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.

No. 2:17-cv-1297-MJP

DEFENDANTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS' AND INTERVENOR'S MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

At the hearing held on March 27, 2018, the Court directed the parties to file supplemental briefs on two issues. Mot. Hr'g Tr. at 49:8–12 (Mar. 27, 2018). First, the Court inquired as to the effective date of the new Department of Defense ("DoD") policy governing military service by transgender individuals. *Id.* Although DoD desires to implement the new policy as soon as possible, DoD has not implemented its new policy and will not do so until the preliminary injunctions issued by this Court and the courts in three related cases are dissolved. Second, the Court requested briefing as to the effect of the new DoD policy on the Court's analysis of Plaintiffs' and Intervenor's constitutional claims in their pending motions for summary judgment. *Id.* The issuance of the new DoD policy and the revocation of the President's prior policy render those pending motions moot. And even if they were not moot, the Court should deny the motions because Plaintiffs and Intervenor have not established that they are currently injured—or would suffer any imminent harm from the DoD policy if it were implemented—and thus they lack standing at the summary judgment stage. Finally, even if the Court does not deny the motions on these threshold jurisdictional bases, the Court should nevertheless deny the motions because evidence amassed by DoD provides substantial support for the President's decision to direct further study on the issue of military service by transgender individuals and to maintain the *status quo* while that study took place.

ARGUMENT

I. The Effective Date of the New DoD Policy

On August 25, 2017, the President issued a memorandum directing, *inter alia*, the Secretary of Defense to conduct "further study" into the risks of maintaining the policy on transgender service announced by former Secretary of Defense Carter in June 2016. Presidential Memorandum, 82 Fed. Reg. 41,319 ("2017 Memorandum"). Following the completion of an extensive study by a panel of senior military officials, DoD proposed to adopt a new policy that would allow some transgender individuals to serve in the military. Mattis Mem., Dkt. 224-1; DoD Report, Dkt. 224-2. In February 2018, Secretary of Defense Mattis, with the agreement of the Secretary of Homeland Security, sent the President a memorandum ("Mattis Memorandum")

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recommending that the President revoke his 2017 Memorandum so that the military could implement the new policy. *Id.* On March 23, 2018, the President issued a new memorandum concerning transgender military service ("2018 Memorandum") that specifically "revoke[d]" the 2017 Memorandum "and any other directive [the President] may have made with respect to military service by transgender individuals," thereby allowing the Secretaries of Defense and Homeland Security to "exercise their authority to implement any appropriate policies concerning military service by transgender persons." Dkt. 214-1.

Although DoD desires to implement the new policy as soon as possible, the Departments of Defense and Homeland Security have not yet implemented the policy as outlined in the Mattis Memorandum. Defendants respectfully maintain that the Court's preliminary injunction, which addressed only certain directives in the 2017 Memorandum, *see* Order, Dkt. 103, does not extend to DoD's new policy. But in an abundance of caution, Defendants will not implement DoD's new policy unless and until this Court and the three other courts in related cases dissolve or clarify the preliminary injunctions. If all four courts, including this Court, dissolve the preliminary injunctions or clarify that they do not extend to the new DoD policy, then the Departments will formally implement the new policy.

II. The Effect of the New DoD Policy on the Pending Summary Judgment Motions

In addition to the reasons set forth in Defendants' Opposition to Plaintiffs' and Intervenor's Motions for Summary Judgment, Dkt. 194, the Court should deny Plaintiffs' and Intervenor's motions for summary judgment for two threshold jurisdictional reasons: (1) their challenge to the revoked 2017 Memorandum is moot; and (2) they would lack standing to challenge the new DoD policy were it implemented. And even if they could establish jurisdiction, substantial record evidence precludes the entry of summary judgment for Plaintiffs and Intervenor with respect to the 2017 Memorandum currently at issue in the pending motions.

A. The Court Must Consider the 2018 Presidential Memorandum, the Mattis Memorandum, and the DoD Report.

As a preliminary matter, the Court inquired during oral argument as to why the Court should consider evidence filed by Defendants outside "the timeframe for this motion." Mot. Hr'g

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Tr. at 43:4–44:12; *see also id.* at 28:16–31:21. Because the 2018 Memorandum revokes the 2017 Memorandum that is at issue in the pending motions, Defendants submit that the new policy renders Plaintiffs' and Intervenor's claims moot. *See infra* Part II.B. Given that the Court is "under a continuing duty to dismiss an action whenever it appears that the court lacks jurisdiction," *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983), the Court should not disregard this jurisdictional issue merely because it was brought to the Court's attention after submission of Defendants' Opposition brief. Indeed, Defendants have noted from the inception of this lawsuit that a new policy would be issued, yet Plaintiffs nevertheless chose to move for summary judgment while that policy was being developed. *See, e.g.*, Defs.' Mot. to Dismiss at 17–19, Dkt. 69.

Even if the evidence did not raise a jurisdictional issue, the Court may consider evidence filed after the submission of Defendants' Opposition brief for good cause. *See Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1060 (9th Cir. 2005). Good cause exists here for Defendants' filing of the 2018 Memorandum, the Mattis Memorandum, and the DoD Report after the submission of Defendants' Opposition brief. The President did not revoke his 2017 Memorandum until March 23, 2018. Dkt. 214-1. That very same day, Defendants notified the Court of the new policy and filed the 2018 Memorandum, the Mattis Memorandum, and the DoD Report with the Court. *See* Notice, Dkt. 213; 2018 Mem., Dkt. 214-1; Mattis Mem., Dkt. 216-1; DoD Report, Dkt. 216-2. Defendants could not have reasonably been expected to file these documents before the President issued the 2018 Memorandum, and Defendants did so the same day the President acted. In any event, because this involves military interests, the Court should consider the professional judgment of senior military officials and not disregard that evidence merely because it was filed after the brief. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 26–28 (2008).

B. Plaintiffs' and Intervenor's Challenge to the 2017 Memorandum Is Moot.

Throughout this litigation, Plaintiffs and Intervenor have challenged the constitutionality of the 2017 Memorandum, which Plaintiffs characterize as a "Ban" on military service by transgender individuals. Am. Compl. ¶¶ 5, 224, 227, 233, Dkt. 30; Int.'s Compl. ¶¶ 24, 29, 35, 36, Dkt. 104 (referring to the 2017 Memorandum as a "Transgender Military Service Ban"); *see*

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also Order at 1, Dkt. 103 ("Plaintiffs challenge the constitutionality of Defendant President Donald J. Trump's Presidential Memorandum excluding transgender individuals from the military."). In their motions for summary judgment, Plaintiffs and Intervenor request that the Court "declar[e] the Ban unconstitutional and permanently enjoin[] it from ever being implemented." Pls.' Mot. at 1, Dkt. 129; *see also* Int.'s Mot. at 19, Dkt. 150. Following the revocation of the 2017 Memorandum (and any other Presidential directives) and the issuance of DoD's new policy, neither Plaintiffs nor Intervenor moved to supplement their complaints or amend their motions for summary judgment to challenge the new DoD policy. Instead, they continue to request that the Court enter final judgment on a policy that no longer exists, *see* Mot. Hr'g Tr. at 5:22, 15:4–21, 49:2–3, arguing that DoD's new policy is merely a "continuation of the same unconstitutional action," Pls.' Reply at 1, Dkt. 201; *see also* Int.'s Reply at 3–5, Dkt. 202; Mot. Hr'g Tr. at 6:1–14.

The Court should decline to do so. To the extent that Plaintiffs and Intervenor now argue that the new DoD policy is unconstitutional, they did not challenge that policy in their complaints and should not be permitted to effectively supplement their complaints in their reply briefs or at oral argument. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008); *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006). Indeed, this Court has recognized that their motions concerned only the 2017 Memorandum. *See* Mot. Hr'g Tr. at 6:20–7:10 (The Court to Plaintiffs' counsel: "[Y]ou're going outside the ban that you originally moved on . . . . [Y]ou're here to argue about the original ban that was put on.").

More fundamentally, Plaintiffs' and Intervenor's claims regarding the constitutionality of the 2017 Memorandum are now moot. "A claim is moot if it has lost its character as a present, live controversy." *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997), *as amended* (Sept. 16, 1997). As stated above, the President has "revoke[d]" the 2017 Memorandum "and any other directive [he] may have made with respect to military service by transgender individuals." Dkt. 214-1. "[T]he Supreme Court and [the Ninth Circuit] have repeatedly held that a case is moot when the challenged statute is repealed, expires, or is amended to remove the challenged language." *Log Cabin Republicans v. United States*, 658 F.3d 1162,

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1166 (9th Cir. 2011). Given the revocation of the 2017 Memorandum (and any other Presidential directives regarding service by transgender individuals), a decision as to that Memorandum's constitutionality would amount to an advisory opinion. *See Am. Rivers*, 126 F.3d at 1123.

If Plaintiffs and Intervenor fear *future* injury from the new DoD policy, which they have not challenged, those harms would stem from the independent action of the Secretaries of Defense and Homeland Security in implementing that policy, not the 2017 Memorandum or the President's statements on Twitter. If Plaintiffs and Intervenor decide to challenge the new policy upon implementation, the Court can review such a challenge at that time.

Nor can Plaintiffs and Intervenor find refuge in the doctrine that "a defendant's voluntary cessation of a challenged practice" does not necessarily moot the case. *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982). When the Government repeals and replaces one of its policies, the relevant question is "whether the new [policy] is sufficiently similar to the repealed [one] that it is permissible to say that the challenged conduct continues," or, put differently, whether the policy "has been sufficiently altered so as to present a substantially different controversy from the one . . . originally decided." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 n.3 (1993) (quotation omitted). When a new policy has "changed substantially," the voluntary cessation exception does not apply, as there is "no basis for concluding that the challenged conduct [is] being repeated." *Id.*

Any dispute over the new policy "'present[s] a substantially different controversy'" than Plaintiffs' and Intervenor's challenge to the President's 2017 Memorandum. *Id.* The target of Plaintiffs' and Intervenor's complaints and motions for summary judgment was the President's action in 2017. Am. Compl. ¶¶ 1, 5, Dkt. 30; Int.'s Compl. ¶ 24, Dkt. 104; Pls.' Mot. at 1, Dkt. 129; Int.'s Mot. at 19, Dkt. 150. This Court's preliminary injunction rested on its view that the President had ordered a categorical "prohibition on transgender service members . . . on Twitter, abruptly and without any evidence of considered reason or deliberation." Order at 18, Dkt. 103. The new policy, by contrast, was issued by DoD and is the product of independent military judgment following an extensive study that was documented in a 44-page report. *See* Mattis Mem., Dkt. 224-1; DoD Report, Dkt. 224-2. Moreover, the new policy differs in important,

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material respects from the challenged actions in that it contains several exceptions allowing some transgender individuals to serve. *See* Mattis Mem.; DoD Report; *see also* Defs.' Mot. to Dissolve the Prelim. Inj. at 3–6, Dkt. 223 (providing additional details).

At a minimum, the replacement of the allegedly categorical "Ban" with DoD's new, nuanced policy presents a substantially different controversy. In *Department of Treasury v. Galioto*, for instance, a lower court held that a federal statute barring all former mental patients who had been involuntarily committed from buying firearms was unconstitutional because it created an "'irrebuttable presumption'" that anyone involuntarily committed was permanently a threat "no matter the circumstances." 477 U.S. 556, 559 (1986) (per curiam). During the appeal, Congress amended the law to allow anyone prohibited from purchasing firearms to seek individualized relief from the Treasury Department. *Id.* Concluding that "no 'irrebuttable presumption' now exists since a hearing is afforded to anyone subject to firearms disabilities," the Supreme Court held the issue moot. *Id.* This case is no different. Because Plaintiffs and Intervenor sought an injunction precluding enforcement of the 2017 Memorandum—and thereby effectively maintain the Carter policy, which, like the new policy, treats gender dysphoria as presumptively disqualifying—the heart of their challenge was necessarily limited to the (allegedly) categorical nature of that Memorandum. Their challenge to the 2017 Memorandum is thus moot, and the Court should deny their motions for summary judgment on that basis alone.

C. Plaintiffs and Intervenor Would Lack Standing to Challenge the New Policy.

The Court previously found that Plaintiffs had alleged injuries sufficient at the pleading stage to defeat Defendants' motion to dismiss. Order at 2, Dkt. 103. Although the Court stated at oral argument that "[s]tanding has already been decided," Mot. Hr'g Tr. at 26:5; *see also id.* at 17:17–18, the question of standing must be examined again at the summary judgment stage of litigation, especially given that the revocation of the 2017 Memorandum and the issuance of the new DoD policy have significantly changed the analysis. As the Supreme Court has repeatedly held, "Article III demands that an 'actual controversy' persist throughout all stages of litigation." *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (citation omitted); *see also* Fed. R. Civ. P. 12(h)(3). Thus, even when a plaintiff establishes standing "[a]t the pleading stage," he must do

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so again—this time under a more demanding evidentiary standard—with respect to "a summary judgment motion." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

Plaintiffs are obviously not suffering any harm from the revoked 2017 Memorandum, and they would neither sustain an actual injury nor face an imminent threat of future injury if the new policy were to take effect. To start, the new DoD policy allows "currently serving Service members who have been diagnosed with gender dysphoria since the previous administration's policy took effect and prior to the effective date of this new policy . . . to continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria." Mattis Mem. at 2. Five of the nine individual Plaintiffs (Cathrine Schmid, Lindsey Muller, Terece Lewis, Philip Stephens, and Meghan Winters) are currently serving and have been diagnosed with gender dysphoria within the relevant time period. *See* Schmid Decl. ¶¶ 4, 9, Dkt. 131; Muller Decl. ¶¶ 4, 15, Dkt. 133; Lewis Decl. ¶¶ 4, 10, Dkt. 134; Stephens Decl. ¶¶ 3, 10, Dkt. 135; Winters Decl. ¶¶ 3, 10, Dkt. 136. These Plaintiffs therefore would be able to continue serving in their preferred gender, change their gender marker, and receive all medically necessary treatment if the new policy were to take effect. *See* Mattis Mem. at 2; DoD Report at 43. They thus would not sustain any injury under the new policy.[1]

As for the remaining litigants, they cannot establish standing to challenge, or irreparable injury from, the new policy for the same reasons they failed to satisfy these requirements with respect to the 2017 Memorandum. *See* Defs.' Opp'n at 4–5, 7–9, Dkt. 194; *see also* Defs.' Reply at 2–7, Dkt. 90. For example, in addition to those reasons, *see id.*, the three individual Plaintiffs who are not in the military (Ryan Karnoski, D.L., and Connor Callahan) may apply for a waiver to access into the military under the new DoD policy. *See* DoD Report at 5, 9–10, 32, 42. These Plaintiffs have not alleged that they would seek such a waiver, nor that they have ever been denied entry into the military. *See* Karnoski Decl., Dkt. 130; D.L. Decl., Dkt. 132; Callahan Decl., Dkt. 137. Also, because they are not currently serving, they are not eligible for DoD health care. Thus, they cannot show they would sustain any injury from the new policy.

[1] Jane Doe is currently serving, Doe Decl. ¶ 2, Dkt. 138, and may have been diagnosed with gender dysphoria, *id.* ¶¶ 8, 13, though Defendants were not permitted to depose her, *see* Dkts. 178, 179, 189. If she has been diagnosed, she may receive treatment. *See* Mattis Mem. at 2.

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Based on standing alone, which must be revisited at the summary judgment stage, the Court lacks jurisdiction to consider Plaintiffs' and Intervenor's summary judgment motions.

D. Substantial Record Evidence Precludes the Entry of Summary Judgment.

Even if the Court finds that Plaintiffs' and Intervenor's claims are not moot, substantial record evidence precludes the entry of summary judgment on their prior claims challenging the 2017 Memorandum. The new DoD Report, which was issued after an exhaustive study by senior military officials, supports not only the new DoD policy outlined in that Report and the Mattis Memorandum (not challenged in the still operative original complaints or pending motions), but also supports the President's decision in 2017 to direct further study on the issue of military service by transgender individuals and to maintain the *status quo* while that study took place.

The DoD Report is the product of a comprehensive review of the military's mental health, physical, and sex-based standards and provides an analysis of whether individuals who have been diagnosed with gender dysphoria are able to meet those standards. DoD Report at 19–31. During that review, the Panel of Experts "met with and received input from transgender Service members, commanders of transgender Service members, military medical professionals, and civilian medical professionals with experience in the care and treatment of individuals with gender dysphoria." *Id.* at 18. "The Panel also reviewed information and analyses about gender dysphoria, the treatment of gender dysphoria, and the effects of currently serving individuals with gender dysphoria on military effectiveness, unit cohesion, and resources." *Id.* The report includes this information, cites to numerous statutes and regulations, medical standards, and peer-reviewed studies, and contains "the Department's own data and experience obtained since the Carter policy took effect." *Id.* Thus, even assuming, *arguendo*, that the pending claims of Plaintiffs and Intervenor were not moot, the Mattis Memorandum and the DoD Report provide support for the directives outlined in the 2017 Presidential Memorandum for DoD to further study the issue of military service by transgender individuals and to maintain the *status quo* while doing so. As Secretary Mattis found in 2018, the Carter policy relied heavily on the RAND report, but that report "contained significant shortcomings" as it relied on "limited and heavily caveated data," "glossed over the impacts of healthcare costs, readiness, and unit cohesion, and

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erroneously relied on the selective experiences of foreign militaries with different operational requirements than our own." Mattis Mem. at 2; *see also* DoD Report at 14, 26–27, 34–35, 38–40 (identifying limitations of the RAND report). These conclusions (and the Memorandum and Report in their entirety) substantially support the President's 2017 decision—at issue in the pending motions—to further study military service by transgender individuals.

Plaintiffs and Intervenor argue in their replies that DoD's new policy is merely a "continuation of the same unconstitutional action" because it is an implementation of the 2017 Memorandum. Pls.' Reply at 1; *see also* Int.'s Reply at 3–5; Mot. Hr'g Tr. at 6:1–14. But this argument ignores both the history of DoD's policies and record evidence. When the Carter policy was issued in June 2016, it anticipated that additional study and revisions to the policy would be necessary to determine, among other things, its impact on military readiness. Parker Decl. Exh. 1 at Attach. at 2, Dkt. 197. In June 2017, Secretary Mattis extended the deadline for revising the accession policy by six months to "evaluate more carefully the impact of such accessions on readiness and lethality." *Id.* at Exhs. 3, 4. Thus, when the President issued his statements on Twitter, DoD had already determined that it needed further study on the impact of accessions of transgender individuals on military readiness and lethality. In addition, after the issuance of the 2017 Memorandum, Secretary Mattis did not direct the Panel of Experts to reach a particular policy recommendation; rather, Secretary Mattis "charged the Panel to provide its best military advice, based on increasing the lethality and readiness of America's armed forces, *without regard to any external factors*." Mattis Mem. at 1 (emphasis added). In response, the "Panel made recommendations based on each Panel member's independent military judgment." DoD Report at 4. Secretary Mattis then evaluated the recommendations using his "professional judgment." Mattis Mem. at 2. As set forth in Defendants' Opposition brief, substantial deference should be given to decisions made by military authorities. *See* Defs.' Opp'n at 13–15.

At the oral argument, Plaintiffs argued that the Court should not consider the DoD Report because it is "post hoc evidence." Mot. Hr'g Tr. at 46:6–47:5. But the 2017 Memorandum has been *rescinded*, and thus Defendants do not seek to support an *existing* policy with any *post hoc* evidence. Rather, if Plaintiffs and Intervenor insist on obtaining judicial review of a non-existent

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policy, then the DoD Report stands as support for the President's 2017 directive to maintain the *status quo* and to study military policy further.

In support of their argument, Plaintiffs cite to *United States v. Virginia*, 518 U.S. 515, 533 (1996), and *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1697 (2017). Mot. Hr'g Tr. at 46:13–17. But those cases did not involve principles of military deference, applicable here, and in the latter context, the Supreme Court has considered *post hoc* evidence. For example, in *Rostker v. Goldberg*, 453 U.S. 57, 59 (1981), the plaintiffs alleged that the Military Selective Service Act, 50 U.S.C. § 451 (1976), violated the Fifth Amendment because the statute authorized the President to require the registration of males, but not females. In considering the constitutionality of excluding females from registration, the Court examined the Congressional record created *decades* after the statute was first enacted. *See id.* at 72–83. The Court specifically "reject[ed] appellees' argument that [the Court] must consider the constitutionality of [the statute] solely on the basis of the views expressed by Congress in 1948, when the [statute] was first enacted in its modern form," *id.* at 74—even though those views consisted solely of impermissible "sexual stereotypes," *Goldberg v. Rostker*, 509 F. Supp. 586, 597 n.15 (E.D. Pa. 1980). Because Congress "thoroughly reconsider[ed] the question of exempting women from [the statute's] provisions" in 1980, the "1980 legislative history is, therefore, highly relevant in assessing the constitutionality of the exemption." 453 U.S. at 75. Accordingly, if the Court determines that it possesses jurisdiction, it should consider the Mattis Memorandum and the DoD Report and conclude that substantial evidence supported the challenged decision by the President in 2017 to study military policy further while maintaining the *status quo*. That alone precludes the entry of summary judgment for Plaintiffs and Intervenor.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Defendants' Opposition to Plaintiffs' and Intervenor's Motions for Summary Judgment as well as Defendants' Motion to Dissolve the Preliminary Injunction, the Court should deny Plaintiffs' and Intervenor's Motions for Summary Judgment. Defendants respectfully request that the Court rule on the summary judgment motions and motion to dissolve the preliminary injunction at the same time.

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Dated: April 3, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2018, I electronically filed the foregoing Supplemental Brief in Opposition to Plaintiffs' and Intervenor's Motions for Summary Judgment using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: April 3, 2018

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