

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

SUPPLEMENTAL BRIEF IN
SUPPORT OF
WASHINGTON’S MOTION
FOR SUMMARY
JUDGMENT

STATE OF WASHINGTON,

Intervenor-Plaintiff,

v.

DONALD TRUMP, et al,

Intervenor-Defendants.

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I. INTRODUCTION

In the absence of evidence justifying the President’s unconstitutional Transgender Military Service Ban (the “Ban”), Defendants seek to avoid summary judgment with post-hoc justifications they have now cooked up for the Ban. However, the new Presidential Memorandum, Department of Defense report, and Secretary Mattis Implementation Plan that Defendants filed with the Court on the evening of Friday, March 23, 2018 – just days before the hearing on Washington’s Motion for Summary Judgment – fail at their purpose. These documents do not revoke the Ban or put in place a “new” policy; the documents simply implement and finalize the unconstitutional Ban. The documents are not evidence that could defeat summary judgment, as they constitute nothing more than post hoc rationalizations that should be summarily dismissed. Rather than moot Washington’s motion, the documents have no bearing on it. Defendants have caused enough harm and delay. The Court should find that the Ban violates the Fifth Amendment’s equal protection and substantive due process guarantees and grant summary judgment as soon as practicable.

II. STATEMENT OF RELEVANT UNDISPUTED MATERIAL FACTS

On June 30, 2016, based on the advice of medical, military, and personnel experts, and an independent research study conducted by the RAND Corporation, former Secretary of Defense Ashton Carter ended the military’s longstanding, facially discriminatory policy that barred transgender individuals from openly accessing and serving in the United States military.¹ ECF 150 at 2 (citing ECF 34-1; ECF 46-2 at 90-93; ECF 48-1; ECF 69 at 4; ECF 103 at 4). To that end, former Secretary Carter issued a directive allowing transgender individuals currently serving to do so openly, and directed the military to allow transgender individuals to access into military service beginning July 1, 2017. *Id.* (citing ECF 48-3).

On June 30, 2017, in order to further evaluate any potential impact of accession of

¹ Washington incorporates, by reference, its prior Statement of Undisputed Material Facts, *see* ECF 150 at 1-7, and supplements it, here, as relevant to the issues requested to be briefed.

1 transgender individuals into military service, Secretary of Defense James Mattis delayed the date
2 for accepting transgender recruits to January 1, 2018. ECF 150 at 2 (citing ECF 34-3).

3 Less than a month later, on July 26, 2017, President Donald J. Trump reneged on the
4 Department of Defense’s (“DoD”) promise of equal treatment and opportunity for transgender
5 individuals in military service and announced on Twitter that the military would return to its
6 discriminatory practices. *Id.* (citing ECF 34-6).

7 On August 25, 2017, President Trump memorialized the Ban in a Presidential
8 Memorandum titled “Military Service by Transgender Individuals” (“Initial Presidential
9 Memorandum”). *Id.* at 3 (citing ECF 34-7).

10 In his Initial Presidential Memorandum, President Trump directed the military to “return
11 to the longstanding policy and practice on military service by transgender individuals that was
12 in place prior to June 2016[.]” *Id.* (citing ECF 34-7 §1(b)). In Section 2 of the Initial Presidential
13 Memorandum, President Trump directed the military to: (1) indefinitely bar accession of
14 transgender individuals into military service; and (2) halt all use of DoD or Department of
15 Homeland Security (“DHS”) funding for sex-reassignment surgical procedures. *Id.* at § 2. The
16 Initial Presidential Memorandum also directed the Secretaries of Defense and Homeland
17 Security, “[b]y February 21, 2018,” to submit “a plan for implementing both the general policy
18 set forth in section 1(b) of this memorandum and the specific directives set forth in section 2 . .
19 .” *Id.* at § 3. President Trump retained final decision-making authority regarding any change to
20 his policy directives regarding transgender individuals in military service. *Id.* at § 1(b) (directing
21 the Secretaries of Defense and Homeland Security to “advise [him], in writing” if they believe
22 “that a change to this policy [the Ban] is warranted”); § 2(a) (instructing that his directive
23 regarding accession into military service by transgender individuals shall be maintained “beyond
24 January 1, 2018, until such time as the Secretary of Defense, after consulting with the Secretary
25 of Homeland Security, provides a recommendation to the contrary that I find convincing”).

26 On August 29, 2017, Secretary of Defense James Mattis issued a Statement confirming

1 receipt of the Initial Presidential Memorandum and affirming that “[t]he department will carry
 2 out the president’s policy direction” Statement by Secretary Mattis at 1, ECF 197, Ex. 2. In
 3 his Statement, Secretary Mattis noted that “as directed, [he] will develop a study and
 4 implementation plan” including establishing “a panel of experts serving with the Departments
 5 of Defense and Homeland Security to provide advice and recommendations on the
 6 implementation of the president’s direction.” *Id.* Secretary Mattis further announced his intent
 7 to “issue interim guidance to the force concerning the President’s direction” *Id.*

8 On September 14, 2017, Secretary Mattis issued Interim Guidance regarding the Initial
 9 Presidential Memorandum. ECF 69-1. The Interim Guidance confirmed the intent of the DoD to
 10 “carry out the President’s policy and directives” *Id.* Secretary Mattis promised that, “[n]ot
 11 later than February 21, 2018, I will present the President with a plan to implement the policy and
 12 directives in the Presidential Memorandum.” *Id.*

13 On February 22, 2018, a day after his deadline, Secretary Mattis presented President
 14 Trump with the implementation plan for the Ban, completing the final step required by the Initial
 15 Presidential Memorandum. Implementation Plan, ECF 216-1. In the “[u]nclassified”
 16 Implementation Plan, Secretary Mattis confirms that he created a panel of experts to “provide
 17 advice and recommendations on the implementation of the president’s” Ban, as promised in his
 18 August 29, 2017 Statement. Statement by Secretary Mattis at 1, ECF 197, Ex. 2. *See also* ECF
 19 216-1 at 1. The panel of experts provided Secretary Mattis with their recommendations in an
 20 “[u]nclassified” Department of Defense Report and Recommendations on Military Service by
 21 Transgender Persons dated February 2018 (“DoD Report”).² ECF 216, Ex. 2. The
 22 Implementation Plan bars (1) accession into military service by transgender individuals “who
 23 require or have undergone gender transition;” (2) military service by openly transgender
 24 individuals who want to serve our country in a manner consistent with their gender identity; and

25 _____
 26 ² The DoD Report indicates that Secretary Mattis established the panel of experts on September 14, 2017,
 the same day he issued the Interim Guidance. ECF 216, Ex. 2 at 17. *See also* ECF 69-1.

1 (3) use of military resources for transition related medical care. ECF 216-1 at 2-3.³ Secretary
 2 Mattis concluded the Implementation Plan by recommending to the President that he revoke the
 3 Initial Presidential Memorandum, “thus allowing me and the Secretary of Homeland Security
 4 with respect to the U.S. Coast Guard, to implement appropriate policies concerning military
 5 service by transgender persons.” ECF 216-1 at 3.

6 On March 23, 2018, a month after receiving Secretary Mattis’ Implementation Plan,
 7 President Trump issued a Memorandum for the Secretary of Defense and Secretary of Homeland
 8 Security regarding Military Service by Transgender Individuals (“Second Presidential
 9 Memorandum”). ECF 214-1. The Second Presidential Memorandum acknowledges that,
 10 pursuant to the Initial Presidential Memorandum, President Trump received Secretary Mattis’
 11 Implementation Plan and DoD Report. *Id.* at 1 Apparently finding those recommendations
 12 convincing, the Second Presidential Memorandum accepts Secretary Mattis’ recommendation
 13 that he revoke the Initial Presidential Memorandum and authorizes Secretary Mattis and the
 14 Secretary of Homeland Security “to implement any appropriate policies concerning military
 15 service by transgender individuals.” *Id.*

16 III. ARGUMENT

17 Defendants filed the Second Presidential Memorandum, Secretary Mattis’
 18 Implementation Plan, and the DoD Report with the Court on March 23, 2018 (collectively
 19 “March 23rd filings”), long after responding to Washington’s Motion for Summary Judgment.
 20 Defendants’ March 23rd filings have no bearing on the merits of Washington’s Motion for
 21 Summary Judgment. Rather than constitute a “new” policy on military service by transgender
 22 individuals, as Defendants suggest, the March 23rd filings simply finalize the Ban and are post-
 23

24 ³ The Implementation Plan contains a narrow exception allowing transgender individuals who entered or
 25 remained in the military following the announcement of the Carter policy and the imposition of preliminary
 26 injunctions to serve in accordance with their gender identity and receive medically necessary treatment. ECF 216-
 1 at 2. However, the DoD Report indicates that, “should its decision to exempt these Service members be used by
 a court as a basis for invalidating the entire policy, this exemption instead is and should be deemed severable from
 the rest of the policy.” ECF 216, Ex. 2 at 43.

1 hoc evidence that cannot – despite Defendants’ suggestions to the contrary – justify the Ban or
 2 moot Washington’s constitutional challenges.

3 **A. The Second Presidential Memorandum, Together With the Implementation Plan
 4 and DoD Report, Finalizes – Not Revokes – the Ban**

5 Defendants’ March 23rd filings reveal that the Ban is alive and well, and ripe for
 6 summary judgment. Defendants, relying on the Second Presidential Memorandum’s purported
 7 revocation of the Initial Presidential Memorandum, attempt to characterize the March 23rd
 8 filings as announcing a “new” policy – separate and distinct from the Ban. However, the
 9 documents themselves belie Defendants’ contentions.

10 In his Initial Presidential Memorandum memorializing the Ban, President Trump plainly
 11 directed the Secretaries of Defense and Homeland Security to submit to President Trump a “plan
 12 for implementing both the general policy set forth in section 1(b) of this memorandum and the
 13 specific directives set forth in section 2” by February 21, 2018. ECF 34-7 §§ 1(a), 3. Secretary
 14 Mattis agreed to carry out this directive. Statement by Secretary Mattis at 1, ECF 197, Ex. 2 (“As
 15 directed, we will develop an implementation plan” including establishing “a panel of experts
 16 serving with the Departments of Defense and Homeland Security to provide advice and
 17 recommendations on the implementation of the president’s direction.”). To that end, he
 18 established a “panel of experts” on September 14, 2017 – the date he issued his Interim Guidance
 19 – and they produced the February 2018 DoD Report. On February 22, 2018, Secretary Mattis
 20 presented his Implementation Plan to the President. The Implementation Plan ensures that the
 21 Accessions, Retention, and Medical Care directives ordered by President Trump in his Initial
 22 Memorandum are implemented. *Compare* ECF 216-1 (ordering the United States military to (1)
 23 bar accession by transgender individuals; (2) disallow transgender individuals to openly serve in
 24 the military; and (3) deny access to medical services solely because a person is transgender) and
 25 ECF 216-1 (barring (1) transgender individuals “who require or have undergone gender
 26 transition” from military service; (2) requiring “[t]ransgender persons without a history or

1 diagnosis of gender dysphoria ... [to] serve ... in their biological sex”; and (3) denying access
2 to transgender related healthcare to any service member not already receiving such services
3 under the Carter policy and this Court’s injunction).

4 The Second Presidential Memorandum acknowledges the President’s receipt of the DoD
5 Report and Implementation Plan. *See* ECF 216-3 (noting that the Implementation Plan and DoD
6 Report were created “[p]ursuant to [President Trump’s] memorandum of August 25, 2017”).
7 Apparently finding Secretary Mattis’ implementing recommendations convincing – a
8 requirement the President announced in his Initial Presidential Memorandum – the Second
9 Presidential Memorandum authorizes Secretary Mattis and the Secretary of Homeland Security
10 “to implement any appropriate policies concerning military service by transgender individuals.”

11 While the Second Presidential Memorandum also follows Secretary Mattis’
12 recommendation and allegedly “revokes” the Initial Presidential Memorandum, there is nothing
13 left to revoke. With Secretary Mattis’ submission of the Implementation Plan and DoD Report
14 to the President, and the President’s acceptance and approval of the same, Defendants completed
15 all that the Initial Presidential Memorandum directed be accomplished regarding the Ban.

16 Thus, the Second Presidential Memorandum did not revoke the Ban. It finalized it.

17 **B. Defendants’ Post-Hoc Justifications Do Not Save the Unconstitutional Ban**

18 The March 23rd filings do not spare the Ban from Washington’s constitutional challenge
19 on summary judgment.

20 Post-hoc justifications are insufficient to satisfy sex-based distinctions. As the Supreme
21 Court recently noted, “[i]t will not do to hypothesize or invent governmental purposes for gender
22 classifications post hoc in response to litigation.” *Sessions v. Morales-Santana*, 137 S. Ct. 1678,
23 1696-97 (2017) (rejecting post-hoc claim of governmental interest unsupported by the record)
24 (quoting *United States v. Virginia*, 518 U.S. 515, 533, 535-36 (1996)). Instead, the Supreme
25 Court has consistently required government entities to prove a “genuine” need for a sex-based
26

1 classification, and has been clear that post-hoc justifications do not qualify. *Virginia*, 518 U.S.
2 at 532-33.

3 Here, the Implementation Plan and the DoD Report are nothing more than post hoc
4 justifications for the Ban. These documents did not exist when President Trump tweeted out the
5 Ban or when it was memorialized in the Initial Presidential Memorandum. The Implementation
6 Plan and DoD Report exist solely because the Initial Presidential Memorandum ordered
7 Defendants to create them as part of the Ban's implementation process. As such, the March 23rd
8 filings constitute quintessential post hoc evidence that should not be relied upon by this Court in
9 deciding whether the Ban passes constitutional muster.

10 To the extent Defendants point to *Rostker v. Goldberg*, 453 U.S. 57 (1981), in advocating
11 that the Court consider the March 23rd filings, that case is distinguishable and their argument
12 falls flat. The statute at issue in *Rostker* exempted women from the draft. *Id.* at 60-61. Congress
13 reconsidered that sex-based distinction in congressional proceedings arising from a subsequent
14 presidential request to reactivate the draft registration process. *Id.* at 61. In considering whether
15 the subsequent evidence was sufficient to justify the sex-based distinction, the *Rostker* Court
16 observed, "Congress did not act 'unthinkingly' or 'reflexively and not for any considered
17 reason.'" 453 U.S. at 71. Instead, the sex-based distinction in *Rostker* was "extensively
18 considered by Congress in hearings, floor debate, and in committee" and in "[h]earings held by
19 both Houses of Congress in response to the President's request for authorization to register
20 women[.]" Further, Congress "adduced extensive testimony and evidence concerning the issue."
21 *Id.* The result is that the Legislature held extensive proceedings that did not have a predetermined
22 outcome and the Court accepted the resulting findings as sufficiently thorough and devoid of
23 knee-jerk discrimination to warrant the Court's consideration.

24 Here, Defendants present the Court with the opposite. The self-interested, in-house DoD
25 Report and Implementation Plan at issue here is manifestly different than the extensive vetting
26 of the Military Selective Service Act that Congress undertook in *Rostker*. Defendants' generated

1 the DoD Report and Implementation Plan to justify the Ban in the face of the present
 2 constitutional challenge. Defendants now ask this Court to defer to a report that directly
 3 contradicts an exhaustive DoD assessment – informed by an external civilian research study –
 4 which ultimately concluded that service by transgender individuals was beneficial to the United
 5 States military. Defendants also ask this Court to not only turn a blind eye to extensive DoD
 6 research, but to give deference to the Implementation Plan and DoD Report which all too
 7 conveniently purports to reverse engineer evidence to justify the Ban and is transparently
 8 responsive to the challenges in this litigation. This quintessential post hoc evidence is nothing
 9 like the congressional record considered in *Rostker* and the Court should disregard it in its
 10 assessment of the President’s basis for the Ban.

11 **C. Defendants’ Post-Hoc Justifications for the Ban Do Not Warrant Deference**

12 This Court owes no deference to Defendants’ March 23rd filings. In reviewing military
 13 action for constitutional compliance, under appropriate circumstances courts may accord
 14 deference where the challenged restriction arises from military experience or developed
 15 research. *Rostker*, 453 U.S. at 67. Although courts owe deference to well-reasoned military
 16 policies, blind deference to discriminatory policies is never warranted.⁴ Courts owe deference
 17 only to well-reasoned policies or practices developed by military experts or the Legislature, as
 18 neither is “free to disregard the Constitution when [they] act in the area of military affairs.” *Id.*
 19 Indeed, if history has instructed anything, it is that there must be limits to judicial deference in
 20 the military context: “it is unthinkable that the judiciary would defer to the Army’s prior
 21 ‘professional’ judgment that black and white soldiers had to be segregated to avoid interracial
 22 tensions.” *Watkins v. U.S. Army*, 875 F.2d 699, 729 (1989) (Norris, J., concurring).

23 Defendants ask this Court to ignore the Carter policy – *i.e.* the military’s own well-
 24 reasoned policies arising out of extensive research performed by military, medical, and civilian

25 ⁴ Inasmuch as Defendants argue that deference to military decision-making requires the Court to subject
 26 Washington’s constitutional challenges to rational basis review, that argument fails. The Supreme Court rejected
 exactly such a request from the military in *Rostker*. See *Rostker*, 453 U.S. at 69.

1 researchers and experts that found the military is better if transgender individuals are allowed to
2 serve openly. Instead, Defendants argue that this Court must defer to Defendants' post hoc in-
3 house "research" – which supports Defendants' litigation position but runs counter to its own
4 recent neutral assessment of the military's needs and interests. However, the Implementation
5 Plan and DoD Report are not the result of neutral, measured consideration and study by military
6 experts but were created with the express purpose of implementing the Ban. The Court owes no
7 deference to such post hoc evidence expressly created for the purpose of implementing the
8 discriminatory Ban.

9 **D. Defendants' March 23, 2018 Filings Do Not Moot Washington's Claims**

10 Defendants contend that Washington's Motion for Summary Judgment is moot as a result
11 of the March 23rd filings. They are wrong.

12 "The burden of demonstrating mootness 'is a heavy one.'" *Cty. of Los Angeles. v. Davis*,
13 440 U.S. 625, 631 (1979) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33
14 (1953)). Further, the Ninth Circuit warned that "dismissal of a case on 'grounds of mootness
15 would be justified only if it were absolutely clear that the litigant no longer had any need of the
16 judicial protection that is sought.'" *Jacobus v. Alaska*, 338 F.3d 1095, 1102-03 (9th Cir. 2003)
17 (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000)).

18 Following this guidance, courts consistently find claims are moot only where the
19 challenged policy has been completely revoked or rescinded. *See Burke v. Barnes*, 479 U.S. 361,
20 363 (1987) (mooting a claim that *only* sought to "litigate the validity of a statute which by its
21 terms had already expired"); *U.S. Dep't of Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986)
22 (finding claim moot *after* Congress altered the challenged statute and rectified the constitutional
23 concerns raised by plaintiff's lawsuit); *Kremens v. Bartley*, 431 U.S. 119, 128-29 (1977) (finding
24 claim moot *after* statutory fix was made to protect plaintiffs' constitutional rights); *Gulf of Me.*
25 *Fisherman's All. v. Daley*, 292 F.3d 84, 88 (1st Cir. 2002) (finding claim moot *after* a regulation
26

1 had been “replaced by a series of subsequent” regulations).⁵ Here, because the March 23rd filings
2 finalize the Ban, the revocation of the Initial Presidential Memorandum does not and cannot
3 moot Washington’s constitutional challenge to the Ban on summary judgment.

4 **IV. CONCLUSION**

5 For the foregoing reasons, the March 23rd filings have no bearing on Washington’s
6 motion, and summary judgment should be granted.

7 DATED this 3rd day of April, 2018.

8
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10
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21 ⁵ To the extent Defendants argue that they have voluntarily ceased implementation of the Ban, this Court
22 should reject such empty claims and proceed to a substantive resolution of Washington’s constitutional claims. “It
23 is well settled that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its
24 power to determine the legality of a practice.” *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 287 (1982).
25 This is especially true where a defendant stopped a challenged practice but implements another practice that causes
26 substantially the same injury to plaintiff. *Ne. Fl. Chapt. of Assoc. Contractors of America v. City of Jacksonville, Fl.*, 508 U.S. 656, 662 (1993). Further, “[w]hen a challenged policy is repealed or amended mid-lawsuit – a
‘recurring problem when injunctive relief is sought’ – the case is not moot if a substantially similar policy has been
instituted or is likely to be instituted.” *Smith v. Exec. Dir. of Ind. War Mem’ls Comm’n*, 742 F.3d 282, 287 (7th Cir.
2014) (quoting *ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire Prot. Dist.*, 724 F.3d 854, 864 (7th Cir. 2013)). *See also Bunker Ltd. P’ship v. United States*, 820 F.2d 308, 312 (9th Cir. 1987) (noting that Defendants cannot moot a
claim by implementing a variant of the challenged policy or law where the new variant does not manifestly change
plaintiff’s likelihood of injury).

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 3rd day of April, 2018.

/s/ La Rond Baker
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