 8–9.) The working group created by Secretary Carter included the Armed Services, the Joint Chiefs of Staff, the service secretaries, and other specialists from throughout the DOD (the "Working Group"). (Id. ¶ 9.) The review process included analyzing evidence from a variety of sources, such as scholarly materials and consultations with medical experts, personnel experts, readiness experts, health insurance companies, civilian employers, and commanders of units with transgender service members. (Id. ¶ 10.)

Additionally, the Working Group commissioned the RAND Corporation, a nonprofit research institution that provides analysis to the military, to complete a comprehensive study on the impact of permitting transgender individuals to serve openly. (Id. ¶ 11.) The 113-page study, "Assessing the Implications of Allowing Transgender Personnel to Serve Openly" (the "RAND Report," Dkt. No. 26, Exh. B), examined factors such as the health care costs and readiness implications of allowing open service by transgender persons. The RAND Report also analyzed the other 18 foreign militaries which permit military service by transgender individuals, focusing on Australia, Canada, Israel, and the United Kingdom—the four countries "with the most well-developed and publicly available policies on transgender military personnel." (RAND Report at 23.) This comparative analysis found no evidence that allowing open service by transgender persons would negatively affect operational effectiveness, readiness, or unit cohesion. (Id. at 24.) Moreover, the RAND Report concluded healthcare costs for transgender service members would "have little impact on and represents an exceedingly small proportion of [the DOD's] overall health care expenditures." (Id. at 22–23.) Specifically, the RAND Report found health care costs would increase "by between $2.4 million and $8.4 million annually." (Id. at 22.) By

[1] Neither party has included a copy of the Interim Guidance as an exhibit, but a copy may be found at https://defense.gov/Portals/1/Documents/PDFs/Military-Service-By-Transgender-Individuals-Interim-Guidance.pdf (last visited December 8, 2017).

contrast, the overall healthcare cost of those serving in the active component of the military is approximately $6 billion annually, while the overall healthcare cost for the DOD is $49.3 billion annually. (Id. at 22–23.) Furthermore, the RAND Report noted discharging transgender service members, "[a]s was the case in enforcing the policy on homosexual conduct, [] can involve costly administrative processes and result in the discharge of personnel with valuable skills who are otherwise qualified." (Id. at 77.) At the conclusion of its analysis, the Working Group "did not identify any basis for a blanket prohibition on open military service of transgender people. Likewise, no one suggested . . . that a bar on military service by transgender persons was necessary for any reason, including readiness or unit cohesion." (Declaration of Eric K. Fanning ¶ 27.)

Based on the results of this review process, on June 30, 2016, Secretary Carter issued a Directive-type Memorandum announcing transgender Americans may serve openly and without fear of being discharged based solely on that status. ("DTM 16-005," Dkt. No. 22, Exh. C.) Secretary Carter stated:

> 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.

(Id. at 135.)

This assessment was shared by some of the highest ranking military officials in the country. (See generally Declaration of Eric K. Fanning; "Declaration of Michael Mullen," Dkt. No. 21; "Declaration of Raymond E. Mabus," Dkt. No. 23; "Declaration of Deborah L. James," Dkt. No. 24.) According to the directive, transgender individuals would be permitted to enlist in the military and serve openly beginning on July 1, 2017. (DTM 16-005, at 137.) This date was later postponed until January 1, 2018. (See Dkt. No. 28, Exh. E.) The DOD also issued handbooks, regulations, and memorandums which provided instruction to military commanders in how to implement the new policies, set forth guidance related to medical treatment provisions, and expressly prohibited discrimination on the basis of gender identity. (See "Transgender Service in the U.S. Military," Dkt. No. 22, Exh. 6.)

The former military leaders among the Working Group, such as, former Secretary of the Army Eric K. Fanning, former Chairman of the Joint Chiefs of Staff Admiral Michael Mullen, former Secretary of the Navy Raymond E. Maubus, and former Secretary of the Air Force Deborah L. James, have all explicitly drawn parallels connecting the allowance of open service by transgender persons to the allowance of open service by gay and lesbian persons. (See Declaration of Eric K. Fanning ¶¶ 10–16; Declaration of Michael Mullen ¶¶ 9–15; Declaration of Raymond E. Mabus ¶¶ 19, 24; Declaration of Deborah L. James ¶ 44.) These leaders contend many of the same worries accompanying allowing open transgender service were vocalized, and eventually allayed, in the context of ending "Don't Ask Don't Tell." (See Declaration of Eric K.

Fanning ¶¶ 10–16; Declaration of Admiral Michael Mullen ¶¶ 9–15; Declaration of Raymond E. Mabus ¶¶ 19, 24; Declaration of Deborah L. James ¶ 44.)

2. Military Transgender Policy after July 2017

On July 26, 2017, President Trump changed course, announcing via Twitter that transgender individuals would not be permitted to serve in the military. (President Trump's Twitter Proclamation.) One month later, his Presidential Memorandum promulgated the Accession Directive, Retention Directive, and Sex Reassignment Surgery Directive. (Presidential Memorandum.) President Trump stated the Obama Administration had "dismantled the [DOD and DHS's] established framework by permitting transgender individuals to serve openly in the military." (Id.) Additionally, he stated the Obama Administration failed to identify a sufficient basis to conclude ending the longstanding policy against open transgender service "would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." (Id.) The Accession Directive extends the policy prohibiting open accession into the military beyond January 1, 2018. The Retention and Sex Assignment Directives take effect on March 23, 2018. (Id.)

On September 14, 2017, Defendant Mattis issued the Interim Guidance, which stated the accession prohibition "remain[s] in effect because current or history of gender dysphoria or gender transition does not meet medical standards." (Interim Guidance.) The Interim Guidance notes this general prohibition is still "subject to the normal waiver process." (Id.) By February 21, 2018, Defendant Mattis must submit to President Trump "a plan to implement the policy and directives in the Presidential Memorandum." (Id.)

Regarding the Sex Assignment Directive, the Interim Guidance provides "[s]ervice members who receive a gender dysphoria diagnosis from a military medical provider will be provided treatment for the diagnosed medical condition." (Id.) However, "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." (Id.) This language essentially mirrors that of the Presidential Memorandum. (Presidential Memorandum.)

The reception to President Trump's policy change by the military has been somewhat critical. Current Chairman of the Joint Chiefs of Staff Joseph Dunford disagrees with the decision to reinstate the transgender ban, stating he "believe[s] that any individual who meets the physical and mental standards . . . should be afforded the opportunity to continue to serve." (Dkt. No. 28, Exh. I.) He has also previously told lawmakers transgender troops have served the military honorably and he would continue to abide by this sentiment for as long as he holds his position. (Id.) Additionally, it is not clear the nation's top military leaders were consulted about this policy change prior to President Trump's Twitter Proclamation. (See Dkt. No. 28, Exh. M.) Moreover, after the promulgation of President Trump's tweets, 56 retired generals and admirals signed a declaration stating a ban on open service by transgender persons would degrade military readiness. (Dkt. No. 28, Exh. O.)

C. The Plaintiffs

1. Aiden Stockman

Plaintiff Aiden Stockman is a transgender man from California who intended to join the Air Force. ("Stockman Declaration," Dkt. No. 16 ¶ 1.) Plaintiff Stockman has conducted online research to prepare for the enlistment process, including talking to friends and neighbors stationed at an Air Force base near his home. (Id. ¶ 9.) He came out to his family as transgender during his sophomore year of high school. (Id. ¶ 4.) During his junior year, he took the Armed Services Vocational Aptitude Battery ("ASVAB") test in hopes he could join the military upon graduation. (Id. ¶ 10.) Plaintiff Stockman intends to undergo chest surgery, also called "top surgery" as soon as possible, likely in the spring of 2018. (Id. ¶ 11.) He states that if the ban were lifted, he would go talk with a recruiter about enlisting as soon as his chest surgery is completed. (Id. ¶ 15.)

2. Nicolas Talbott

Plaintiff Nicolas Talbott is a transgender man from Ohio who intended to join the Air Force National Guard. ("Talbott Declaration," Dkt. No. 17 ¶ 1.) Plaintiff Talbott came out as transgender to his mother at the age of 16 and, in 2012, started taking hormones according to his transition plan. (Id. ¶¶ 5–6.) He states he tried to enlist but the military recruiters would not allow him because of his transgender status. (Id. ¶ 7.) After he learned the accession ban was lifted in June 2016, Plaintiff Talbott spoke with an Air Force National Guard recruiter who advised him to enlist. (Id. ¶ 11.) Plaintiff Talbott was told to get letters certifying that being transgender had no adverse effects on his ability to serve and that older, unrelated injuries would also have no adverse effects. (Id.) He then began studying for the ASVAB in anticipation of being allowed to join the military, but President Trump's Twitter Proclamation discouraged him. (Id. ¶ 14.) Plaintiff Talbott maintains he would seek immediate enlistment were the ban lifted today. (Id. ¶ 16.)

3. Tamasyn Reeves

Plaintiff Tamasyn Reeves is a transgender woman from California who wants to serve in the Navy. ("Reeves Declaration," Dkt. No. 18 ¶ 1.) Plaintiff Reeves had tried to enlist in the military in 2010, but was rejected because she, at the time, identified as gay. (Id. ¶ 5.) In 2011, she learned about what it means to be transgender and started coming out to her colleagues and friends. (Id. ¶ 6.) A year later, she started taking hormones to begin her medical transition. (Id. ¶ 7.) The policy change June 2016 excited Plaintiff Reeves, and she intended to enlist as soon as she finished her college degree. (Id. ¶ 9.) The revived ban, however, sunk her hopes. (Id. ¶ 10.) She states she would immediately talk to a recruiter about enlisting upon receiving her degree in the spring of 2018 if the ban was lifted. (Id. ¶ 12.)

4. Jaquice Tate

Plaintiff Jaquice Tate is a transgender man currently serving as a Sergeant in the Army. ("Tate Declaration," Dkt. No. 19 ¶ 1.) He enlisted in 2008 and has served domestically, in Germany, and on deployment in Iraq. (Id. ¶ 4.) For his service in Iraq, he was awarded an Army Commendation Medal. (Id. ¶ 6.) He has also received multiple Army Achievement Medals, Certificates of Appreciation, and two Colonel Coins of Excellence. (Id. ¶ 11.) Plaintiff Tate, in reliance on the June 2016 Policy, came out to his chain of command. (Id. ¶ 19.) In Fall of 2016, Plaintiff Tate, in conjunction with his chain of command and his doctor, created his medical transition plan. (Id. ¶ 21.) Consequently, he started taking hormones in February 2017 and received approval for chest surgery. (Id.) Plaintiff Tate expects to receive chest surgery in late 2017 or early 2018. (Id.) Plaintiff Tate feels as though the ban demeans his years of military service. (Id. ¶ 23.)

5. John Doe 1

Plaintiff John Doe 1 is a transgender man who currently serves as a Non-Commissioned Officer in the Air Force. ("John Doe 1 Declaration," Dkt. No. 29, Exh. 2.) Plaintiff John Doe 1 grew up in a military family and intends to make a career out of his military service. (Id. ¶¶ 2–3.) He has received numerous commendations and endorsements from his chain of command. (Id. ¶¶ 7–8.) In April 2017, in reliance on the June 2016 Policy, he came out to his chain of command and received a medical transition plan. (Id. ¶ 17.) Plaintiff John Doe 1 fears he will be discharged under the express terms of the ban. (Id. ¶ 19.) He understands the Sex Reassignment Surgery Directive denies him transition-related medical care. (Id. ¶ 21.) Consequently, he intends to pay out-of-pocket for chest surgery. (Id.) Plaintiff John Doe 1 is bewildered at how he went from first in his class at Airmen Leadership School to being deemed unfit to serve. (Id. ¶ 25.)

6. John Doe 2

Plaintiff John Doe 2 is a transgender man who currently serves in the Army. ("John Doe 2 Declaration," Dkt. No. 29, Exh. 3.) Plaintiff John Doe 2 enlisted in 2015 at the age of 17, and earned two Colonel Coins of Excellence by August 2017. (Id. ¶ 6.) He possess technical expertise pertaining to the operations, diagnostics, and maintenance of multichannel communications systems necessary for the Army to make real-time tactical decisions. (Id. ¶ 5.) His position requires Secret-level security clearance. (Id.) He expects to serve in the Army until he is eligible to receive retirement benefits. (Id. ¶ 11.) While Plaintiff John Doe 2 realized he was transgender in his junior year of high school, he did not come out to anyone until he joined the Army. (Id. ¶¶ 15, 18.) In reliance on the June 2016 policy change, he came out to his chain of command and began researching the new policies and guidance. (Id. ¶¶ 20–21.) He worked with an Army doctor to develop a medical transition plan and treatment. (Id. ¶ 21.) After meeting with his commander and doctors, Plaintiff John Doe 2 was approved for chest surgery, and expects to have it completed in March 2018. (Id. ¶ 22.) He anticipates completing his medical transition by 2020. (Id.) However, after the promulgation of the Presidential Memorandum, he fears being subject to an imminent involuntary discharge. (Id. ¶¶ 28–29.)

7. Jane Doe 2

Plaintiff Jane Doe is a transgender woman currently serving in the Air Force. ("Jane Doe Declaration," Dkt. No. 29, Exh. 4.) Plaintiff Jane Doe entered the military in 2010, having already completed her college degree. (Id. ¶¶ 2–3.) As a consequence, she entered the military as an Airman First Class. (Id. ¶ 3.) After basic training, she was stationed domestically then selected for deployment in the Middle East. (Id.) She has received an Air Force Commendation Medal for distinctly exemplary service. (Id. ¶ 5.) Plaintiff Jane Doe intends on serving in the military until she is eligible for a pension and retirement benefits. (Id. ¶ 9.) While she identified as transgender at age 14, she waited until college to come out to those closest to her. (Id. ¶ 11.) In reliance on the June 2016 policy change, she came out to the rest of her family and to the public, updating her social media to her correct gender. (Id. ¶ 13.) With her chain of command and doctor, she created a medical transition plan which had received all the necessary approvals. (Id. ¶ 14.) She fears the Presidential Memorandum will strip her of her career, salary, and housing. (Id. ¶¶ 15–18.)

8. Equality California

Plaintiff Equality California ("EQCA") is an organization dedicated to LGBTQ civil rights. ("Declaration of Rick Zbur," Dkt. No. 20 ¶ 2.) Its membership includes transgender individuals in active service, transgender military veterans, and transgender individuals who have intend to pursue long-term military careers. (Id. ¶ 4.)

D. Pending Cases

On October 30, 2017, the Honorable Colleen Kollar-Kotelly of the D.C. District Court issued a nationwide injunction concerning the Accession and Retention Directives. See Doe 1 v. Trump, --- F. Supp. 3d ----, CV 17-01597 (CKK), 2017 WL 4873042, at *2 (D.D.C. Oct. 30, 2017). That court, however, dismissed the Sex Reassignment Surgery Directive claim, holding the plaintiffs lacked standing to challenge that directive. Id. at *23–24. The court noted one plaintiff, who had her transition-related procedure canceled by the Defense Health Agency, later received a waiver and is currently having her request processed. Id. at *24. A second plaintiff's prospective harm was deemed too speculative, as her transition treatment plan would not begin until after she returned from active duty in Iraq. Id. Finally, a third plaintiff is set to begin transition surgery before the ban would go into effect, also excluding him from harm. Id. The court concluded "no Plaintiffs have demonstrated that they are substantially likely to be impacted by the Sex Reassignment Surgery Directive, and none have standing to challenge that directive." Id.

The court in Doe 1 conducted a lengthy analysis regarding the import of the Presidential Memorandum. As here, Defendants in Doe 1 essentially argued "the Presidential Memorandum merely commissioned an additional policy review; that review is underway; nothing is set in stone, and what policy may come about is unknown; and regardless, Plaintiffs are protected by

the Interim Guidance." Id. at *17. Finding the defendants' arguments to be a "red herring," the court stated:

> The President controls the United States military. The directives of the Presidential Memorandum, to the extent they are definitive, are the operative policy toward military service by transgender service members. The Court must and shall assume that the directives of the Presidential Memorandum will be faithfully executed. See Nat'l Mining Ass'n v. U.S. Army Corps of Engineers, 145 F.3d 1399, 1408 (D.C. Cir. 1998) (assessing "faithful" application of agency rule). Consequently, the Interim Guidance must be read as implementing the directives of the Presidential Memorandum, and any protections afforded by the Interim Guidance are necessarily limited to the extent they conflict with the express directives of the memorandum.
>
> . . .
>
> Nothing in the August 2017 Statement by Secretary Mattis, or the Interim Guidance, can or does alter these realities. The Statement provides that Secretary Mattis will establish a panel of experts "to provide advice and recommendations on the implementation of the president's direction." After the "panel reports its recommendations and following ... consultation with the secretary of Homeland Security," Secretary Mattis will "provide [his] advice to the president concerning implementation of his policy direction." Put differently, the military is studying how to implement the directives of the Presidential Memorandum. Such a policy review and implementation plan are likely necessitated by the fact that—as borne out by the RAND Report and the declarations submitted by the Pseudonym Plaintiffs—transgender service members occupy a variety of crucial positions throughout the military, including active duty postings in war zones. Presumably, the removal and replacement of such individuals during a time of war cannot occur overnight. Accordingly, Defendants are correct that policy decisions are still being made. But the decisions that must be made are how to best implement a policy under which transgender accession is *prohibited*, and discharge of transgender service members is *authorized*. Unless the directives of the Presidential Memorandum are altered—and there is no evidence that they will be—military policy toward transgender individuals must fit within these confines.
>
> . . .
>
> Finally, although Defendants make much of the protections afforded by the Interim Guidance to transgender individuals, that protection is necessarily qualified by the Presidential Memorandum. The Interim Guidance provides that: "*As directed by the [Presidential] 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." (Emphasis added). The protections

> afforded by the Presidential Memorandum lapse by February 21, 2018, and discharge must be authorized by March 23, 2018. The Interim Guidance can do nothing to obviate these facts. Nor is standing vitiated by the mere possibility that the President may alter the directives of the Presidential Memorandum. See Appalachian Power Co. v. EPA, 208 F.3d 1015, 1022 (D.C. Cir. 2000) ("[A]ll laws are subject to change. Even that most enduring of documents, the Constitution of the United States, may be amended from time to time. The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment."). Nor is there evidence that such a change may occur, given the President's unequivocal pronouncement that "the United States government will not accept or allow transgender individuals to serve in any capacity in the U.S. military."

Id. at *17–18 (emphasis in original). The Court considers Doe to be persuasive authority, and finds its analysis sound and useful.

On November 21, 2017, the Honorable Marvin J. Garbis of the District of Maryland issued a nationwide injunction concerning the Accession Directive, the Retention Directive, and the Sex Reassignment Surgery Directive. Stone v. Trump, --- F. Supp. 3d ---- No. CV MJG-17-2459, 2017 WL 5589122, at *16 (D. Md. Nov. 21, 2017). Distinguishing the plaintiffs before it from the plaintiffs in Doe 1, the Stone court noted plaintiffs Stone and Cole were "highly unlikely to complete their medically-necessary surgeries before the effective date of the Directive." Id. at *13. Additionally, while the Doe 1 court found a disqualifying lack of certainty impeded the plaintiffs' standing, the Stone court stated there is "no lack of certainty regarding when transition treatment will begin for [plaintiffs] Stone and Cole since treatment has already begun, and [their] surgeries are endangered by the Directive's deadline." Id. That court approvingly cited the standing and constitutional analysis in Doe 1. Id. at *10, 15.

II. MOTION TO DISMISS

Defendants present a two-pronged challenged to Plaintiffs' Complaint. First, they assert Plaintiffs lack standing and do not face an imminent threat of future injury. Alternatively, they assert Plaintiffs' claims are unripe and not yet fit for judicial determination. (MTD at 11.) For the reasons stated below, the Court concludes it has jurisdiction to determine the constitutionality of the Accession Directive, Retention Directive, and Sex Reassignment Surgery Directive.

A. Legal Standard

Under Rule 12(b)(1), a party may bring a motion to dismiss for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A challenge to the court's jurisdiction may be facial or factual. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000)). In a facial attack, the moving party asserts the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. Safe Air, 373

F.3d at 1039. By contrast, in a factual attack, the moving party disputes the truth of allegations that, by themselves, would otherwise invoke federal jurisdiction. Id.

When considering a factual attack, a court applies a standard similar to that used in deciding summary judgment motions. Evidence outside the pleadings may be considered, but all factual disputes must be resolved in favor of the nonmoving party. See Dreier v. United States, 106 F.3d 844, 847 (9th Cir. 1996). If the moving party presents admissible evidence in support of its motion, "the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039 n.2 (9th Cir. 2003).

In a facial challenge, "a court examines the complaint as a whole to determine whether the plaintiff has alleged a proper basis of jurisdiction." Watson v. Chessman, 362 F. Supp. 2d 1190, 1194 (S.D. Cal. 2005). Again, a plaintiff's complaint is treated similarly to a summary judgment motion: the allegations are treated as true and all inferences are drawn in favor of the plaintiff. Id. "The court will not, however, infer allegations supporting federal jurisdiction; federal subject matter must always be affirmatively alleged." Id. (quoting Century Sw. Cable Television, Inc. v. CIIF Assocs., 33 F.3d 1068 (9th Cir. 1994)). When a plaintiff relies on the general federal question statute, 28 U.S.C. § 1331, "a claim not arising under the United States Constitution, or any federal statute . . . . will not generally survive a Rule 12(b)(1) facial attack." Id. (internal citations and quotation marks omitted).

B. Standing

"Constitutional standing concerns whether the plaintiff's personal stake in the lawsuit is sufficient to make out a concrete 'case' or 'controversy' to which the federal judicial power may extend under Article III, § 2." Pershing Park Villas Homeowners Ass'n v. United Pacific Ins. Co., 219 F.3d 895 (9th Cir. 2000). "[T]he irreducible constitutional minimum of standing" is comprised of three elements: (1) an injury-in-fact; (2) a causal connection between the injury and challenged conduct such that the injury is "fairly traceable" to the challenged action; and (3) it must be "likely," not merely "speculative" that the injury can be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). The injury-in-fact must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Id. at 560. "The party invoking federal jurisdiction bears the burden of establishing these elements." Id. at 561.

"The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013). Thus, the "standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of Government was unconstitutional." Id. (quoting Raines v. Byrd, 521 U.S. 811, 819 (1997)). Importantly, when there are multiple plaintiffs, "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint." Town of Chester, N.Y. v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650–51 (2017).

Defendants argue Plaintiffs have not demonstrated injury-in-fact. (MTD at 17.) For the foregoing reasons, the Court finds Plaintiffs met their burden and have standing to challenge the Accession, Retention, and Sex Reassignment Surgery Directives.

1. Accession Directive

The Accession Directive indefinitely extends the prohibition preventing transgender individuals from entering the military. The prohibition would have expired on December 31, 2017. Defendants argue no Plaintiff "has been denied accession into the military, which could be denied for numerous reasons wholly unrelated to an applicant's transgender status." (Id. at 18.) Additionally, "allegations of speculative future harms are insufficient to establish standing." (Id.) Defendants have made this argument twice before, to no avail. See Stone, 2017 WL 5589122, at *11; Doe 1, 2017 WL 4873042, at *20–22. Citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 205, (1995), Gratz v. Bollinger, 539 U.S. 244, 251 (2003), and Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 709–10 (2007), the Doe 1 court noted the appropriate inquiry is two-pronged: (1) whether the plaintiff is "very likely" to apply for accession "in the relatively near future"; and (2) whether the plaintiff is "substantially likely to hit a barrier when he applies for accession." Doe 1, 2017 WL 4873042, at *21. The court found it was likely one of the plaintiffs will graduate from the Naval Academy and attempt to accede, and "[a]nything else is the product of mere speculation." Id. Likewise, based on a plaintiff's declarations and testimony showing he had already met with a recruiting officer and had plans to accede which "are not speculative," the Stone court also found a plaintiff faced a "substantial risk" that his "attempt to accede . . . will be prohibited solely on the basis of his transgender status." Stone, 2017 WL 5589122, at *11. Defendants' argument leaves this Court similarly unpersuaded.

Here, Plaintiffs Stockman, Talbott, and Reeves have separately demonstrated an affirmative intent to join the military, going as far as to take the ASVAB, speaking with military recruiters, and attempting to join even before Secretary Carter promulgated DTM 16-005. (See Declaration of Aiden Stockman ¶¶ 9–11; Declaration of Nicolas Talbott ¶¶ 7–16; Declaration of Tamasyn Reeves ¶¶ 7–12.) These Plaintiffs all declare that, were the ban lifted today, they would seek enlistment. See Declaration of Aiden Stockman ¶ 15; Declaration of Nicolas Talbott ¶ 16; Declaration of Tamasyn Reeves ¶ 12.) While Defendants argue Plaintiffs may be eligible for individualized waivers (MTD at 18), Plaintiffs contend, and the Doe 1 court agreed, transgender people have never been eligible for medical waivers. See Doe 1, 2017 WL 4873042, at *21 (finding "no evidence that waivers are actually made available to transgender individuals, or that they will be"); Supplemental Declaration of Eric K. Fanning, Dkt. No. 47-1 ¶ 11; Supplemental Declaration of Raymond Edwin Maybus Jr., Dkt. No. 47-2 ¶ 10.) Additionally, even if Plaintiffs could successfully apply for a waiver, the need to apply for one when no other group must do so is likely also a violation of equal protection rights. See Hawaii v. Trump, 859 F.3d 741, 767–68 (9th Cir. 2017) (holding a plaintiff need not wait for a denial of discretionary waiver from the travel ban in order to challenge the ban), vacated as moot on other grounds, 2017 WL 4782860, at *1 (U.S. Oct. 24, 2017); Doe 1, 2017 WL 4873042, at *21 (stating "even if a bona fide waiver

process were made available . . . [this] would not vitiate the barrier that [the plaintiff] claims is violative of equal protection.")

Based on the submitted declarations, the Court is convinced Plaintiffs Stockman, Talbott, and Reeves are highly likely to apply for accession in the relatively near future and are substantially likely to hit a barrier upon that application. This injury is concrete, particularized, imminent, and not at all hypothetical. Consequently, Plaintiffs have standing to challenge the Accession Directive.

2. Retention Directive

Beginning on March 23, 2018, the Retention Directive authorizes the discharge of military members solely on the basis of their transgender status. (See Presidential Memorandum; President Trump's Twitter Proclamation.) Defendants argue Plaintiffs merely "*may* be discharged from the military in the future" and note, as of yet, no transgender service member has been discharged. (MTD at 17 (emphasis added).) Consequently, "Plaintiffs' speculation that they may be discharged in the future is insufficiently concrete and imminent to establish standing." Id. However, by characterizing Plaintiffs' fear as "speculation," Defendants ignore the surrounding political and legal realities. The Commander-in-Chief of the military, President Trump, announced:

> After consultation with my Generals and military experts, please be advised that the United States Government *will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military*. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.

(President Trump's Twitter Proclamation, (emphasis added).)

This proclamation has been expanded into a full Presidential Memorandum, which proclaims the Retention Directive is set to begin on March 23, 2018. (Presidential Memorandum.) Nonetheless, Defendants untenably argue that Plaintiffs' fear of being discharged is speculative because no one has yet been discharged. (MTD at 17.) This logic falls apart under scrutiny, however, as the Presidential Memorandum does not even take effect until 2018. The Presidential Memorandum is clear in its intent, force, and impending effect.

Plaintiffs argue courts routinely decide questions of constitutionality before the promulgation of implementing regulations. (MPI Reply at 10, citing Union Pac. R.R. Co. v. Cal. Pub. Utils. Comm'n, 346 F.3d 851, 872 n.22 (9th Cir. 2003) (holding statutory challenge justiciable despite absence of implementing regulations "because it is clear that any standard required" would violate the constitution although no standard had yet issued); Nance v. EPA, 645 F.2d 701, 713, 717 (9th Cir. 1981) (holding statutory challenge justiciable although the "EPA has not yet promulgated regulations under the amended act).) The Court agrees with Plaintiffs' position. Plaintiffs Tate, John Doe 1, and John Doe 2, all current military service members,

plausibly fear discharge once the Retention Directive becomes operative. (See Tate Declaration ¶ 25; John Doe 1 Declaration ¶ 19; John Doe 2 Declaration ¶¶ 28–29.) This fear is appropriately born out of President Defendant Trump's Twitter Proclamation, the Presidential Memorandum, and the Interim Guidance. Consequently, the Court finds Plaintiffs Tate, John Doe 1, and John Doe 2 face concrete, particularized, and imminent injury. Accordingly, they have standing to challenge the constitutionality of the Retention Directive.

3. Sex Reassignment Surgery Directive

The Court believes it useful to juxtapose Plaintiffs against the plaintiffs in Doe 1. The Doe 1 plaintiffs failed this first prong of the standing inquiry, as the court found "the risk of being impacted by the Sex Reassignment Surgery Directive is not sufficiently great to confer standing." 2017 WK 4873042 at * 23. As previously discussed, that court noted Jane Doe 1's transition related procedure had been canceled, but defendants had submitted a declaration stating Jane Doe 1 had received a "health care waiver necessary to receive a transition-related surgery [and] is currently being processed." Id. at 24. This finding rendered Jane Doe 1 ineligible to challenge the Sex Reassignment Surgery Directive. Additionally, Jane Doe 3 would not have begun her transition plan until after she returns from active deployment in Iraq. Id. The court found "[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 . . . is too speculative to constitute an injury in fact." Id. Finally, one of the named plaintiffs had stated that he would transition prior to applying for accession; therefore, he also failed to show injury-in-fact. Id.

Here, Plaintiff John Doe 1 received a medical transition plan in April 2017. (John Doe 1 Declaration ¶ 17.) He has also received a diagnosis of gender dysphoria. ("John Doe 1 Supplemental Declaration," Dkt. No. 47-6 ¶ 2.) As a part of his plan, he is to begin taking Hormone Replacement Therapy ("HRT") "later this year," "once [he receives] final approvals from the Medical Multidisciplinary Team and [his] commander." (Id. ¶ 3.) He is scheduled to receive chest surgery in mid-2018 and sex organ surgery in 2020. (Id. ¶¶ 4–5.) Plaintiff John Doe 2 received a formal diagnosis of gender dysphoria in October 2016. ("John Doe 2 Supplemental Declaration," Dkt. No. 47-7 ¶ 2.) He began HRT in March 2017. (Id. ¶ 3.) His transition plan includes a projected chest surgery date in April 2018 and sex organ surgery by the end of 2021. (Id. ¶¶ 4–5.)

According to the Presidential 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." (Presidential Memorandum.) In deciding whether Plaintiffs have standing to challenge the Sex Reassignment Surgery Directive, the Court ordered the parties to submit supplemental briefing discussing the definition of the terms "necessary to protect the health" and "begun a course of treatment to reassign his or her sex." (Dkt. No. 66.) Additionally, the Court asked the parties to discuss whether and how these terms apply to Plaintiffs John Doe 1 and John Doe 2. (Id.) In response to the Court's order, Defendants argue

the Sex Reassignment Surgery Directive is currently under review and the final definitions of these terms are not yet ascertainable. (Dkt. No. 70, at 3.) Thus, Defendants contend Plaintiffs have not demonstrated injury-in-fact because no one yet knows what the future policy will be. (Id.) Despite this hand waiving, Defendants suggest the definitionally hollow term "necessary to protect the health" may equate to the legally hefty term "medically necessary." (Id. at 5–6.) However:

> As of now, Defendants therefore cannot state what the full scope and impact of [the] future policy will be with respect to sex reassignment surgery until the pending review is completed, including whether or not [the] current understanding of the terms 'necessary to protect the health' or 'begun a course of treatment to reassign his or her sex' will be altered in the future.

(Id. at 6.)

By contrast, Plaintiffs contend reading the Sex Reassignment Surgery Directive in context of the overall directive shows that it is intended to deny coverage of the surgery except in cases where the surgery is "necessary to protect the health of a transgender service member *for a reason unrelated to gender transition*." (Dkt. No. 72 (emphasis in original).) Plaintiffs note the Sex Reassignment Surgery Directive is not an isolated order but is part of a larger policy directive excluding transgender people from military service. (Id.) They argue the purpose of the Directive is to "hasten the departure of transgender individuals from the military, both by sending a clear message that they are unwelcome and by causing some current service members to leave military service because they cannot obtain needed medical care." (Id. at 4.) Moreover, Plaintiffs believe Defendants chose the ambiguous phrase "necessary to protect the health" as a way of intentionally avoiding the common legal term "medically necessary." (Id. at 5.) The interpretation must be different because then the surgeries would continue whenever they were proscribed as part of a gender transition plan, a reading which would "essentially nullify the Directive and contravene President Trump's premise about the cost of surgical care." Stone, 2017 WL 558122 at *13. Notably, Defendants made the same argument before the Stone court, which stated:

> [I]f 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 . . . Defendants may not evade judicial review by advancing (or, in this case, weakly suggesting) an interpretation of the challenged action that is both implausible and would fatally undercut the President's announced policy.

Id. at *13 (citation omitted).

This Court is equally unpersuaded by Defendants' construction of the Sex Reassignment Surgery exception. If the Sex Reassignment Surgery Directive means anything, it means a transgender service member cannot receive the surgery simply because it is "medically

necessary." President Trump stated the policy change is occurring because the military would be "burdened with the tremendous medical costs." (President Trump's Twitter Proclamation.) Allowing sex reassignment surgeries whenever they became medically necessary would result in the exception swallowing the rule and would do nothing to address President Trump's concerns. Perhaps anticipating this outcome, Defendants equivocate in their briefing, only suggesting that "necessary to protect the health" might equate to "medical necessity" instead of firmly proffering a definition. Defendants hesitated when deciding whether the exception applies to Plaintiffs (MTD Reply at 7, (stating that Plaintiffs "potentially fall within the exception to the funding directive")), and now attempt to forge that hesitation into an axe sharp enough to chop down Plaintiffs' standing argument. As Defendants are not able to outright state Plaintiffs fit into the exception and are entitled to the surgery, Plaintiffs' fears that the surgery will be denied are plausible given the plain words of President Trump. Consequently, Plaintiffs John Doe 1 and John Doe 2 have demonstrated injury-in-fact as it pertains to the Sex Reassignment Surgery Directive.

As an aside, despite the Court's order for supplemental briefing, neither party addressed the meaning of "begun a course of treatment to reassign his or her sex." This definition could be impactful as it is not at all clear Plaintiff John Doe 1 stands on the same jurisdictional footing as Plaintiff John Doe 2. Without supplemental briefing the Court cannot be certain, but it appears Plaintiff John Doe 1 may not have yet started HRT, while Plaintiff John Doe 2 began it earlier this spring. (Compare John Doe 1 Supplemental Declaration ¶ 3 with John Doe 2 Supplemental Declaration ¶ 3.) Consequently, Plaintiff John Doe 1 may not have sufficiently "begun a course of treatment to reassign his or her sex," and thus would be ineligible for the exception regardless if the surgery was "necessary to protect" his health.

C. Ripeness

Alternatively, Defendants argue this case should be dismissed because it is not ripe to be adjudicated. A dispute is ripe when it presents concrete legal issues in actual cases. Colwell v. HHS, 558 F.3d 1112, 1123 (9th Cir. 2009). "Ripeness and standing are closely related because they originate from the same Article III limitation." Montana Envtl. Info. Ctr. v. Stone-Manning, 766 F.3d 1184, 1188 (9th Cir. 2014) (citing Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 n.5 (2014)). In fact, "in many cases, ripeness coincides squarely with standing's injury in fact prong." Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) ("The constitutional component of the ripeness inquiry is often treated under the rubric of standing. . . . Indeed, because the focus of our ripeness inquiry is primarily temporal in scope, ripeness can be characterized as standing on a timeline.")

Plaintiffs have satisfied the injury-in-fact requirements and have standing to challenge the Accession, Retention, and Sex Reassignment Surgery Directives. Thus, Plaintiffs also have established constitutional ripeness. Bishop Paiute Tribe v. Inyo Cty., 863 F.3d 1144, 1153 (9th Cir. 2017). Defendants' ripeness argument is not based in constitutional ripeness, but prudential ripeness. Whether a dispute is ripe depends on "the fitness of the issues for judicial decision" and "the hardship to the parties" of withholding review. Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967), overruled on other grounds by Califano v. Sanders, 430 U.S. 99, 105 (1977).

This case is fit for judicial decision. President Trump has unambiguously stated his policy intentions, then formalized those intentions into an operative Presidential Memorandum. "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." Stone, 2017 WL 5589122, at *14. The constitutionality of the Directives within the Presidential Memorandum are fit for constitutional review; indeed, the Accession Directive goes into effect within a few short weeks. (Presidential Memorandum.) The Court need not wait for the Presidential Memorandum to be fully implemented before determining its constitutionality. Union Pac. R.R. Co., 346 F.3d at 872 n.22. Additionally, Plaintiffs would bear the brunt of the harm were judicial review withheld. Plaintiffs have demonstrated "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, . . . 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." Stone, 2017 WL 5589122, at *14; Doe 1, 2017 WL 4873042, at *24–25 ("The directives are known, and so are the circumstances under which they were issued. They cannot be more concrete, and future policy by the military—absent action from the president—cannot change what the directives require. . . . Furthermore, the nature of the equal protection analysis in this case, which asses the facial validity of the Presidential Memorandum, means that the Court would not benefit from delay—the salient facts regarding the issuance of the Presidential Memorandum are not subject to change.")

Accordingly, having found Plaintiffs have standing to challenge the Directives, and that this case is ripe for judicial adjudication, the Court DENIES Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

III. MOTION FOR PRELIMINARY INJUNCTION

A. Legal Standard

A plaintiff seeking a preliminary injunction must establish that: (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). "A preliminary injunction is an extraordinary and drastic remedy" that should not be granted "unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (describing the "substantial proof" requirement to grant a preliminary injunction as much higher than the burden of proof for a summary judgment).

The Ninth Circuit has adopted a "sliding scale" test for preliminary injunctions. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011). Under this approach, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another. Id. For example, "serious questions" as to the

merits of a case, combined with a showing that the hardships tip sharply in the plaintiff's favor, can support the issuance of an injunction, assuming the other two elements of the Winter test are also met. Winter, 555 U.S. at 24 ("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, and should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.") Id.

A preliminary injunction can take two forms: either a prohibitory injunction or a mandatory injunction. Chalk v. U.S. Dist. Court Cent. Dist. of California, 840 F.2d 701, 704 (9th Cir. 1988). A prohibitory injunction prevents a party from taking action pending a resolution on the merits, Heckler v. Lopez, 463 U.S. 1328, 1333 (1983) (stating that a prohibitory injunction "freezes the positions of the parties until the court can hear the case on the merits"), while a mandatory injunction "orders a responsible party to take action." Meghrig v. KFC W., Inc., 516 U.S. 479, 484 (1996). Since the "basic function" of a preliminary injunction is to preserve the status quo pending resolution on the merits, mandatory injunctions are "particularly disfavored." Id. Indeed, mandatory injunctions will not be issued unless failure to do so will result in "extreme or very serious damage." Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 879 (9th Cir. 2009).

B. Likelihood of Success on the Merits

Defendants argue "[t]he President and Secretary Mattis' decision that the complex issues presented by the policy on military service by transgender individuals warrant additional study before changes are made to longstanding policies passes muster under any standard." (MTD at 25.) However, this is not what happened in this case. In July of 2017, President Trump announced transgender people are barred from military service, and nothing in the Presidential Memorandum or Interim Guidance alters the fact that the decision has already been made. Defendants, in their briefing and at oral argument, attempt to focus on the constitutionality of the Interim Guidance and not the policy that takes place once it expires.[2] Even the title of the current operative policy, the "*Interim* Guidance," (emphasis added) attests to its temporary nature.

Defendants additionally contend military personnel decisions should be accorded a highly deferential level of review. However, this deferential review is most appropriate when the military acts with measure, and not "unthinkingly or reflexively." Rostker v. Goldberg, 453 U.S. 57, 72 (1981). Here, the only serious study and evaluation concerning the effect of transgender people in the armed forces led the military leaders to resoundingly conclude there was no justification for the ban. (Supra, "Military Transgender Policy Before July 2017," at 3–5.) The Court agrees with the Doe 1 court, which noted "the record at this stage of the case shows that the reasons offered for categorically excluding transgender individuals were not supported and

[2] The Doe 1 court's analysis of the interaction between the Presidential Memorandum and the Interim Guidance is sound and adopted by the Court. 2017 WL 4873042, at *17–18. Portions of that analysis have been reproduced in this Opinion. (See supra 9–10.)

were in fact contradicted by the only military judgment available at the time." 2017 WL 4873042, at *31. "[T]he Court's analysis in this Opinion has not been based on an independent evaluation of evidence or faulting the President for choosing between two alternatives based on competing evidence." Id.

The Ninth Circuit has strongly suggested that discrimination on the basis of one's transgender status is equivalent to sex-based discrimination. See Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir. 2000) ("both [the Gender Motivated Violence Act and Title VII] prohibit discrimination based on gender as well as sex. Indeed, for the purposes of these two acts, the terms 'sex' and 'gender' have become interchangeable." Additionally, sex-based discrimination can include discrimination based on someone failing "to conform to socially-constructed gender expectations.") Several district courts in this circuit have plainly held discrimination on the basis of one's transgender status is subject to intermediate scrutiny. See Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); Olive v. Harrington, No. 115CV01276BAMPC, 2016 WL 4899177, at *5 (E.D. Cal. Sept. 14, 2016). Moreover, the courts which have examined the constitutionality of the transgender ban have also applied intermediate scrutiny. See Stone, 2017 WL 5589122, at *15; Doe 1, 2017 WL 4873042, at *27–29. The Court is persuaded by the analysis contained in these opinions.

Plaintiffs 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." U.S. v. Windsor, 133 S. Ct. 2675, 2695, 186 L. Ed. 2d 808 (2013). Consequently, the government must proffer a justification which is "exceedingly persuasive," "genuine," "not hypothesized," not "invented *post hoc* in response to litigation," and "must not rely on overbroad generalizations." United States v. Virginia, 518 U.S. 515, 531 (1996). Defendants' justifications do not pass muster. Their reliance on cost is unavailing, as precedent shows the ease of cost and administration not survive intermediate scrutiny even if it is significant. Frontiero v. Richardson, 411 U.S. 677, 688–91 (1973). Moreover, all the evidence in the record suggests the ban's cost savings to the government is miniscule. (RAND Report at 22–23.) Furthermore, Defendants' unsupported allegation that allowing transgender individuals to be in the military would adversely affect unit cohesion is similarly unsupported by the proffered evidence. (Compare MTD at 30–31 with RAND Report at 24.) These justifications fall far short of exceedingly persuasive. Accordingly, the Court finds Plaintiffs have demonstrated their Equal Protection claim will likely succeed on the merits and further analysis of their other claims is unnecessary at this stage of the proceedings.

C. Irreparable Harm

Defendants first argue, "for much the same reasons they lack standing, Plaintiffs cannot show that they are likely to be injured if the Court does not enter an injunction." (MTD at 24.) Considering the Court has already found Plaintiffs have standing, this argument is easily dismissed. Second, Defendants contend Plaintiffs' injuries would not be beyond remediation. (Id.) For example, they argue separation from the military would not constitute irreparable harm

because it is within the Court's equitable powers to remedy the injury. (Id.) However, these arguments fail to address the negative stigma the ban forces upon Plaintiffs.

Plaintiffs allege, and the Court agrees, the ban sends a damaging public message that transgender people are not fit to serve in the military. (MPI Reply at 19.) There is nothing any court can do to remedy a government-sent message that some citizens are not worthy of the military uniform simply because of their gender. A few strokes of the legal quill may easily alter the law, but the stigma of being seen as less-than is not so easily erased. See Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) ("laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter"); Lawrence v. Texas, 539 U.S. 558, 573 (2003) ("If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.") Additionally, "the deprivation of constitutional rights unquestionably constitutes irreparable injury." Hernandez v. Sessions, 872 F.3d 976, 994 (9th Cir. 2017) (internal quotations omitted) (citing Elrod v. Burns, 427 U.S. 347, 373 (1976)). This ban singles out transgender individuals for unequal treatment solely because of their transgender status. Plaintiffs have appropriately demonstrated irreparable injury. See Stone, 2017 WL 5589122, at *16; Doe 1, 2017 WL 4873042, at *32.

D. Balance of Equities and Public Interest

The Court finds Plaintiffs have shown the balance of equities and public interest weighs in favor of granting injunctive relief. Plaintiffs already feel the stigma attached to the Directives. (See Tate Declaration ¶ 23; John Doe 1 Declaration ¶¶ 23–25; John Doe 2 Declaration ¶¶ 30–33, 38–39.) Defendants again attempt to make the preliminary injunction about the Interim Guidance and not the policies which will supersede the Interim Guidance. (MTD at 40.) As noted above, this argument is misplaced. Additionally, as in Stone and Doe 1, Defendants make a perfunctory argument regarding the import of a strong national defense. (MTD at 40.) However:

> 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.

Stone, 2017 WL 5589122, at *16 (quoting Doe 1, 2017 4873042, at *33.) The record stands much the same here as it did in Stone and Doe 1, thus the Court has no reason to deviate from the above analysis. In sum, considering all the Winter factors weigh in favor of granting a preliminary injunction, the Court preliminarily enjoins the Accession, Retention, and Sex Reassignment Surgery Directives pending the final resolution of this lawsuit.

IV. CONCLUSION

Finding the Plaintiffs have established injury-in-fact as it pertains to the Accession, Retention, and Sex Reassignment Surgery Directives, and finding this case ripe for adjudication, the Court DENIES Defendants' Motion to Dismiss. Additionally, finding the Winter factors weigh in favor of granting a preliminary injunction, the Court GRANTS Plaintiffs' Motion for Preliminary Injunction. Therefore, until this litigation is resolved, the Court ORDERS:

1. Defendants, and their agents, employees, assigns, and all those acting in concert with them are enjoined from categorically excluding individuals, including Plaintiffs Aiden Stockman, Nicolas Talbot, Tamasyn Reeves, from military service on the basis that they are transgender; and

2. No current service member, including Plaintiffs Jaquice Tate, John Doe 1, John Doe 2, and Jane Doe, may be separated, denied reenlistment, demoted, denied promotion, denied medically necessary treatment on a timely basis, or otherwise subjected to adverse treatment or differential terms of service on the basis that they are transgender.

IT IS SO ORDERED.

Exhibit 5

DEPARTMENT OF DEFENSE
HEADQUARTERS, UNITED STATES MILITARY ENTRANCE PROCESSING COMMAND
2834 GREEN BAY ROAD
NORTH CHICAGO, ILLINOIS 60064-3091

MECD

DEC 0 8 2017

MEMORANDUM FOR SECTOR COMMANDERS
BATTALION COMMANDERS
MEPS COMMANDERS
DIRECTORS AND SPECIAL STAFF OFFICERS

SUBJECT: Policy Memorandum 2-5, Transgender Applicant Processing

References:

(a) Deputy Secretary of Defense Memorandum, "Medical Standards for Appointment, Enlistment, or Induction of Transgender Applicants into the Military Services," dated December 8, 2017.
(b) DoDI 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services."
(c) DoDI 1300.28, "In-Service Transition for Transgender Service Members," dated June 30, 2016.
(d) USMEPCOM Regulation 40-1, "Medical Qualification Program," dated July 24, 2017.
(e) Army Regulation 601-270/OPNAVINST 1100.4C CH-2/AFI 36-2003/MCO 1100.75/COMDTINST M. 1100.2E, "Military Entrance Processing Station," RAR dated September 13, 2011.

PURPOSE. This memorandum provides interim policy guidance for processing transgender applicants for military service in accordance with Reference (a). This policy memorandum supersedes Policy Memorandum 2-5 dated August 11, 2016. This policy memorandum shall remain in effect until expressly revoked.

APPLICABILITY. This policy applies to all USMEPCOM personnel and activities.

BACKGROUND. The medical accession standards set forth in reference (a) will be implemented on January 1, 2018. The new standard permits accession of qualified transgender applicants. Implementation of the new standard, effective January 1, 2018, is mandatory. Prior to that date, the civilian and military team of USMEPCOM must prepare to implement the necessary procedural adjustments to ensure a seamless processing experience for transgender applicants. Based on references (a) – (e), this policy memorandum establishes standard operating procedures and specific processing guidance that will be applied across the command. It is an administrative tool, not a health management tool or health policy document and does not confer rights, procedural or substantive, for applicants. Any provision of USMEPCOM or individual Military Entrance Processing Station (MEPS) policy or guidance inconsistent with this memorandum is hereby superseded. The following guidance will remain in effect until expressly revoked.

USMEPCOM mission requirements and physical space limitations often will not afford the opportunity for completely private screening procedures. All applicants, including those who are transgender, may express concern about privacy in bathrooms, ortho-neuro rooms, applicant hotel rooms, or similar venues. In these cases, Commanders may employ reasonable alternate measures to provide greater privacy, should daily capacity allow. Commanders or their representatives should review standard operating procedures during the morning Commander's brief, highlighting the rights, sensitivities, and privacy needs of all applicants, while acknowledging that the daily production environment may limit a Commander's ability to provide individual screening procedures.

As always, every applicant will be treated with dignity and respect. Applicants will be evaluated per established DoD standards for the purpose of qualifying for Military Service. Out of respect for all applicants, an individual's gender identity history should not be disclosed without his/her permission, unless disclosure is made for official use in accordance with applicable law and policy. Requests for privacy should be reviewed and adjudicated so as to avoid stigmatizing of any applicant.

I have the utmost confidence that the actions of the USMEPCOM team will continue to exemplify our core values of Integrity, Teamwork, Professionalism, and Respect. Ultimately, Commanders are responsible for upholding and maintaining the high standards of the U. S. military at all times, and in all places.

POLICY.

Identity Validation: Per reference (e), identity validation is the responsibility of Military Service recruiting command personnel. To ensure appropriate enrollment in the Defense Enrollment Eligibility Reporting System (DEERS) following accession, for transgender applicants, Service recruiting command personnel are responsible for notifying USMEPCOM (or the servicing MEPS) of an individual's identity, using one of the following documents to validate an applicant's gender, consistent with reference (c): a certified true copy of a state birth certificate reflecting preferred gender, a certified true copy of a court order reflecting preferred gender, or a U.S. Passport reflecting preferred gender.

Processing: Due to the complexity of this new medical standard, during the routine preliminary screening of applicants required by reference (e), recruiters shall refrain from screening out transgender applicants based on the information contained in the Accessions Medical Prescreen Report (DD Form 2807-2), and will instead allow the MEPS medical provider to perform a medical pre-screening of all transgender applicants for military service.

For the purposes of military entrance processing, the applicant's preferred gender will be used on all forms asking for the "sex" of the applicant. For example, if the applicant was born male but currently identifies as female, female will be selected in the "sex" category. The only form on which any difference between birth sex and preferred gender will be indicated is the DD Form 2807-2.

For applicants who do not identify with either male or female, their birth sex will be used on all forms when asking for the "sex" of the applicant. For example: if applicant was born male and does not identify as male or female, male will be selected in the "sex" category.

Services will submit the USMEPCOM Form 680-3A-E, Request for Examination (UMF 680-3A-E), indicating in block 6 the preferred gender with which the applicant identifies, not the applicant's birth sex. If an applicant's preferred gender is different than the applicant's birth sex, recruiters must verify the applicant's preferred gender through review of the applicant's birth certificate, court order, or passport. These three means to verify a gender change are the only valid means by which to do so, per reference (c) and this policy guidance.

Pending release of the updated DD Form 2807-2, the current DD Form 2807-2 "SECTION III-APPLICANT COMMENTS" will be used to identify transgender applicants to the medical department. The following annotations will be placed in Section III for **ALL APPLICANTS**, "Birth Sex: (male or female)" and "Preferred Gender: (male or female)." If birth sex and preferred gender are different, the recruiter will:

a. Verify preferred gender using only a birth certificate, court order, or passport, per reference (c) and this policy guidance.

b. Obtain the letter/s from the appropriate licensed medical provider/s, attesting that the applicant has been medically stable according to the standards prescribed in reference (a).

c. Include with the prescreen submission the letter/s and all related medical documents provided by the applicant (e.g., documentation of counseling, surgery, hormone treatments) that facilitated the applicant's gender transition.

All projections and processing actions will be based on the preferred gender of the applicant. Transgender applicants will be addressed by their preferred gender name and pronoun. To avoid confusion, MEPS personnel will ask the applicant for his/her preferred name.

A transgender male (birth sex female, preferred gender male) will be projected by the Services as a male; a transgender female (birth sex male, preferred gender female) will be projected by the Services as a female. Room assignment, height/weight standards, ortho-neuro exam, specimen observation, underwear requirements, chaperone, and bathroom assignments will be made based on the applicant's preferred gender identified by the sponsoring Service. However, although an individual might identify with a preferred gender, he/she may retain the anatomical characteristics of their birth sex. Medical examinations and labs may need to be tailored to the specific anatomical characteristics presented by the applicant.

Transgender male applicants who have not undergone surgical/hormone therapy will wear undergarments consistent with their physical anatomy (as per routine in the USMEPCOM regulations for all applicants), will be administered a pregnancy test, and will receive medical review and examination specific to female anatomical characteristics during the physical examination portion of processing.

Transgender female applicants who have not undergone surgical/hormone therapy will wear undergarments consistent with their physical anatomy (as per routine in the USMEPCOM regulations for all applicants), will not be administered a pregnancy test, and will receive medical review and examination specific to male anatomical characteristics during the physical examination portion of processing.

The gender of the chaperone will be the same as the applicant's preferred gender. The examining provider must confirm whether the applicant "does" or "does not" want a chaperone before beginning the medical examination (where the applicant will be in a state of undress). When the gender of the examiner is the opposite of the applicant's preferred gender, a chaperone must be provided while the applicant is in a state of undress. When the examiner's gender is the same as the applicant's preferred gender, a chaperone will be provided on request of either the applicant or the medical provider. The applicant or medical provider may request a chaperone at any time, and the examination will not proceed further until a chaperone is provided.

FOR MEPS MEDICAL DEPARTMENT

In accordance with Reference (a):

a. As to a transgender male (birth sex female, preferred gender male), a history of sex reassignment surgery or major genital reconstruction is disqualifying, unless, as certified by a licensed surgeon whose scope of practice includes the attested surgical procedure(s) (to include OB/GYN, urology, or plastic surgery):

1) A period of 18 months has elapsed since the date of the most recent of any such surgery during which period no further surgical follow-up or monitoring was required; and

2) No functional limitations or complications persist, nor is any additional surgery required; and

3) The applicant is not experiencing clinically significant distress or impairment in social, occupational, or other important areas of functioning.

b. As to a transgender female (birth sex male, preferred gender female), a history of sex reassignment surgery or major genital reconstruction is disqualifying, unless, as certified by a licensed surgeon whose scope of practice includes the attested surgical procedure(s) (to include urology or plastic surgery):

1) A period of 18 months has elapsed since the date of the most recent of any such surgery, during which period no further surgical follow-up or monitoring was required; and

2) No functional limitations or complications persist, nor is any additional surgery required; and

3) The applicant is not experiencing clinically significant distress or impairment in social, occupational, or other important areas of functioning.

c. As to any transgender applicant, a history of medical treatment associated with gender transition is disqualifying, unless, as certified by a licensed medical provider who treats gender dysphoria, such as a primary care provider, endocrinologist, or licensed mental health provider (psychiatrist, clinical psychologist, clinical social worker with a master's degree or doctorate in clinical social work, or psychiatric nurse practitioner):

1) The applicant has completed all elements of a medical treatment plan associated with the applicant's gender transition; and

2) The applicant has been stable, without clinically significant distress or impairment in social, occupational, or other important areas of functioning, in the preferred gender for the previous 18 months; and

3) If the applicant is presently receiving cross-sex hormone therapy post gender transition, the individual has been stable without adverse side effects, functional limitations, or complications on such hormones for at least the 18 consecutive months immediately preceding examination by the MEPS medical department.

d. As to any transgender applicant, a history of gender dysphoria is disqualifying, unless, as certified by a licensed mental health provider (psychiatrist, clinical psychologist, clinical social worker with a master's degree or doctorate in clinical social work, or psychiatric nurse practitioner) who treats gender dysphoria, the applicant has been stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for at least the 18 consecutive months immediately preceding examination by the MEPS medical department.

e. Licensed medical provider is defined as "a health care professional who is licensed, credentialed, and granted clinical practice privileges to provide health care services within the provider's scope of practice, in a medical treatment facility."

f. For the purpose of accession, transgender applicants must be stable in the preferred gender for a period of 18 consecutive months post gender transition. "Stable in the preferred gender" is defined as "medical and surgical interventions for gender transition are complete, with the exception of continued use of a stable cross-sex hormone protocol, if applicable, no functional limitations or complications persist, and the individual is not experiencing clinically significant distress or impairment in social, occupational, or other important areas of functioning."

g. The following action will be taken for applicants, who during processing at the MEPS, disclose that they are transgender, but who have not taken the legal and/or medical steps to transition to their preferred gender or to demonstrate stability in their preferred gender as defined in this guidance: Applicant will be interviewed by a MEPS medical provider. If the applicant discloses to the MEPS medical provider that his/her preferred gender is other than the applicant's birth sex, as recorded on the applicant's DD Form 2807-2, or discloses additional medical information that calls into question whether stability in their preferred gender has been demonstrated, the applicant will be placed in open status (S-O), if medical treatment records are requested; or in temporary disqualified status (S-3T), if medical treatment records substantiate stability, but do not substantiate that the applicant meets the requirement that he/she be stable for 18

months in the preferred gender. In the latter case, the applicant will be given a Reevaluation Believed Justified (RBJ) date on the DD Form 2808 of 18 months minus the period of previously documented stability. In addition, in cases in which a transgender applicant is temporarily disqualified because he/she does not meet the 18 month stability requirement in the preferred gender, the sponsoring Service may request a Medical Exception to Policy (ETP), using the procedures in reference (d) to submit the applicant for consideration for a medical waiver by the Service Medical Waiver Review Authority (SMWRA), as authorized by reference (a).

h. The following action will be taken for applicants, who during prescreening, disclose that they are transgender, but who have not taken the legal and/or medical steps to transition to their preferred gender or to demonstrate stability in their preferred gender as defined this guidance: The MEPS medical provider will determine if Processing is Authorized (PA) in accordance with paragraph 2-3 of reference (d). If medical treatment records substantiate stability, but do not substantiate that the applicant meets the requirement that he/she is stable for 18 months in the preferred gender, the applicant will be given a Return Justified (RJ) date on the DD Form 2807-2 of 18 months minus the period of previously documented stability. In cases during prescreening in which an RJ date has been assigned, or in cases in which the MEPS medical provider has determined Processing is Not Justified (PNJ), the SMWRA (upon request of the Service) may Request Processing (PRW) in accordance with the procedures contained in paragraph 2-3 of reference (d).

i. For consistency, as USMEPCOM implements this new standard, and given the complexity and inter-dimensionality of medical qualification decisions, copies of the medical processing records: DD Form 2807-2, Report of Medical History (DD Form 2807-1), Report of Medical Examination (DD Form 2808), and the supporting medical records for all transgender applicant will be submitted to the USMEPCOM Medical Plans and Policy Directorate (J-7) for review after MEPS medical providers have rendered a medical qualification determination in regard to that applicant. The J-7 review is instituted to ensure consistency in the application of the new standard and to gather best practices and lessons learned as they pertain to this guidance. Supplemental guidance may be provided following J-7 review. J-7 review will not delay accession of transgender applicants determined to be qualified under the foregoing standards.

j. The Services must submit DD Form 2807-2 with substantiating and supporting medical documents, as specified in the USMEPCOM Medical Prescreen Documents List, together with all other documentation requested by the MEPS provider, for an applicant to be considered for a medical examination at the MEPS, IAW USMEPCOM Regulation, Medical Qualification Program (UMR 40-1), para 2-2c.

The point of contact for operational aspects of this policy is the Accession Division, J-3/MEOP-AD, (847) 688-3680 ext. 7519, email osd.north-chicago.usmepcom.list.hq-j3-meop-accession-division@mail.mil. The point of contact for all medical related questions is the Clinical Operations Division, J-7/MEMD-COD, (847) 688-3680 ext. 7132, email osd.north-chicago.usmepcom.list.hq-j7-memd-clinical-ops-div@mail.mil.

David S. Kemp
CAPT, USN
Commanding

Exhibit 6

IMMEDIATE RELEASE

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

Press Operations

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

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

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

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

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

Exhibit 7

PALM CENTER
BLUEPRINTS FOR SOUND PUBLIC POLICY

MENU

DECEMBER 7, 2017

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

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

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

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

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

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

###

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ABOUT THE PALM CENTER

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

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

IMPLEMENTATION

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PRESS RELEASE

Former Military Leaders Dispute Claim That 23,000 Personnel Must Be Trained Before Transgender Enlistments Can Begin

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PRESS RELEASE

Military Professors Refute Trump Administration Assertion that Armed Forces Are Not Ready for Transgender Recruits

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Exhibit 8

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BLUEPRINTS FOR SOUND PUBLIC POLICY

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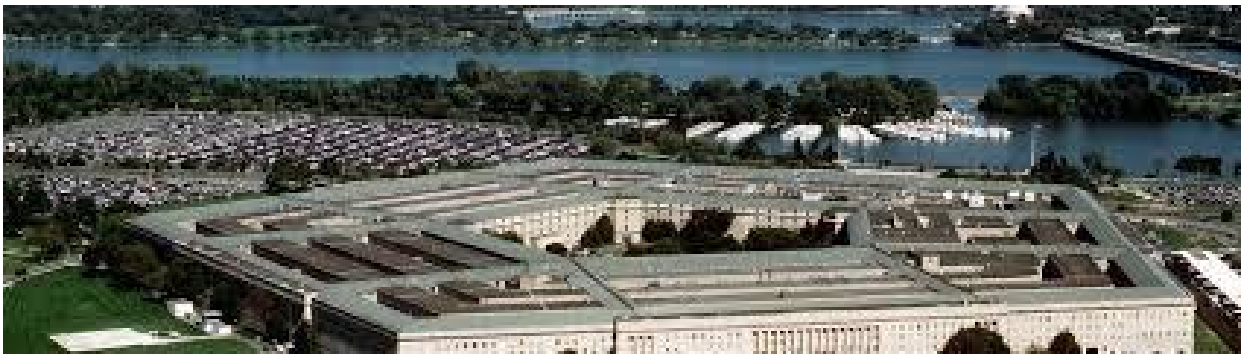
DECEMBER 6, 2017

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



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

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

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

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

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Exhibit 9

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BLUEPRINTS FOR SOUND PUBLIC POLICY

DoD Is Ready to Accept Transgender Applicants

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

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

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

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

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

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

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

December 2017

EXECUTIVE SUMMARY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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