

NO.18-35347

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RYAN KARNOSKI, et al.,

Plaintiffs-Appellees,

STATE OF WASHINGTON,

Intervenor-Plaintiff-Appellee,

v.

DONALD TRUMP, in his official capacity as President of the United States;
et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. 2:17-cv-01297-MJP

The Honorable MARSHA J. PECHMAN
United States District Court Judge

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I. INTRODUCTION

Transgender individuals have long devoted their lives to serving our country in the United States military. Until recently, they were forced to do so in silence due to a longstanding Department of Defense (“DoD”) policy prohibiting 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 and better aligned with the military’s core value of equal opportunity. Relying on DoD’s promise of inclusion, enlisted service members came forward and began to serve openly, and transgender individuals—many of whom had long wished to serve—began planning for military service.

Without warning, on August 25, 2017, President Trump reversed course, announcing via Twitter that transgender individuals would be barred from serving in the military in any capacity. Following a post hoc, presidentially commissioned study and report, the President and, Department of Defense, and related federal agencies and officials (“Defendants-Appellants”) Defendants-Appellants now propose to ban nearly all transgender people from military service and prevent transgender service members from receiving necessary medical care (“the Ban”).

The District Court, like every court nationwide to rule on a preliminary injunction motion involving the Ban, enjoined its implementation. The District Court concluded that the Ban would inflict irreparable harm on Washington and its residents, and that its undisguised discrimination is likely unconstitutional. As a result of that injunction and others, transgender service members now serve openly without threat of discharge based on gender identity, and transgender recruits are evaluated for service based on their qualifications and merit.

Defendants now ask this Court's permission to return the military to a policy of government-sponsored discrimination. This Court should decline. The District Court did not abuse its discretion in enjoining the proposed implementation plan, which flows directly from the original Twitter announcement, irreparably harms Washington and its residents, and violates the constitutional guarantees of equal protection and due process.

II. STATEMENT OF JURISDICTION

This case is an appeal from the District Court's April 13, 2018, order denying Defendants-Appellants' Motion to Dissolve the Preliminary Injunction. ER 1-31. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

III. STATEMENT OF THE CASE

“In 2010, Congress repealed the ‘Don’t Ask, Don’t Tell’ policy that had previously prevented gay, lesbian, and bisexual people from serving openly in the military.” ER6. “The repeal of ‘Don’t Ask, Don’t Tell’ raised questions about the military’s policy on transgender service members, as commanders became increasingly aware that there were capable and experienced transgender service members in every branch of the military.” *Id.* “In August 2014, the DoD eliminated its categorical ban on retention of transgender service members, enabling each branch of military service to reassess its own policies.” *Id.* In July 2015, then-Secretary of Defense Ashton Carter convened a group to evaluate policy options regarding openly transgender service members (the “Working Group”). *Id.* The Working Group “consulted with medical experts, personnel experts, readiness experts, and commanders whose units included transgender service members, and commissioned an independent study by the RAND Corporation to assess the implications of allowing transgender people to serve openly (the “RAND study”). *Id.* After performing extensive research, the Working Group “unanimously agreed that (1) transgender people should be allowed to serve openly and (2) excluding them from service based on a

characteristic unrelated to their fitness to serve would undermine military efficacy.” *Id.*

On June 30, 2016, based on the advice the Working Group, then-Secretary Carter ended the longstanding, discriminatory policy that barred transgender individuals from openly accessing and serving into military service by issuing “Directive-type Memorandum 16-005 (the ‘Carter Policy’), which affirmed that ‘service in the United States military should be open to all who can meet the rigorous standards for military service and readiness.’” ER7. To that end, 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 ER433-34).

On June 30, 2017, Secretary Mattis delayed the date for accessing transgender applicants into military service to January 1, 2018. WaSER618-19.

Less than a month later, on July 26, 2017, President Trump—to the surprise of military leadership—reneged on the DoD promise of equal treatment and opportunity for transgender individuals in military service and announced on Twitter that the military “will not accept or allow” “Transgender individuals to serve in any capacity in the U.S. Military.” WaSER621. On August 25, 2017,

President Trump memorialized the Ban in a Presidential Memorandum titled “Military Service by Transgender Individuals” (“2017 Memorandum”). ER214-215.

In the 2017 Memorandum, President Trump directed the military to “return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016[.]” *Id.* at § 1(b). In Section 2 of the 2017 Memorandum, President Trump directed the military to: (1) indefinitely bar accession of transgender individuals into military service; and (2) halt all use of DoD or Department of Homeland Security (“DHS”) funding for sex-reassignment surgical procedures. *Id.* at § 2. The 2017 Memorandum also directed the Secretaries of Defense and Homeland Security, to submit “a plan for implementing both the general policy set forth in section 1(b) of this memorandum and the specific directives set forth in section 2 . . .” *Id.* at § 3. President Trump retained final decision-making authority regarding any change to his policy directives regarding transgender individuals in military service. *Id.* at § 1(b) (directing the Secretaries of Defense and Homeland Security to “advise [him], in writing” if they believe “that a change to this policy [the Ban] is warranted”); § 2(a) (instructing that his directive be maintained “beyond January 1, 2018, until such time as the Secretary of Defense, after consulting with the

Secretary of Homeland Security, provides a recommendation to the contrary that I find convincing”).

On August 28, 2017, a group of private plaintiffs and advocacy organizations filed this lawsuit. ER36. Washington intervened to protect its sovereign and quasi-sovereign interests in its natural resources, anti-discrimination laws, and in the health and physical and economic well-being of its residents. ER18-19; ER42-43; ER541-544; WaSER580-99.

On August 29, 2017, Secretary of Defense James Mattis issued a Statement affirming that “[t]he department will carry out the president’s policy direction[.]” WaSER334. In his Statement, Secretary Mattis confirmed that “as directed, [he] will develop a study and implementation plan” including establishing “a panel of experts serving with the Departments of Defense and Homeland Security to provide advice and recommendations on the implementation of the president’s direction.” *Id.* Secretary Mattis further announced his intent to “issue interim guidance to the force concerning the President’s direction[.]” *Id.*

On September 14, 2017, Secretary Mattis issued Interim Guidance for the 2017 Memorandum (“Interim Guidance”). ER208-209. The Interim Guidance again confirmed DoD’s objective to “carry out the President’s policy and

directives[.]” *Id.* Secretary Mattis promised that, I will present the President with a plan to implement the policy and directives in the Presidential Memorandum.”

Id.

On December 11, 2017, the District Court preliminarily enjoined Defendants-Appellants from “taking any action relative to transgender individuals that is inconsistent with the status quo that existed prior to President Trump’s July 26, 2017 announcement.” ER54. Courts in the District of Columbia, Maryland, and California entered similar nationwide injunctions that remain in place. *See Doe 1 v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017); *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017); *Stockman v. Trump*, No. 17-cv-1799-JGB-KK, ECF 79 (C.D. Cal. Dec. 22, 2017).

On February 22, 2018, a day after his deadline, Secretary Mattis presented President Trump with a memorandum titled “Military Service by Transgender Individuals” (“Mattis Policy Recommendation”), ER160-62, and a report titled “Department of Defense Report and Recommendations on Military Service by Transgender Persons” (“DoD Report”), ER163-206. In his “[u]nclassified” Policy Recommendation, Secretary Mattis confirmed that he created a panel of experts to “provide advice and recommendations on the implementation of the president’s” policy directive, as promised in his August 29, 2017 Statement.

ER160. *See also* WaSER334 The Mattis Policy Recommendation proposed barring: (1) accession into military service by transgender individuals with a history or diagnosis of gender dysphoria and transgender individuals “who require or have undergone gender transition;” (2) military service by openly transgender individuals who want to serve our country in a manner consistent with their gender identity; and (3) use of military resources for transition-related medical care. ER161-62. Secretary Mattis concluded his Policy Recommendation by recommending to the President that he revoke the 2017 Memorandum, “thus allowing [Secretary Mattis] and the Secretary of Homeland Security . . . to implement appropriate policies concerning military service by transgender persons.” ER162.

On March 23, 2018, President Trump adopted Secretary Mattis’s recommendations and issued a Memorandum for the Secretary of Defense and Secretary of Homeland Security regarding Military Service by Transgender Individuals (“2018 Memorandum”). ER158-59. The 2018 Memorandum recites that, pursuant to the 2017 Memorandum, Secretary Mattis provided President Trump his Policy Recommendation and DoD Report. ER158. The 2018 Memorandum then revokes 2017 Memorandum and authorizes Secretary Mattis and the Secretary of Homeland Security “to implement any appropriate policies

concerning military service by transgender individuals.” *Id.* Based on the Mattis Policy Recommendation, DoD Report, and 2018 Memorandum (collectively the “Implementation Plan”) Defendants-Appellants moved to dissolve the preliminary injunction. ECF 215.

The parties filed cross motions for summary judgment. ER1-2. The District Court granted in part and denied in part each party’s motion. ER30-31. The District Court expressly rejected Defendants-Appellants’ argument that the Implementation Plan was “new” and independent from the Ban announced in 2017. ER12 (finding that “the 2018 Memorandum and Implementation Plan do not substantively rescind or revoke the Ban, but instead threaten the very same violations that caused it and other courts to enjoin the Ban in the first place”).¹ The District Court also affirmed that “[t]he preliminary injunction previously entered otherwise remains in full force and effect” and struck Defendants-Appellants’ Motion to Dissolve the Preliminary Injunction. ER30.

¹ The District Court granted Defendants-Appellants’ motion and dismissed Washington’s and private Plaintiffs’ claims for injunctive relief against President Trump, but affirmed that the court has “jurisdiction to issue declaratory relief against the President, [and] that this case presents a ‘most appropriate instance’ for such relief” as the Ban was likely “devised by the President, and the President alone.” ER29

Defendants-Appellants filed this appeal and moved concurrently in this Court and the District Court for a stay of the preliminary injunction. ER63-65; WaSER4-9. The District Court denied Defendants-Appellants' motion on June 15, 2018, concluding that "Defendants-Appellants have not established that a stay of the preliminary injunction is appropriate[.]" WaSER9, because they did not: (1) make a strong showing that they are likely to succeed on the merits; (2) show that they will be irreparably injured absent a stay; (3) show that Washington and private Plaintiffs would not be substantially injured if the preliminary injunction were stayed; or (4) establish that the public interest supports staying the preliminary injunction. WaSER6-9.

IV. STANDARD OF REVIEW

"A party seeking modification or dissolution of an injunction bears the burden of establishing that a significant change in facts or law warrants revision or dissolution of the injunction." *Alto v. Black*, 738 F.3d 1111, 1120 (9th Cir. 2013) (citing *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000)). A district court's denial of a request to modify or dissolve a preliminary injunction is overturned only for an abuse of discretion. *Sharp*, 233 F.3d at 1173. "As long as the district court got the law right, it will not be reversed simply because [we] would have arrived at a different result if [we] had applied the law to the facts

of the case.” *Hawai’i v. Trump*, 871 F.3d 646, 654 (9th Cir. 2017) (quoting *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1096 (9th Cir. 2002)). Further, “[i]n reviewing denials of motions to dissolve injunctions, [the Ninth Circuit does] not consider the propriety of the underlying order, but limit[s] [its] review to the new material presented with respect to the motion to dissolve.” *Sharp*, 233 F.3d at 1169–70.

V. ARGUMENT

A. **The District Court Did Not Abuse Its Discretion When It Found That the Implementation Plan Does Not Constitute Significantly Changed Circumstances**

The District Court did not abuse its discretion when it found that the Implementation Plan is not a “new” policy creating significantly changed circumstances that warrants dissolution or alteration of the preliminary injunction. Instead, the District Court correctly found that the Implementation Plan is merely the blueprint ordered by the President and delivered by the Secretary of Defense to implement the Ban, and that it was appropriate to maintain the injunction to protect Washington from the harms that the discriminatory Ban would inflict.

1. The Implementation Plan is the direct result of President Trump's Twitter announcement and 2017 Memorandum

Defendants-Appellants argue that the issuance of the Implementation Plan constitutes such a significant change in circumstances that it moots Washington's need for the preliminary injunction. Defendants-Appellants argue that the 2018 Implementation Plan is a fresh start and a departure from the 2017 policies, and that the Implementation Plan is the result of "the Department's professional military judgment[.]" Op. Br. at 1. *See also id.* at 8, 9. But the sequence of events belies any argument that Secretary Mattis exercised "the Departments' best military judgment[.]" and that the Implementation Plan is the result of "an extensive deliberative process[.]" Op. Br. at 2 (citing ER161). Given the factual record, the District Court did not abuse its discretion when it found that Defendants-Appellants' Implementation Plan does not constitute a "new" policy. ER14.

First, Defendants-Appellants characterize the Implementation Plan as "[t]he military's independent re-examination of the Carter policy," suggesting that is independent of the August 2017 Twitter announcement and Memorandum. Op. Br. at 19. On its face, however, the Implementation Plan states that it is the direct result and final culmination of the 2017 Memorandum, which itself implemented the President's Twitter announcement. *See* ER158

(affirming that “[p]ursuant to [President Trump’s] memorandum of August 25, 2017 . . . the Secretary of Defense, in consultation with the Secretary of Homeland Security, submitted to me a memorandum and report concerning military service by transgender individuals”); ER44 (“President Trump’s announcement on Twitter and his Presidential Memorandum did not order a study, but instead unilaterally proclaimed a prohibition on transgender service members.”). It is clear from Defendants-Appellants’ own statements and documents that the Implementation Plan is not a “new” policy or an “independent re-examination” military service by transgender individuals—but simply the final step necessary to formalize and operationalize the Ban.

Second, Defendants-Appellants argue that the Mattis Policy Recommendation is the result of “the Department’s best military judgment” in creating the Implementation Plan. However, the 2017 Memorandum expressly states that Secretary Mattis “*shall* submit to [President Trump] a plan for implementing” the 2017 Memorandum. *Id.* at § 3 (emphasis added). Further, President Trump unambiguously directed that Secretary Mattis “shall” maintain the Ban indefinitely or “until such time as the Secretary of Defense . . . provides a recommendation to the contrary that [President Trump] find[s] convincing.” ER214 at § 2(a). In the face of a clear directive from the Commander in Chief,

it is simply unrealistic to posit that Secretary Mattis had the option to do anything other than what he did: “return to the longstanding policy” regarding military service by transgender individuals. That he did so is evidenced by Secretary Mattis’s own description of his role. *See* ER208 (affirming that Secretary Mattis will “carry out the President’s policy and directives”).

It is clear from Defendants-Appellants’ own documents and statements that the Implementation Plan is the direct and anticipated result of President Trump’s Tweets announcing the Ban, not the result of independent military consideration. The District Court did not abuse its discretion in finding that “the 2018 Memorandum and the Implementation Plan do not substantively rescind or revoke the Ban, but instead threaten the very same violations that caused it to enjoin the Ban in the first place.” ER12.

2. The Implementation Plan erects the same barriers to open service that were announced through the Twitter announcement and 2017 Memorandum

In addition to being the natural outgrowth of the policy first announced by the President via Twitter, the Implementation Plan imposes substantially the same barriers and limits on military service that were first announced in the 2017 directives. The District Court properly recognized that these parallels rendered

the Implementation Plan part of the same policy already subject to a proper injunction.

First, like the 2017 Memorandum, the Implementation Plan would foreclose from transgender individuals the dignity of open service in accordance with their gender identity. *Compare* ER214 at § 1(b), *with* ER161-62. It would do so by: (1) requiring transgender individuals to serve in their “biological sex” and comply with all standards that apply to their “biological sex,” regardless of whether that comports with their gender identity, ER162; and (2) creating an absolute bar to military service by transgender individuals who have transitioned their gender or who decide to transition their gender.

Second, like the 2017 Memorandum, the Implementation Plan bars transgender people from accessing into military service. The Implementation Plan prohibits accession of transgender individuals unless a person has been “stable for 36 consecutive months in their *biological sex* prior to accession,” and bans anyone who has gone through a gender transition by requiring every service member to serve in accordance with their biological sex. ER161 (emphasis added).

Third, the 2017 Memorandum directed the military to “halt all use of DoD or DHS resources to fund sex-reassignment surgical procedures for military

personnel[.] ER214 at § 2(b). The Implementation Plan also does that, by barring “[t]ransgender person[s] who require or have undergone gender transition are disqualified from military service” thereby making it impossible for them to obtain sex-reassignment surgical care through the military. ER161.

The primary policy directives that the President directed in his Tweet and his 2017 Memorandum have thus been carried on through the Implementation Plan. Accordingly, Defendants-Appellants are simply wrong that that the Implementation Plan moots Washington’s need for the preliminary injunction. The injunction would be moot only “if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought.” *Jacobus v. Alaska*, 338 F.3d 1095, 1102 (9th Cir. 2003) (citing *Adarand Constructors, Inc. v Slater*, 528 U.S. 216, 224 (2000)). The District Court did not abuse its discretion in determining that the Implementation Plan is a continuation of the same, unlawful policy, and affirming that the preliminary injunction should remain in place to preserve the status quo while this case proceeds on the merits.

B. The District Court Did Not Abuse Its Discretion When It Rejected Defendants-Appellants’ Request to Dissolve the Preliminary Injunction

A preliminary injunction is appropriate where the moving party shows: (1) the likelihood of success on the merits; (2) the likelihood of irreparable harm

in the absence of an injunction; (3) the balance of equities tip in favor of the injunction; and (4) an injunction serves the public interest. *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008). The District Court did not abuse its discretion when it rejected Defendants-Appellants' bid to dissolve the preliminary injunction, because all of the *Winter* factors are still met.

1. Washington is likely to succeed on the merits of its claims

a. Washington has standing to protect its sovereign and quasi-sovereign interests

The District Court did not abuse its discretion when it found that Washington has standing to challenge the Ban. ER18-20; ER42-43.

(1) Washington has standing to protect its sovereign interests

Implementing the Ban would force Washington to discriminate against its own transgender residents when it staffs and deploys Washington National Guard for intrastate service. This is because, when Washington's Governor deploys the National Guard for intrastate matters, Washington pays Guard members for their service and is responsible for their training, upkeep, and well-being. ER541-42; Wash. Rev. Code §§ 38.08.020, 38.08.040. If the Ban is implemented, Washington will be required to recruit and staff its National Guard—even for intrastate emergencies—using discriminatory policies causing

Washington to discriminate against its own residents when it hires Guard members to protect and serve the needs of the State.

The Ban injures Washington by infringing on its sovereign interest in maintaining and enforcing its longstanding antidiscrimination laws. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982) (“[T]he exercise of sovereign power . . . involves the power to create and enforce a legal code, both civil and criminal”). The Washington Constitution and Washington Law Against Discrimination both provide robust provisions prohibiting discrimination on the bases of sex and gender identity. *See* Washington State Const. art. XXXI, § 1 (affirming that equality of rights and responsibility shall not be denied or abridged on account of sex); Wash. Rev. Code § 49.60.010 (finding that discrimination “menaces the institutions and foundation of a free democratic state”); Wash. Rev. Code § 49.60.030 (prohibiting discrimination based on sex); Wash. Rev. Code § 49.60.040(26) (defining prohibited discrimination to include “gender identity”). *See also* WaSER580-87; WaSER705-11. If implemented, the Ban’s discriminatory accession and retention directives will require Washington to violate its own anti-discrimination laws and apply discriminatory policies to its own residents

any time that Washington deploys its National Guard to protect its residents and natural resources.

Washington’s sovereign interests in protecting its anti-discrimination laws and not discriminating against its residents are not mitigated by Defendants-Appellants’ argument that “Washington has yet to identify any state law that would prevent it from adhering to military restrictions based on the medical condition of gender dysphoria or its treatment.” Op. Br. at 53. This misses the mark. Washington brings this suit because multiple provisions of federal and state law—including the Fifth Amendment, the Washington Constitution, and Washington statutes—prohibit Washington from discriminating against its own residents based on sex and gender identity, and that is exactly what the Ban requires Washington to do.

Further, Washington has protectable sovereign interests in “preserv[ing] its sovereign territory.” *Massachusetts v. E.P.A.*, 549 U.S. 497, 519 (2007) (affirming that states have an “independent interest” in protecting the natural environments and resources within the state’s boundaries) (citing *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)). Washington protects these interests with its National Guard, as a critical part of the Washington National Guard’s mission is to prevent and minimize damage caused by natural disasters

like wildfires, landslides, flooding, and earthquakes. ER18-20; ER42-43; WaSER588-99. Recruitment for the Washington National Guard is subject to DoD policies governing accession into military service, 10 U.S.C. § 12201(b), and excluding transgender Washingtonians from the pool of candidates who can join the Washington National Guard results in diminished numbers of Guard members who can provide emergency response and disaster mitigation in emergent situations.² See ER42-43. Contrary to Defendants-Appellants' argument that this injury is "speculative," Op. Br. at 53, Washington experiences difficulty in recruiting for the National Guard, and any reduction in qualified service members negatively impacts the State's interest in responding to and mitigating natural disasters.³ *Id.* WaSER712-14.

² Defendants-Appellants argue that Washington should utilize its authority to establish a "defense force" independent of the Washington National Guard if it wants to protect its natural resources without being forced to participate in Defendants-Appellants' discriminatory Ban. Op. Br. at 53. The suggestion that Washington's only alternative to being complicit in the Ban would be to invest millions of dollars in creating, training, and overseeing an independent defense force only confirms that Washington has standing to bring this action.

³ Defendants-Appellants argue that "Washington had only 'one soldier' who identified as transgender." Op. Br. at 53. This is an incredible oversimplification of a complex situation that Defendants-Appellants' created. Transgender service members have long been reticent to come forward and identify themselves out of fear that Defendants-Appellants will target them for discriminatory treatment. The same is true for National Guard members subject to federal policy. For this reason, the total number of Washington's transgender Guard members is unknown. Further, Defendants determine military eligibility, and are in the best position to identify transgender Washingtonians that were

Finally, Defendants-Appellants complain that, if allowed to challenge the Ban, Washington would be able to challenge “any military personnel regulation.” Op. Br. at 53. The implication that Washington might claim standing to challenge everyday personnel regulations, like the color of military footwear or the specifications of military haircuts, makes light of the government-sponsored discrimination at issue here. To be sure, if the military next demands that Washington staff its National Guard using discriminatory guidelines based on race, ethnic heritage, or religion, Washington also would have standing to challenge those directives.

The District Court did not err when it found that Washington has standing to protect its sovereign interests. *See* ER18-19; ER42-43.

(2) Washington has *parens patriae* standing to protect its residents from discrimination

As the Supreme Court has recognized, states have standing as *parens patriae* to protect residents from “the harmful effects of discrimination.” *Snapp*, 458 U.S. at 609 (holding that protecting residents from overt federal discrimination is squarely a state concern). This is because “*parens patriae* is inherent in the supreme power of every State . . . often necessary . . . for the

denied accession opportunities into Guard service because of their transgender status or who were terminated from service because of their transgender status.

prevention of injury to those who cannot protect themselves[.]” *Id.* at 600. Even in the face of such clear authority, Defendants-Appellants argue that Washington cannot bring a challenge against the federal government in its *parens patriae* capacity. Op. Br. at 52. This is incorrect.

In 2007, the Supreme Court rejected this precise argument and upheld States’ ability to sue the federal government to protect its quasi-sovereign *parens patriae* interests. *See Massachusetts*, 549 U.S. at 520 n.17. *See also Am. Rivers v. F.E.R.C.*, 201 F.3d 1186, 1205 (9th Cir. 1999) (affirming that state entities have *parens patriae* standing to sue federal entities); *Nebraska v. Wyoming*, 515 U.S. 1, 20 (1995) (affirming that state have standing to vindicate “quasi-sovereign” interests).

Washington is home to at least 60,000 active and reserve military service members and approximately 8,000 Guard members. ER19. Each of these Washingtonians works for the military and, as a result of the Ban, is part of an organization that seeks to discriminate against transgender Washingtonians. As long as the Ban is in place, every Washington service member is impacted because they are part of an entity that shows it is willing to discriminate against its own members and renege on the promises of equal treatment it made to its soldiers. Further, every transgender Washingtonian who currently serves in the

military, was discharged due to their transgender status, or was denied the opportunity to serve has been harmed by Defendants-Appellants' discrimination. As the District Court correctly concluded, the Ban "denie[s] them the opportunity to serve in the military on the same terms as others; . . . deprive[s] them of dignity; and . . . subject[s] them to stigmatization." ER16 (citing *Heckler v. Mathews*, 465 U.S. 728, 739 (1984) (noting that policies that "stigmatiz[e] members of [a] disfavored group as 'innately inferior' . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group").

In addition to current service members, Washington is also home to approximately 32,850 transgender adults. ER19. The Ban targets each of these Washingtonians for disfavored treatment in career and economic growth by barring them access to military service simply because they are transgender. States have long been accorded standing to challenge blanket discrimination against their residents. *See Snapp*, 458 U.S. at 609 (finding state standing to challenge discrimination because state has "substantial interest in assuring its residents that it will act to protect them" from "political, social, and moral damage of discrimination").

The District Court did not err when it found Washington has standing to challenge Defendants-Appellants' Ban to protect its sovereign and quasi-sovereign interests.

b. Courts have authority to protect service members from unconstitutional military policies

The District Court has reserved for trial the question of whether the “timing and thoroughness of [DoD’s] study and the soundness of the medical and other evidence it relied upon” is the type to which deference is owed. ER30. Through this interlocutory appeal, Defendants-Appellants seek to force the answer to that question now, demanding that this Court agree that the Ban merits “special deference” and should receive only limited judicial review. Op. Br. at 2. This Court should decline, at this preliminary stage, to declare that the Ban merits deference.

In reviewing military action for constitutional compliance, courts accord deference where the challenged restriction arises from military experience or developed research. *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). But respect for military expertise never requires courts to afford blind deference to policies that discriminate on their face. Neither military experts nor Congress is “free to disregard the Constitution when [they] act in the area of military affairs.” *Id.* Indeed, if history has instructed anything, it is that there must be limits to judicial

deference in the military context: “it is 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.” *Watkins v. U.S. Army*, 875 F.2d 699, 729 (9th Cir. 1989) (Norris, J., concurring).

This is why the Supreme Court long ago warned that—even in the military context—“deference does not mean abdication.” *Rostker*, 453 U.S. at 70. In *Rostker*, the Court rejected the same request Defendants-Appellants now make—*i.e.* to find that deference to military affairs limits courts’ ability to apply a more rigorous standard than rational basis review. *Id.* Instead, the Court held that “any further ‘refinement’ in the applicable tests” when reviewing the constitutionality of military policies was unnecessary.⁴ *Id.*

Following the Supreme Court’s directive, this Court and others have rejected requests from the military to defer to discriminatory policies. *Witt v. Dept. of Air Force*, 527 F.3d 806, 813 (9th Cir. 2008) (refusing to apply rational basis to review military policy discriminating against gays and lesbians); *Doe*, 275 F. Supp. 3d 167 (D.D.C. 2017) (“The military has not been exempted from

⁴ Defendants-Appellants argue that, as applied, the *Rostker* court’s analysis “most closely resembles rational-basis review.” Op. Br. at 21. This characterization overlooks the Court’s express statement that it was applying heightened scrutiny. *Rostker*, 453 U.S. at 69.

constitutional provisions that protect the rights of individuals’ and, indeed, ‘[i]t is precisely the role of courts to determine whether those rights have been violated.’”) (quoting *Emory v. Sec’y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987)). Thus, even in the military context, courts appropriately apply heightened scrutiny to policies that discriminate on their face.

This Court also should reject Defendants-Appellants’ argument that the District Court should have deferred to the military because its most-recent effort, the Implementation Plan, “draws lines on the basis of a medical condition (gender dysphoria) and its treatment (gender transition).” Op. Br. at 23. That is a distinction without a difference. The Ban discriminates against transgender individuals by forcing them to serve in denial of the very thing that makes them transgender—a gender identity that does not comport with their “biological sex.” Put another way, the Ban impacts every transgender Washingtonian who currently serves or may wish to serve by requiring them to act *as if they were not transgender* and denying them the opportunity to serve if they have a history or diagnosis of gender dysphoria or have ever transitioned their gender.

Finally, the District Court was correct to reserve the question whether the deference that might apply in ordinary circumstances is appropriate given the factual record here, where all of the DoD “expert” policies were developed post-

hoc and after the Ban had been announced by the President and challenged in court. Indeed, Defendants-Appellants' Implementation Plan is the result of a review—conducted entirely within one 90-day span—that was initiated, organized, and completed after the President had decreed the expected result and while Defendants-Appellants were in active litigation in four courts over the Ban. ER181. This is an incredibly abbreviated approach to this issue when compared to the extensive vetting DoD performed prior to implementing the Carter policy. *See* ER6-7 (noting that review of DoD policies governing service by transgender individuals (1) began in 2014 when “DoD eliminated its categorical ban on retention of transgender service members;” (2) formalized when Secretary Carter “convened a group to evaluate policy options regarding openly transgender service members;” (3) formalized when a Working Group “includ[ing] senior uniformed officials from each branch, a senior civilian official, and various staff members” and included research from the RAND Corporation.” ER6.

The District Court properly evaluated this history against Supreme Court instructions that courts should reject post-hoc attempts to shore up discriminatory policies with self-serving evidence developed during litigation. *See* ECF 233 at 25; *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1696-97

(2017) (“It will not do to ‘hypothesiz[e] or invent[t] governmental purposes . . . *post hoc* in response to litigation.”) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). As such, the District Court did not abuse its discretion in maintaining its injunction after concluding that, “[o]n the present record, the Court cannot determine whether the DoD’s deliberative process—including the timing and thoroughness of its study and the soundness . . . —is the type to which Courts typically should defer.” ER26.

c. The Ban—including the Implementation Plan—violates Equal Protection guarantees

The District Court rightly concluded that transgender individuals constitute a suspect class and that in order to survive constitutional review the Ban must survive strict scrutiny. ER20. Under strict scrutiny, Defendants-Appellants must prove that the Ban furthers compelling government interests and is narrowly tailored to achieve those interests. *See Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). This is a heavy burden, and Defendants-Appellants cannot show a likelihood of success of meeting this exacting standard. Nor can Defendants-Appellants even meet the burden of proving that the Ban, as a sex based distinction, survives intermediate scrutiny. *See Virginia*, 518 U.S. at 531. Indeed, the Ban cannot meet any standard of heightened scrutiny.

(1) Defendants-Appellants articulate no government interest that meets heightened scrutiny

Defendants-Appellants fail to prove that government interests purportedly protected by the Ban—including the Implementation Plan—can survive heightened scrutiny.

First, Defendants-Appellants’ claim that military readiness is protected by the Ban is undercut by top military leaders of the Army, Navy, Air Force, and Marine Corps, each of whom independently testified that they were aware of no negative impact on the military from open service by transgender military service members. *See* WaSER561 (noting that as Army Chief of Staff Mark Milley has received “precisely zero” report of problems). *See also* WaSER552-575.

Second, Defendants-Appellants’ claim that the Ban is necessary to protect unit cohesion fails. Four of Defendants-Appellants’ purported government interests related to unit cohesion are rooted in bias against transgender service members including: (1) “irreconcilable privacy demands” of non-transgender service members who might feel uncomfortable sharing space with transgender service members; (2) threats to “unit cohesion”—inasmuch as those threats would arise from private discrimination aimed at transgender service members; (3) “[f]rustration of non-transgender service members who also wish to be

exempted from uniform and grooming standards;” and (4) ensuring that non-transgender service members do not experience a feeling of “unfairness” because transgender service members are held to standards associated with their gender identity and not their “biological sex.” Op. Br. at 31-36. These asserted interests would simply ratify the assumed biases of non-transgender service members, and cannot justify the Ban. Even if soldiers are biased against their fellow soldiers, a point Defendants-Appellants appear to assume, it is well-established that “private biases and the possible injury they might inflict” cannot be the basis of lawful government policies. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). Nor can “[p]ublic officials sworn to uphold the Constitution . . . avoid a constitutional duty by bowing to the hypothetical effects of private . . . prejudice that they assume to be both widely and deeply held.” *Id.*

Further, Defendants-Appellants argument that unit cohesion is furthered by excluding transgender individuals from military service because of periods of non-deployability is flawed. Defendants-Appellants first argue that surgical transition and hormone treatment can require significant periods of non-deployability and that these periods of non-deployability will have negative impact on unit cohesion because other military service members will suffer “undue risk and personal burden[.]” Op. Br. at 29. But not all transgender

individuals will opt for these medical options for their transition. Further, such periods of non-deployability are routine in military service—whether the service member is transgender or not. *See* ER35-36 (noting that *all* service members might suffer from medical conditions that could impede performance). This includes military service members who may become pregnant or develop any number of conditions including “sleep apnea, appendicitis, gall bladder disease, infectious disease, and myriad other conditions” that need treatment before deployment. WaSER627. If DoD is able to perform individualized assessments for military service members who may experience periods of non-deployability for medical reasons, it can and must also do so with transgender military service members.

Third, Defendants-Appellants claim that transgender soldiers suffer mental health impairments at higher rates than non-transgender soldiers is unsupported by the record and rejected by medical experts in the field of transgender health care. *See* Op. Br. at 25-31. The American Medical Association unwaiveringly affirmed that “[t]here is no medically valid reason to exclude transgender individuals from military service,” and that “the Defense Department’s February 22, 2018, Memorandum for the President mischaracterized and rejected the wide body of peer-reviewed research on the

effectiveness of transgender medical care[.]” WaSER471-72. Similarly, the American Psychological Association (“APA”) issued a statement in response to the Implementation Plan that it “is alarmed by the administration’s misuse of psychological science to stigmatize transgender Americans and justify limiting their ability to serve in uniform and access medically necessary health care.” WaSER469. Even former Surgeons General have critiqued DoD’s characterization of “the effectiveness of transgender medical care as demonstrating ‘considerable scientific uncertainty.’” WaSER490. The Surgeon Generals affirmed that “[a] wide body of reputable, peer-reviewed research has demonstrated to psychological and health experts that treatments for gender dysphoria are effective.” *Id.* The Palm Center, an independent public policy research institute also issued a report debunking Defendants-Appellants’ purported medical reasons for the Ban and affirming that “[s]cholars and experts agree that transition-related care is reliable, safe, and effective[.]” WaSER497. The report additionally affirmed that “[s]cholarly research and DoD’s own data confirm that transgender personnel, even those with diagnoses of gender dysphoria, are deployable and medically fit.” WaSER498.

Fourth, while Defendants-Appellants’ interests in protecting the military’s budget may be a legitimate government interest, Defendants-

Appellants have presented no evidence that open service by transgender service members is an improvement over forcing these members to serve in secret. Instead, Defendants-Appellants assert that treatment for gender dysphoria has increased substantially compared costs associated with service members without this condition. Op. Br. at 37. Defendants-Appellants provide no evidence for this self-serving assertion and, even if they could, the cost of transition-related care is negligible when compared to the cost of care that other populations incur—*i.e.* service members who incur injuries in training, women who become pregnant while serving, or soldiers who develop mental or physical conditions as a result of service. Lastly, inasmuch as Defendants-Appellants argue that fundamental rights only demand respect if the ledger reads in the black, that argument must fail if fundamental rights are to have any meaning.

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

Defendants-Appellants' Ban is neither narrowly tailored nor substantially related to the interests it purports to protect. A policy is sufficiently narrowly tailored for strict scrutiny review only if “the means chosen to accomplish the [government's] asserted purpose [is] specifically and narrowly framed to accomplish that purpose,” *Shaw v. Hunt*, 517 U.S. 899, 908 (1996), such that “there is little or no possibility that the motive for the classification was

illegitimate . . . prejudice or stereotype,” *Grutter*, 539 U.S. at 333 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)). And a policy will survive intermediate scrutiny only if the discriminatory means employed are “substantially related to the achievement of those objectives.” *Morales-Santana*, 137 S. Ct. at 1690 (quoting *Virginia*, 518 U.S. at 533). The Ban is not sufficiently tailored to any governmental interests to survive heightened scrutiny.

First, current high-ranking military leaders have publically acknowledged that they are unaware of any problems arising from open service by transgender individuals. *See* 552-575. A Ban on service by transgender individuals to remedy a problem that current military leadership does not recognize as significant cannot be deemed an approach that is narrowly tailored or substantially related to protectable military interests. Further, every governmental interest that Defendants-Appellants claim have been undermined by prior DoD research or by the medical community. A policy barring open service that does not forward any governmental interests will fail heightened scrutiny’s tailoring requirement.

Second, the Ban excludes transgender individuals from serving openly. ER161-62. Even assuming *arguendo* that Defendants-Appellants’ purported interests are legitimate, a blanket exclusion on open service by transgender individuals is, by definition, not a tailored method to further those interests.

Defendants offer no reason why DoD's usual practice of evaluating recruits and retaining service members through individualized assessments would be insufficient to protect any non-discriminatory governmental interests in military readiness and lethality.

Third, insofar as Defendants-Appellants claim government interests are impaired because transgender individuals may experience psychological conditions during their service, Defendants-Appellants fail to explain why existing military policies governing service by *anyone* who may develop psychological conditions are insufficient to address appropriate medical care or discharge, where appropriate. *See* WaSER509-13. This individualized approach works for all service members, including transgender service members.

As such, the District Court did not abuse its discretion when it found that “Defendants[-Appellants] have failed to demonstrate that the policies prohibiting transgender individuals from serving openly is substantially related to important government interests” and that Washington is likely to succeed on its equal protection claim.

d. Washington is likely to succeed on its substantive Due Process claim

Defendants-Appellants argue that “there is no fundamental right to serve in the military, much less to do so in a particular manner.” Op. Br. at 39. This

framing mischaracterizes Washington’s claim, which is that the Ban infringes on the right to personal choices protected by substantive due process including choices core to personal autonomy and self-definition. WaSER30.

The District Court did not abuse its discretion when it found that the Ban—including the Implementation Plan—is not likely to survive Washington’s substantive due process claim as the Ban does not advance any legitimate government interest, does not limit the intrusion into the liberty interests at stake, and “directly interferes with [transgender individuals’] ability to define and express their gender identity and penalizes [them] for exercising their fundamental right to do so openly by depriving them of employment and career opportunities[.]” ER50. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984).

2. The injunction causes no injury to Defendants-Appellants

Defendants-Appellants’ claim that the preliminary injunction causes them irreparable harm is undercut by their failure to adduce any evidence that shows any likelihood of *specific* injury to the military from open service by transgender individuals under the Carter policy, or any injury to the military during the last six months that transgender individuals have accessed openly into military service. Instead, Defendants-Appellants point to *Winter* and claim that courts

must defer to military officials' predictions of harm when assessing preliminary injunctions. Op. Br. at 48 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 27 (2008)).

Winter itself shows that Defendants-Appellants have not presented sufficient evidence to warrant dissolving or modifying the preliminary injunction. In *Winter*, the Navy presented *significant* evidence to the district court—including “declarations from some of the Navy’s most senior officers”—detailing *specific* harms to Navy training protocols if the injunction stood. *Id.* at 24. Here, Defendants-Appellants have not provided this Court with any evidence that allowing transgender individuals to serve openly under the District Court’s injunction will cause them irreparable harm. Instead, the only evidence of harm that Defendants-Appellants produced is one “dueling equal-opportunity complaint” regarding privacy concerns arising from a transgender service member’s access to shower facilities. Op. Br. at 32-33; ER200. Although Defendants-Appellants cite this single example, they failed to even present any evidence regarding any costs or burdens associated with resolving that complaint or whether the issue could have been resolved by utilizing the protocols that DoD has already developed to resolve exactly these types of issues. *See* WaSER632-704.

In sum, Defendants-Appellants show no harm sufficient to vacate the injunction. All evidence presented—including statements from Defendants-Appellants’ own high-ranking military officials—indicate that Defendants-Appellants will not suffer irreparable injury from this Court maintaining the preliminary injunction. *See* WaSER6-7 (citing statements by high-ranking military officials and concluding that “Defendants-Appellants’ hypothetical and conclusory claims are unsupported by the evidence and do not establish a likelihood of irreparable harm”); WaSER556-575.

3. The Balance of Equities and Public Interest Favor Enjoining the Government from Violating Constitutional Rights

The District Court properly concluded that the balance of equities and public interest strongly favor maintaining the preliminary injunction. ER52-53; ECF 283 at 5. The discriminatory Ban tramples transgender Washingtonians’ constitutional rights and infringes on Washington’s sovereign and quasi-sovereign interests. As the balance of equities and public interest always favor “prevent[ing] the violation of a party’s constitutional rights[,]” this Court should find that the District Court did not abuse its discretion when it upheld its preliminary injunction. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

4. Nationwide Injunctive Relief Was Appropriate

“The purpose of [a preliminary injunction] is not to conclusively determine the rights of the parties but to balance the equities as the litigation moves forward.” *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (internal citation omitted).

Defendants-Appellants argue the injunction should be limited to the individually named plaintiffs and Washington because there are only six individuals “with ties to Washington and/or these organizations who may be affected by the new policy” and “whatever harms Washington may allege, redressing them would not require an injunction extending to all 49 other States.” Mot. at 55. This is plainly wrong, and the District Court did not abuse its discretion in issuing a nationwide injunction. Washington has 32,850 transgender adult residents and each of these individuals are stigmatized and impacted by the government-sponsored discrimination implemented in the Ban, so injunctive relief beyond the six named Plaintiffs is clearly appropriate. Washington seeks to protect its service members stationed throughout the country, ER18-19, including residents who intend to return to Washington but who may be temporarily deployed outside the state. An injunction that protects only the named Plaintiffs and that is geographically limited to Washington State

will not protect Washington’s *parens patriae* interests in ensuring that its residents—who may be stationed anywhere in the world—are protected from the discriminatory Ban. The District Court was well within its discretion to maintain a nationwide injunction. *See Washington v. Trump*, 847 F.3d 1151, 1166-67 (W.D. Wash. 2017).

VI. CONCLUSION

For the foregoing reasons this Court should deny Defendants-Appellants’ appeal and affirm the District Court’s preliminary injunction.

RESPECTFULLY SUBMITTED this 26th day of June, 2018.

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CERTIFICATE OF COMPLIANCE (FRAP 32(a)(7))

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached reply brief is proportionately spaced, has a typeface of 14 points or more and contains 7,881 words.

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DECLARATION OF SERVICE

I hereby certify that on June 26, 2018, the forgoing document was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

Dated this 26th day of June 2018.

s/ La Rond Baker

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