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' REPLY IN SUPPORT OF THEIR MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

NOTED FOR CONSIDERATION:
May 18, 2018

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 514-4336

INTRODUCTION

Plaintiffs' Opposition to Defendant's Motion to Stay the Preliminary Injunction Pending Appeal is based entirely on their faulty claim that the Department of Defense's ("DoD") new policy regarding military service by transgender individuals is merely an implementation of the 2017 Presidential Memorandum that the Court previously enjoined. Plaintiffs' argument is inconsistent with both the substance of DoD's new policy and the thorough deliberative process through which the new policy was created. As Defendants are likely to succeed in defending the merits of DoD's new policy, and the other factors also weigh in Defendants' favor, the Court should grant Defendants' motion for a stay of the preliminary injunction pending appeal.

ARGUMENT

I. Defendants Are Likely To Succeed On The Merits.

Despite Plaintiffs' arguments, DoD's new policy is not a mere implementation of the President's 2017 Memorandum. Throughout this litigation, Plaintiffs have emphasized the "sheer breadth" of the President's 2017 memorandum, describing it as a "sweeping exclusion of transgender people" based on "transgender status" alone. ECF No. 129 at 14, 17. By contrast, DoD's new policy—like the policy put in place by then-Secretary Ash Carter—turns on gender dysphoria, a medical condition that is characterized by "clinically significant distress or impairment in social, occupational, or other important areas of functioning," ECF No. 224-2 at 13, and that, as Plaintiffs recognize, impacts only "a subset of transgender people," ECF No. 129 at 17. And DoD's new policy not only allows service by individuals with gender dysphoria who relied on the Carter policy, but permits them to do so in their preferred gender. ECF No. 224-1 at 2.

These differences confirm that DoD's new policy does not "implement[]" the 2017 memorandum, Pls. Opp. at 9, but substantially departs from it. The possibility of such a departure was clear from the outset. Plaintiffs stress that the President initially ordered DoD to submit "a plan for implementing" the memorandum's "general policy" and "specific directives," which required the Department to follow a "longstanding" policy of generally disqualifying individuals on the basis of transgender status. 82 FR 41319. But they omit that the President also stated that

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the Secretary "may advise [him] at any time, in writing, that a change to this policy is warranted." *Id.* Although the Secretary initially stated that he would develop an implementation plan, ECF No. 197, a period of extensive study by a panel of military experts led him to ultimately advocate a change to the "longstanding" policy directed by the President, *see* ECF 216-1. That is why he had to recommend that the President "revoke" his 2017 Memorandum and thereby "allow[]" the military to implement its preferred framework. *Id.* In short, the military "implemented" the 2017 Presidential Memorandum only insofar as it studied the issue and advised the President that a new and different policy was appropriate.

In addition, DoD's new policy resulted from an extensive, independent review of the issue of military service by transgender individuals—a review that had already begun before the President's statements on Twitter. *See* ECF No. 216-1; *see also* ECF No. 197. The Panel of Experts engaged in "an independent multi-disciplinary review," ECF No. 224-2 at 17, and was charged to provide its "best military advice … without regard to any external factors," ECF No. 224-1 at 1. It considered evidence and testimony on all sides and "made recommendations based on each Panel member's independent military judgment." ECF No. 224-2 at 4. The new policy is the product of "the Panel's professional military judgment," "the Department's best military judgment," and Secretary Mattis's "own professional judgment," ECF No. 224-1 at 2. Plaintiffs fail to acknowledge any of these facts, much less explain why representations by senior military leadership, including the Secretary of Defense himself, should be called into question.

Once the assumption that DoD's new policy merely implements the President's initial approach is set aside, it is plain that the new policy survives constitutional review for several reasons. First, the considered judgment of the Nation's military leaders on a matter of military policy receives the most deferential form of constitutional scrutiny. *See e.g., Rostker v. Goldberg*, 453 U.S. 57, 70-71 (1981).[1] Plaintiffs contend in their Opposition that "[no] amount

[1] The Ninth Circuit's decision in *Witt v. Department of Air Force*, 527 F.3d 806 (9th Cir. 2008), is not to the contrary. *Witt* acknowledged that "'judicial deference … is at its apogee'" in the military context and found it "clear" that the military's need to preserve "'morale, good, order, and discipline, and unit cohesion'" is "an important governmental interest." *Id.* at 817 n.5, 821. Beyond that, *Witt's* narrow ruling that an unusual form of scrutiny governed an as-applied substantive-due-process challenge under *Lawrence v. Texas*, 529 U.S. 558 (2003), to "Don't

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of military deference [is] … due here" because the 2018 policy "is simply the implementation of the President's orders," but that argument rests on the same flawed premise discussed above. Pls. Opp. at 21. Moreover, Plaintiffs' suggestion that this Court should inquire into the military's decision-making process to determine whether it was sufficiently "careful and deliberative," *id.*, is seriously misguided. *See Goldman*, 475 U.S. at 509 (rejecting argument that military's assertion regarding its policy was "mere ipse dixit, with no support from actual experience or a scientific study in the record," and deeming it sufficient that the question was "decided by the appropriate military officials" in "their considered professional judgment"). And even if such an inquiry were appropriate, the record in support of the policy—which includes a reasoned memorandum from the Secretary of Defense himself and an extensive 44-page report—leaves no doubt that the policy reflects precisely the sort of "professional judgment" that merits "great deference" from this Court. *Id.* at 507.

Second, DoD's new policy is based on gender dysphoria and its associated treatment and is, therefore, plainly subject to rational basis review. Plaintiffs' assertion that DoD's new policy is based on "transgender status," Pls. Opp. at 14, cannot be squared with the terms of the DoD's new policy, which, like the Carter policy, imposes restrictions only on those "transgender persons with a history or diagnosis of gender dysphoria." ECF No. 224-3 at 1; *see also* ECF No. 224-1. And Plaintiffs cannot credibly maintain that gender-dysphoria classifications necessarily target transgender status. Pls. Opp. at 14. As Plaintiffs themselves have explained, gender dysphoria is a medical condition that only "a subset of transgender people may experience," and restrictions based on this condition and treatment are distinct from a "sweeping exclusion of transgender people." ECF No.129 at 17. That gender dysphoria affects a subset of transgender individuals does not transform the policy into a status-based classification. *Cf. Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification … .").

Ask, Don't Tell," 527 F.3d at 821, has no bearing on how to resolve a facial challenge to a military policy that turns on the medical condition of gender dysphoria.

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Third, DoD's new policy satisfies constitutional requirements under any standard of review. As the Department's report explains, service by individuals with a history of gender dysphoria implicates numerous military concerns that, taken together, clearly support the constitutionality of the 2018 policy. *See* ECF No. 224-2 at 32-43. Although Plaintiffs point to a smattering of contrary statements by prior military officials and medical organizations, Pls. Opp. at 22-23, such evidence is "quite beside the point," *Goldman*, 475 U.S. at 509.

Plaintiffs argue that DoD's report does not substantiate concerns regarding deployability, Pls. Opp. at 18-19, but their criticisms are unfounded. For example, the report thoroughly explains its conclusion that transition-related care could render a service member non-deployable for over one year, citing the substantial recovery time for sex-reassignment procedures and the need to provide access to a laboratory to monitor hormones in the year prior to genital surgery. ECF No. 224-1 at 33. It also notes that RAND's estimates regarding the total impact on available deployable labor-years, upon which Plaintiffs rely, were based on an "exceedingly small number" of estimated transitioning individuals and that RAND itself admitted that the information "must be interpreted with caution." *Id.* at 35. DoD also reasonably accounted for the "considerable scientific uncertainty" regarding whether transition treatments "fully remedy … the mental health problems associated with gender dysphoria," which could be exacerbated as a result of exposure to "trauma or severe operational stress." *Id.* at 33, 35.

Plaintiffs further critique the report's reliance on order, discipline, leadership, and unit cohesion. Pls.' Opp. at 7-8. But DoD explains in its report that permitting service by individuals who have undergone or may require gender transition would demand a permanent exception to the biologically-based standards regarding physical fitness, height-weight, uniforms and grooming, and facilities that would otherwise apply to the individual. ECF No. 224-1 at 35-41.

Plaintiffs also try to cast doubt on the military's concerns regarding internal discipline, Pls. Opp. at 19-20, but the Supreme Court has repeatedly deferred to similar judgments. *See, e.g., Goldman*, 475 U.S. at 509-10 (deferring to Air Force view that "the wearing of religious apparel such as a yarmulke … would detract from the uniformity sought by the dress regulation"); *Rostker*, 453 U.S. at 81 (noting concerns about "problems such as housing and different treatment

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with regard to … physical standards" in the "context of military preparedness"). Although Plaintiffs cite recent testimony from military officials stating that they are unaware of reported problems along these lines, *see* Pls. Opp. at 20, Secretary Mattis has testified that any reports would not have come up to the level of those officials due to reporting limitations in the Carter policy. *See* Declaration of Ryan Parker, Ex. 1 at 63; *see also* ECF No. 224-1 at 37 n.143.

Finally, Plaintiffs contest the Department's reliance on cost, complaining that it failed to "provide any new data" or "conduct[] [a] detailed evidence-based analysis necessary to estimate the cost of transition-related care." Pls. Opp. at 20. But they overlook the report's findings that "[s]ince implementation of the Carter policy, the medical costs for Service members with gender dysphoria have increased nearly three times—or 300%—compared to Service members without gender dysphoria." ECF No. 224-1 at 41. The RAND report on which plaintiffs rely, by contrast, failed to account for costs "on a per capita basis," instead focusing on the total cost of transition-related treatment in comparison to the military's total health care costs. *Id.* Finally, the Department does not rely on "cost savings alone" Pls. Opp. at 20, but on the totality of concerns.

As DoD's new policy is supported by an extensive record and is the product of the considered judgment of military officials, it is constitutional under any standard or review.

II. The Remaining Factors Favor A Stay.

Plaintiffs will not suffer irreparable harm if this Court grants a stay. Plaintiffs Karnoski, D.L., and Callahan have not demonstrated that they are otherwise eligible to enter the military, see ECF Nos. 130, 132, 137, and plaintiff Doe could seek a diagnosis of gender dysphoria and obtain medical treatment while the Carter policy remains in effect, *see* ECF No. 138. Plaintiffs mistakenly contend that Muller and Schmid may be discharged from the military because they fall outside the reliance exception, Pls. Opp. 9 & n.1, but these plaintiffs would qualify for the exception because they had begun transition under the Carter policy, ECF No. 131 at 2, 4; ECF No. 133 at 4, 6-7, which itself requires a "diagnosis from a military medical provider indicating that gender transition is medically necessary," ECF No. 239-1 at 7; *see also id*. at 8; Declaration of Ryan Parker, Ex. 2 at 2. And to the extent there is any remaining doubt on this issue, the military has confirmed its intention under the new policy "to exempt any Service member who

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Tel: (202) 514-4336

was diagnosed with gender dysphoria prior to the effective date of the Carter policy and has continued to serve and receive treatment pursuant to the Carter policy after it took effect." *See* Declaration of Stephanie A. Barna, ¶6. In any event, asserted harms regarding military employment are not irreparable. *See Hartikka v. United States*, 754 F.2d. 1516, 1518 (9th Cir. 1985) (damage to reputation as well as lost income, retirement, and relocation pay resulting from less-than-honorable discharge not irreparable). Nor is stigma alone sufficient to demonstrate standing, much less irreparable harm. *Allen v. Wright*, 468 U.S. 737, 750 (1984). Washington, for its part, fails to explain why its asserted harms are irreparable. *See* Wash. Opp.

Plaintiffs' attempt to minimalize the countervailing harm in maintaining a policy that DoD has concluded would pose "substantial risks" and threaten to "undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." ECF No. 224-1 at 2. They contend that such harm is speculative because Defendants have not supplied sufficient evidence of harm under the Carter policy. Pls. Opp. at 25; Wash. Opp. at 24. But the military's predictive judgments about the seriousness or likelihood of a particular harm are not the types of determinations that courts should second-guess or review for substantial evidence. *See Winter v. NRDC, Inc.*, 555 U.S. at 27, 31 (2008).

III. This Court Should Stay The Preliminary Injunction At Least Insofar As It Grants Nationwide Relief.

At a minimum, this Court should stay the preliminary injunction insofar as it grants relief to non-parties who have not been found to have standing in this case. Plaintiffs' suggestion that the "facial[]" nature of their challenge demands "facial" relief across the nation confuses the nature of their claims with the proper scope of relief. Pls. Opp. at 26-27. A court's conclusion that "no application" of a federal law would be constitutional, *see Sabri v. United States*, 541 U.S. 600, 609 (2004), does not require an injunction barring the law's application to non-parties, *see, e.g., Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994).

CONCLUSION

Defendants respectfully request that the Court enter a stay of the preliminary injunction pending appeal.

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Dated: May 18, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ Ryan B. Parker
RYAN B. PARKER
ANDREW E. CARMICHAEL
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2018, I electronically filed the foregoing Reply in Support of Defendants' Motion to Stay Preliminary Injunction Pending Appeal using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: May 18, 2018

/s/ Ryan Parker

RYAN B. PARKER
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

Counsel for Defendants