

The Honorable Marsha J. Pechman

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al,  
Plaintiffs,  
v.  
DONALD TRUMP, et al,  
Defendants.

Case No: 2:17-cv-1297-MJP  
  
WASHINGTON'S  
RESPONSE TO  
DEFENDANTS' CROSS-  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT

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STATE OF WASHINGTON,  
Intervenor-Plaintiff,  
v.  
DONALD TRUMP, et al,  
Intervenor-Defendants.

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**I. INTRODUCTION**

1  
2 Defendants fail to adduce any evidence to justify the unconstitutional Transgender  
3 Military Service Ban (“Ban”) announced by the President on Twitter on July 26, 2017,  
4 memorialized in a subsequent Presidential Memorandum dated August 25, 2017, and long  
5 embedded in the historically discriminatory policies and practices of the military. Without such  
6 evidence, they fail to meet their burden of proof to establish that the President is entitled to partial  
7 summary judgment on Washington’s equal protection and substantive due process claims.  
8 Defendants’ motion should be denied for this reason alone.

9 With no defense on the merits, Defendants make the extraordinary claim that no court  
10 has jurisdiction to review the constitutionality of the President’s official actions or directives and  
11 that no court may impose “declaratory relief against the President for his official, discretionary  
12 conduct[.]” ECF 194 at 22-23. This argument is unavailing and contrary to fundamental  
13 principles of our democracy. Presidential action is reviewable by the courts and subject to  
14 appropriate judicial declarations. This case is no exception. The Court should reject Defendants’  
15 arguments that it may not issue a judicial declaration against the President and deny the motion  
16 for partial summary judgment on this additional basis.

**II. UNDISPUTED MATERIAL FACTS**

17  
18 The following undisputed facts are taken from this Court’s prior rulings and Defendants’  
19 evidence, briefing, and public statements.

20 On July 26, 2017, President Trump tweeted out new policy governing service by  
21 transgender individuals in the United States Military. ECF 34-6 (tweeting “. . . please be advised  
22 that the United States Government will not accept or allow transgender individuals to serve in  
23 any capacity in the U.S. military”). One month later, on August 25, 2017, President Trump issued  
24 a Presidential Memorandum directing the Secretaries of Defense and Homeland Security “to  
25 ‘return’ to the military’s policy authorizing the discharge of openly transgender individuals (the  
26 ‘Retention Directive’); to prohibit the accession (bringing into service) of openly transgender

1 individuals (the ‘Accession Directive’); and to prohibit the funding of certain surgical procedures  
2 for transgender service members (the ‘Medical Care Directive’).” ECF 103 at 3; ECF 34-7 §§  
3 1(b), 2(a)-(b). The Accession Directive was scheduled to take effect on January 1, 2018, and the  
4 Retention and Medical Care Directives were ordered to take effect on March 23, 2018. *Id.* §3.

5 President Trump’s Memorandum stated his belief that the Ban is necessary because, “[i]n  
6 [his] judgment, the previous Administration failed to identify a sufficient basis to conclude that  
7 terminating the Departments’ longstanding policy and practice would not hinder military  
8 effectiveness and lethality, disrupt unit cohesion, or tax military resources.” ECF 34-7 § 1(a).  
9 However, the Memorandum cited no study, report, or other evidence to support the President’s  
10 assertion. President Trump directed that the “Secretary of Defense, after consulting with the  
11 Secretary of Homeland Security, may advise [him] at any time, in writing, that a change to this  
12 policy is warranted,” but did not grant the Secretaries decision-making power. *Id.* § 1(b). The  
13 President also directed that the accession policy be maintained “until such time as the Secretary  
14 of Defense, after consulting with the Secretary of Homeland Security, provides a  
15 recommendation to the contrary that I find convincing[.]” *Id.* § 2(a).

16 Pursuant to the President’s instructions, on September 14, 2017, Secretary Mattis issued  
17 Interim Guidance regarding military service by transgender individuals. ECF 69-1. The Interim  
18 Guidance confirms that Secretary Mattis will “implement the policy and directives in the  
19 Presidential Memorandum,” including reverting the military back to its longstanding accession  
20 policy “which generally prohibit[s] the accession of transgender individuals into the Military  
21 Services[.]” *Id.* at 2-3. The Interim Guidance, pending the issuance of the Secretary’s report and  
22 “plan to implement the policy and directives in the Presidential Memorandum” by February 21,  
23 2018, directs military leadership to take “no action” to involuntarily separate or discharge an  
24 active military member solely on the basis that they are transgender. *Id.* No implementation plan  
25 was announced on February 21, 2018. Nor has any implementation plan been submitted to  
26 Washington or this Court. The Presidential Memorandum directing Defendants to implement the

1 Ban has not been revoked or rescinded.

2 **III. ARGUMENT**

3 **A. Defendants’ Request for Partial Summary Judgment Should Be Denied**

4 To succeed on a motion for summary judgment the movant must establish that it is  
5 entitled to judgment as a matter of law based on undisputed material facts. *See* Fed. R. Civ. Pro.  
6 56(a). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Defendants fail to meet their  
7 burden. Though they seek partial summary judgment on “all . . . claims against the President,”  
8 ECF 194 at 23-24, the undisputed evidence establishes that the President announced the Ban by  
9 tweet on July 26, 2017, and memorialized it by Presidential Memorandum dated August 25,  
10 2017. ECF 150 at 2-3 (citing ECF 34-6; ECF 34-7). Defendants fail to present any facts that  
11 could negate the President’s role as author of the Ban. Neither do they submit evidence justifying  
12 the unconstitutional Ban, which cannot survive constitutional scrutiny for purposes of either  
13 Washington’s equal protection or substantive due process claims.<sup>1</sup> ECF 150 at 8-18. Defendants’  
14 cross-motion for partial summary judgment should be denied for this reason alone.

15 Unable to sustain their burden on the merits, Defendants instead argue that the  
16 President’s actions are unreviewable and that the court lacks authority to issue declaratory or  
17 injunctive relief directed at him. ECF 194 at 26-27. However, the notion that the President’s  
18 policy pronouncements are unreviewable ““runs contrary to the fundamental structure of our  
19 constitutional democracy.”” *Hawai’i v. Trump*, 878 F.3d 662, 680 (9th Cir. 2017). “In this  
20 country the President is not above the law; it is above him, and hence he must be subject to its  
21 restraints.” *Mississippi v. Johnson*, 71 U.S. 475, 480 (1866). The Court has authority to review  
22 the constitutionality of presidential policies and issue a resulting judicial declaration. Because  
23 Defendants have failed to show that the President is entitled to judgment as a matter of law on  
24 either claim, the Court should deny Defendants’ Cross-Motion for Partial Summary Judgment.

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<sup>1</sup> Washington has moved for summary judgment on both of its claims. ECF 150.

1 **B. The President’s Ban Violates Equal Protection and Substantive Due Process, and**  
2 **Defendants Present No Evidence Establishing That the Ban Was Constitutionally**  
3 **Justified**

4 Washington has moved for summary judgment on its equal protection and substantive  
5 due process claims. ECF 150. Defendants’ own statements and evidence establish that the  
6 facially discriminatory Ban is unrelated to any important governmental interest, and does not  
7 further the military’s goals of readiness, unit cohesion, or cost control. ECF 150 at 8-18.  
8 Because the undisputed evidence shows that the Ban cannot survive constitutional scrutiny,  
9 Washington is entitled to summary judgment.

10 Defendants fail to present any evidence justifying the President’s unconstitutional Ban  
11 in response to Washington’s Motion for Summary Judgment. ECF 194. Not only do they fail to  
12 provide any basis to defeat Washington’s Motion for Summary Judgment, but they also fail to  
13 provide any evidence to sustain their own burden in seeking partial summary judgment on  
14 behalf of the President on Washington’s equal protection and substantive due process claims.  
15 *Id.* Because Defendants fail to present any evidence that the President’s Ban is constitutional,  
16 the President is not entitled to partial summary judgment on Washington’s claims.

17 **C. The President’s Ban Is Reviewable and The Court Has Authority to Issue**  
18 **Declaratory Relief Regarding the Ban**

19 The Supreme Court has “long held that when the President takes official action, the Court  
20 has the authority to determine whether he has acted within the law.” *Clinton v. Jones*, 520 U.S.  
21 681, 703 (1997). Further, “the President’s actions may . . . be reviewed for constitutionality . . .  
22 .” *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). *See also, Youngstown Sheet & Tube Co.*  
23 *v. Sawyer*, 343 U.S. 579, 585-89 (1952) (reviewing the constitutionality of President’s executive  
24 order directing the seizure of property). It is only natural that, upon such review, the Court may  
25 issue an appropriate judicial declaration. *See, e.g., Clinton v City of New York*, 524 U.S. 417,  
26 426 n.9, 449 (1998) (affirming declaratory judgment against President and other federal  
defendants on the basis that Line Item Veto Act was unconstitutional); *Nat’l Treasury Emps.*

1 *Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974) (issuing judicial declaration against  
2 President relating to his constitutional duty faithfully to execute the laws); *City of New York v.*  
3 *United States Dep't of Commerce*, 739 F. Supp. 761, 764-68 (E.D.N.Y. 1990) (granting  
4 declaratory judgment against President Bush and other defendants).

5 Declaratory relief is particularly appropriate where the President “has not delegated to  
6 any subordinate executive official his powers under the applicable” policy. *Nat'l Treasury Emps.*  
7 *Union*, 492 F.2d at 615. Here, President Trump issued the Ban. He directed that the “Secretary  
8 of Defense, after consulting with the Secretary of Homeland Security, may advise [him] at any  
9 time, in writing, that a change to this policy is warranted,” but did not grant the Secretaries  
10 decision-making power. ECF 34-7 § 1(b). The President also directed that the accession policy  
11 be maintained “until such time as the Secretary of Defense, after consulting with the Secretary  
12 of Homeland Security, provides a recommendation to the contrary that I find convincing[.]” *Id.*  
13 § 2(a). Thus, the President – and the President alone – has retained final decision-making power  
14 regarding any future change to his directive that transgender individuals may not accede into the  
15 military. As such, “no federal official other than the President can be properly named as  
16 defendant herein in the place of the President.” *Nat'l Treasury Emps. Union*, 492 F.2d at 615.  
17 As in *National Treasury Employees Union*, this Court may “restrict [itself]” to a declaration “to  
18 show the utmost respect to the office of the Presidency . . . .” *Id.* at 616. A declaration that the  
19 Ban is unconstitutional is proper “in order that the President be given every opportunity to” take  
20 action to bring his policy in line with constitutional mandates “or timely seek review of this  
21 decision.” *Id.*

22 Defendants cite no controlling authorities to the contrary. Defendants rely upon Justice  
23 Scalia’s concurrence in *Franklin* in support of their claim that the court lacks authority to issue  
24 declaratory relief against the President. ECF 194 at 23 (citing *Franklin*, 505 U.S. at 827-28  
25 (Scalia, J., concurring)). However, Justice Scalia does not write for the majority, nor do any other  
26 Justices join in his opinion.

1 To the extent Defendants also rely on *Mississippi v. Johnson*, 71 U.S. 475 (1866), by  
 2 analogy, to support their argument that declaratory relief is unavailable as against the  
 3 President, the *Mississippi* Court's concerns with the effect of injunctive relief against the  
 4 President simply do not present themselves in the case of declaratory relief. Declaratory relief  
 5 does not interfere with or restrain the President from performing his official duties, lawfully or  
 6 not. Thus, Courts have properly entertained declaratory judgment relief actions against the  
 7 President. *See Clinton*, 524 U.S. at 426 n.9, 449 (affirming declaratory judgment against  
 8 President and other federal defendants on the basis that Line Item Veto Act was  
 9 unconstitutional); *Nat'l Treasury Emps. Union*, 492 F.2d at 616 (issuing judicial declaration  
 10 against President relating to his constitutional duty faithfully to execute the laws); *City of New*  
 11 *York*, 739 F. Supp. at 764-68 (granting declaratory judgment against President Bush and other  
 12 defendants); *Foley v. Carter*, 526 F. Supp. 977, 982 (D.D.C. 1981) (rejecting President's  
 13 argument that suit for declaratory judgment was improper under the circumstances, without  
 14 any suggesting declaratory relief was unavailable as against the President).

15 This Court should reject Defendants' argument that any action taken by the President is  
 16 unreviewable, or that the President is not properly subject to declaratory relief, and deny  
 17 Defendants' motion for partial summary judgment on that basis.

18 **D. Provided Defendants May Be Permanently Enjoined from Implementing the**  
 19 **President's Ban, the Court May Elect to Refrain From Issuing a Permanent**  
 20 **Injunction as Against the President**

21 Washington seeks permanent injunctive relief against Defendants to enjoin them from  
 22 implementing or enforcing the Ban. ECF 104 ¶¶ 41-43. The Court may exercise its discretion,  
 23 if it so chooses, and refrain from issuing an injunction against the President as long as  
 24 Washington's injuries can be fully redressed. *See Franklin*, 505 U.S. at 802-03.

25 **IV. CONCLUSION**

26 For each of the foregoing reasons, the Court should deny Defendants' motion for partial  
 summary judgment as to Washington's claims against the President.

DATED this 19<sup>th</sup> day of March, 2018.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 19<sup>th</sup> day of March, 2018.

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