No. 18-35347

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYAN KARNOSKI, et al.,
Plaintiffs-Appellees,

STATE OF WASHINGTON, Attorney General's Office Civil Rights Unit,
Intervenor-Plaintiff-Appellee,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

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INTRODUCTION AND SUMMARY

Plaintiffs' responses only highlight the extraordinary nature of the district court's order.[1] That court preliminarily enjoined a military policy adopted by Secretary Mattis in 2018, at the recommendation of a panel of military experts and on the basis of a substantial record. It did so without pausing to ask whether plaintiffs were likely to succeed in challenging that policy, and without even a nod of respect for the professional judgment of military experts on issues of military policy.

Following the district court's lead, plaintiffs characterize the Secretary's 2018 policy as a mere implementation of a 2017 presidential memorandum that was previously enjoined. But even a cursory review of the 2018 policy makes clear that it differs in critical respects from the approach outlined in the 2017 memorandum. First, the 2018 policy draws no distinction based on transgender status, but instead restricts service based on the medical condition of gender dysphoria and its treatment—just as the military does with respect to other medical conditions that may impair military operations. Second, the 2018 policy contains an important exception that permits a subset of transgender individuals—including many of the plaintiffs here—to serve. And third, the 2018 policy reflects the results of a careful study by a panel of military experts, as well as the Secretary's "own professional judgment." Add.60. In short, the

[1] In general, "plaintiffs" includes the original plaintiffs and Washington. Plaintiffs' stay opposition is referred to as "K-Opp." and Washington's as "W-Opp."

Secretary's 2018 policy is different from the President's 2017 memorandum in both process and substance, and an injunction against it should not be allowed to take effect absent this Court's review.[2]

ARGUMENT

I. The Government Is Likely To Succeed On The Merits.

A. The 2018 Policy Does Not Implement The 2017 Memorandum.

The district court necessarily abused its discretion by enjoining the 2018 policy without analyzing that policy on its own terms. Plaintiffs not only defend that extraordinary step, but double down on the court's faulty premise that the Secretary's 2018 policy merely implements the President's 2017 memorandum.

Plaintiffs, however, should be the last to claim that the 2018 policy implements, or even reflects, the approach taken by the President in his 2017 memorandum. Throughout this litigation, plaintiffs have emphasized the "sheer breadth" of the 2017 memorandum, describing it as a "sweeping exclusion of transgender people" based on "transgender status" alone. Doc.129 at 14, 17. By contrast, the 2018 policy—like the

[2] Contrary to Washington's claim (W-Opp.7-8), this stay motion is procedurally proper. On April 30, the government promptly appealed the district court's April 13 order and moved for a stay in district court. Mot.8-9. The government advised that it would seek a stay from this Court by May 4, thereby permitting the Court to consider a fully-briefed stay motion before the government files its opening appellate brief on May 29. The district court has not yet "afford[ed] the relief requested," and waiting for its ruling "would [have] be[en] impracticable" given the expedited nature of the appeal and the importance of the military interests at stake. Fed. R. App. P. 8(a)(2)(A).

Carter policy before it, which the district court ordered the military to preserve—turns on gender dysphoria, a medical condition characterized by "clinically significant distress or impairment in social, occupational, or other important areas of functioning," Add.75, and affecting only "a subset of transgender people," Doc.129 at 17. Additionally, the 2018 policy allows individuals who relied on the Carter policy not only to serve, but to do so in their preferred gender. Add.60.

As these differences confirm, the 2018 policy substantially departs from the 2017 memorandum, a possibility that was clear from the outset. Plaintiffs stress that the President initially ordered the Secretary to submit "a plan for implementing" his memorandum, which required the Department of Defense to follow a "longstanding" policy of generally disqualifying individuals on the basis of transgender status. Add.109. But they omit the President's instructions to "study" the issue and to "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, SA.807, an extensive study by a panel of military experts ultimately led him to urge a change to the "longstanding" policy directed by the President, *see* Add.59-61. That is why he recommended that the President "revoke" his 2017 memorandum to "allow[]" the military to implement its preferred framework. Add.61. In short, the military "implemented" the 2017 memorandum only insofar as it studied the issue and advised the President that a different policy was appropriate.

The district court erred in enjoining the 2018 policy without taking account of these developments. The military's process involved "an independent multi-disciplinary review," SA.808; Add.79, conducted "without regard to any external factors," Add.59, that had begun *before* the President's tweets, *see id.*; *see also* Add.112-13. And its new policy was the product of "each Panel member's independent military judgment," Add.66, "the Department's best military judgment," and Secretary Mattis's "own professional judgment," Add.60. Plaintiffs fail to acknowledge *any* of these facts, much less offer a basis for questioning representations by senior military leadership, including the Secretary himself.

B. The 2018 Policy Is Subject To Highly Deferential Review.

Once the pretense that the Secretary's 2018 policy merely implements the President's initial approach is set aside, it is plain that the policy survives constitutional review. The considered judgment of our Nation's military leaders on a matter of military policy receives only the most deferential form of constitutional scrutiny.

1. Plaintiffs fail to appreciate the Supreme Court's substantial departures from core aspects of heightened scrutiny in the military context, reflecting a judicial approach that most closely resembles rational-basis review. Mot.10-12. Although the Court has declined to provide "label[s]" in this area, it has made clear, in form and substance, that "judicial deference … is at its apogee" and that "the tests and limitations to be applied may differ because of the military context." *Rostker v. Goldberg*, 453 U.S. 57, 67, 70 (1981). Whatever standard applies, it is not a traditional form of heightened scrutiny.

This Court's decision in *Witt v. Department of Air Force*, 527 F.3d 806 (9th Cir. 2008), is not to the contrary. Rather, *Witt* acknowledged both that "'judicial deference … is at its apogee'" in the military context and 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 holding that an unusual form of scrutiny governed an as-applied substantive-due-process challenge to "Don't Ask, Don't Tell," *id.* at 821, has no bearing on how to resolve a facial challenge to a military policy based on the medical condition of gender dysphoria.

2. Plaintiffs' suggestion (K-Opp.21) that this Court should inquire into the military's decision-making process to determine whether it was sufficiently "careful and deliberative" is seriously misguided. *See Goldman v. Weinberger*, 475 U.S. 503, 509 (1986) (noting argument that the Air Force's defense of its policy was "mere *ipse dixit*, with no support from actual experience or a scientific study in the record," but deeming it sufficient that the question was "decided by the appropriate military officials" in "their considered professional judgment"). Even if such an inquiry were appropriate, the record here—which includes a reasoned memorandum from the Secretary and an extensive 44-page report—leaves no doubt that the 2018 policy reflects precisely the sort of "professional judgment" that merits "great deference." *Id.* at 507.

3. Plaintiffs insist that the 2018 policy is based not on gender dysphoria or its treatment—classifications plainly subject to rational-basis review—but on "transgender status." K-Opp.14; W-Opp.23. That assertion cannot be squared with the terms of

the 2018 policy, which, like the Carter policy, imposes restrictions only on those "transgender persons with a history or diagnosis of gender dysphoria." Add.57; *see also* Add.59-61. Nor can plaintiffs credibly maintain that gender-dysphoria classifications necessarily target transgender status (*see* K-Opp.14), given that they agree gender dysphoria is a medical condition that only "a subset of transgender people may experience," and that restrictions based on this condition (and its treatment) are distinct from a "sweeping exclusion of transgender people." Doc.129 at 17. That this condition 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 ….").

For its part, Washington claims that the policy is based on "transgender status" because transgender persons without gender dysphoria may serve only if they comply with "all standards associated with the sex they were assigned at birth as if they were not transgender." W-Opp.23 (emphasis omitted). But it never acknowledges that the Carter policy—which the military must maintain under the injunction—imposed the same requirement. Add.77; *see* Add.114-17. And Washington's assumption that all transgender individuals wish to be exempted from standards applicable to their biological sex is itself an overbroad generalization. As the RAND Report explains, only "a subset" of transgender individuals "choose to *transition*, the term used to refer to the act of living and working in a gender different from one's sex assigned at birth." SA.62.

C. The 2018 Policy Satisfies Highly Deferential Review.

1. Under a properly deferential standard of review, the 2018 policy easily withstands plaintiffs' equal-protection claim. Mot.12-16.[3] The original plaintiffs do not dispute that the military has a compelling interest in preventing harm to military readiness, unit cohesion, military effectiveness and lethality, and military resources, *see* Add.60, but contend that the Department's lengthy explanations for the 2018 policy are merely "*post hoc* justifications" of the President's earlier statements. K-Opp.16-17. Once again, this myopic focus on the President's revoked directives is misplaced. Plaintiffs cannot defend an injunction against the 2018 policy without considering the military's contemporaneous explanation of that policy.

2. The Secretary's memorandum and accompanying report demonstrate that the 2018 policy survives any standard of review, particularly when military-deference principles are properly applied. The Department explained that service by individuals with gender dysphoria implicates numerous military concerns that, especially when taken together, amply justify the 2018 policy. Add.94-105. Although plaintiffs point to contrary statements by prior military officials and medical organizations (K-Opp.22-23; W-Opp.17-18), such evidence is "quite beside the point." *Goldman*, 475 U.S. at 509.

Plaintiffs' criticism (K-Opp.18-19) of the Department's deployability analysis is likewise unfounded. The Department explained that transition-related care could limit

[3] Plaintiffs' other claims are similarly without merit. Mot.16-17.

deployability for well over a year due to "substantial" recovery time and the need to monitor hormone levels, Add.95, and that RAND considered an "exceedingly small" data set and admitted that its information "must be interpreted with caution," Add.97. The Department also reasonably accounted for "considerable scientific uncertainty" regarding whether transition treatments "fully remedy … the mental health problems associated with gender dysphoria," which could be exacerbated from exposure to "trauma or severe operational stress." Add.94, 96.

Plaintiffs further critique (K-Opp.19-20) the military's reliance on good order and discipline, leadership, and unit cohesion. Add.97-103. But as the report recognized, permitting service by individuals who have undergone or require gender transition would demand a permanent exception to biologically-based standards concerning physical fitness, height and weight, uniforms and grooming, and facilities. *Id.*; *see also Goldman*, 475 U.S. at 509-10 (citing military interest in "uniformity sought by the dress regulations"); *Rostker*, 453 U.S. at 81 (noting concerns over "problems such as housing and different treatment with regard to … physical standards"). Plaintiffs' attempt to analogize gender dysphoria to other medical conditions, such as pregnancy (K-Opp.18-19; W-Opp.19), is misplaced; no other condition or treatment triggers a permanent exception to these standards. Add.93, 102. And although plaintiffs cite recent testimony from some military officials stating that they are unaware of reported problems regarding unit cohesion and discipline (K-Opp.20), Secretary Mattis has

explained that such reports would not have been shared with those officials due to reporting limitations in the Carter policy. *See* Gov't.Supp.Add.5; *see also* Add.99 n.143.

Plaintiffs also contest the Department's reliance on costs (K-Opp.20-21), but overlook its findings that "[s]ince implementation of the Carter policy, the medical costs for Service members with gender dysphoria have increased nearly three times" compared to those without this condition. Add.103. In any event, the report hardly relies on "cost savings alone." K-Opp.20.

3. Contrary to Washington's claim (W-Opp.20 n.5), the reliance exception does not undermine the necessity of the 2018 policy, but reflects a careful cost-benefit analysis. Add.105; *cf. Winter v. NRDC*, 555 U.S. 7, 31 (2008) (rejecting similar "no good deed goes unpunished" argument). And to the extent that this Court believes this exception would render the 2018 policy unconstitutional, it is severable. Add.105.

Washington also errs in insisting (W-Opp.21) that existing policies regarding psychological conditions are sufficient to address the military's concerns. Gender dysphoria itself is characterized by "clinically significant distress or impairment in social, occupational, or other important areas of functioning," Add.75, and its typical treatment—gender transition—is unlike any other in that it requires a permanent exception from the military's sex-based standards, Add.93. Again, Washington's point would apply with equal force to the Carter policy that the military has been ordered to maintain, which likewise imposes restrictions based on gender dysphoria and transition separate from other rules related to mental health.

II. The Remaining Factors Favor A Stay.

Plaintiffs will not suffer irreparable harm if this Court grants a stay. Indeed, plaintiffs offer no response to the government's arguments that Karnoski, D.L., Callahan, and Doe lack standing. *See* Mot.18; K-Opp.23-24. Nor do they contend that stigmatic injury alone is sufficient to demonstrate standing, much less irreparable harm. K-Opp.24 (asserting that stigma is "coupled with" other injuries); *see* Mot.17. At most, they insist that two plaintiffs—Muller and Schmid—may be discharged from the military. K-Opp.23 & n.3. They mistakenly contend that these plaintiffs fall outside the scope of the reliance exception because they were diagnosed with gender dysphoria before the Carter policy took effect, *id.*, but it is sufficient that they had begun to transition under that policy, Add.145, 147, 159, 161-62, which itself requires a medical diagnosis, Add.120-21; Gov't.Supp.Add.7. As the Department has confirmed, it will "exempt any Service member who 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." Gov't.Supp.Add.3.

Washington's asserted injuries fare no better. W-Opp.13-14. While Washington claims that it is forced to violate its own anti-discrimination laws, it identifies no state law preventing restrictions based on gender dysphoria or its treatment. Indeed, if such a law existed, Washington would presently be in violation of it under the Carter policy. Washington's asserted injury based on an inability to recruit adequate National Guard members is likewise speculative, Mot.19, and, in any event, the State remains free to

"preserv[e] its sovereign territory" (W-Opp.13) through other means, including through its own State Defense Force, *see* 32 U.S.C. § 109(c). Moreover, "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 609, 610 n.16 (1982).

Plaintiffs minimize the government's countervailing harm in maintaining a policy that the Department 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." Add.60. They contend (K-Opp.25; W-Opp.24) that such harm is speculative because the government has not supplied sufficient evidence of harm under the Carter policy. But the military's predictive judgments about the seriousness of a particular harm or the likelihood of its occurrence are not the sort of determinations that courts may second-guess or review for substantial evidence. *See, e.g.*, *Winter*, 555 U.S. at 27, 31.

III. The Nationwide Injunction Is Improper.

At a minimum, this Court should stay the preliminary injunction insofar as it grants nationwide relief. Mot.20-21. Plaintiffs' suggestion that the "facial[]" nature of their challenge demands "facial" relief confuses the nature of their claims with the proper remedy. K-Opp.26-27. A court's conclusion that "no application" of a federal law would be constitutional, *Sabri v. United States*, 541 U.S. 600, 609 (2004), does not require an injunction barring that law's application to non-parties. *E.g.*, *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994). Nor can plaintiffs circumvent these

constitutional and equitable limitations simply by asking for "facial relief" (K-Opp.27) or alleging that a single State's residents are "stigmatized." W-Opp.26; *see Meinhold*, 34 F.3d at 1473 (plaintiff sought declaration that policy was facially unconstitutional).

CONCLUSION

This Court should grant the government's motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 2,797 words. This reply complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because it has been prepared in a proportionally spaced typeface using 14-point Garamond typeface.

s/ Catherine H. Dorsey
Catherine H. Dorsey

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2018, I filed the foregoing reply with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Catherine H. Dorsey
Catherine H. Dorsey

No. 18-35347

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYAN KARNOSKI, et al.,
Plaintiffs-Appellees,

STATE OF WASHINGTON, Attorney General's Office Civil Rights Unit,
Intervenor-Plaintiff-Appellee,

v.

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Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

GOVERNMENT'S SUPPLEMENTAL ADDENDUM TO STAY MOTION

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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

DECLARATION OF STEPHANIE A. BARNA

I, Stephanie A. Barna, do hereby declare as follows:

1. I am the Acting Assistant Secretary of Defense (Manpower and Reserve Affairs), Performing the Duties of the Under Secretary of Defense for Personnel and Readiness, within the Department of Defense (DoD). In this capacity, I am responsible for Total Force management, including military readiness and training, and military personnel requirements. I have served in this capacity since March 30, 2018. From June 2014 through March 2018, I served first as the Acting Assistant Secretary of Defense (Readiness and Force Management) and subsequently performed both the duties of the Assistant Secretary of Defense (Manpower and Reserve Affairs) and the duties of the Principal Deputy Under Secretary of Defense for Personnel and Readiness. In these roles, I served as principal advisor to the Secretary of Defense and the Under Secretary of Defense (Personnel and Readiness) on all personnel matters,

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including civilian and military personnel policies, reserve affairs, Total Force Planning and Requirements, and diversity. I also served in senior leadership positions in the Department of the Army as a career senior executive, and retired from the U.S. Army Reserve in 2011 in the grade of Colonel.

2. In my current role, I have oversight responsibility for the drafting and implementation of policy concerning military service by transgender individuals.

3. In the exercise of my official duties, I have been made aware of this lawsuit and the related litigation involving DoD transgender service policy. The information in this declaration is based on my personal knowledge and on information made available to me in my official capacity.

4. On February 22, 2018, the Secretary of Defense, with the agreement of the Secretary of Homeland Security, sent the President a memorandum proposing a new policy regarding military service by transgender persons. The memorandum was accompanied by a 44-page report detailing the proposed policy and explaining the rationale for it. On March 23, 2018, the President issued a memorandum that revoked his August 2017 memorandum and any other directive he may have made on military service by transgender persons, thereby allowing the Secretaries of Defense and Homeland Security to implement their proposed policy.

5. The proposed policy includes an exemption for "transgender Service members who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy, but before the effective date of any new policy." Report 43. Under the policy, these Service members "may continue to receive all medically necessary treatment, to change their gender marker in DEERS, and to serve in their preferred gender, even after the new policy commences." *Id.*

6. The Department included this exemption because of its commitment to honor the reasonable expectations of Service members "who were diagnosed with gender dysphoria and either entered or remained in service following the announcement of the Carter policy and the court orders requiring transgender accession and retention" and because of the "substantial

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investment" it has made in them. *Id.* Consistent with these purposes, the Department will, if permitted to implement its proposed new policy, exempt any Service member who 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.

Pursuant to 28 U.S.C. § 1746(2), I declare under the penalty of perjury that the foregoing is true and correct.

Executed on May 18, 2018

STEPHANIE A. BARNA

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Stenographic Transcript
Before the

COMMITTEE ON
ARMED SERVICES

UNITED STATES SENATE

HEARING TO RECEIVE TESTIMONY ON THE DEPARTMENT OF DEFENSE BUDGET POSTURE IN REVIEW OF THE DEFENSE AUTHORIZATION REQUEST FOR FISCAL YEAR 2019 AND THE FUTURE YEARS DEFENSE PROGRAM

Thursday, April 26, 2018

Washington, D.C.

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Senator Gillibrand: And a list of all experts you consulted, please.

Secretary Mattis: Pardon?

Senator Gillibrand: I would like a list of all the experts, medical experts, that were consulted for that report, please.

Secretary Mattis: Right now, this is under litigation. I will see what I can provide or when I can provide it. I will do that, Senator.

But at the same time, basically my responsibility is to give the best advice I can for making a lethal force. And I think that right now the Carter policy is still in effect, and we have the four cases being litigated.

Why these issues like this would not come to the service chief level during this was a very, very, I would call it, newsworthy situation. And the reason is that under the Carter policy, the reporting is opaque. We cannot report that a problem emanated from a transgender. We cannot under the Carter policy do that. So the question you have asked the service chiefs and the Chairman are ones that right now the Carter policy prohibited that very information from coming up because it is private information. And it is specifically called out in his policy statement. So it is impossible for them to have responded to you.

And I would just say that right now we look at medical

THE ASSISTANT SECRETARY OF DEFENSE
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HEALTH AFFAIRS

JUL 2 9 2016

MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY (MANPOWER AND RESERVE AFFAIRS)
ASSISTANT SECRETARY OF THE NAVY (MANPOWER AND RESERVE AFFAIRS)
ASSISTANT SECRETARY OF THE AIR FORCE (MANPOWER AND RESERVE AFFAIRS)
DIRECTOR, DEFENSE HEALTH AGENCY
DIRECTOR, HEALTH, SAFETY AND WORK LIFE, U.S. COAST GUARD

SUBJECT: Guidance for Treatment of Gender Dysphoria for Active and Reserve Component Service Members

In accordance with Department of Defense Instruction (DoDI) 1300.28, "In-Service Transition for Transgender Service Members," June 30, 2016, and Directive-Type Memorandum (DTM)16-005, "Military Service of Transgender Service Members," June 30, 2016, this memorandum provides guidance for the medical care of transgender Service members. This memorandum supplements requirements in those issuances; it does not supersede any such requirements.

General Provisions:

The Military Health System (MHS) will either provide or arrange consultation for medically necessary care for members on active duty for a period of more than 30 days (referred to as Active Duty Service members (ADSMs) throughout the remainder of this document). Such care is based upon the individual's unique health care needs and, following initial evaluation, may include counseling and behavioral health services, medical support, and assistance with establishing a treatment plan for the Service member's submission to the unit commander, followed by any medically necessary treatment.

Until the DoD is able to promulgate specific clinical practice guidelines for the care of transgender personnel, the MHS will adhere to the attached 2009 version of the Endocrine Society's Standards of Care, "Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline," as the primary guideline to provide consistent, evidence based care to transitioning patients. Explanation of any clinically indicated deviation from the guideline should be documented in the patient's health record. Clinical Practice Guidelines from other professional societies may also help inform clinical decision making (e.g., the 2015 American Psychological Association Guidelines for Psychological Practice with Transgender and Gender Nonconforming People and the World Professional Association for Transgender Health Standards of Care). Key components of medical care for the purpose of treating gender dysphoria include initial assessment and, based upon that assessment of the individual's needs,

the establishment of a treatment plan which may include real life experience (RLE) that is provided in a manner consistent with the requirements of DoDI 1300.28 and DTM 16-005 regarding RLE, cross-sex hormone therapy, and surgical transition. Treatment plans must be individualized and approved by a military medical provider. The following guidance addresses various stages of treatment:

1. For Active Duty Service members (ADSMs) seeking initial treatment for gender dysphoria, a diagnosis of gender dysphoria must be established by a privileged behavioral health provider (or similarly qualified civilian provider if unavailable in a military facility), with appropriate referral to other types of providers as indicated or required. The assessment should be comprehensive in nature, including exclusion of other causes for dysphoria, and lead to formulation of an initial treatment plan.

2. For ADSMs who have already received a diagnosis of gender dysphoria and established a treatment plan approved by a military medical provider, and who desire to proceed to or continue cross-sex hormone therapy, an endocrinologist or other physician with appropriate professional expertise should exclude medical conditions making hormone therapy unsafe, may initiate or continue hormone therapy if indicated as medically necessary, and monitor response to hormones in accordance with the Endocrine Society's Standards of Care guidelines, to include periodic screening for hormone associated adverse outcomes.

3. ADSMs with an established treatment plan desiring surgical treatment following a period of RLE and who are compliant with all facets of an approved treatment plan should be referred to an appropriately qualified surgeon for evaluation. The surgeon should fully discuss all surgical options and potential complications in order to provide informed consent before surgery is proposed. Consistent with current DoD policies, purely cosmetic or other non-medically necessary surgery is not authorized.

4. Any Service member for whom the Defense Enrollment Eligibility Reporting System has recorded a gender change, or who is in the process of obtaining such a change, must have an ongoing plan to address needed medical care, including follow up of hormone treatment and any appropriate health screening.

5. Unless and until adequate surgical capabilities have been established in DoD Military Treatment Facilities (MTFs), medically necessary surgical treatment will be evaluated using the existing MHS waiver process for private sector care for Active Duty members under the Supplemental Health Care Program (SHCP). This standardized process requires referral through the Service chain of command and review and approval by the Director, Defense Health Agency (DHA).

6. The expectation is for the MHS to provide an interdisciplinary team approach to transition care in accordance with evidence based guidelines and practices, reinforcing at all times the transgender Service member's right to receive all medical care with dignity and respect. Provision of care may involve multiple facilities and require appropriate care coordination between providers. In no circumstance will a provider be required to

deliver care that he or she feels unprepared to provide either by lack of clinical skill or due to ethical, moral or religious beliefs. However, referral to an appropriate provider or level of care is required under such circumstances.

7. As with all other medical conditions, in the first 180 days of service in the military, all personnel must continue to meet the medical standards associated with accession (DoDI 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services"). Ongoing fitness for duty and deployment screening after 180 days shall be assessed in accordance with current Service practices and policies applied to other medical conditions.

Central Coordination:

1. Service Central Coordination Cells (SCCC) established under DoDI 1300.28 shall provide multi-disciplinary (e.g., medical, legal, military personnel management) expert advice and assistance to commanders with regard to service by transgender Service members and gender transition in the military to assist commanders in the execution of DoD, Military Department, and Service policies and procedures.

2. The Under Secretary of Defense for Personnel and Readiness (USD(P&R)) has established a Central Coordination Cell with Office of the Secretary of Defense, DHA, and Service representatives to oversee consistent and uniform implementation of DoDI 1300.28, provide consultation to SCCCs, and receive and analyze data reported by the Services. The Central Coordination Cell is not a substitute for SCCCs, but provides information and advice on policy matters, and assistance with identification and coordination of needed treatment resources, when necessary. DHA has provided a senior representative to facilitate coordination of care and services delivered by the managed care support contractors and the DHA Waiver Authority process.

3. To assist Commanders and Service members until each Service establishes its own SCCC, the DoD Central Coordination Cell has established the following website: https://prext.osd.mil/DoDCCC. This is a Common Access Card-enabled website for secure questions by all Service members. Policy documents and Frequently Asked Questions reside on this website and questions will be answered by policy, legal and medical experts.

Service and DHA Requirements and Responsibilities:

1. Each Service and DHA shall develop and submit an assessment of current Service medical capacity and expertise in providing medical and surgical support for treating gender dysphoria to the USD(P&R) no later than August 31, 2016. This assessment should include a listing of MTFs at which interdisciplinary care and treatment are available or under development for this purpose, and use the attached data reporting template.

2. Each Service and DHA shall develop an education and training plan for both privileged and non-privileged medical personnel no later than November 1, 2016. This plan should detail how the Service will ensure familiarity with applicable Department policies and requirements, evidence-based practice guidelines and standards of care, and any Service-specific policies. To the extent practicable, training plans and requirements, and additional procedural guidance for care and services will be consistent across the MHS, and will be published as DHA procedural guidance.

3. Each Service and DHA shall be prepared to begin supporting transition medical care to transgender ADSMs no later than October 1, 2016. At a minimum, Services will be expected to provide, by referral if necessary, initial assessment, psychological and pharmaceutical support. As directed by the Secretary of Defense, in the period prior to October 1, 2016, the Military Departments and Services will address requests for gender transition from serving transgender Service members on a case-by-case basis, following the spirit and intent of DTM 16-005 and DoDI 1300.28. Until the capability of MHS MTFs to provide surgical transition services has been documented, any proposed genital surgical transition procedures within MTFs shall be prospectively reviewed by the appropriate Surgeon General or, in the case of the National Capital Region facilities, the Director, DHA. Approvals will be reported to the Assistant Secretary of Defense for Health Affairs (ASD(HA)) monthly.

4. The Director, DHA, will ensure that the Managed Care Support Contractors identify appropriate referral resources with providers experienced in care and treatment of transgender persons to ensure availability of care to complement MTF capabilities. An inventory of such resources shall be provided to the ASD(HA) not later than August 31, 2016.

5. The Director, DHA, will evaluate proposed referrals to the TRICARE network for surgical treatment in accordance with the Supplemental Health Care Program (SHCP). MHS care for ADSMs from non-DoD providers is governed by section 1074(c)(2) of title 10, U.S. Code, and section 199.16 of title 32, Code of Federal Regulations. Under these provisions, the SHCP normally follows TRICARE rules, which disallow surgical treatment of gender dysphoria, but the prohibition is subject to waiver for medically necessary care for ADSMs. The Director, DHA, is authorized to grant waivers on a case-by-case basis. Waiver requests will follow existing processes. Each waiver request, with appropriate clinical documentation, should be submitted through the Surgeon General concerned, to the Director, DHA.

6. To the extent a SHCP waiver would be needed to authorize non-surgical care for an ADSM, this memorandum approves such a waiver on a blanket basis if such care is recommended by a military health care provider in accordance with established SHCP procedures and this memorandum.

7. With respect to Reserve Component Service members not on active duty for a period of more than 30 days who initiate or are involved in a gender transition process, the Services shall establish procedures to ensure that a medical diagnosis and treatment plan (or significant revisions to a treatment plan) or a recommendation for a change in a member's gender marker made by a civilian medical provider is reviewed and approved by an appropriate military medical provider and communicated in a timely and efficient manner with the Reserve Component command involved.

ASD(HA) Responsibilities:

1. The ASD(HA) shall establish collaboration with the Veterans Health Administration and academic medical centers to support Service training plans and specialty consultations, including via telemedicine, where necessary and appropriate.

2. The ASD(HA) shall monitor compliance with this memorandum, which may include assessing Service and DHA performance on all provisions contained within this memorandum.

Karen S. Guice, M.D., M.P.P.
Acting

Attachments:
As stated

cc:
Under Secretary of Defense for Personnel and Readiness
Assistant Secretary of Defense (Manpower and Reserve Affairs)
Surgeon General of the Army
Surgeon General of the Navy
Surgeon General of the Air Force
Joint Staff Surgeon
Medical Office of the Marine Corps

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2018, I filed the foregoing supplemental addendum with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Catherine H. Dorsey
Catherine H. Dorsey