

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

STATE OF WASHINGTON'S
RESPONSE TO DEFENDANTS'
MOTION TO STAY
PRELIMINARY INJUNCTION
PENDING APPEAL

STATE OF WASHINGTON,

Intervenor-Plaintiff,

v.

DONALD TRUMP, et al,

Intervenor-Defendants.

NOTED FOR CONSIDERATION:
May 18, 2018

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

- I. INTRODUCTION..... 1
- II. BACKGROUND..... 2
- III. ARGUMENT 3
 - A. Defendants Cannot Meet the Extraordinary Burden to Warrant a Stay 3
 - 1. The Ban—Implementation Plan Included—is Unconstitutional and Defendants Cannot Show a Strong Likelihood of Success on the Merits..... 4
 - a. Defendants’ 2018 Implementation materials did not moot Washington’s need for the protections of the preliminary injunction 5
 - b. The Ban violates Equal Protection guarantees 6
 - (1) The Ban cannot survive heightened scrutiny 6
 - (2) The Ban is insufficiently tailored to meet heightened scrutiny..... 8
 - c. The Ban is unlikely to withstand Washington’s Substantive Due Process claim 9
 - d. The deference required here is not likely to save the Ban from Washington’s constitutional challenge 9
 - 2. Defendants Are Not Likely to Suffer Irreparable Injury If a Stay Is Denied 11
 - 3. Public Interest and the Balance of Equities Favors Enjoining the Government From Trampling Constitutional Rights 11
 - 4. Nationwide Injunctive Relief Was Appropriate..... 12
- IV. CONCLUSION 12

TABLE OF AUTHORITIES

1

2 *Adarand Constructors, Inc. v Slater*, 528 U.S. 216 (2000) 5

3 *Am. Hotel & Lodging Assoc. v. Los Angeles*, 834 F.3d 958 (9th Cir. 2016) 4

4 *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656 (2004) 4

5 *Credit Suisse First Boston Corp. v. Grunwalk*, 400 F.3d 1119 (2005) 4

6 *Doe I v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017)..... 10

7 *Giovani Carandola, Ltd. v. Bason*, 303, F.3d 507 (4th Cir. 2002) 11

8 *Golden v. Washington*, No. 17-5424, 2017 WL 3224674 (U.S. Nov. 13, 2017)..... 4

9 *Grutter v. Bollinger*, 539 U.S. 306 (2003)..... 6, 8

10 *Hawaii v. Trump*, 871 F.3d 646 (9th Cir. 2017).....12

11 *Hilton v. Braunskill*, 481 U.S. 770 (1987)..... 4

12 *Jacobus v. Alaska*, 338 F.3d 1095 (9th Cir. 2003)..... 5

13 *Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012)..... 11

14 *Nken v. Holder*, 556 U.S. 418 (2009) 3, 4

15 *Palmore v. Sidoti*, 466 U.S. 429 (1984)..... 7

16 *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1996)..... 8

17 *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)..... 9

18 *Rostker v. Goldberg*, 453 U.S. 57 (1981) 9

19 *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) 9

20 *Sessions v. Santana Morales*, 137 S.Ct. 1678 (2017)..... 8

21 *Shaw v. Hunt*, 517 U.S. 899 (2008) 8

22 *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003)..... 4

23 *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017)..... 12

24 *United States v. Virginia*, 518 U.S. 515 (1996)..... 6, 8

25 *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017).....4, 12

26 *Watkins v. U.S. Army*, 875 F.2d 699 (9th Cir. 1989)..... 10

1	<i>Winter v. Nat. Res. Def. Council, Inc.</i> , 555 U.S. 7 (2008).....	11
2	<i>Witt v. Dept. of Air Force</i> , 527 F.3d 806 (9th Cir. 2008)	10
3		
4		
5		
6		
7		
8		
9		
10		
11		
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I. INTRODUCTION

Transgender individuals have long devoted their lives in service to our country in the United States military. But they were forced to do so in silence due the longstanding Department of Defense (“DoD”) policy of excluding open service by transgender individuals. In 2016, the Department of Defense—after an extensive review process—determined that allowing transgender individuals to serve openly would make our military stronger. Relying on DoD’s promise of inclusion, enlisted servicemembers came forward and began to serve openly and transgender individuals—many of whom had long wished to serve—began to plan their accessions.

Without warning, on August 25, 2017, President Donald Trump announced via Twitter that transgender individuals would be barred from serving in the military in any capacity (“the Ban”). President Trump memorialized his Ban in an August 25, 2017 Presidential Memorandum (“2017 Memorandum”) which directed Secretary of Defense James Mattis to develop an implementation plan for the Ban. Secretary Mattis presented President Trump with that plan on February 22, 2018 (“Mattis Policy Recommendation”) along with the Department of Defense Report and Recommendations on Military Service by Transgender Individuals (“DoD Report”). President Trump accepted and ratified the Mattis Policy Recommendation and DoD Report in his March 23, 2018 Presidential Memorandum (“2018 Memorandum”). Defendants then moved to dissolve the preliminary injunction in place in this lawsuit. ECF 215.

The Court’s decision to strike Defendants’ motion to dissolve the preliminary injunction was proper, as Defendants presented no change in circumstance or law to justify dissolution. To the contrary, Defendants sought dissolution because Secretary Mattis delivered, and the President approved, a plan to implement the Ban. But the Court was aware that the 2017 Memorandum required such a plan at the time it issued the preliminary injunction. That Secretary Mattis did what he was required to do to effectuate the Ban is not a change in circumstance. Neither did delivery and approval of the Mattis Policy Recommendation “moot” the preliminary

1 injunction or Washington’s claims.

2 Defendants have appealed the Court’s decision denying dissolution and, on that basis,
3 now ask this Court to stay the preliminary injunction pending appeal. However, Defendants fail
4 to explain why their appeal militates against continuing to “preserve the status quo that existed
5 prior to the change in policy announced by President Trump on Twitter and in his Presidential
6 Memorandum[,]” pending a final ruling on the merits. ECF 103 at 14. Because Defendants
7 otherwise fail to satisfy any part of the stay test, the Court should deny their motion.

8 II. BACKGROUND

9 On August 28, 2017, Plaintiffs filed this lawsuit challenging the constitutionality of the
10 Ban, “as set forth in the Twitter Announcement and the 2017 Memorandum,” and subsequently
11 implemented by the 2018 Memorandum, Mattis Policy Recommendation, and DoD Report
12 (collectively “Implementation Plan”). ECF 233 at 8. Washington intervened to protect its
13 sovereign and quasi-sovereign interests in its natural resources, anti-discrimination laws, and in
14 the health and physical and economic well-being of its residents. ECF 103 at 11-12; ECF 233 at
15 18-19; Baker Decl. Exs. A-F. On December 11, 2017, the District Court preliminarily enjoined
16 Defendants from “taking any action relative to transgender individuals that is inconsistent with
17 the status quo that existed prior to President Trump’s July 26, 2017 announcement.” ECF 103.

18 Washington moved for summary judgment on January 25, 2018, seeking a declaration
19 that the Ban violated the Fifth Amendment’s equal protection and substantive due process
20 guarantees.

21 On March 23, 2018, Defendants filed the Implementation Plan—one month after DoD
22 finalized the Mattis Policy Recommendation and DoD Report. ECF 213; ECF 214. Defendants
23 moved to dissolve the preliminary injunction. ECF 215; ECF 216. The Parties provided the Court
24 with supplemental briefing regarding whether the implementing documents had any impact on
25 the pending Motions for Summary Judgment. *See* ECF 226; ECF 227; ECF 228.

1 In its Order Denying and Granting in Part Plaintiffs’ and Washington’s Motions for
 2 Summary Judgment; [and] Granting in Part and Denying in Part Defendants’ Motion for Partial
 3 Summary Judgment, the Court found that transgender status is a suspect classification and that
 4 the Ban, therefore, must survive strict scrutiny. ECF 233 at 20-24. The Court also found that the
 5 Implementation Plan “do[es] not substantively rescind or revoke the Ban, but instead threaten
 6 the very same violations[.]” ECF 233 at 12. However, the Court found that summary judgment
 7 was not appropriate at this stage of the proceedings because “[o]n the present record, the Court
 8 cannot determine whether the DoD’s deliberative process—including the timing and
 9 thoroughness of its study and the soundness of the medical and other evidence it relied upon—is
 10 the type to which Courts typically should defer.” ECF 233 at 26. Because the Court found that
 11 the Implementation Plan does not moot Plaintiffs’ claims, the Ban is subject to strict scrutiny,
 12 and that there are significant questions regarding whether or to what extent Defendants are due
 13 deference, it struck Defendants’ Motion to Dissolve the Preliminary Injunction and affirmed that
 14 “[t]he preliminary injunction previously entered otherwise remains in full force and effect.” ECF
 15 233 at 30-31.

16 Defendants filed a Motion to Stay the Preliminary Injunction on April 30, 2018, ECF
 17 238, noting it for consideration on May 18, 2018. However, Defendants’ moving papers
 18 inexplicably advised the District Court that “[i]f this Court has not ruled on Defendants’ motion
 19 by May 4, 2018, Defendants intend to file for a stay of the Court’s preliminary injunction with
 20 the Ninth Circuit Court of Appeals”—even though the motion will not be fully briefed until May
 21 14, 2018. ECF 238 at 5-6.

22 III. ARGUMENT

23 A. Defendants Cannot Meet the Extraordinary Burden to Warrant a Stay

24 A stay is an “intrusion into the ordinary processes of administration and judicial review”
 25 and “is not a matter of right, even if irreparable injury might otherwise result to the appellant.”
 26 *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted); *Washington v. Trump*, 847 F.3d

1 1151, 1164 (9th Cir. 2017), *cert. denied sub nom. Golden v. Washington*, No. 17-5424, 2017 WL
 2 3224674 (U.S. Nov. 13, 2017). A stay is an “exercise of judicial discretion,” and the party
 3 requesting a stay bears the burden of showing that the circumstances of the particular case justify
 4 an exercise of that discretion. *Nken*, 556 U.S. at 433-34; *Washington*, 847 F.3d at 1164.

5 In seeking a stay, Defendants bear the heavy burden of showing (1) a strong likelihood
 6 of success on the merits, (2) the likelihood of irreparable injury if relief is not granted, (3) a
 7 balance of hardships favoring Defendants, and (4) that reinstating the Ban, as implemented, is in
 8 the public interest. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). In assessing these factors,
 9 appellate courts review the district court’s order for abuse of discretion. *Am. Hotel & Lodging*
 10 *Assoc. v. Los Angeles*, 834 F.3d 958, 962 (9th Cir. 2016). Review is “limited and deferential,”
 11 and does not extend to the “underlying merits of the case.” *Sw. Voter Registration Educ. Project*
 12 *v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc). “[I]f the underlying constitutional
 13 question is close” the appellate court “should uphold the injunction and remand for trial on the
 14 merits.” *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 664 (2004). This Court was well
 15 within its discretion to maintain a nationwide preliminary injunction, and Defendants cannot
 16 make any of the necessary showings to stay it. *See, e.g., Credit Suisse First Boston Corp. v.*
 17 *Grunwald*, 400 F.3d 1119, 1126 n.7 (2005) (noting standard of review for a district court’s
 18 disposition of a motion to dissolve a preliminary injunction is abuse of discretion).

19 **1. The Ban—Implementation Plan Included—is Unconstitutional and**
 20 **Defendants Cannot Show a Strong Likelihood of Success on the Merits**

21 Defendants argue that the culmination of the Ban—issuance of the Implementation
 22 Plan—somehow moots the preliminary injunction. That makes little sense as the Implementation
 23 Plan merely executed the directives of the 2017 Memorandum before the President purportedly
 24 “revoked” it. Nor does the manner in which Defendants now wish to implement the Ban pass
 25 constitutional muster or moot Washington’s claims.¹

26 ¹ As the District Court has repeatedly recognized, Washington has significant protectable sovereign interests that give it standing to challenge the Ban. ECF 103 at 11-12; ECF 233 at 18-19.

1 **a. Defendants’ 2018 Implementation materials did not moot**
 2 **Washington’s need for the protections of the preliminary injunction**

3 Yet again, Defendants argue that the Implementation Plan is a “new policy.” ECF 238 at
 4 2-4. However, to view the Implementation Plan as untethered from the President’s 2017 directive
 5 to ban transgender individuals from military service is ahistorical *and* requires the Court to
 6 ignore the actual text of the documents.

7 The 2018 Memorandum acknowledges that the Implementation Plan and DoD Report
 8 were created “[p]ursuant to [President Trump’s] memorandum of August 25, 2017” which
 9 directed Defendants to ban transgender individuals from military service. ECF 216-3 at 1. And
 10 the Implementation Plan does just that.² Defendants’ Implementation Plan formalized each
 11 aspect of the Ban. Thus, the Court correctly found that the Implementation Plan did not revoke
 12 the Ban or constitute a “new policy.”

13 The Ninth Circuit is clear: “[D]ismissal of a case ‘on grounds of mootness would be
 14 justified only if it were absolutely clear that the litigant no longer had any need of the judicial
 15 protection that it sought.’” *Jacobus v. Alaska*, 338 F.3d 1095, 1102 (9th Cir. 2003) (quoting
 16 *Adarand Constructors, Inc. v Slater*, 528 U.S. 216, 224 (2000)). As the Court correctly found
 17 that the the Implementation Plan does not constitute a “new” policy and does not substantively
 18 revoke or rescind the Ban, Washington still needs the Court to protect it from the irreparable
 19 harms the Ban would cause to its sovereign and quasi-sovereign interests. As such, these
 20 implementing documents do not moot Washington’s claims.

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 22
 23 ² Compare ECF 34-7 (ordering the United States military to (1) bar accession by transgender individuals;
 24 (2) disallow transgender individuals to openly serve in the military; and (3) deny access to medical services solely
 25 because a person is transgender) and ECF 216-1 (barring (1) transgender individuals “who require or have
 26 undergone gender transition” from military service; (2) requiring “[t]ransgender persons without a history or
 diagnosis of gender dysphoria ... [to] serve ... in their biological sex”; and (3) denying access to transgender related
 healthcare to any servicemember not already receiving such services under the Carter policy and this Court’s
 injunction).

1 **b. The Ban violates Equal Protection guarantees**

2 The Court rightfully concluded that transgender individuals constitute a suspect class
3 and, as such, the Ban must survive strict scrutiny. ECF 233 at 20-24. Under strict scrutiny,
4 Defendants need to prove that the Ban forwards compelling government interests and is narrowly
5 tailored to achieve those interests. *See Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (citation
6 omitted). This is a heavy burden, and Defendants cannot show a likelihood of success of meeting
7 this exacting standard. In fact, the Ban cannot even withstand intermediate scrutiny, as a gender
8 based distinction. *See United States v. Virginia*, 518 U.S. 515, 531 (1996).

9 Seeming to concede this, Defendants do not provide the Court with any evidence or
10 argument that the Ban can survive heightened scrutiny. *See generally* ECF 238. Instead,
11 Defendants argue that a stay pending resolution of Defendants’ appeal is appropriate because
12 this Court “is likely to conclude that significant deference is appropriate” when reviewing the
13 constitutionality of the Ban. ECF 238 at 4.

14 **(1) The Ban cannot survive heightened scrutiny**

15 Defendants fail to prove that any legitimate—let alone important or
16 compelling—government interests are protected by the Ban.

17 *First*, Defendants’ claim that military readiness is protected by the Ban is undercut by
18 top military leaders of the Army, Navy, Air Force, and Marine Corps, each of whom
19 independently testified at Senate hearings that there was no negative impact on the military from
20 open service by transgender military servicemembers. ECF 255-9; ECF 225-14; ECF 225-15;
21 ECF 225-16.

22 *Second*, DoD claims four purported government interests that are nothing more than
23 coded speech for anti-transgender discrimination: (1) irreconcilable privacy demands of non-
24 transgender servicemembers who might feel uncomfortable sharing space with transgender
25 servicemembers; (2) threats to “unit cohesion” inasmuch as those threats would arise from
26 private discrimination aimed at transgender servicemembers; (3) frustration of non-transgender

1 servicemembers who also wish to be exempted from uniform and grooming standards; and (4)
 2 assuring non-transgender servicemembers experiencing a sense of “unfairness” because
 3 transgender servicemembers are held to standards associated with their gender identity. ECF
 4 216-2 at 32-36. These asserted interests cannot justify the Ban, as the rationale for each of these
 5 interests is non-transgender servicemembers’ bias against transgender individuals. Indeed, it is
 6 well-established that “private biases and the possible injury they might inflict” cannot be the
 7 basis of lawful government policies. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). Nor can
 8 “[p]ublic officials sworn to uphold the Constitution . . . avoid a constitutional duty by bowing to
 9 the hypothetical effects of private . . . prejudice that they assume to be both widely and deeply
 10 held.” *Id.* As such, none of these purported government interests can be relied upon to justify the
 11 Ban.

12 *Third*, Defendants claim that transgender individuals are at greater risk of (1) psychiatric
 13 hospitalizations; (2) suicidal behavior – even after transition; and (3) significant periods of non-
 14 deployability that justify the Ban. *See* ECF 216-1; ECF 216-2. However, these claims have been
 15 outright rejected by the medical community.³ Indeed, the American Medical Association
 16 unwaiveringly affirmed that “[t]here is no medically valid reason to exclude transgender
 17 individuals from military service.” ECF 255-4. Similarly, the American Psychiatric Association
 18 (“APA”) issued a statement in response to the DoD Implementation Plan noting that it “is
 19 alarmed by the administration’s misuse of psychological science to stigmatize transgender
 20 Americans and justify limiting their ability to serve in uniform and access medically necessary
 21 health care.” ECF 251-3. Even former Surgeons General have critiqued DoD’s characterization
 22 of “the effectiveness of transgender medical care as demonstrating ‘considerable scientific

23 ³ Defendants also argue that a stay should be granted because “the new policy applies to a medical condition
 24 and its attendant treatments – gender dysphoria and transition – not on the basis of whether a person is transgender.”
 25 ECF 238 at 4 n.3. This argument fails. Defendants’ policies—on their face—target transgender individuals wishing
 26 to serve openly, solely because of their transgender status and not because of any medical diagnosis or history. The
 proposed policies regulate and impact every transgender Washingtonian who currently serves or may serve in the
 future by requiring them to serve in compliance with all standards associated with the sex they were assigned at
 birth *as if they were not transgender*.

1 uncertainty.”⁴ ECF 255-6 at 2. The Palm Center affirmed that “[s]cholarly research and DoD’s
 2 own data confirm that transgender personnel, even those with diagnoses of gender dysphoria,
 3 are deployable and medically fit.”⁵ ECF 255-8 at 2.

4 *Finally*, all evidence Defendants provide this Court to justify its Ban has been generated
 5 post-hoc and in the heat of litigation. This is insufficient to meet intermediate scrutiny
 6 nonetheless strict scrutiny. *See Sessions v. Santana Morales*, 137 S.Ct. 1678, 1696 (2017) (“It
 7 will not do to ‘hypothesiz[e] or invent[t] governmental purposes for gender classification ‘post
 8 hoc in response to litigation.’”) (quoting *Virginia*, 518 U.S. at 533).

9 Defendants have proffered no legitimate government interests to support the Ban, let
 10 alone any important or compelling government interests.

11 **(2) The Ban is insufficiently tailored to meet heightened scrutiny**

12 Defendants’ Ban is neither narrowly tailored nor substantially related to the interests it
 13 purports to protect. A policy is only sufficiently narrowly tailored for strict scrutiny review if
 14 “the means chosen to accomplish the [government’s] asserted purpose [is] specifically and
 15 narrowly framed to accomplish that purpose[.]” *Shaw v. Hunt*, 517 U.S. 899, 908 (2008), such
 16 that “there is little or no possibility that the motive for the classification was illegitimate . . .
 17 prejudice or stereotype[.]” *Grutter*, 539 U.S. at 333 (citing *Richmond v. J.A. Croson Co.*, 488
 18 U.S. 469, 493 (1996)). And a policy will survive intermediate scrutiny only if the discriminatory
 19 means employed are “substantially related to the achievement of those objectives.” *Santana*
 20 *Morales*, 137 S. Ct. at 1690 (quoting *Virginia*, 518 U.S. at 533). The Ban is neither narrowly
 21 tailored nor substantially related to any governmental interests.

22
 23 _____
 24 ⁴ The Surgeons General affirmed that “[a] wide body of reputable, peer-reviewed research has
 25 demonstrated to psychological and health experts that treatments for gender dysphoria are effective.” *Id.* The
 26 Surgeons General also noted that DoD’s decision to “set[] certainty as a standard suggests an inability to refute the
 research.” ECF 255-6 at 2.

⁵ The Palm Center also issued a report affirming that “[s]cholars and experts agree that transition-related
 care is reliable, safe, and effective,” debunking Defendants’ purported medical reasons for the Ban. ECF 255-8 at
 2, 5-13.

1 *First*, a Ban to remedy a problem that military leadership does not recognize as real
 2 cannot be deemed narrowly tailored or substantially related to protect the asserted interests. ECF
 3 255-9. *Second*, the Ban categorically excludes transgender individuals. Even assuming *arguendo*
 4 that Defendants’ purported interests are legitimate, a blanket exclusion of transgender
 5 individuals wishing to serve openly is not a targeted way of forwarding those interests,
 6 particularly since Defendants provide no evidence that existing military policies governing
 7 service by individuals suffering from psychological conditions are insufficient to ensure that the
 8 military provides the most appropriate medical care to those in need and discharges individuals
 9 whose symptoms are sufficient to warrant such an action. *See* ECF 255-8 at 18, 20.

10 **c. The Ban is unlikely to withstand Washington’s Substantive Due**
 11 **Process claim**

12 Washington seeks to protect transgender Washingtonians’ fundamental right to
 13 make intimate decisions regarding self-definition, family life, and personal autonomy—all of
 14 which is integral to an individual’s sense of dignity, autonomy, and self-determination and
 15 protected by substantive due process. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015);
 16 *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984). As with equal protection, Defendants’ Ban
 17 cannot meet the heightened scrutiny requirements to survive Washington’s substantive due
 18 process claim.

19 **d. The deference required here is not likely to save the Ban from**
 20 **Washington’s constitutional challenge**

21 Defendants are not likely to succeed in defending against Washington’s challenge on the
 22 basis that deference is due to military decisions.

23 The Supreme Court long ago warned courts that—even in the military context—
 24 “deference does not mean abdication.” *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981). In *Rostker*,
 25 the Court also rejected the same request Defendants now make—*i.e.* to find that deference to
 26 military affairs limits courts’ ability to apply a more rigorous standard than rational basis review.

1 *Id.* Instead, the Court held that it was certain that “any further ‘refinement’ in the applicable
2 tests” when reviewing the constitutionality of military policies was unnecessary. *Id.*

3 Following this directive, the Court rejected similar arguments from Defendants. *Witt v.*
4 *Dept. of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008) (rejecting argument that rational basis
5 review was necessary standard to apply to military policy). Indeed, as noted in *Watkins v. U.S.*
6 *Army*, deference has its limits for good reason:

7 As recently as World War II both the Army chief of staff and the
8 Secretary of the Navy justified racial segregation in the ranks as
9 necessary to maintain efficiency, discipline, and morale. Today it is
10 unthinkable that the judiciary would defer to the Army’s prior
‘professional’ judgment that black and white soldiers had to be
segregated to avoid interracial tensions.

11 875 F.2d 699, 729 (9th Cir. 1989) (Norris, J. concurring). Following this suit, in a companion
12 challenge to the Ban, the District Court of the District of Columbia recently noted that “[t]he
13 military has not been exempted from constitutional provisions that protect the rights of
14 individuals’ and, indeed, ‘[i]t is precisely the role of courts to determine whether those rights
15 have been violated.’” *Doe I v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017). Thus, even in the
16 military context, courts apply heightened scrutiny, and deference does not mean the application
17 of rational basis review.

18 Further, this Court previously found “that the Ban – as set forth in President Trump’s
19 Twitter Announcement and 2017 Memorandum – was not owed deference, as it was not
20 supported by ‘any evidence of considered reason or deliberation.’” ECF 233 at 24 (quoting ECF
21 103 at 17-18). After Defendants submitted the Implementation Plan, the Court found that
22 “whether the ban is entitled to deference raises an unresolved question of fact” including whether
23 the implementation documents are “of the type to which Courts typically should defer.” ECF
24 233 at 26.

25 As deference does not mean that courts must abdicate their ability to ensure that military
26 policies comport with constitutional principles, and there are substantial questions of fact

1 regarding whether deference should apply to these implementation documents, Defendants
2 cannot show a likelihood of success in defeating Washington’s claims on the basis of deference.

3 **2. Defendants Are Not Likely to Suffer Irreparable Injury If a Stay Is Denied**

4 Defendants’ claim that they will suffer irreparable harm is undercut by the fact that they
5 adduced no evidence in their motion or in their Implementation Plan that show any likelihood of
6 *specific* injury to the military from open service by transgender individuals under the Carter
7 policy, or any injury to the military during the last five months that transgender individuals have
8 been accessing into military service. Instead, Defendants point to *Winter* and claim that the
9 military need not wait until there is an injury arising from an injunction to obtain a stay. *Winter*
10 *v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 31 (2008).

11 However, *Winter* shows that Defendants have not provide sufficient evidence to show
12 they will suffer irreparable injury sufficient to warrant a stay. In *Winter*, the Navy presented
13 *significant* evidence to the district court—including “declarations from some of the Navy’s most
14 senior officers”—detailing *specific* harms to Navy training protocols if the injunction stood. *Id.*
15 at 24. Here, Defendants have not provided this Court with any reliable evidence that allowing
16 transgender individuals to serve openly under the District Court’s injunction—prior to the Ninth
17 Circuit’s resolution of their pending appeal—will cause them irreparable harm.

18 **3. Public Interest and the Balance of Equities Favors Enjoining the**
19 **Government From Trampling Constitutional Rights**

20 The equities and public interest strongly favor denying Defendants’ requested stay. The
21 discriminatory Ban tramples transgender Washingtonians’ Fifth Amendment equal protection
22 and substantive due process guarantees and the balance of equities and public interest always
23 favors “prevent[ing] the violation of a party’s constitutional rights[.]” *Melendres v. Arpaio*, 695
24 F.3d 990, 1002 (9th Cir. 2012). *See also Giovanni Carandola, Ltd. v. Bason*, 303, F.3d 507, 521
25 (4th Cir. 2002) (“[U]pholding constitutional rights surely serves the public interest.”).

26

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 14th day of May, 2018.

/s/ La Rond Baker
LA ROND BAKER, WSBA No. 43610

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