

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.,

Defendant.

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

**SUPPLEMENTAL EXCERPTS OF RECORD
VOLUME I**

ROBERT W. FERGUSON
Attorney General

La Rond Baker, WSBA No. 43610
Assistant Attorney General
Washington State Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744

**INDEX TO
SUPPLEMENTAL EXCERPTS OF RECORD**

Ryan Karnoski, et al., State of Washington v. Donald J. Trump.
United States Court of Appeals
for the Ninth Circuit
No. 18-35347
United States District Court
for the Western District of Washington, Seattle
No. 2:17-cv-01297-MJP

Dkt #	Date Filed	Document Description	Vol.	SER
Vol I				
221	3/27/2018	Mar. 27, 2018 Order on Motion for Summary Judgment Hearing	I	WA SER 001-003
283	6/15/2018	Order Denying Motion to Stay Preliminary Injunction	I	WA SER 004-009

Vol II				
150	1/25/2018	Washington State's Motion for Summary Judgment	II	WA SER 010-025
163-1	1/31/2018	Amicus Brief Constitutional Accountability Center	II	WA SER 026-063
169	2/1/2018	Agreed Motion For Leave To File Amicus Brief-Legal Voice	II	WA SER 064-084
170-2	2/1/2018	Amicus Brief of the Commonwealth of-Massachusetts and Amici States	II	WA SER 085-115
178	2/12/2018	Defendants Response To Plaintiff-Intervenor Washington's Motion for Summary Judgment	II	WA SER 116-126
185	2/16/2018	Plaintiff's Reply on Summary Judgment	II	WA SER 127-138
194	2/28/2018	Cross-Motion for Summary Judgment and Opposition To Plaintiffs And Interveners Motions for Summary Judgment	II	WA SER 139-167
201	3/7/2018	Plaintiff's Reply in Support of Motion for Summary Judgment	II	WA SER 168-182
202	3/7/2018	Plaintiff Intervenor Washington's reply in support of Motion for Summary Judgment	II	WA SER 183-201
226	4/3/2018	Defendants Supplemental Brief In Opposition To Plaintiffs MSJ	II	WA SER 202-214
227	4/3/2018	Plaintiff's Supplemental Briefing in Support of MSJ	II	WA SER 215-227

228	4/3/2018	Washington's Supplemental Brief In Support Of Own MSJ	II	WA SER 228-241
238	4/30/2018	Motion to Stay Preliminary Injunction	II	WA SER 242-249
250	5/14/2018	Plaintiff's Opposition to Defendant's Motion to Stay	II	WA SER 250-265
257	5/14/2018	Response, by Intervenor Plaintiff State of Washington, to Motion to Stay Preliminary Injunction Pending Appeal	II	WA SER 266-282
261	5/18/2018	Reply, filed by Intervenor Defendants Department of Homeland Security, Elaine C. Duke, Defendants James N Mattis, Donald J. Trump, United States Department of Defense, United States of America, to Response Motion to Stay Preliminary Injunction Pending Appeal	II	WA SER 283-291

VOL III				
152-2	1/29/2018	Amicus Brief of Retired Military Officers	III	WA SER 292-316
187-1	2/16/2018	Declaration La Rond Baker In Support Of Washington's MSJ	III	WA SER 317-318
187-2	2/16/2018	Exhibit A-E-mails Dated 2/6/2018 Re: Request For Extension To File Opposition To MSJ	III	WA SER 319-323
197	2/28/2018	Declaration of Parker In Support of Defendant's Motion for Summary Judgment	III	WA SER 324-392
215	3/23/2018	Motion to Dissolve Preliminary Injunction	III	WA SER 393-420
224	3/29/2018	Declaration Of Ryan Parker In Support Of Motion To Dissolve Preliminary Injunction	III	WA SER 421-422
224-2	3/29/2018	Exhibit 2-Department of Defense Report And Recommendation On Military Service By Transgender Persons February 2008	III	WA SER 423-468
251-3	5/14/2018	American Psychological Association, APA Statement Regarding Transgender Individuals Serving in the Military Mar. 26, 2018	III	WA SER 469-470
251-4	5/14/2018	American Medical Association, Letter to James Mattis Apr. 3, 2018	III	WA SER 471-472
255-4	5/14/2018	Ford, Zack, Pence Secretly Drafted Trumps Latest Transgender Military Ban Mar. 25, 2018	III	WA SER 473-487
255-6	5/14/2018	Palm Center, Former Surgeons Gen. Debunk Pentagon Assertions About Medical Fitness Transgender Troops Mar. 28, 2018	III	WA SER 488-494
255-8	5/14/2018	Palm Center, DoD's Rationale for Reinstating the Transgender Ban Is Contradicted by Evidence April 2018	III	WA SER 495-551

255-9	5/14/2018	Copp, Tara, “All Four Service Chiefs On Record: New Harm Units Transgender Circles” Mar. 24, 2018	III	WA SER 552-555
255-14	5/14/2018	Exhibit 14 Transcript Before The Committee On Armed Services U.S. Senate 4/12/2018	III	WA SER 556-561
255-15	5/14/2018	Exhibit 15 Transcript Before Committee On Armed Services U.S. Senate 4/19/2018	III	WA SER 562-569
255-16	3/14/2018	Exhibit 15 Transcript Before Committee On Armed Services U.S. Senate 4/24/2018	III	WA SER 570-575
258	5/14/2018	Declaration La Rond Baker in Support of Washington’s Response to Def’s Mtn to Stay PI	III	WA SER 576-579
258-1	5/14/2018	Dept Policy HR-209-02 Equal Opportunity/Affirm. Action	III	WA SER 580-583
258-2	5/14/2018	Exhibit B – Dept. Policy HR-208-01 Anti-Discrimination	III	WA SER 584-587
258-3	5/14/2018	Directive of The Governor 16-11 6/23/2016	III	WA SER 588-590
258-4	5/14/2018	Proclamation by the Governor 18-03	III	WA SER 591-593
258-5	5/14/2018	Proclamation by the Governor 17-13	III	WA SER 594-596
258-6	5/14/2018	Proclamation by the Governor 17-12	III	WA SER 597-599

VOL IV				
34-1	9/14/2017	Department of Defense Press Briefing – Secretary Carter	IV	WA SER 600-617
34-3	9/14/2017	Statement of Chief Pentagon Spokesperson D. White On Transgender Accessions	IV	WA SER 618-619
34-6	9/14/2017	President Donald J. Trump Twitter Announcement	IV	WA SER 620-621
46	9/14/2017	Declaration of Brad R. Carson in Support of Pltf’s Mtn for Prelim. Injunction	IV	WA SER 622-631
48-6	9/14/2017	Exhibit F – Implementation Guidance	IV	WA SER 632-704
56-8	9/25/2017	Department Policy No. HR-253-02 State Active-Duty Injury/Illness-Death Reporting Process	IV	WA SER 705-711
56-9	9/25/2017	WAARING Recruiting Overview	IV	WA SER 712-714

From: ECF@wawd.uscourts.gov
To: ECF@wawd.uscourts.gov
Subject: Activity in Case 2:17-cv-01297-MJP Karnoski et al v. Trump et al Motion Hearing
Date: Tuesday, March 27, 2018 5:26:21 PM

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS***** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

United States District Court for the Western District of Washington

Notice of Electronic Filing

The following transaction was entered on 3/27/2018 at 5:26 PM PDT and filed on 3/27/2018

Case Name: Karnoski et al v. Trump et al

Case Number: [2:17-cv-01297-MJP](#)

Filer:

Document Number: 221(No document attached)

Docket Text:

MINUTE ENTRY for proceedings held before Judge Marsha J. Pechman- Dep Clerk: *Rhonda Miller*; Pla Counsel: *Joseph Tyson, Peter Renn, Steve Patton, Natalie Nardecchia, La Rond Baker*; Def Counsel: *Ryan Parker, Brett Shumate*; CR: *Debbie Zurn*; Motion Hearing held on 3/27/2018 [129] **MOTION** for Summary Judgment filed by Cathrine Schmid, Jane Doe, Megan Winters, Terece Lewis, Phillip Stephens, Gender Justice League, American Military Partner Association, Conner Callahan, Lindsey Muller, D.L., Ryan Karnoski, Laura Garza, Human Rights Campaign, [150] **MOTION** for Summary Judgment filed by State of Washington. Oral argument presented. Court will issue written opinion after parties provide additional briefing on the new transgender policy memorandum issued 3/23/2018. Simultaneous briefing shall not exceed ten pages and is due within seven days. Defendants are ordered to refile and re-note their pending motions in the proper form and format as required by the local rules. (RM)

2:17-cv-01297-MJP Notice has been electronically mailed to:

Derek Alan Newman Derek@newmanlaw.com, ecf@newmanlaw.com,
samantha@newmanlaw.com

Amanda J Beane abeane@perkinscoie.com, docketsea@perkinscoie.com,

jhernandez@perkinscoie.com

Joseph R Shaeffer Joe@mhb.com, esmeraldav@mhb.com

Tara Borelli tborelli@lambdalegal.org, ejeffers@lambdalegal.org

Katherine C. Chamberlain katherinec@mhb.com, terrif@mhb.com

Michael J Ewart jake.ewart@hcmp.com, frances.drobny@hcmp.com

Sara Ainsworth sainsworth@legalvoice.org, cphalan@legalvoice.org

William B. Stafford WStafford@perkinscoie.com, awells@perkinscoie.com,
docketsea@perkinscoie.com, ksiwiec@perkinscoie.com

Abha Khanna akhanna@perkinscoie.com, docketsea@perkinscoie.com,
eweinkauf@perkinscoie.com

La Rond Baker larondb@atg.wa.gov, chamenew@atg.wa.gov, colleenm1@atg.wa.gov,
cruecf@atg.wa.gov

Colleen M Melody colleenm1@atg.wa.gov, chamenew@atg.wa.gov, cruecf@atg.wa.gov

Samantha Everett samantha@newmanlaw.com, ecf@newmanlaw.com

Lauren Watts Staniar LStaniar@perkinscoie.com, DocketSEA@perkinscoie.com,
VLBabani@perkinscoie.com

James F. Hurst james.hurst@kirkland.com, annette.clemens@kirkland.com

Jordan M Heinz jheinze@kirkland.com, eric.greenberg@kirkland.com,
paul.ketz@kirkland.com

Kara N. Ingelhart kingelhart@lambdalegal.org, apaige@lambdalegal.org

Natalie Nardecchia nnardecchia@lambdalegal.org

Peter E Perkowski peterp@outserve.org, peter@perkowskilegal.com

Peter C Renn prenn@lambdalegal.org, apaige@lambdalegal.org,
jfarnsworth@lambdalegal.org

Carl Charles ccharles@lambdalegal.org

Sasha J Buchert sbuchert@lambdalegal.org

Camilla B Taylor ctaylor@lambdalegal.org, ejeffers@lambdalegal.org

Ryan Bradley Parker ryan.parker@usdoj.gov

Vanessa Barsanti vanessa.barsanti@kirkland.com, nmortenson@kirkland.com

Scott Lerner scott.lerner@kirkland.com, kelly.borsch@kirkland.com

Daniel I Siegfried daniel.siegfried@kirkland.com, bdaniel@kirkland.com

Gerald Brinton Lucas brinton.lucas@usdoj.gov, Kimberly.Sasser@usdoj.gov

Joseph B Tyson ben.tyson@kirkland.com

Kimberly A. Parr kimberly.parr@state.ma.us, adlawEFilings@state.ma.us

Ashwin P Phatak ashwin@theusconstitution.org

Brianne J. Gorod brianne@theusconstitution.org

David H Gans david@theusconstitution.org

Elizabeth B Wydra elizabeth@theusconstitution.org

Cristina Sepe csepe@perkinscoie.com, jpeterson@perkinscoie.com

Stephen R Patton stephen.patton@kirkland.com

2:17-cv-01297-MJP Notice will not be electronically mailed to:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI,

Plaintiff,

v.

DONALD J. TRUMP,

Defendant.

CASE NO. C17-1297-MJP

ORDER DENYING MOTION TO
STAY PRELIMINARY
INJUNCTION

THIS MATTER comes before the Court on Defendants' Motion to Stay the Preliminary Injunction Pending Appeal. (Dkt. No. 238.) Having reviewed the Motion, the Responses (Dkt. Nos. 250, 257), the Reply (Dkt. No. 261), the Jurisdictional Briefing (Dkt. Nos. 275, 276, 277) and all related papers, the Court DENIES the Motion.

Background

On December 11, 2017, the Court issued a nationwide preliminary injunction barring Defendants 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" of a policy

1 excluding transgender people from serving openly in the military (the “Ban”). (Dkt. No. 103 at
2 23.)

3 On March 23, 2018, Defendants released an Implementation Plan and a 2018
4 Memorandum which purported to “revoke” the 2017 Memorandum and replace it with a “new
5 policy” that does not mandate a “categorical prohibition on transgender service members,” but
6 rather targets those who have been diagnosed with gender dysphoria. (Dkt. No. 226 at 3-7; see
7 also Dkt. No. 224, Exs. 1, 3.)

8 On April 13, 2018, the Court granted partial summary judgment for Plaintiffs and the
9 State of Washington, and ordered the preliminary injunction to remain in effect. (See Dkt. No.
10 233.) In so doing, the Court rejected Defendants’ claim that the subsequent Implementation Plan
11 and 2018 Memorandum represented a “new policy.” (Id. at 12.) Instead, the Court found that
12 the Implementation Plan and 2018 Memorandum “threaten the very same violations that caused
13 it and others to enjoin the Ban in the first place.” (Id.)

14 On April 30, 2018, Defendants filed a notice of appeal with the Ninth Circuit. (See Dkt.
15 No. 236.) On the same day, Defendants filed this motion requesting an expedited ruling no later
16 than May 4, 2018. (Dkt. No. 238.) After the Court declined to issue an expedited ruling (Dkt.
17 No. 240), Defendants filed a separate Motion for a Stay Pending Appeal in the Ninth Circuit.
18 See Karnoski v. Trump, No. 18-35347, Dkt. No. 3 (9th Cir. May 4, 2018). The Ninth Circuit has
19 yet to issue a ruling.

20 Discussion

21 I. Jurisdiction

22 While the filing of a notice of appeal generally divests a district court of jurisdiction,
23 Federal Rule of Civil Procedure 62(c) allows the Court “to issue further orders with respect to an
24

1 injunction, even pending appeal, in order to preserve the status quo or ensure compliance with its
2 earlier orders.” Doe v. Trump, 284 F. Supp. 3d 1172 (W.D. Wash. 2018) (citing Nat. Res. Def.
3 Council, Inc. v. Southwest Marine, Inc., 242 F.3d 1163, 1166 (9th Cir. 2001)). The Court’s
4 exercise of jurisdiction may not “adjudicate anew the merits of the case” nor “materially alter the
5 status of the case on appeal.” Southwest Marine, 242 F.3d at 1166.

6 **II. Motion to Stay**

7 A stay pending appeal “is an intrusion into the ordinary processes of administration and
8 judicial review.” Nken v. Holder, 556 U.S. 418, 427 (2009) (internal quotation marks and
9 citation omitted). In determining whether to grant a stay, the Court considers: (1) whether
10 Defendants have made a strong showing that they are likely to succeed on the merits; (2) whether
11 Defendants will be irreparably injured absent a stay; (3) whether a stay will substantially injure
12 Plaintiffs and Washington; and (4) whether the public interest supports a stay. Id. at 434.

13 **A. Likelihood of Success on the Merits**

14 The Court finds that Defendants have not made a “strong showing” that they are likely to
15 succeed on the merits of their appeal.

16 First, each of the arguments raised by Defendants already has been considered and
17 rejected by the Court, and Defendants have done nothing to remedy the constitutional violations
18 that supported entry of a preliminary injunction in the first instance. Instead, Defendants
19 attempt, once again, to characterize the Implementation Plan and 2018 Memorandum as a “new
20 and different” policy, distinct from the one this Court and others enjoined. (See Dkt. No. 261 at
21 3.) The Court was not persuaded by this argument before, and it is not persuaded now.

22 Second, while Defendants claim—without explanation—that “the Ninth Circuit and/or
23 this Court ultimately . . . are highly likely to conclude that significant deference is appropriate”
24

(Dkt. No. 238 at 5), whether *any* deference is due remains unresolved. (See Dkt. No. 233 at 24-27.) Defendants bear the burden of providing a “genuine” justification for the Ban. To withstand judicial scrutiny, that justification must “describe actual state purposes, not rationalizations” and must not be “hypothesized or invented *post hoc* in response to litigation.” United States v. Virginia, 518 U.S. 515, 533, 535-36 (1996); see also Sessions v. Morales-Santana, 137 S.Ct. 1678, 1696-97 (2012). To date, Defendants have steadfastly refused to put before the Court evidence of any justification that predates this litigation. (See Dkt. No. 211.)

Finally, the Court notes that the Ban currently is enjoined by four separate courts. 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, Dkt. No. 79 (C.D. Cal. Dec. 22, 2017). As a practical matter, Defendants face the challenge of convincing each of these courts to lift their injunctions before they may implement the Ban.

B. Likelihood of Irreparable Harm

The Court finds that Defendants have not shown that they will be irreparably harmed without a stay. Defendants contend that unless stayed, the injunction “will irreparably harm the government (and the public) by compelling the military to adhere to a policy it has concluded poses substantial risks.” (Dkt. No. 238 at 2.) In particular, Defendants contend that allowing transgender people to serve openly—as they have for nearly two years—threatens to “undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality.” (*Id.* at 3.)

Since the preliminary injunction has been in effect, the Senate Committee on Armed Services has heard testimony from high-ranking military officials on the effect of open service

by transgender people. Army Chief of Staff General Mark Milley testified that he “monitor[s] very closely” the situation and had received “precisely zero” reports of problems related to unit cohesion, discipline, and morale. (Dkt. No. 255, Ex. 14 at 6.) Chief of Naval Operations Admiral John Richardson testified that he, too, had received no negative reports, and that in his experience, “[i]t’s steady as she goes.” (Dkt. No. 255, Ex. 15.) As this testimony makes clear, Defendants’ hypothetical and conclusory claims are unsupported by evidence and do not establish a likelihood of irreparable harm.

C. Injury to Plaintiffs and Washington and Impact on Public Interest

Having found that Defendants have not established either a likelihood of success on the merits or a likelihood of irreparable harm absent a stay, the Court need not reach these remaining factors. See Washington v. Trump, 847 F.3d at 1164. However, the Court also finds that these factors do not support entry of a stay.

The Court already found that Plaintiffs and Washington are likely to suffer irreparable injury absent a preliminary injunction, and for the same reasons, will be injured by a stay. (See Dkt. No. 103 at 20-21.) Further, maintaining the injunction pending appeal advances the public’s interest in a strong national defense, as it allows skilled and qualified service members to continue to serve their country.

D. Scope of the Preliminary Injunction

The Court declines to stay the preliminary injunction insofar as it grants nationwide relief. While Defendants contend that the injunction should be limited to the nine Individual Plaintiffs (Dkt. No. 238 at 2), the Court disagrees. The scope of injunctive relief is to be “dictated by the extent of the violation established.” Califano v. Yamasaki, 442 U.S. 682, 702

(1979). The Ban, like the Constitution, would apply nationwide. Accordingly, a nationwide injunction is appropriate.

Conclusion

Because Defendants have not established that a stay of the preliminary injunction is appropriate, the Court DENIES Defendants' Motion. The status quo shall remain "steady as she goes," and the preliminary injunction shall remain in full force and effect nationwide.

The clerk is ordered to provide copies of this order to all counsel.

Dated June 15, 2018.



The Honorable Marsha J. Pechman
United States Senior District Court Judge

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.,

Defendant.

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

**SUPPLEMENTAL EXCERPTS OF RECORD
VOLUME II**

ROBERT W. FERGUSON
Attorney General

La Rond Baker, WSBA No. 43610
Assistant Attorney General
Washington State Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744

**INDEX TO
SUPPLEMENTAL EXCERPTS OF RECORD**

Ryan Karnoski, et al., State of Washington v. Donald J. Trump.
United States Court of Appeals
for the Ninth Circuit
No. 18-35347
United States District Court
for the Western District of Washington, Seattle
No. 2:17-cv-01297-MJP

Dkt #	Date Filed	Document Description	Vol.	SER
Vol I				
221	3/27/2018	Mar. 27, 2018 Order on Motion for Summary Judgment Hearing	I	WA SER 001-003
283	6/15/2018	Order Denying Motion to Stay Preliminary Injunction	I	WA SER 004-009

Vol II				
150	1/25/2018	Washington State's Motion for Summary Judgment	II	WA SER 010-025
163-1	1/31/2018	Amicus Brief Constitutional Accountability Center	II	WA SER 026-063
169	2/1/2018	Agreed Motion For Leave To File Amicus Brief-Legal Voice	II	WA SER 064-084
170-2	2/1/2018	Amicus Brief of the Commonwealth of-Massachusetts and Amici States	II	WA SER 085-115
178	2/12/2018	Defendants Response To Plaintiff-Intervenor Washington's Motion for Summary Judgment	II	WA SER 116-126
185	2/16/2018	Plaintiff's Reply on Summary Judgment	II	WA SER 127-138
194	2/28/2018	Cross-Motion for Summary Judgment and Opposition To Plaintiffs And Interveners Motions for Summary Judgment	II	WA SER 139-167
201	3/7/2018	Plaintiff's Reply in Support of Motion for Summary Judgment	II	WA SER 168-182
202	3/7/2018	Plaintiff Intervenor Washington's reply in support of Motion for Summary Judgment	II	WA SER 183-201
226	4/3/2018	Defendants Supplemental Brief In Opposition To Plaintiffs MSJ	II	WA SER 202-214
227	4/3/2018	Plaintiff's Supplemental Briefing in Support of MSJ	II	WA SER 215-227

228	4/3/2018	Washington's Supplemental Brief In Support Of Own MSJ	II	WA SER 228-241
238	4/30/2018	Motion to Stay Preliminary Injunction	II	WA SER 242-249
250	5/14/2018	Plaintiff's Opposition to Defendant's Motion to Stay	II	WA SER 250-265
257	5/14/2018	Response, by Intervenor Plaintiff State of Washington, to Motion to Stay Preliminary Injunction Pending Appeal	II	WA SER 266-282
261	5/18/2018	Reply, filed by Intervenor Defendants Department of Homeland Security, Elaine C. Duke, Defendants James N Mattis, Donald J. Trump, United States Department of Defense, United States of America, to Response Motion to Stay Preliminary Injunction Pending Appeal	II	WA SER 283-291

VOL III				
152-2	1/29/2018	Amicus Brief of Retired Military Officers	III	WA SER 292-316
187-1	2/16/2018	Declaration La Rond Baker In Support Of Washington's MSJ	III	WA SER 317-318
187-2	2/16/2018	Exhibit A-E-mails Dated 2/6/2018 Re: Request For Extension To File Opposition To MSJ	III	WA SER 319-323
197	2/28/2018	Declaration of Parker In Support of Defendant's Motion for Summary Judgment	III	WA SER 324-392
215	3/23/2018	Motion to Dissolve Preliminary Injunction	III	WA SER 393-420
224	3/29/2018	Declaration Of Ryan Parker In Support Of Motion To Dissolve Preliminary Injunction	III	WA SER 421-422
224-2	3/29/2018	Exhibit 2-Department of Defense Report And Recommendation On Military Service By Transgender Persons February 2008	III	WA SER 423-468
251-3	5/14/2018	American Psychological Association, APA Statement Regarding Transgender Individuals Serving in the Military Mar. 26, 2018	III	WA SER 469-470
251-4	5/14/2018	American Medical Association, Letter to James Mattis Apr. 3, 2018	III	WA SER 471-472
255-4	5/14/2018	Ford, Zack, Pence Secretly Drafted Trumps Latest Transgender Military Ban Mar. 25, 2018	III	WA SER 473-487
255-6	5/14/2018	Palm Center, Former Surgeons Gen. Debunk Pentagon Assertions About Medical Fitness Transgender Troops Mar. 28, 2018	III	WA SER 488-494
255-8	5/14/2018	Palm Center, DoD's Rationale for Reinstating the Transgender Ban Is Contradicted by Evidence April 2018	III	WA SER 495-551

255-9	5/14/2018	Copp, Tara, "All Four Service Chiefs On Record: New Harm Units Transgender Circles" Mar. 24, 2018	III	WA SER 552-555
255-14	5/14/2018	Exhibit 14 Transcript Before The Committee On Armed Services U.S. Senate 4/12/2018	III	WA SER 556-561
255-15	5/14/2018	Exhibit 15 Transcript Before Committee On Armed Services U.S. Senate 4/19/2018	III	WA SER 562-569
255-16	3/14/2018	Exhibit 15 Transcript Before Committee On Armed Services U.S. Senate 4/24/2018	III	WA SER 570-575
258	5/14/2018	Declaration La Rond Baker in Support of Washington's Response to Def's Mtn to Stay PI	III	WA SER 576-579
258-1	5/14/2018	Dept Policy HR-209-02 Equal Opportunity/Affirm. Action	III	WA SER 580-583
258-2	5/14/2018	Exhibit B – Dept. Policy HR-208-01 Anti-Discrimination	III	WA SER 584-587
258-3	5/14/2018	Directive of The Governor 16-11 6/23/2016	III	WA SER 588-590
258-4	5/14/2018	Proclamation by the Governor 18-03	III	WA SER 591-593
258-5	5/14/2018	Proclamation by the Governor 17-13	III	WA SER 594-596
258-6	5/14/2018	Proclamation by the Governor 17-12	III	WA SER 597-599

VOL IV				
34-1	9/14/2017	Department of Defense Press Briefing – Secretary Carter	IV	WA SER 600-617
34-3	9/14/2017	Statement of Chief Pentagon Spokesperson D. White On Transgender Accessions	IV	WA SER 618-619
34-6	9/14/2017	President Donald J. Trump Twitter Announcement	IV	WA SER 620-621
46	9/14/2017	Declaration of Brad R. Carson in Support of Pltf's Mtn for Prelim. Injunction	IV	WA SER 622-631
48-6	9/14/2017	Exhibit F – Implementation Guidance	IV	WA SER 632-704
56-8	9/25/2017	Department Policy No. HR-253-02 State Active-Duty Injury/Illness-Death Reporting Process	IV	WA SER 705-711
56-9	9/25/2017	WAARING Recruiting Overview	IV	WA SER 712-714

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al,

Plaintiffs,

v.

DONALD TRUMP, et al,

Defendants.

Case No: 2:17-cv-1297-MJP

**WASHINGTON'S MOTION
FOR SUMMARY JUDGMENT**

Noted for February 16, 2018

**ORAL ARGUMENT
REQUESTED**

STATE OF WASHINGTON,

Intervenor-Plaintiff,

v.

DONALD TRUMP, et al,

Intervenor-Defendants.

WASHINGTON'S MOTION FOR
SUMMARY JUDGMENT

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 442-4492

WA SER 010

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF UNDISPUTED MATERIAL FACTS.....	1
	A. Defendants Implement the Transgender Military Service Ban	2
	B. Washington Sues to Vindicate Its Interests	4
	C. The Ban Is Enjoined by this Court and Others	5
III.	ARGUMENT	7
	A. Summary Judgment Standard	7
	B. The Ban Violates Equal Protection.....	8
	1. Military readiness and cost control can be important governmental interests, but must be established by evidence	9
	2. There is no substantial relationship between the Ban and the asserted governmental interests.....	10
	a. The Ban undermines the asserted governmental interests in readiness, unit cohesion, and cost control.....	10
	b. A promise of future justification is insufficient to satisfy intermediate scrutiny.....	12
	c. “Military deference” is no substitute for constitutional tailoring	13
	C. The Ban Violates Substantive Due Process.....	15
	1. There is no evidence that the Ban improves military readiness or cost control.....	16
	2. The Ban does not significantly further the alleged governmental interests at issue	17
	3. The Ban is not the least intrusive means by which Defendants can protect the asserted governmental interests.....	17
IV.	CONCLUSION	19

TABLE OF AUTHORITIES

Cases

<i>Abbott v. Abbott</i> , 560 U.S. 1 (2010).....	16
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	7
<i>Aptheke v. Sec’y of State</i> , 378 U.S. 500 (1964).....	18
<i>Ball v. Massanari</i> , 254 F.3d 817 (9th Cir. 2001).....	8
<i>Beyene v. Coleman Sec. Servs., Inc.</i> , 854 F.2d 1179 (9th Cir. 1988)	7
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	7
<i>Collins v. Harker Heights</i> , 503 U.S. 115 (1992)	16
<i>Dep’t of Navy v. Egan</i> , 484 U.S. 518 (1988).....	14
<i>Doe 1 v. Trump</i> , No. 17-1597, 2017 WL 4873042 (D.D.C. Oct. 30, 2017)	6, 12, 15
<i>Doe 1 v. Trump</i> , 17-cv-01597-CKK (D.D.C. Aug. 9, 2017).....	6
<i>Doe 1 v. Trump</i> , No. 17-5267, 2017 WL 6553389 (D.C. Cir. Dec. 22, 2017)	6
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972)	16
<i>FTC v. Publishing Clearing House, Inc.</i> , 104 F.3d 1168 (9th Cir. 1997)	7
<i>Glenn v. Brumby</i> , 663 F.3d 1312 (11th Cir. 2011)	8
<i>Goldman v. Weinberger</i> , 475 U.S. 503 (1986)	14
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965).....	16
<i>Hansen v. United States</i> , 7 F.3d 137 (9th Cir. 1993).....	7
<i>Karnoski v. Trump</i> , No. 17-36009 (9th Cir. Dec. 15, 2017).....	6
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003).....	16
<i>Miss. Univ. for Women v. Hogan</i> , 458 U.S. 718 (1982)	8, 9, 10, 11
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015).....	9, 15, 16
<i>Orr v. Bank of Am., NT & SA</i> , 285 F.3d 764 (9th Cir. 2002)	7
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989).....	8

1	<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984)	16
2	<i>Rostker v. Goldberg</i> , 453 U.S. 57 (1981)	13, 14
3	<i>Schwenk v. Hartford</i> , 204 F.3d 1187 (9th Cir. 2000)	8
4	<i>Sessions v. Morales-Santana</i> , 137 S. Ct. 1678 (2017).....	8, 10, 12
5	<i>Snyder v. Massachusetts</i> , 291 U.S. 97 (1934)	16
6	<i>Stockman v. Trump</i> , No. 5:17-cv-1799-JGB (C.D. Cal. Sept. 5, 2017).....	6, 12
7	<i>Stone v. Trump</i> , No. MJG-17-2459, 2017 WL 5589122 (D. Md. Aug. 28, 2017)	6, 10, 12
8	<i>Stone v. Trump</i> , No. 17-2398 (4th Cir. Dec. 6, 2017).....	6
9	<i>United States v. Virginia</i> , 518 U.S. 515 (1996)	8, 9, 12, 13
10	<i>United States v. Windsor</i> , 133 S. Ct. 2675 (2013).....	8
11	<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997)	16
12	<i>Watkins v. U.S. Army</i> , 875 F.2d 699 (9th Cir. 1989)	9, 17
13	<i>Whitaker v. Kenosha Unified Sch. Dist. No. 1</i> , 858 F.3d 1034 (7th Cir. 2017).....	8
14	<i>Witt v. Dep't of the Air Force</i> , 527 F.3d 806 (9th Cir. 2008)	passim
15	<u>Statutes</u>	
16	10 U.S.C. § 12201(b)	4
17	Wash. Rev. Code § 38.04.010	4
18	Wash. Rev. Code § 38.04.040	4
19	Wash. Rev. Code § 38.08.010	4
20	Wash. Rev. Code § 38.24.050	4
21	Wash. Rev. Code § 49.60.030	5
22	Wash. Rev. Code § 49.60.040(25)-(26).....	5
23	Wash. Rev. Code § 49.60.180	5
24	<u>Other Authorities</u>	
25	Department of Defense Instruction 6130.03	
26	http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003p.pdf	19

1 Department of Defense Instruction 6490.03
http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/649003p.pdf..... 19

2
3 Rules

4 Fed. R. Civ. P. 56..... 7

I. INTRODUCTION

In the six months since President Trump issued a string of surprise tweets announcing the Transgender Military Service Ban (“Ban”), the federal government and its officers (“Defendants”) have failed to produce any evidence that justified the President’s sweeping, facially discriminatory announcement. Since then, this Court and others have enjoined the Ban, concluding that it is unconstitutional and wholly at odds with the very military goals it claims to advance. Defendants have appealed none of those injunctions, apparently hoping that new reports or analyses might someday backfill the missing evidence. But the die was cast with the President’s Twitter announcement.

The State of Washington (“Washington”) now moves for summary judgment on its two constitutional claims. Defendants’ own public statements and evidence demonstrate that the Ban violates equal protection because the classification based on transgender status bears no relationship – let alone a substantial relationship – to any important governmental objective. Likewise, the Ban violates substantive due process because Defendants offer no explanation why a categorical prohibition based on gender identity, rather than an assessment of each soldier or recruit on his or her merits, is necessary to further the military’s goals of readiness, unit cohesion, or cost control.

From the start, the Ban was an indefensible policy in search of a justification. There was no evidence to support the President’s policy at the time he announced it, and no amount of post-hoc maneuvering can change that. The Court should credit the government’s own multi-year studies and conclusions showing that a ban on transgender service members and recruits actually harms the military, and grant summary judgment in favor of the State.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

The following undisputed facts are taken from this Court’s prior rulings and Defendants’ evidence, briefing, and public statements.

A. Defendants Implement the Transgender Military Service Ban

The United States Military has long maintained a facially discriminatory policy barring transgender individuals from openly serving and acceding into military service. ECF 34-1; ECF 69 at 4.

In July 2015, former Secretary of Defense Ashton Carter created a Working Group “to study . . . the policy and readiness implications of welcoming transgender persons to serve openly.” ECF 48-1. The Working Group considered medical, military, and personnel experts’ advice, and Department of Defense (“DoD”) commissioned a civilian research group, the RAND Corporation, to assess how open service by transgender individuals would impact the military’s effectiveness and readiness. ECF 103 at 4 (citing ECF 30 ¶ 161; ECF 46 ¶ 10); ECF 46-2; ECF 34-1 at 5-6. The RAND study “concluded that allowing transgender individuals to serve would not negatively impact military effectiveness, readiness, or unit cohesion, and that the costs of providing transgender service members with transition-related healthcare would be ‘exceedingly small’ compared with DoD’s overall healthcare expenditures.” ECF 103 at 4; ECF 46-2 at 90-93.

After reviewing the recommendations of the Working Group and the RAND Corporation’s findings, on June 30, 2016, Secretary Carter issued a directive allowing transgender individuals currently serving in the military to do so openly. ECF 48-3. Secretary Carter also directed the military to allow transgender individuals to accede into the military beginning July 1, 2017. *Id.* On June 30, 2017, Secretary of Defense James Mattis extended the date for accepting transgender recruits to January 1, 2018. ECF 34-3.

On July 26, 2017, President Trump reversed this policy. ECF 103 at 3. In a series of statements on Twitter, the President announced that he would no longer allow “transgender individuals to serve in any capacity in the U.S. military.” *Id.* (citing ECF 34-6).

One month later, on August 25, 2017, President Trump issued a Presidential Memorandum directing the Secretaries of Defense and Homeland Security “to ‘return’ to the

1 military’s policy authorizing the discharge of openly transgender individuals (the ‘Retention
 2 Directive’); to prohibit the accession (bringing into service) of openly transgender individuals
 3 (the ‘Accession Directive’); and to prohibit the funding of certain surgical procedures for
 4 transgender service members (the ‘Medical Care Directive’).” ECF 103 at 3; ECF 34-7 §§ 1(b),
 5 2(a)-(b). The Accession Directive was scheduled to take effect on January 1, 2018, and the
 6 Retention and Medical Care Directives were ordered to take effect on March 23, 2018. *Id.* § 3.
 7 The President directed the Secretary of Defense to develop a plan for implementing the directive,
 8 which is to remain in place indefinitely. *Id.* §§ 2-3.

9 President Trump’s Memorandum stated his belief that the Ban is necessary because, “[i]n
 10 [his] judgment, the previous Administration failed to identify a sufficient basis to conclude that
 11 terminating the Departments’ longstanding policy and practice would not hinder military
 12 effectiveness and lethality, disrupt unit cohesion, or tax military resources.” ECF 34-7 § 1(a).
 13 However, the Memorandum cited no study, report, or other evidence to support the President’s
 14 assertion.

15 Pursuant to the President’s instructions, on September 14, 2017, Secretary Mattis issued
 16 Interim Guidance regarding military service by transgender individuals. ECF 69-1. The Interim
 17 Guidance confirms that Secretary Mattis will “implement the policy and directives in the
 18 Presidential Memorandum,” including reverting the military back to its longstanding accession
 19 policy “which generally prohibit[s] the accession of transgender individuals into the Military
 20 Services[.]” *Id.* at 2-3. The Interim Guidance, pending the issuance of the Secretary’s report and
 21 plan, due February 21, 2018, directs military leadership to take “no action” to involuntarily
 22 separate or discharge an active military member solely on the basis that they are transgender. *Id.*
 23 The Interim Guidance further confirms that “no new sex reassignment surgical procedures for
 24 military personnel will be permitted after March 22, 2018.” *Id.* Other than the Presidential
 25 Memorandum, the Interim Guidance cited no basis for the changes in military policy.
 26

B. Washington Sues to Vindicate Its Interests

Three days after President Trump issued the Presidential Memorandum, the Karnoski plaintiffs filed this lawsuit. ECF 1. Washington moved to intervene, alleging the Ban violates the equal protection and substantive due process guarantees of the Fifth Amendment, causing harm to Washington’s unique state interests. ECF 55; ECF 104 ¶¶.

The Court granted Washington’s motion, explaining, “Washington is home to approximately 60,000 active, reserve, and National Guard members, and the military is the second largest public employer in the state.” ECF 101 at 5. This includes the Washington National Guard, which is comprised of military service members who assist with emergency preparedness, disaster recovery planning, and who are deployed to protect Washington’s natural resources from wildfires, landslides, flooding, and earthquakes. *Id.*; ECF 103 at 11. These Guard members are dedicated to safeguarding lives, property, and the economy of Washington State. *Id.*

The Governor has the authority to deploy the Washington National Guard for intrastate emergencies. Wash. Rev. Code §§ 38.04.010; 38.04.040. When the Governor deploys the Guard for state service (“State Active Duty”), Guard members fall under Washington’s command. During State Active Duty, Washington pays Guard members’ wages and provides disability and life insurance benefits for injuries they may sustain while serving their state. Wash. Rev. Code § 38.24.050; ECF 101 at 5; ECF 103 at 11-12. Further, the Governor has an obligation to ensure that the National Guard conforms to all federal and state laws and regulations, including the state and federal constitutions. Wash. Rev. Code § 38.08.010. However, recruitment for the Washington National Guard is subject to DoD policies governing accession into military service, including the Accession Directive. 10 U.S.C. § 12201(b).

Washington is also home to approximately 32,850 transgender adults. ECF 103 at 11. Washington state law protects its residents against sex, gender, and gender identity

discrimination, including in employment. See Wash. Rev. Code §§ 49.60.030; 49.60.040(25)-(26); 49.60.180.

C. The Ban Is Enjoined by this Court and Others

The Karnoski plaintiffs moved for a preliminary injunction, arguing that the Ban violates their constitutional rights to equal protection, due process, and free speech. ECF 32. Washington joined the motion. ECF 97. On December 11, 2017, the Court enjoined Defendants “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.” ECF 103 at 23. The Court concluded that the plaintiffs established a likelihood of success on their equal protection, substantive due process, and First Amendment claims. *Id.* at 15-20. The Court further concluded that the remaining injunctive factors – irreparable harm, the balance of equities, and the public interest – weighed in favor of preliminary relief. *Id.* at 20-22.

With respect to Washington specifically, the Court ruled that Washington has standing to challenge the Ban’s harms to its ability to recruit and retain members of the Washington National Guard, protect its territory and natural resources, maintain and enforce its anti-discrimination laws, protect its residents from discrimination, and ensure that employment opportunities in the state are not unlawfully restricted based on gender identity. ECF 103 at 11-12. In granting preliminary injunctive relief, the Court determined that the Ban irreparably harms Washington’s sovereign and quasi-sovereign interests by forcing it “to expend its scarce resources to support a discriminatory policy when it provides funding or deploys the National Guard,” and by threatening “its ability to recruit and retain service personnel for the Washington National Guard.” ECF 103 at 21.

On December 15, 2017, Defendants sought clarification and a partial stay of the injunction against the Accession Directive, ECF 106, and simultaneously appealed the preliminary injunction, ECF 105. Defendants then filed an Emergency Motion for Administrative Stay and Motion for Stay Pending Appeal before the Ninth Circuit. *Karnoski v.*

1 *Trump*, No. 17-36009 (9th Cir. Dec. 15, 2017), ECF 3-1. After expedited briefing, but before
 2 their emergency motion or appeal was heard, Defendants withdrew both. Notice of Withdrawal
 3 of Emergency Stay Motion, *Karnoski*, No. 17-36009 (9th Cir. Dec. 29, 2017), ECF 20; Notice
 4 of Voluntary Dismissal of Appeal, *Karnoski*, No. 17-36009 (9th Cir. Dec. 29, 2017), ECF 21.
 5 This Court denied Defendants' motion for clarification and partial stay. ECF 121.

6 Three other district courts also issued injunctions against the Ban. On October 30, 2017,
 7 the District Court for the District of Columbia issued an order barring Defendants from
 8 implementing the Accession and Retention Directives. *Doe 1 v. Trump*, No. 17-1597, 2017 WL
 9 4873042, at *33 (D.D.C. Oct. 30, 2017). The District Courts of Maryland and Central District
 10 of California enjoined the Accession, Retention, and Medical Care Directives. *Stone v. Trump*,
 11 No. MJG-17-2459, 2017 WL 5589122, at *16 (D. Md. Nov. 21, 2017); Order Denying
 12 Defendants' Motion to Dismiss and Granting Plaintiffs' Motion for Preliminary Injunction at 21,
 13 *Stockman v. Trump*, No. 5:17-cv-1799-JGB (C.D. Cal. Dec. 22, 2017), ECF 79. In three of these
 14 cases, including this one, Defendants repeated the same pattern of filing emergency motions and
 15 appeals. All were either denied or withdrawn. Order, *Doe 1*, No. 17-cv-01597-CKK (D.D.C.
 16 Dec. 11, 2017), ECF 75; *Doe 1 v. Trump*, No. 17-5267, 2017 WL 6553389, at *2 (D.C. Cir. Dec.
 17 22, 2017); Memorandum & Order RE: Clarification, *Stone*, No. MJG-17-2459 (D. Md. Dec. 28,
 18 2017), ECF 101; Order, *Stone v. Trump*, No. 17-2398 (4th Cir. Dec. 31, 2017), ECF 31.

19 In the midst of this litigation, on December 8, 2017, DoD issued Policy Memorandum 2-
 20 5, titled "Transgender Applicant Processing." ECF 120-1. The policy was DoD's directive and
 21 guide for acceding transgender individuals into the military starting January 1, 2018. *Id.* Policy
 22 Memorandum 2-5 sets forth specific guidance regarding the processing of transgender applicants
 23 to all personnel and staff at USMEPCOM, the command unit whose mission is to determine "the
 24 physical, mental and moral qualifications of every new member of the armed services."¹ Policy

25 _____
 26 ¹ U.S. Military Entrance Processing Command, "Freedom's Front Door," available at
<http://www.mepcom.army.mil/Command/>.

Memorandum 2-5 provides the standard for processing transgender applicants and evaluating their applications, including verifying identity and fitness to serve. ECF 102-1. Among other things, the policy instructs USMEPCOM personnel to indicate an applicant's preferred gender on official forms; verify an applicant's preferred gender using a birth certificate, court order, or U.S. passport; address applicants by their preferred gender name and pronoun; allow the applicant or medical provider to request a chaperone at any time; and ensure "the gender of the chaperone . . . be the same as the applicant's preferred gender." *Id.* at 4. On January 1, 2018, for the first time, openly transgender individuals were allowed to access into the United States Military.

III. ARGUMENT

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56(a) provides that summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A trial court may only consider admissible evidence in ruling on a motion for summary judgment. *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002) (citing Fed. R. Civ. P. 56(e)); *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988)). "The mere existence of a scintilla of evidence in support of the [opponent's] position will be insufficient [to defeat summary judgment]; there must be evidence on which the [trier of fact] could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Here, to avoid summary judgment, Defendants must submit evidence to support their claimed justifications for the Ban, because conclusory allegations without factual support are insufficient to defeat summary judgment. *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) (citing *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993)). As there are no material disputed facts about President Trump's implementation of the Ban, summary judgment is appropriate at this early stage of litigation.

B. The Ban Violates Equal Protection

The equal protection guarantee of the Fifth Amendment prohibits federal government action “denying to any person the equal protection of the laws.” *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

Following longstanding equal protection jurisprudence, this Court previously concluded that the Ban “distinguishes on the basis of transgender status, a quasi-suspect classification, and is therefore subject to intermediate scrutiny.” ECF 103 at 15 (citing *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001)). In arriving at this conclusion, the Court followed clear precedent that gender discrimination, including discrimination based on a “socially-constructed gender expectation,” is a form of sex discrimination. *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989)). *See also Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982) (holding unconstitutional statute whose “objective itself reflects archaic and stereotypic notions”); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (sex classifications may not serve as “artificial constraints on an individual’s opportunity”); *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1048 (7th Cir. 2017) (holding that sex discrimination includes discrimination against a transgender person for failure to “conform to the sex-based stereotypes of the sex that he or she was assigned at birth”); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (holding that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination”).

To survive intermediate scrutiny, Defendants must show an “exceedingly persuasive justification” for the Ban by proving that (1) it serves “important governmental objectives,” and (2) “the discriminatory means employed are substantially related to the achievement of those objectives.” *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (quoting *Virginia*, 518 U.S. at 533). “[T]he classification must substantially serve an important governmental interest *today*, for ‘in interpreting the equal protection guarantee, we have recognized that new insights and societal understandings can reveal unjustified inequality that once passed unnoticed and

unchallenged.” *Id.* at 1690 (internal brackets and punctuation omitted) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)). In applying this straightforward test, “[c]are must be taken in ascertaining whether the . . . [government’s] objective itself reflects archaic and stereotypic notions.” *Hogan*, 458 U.S. at 724.

1. Military readiness and cost control can be important governmental interests, but must be established by evidence

Defendants claim that the Ban is necessary to ensure that open military service by transgender individuals does not “hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources.” ECF 56-1. However, while courts have consistently held that these interests are important, Defendants must provide more than bald assertions that these interests are at risk. *See Witt v. Dep’t of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) (accepting that “unit cohesion” may be an important governmental interest, but remanding for determination whether that interest was actually implicated by the facts); *Watkins v. U.S. Army*, 875 F.2d 699, 709 (9th Cir. 1989) (rejecting military’s attempt to bar an exemplary gay soldier from reenlistment where “no evidence” supported military’s concerns of a “degrading effect upon unit performance, morale or discipline . . . and job performance”). Indeed, assertions of a governmental interest made without any citation to an evidentiary basis that the interest is threatened may lead to the opposite conclusion – that the interest is not, in fact, threatened. *See e.g., Virginia*, 518 U.S. at 535-36 (affirming that “precedent instructs that ‘benign’ justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded”); *Stone*, 2017 WL 5589122, at *15 (rejecting the asserted interests for the Ban because “President Trump’s tweets did not emerge from a policy review, nor did the Presidential Memorandum identify any policymaking process or evidence” that supported it).

Defendants have simply presented no evidence whatsoever that military readiness and unit cohesion are *actually* put at risk by open service by transgender service members. The Ban

1 fails the first prong of intermediate scrutiny, and the Court should grant summary judgment to
 2 Washington on its equal protection claim.

3 **2. There is no substantial relationship between the Ban and the asserted**
 4 **governmental interests**

5 Even apart from whether the Ban furthers important governmental interests, Defendants
 6 must show a substantial relationship between the Ban and their military goals. *Morales-Santana*,
 7 137 S. Ct. at 1690. Defendants fall dramatically short. The government’s own evidence
 8 demonstrates that the Ban undermines – not furthers – military readiness and unit cohesion. And,
 9 as a matter of law, there can be no substantial relationship between the Ban and the asserted
 10 governmental interests when all of Defendants’ justifications were developed post-hoc.

11 **a. The Ban undermines the asserted governmental interests in**
 12 **readiness, unit cohesion, and cost control**

13 A policy fails the second prong of intermediate scrutiny where, as here, the challenged
 14 policy undermines the important governmental interest purportedly served by the discriminatory
 15 policy. *See Morales-Santana*, 137 S. Ct. at 1697-98; *Hogan*, 458 U.S. at 729-30. Recently, the
 16 Supreme Court addressed a sex-based equal protection challenge in *Morales-Santana*. 137 S. Ct.
 17 1678. *Morales-Santana* challenged a longstanding rule that transmitted U.S. citizenship
 18 differently to children of unwed citizens depending on the sex of the U.S.-citizen parent. *Id.* at
 19 1682. The government argued that its discriminatory policy was necessary to forward the
 20 important governmental interest of ensuring that children are not born “stateless.” *Id.* at 1696.
 21 However, researchers, including a multi-year research project performed by the United Nations
 22 High Commissioner for Refugees, found that policies like the one at issue were a major *cause*
 23 of children being born stateless. *Id.* (noting that researchers determined that “discrimination
 24 against either mothers or fathers in citizenship and nationality laws is a major cause of
 25 statelessness”). The Court held that the government had failed to subject its assumptions to a
 26 “reality check,” and struck down the gender classification as insufficiently tailored to the
 governmental objective. *Id.* at 1697-98.

1 Similarly, the Supreme Court held that a university’s policy of excluding males from
 2 nursing school violated equal protection when the sex-based policy perpetuated gender
 3 stereotypes, rather than furthered the university’s goal of rectifying past discrimination against
 4 women. *Hogan*, 458 U.S. at 729-30. In arriving at its holding, the Court noted that although the
 5 university recited the “benign, compensatory purpose” of reducing gender-based stereotypes, its
 6 policy of limiting the nursing program to women actually reinforced the stereotypes that only
 7 women work as nurses. *Id.* (noting that “[r]ather than compensate for discriminatory barriers
 8 faced by women, [the university’s] policy of excluding males from admission to the School of
 9 Nursing tends to perpetuate the stereotyped view of nursing as exclusively a woman’s job”).

10 Applying these settled principles, this Court correctly rejected Defendants’ assumption
 11 that barring transgender people from military service somehow furthers government’s interests
 12 in readiness or cost control. ECF 103 at 16. In granting preliminary relief, the Court cited the
 13 government’s own evidence that banning transgender individuals from service affirmatively
 14 harms military budgets and readiness by causing “loss of qualified personnel, erosion of unit
 15 cohesion, and erosion of trust in command.” *Id.* (citing ECF 46 ¶¶ 25-26; ECF 48 ¶¶ 45-47); *see*
 16 *also* ECF 46-2 at 39-47 (RAND Corporation report finding “no evidence” that allowing
 17 transgender individuals to serve in the military would undermine lethality, unit cohesion,
 18 effectiveness, or readiness and noting that disallowing transgender individuals to serve would
 19 cause the military to lose skilled and qualified personnel).

20 Other courts agree. *See Doe 1*, 2017 WL 4873042, at *30 (“[A]ll of the reasons proffered
 21 by the President for excluding transgender individuals from the military [are] not merely
 22 unsupported, but [are] actually contradicted by the studies, conclusions, and judgment of the
 23 military itself.”); *id.* at *33 (“On the record before the Court, there is absolutely no support for
 24 the claim that the ongoing service of transgender people would have *any* negative effect[] on the
 25 military at all. In fact, there is considerable evidence that it is the *discharge* and *banning* of such
 26 individuals that would have such effects.”); *Stone*, 2017 WL 5589122, at *16 (same); Order

Denying Defendants’ Motion to Dismiss and Granting Plaintiffs’ Motion for Preliminary Injunction at 20, *Stockman*, No. 5:17-cv-1799-JGB (C.D. Cal. Dec. 22, 2017), ECF 79 (same).

As the Ban undercuts the very governmental interests it purports to promote, it cannot be deemed substantially related to those same interests. Accordingly, the Ban fails intermediate scrutiny.

b. A promise of future justification is insufficient to satisfy intermediate scrutiny

In the absence of any evidentiary support, Defendants’ primary argument in support of the Ban appears to be a promise that Defendants will issue a “final” policy excluding transgender individuals from serving in the military, and justifications will accompany that forthcoming policy. See ECF 69 at 20-21 (noting that “[t]he Court does not have before it the final policy [or] justifications for that final policy”). As a matter of law, post-hoc justifications are insufficient to satisfy intermediate scrutiny, and Defendants’ concession that they plan to rely on post-hoc justifications dooms any defense to Washington’s equal protection claim.

The Supreme Court has consistently held that post-hoc rationales are legally insufficient to inoculate sex-based classifications. “It will not do to ‘hypothesiz[e] or inven[t]’ governmental purposes for gender classifications ‘*post hoc* in response to litigation.’” *Morales-Santana*, 137 S. Ct. at 1696-97 (rejecting post-hoc claim of governmental interest that is not supported by the record) (quoting *Virginia*, 518 U.S. at 533, 535-36). Instead, the Court has consistently required government entities to prove a “genuine” need for a sex-based classification, and has been clear that post-hoc justifications do not qualify. *Virginia*, 518 U.S. at 532-33.

Here, Defendants’ own pleadings confirm that there is no current justification for the Ban, but Defendants assure the Court that DoD is working to “complete its study and implement its final policy.” ECF 106 at 6; *see also* ECF 69 at 40 (conceding that the “final policy” remains to be “studied, developed and implemented”); *id.* at 37 n.12 (conceding that a review is only “now underway”). This process is exactly backwards. The Court should evaluate the Ban on the

evidence presented at the time it was announced, which is no evidence at all. The Ban is unrelated to any government objective, and fails intermediate scrutiny.²

c. “Military deference” is no substitute for constitutional tailoring

While courts owe deference to well-reasoned policies or practices developed by military experts or the Legislature, neither is “free to disregard the Constitution when [they] act in the area of military affairs.” *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). In reviewing military action for constitutional compliance, courts may accord deference where the challenged restriction arises from military expertise or developed research. *Id.* Here, by contrast, the Defendants’ evidence demonstrates that President Trump initiated the Ban without performing research or consulting with military professionals. This Court owes no deference to his decision.

In *Rostker*, the Court assessed the constitutionality of the provision of the Military Selective Service Act exempting women from Selective Service registration requirements. 453 U.S. at 59. While acknowledging the deference applicable to “legislative and executive judgments in the area of military affairs,” the Court was quick to reaffirm that the Due Process Clause provides protections in the military context. *Id.* at 66-67. The Court upheld the Selective Service exemption for women after reviewing the congressional record and decision making process, and concluding that it was not the result of “reflexive[]” or “unthinking[]” bias. *Id.* at 72. Instead, it was appropriate to defer to Congress’s “careful[]” evaluation of the evidence, which was “extensively considered” in “hearings, floor debate, and in committee.” *Id.* at 72, 82.

Similarly, in a challenge involving religious head coverings, the Court began by noting the deferential review standard owed to military regulations. *Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986). The Court was careful to explain, however, that such deference attaches to the “professional judgment of military authorities concerning the relative importance of a particular military interest.” *Id.* at 507; *see also Dep’t of Navy v. Egan*, 484 U.S. 518, 527, 530-

² The Court was correct to conclude that the wholesale lack of evidence would also cause the Ban to fail ordinary rational basis review. *See* ECF 103 at 18 n.8.

31 (1988) (deferring to a longstanding military information and staffing classification system and noting the statutory scheme out of which the system arose). Indeed, in *Goldman*, a case involving a “military regulation” governing uniform standards, judicial deference was appropriate because the record showed that it constituted the “considered professional judgment of the Air Force” developed over multiple years. 475 U.S. at 508-09.

Rostker, *Goldman*, and *Egan* demonstrate that deference is only given to considered military decision making, not where military policy is the result of reflexive, impulsive or baseless decisions unrooted in evidence or the professional judgment of military authorities. See *Watkins*, 875 F.2d at 729 (reminding that there are limits to court deference in the military context and noting that “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”). See also *Rostker*, 453 U.S. at 57; *Witt*, 527 F.3d at 820.

Such is the case here. The Ban is not the outcome of any study, but rather President Trump’s abrupt action on a “major policy change[] that will gravely affect the lives of many Americans.” *Doe 1*, 2017 WL 4873042, at *30. Indeed, the Ban flies in the face of the conclusions and recommendations only recently reached by military professionals and researchers following a multi-year assessment of the impact that open service and accession by transgender individuals might have on military readiness, efficacy, and budgetary constraints. ECF 103 at 4 (citing ECF 30 at ¶¶ 159-62; ECF 32 at 9-10; ECF 46 ¶ 11); ECF 34-1 at 4-5. If this Court accords deference to any military policies or guidance in this matter, it should be to those careful and considered conclusions, not an unresearched blanket Ban – the justifications for which Defendants have yet to provide to this or any court. Precedent simply provides no support for a grant of special deference under these circumstances, either to President Trump’s tweets, the Presidential Memorandum, or any hastily crafted “studies” that may be developed to provide cover for the Ban.

Finally, Defendants imply that because the Ban is longstanding military policy, it must be constitutional. See ECF 69 at 29 (“The military’s longstanding accessions policy is subject to a highly deferential form of review”). This Court should reject such an argument. Regardless of a policy’s age, every government policy is subject to constitutional review and must be held invalid if it violates constitutional guarantees. As the Supreme Court has recently confirmed, when “interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understanding can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.” *Obergefell*, 135 S. Ct. at 2590. The fact that the military has long excluded transgender individuals from service and denied them medically necessary healthcare does not transform an unlawful policy into a constitutional or unreviewable one. It just confirms the critical role of judicial review as a check on such military policies.

In sum, Defendants have not produced evidence sufficient to show that the Ban furthers any government objectives – much less important ones. Even if they had, there is no evidence whatsoever that a categorical Ban is substantially related to military readiness, lethality, unit cohesion, or cost control. The Ban violates both prongs of intermediate scrutiny, and the Court should grant summary judgment on Washington’s claim that it violates the equal protection guarantee of the Fifth Amendment.

C. The Ban Violates Substantive Due Process

The Ban also violates the substantive due process protections of the Fifth Amendment. “The Due Process Clause guarantees more than fair process, and the ‘liberty’ it protects includes more than the absence of physical restraint.” *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (citing *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). Indeed, the “Due Process Clause ‘protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them.’” *Id.* (quoting *Collins*, 503 U.S. at 125). “The theory is that some liberties are ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental,’ and therefore cannot be deprived without compelling justification.” *Obergefell*,

1 135 S. Ct. at 2597-98 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). The
 2 fundamental liberties protected by this Clause extend to “certain personal choices central to
 3 individual dignity and autonomy – including intimate choices that define personal identity and
 4 beliefs.” *Id.* at 2597-98 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), and *Griswold v.*
 5 *Connecticut*, 381 U.S. 479, 484–486 (1965)). The personal choices protected by substantive due
 6 process include choices at the core of personal autonomy and self-definition, *id.* at 2599,
 7 including “the ability independently to define one’s identity[.]” *Roberts v. U.S. Jaycees*, 468
 8 U.S. 609, 619 (1984)). *See also Abbott v. Abbott*, 560 U.S. 1, 11 (2010); *Lawrence v. Texas*, 539
 9 U.S. 558, 567 (2003)).

10 Asserting one’s own gender identity is a core aspect of personal autonomy and self-
 11 definition and, as such, is a fundamental right protected by substantive due process guarantees.
 12 A restriction on such a fundamental right – even in the military context – can only be sustained
 13 if: (1) the restriction advances an important governmental interest; (2) the intrusion significantly
 14 furthers that interest, and (3) a less intrusive means will not substantially achieve the
 15 government’s interest. *Witt*, 527 F.3d at 819. In this case, the due process and equal protection
 16 analyses are closely related. As with the equal protection claim, the Ban fails every prong of the
 17 due process test, and summary judgment is appropriate.

18 **1. There is no evidence that the Ban improves military readiness or cost**
 19 **control**

20 Presumably, and consistent with their equal protection defense, Defendants will claim
 21 that the Ban is necessary to ensure that open military service by transgender individuals does not
 22 “hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources.” *See*
 23 ECF 56-1 § 1(a). Where supported by evidence, courts have consistently found these to be
 24 important governmental interests for meeting the first prong of a substantive due process
 25 challenge. *See, e.g., Witt*, 527 F.3d at 820 (citing cases). But simply reciting the key words
 26 “military,” “lethality,” “unit cohesion,” or “force,” without more, is insufficient to sustain a

discriminatory policy. *Witt*, 527 F.3d at 820 n.10; *Watkins*, 875 F.2d at 699. Defendants have submitted no evidence in support of the President’s policy, and, on this basis alone, the Court should grant summary judgment on Washington’s substantive due process claim.

2. The Ban does not significantly further the alleged military interests

Even had Defendants offered evidence that the Ban furthers an important governmental interest – and they have not – Defendants fail to show that the Ban’s intrusion on fundamental rights is substantially connected to the military’s interests. As discussed, the government’s own evidence shows that military readiness, efficacy, unit cohesion, and budgetary goals are harmed by the exclusion of transgender individuals from service, *not* by allowing transgender individuals to serve including the “loss of qualified personnel, erosion of unit cohesion, and erosion of trust in command.” ECF 103 at 16 (citing ECF 46 ¶¶ 25-26; ECF 48 ¶¶ 45-47). Defendants’ stated interests are insufficient to “justify [the] intrusion into the personal and private life of the individual.” *Lawrence*, 539 U.S. at 578. The Ban fails under the second step of the due process analysis.

3. The Ban is not the least intrusive means by which Defendants can protect the asserted government interests

“Even though governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” *Aptheker v. Sec’y of State*, 378 U.S. 500, 508 (1964) (internal quotation marks omitted)). Courts will not sustain a discriminatory policy or practice unless “a less intrusive means [is] unlikely to achieve substantially the government’s interest.” *Witt*, 527 F.3d at 819.

A blanket Ban excluding all transgender individuals from military service cannot possibly be the least intrusive means to promote military interests. An obvious, less restrictive alternative is to evaluate service members and recruits individually to determine whether any of them “hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources”

1 as compared with other soldiers. *Cf.* ECF 56-1 § 1(a). That is precisely the analysis that the
 2 Ninth Circuit requires in the military context. *Witt*, 527 F.3d at 821 & n.11 (remanding for
 3 determination whether applying Don’t Ask, Don’t Tell “specifically to Major Witt . . . would
 4 achieve substantially the government’s interest,” but expressing skepticism where the alleged
 5 facts showed that “Major Witt was a model officer” and that “it was her suspension . . . not her
 6 homosexuality, that damaged unit cohesion”); *see also* *Watkins*, 875 F.2d at 708-09 (estopping
 7 the military from denying soldier’s reenlistment where record showed that service member had
 8 “greatly benefitted the Army, and therefore the country, by his military service” which had been
 9 marked by “nothing but the highest praise”).

10 Finally, and critically, individualized assessment of service members and recruits
 11 imposes no new or different burdens on the military. It is the standard practice applicable to all
 12 service members and recruits to determine whether they are fit for service and whether their
 13 individual characteristics (specializations, training, medical needs) affect their proper
 14 assignment. *See* Department of Defense Instruction (“DoDI”) 6130.03, Medical Standards for
 15 Appointment, Enlistment, or Induction in the Military Services; DoDI 6490.03, Deployment
 16 Health Assessment.³ Defendants routinely determine whether a recruit is fit for service based on
 17 background, medical condition, or any number of additional factors. *Id.* With respect to
 18 transgender recruits specifically, the military’s own evidence shows that it is well equipped to
 19 evaluate the fitness of individual applicants, and has been doing so since January 1, 2018. ECF
 20 120-1. There is simply no reason to think that the military is incapable of individually assessing
 21 a transgender person’s fitness to serve without regard- to their gender identity, just as it does for
 22 individuals of diverse racial, religious, language, medical, and educational backgrounds. A
 23 categorical ban is not the least-intrusive means to achieve the military’s interests, and the Ban
 24 fails the third prong of the due process analysis.

25
 26 ³ Available at: <http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003p.pdf>, and
<http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/649003p.pdf>.

IV. CONCLUSION

The Transgender Military Service Ban violates the Fifth Amendment's guarantees of equal protection and due process. The Court should grant summary judgment in favor of Washington on both of its claims.

DATED this 25th day of January, 2018.

ROBERT W. FERGUSON
Washington Attorney General

/s/ La Rond Baker

LA ROND BAKER, WSBA No. 43610
COLLEEN MELODY, WSBA No. 42275
Assistant Attorneys General
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744
LaRondB@atg.wa.gov

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 25th day of January, 2018.

/s/ La Rond Baker

LA ROND BAKER, WSBA No. 43610

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-01297-MJP

BRIEF OF *AMICUS CURIAE*
CONSTITUTIONAL ACCOUNTABILITY
CENTER IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION	1
ARGUMENT	4
I. THE CONSTITUTION GUARANTEES EQUAL PROTECTION FOR ALL AND FORBIDS THE FEDERAL GOVERNMENT FROM ENACTING POLICIES SINGLING OUT A CLASS OF INDIVIDUALS FOR DISFAVORED LEGAL STATUS	4
II. THE GOVERNMENT’S JUSTIFICATIONS FOR THE BAN ON OPEN SERVICE BY TRANSGENDER SERVICE MEMBERS ARE SIMILAR TO THOSE THAT WERE OFFERED TO JUSTIFY PAST DISCRIMINATION ON THE BASIS OF RACE, SEXUAL ORIENTATION, AND GENDER	8
III. LIKE PRIOR DISCRIMINATION BY THE MILITARY, A BAN ON OPEN SERVICE BY TRANSGENDER SERVICE MEMBERS IS NOT RATIONALLY RELATED TO ANY LEGITIMATE GOVERNMENT INTEREST	17
CONCLUSION.....	21

TABLE OF AUTHORITIES

	Page(s)
<u>CASES</u>	
<i>Adarand Constructors, Inc. v. Pena</i> , 515 U.S. 200 (1995)	4, 5
<i>City of Cleburne v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985)	4, 6, 7, 8
<i>Clinton v. City of New York</i> , 524 U.S. 417 (1998)	6
<i>Doe I v. Trump</i> , No. 17-1597, 2017 WL 4873042 (D.D.C. Oct. 30, 2017).....	20
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003)	10
<i>Heller v. Doe</i> , 509 U.S. 312 (1993)	2, 6, 17
<i>J.E.B. v. Alabama ex rel. T.B.</i> , 511 U.S. 127 (1994)	2, 5
<i>Lyng v. Castillo</i> , 477 U.S. 635 (1986)	4
<i>Nat'l Fed'n of Indep. Bus. v. Sebelius</i> , 567 U.S. 519 (2012)	6
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015)	4
<i>Philips v. Perry</i> , 106 F.3d 1420 (9th Cir. 1997).....	9
<i>Romer v. Evans</i> , 517 U.S. 620 (1996)	passim
<i>The Civil Rights Cases</i> , 109 U.S. 3 (1883)	5
<i>United States v. Windsor</i> , 133 S. Ct. 2675 (2013)	2, 5, 7, 8
<i>U.S. Dep't of Agric. v. Moreno</i> , 413 U.S. 528 (1973)	6

TABLE OF AUTHORITIES – cont’d

	Page(s)
<i>Watkins v. U.S. Army</i> , 875 F.2d 699 (9th Cir. 1989)	10
<i>Weinberger v. Wiesenfeld</i> , 420 U.S. 636 (1976)	4
<i>Zobel v. Williams</i> , 457 U.S. 55 (1982)	5
<u>CONSTITUTIONAL PROVISIONS, STATUTES, AND LEGISLATIVE MATERIALS</u>	
10 U.S.C. § 654(a)(15)	12
156 Cong. Rec. (daily ed. Sept. 21, 2010)	13
<i>Authorization for Appropriations for Fiscal Year 2011: Hearing on S. 3454 Before the S. Comm. on Armed Servs.</i> , 111th Cong. (2010)	13
Don’t Ask Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (Dec. 22, 2010)	13
S. REP. NO. 103-112 (1993)	11
U.S. Const. amend. V	2
<u>EXECUTIVE BRANCH MATERIALS</u>	
Executive Order 9981, 13 Fed. Reg. 4313 (July 26, 1948)	10
<u>OTHER AUTHORITIES</u>	
Lizette Alvarez, <i>G.I. Jane Breaks the Combat Barrier</i> , N.Y. Times, Aug. 16, 2009....	16
Aaron Belkin et al., Palm Ctr., <i>One Year Out: An Assessment of DADT Repeal’s Impact on Military Readiness</i> (2012)	14
Elisabeth Bumiller, <i>Top Defense Officials Seek To End ‘Don’t Ask, Don’t Tell’</i> , N.Y. Times, Feb. 3, 2010	12
Julie Hirschfeld Davis & Helene Cooper, <i>Trump Surprises Military With a Transgender Ban</i> , N.Y. Times, July 27, 2017	3, 20

TABLE OF AUTHORITIES – cont’d

	Page(s)
Josh Dawsey, <i>John Kelly’s Big Challenge: Controlling the Tweeter in Chief</i> , Politico (Aug. 4, 2017)	20
Karen DeYoung, <i>Colin Powell Now Says Gays Should Be Able To Serve Openly in Military</i> , Wash. Post (Feb. 4, 2010)	12
Maj. Jeffrey S. Dietz, <i>Breaking the Ground Barrier: Equal Protection Analysis of the U.S. Military’s Direct Ground Combat Exclusion of Women</i> , 207 Mil. L. Rev. 86 (2011)	16
Joycelyn Elders, MD, et al., Palm Ctr., <i>Report of the Transgender Military Service Commission</i> (2014).....	18, 19
Jody Feder, Cong. Research Serv., “Don’t Ask, Don’t Tell”: A Legal Analysis (2013)	14
Chuck Hagel, Sec’y of Def., Remarks at the Lesbian, Gay, Bisexual, Transgender Pride Month Event in the Pentagon Auditorium (June 25, 2013)	14
Richard Halloran, <i>Fighting Women</i> , N.Y. Times (Sept. 3, 1989).....	15
Margaret C. Harrell & Laura L. Miller, RAND Nat’l Def. Research Inst., <i>New Opportunities for Military Women: Effects Upon Readiness, Cohesion, and Morale</i> (1997).....	15
Robert T. Herres et al., Presidential Comm’n on the Assignment of Women in the Armed Forces, <i>Report to the President</i> (1992)	14-15
Lawrence Kapp, Cong. Research Serv., <i>Recruiting and Retention: An Overview of FY2011 and FY2012 Results for Active and Reserve Component Enlisted Personnel</i> (2013)	14
Memorandum from Henry Arnold, Commander of the Army Air Corp, <i>Employment of Negro Personnel in Air Corps Units</i> (May 31, 1940), quoted in J. Todd Moye, <i>Freedom Flyers: The Tuskegee Airmen of World War II</i> (2010)	9
Memorandum from President Donald Trump to the Sec’y of Def. and Sec’y of Homeland Sec. §1(b) (Aug. 25, 2017)	1
Brian Mitchell, <i>Women in the Military: Flirting with Disaster</i> (1997)	15
Matthew Rosenberg & Dave Phillips, <i>Pentagon Opens All Combat Roles to Women: ‘No Exceptions’</i> , N.Y. Times, Dec. 4, 2015	16

TABLE OF AUTHORITIES – cont’d

	Page(s)
Bernard Rostker et al., RAND Nat’l Def. Research Inst., <i>Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment</i> (1993).....	9, 10
Agnes Gereben Schaefer et al., RAND Nat’l Def. Research Inst., <i>Assessing the Implications of Allowing Transgender Personnel To Serve Openly</i> (2016)	17, 18
U.S. Dep’t of Def., <i>Report of the Comprehensive Review of the Issues Associated with a Repeal of “Don’t Ask, Don’t Tell”</i> (Nov. 30, 2010)	10, 12
<i>War and the Second Sex</i> , Newsweek (Aug. 4, 1991).....	15

INTEREST OF *AMICUS CURIAE*¹

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution’s text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights, freedoms, and structural safeguards that our nation’s charter guarantees. CAC accordingly has a strong interest in this case and in the scope of the Fifth Amendment’s protections for liberty and equality.

INTRODUCTION

The Constitution’s guarantee of equal protection implicit in the Fifth Amendment requires that the federal government respect fundamental rights central to individual dignity and autonomy for all persons, including transgender persons. Yet on July 26, 2017, President Donald Trump issued a statement via Twitter, categorically barring transgender persons from serving openly in the U.S. military: “the United States government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military.” Dkt. No. 103 at 3. These tweets were subsequently formalized in a presidential memorandum, which directed the “Secretary of Defense[] and the Secretary of Homeland Security . . . to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 [which prohibited open service by transgender individuals].” Memorandum from President Donald Trump to the Sec’y of Def. and Sec’y of Homeland Sec. §1(b) (Aug. 25, 2017). This categorical ban on open service in the military by transgender individuals violates the

¹ *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* made a monetary contribution to the brief’s preparation or submission. Counsel for all parties have consented to the filing of this brief.

1 constitutional guarantee of equal protection, and the plaintiffs’ motion for summary judgment
2
3 should therefore be granted.
4

5 The Due Process Clause of the Fifth Amendment provides that no “person” shall “be
6
7 deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V. By
8
9 broadly protecting all “person[s],” the Amendment guarantees to all, regardless of race, sex,
10
11 sexual orientation, or gender identity, dignity and equality under the law, “withdraw[ing] from
12
13 Government the power to degrade or demean,” *United States v. Windsor*, 133 S. Ct. 2675, 2695
14
15 (2013). “At the heart of the Constitution’s guarantee of equal protection lies the simple
16
17 command that the Government must treat citizens as individuals, not as simply components of a
18
19 racial [or] sexual . . . class.” *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152–53 (1994)
20
21 (Kennedy, J., concurring) (alteration in original) (quoting *Metro Broad., Inc. v. FCC*, 497 U.S.
22
23 547, 602 (1990) (O’Connor, J., dissenting)). To effectuate that guarantee, the Constitution
24
25 requires policies that single out a class of people for disparate treatment to have—at the very
26
27 least—“a rational relationship between the disparity of treatment and some legitimate
28
29 governmental purpose.” *Heller v. Doe*, 509 U.S. 312, 320 (1993).² The government’s ban on
30
31 military service by transgender persons fails that test.
32
33
34
35
36

37 The government insists that the ban is justified by concerns about transgender service
38
39 members’ impact on unit cohesion and military effectiveness. But these purported concerns are
40
41 the very same concerns cited, time and again, by opponents of greater integration of our
42
43 military—and they are the same concerns that, time and again, have proven to be lacking in any
44
45
46

47
48 ² In its order granting in part and denying in part the defendants’ motion to dismiss and
49
50 granting plaintiffs’ motion for a preliminary injunction, this court applied intermediate scrutiny
51
to the ban on transgender service members. Dkt. No. 103 at 15. *Amicus* takes no position on
what level of review should apply because it believes the ban cannot withstand judicial scrutiny
under even the most deferential standard of review.

1 factual basis. When the military was racially segregated, proponents of that policy claimed it
 2
 3 was necessary for unit cohesion and military effectiveness; when gay and lesbian individuals
 4
 5 were prohibited from serving openly, proponents of that policy claimed it was necessary for unit
 6
 7 cohesion and military effectiveness; and when women were forbidden from serving in combat
 8
 9 roles, proponents of that policy claimed it was necessary for unit cohesion and military
 10
 11 effectiveness. Yet the military is now integrated, gay men and lesbians are allowed to serve
 12
 13 openly, and women are allowed to serve in combat roles—and there have been no negative
 14
 15 effects on the cohesion of units specifically or on the effectiveness of the military as a whole. To
 16
 17 the contrary, military experts agree that ending those discriminatory policies and ensuring
 18
 19 diversity in the military's ranks actually strengthened the military and its effectiveness. In short,
 20
 21 concerns about unit cohesion and military effectiveness did not provide a rational basis for
 22
 23 treating some classes of military service members in a discriminatory manner then, and they do
 24
 25 not do so now.

26
 27
 28
 29
 30
 31 For the past year, transgender individuals have been serving openly in the military with
 32
 33 no deleterious effects. And this is no surprise: a military-commissioned study released before
 34
 35 transgender people were allowed to serve openly concluded that open service would not
 36
 37 negatively affect military effectiveness or unit cohesion. President Trump's decision to change
 38
 39 the open service policy was not based on new evidence about the effects of transgender
 40
 41 individuals serving in the military. In fact, President Trump failed to consult with the Pentagon
 42
 43 or other military experts before announcing this policy change. See Julie Hirschfeld Davis &
 44
 45 Helene Cooper, *Trump Surprises Military With a Transgender Ban*, N.Y. Times, July 27, 2017,
 46
 47 at A1.
 48
 49
 50
 51

In sum, the government’s singling out of transgender people for exclusion from military service bears no rational relationship to any legitimate government interest. Instead, it impermissibly rests purely on “negative attitudes,” “fear,” and “irrational prejudice[s]” about transgender people. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 450 (1985). Given that, President Trump’s ban serves no purpose other than to “disrespect and subordinate” transgender service members by “lock[ing] them out of a central institution of the Nation’s society,” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604, 2602 (2015)—military service. This ban cannot be squared with the Fifth Amendment’s guarantee of equal protection for all people, and the plaintiffs’ motion for summary judgment should therefore be granted.

ARGUMENT

I. THE CONSTITUTION GUARANTEES EQUAL PROTECTION FOR ALL AND FORBIDS THE FEDERAL GOVERNMENT FROM ENACTING POLICIES SINGLING OUT A CLASS OF INDIVIDUALS FOR DISFAVORED LEGAL STATUS.

The Due Process Clause of the Fifth Amendment, which provides that no “person” shall “be deprived of life, liberty, or property, without due process of law,” U.S. Const. amend. V, guarantees all persons dignity and equality under the law. While the text of the Fifth Amendment “is not as explicit a guarantee of equal treatment as the Fourteenth Amendment,” the Supreme Court has consistently held that “the Constitution imposes upon federal, state, and local government actors the same obligation to respect the personal right to equal protection of the laws.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213, 231-32 (1995); *see Lyng v. Castillo*, 477 U.S. 635, 636 n.2 (1986) (“The concept of equal justice under law is served by the Fifth Amendment’s guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment.” (quoting *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976)));

1 *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (“This Court’s approach to Fifth
 2 Amendment equal protection claims has always been precisely the same as to equal protection
 3 claims under the Fourteenth Amendment.”); *Windsor*, 133 S. Ct. at 2695 (“the equal protection
 4 guarantee of the Fourteenth Amendment makes that Fifth Amendment [due process] right all the
 5 more specific and all the better understood and preserved”). These repeated holdings reflect that
 6 at both the federal and state levels, “equality of citizenship is of the essence in our Republic.”
 7
 8 *Zobel v. Williams*, 457 U.S. 55, 70 (1982) (Brennan, J., concurring).

9
 10 The Constitution’s profound commitment to equal protection is reflected in the Fifth
 11 Amendment’s broad language, protecting “any person.” See *Adarand*, 515 U.S. at 227 (“[t]he
 12 Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*”); *J.E.B.*, 511
 13 U.S. at 152 (Kennedy, J., concurring) (noting “constitutional tradition” that “an individual
 14 possesses rights that are protected against lawless action by the government”). As a personal
 15 right that belongs to all individuals, the right of equal protection secures equality to all persons,
 16 regardless of race, sex, sexual orientation, or gender identity. “At the heart of the Constitution’s
 17 guarantee of equal protection lies the simple command that the Government must treat citizens as
 18 individuals, not as simply components of a racial [or] sexual . . . class.” *Id.* at 152-53 (Kennedy,
 19 J., concurring) (alteration in original) (quoting *Metro Broad., Inc.*, 497 U.S. at 602 (O’Connor,
 20 J., dissenting)); see *The Civil Rights Cases*, 109 U.S. 3, 24 (1883) (Constitution prohibits any
 21 policy “which has the effect of denying to any race or class, or to any individual, the equal
 22 protection of the laws” (emphasis added)). Thus, the Constitution prohibits “indiscriminate
 23 imposition of inequalities’ . . . born of animosity toward the class of persons affected.” *Romer v.*
 24 *Evans*, 517 U.S. 620, 633, 634 (1996) (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950)).

1 In giving effect to the constitutional requirement of equal protection, the Supreme Court
 2
 3 has insisted that when policies single out a particular class of people for disparate treatment,
 4
 5 there must be “a rational relationship between the disparity of treatment and some legitimate
 6
 7 governmental purpose.” *Heller*, 509 U.S. at 320. To be sure, rational-basis review affords some
 8
 9 deference to the Executive’s policy judgments, but the Supreme Court has long recognized that
 10
 11 courts have a constitutional obligation to “ensure that classifications are not drawn for the
 12
 13 purpose of disadvantaging the group burdened by the law,” *Romer*, 517 U.S. at 633; *see Nat’l*
 14
 15 *Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012) (explaining that “deference in matters
 16
 17 of policy cannot . . . become abdication in matters of law”); *Clinton v. City of New York*, 524
 18
 19 U.S. 417, 452 (1998) (Kennedy, J., concurring) (“[a]bdication of responsibility is not part of the
 20
 21 constitutional design”).

22
 23
 24
 25
 26 For example, in *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the
 27
 28 Supreme Court struck down a federal statutory provision that denied federal food stamp benefits
 29
 30 to a household composed of unrelated individuals living together as a violation of the equal
 31
 32 protection guarantee. Concluding that the provision had been designed to deny food stamps to
 33
 34 “hippies” and served no conceivable purpose other than to discriminate, this Court held that the
 35
 36 statute was inconsistent with the constitutional guarantee of equality under the law. “[I]f the
 37
 38 constitutional conception of ‘equal protection of the laws’ means anything, it must at the very
 39
 40 least mean that a bare congressional desire to harm a politically unpopular group cannot
 41
 42 constitute a legitimate governmental interest.” *Id.* at 534. Similarly, in *City of Cleburne*, the
 43
 44 Supreme Court held unconstitutional a municipal zoning ordinance that required a special-use
 45
 46 permit for homes for mentally disabled persons, but not for other group homes. The Court
 47
 48 concluded that the discriminatory permit requirement rested on “negative attitudes,” “fear,” and
 49
 50
 51

1 “irrational prejudice,” 473 U.S. at 448, 450, and held that “the City [could] not avoid the
2 strictures of th[e Equal Protection] Clause by deferring to the wishes or objections of some
3 fraction of the body politic,” *id.* at 448.
4
5

6
7 The Court also applied rational-basis review in *Romer v. Evans* and nonetheless held
8 unconstitutional a state constitutional amendment that prohibited state or local government
9 action that protected gay men and lesbians from discrimination. Stressing that the government
10 had “impos[ed] a broad and undifferentiated disability on a single named group,” the Court noted
11 that “laws of the kind now before us raise the inevitable inference that the disadvantage imposed
12 is born of animosity toward the class of persons affected.” *Romer*, 517 U.S. at 632, 634-35. For
13 that reason, Colorado’s “status-based enactment” was unconstitutional because it denied equal
14 rights to gay men and lesbians not “to further a proper legislative end but to make them unequal
15 to everyone else.” *Id.* at 635.
16
17

18
19 Likewise, in *Windsor*, the Court held that a federal law that prohibited same-sex married
20 couples from obtaining the same federal benefits enjoyed by married opposite-sex couples
21 “violates basic due process and equal protection principles applicable to the Federal
22 Government.” 133 S. Ct. at 2693. The Court focused on the “avowed purpose and practical
23 effect of the law . . . to impose a disadvantage, a separate status, and so a stigma upon all who
24 enter into same-sex marriages,” *id.*, and concluded that “[t]he federal statute [was] invalid, for no
25 legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the
26 State [of New York], by its marriage laws, sought to protect in personhood and dignity,” *id.* at
27 2696. The federal government could not, consistent with the constitutional guarantee of equal
28 protection, treat same-sex couples as “less respected than others.” *Id.*
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51

As all of these cases recognize, rational basis scrutiny, while deferential, does not require a reviewing court to abdicate its constitutional responsibility to enforce the guarantee of equal protection for all persons. To the contrary, as all of these cases also make clear, the government may not subject any group of persons to adverse treatment “born of animosity toward the class of persons affected.” *Romer*, 517 U.S. at 634; *Windsor*, 133 S. Ct. at 2693 (“The Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.” (quoting *Moreno*, 413 U.S. at 534-35)). For that reason, this Court has been “especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a ‘tradition of disfavor’” in order to prevent the use of a “stereotyped reaction [that] may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made.” *Cleburne*, 473 U.S. at 453 n.6 (Stevens, J., concurring) (quoting *Matthews v. Lucas*, 427 U.S. 495, 520-21 (1976) (Stevens, J., dissenting)). The transgender military ban at issue here is totally lacking in any rational basis, as the remainder of this brief explains.

II. THE GOVERNMENT’S JUSTIFICATIONS FOR THE BAN ON OPEN SERVICE BY TRANSGENDER SERVICE MEMBERS ARE SIMILAR TO THOSE THAT WERE OFFERED TO JUSTIFY PAST DISCRIMINATION ON THE BASIS OF RACE, SEXUAL ORIENTATION, AND GENDER.

The government justifies its decision to ban transgender people from serving openly in the military by arguing that allowing open service would “hinder military readiness and lethality” and “disrupt unit cohesion.” Dkt. No. 69 at 28 (quoting Presidential Memorandum). These supposed justifications are strikingly similar to justifications offered in the past to support racial segregation in the military, the military’s “Don’t Ask, Don’t Tell” policy preventing gay

men and lesbians from serving openly, and the military's prohibition on women serving in combat roles. Yet the military has since abandoned all of those policies, recognizing that military effectiveness is best served by allowing all who are able to serve to do so. Thus, these historical analogues suggest that the government's proffered justifications should be treated with great skepticism as legitimate reasons for discriminating against transgender service members.

First, those opposed to racial integration in the military in the first half of the twentieth century justified their position with misguided fears about unit cohesion and military effectiveness. Bernard Rostker et al., RAND Nat'l Def. Research Inst., *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment* 171-72 (1993) ("1993 RAND Study"), https://www.rand.org/pubs/monograph_reports/MR323.html (opponents of integration argued that "[r]acial mixing . . . would undermine unit cohesion among the troops and thereby impair their morale, readiness, and ability to perform as a unified combat force."); see *Philips v. Perry*, 106 F.3d 1420, 1439 (9th Cir. 1997) (Fletcher, J., dissenting) ("[T]he 'unit cohesion' rationale . . . is disturbingly similar to the arguments used by the military to justify the exclusion from and segregation of African Americans in military service.").

For instance, in 1935, Rear Admiral Adolphus Andrews, Chief of the Navy Bureau of Navigation, argued that if black service members were enlisted as seamen, "team work, harmony, and ship efficiency [would be] seriously handicapped." 1993 RAND Study at 172. Likewise, General Henry Arnold, commander of the Army Air Corp, wrote in 1940 that "Negro pilots cannot be used in our present Air Force since this would result in having Negro officers serving over white enlisted men. This would create an impossible social problem." Memorandum from Henry Arnold, Commander of the Army Air Corp, *Employment of Negro Personnel in Air Corps Units* (May 31, 1940), quoted in J. Todd Moye, *Freedom Flyers: The*

1 *Tuskegee Airmen of World War II* 14 (2010). And during “World War II both the Army chief of
 2 staff and the Secretary of the Navy justified racial segregation in the ranks as necessary to
 3 maintain efficiency, discipline, and morale.” *Watkins v. U.S. Army*, 875 F.2d 699, 729 (9th Cir.
 4 1989) (Norris, J., concurring in the judgment).

5
 6
 7
 8
 9
 10 Though the reluctance to integrate was presented as a concern about unit cohesion and
 11 military effectiveness, the trepidation was in truth based upon racism and stereotypes about black
 12 Americans. For instance, in 1946, Major General Idwal Edwards, the Army’s Assistant Chief of
 13 Staff for Organization and Training, acknowledged that his preference for racial segregation was
 14 related to his views about the “ineptitude and limited capacity of the Negro soldier.” U.S. Dep’t
 15 of Def., *Report of the Comprehensive Review of the Issues Associated with a Repeal of “Don’t*
 16 *Ask, Don’t Tell”* 82 (Nov. 30, 2010), [http://www.washingtonpost.com/wp-](http://www.washingtonpost.com/wp-srv/special/politics/dont-ask-dont-tell/DADTReport_FINAL.pdf)
 17 [srv/special/politics/dont-ask-dont-tell/DADTReport_FINAL.pdf](http://www.washingtonpost.com/wp-srv/special/politics/dont-ask-dont-tell/DADTReport_FINAL.pdf). Similarly, “[m]any white
 18 Americans (especially Southerners) responded with visceral revulsion to the idea of close
 19 physical contact with blacks.” 1993 RAND Study at 160.

20
 21
 22
 23
 24
 25
 26
 27
 28
 29
 30
 31
 32
 33 Despite these attitudes, on July 26, 1948, President Harry Truman issued an Executive
 34 Order requiring “equality of treatment and opportunity for all persons in the armed services
 35 without regard to race, color, religion or national origin.” Exec. Order No. 9981, 13 Fed. Reg.
 36 4313 (July 26, 1948). And “[b]y the late 1950s, the Army, like the Navy and the Air Force
 37 before it, had come to accept . . . the view that racial integration actually benefited the military”
 38 because “[o]nce blacks and whites began to share the risks, rewards, and responsibilities of
 39 military life more equitably, morale problems diminished.” 1993 RAND Study at 178, 180. In
 40 short, the warnings that racial integration would affect military readiness and unit cohesion
 41 proved to be unfounded. Indeed, integration of the armed forces has actually strengthened the

1 military's effectiveness. See *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (“[A] ‘highly
 2 qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its
 3 principle mission to provide national security.’” (quoting Brief for Julius W. Becton, Jr., et al.
 4 as *Amici Curiae* at 5)).

5
 6
 7
 8
 9
 10 Second, essentially the same arguments that played out over racial integration in the first
 11 half of the twentieth century played out over the open service of gay men and lesbians in the
 12 second half of the century. Just like the opponents of racial integration before them, those who
 13 supported the military’s “Don’t Ask, Don’t Tell” policy argued that allowing gay men and
 14 lesbians to serve openly in the military would negatively affect military effectiveness and unit
 15 cohesion. For instance, General Colin Powell testified before Congress that “[t]o win wars, we
 16 create cohesive teams of warriors who will bond so tightly that they are prepared to go into battle
 17 and give their lives if necessary for the accomplishment of the mission and for the cohesion of
 18 the group and for their individual buddies. . . . [T]he presence of open homosexuality would have
 19 an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of
 20 the armed forces.” S. REP. NO. 103-112, at 275, 278 (1993). Likewise, General H. Norman
 21 Schwarzkopf testified that “the introduction of an open homosexual into a small unit
 22 immediately polarizes that unit and destroys the very bonding that is so important for the unit’s
 23 survival in time of war.” *Id.* at 280. And Lieutenant General Calvin Waller testified that
 24 allowing gay men and lesbians “total openness in our Armed forces would cause less ready units
 25 or units that would not nearly be as effective as the units we currently have.” *Id.*

26
 27
 28
 29
 30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47 For that reason, Congress itself concluded in 1993 that “[i]n view of the unique
 48 conditions that characterize military life, there is broad agreement that lifting the restrictions on
 49 the service of gay men and lesbians would be detrimental to the best interests of the armed
 50
 51

forces.” *Id.* at 278. Indeed, in the statutory provision that codified the “Don’t Ask, Don’t Tell” policy, Congress specifically stated that “[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.” 10 U.S.C. § 654(a)(15).

Again, however, experience ultimately showed that such fears were unfounded, and that there was no rational basis for concluding that open service in the military by gay men and lesbians would harm military effectiveness and unit cohesion. As the Department of Defense explained when Congress was considering repealing “Don’t Ask, Don’t Tell” in 2010, “aside from the moral and religious objections to homosexuality, much of the concern about ‘open’ service [was] driven by misperceptions and stereotypes about what it would mean if gay Service members were allowed to be ‘open’ about their sexual orientation.” U.S. Dep’t of Def., *supra*, at 5. The conclusions of this study mirrored the views of then-Chairman of the Joint Chiefs of Staff Admiral Mike Mullen, who testified to the Senate Armed Services Committee that the policy should be repealed, and noted that he had “served with homosexuals since 1968” without issue and that “[e]verybody in the military ha[d].” Elisabeth Bumiller, *Top Defense Officials Seek To End ‘Don’t Ask, Don’t Tell’*, N.Y. Times, Feb. 3, 2010, at A1. Even General Powell, whose opposition to open service by gay soldiers contributed to the adoption of the “Don’t Ask, Don’t Tell” policy, ultimately changed his view and supported an end to that policy. See Karen DeYoung, *Colin Powell Now Says Gays Should Be Able To Serve Openly in Military*, Wash. Post (Feb. 4, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/03/AR2010020302292.html>.

Members of Congress from across the political spectrum also realized that the important interests of unit cohesion and military effectiveness could not justify the “Don’t Ask, Don’t Tell” policy. For example, Senator Susan Collins noted in debate that “[a]t least 28 countries, including Great Britain, Australia, Canada, the Netherlands, and Israel allow open service by lesbian and gay troops,” and “[n]one of these countries—not one—report[ed] morale or recruitment problems.” 156 CONG. REC. S7234 (daily ed. Sept. 21, 2010) (statement of Sen. Collins). Furthermore, she argued that the “Don’t Ask, Don’t Tell” policy actually reduced military effectiveness, noting that “8 percent of the servicemembers let go under [the policy] held critical occupations . . . such as interpreters.” *Id.* Similarly, Senator Joseph Lieberman noted that “[m]ore than 14,000 members of the military ha[d] been put out of the services since 1993 . . . , not because they weren’t good soldiers, sailors, marines or airmen, not because they violated any military code of conduct but only because of their private sexual orientation.” 156 Cong. Rec. S7244 (daily ed. Sept. 21, 2010). This, he noted, cost taxpayers more than \$600 million. *Id.* Likewise, Senator Carl Levin rejected the argument that “allowing gays and lesbians to serve openly would damage unit cohesion and morale,” arguing instead that “there is no evidence that the presence of gay and lesbian colleagues would damage our military’s ability to fight.” *Authorization for Appropriations for Fiscal Year 2011: Hearing on S. 3454 Before the S. Comm. on Armed Servs.*, 111th Cong. (2010). Following careful deliberation, Congress in December 2010 repealed the “Don’t Ask, Don’t Tell” policy and formally permitted gay men and lesbians to serve openly. *See Don’t Ask Don’t Tell Repeal Act of 2010*, Pub. L. No. 111-321, 124 Stat. 3515 (Dec. 22, 2010).

Since that time, study after study has shown that repeal of the “Don’t Ask, Don’t Tell” policy had no impact on unit cohesion or military effectiveness. One prominent report released a

1 year after the policy's repeal found "no overall negative impact on military readiness or its
 2
 3 component dimensions, including cohesion, recruitment, retention, assaults, harassment or
 4 morale." Aaron Belkin et al., Palm Ctr., *One Year Out: An Assessment of DADT Repeal's*
 5
 6 *Impact on Military Readiness* 4 (2012),
 7
 8 http://archive.palmcenter.org/files/One%20Year%20Out_0.pdf. By 2013, the Congressional
 9
 10 Research Service had noted that the "repeal [of "Don't Ask, Don't Tell"] appears to have
 11
 12 proceeded smoothly." Jody Feder, Cong. Research Serv., "*Don't Ask, Don't Tell*": A Legal
 13
 14 Analysis 3 (2013); see Lawrence Kapp, Cong. Research Serv., *Recruiting and Retention: An*
 15
 16 *Overview of FY2011 and FY2012 Results for Active and Reserve Component Enlisted Personnel*
 17
 18 (2013) (noting that recruitment and retention remained strong in fiscal years 2011 and 2012). In
 19
 20 fact, Defense Secretary Chuck Hagel remarked in 2013 that allowing gay men and lesbians to
 21
 22 serve openly has "ma[de] our military and our nation stronger, much stronger." Chuck Hagel,
 23
 24 Sec'y of Def., Remarks at the Lesbian, Gay, Bisexual, Transgender Pride Month Event in the
 25
 26 Pentagon Auditorium (June 25, 2013),
 27
 28 <http://archive.defense.gov/transcripts/transcript.aspx?transcriptid=5262>. In short, as with
 29
 30 opposition to racial integration of the military, the justifications offered by the opponents of open
 31
 32 service by gay men and lesbians turned out to have no basis in fact: gay and lesbian service
 33
 34 members have been serving openly for the last six years with no reported decline in military
 35
 36 effectiveness or unit cohesion.
 37
 38
 39
 40
 41
 42
 43

44 *Third*, opponents of women's equal participation in combat also claimed that treating
 45
 46 women equally would harm military effectiveness and unit cohesion. For instance, a 1992 report
 47
 48 by the Presidential Commission on the Assignment of Women in the Armed Forces—which
 49
 50 recommended that women be excluded from combat roles—opined that "unit cohesion can be
 51

negatively affected by the introduction of any element that detracts from the need for such key ingredients as mutual confidence, commonality of experience, and equitable treatment.” Robert T. Herres et al., Presidential Comm’n on the Assignment of Women in the Armed Forces, *Report to the President* 25 (1992), <https://babel.hathitrust.org/cgi/pt?id=umn.31951d00277676f;view=1up;seq=3>. The commission believed that women would degrade these values because of, among other things, the “lack of privacy on the battlefield,” “traditional Western values where men feel a responsibility to protect women,” “sexual misconduct,” and the possibility of “pregnancy.” *Id.* Similarly, General Robert Barrow of the Marine Corps stated in congressional testimony that the decision not to allow women to serve in combat roles is about “combat effectiveness, combat readiness,” and “national security.” *War and the Second Sex*, Newsweek (Aug. 4, 1991), <http://www.newsweek.com/war-and-second-sex-202970>. Another commentator suggested that “[t]he presence of women inhibits male bonding, corrupts allegiance to the hierarchy, and diminishes the desire of men to compete for anything but the attentions of women.” Brian Mitchell, *Women in the Military: Flirting with Disaster* 175 (1997); see Richard Halloran, *Fighting Women*, N.Y. Times (Sept. 3, 1989), <http://www.nytimes.com/1989/09/03/books/fighting-women.html> (same).

Again, however, subsequent experience has shown that these fears were unfounded, lacking any rational basis in fact. Indeed, even before women were allowed to serve in combat roles, a 1997 RAND National Defense Research Institute study concluded that “gender integration is perceived to have a relatively small effect on readiness, cohesion, and morale in the units . . . studied,” and that “gender integration . . . [had] a positive effect, raising the level of professional standards.” Margaret C. Harrell & Laura L. Miller, RAND Nat’l Def. Research

1 Inst., *New Opportunities for Military Women: Effects Upon Readiness, Cohesion, and Morale*
 2
 3 xvii, xviii (1997), https://www.rand.org/pubs/monograph_reports/MR896.html. Indeed, during
 4
 5 the wars in Afghanistan and Iraq, Army commanders skirted the official prohibition on women
 6
 7 in combat roles when they needed more soldiers for crucial jobs, and women serving in these
 8
 9 positions “repeatedly proved their mettle in combat.” Lizette Alvarez, *G.I. Jane Breaks the*
 10
 11 *Combat Barrier*, N.Y. Times, Aug. 16, 2009, at A1.
 12
 13

14
 15 Moreover, as more and more members of the military concluded that “[a]ssertions
 16
 17 that women do not possess the leadership capability or that they will destroy unit cohesion are
 18
 19 overbroad generalizations, and are disproved by the actual successful combat performance of
 20
 21 mixed-gender combat support units,” Maj. Jeffrey S. Dietz, *Breaking the Ground Barrier: Equal*
 22
 23 *Protection Analysis of the U.S. Military’s Direct Ground Combat Exclusion of Women*, 207 Mil.
 24
 25 L. Rev. 86, 113 (2011), the military ultimately changed its position, first rescinding the rule that
 26
 27 restricted women from serving in combat units in 2013, and then officially opening all combat
 28
 29 roles to women by late 2015, see Matthew Rosenberg & Dave Phillips, *Pentagon Opens All*
 30
 31 *Combat Roles to Women: ‘No Exceptions’*, N.Y. Times, Dec. 4, 2015, at A1. In the short time
 32
 33 since that policy change took effect, there have been no reports of any negative impact on the
 34
 35 military’s effectiveness or unit cohesion.
 36
 37
 38

39
 40 In sum, the government’s claim that allowing transgender people to serve openly will
 41
 42 cause a disruption to unit cohesion and military effectiveness is nothing new. Time and again,
 43
 44 these arguments have been trotted out to justify treating other groups of service members
 45
 46 unequally, whether racial minorities, gay men and lesbians, or women, and each time the
 47
 48 purported fears have proven to be unfounded, based on some combination of misunderstanding,
 49
 50
 51

1 prejudice, or stereotypes. As the next section shows, there is no more basis for these claims now
 2
 3 than there was in the past.
 4

5 **III. LIKE PRIOR DISCRIMINATION BY THE MILITARY, A BAN ON OPEN**
 6 **SERVICE BY TRANSGENDER SERVICE MEMBERS IS NOT RATIONALLY**
 7 **RELATED TO ANY LEGITIMATE GOVERNMENT INTEREST.**
 8

9
 10 Even under “the most deferential of standards,” *Romer*, 517 U.S. at 632, there must be “a
 11
 12 rational relationship between the disparity of treatment and some legitimate governmental
 13
 14 purpose,” *Heller*, 509 U.S. at 320. The government’s ban on transgender service members fails
 15
 16 this test.
 17

18
 19 To start, as this court previously noted, “all of the reasons proffered by the President for
 20
 21 excluding transgender individuals from the military [are] not merely unsupported, but [are]
 22
 23 actually *contradicted* by the studies, conclusions, and judgment of the military itself.” Dkt. No.
 24
 25 103 at 16 (quoting *Doe I v. Trump*, No. 17-1597, 2017 WL 4873042, at *30 (D.D.C. Oct. 30,
 26
 27 2017) (alterations in original)). Indeed, the results of the military-commissioned RAND study
 28
 29 released in 2016 put to rest any notion that allowing open service by transgender people would
 30
 31 affect unit cohesion or military effectiveness. *See* Agnes Gereben Schaefer et al., RAND Nat’l
 32
 33 Def. Research Inst., *Assessing the Implications of Allowing Transgender Personnel To Serve*
 34
 35 *Openly* (2016). With regard to unit cohesion, the study considered the experiences of foreign
 36
 37 militaries that allowed transgender people to serve openly, and concluded that in those countries,
 38
 39 “there [was] no significant effect of openly serving transgender service members on cohesion,
 40
 41 operational effectiveness, or readiness.” *Id.* at 44. For instance, in the United Kingdom,
 42
 43 commanders “found no effect on cohesion.” *Id.* at 45. Likewise, in Canada, an extensive review
 44
 45 “found no evidence of any effect on operational effectiveness or readiness” and “no evidence of
 46
 47 any effect on unit or overall cohesion.” *Id.* Though these foreign militaries noted that some
 48
 49
 50
 51

1 service members harbored prejudices and hostility toward transgender people, “this resistance
2
3 was apparently short-lived.” *Id.*

4
5 With regard to readiness and ability to deploy, the RAND study predicted that between
6
7 29 and 129 active component service members would seek gender transition-related treatment
8
9 each year. *Id.* at 69. The study analyzed relevant data and determined that the treatment and
10
11 recovery time for these service members would “represent[] 0.0015 percent of available
12
13 deployable labor-years across the [active component] and [selected reserve].” *Id.* at 42. Thus,
14
15 the study concluded that “a service member’s care would have a substantial overall impact on
16
17 readiness *only* if that service member worked in an especially unique military occupation, if that
18
19 occupation was in demand at the time of transition, and if the service member needed to be
20
21 available for frequent, unpredicted mobilizations.” *Id.* at 43 (emphasis added). The experience
22
23 of foreign militaries confirmed these findings. For instance, Israeli military commanders
24
25 “reported that transgender personnel perform their military duties and contribute effectively to
26
27 their units.” *Id.* at 45. Commanders in the United Kingdom “reported that increases in diversity
28
29 had led to *increases* in readiness and performance.” *Id.* at 60 (emphasis added). Moreover, the
30
31 study noted that continuing to prohibit transgender people from serving had its own deleterious
32
33 effects: “worsening mental health status, declining productivity, and other negative outcomes
34
35 due to lack of treatment for gender identity-related issues.” *Id.* at 46; *see* Dkt. No. 103 at 16
36
37 (noting that the RAND study “concluded that *prohibiting* open service would have negative
38
39 impacts including loss of qualified personnel, erosion of unit cohesion, and erosion of trust in
40
41 command”).
42
43
44
45
46
47
48

49 These results echoed a 2014 Report of the Transgender Military Service Commission at
50
51 the Palm Center. *See* Joycelyn Elders, MD, et al., Palm Ctr., *Report of the Transgender Military*

1 Service Commission (2014). That study concluded that “[w]ith few exceptions, transgender
 2 service members are deployable and medically ready. . . . [C]ross-sex hormone treatment and
 3 mental health considerations do not, in general, impede the deployability of transgender service
 4 members, and the public record includes instances in which transgender individuals deployed [as
 5 civilians] after having undergone transition.” *Id.* at 16. In short, even before the U.S. military
 6 allowed transgender persons to serve openly, there was a wealth of uncontroverted evidence that
 7 allowing transgender people to serve openly in the military would have no negative impact on
 8 unit cohesion or military effectiveness.
 9

10
 11
 12
 13
 14
 15
 16
 17
 18
 19 Moreover, by the time President Trump announced that he would ban transgender people
 20 from serving, transgender service members had *already* been serving openly in the military for
 21 about a year. And experiences during that period confirmed the military’s prior conclusions:
 22 transgender people can serve openly in the military without negatively affecting the military’s
 23 performance, readiness, or cohesion. In sum, based on all of the available evidence, there is
 24 simply no “relation between the classification [President Trump] adopted and the object to be
 25 attained.” *Romer*, 517 U.S. at 632.
 26
 27
 28
 29
 30
 31
 32
 33
 34

35 Ignoring the RAND study’s meticulously researched conclusion that transgender
 36 individuals could serve openly without negatively affecting unit cohesion or military
 37 effectiveness, as well as the U.S. military’s experiences over the past year, the government
 38 argues that it is “reasonable for the President to have concluded that maintaining the [ban] could
 39 rationally further unit cohesion.” Dkt. No. 69 at 35. But, as this court noted, “[w]hile
 40 Defendants identify important governmental interests including military effectiveness, unit
 41 cohesion, and preservation of military resources, they fail to show that the policy prohibiting
 42 transgender individuals from serving openly is related to the achievement of those interests.”
 43
 44
 45
 46
 47
 48
 49
 50
 51

1 Dkt. No. 103 at 16. Indeed, the only support the government offers for this proposition are two
 2
 3 cherry-picked sentences from the 91-page RAND study that explain the bounds of the data the
 4
 5 authors considered—in particular, that they did not have some survey data from the U.S. military
 6
 7 and that the evidence from foreign militaries was based on a low number of openly serving
 8
 9 transgender people. Dkt. No. 69 at 35. However, the fact that there were some limits to the
 10
 11 authors’ data does not mean that the overall conclusions of the study—based on reams of other
 12
 13 evidence—are unsound. And although the government tries to quibble around the edges of the
 14
 15 military-commissioned RAND study, it fails to offer any *affirmative* evidence to support its
 16
 17 conclusion that transgender service members would affect unit cohesion. *See Doe I*, 2017 WL
 18
 19 4873042, at *29 (noting the “absence of any prior studies or evaluations supporting the
 20
 21 [government’s] proffered justifications”). Even in the realm of military policy, the President’s
 22
 23 decisions cannot be based on no evidence at all.

24
 25
 26
 27
 28 Tellingly, President Trump made the decision to ban transgender service members
 29
 30 without consulting the Pentagon or any relevant experts. *See* Dkt. No. 103 at 18 (noting that the
 31
 32 ban was announced “abruptly and without any evidence of considered reason or deliberation”);
 33
 34 *Doe I*, 2017 WL 4873042, at *30 (noting that the President acted “without any of the formality
 35
 36 or deliberative processes that generally accompany the development and announcement of major
 37
 38 policy changes that will gravely affect the lives of many Americans”). Defense Secretary Mattis
 39
 40 was on vacation and was given one day’s notice before the President announced the military’s
 41
 42 new policy via Twitter. *See* Julie Hirschfeld Davis & Helene Cooper, *supra*. Moreover, the
 43
 44 White House and Department of Defense lawyers who did have some knowledge of the
 45
 46 impending policy change reportedly warned the President of “the ramifications of the policy”
 47
 48 and “how military officials would respond.” Josh Dawsey, *John Kelly’s Big Challenge*:

1 *Controlling the Tweeter in Chief*, Politico (Aug. 4, 2017),

2
3 <https://www.politico.com/story/2017/08/04/trump-john-kelly-challenge-twitter-241343>.

4
5 In sum, President Trump’s ban “impos[es] a broad and undifferentiated disability on a
6 single named group,” *Romer*, 517 U.S. at 632—transgender service members—and no legitimate
7 government interests support that policy decision. The Due Process Clause of the Fifth
8 Amendment does not permit this sort of unsupported discrimination. The Constitution requires
9 the government to provide at least some reasonable “link between classification and objective” to
10 “give[] substance to the . . . Clause,” *id.*, and the government has failed to do that here. For that
11 reason, the ban cannot stand.
12
13
14
15
16
17
18
19
20

21 CONCLUSION

22 For the foregoing reasons, the plaintiffs’ motions for summary judgment should be
23 granted.
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51

DATED this 31st day of January, 2018.

Respectfully submitted,

Constitutional Accountability Center

By: s/ Elizabeth B. Wydra

By: s/ Brianne J. Gorod

By: s/ David H. Gans

By: s/ Ashwin Phatak

Elizabeth B. Wydra (*pro hac vice application pending)

Brianne J. Gorod (*pro hac vice application pending)

David H. Gans (*pro hac vice application pending)

Ashwin P. Phatak (*pro hac vice application pending; Not admitted in D.C.; supervised by principals of the firm)

1200 18th Street, N.W.

Suite 501

Washington, D.C. 20036

Telephone: 202.296.6889

Email: elizabeth@theusconstitution.org

brianne@theusconstitution.org

david@theusconstitution.org

ashwin@theusconstitution.org

Perkins Coie LLP

By: s/ Abha Khanna

By: s/ William B. Stafford

Abha Khanna, #42612

William B. Stafford #39849

Attorneys for Constitutional Accountability Center

Perkins Coie LLP

1201 Third Avenue, Suite 4900

Seattle, WA 98101-3099

Telephone: 206.359.8000

Email: AKhanna@perkinscoie.com

BStafford@perkinscoie.com

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on January 31, 2018, I electronically filed the foregoing BRIEF OF *AMICUS CURIAE* CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorneys of record.

DATED this 31st day of January, 2018

/s/ Erin J. Weinkauff

Erin J. Weinkauff
Legal Secretary

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.

Case No. 2:17-cv-01297-MJP

**AGREED MOTION OF LEGAL VOICE
AS AMICUS CURIAE FOR LEAVE TO
FILE AMICUS BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

**NOTED ON MOTION CALENDAR:
FEBRUARY 1, 2018**

Proposed amicus Legal Voice respectfully moves the Court for leave to file an amicus curiae brief in support of Plaintiffs' Motion for Summary Judgment (Dkt. No. 129). A copy of the brief is attached as Exhibit A to this motion. All parties consent to the filing of the amicus brief.

I. IDENTITY AND INTERESTS OF AMICUS CURIAE

Legal Voice, founded in 1978 as the Northwest Women's Law Center, is a regional non-profit public interest organization based in Seattle that works to advance the legal rights of women in the five Northwest states (Washington, Oregon, Idaho, Montana, and Alaska) through litigation, legislative advocacy, and education. Since its founding, Legal Voice has worked to eliminate all forms of sex discrimination and frequently appears as counsel and as *amicus curiae* in courts throughout the Northwest and the United States. Because discrimination based on

AGREED MOTION FOR LEAVE
TO FILE AMICUS BRIEF – 1
No. 2:17-cv-01297-MJP

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

sexual orientation or gender identity is at minimum a form of sex discrimination, Legal Voice has a long history of advocacy on behalf of lesbians, gay men, bisexuals, and transgender people. Legal Voice has substantial expertise in constitutional issues related to equal protection of the laws, including with respect to discrimination based on sex, sexual orientation, gender identity, and gender stereotypes. Legal Voice's expertise bears directly on the issues before the Court in this case. Legal Voice therefore requests that this Court grant its motion for leave to appear as amicus curiae and accept for filing its brief.

II. DISTRICT COURTS HAVE THE INHERENT AUTHORITY TO ACCEPT AMICUS BRIEFS

The Court has broad discretion to permit a non-party to participate in an action as amicus curiae. *See Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Connor*, 515 U.S. 472 (1995) ("The district court has broad discretion to appoint amici curiae."); *In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1249 n.34 (11th Cir. 2006) ("[D]istrict courts possess the inherent authority to appoint 'friends of the court' to assist in their proceedings."). "District courts may consider amicus briefs from non-parties 'concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has 'unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.'" *Skokomish Indian Tribe v. Goldmark*, No. C13-5071JLR, 2013 WL 5720053, at *1 (W.D. Wash. Oct. 21, 2013) (citation omitted). Participation as amicus curiae is particularly appropriate when courts consider issues of public interest. *See Liberty Res., Inc. v. Phil. Hous. Auth.*, 395 F. Supp. 2d 206, 209 (E.D. Pa. 2005) ("Courts have found the participation of an amicus especially proper . . . where an issue of general public interest is at stake."); *Russell v. Bd. of Plumbing Examiners of Cty. of Westchester*, 74 F. Supp. 2d 349, 351 (S.D.N.Y. 1999) ("The primary role of the *amicus* is to assist the Court in reaching the right decision in a case affected with the interest of the general public.").

III. THE PROPOSED BRIEF PROVIDES SUPPLEMENTAL ANALYSIS OF TRANSGENDER INDIVIDUALS' EQUAL PROTECTION RIGHTS

Plaintiffs challenge the constitutionality of the policy excluding openly transgender individuals from military service under the Fifth Amendment's Equal Protection Clause, the Due Process clause, and the First Amendment. This Court's order, which granted Plaintiffs' preliminary injunction, determined that the policy was subject to intermediate scrutiny because the policy distinguishes on the basis of transgender status. (Dkt. No. 103.) The attached amicus brief further explains why discrimination against transgender people is suspect, warranting strict scrutiny, and why discrimination against transgender individuals is independently sex-based discrimination requiring an "exceedingly persuasive justification" for the classification. *See United States v. Virginia*, 518 U.S. 515, 524 (1996). Legal Voice's advocacy and litigation experience regarding equal protection and sex discrimination issues offers a unique perspective that can aid this Court. *See Skokomish Indian Tribe*, 2013 WL 5720053, at *2. And the question of whether transgender individuals should be barred from military service solely based on their transgender status is a significant issue of general public interest. *See Liberty Res.*, 395 F. Supp. 2d at 209.

No local rules govern when an amicus curiae must file a motion for leave to file a proposed brief. As such, Legal Voice has adhered to the Federal Rules of Appellate Procedure in this case by filing its motion and proposed amicus brief no later than seven days after Plaintiffs filed their principal brief. *See Fed. R. App. 29(a)(6)*.

IV. CONCLUSION

Legal Voice respectfully requests that the Court grant this motion for leave to file the attached amicus curiae brief.

1 DATED: February 1, 2018

2 Respectfully submitted,

3 /s/ Amanda J. Beane

4 Amanda J. Beane, WSBA No. 33070
5 Lauren Watts Staniar, WSBA No. 48741
6 Cristina Sepe*
7 Perkins Coie LLP
8 1201 Third Avenue, Suite 4900
9 Seattle, WA 98101-3099
Telephone: 206.359.8000
abeane@perkinscoie.com
lstaniar@perkinscoie.com
csepe@perkinscoie.com

10 Sara L. Ainsworth, WSBA No. 26656
11 Legal Voice
12 907 Pine Street, Suite 500
13 Seattle, WA 98101-1818
Telephone: 206.682.9552
sainsworth@legalvoice.org

14 **Pro Hac Vice Forthcoming*

15 *Counsel for Amicus Curiae Legal Voice*

16
17
18
19
20
21
22
23
24
25
26
AGREED MOTION FOR LEAVE
TO FILE AMICUS BRIEF – 4
No. 2:17-cv-01297-MJP

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2018, I electronically filed the foregoing (1) Motion for Leave to File Amicus Brief (with the proposed Amicus Brief as an attached exhibit); and (2) Proposed Order Granting Leave to File Amicus Brief, with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all of the registered CM/ECF users for this case.

I hereby declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED this 1st day of February, 2018.

/s/ Lauren Watts Staniar
Lauren Watts Staniar, WSBA No. 48741

Exhibit A

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.

Case No. 2:17-cv-01297-MJP

**BRIEF OF AMICUS CURIAE LEGAL
VOICE IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

BRIEF OF AMICUS CURIAE LEGAL VOICE – 1
No. 2:17-cv-01297-MJP

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 In the summer of 2016, then-Secretary of Defense Ash Carter announced that the U.S.
 2 military would lift its ban on openly transgender individuals joining and serving in the military.
 3 Carter explained: “We’re talking about talented Americans who are serving with distinction or
 4 who want the opportunity to serve. We can’t allow barriers unrelated to a person’s qualifications
 5 prevent us from recruiting and retaining those who can best accomplish the mission.” Marina
 6 Koren, *The U.S. Military’s Welcome for Transgender Troops*, The Atlantic (June 30, 2016),
 7 <https://www.theatlantic.com/news/archive/2016/06/transgender-military/489584/>. A year later,
 8 the Trump Administration swiftly reversed course in a series of tweets (followed by a
 9 memorandum) and banned transgender people from military service solely based on their
 10 transgender status.

11 In granting Plaintiffs’ motion for a preliminary injunction, this Court recognized that the
 12 Transgender Military Ban is subject to heightened equal protection scrutiny because
 13 “transgender status [is] a quasi-suspect classification.” (Dkt. 103, at 15.) In considering the
 14 pending motion for summary judgment, amicus urge the Court to expand its analysis and hold
 15 that discrimination against transgender people meets the criteria of a “suspect” classification,
 16 which requires strict scrutiny. Although the Ban also fails under intermediate scrutiny because it
 17 discriminates based on sex, this Court should hold that attacks like this are the worst form of
 18 unconstitutional discrimination and subject such discrimination to the highest level of review.

19 **I. PRELIMINARY STATEMENT OF AMICUS CURIAE**

20 Legal Voice submits this brief as amicus curiae in support of Plaintiffs’ Motion for
 21 Summary Judgment. Legal Voice is a non-profit public interest organization based in Seattle that
 22 works to advance the legal rights of women through litigation, legislation, and education. Legal
 23 Voice strives to eliminate all forms of sex discrimination, and has substantial expertise in
 24 constitutional issues related to equal protection of the laws, including with respect to
 25 discrimination based on sex, sexual orientation, gender identity, and gender stereotypes.
 26

BRIEF OF AMICUS CURIAE LEGAL VOICE – 1
 No. 2:17-cv-01297-MJP

Perkins Coie LLP
 1201 Third Avenue, Suite 4900
 Seattle, WA 98101-3099
 Phone: 206.359.8000
 Fax: 206.359.9000

II. THE COURT SHOULD APPLY STRICT SCRUTINY TO THE TRANSGENDER MILITARY BAN BECAUSE DISCRIMINATION AGAINST PEOPLE WHO ARE TRANSGENDER IS A SUSPECT CLASSIFICATION

The Equal Protection Clause “commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quotation omitted). When a statute draws distinctions based on certain suspect classifications, such as race, and quasi-suspect classifications, such as gender, “the Court must apply a heightened degree of scrutiny.” *Doe 1 v. Trump*, Case No. 17-cv-1597 (CKK), 2017 WL 4873042, at *27 (D.D.C. Oct. 30, 2017).

The Supreme Court considers four factors to decide whether a classification is suspect or quasi-suspect: First, the Court considers whether the class has been historically “subjected to discrimination.” *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). Second, it considers whether the characteristic that defines the group “frequently bears [any] relation to [group members’] ability to perform or contribute to society.” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). Third, it considers whether the group is “politically powerless,” *Cleburne*, 473 U.S. at 445, most often by assessing legislative action on the groups’ behalf, *id.* at 443–45, or the groups’ representation in “institutions of self-governance,” *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014). Fourth, courts consider whether the class exhibits “obvious, immutable, or distinguishing characteristics that define them as a discrete group.” *Lyng*, 477 U.S. at 638. “[N]o one factor is dispositive.” *Pedersen v. OPM*, 881 F. Supp. 2d 294, 311 (D. Conn. 2012). Here, however, each factor militates in favor of recognizing transgender status as a suspect classification.

A. Transgender individuals have experienced a long history of discrimination.

“The hostility and discrimination that transgender individuals face in our society today is well-documented,” *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014), and includes horrifying levels of violence. Respondents to the 2015 Report of the United States Transgender

1 Survey “reported high levels of mistreatment, harassment, and violence in every aspect of life,”
 2 and that they were physically assaulted because of their identity. Sandy E. James, et al., *The*
 3 *Report of the 2015 U.S. Transgender Survey* 4, 197 (Dec. 2016) (hereinafter “2015 Transgender
 4 Survey Report”). Forty-eight percent “of all respondents in the sample reported being denied
 5 equal treatment, verbally harassed, and/or physically attacked in the past year because of being
 6 transgender,” and “[n]early half (47%) of respondents have been sexually assaulted at some point
 7 in their lifetime.” *Id.* at 198. Since 2013, “[a]t least 74 transgender people were victims of fatal
 8 violence,” and “it is generally estimated that transgender women face 4.3 times the risk of
 9 becoming homicide victims than the general population.” Human Rights Campaign & Trans
 10 People of Color Coalition, *A Matter of Life & Death: Fatal Violence Against Transgender*
 11 *People in American* 2016 30 (2016) (emphasis in original).

12 This discrimination impacts transgender people at every turn—at home, in school, at the
 13 work place, and when seeking housing or healthcare. One in ten respondents to the 2015
 14 Transgender Survey who were out to their immediate family “reported that an immediate family
 15 member was violent towards them because they were transgender,” and 15% “ran away from
 16 home and/or were kicked out of the house because they were transgender.” 2015 Transgender
 17 Survey Report at 65. Before the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct.
 18 2584 (2015), courts routinely voided the marriages of transgender people based on their
 19 transgender status. *See, e.g., In re Estate of Gardiner*, 42 P.3d 120, 137 (Kan. 2002) (voiding a
 20 marriage between a transgender woman and her husband). And courts have publicly questioned
 21 transgender people’s ability to parent children, in some cases stripping them of their parental
 22 rights. *See, e.g., M.B. v. D.W.*, 236 S.W.3d 31, 36 (Ky. Ct. App. 2007) (terminating the parental
 23 rights of a transgender parent based on alleged harm to children caused by failing to “adequately
 24 prepare” them for parent’s gender transition).

25 At school, “[m]ore than three quarters (77%) of respondents who were out or perceived
 26 as transgender in K–12 had one or more negative experiences, such as being verbally harassed,

1 prohibited from dressing according to their gender identity, or physically or sexually assaulted.”
 2 2015 Transgender Survey Report at 131. At work, “[t]hirty percent (30%) of respondents who
 3 had a job in the past year reported being fired, denied a promotion, or experiencing some other
 4 form of mistreatment in the workplace related to their gender identity or expression, such as
 5 being harassed or attacked.” *Id.* at 148. In housing and healthcare, “one in eight [respondents] . . .
 6 experienced homelessness in the past year because of being transgender,” *id.* at 176, “[n]early
 7 one-quarter (23%) of respondents experienced some form of housing discrimination in the past
 8 year,” *id.*, and one-third of respondents “who had seen a health care provider in the past year
 9 reported having at least one negative experience relating to being transgender,” *id.* at 93.

10 Courts consistently recognize that transgender individuals experience pervasive
 11 discrimination. In *Adkins v. City of New York*, 143 F. Supp. 3d 134 (S.D.N.Y. 2015), the Court
 12 recognized that “transgender people report high rates of discrimination in education,
 13 employment, housing, and access to healthcare” before concluding that transgender people are a
 14 quasi-suspect class. *Id.* at 139, 140; *see also Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 n.8
 15 (N.D. Cal. 2015) (finding that transgender people “have experienced even greater levels of
 16 societal discrimination and marginalization” than gay and lesbian people). According to the
 17 Seventh Circuit, “[t]here is no denying that transgender individuals face discrimination,
 18 harassment, and violence because of their gender identity.” *Whitaker ex rel. Whitaker v. Kenosha*
 19 *Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (school district’s
 20 requirement that transgender student use bathroom according to his birth certificate violated Title
 21 IX); *see also Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp.
 22 3d 850, 857 (S.D. Ohio 2016) (recounting the bullying a fourth grade transgender girl suffered at
 23 the hands of teachers and other students). In *Brocksmith*, an assault case where the victim was
 24 transgender, the Court discussed the victim’s disincentive to contact the police after the assault
 25 “for fear of discrimination and exposure” based on her transgender status. 99 A.3d at 692; *see*
 26

1 also *id.* at 698 (recognizing the “jury’s common-sense knowledge that transgender individuals
2 face hostility and discrimination in our society.”).

3 **B. There is no relationship between transgender status and the ability to**
4 **perform in society.**

5 “[T]here is obviously no relationship between transgender status and the ability to
6 contribute to society.” *Highland*, 208 F. Supp. 3d at 874; *see also Norsworthy*, 87 F. Supp. 3d at
7 1119 n.8 (“[Transgender] identity is . . . irrelevant to [a person’s] ability to contribute to
8 society.”); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017)
9 (“Plaintiffs [transgender students] are in all respects productive, engaged, contributing members
10 of the student body at the High School.”). As courts frequently recognize, no “data or argument
11 suggest[s] that a transgender person, simply by virtue of transgender status, is any less
12 productive than any other member of society.” *Adkins*, 143 F. Supp. 3d at 139. Because being
13 transgender is entirely irrelevant to one’s ability to contribute to society, laws that classify based
14 on transgender status “are deemed to reflect prejudice and antipathy—a view that those in the
15 burdened class are not as worthy or deserving of others,” and should be subject to strict scrutiny
16 review. *See Cleburne*, 473 U.S. at 440 (explaining why classifications based on race, alienage,
17 and national origin are subject to strict scrutiny).

18 **C. The transgender community is a politically powerless minority.**

19 The question for purposes of the equal protection analysis is not whether transgender
20 individuals have achieved political success; rather, “[t]he question is whether they have the
21 strength to politically protect themselves from wrongful discrimination.” *Windsor v. United*
22 *States*, 699 F.3d 169, 184 (2d Cir. 2012), *aff’d*, 570 U.S. 744 (2013). They do not. Fewer than
23 half of the fifty states have laws that explicitly prohibit discrimination against transgender people
24 even when, as explained, that discrimination is rampant. *See Am. Civil Liberties Union,*
25 *Transgender People & the Law* (last visited Jan. 31, 2018), [https://www.aclu.org/know-your-](https://www.aclu.org/know-your-rights/transgender-people-and-law)
26 [rights/transgender-people-and-law](https://www.aclu.org/know-your-rights/transgender-people-and-law). Federal law affords spotty explicit protections for

transgender individuals, and recent actions by the Trump Administration call those limited protections into question. *See, e.g.*, Press Release, U.S. Dep’t of Health & Human Servs., *HHS Announces New Conscience & Religious Freedom Division* (Jan. 18, 2018) (announcing division that will permit discrimination against LGBT individuals by healthcare providers); Letter from Sandra Battle, Acting Assistant Secretary for Civil Rights, U.S. Dep’t of Educ., and T.E. Wheeler, II, Acting Assistant Attorney General for Civil Rights, U.S. Dep’t of Educ., to Colleague (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> (withdrawing Obama-era guidance providing for protection under Title IX for transgender students in public schools); *see also* Lena H. Sun & Juliet Eilperin, *CDC gets list of forbidden words: Fetus, transgender, diversity*, Wash. Post (Dec. 5, 2017), https://www.washingtonpost.com/national/health-science/cdc-gets-list-of-forbidden-words-fetus-transgender-diversity/2017/12/15/f503837a-e1cf-11e7-89e8-edec16379010_story.html?utm_term=.c37080b54956 (reporting that the Trump administration prohibits officials at the CDC from using word ‘transgender’); National Ctr. for Transgender Equality, *The Discrimination Administration* (last accessed Jan. 31, 2018), <https://transequality.org/the-discrimination-administration> (documenting Trump Administration’s record of action against transgender people). Across the country, bills have been introduced in state legislatures seeking to ban transgender people from using the bathroom that is consistent with their gender identity. National Conference of State Legislatures, *“Bathroom Bill” Legislative Tracking* (July 28, 2017), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx> (noting that seven state legislatures will consider “bathroom bills” in the 2018 session). “The efforts of states to pass legislation requiring individuals to use sex-segregated bathrooms that correspond with their birth sex are but one example of the relative political powerlessness of this group.” *Highland*, 208 F. Supp. 3d at 874.

The group’s political powerlessness is also reflected in its underrepresentation in “institutions of self-governance.” *SmithKline*, 740 F.3d at 484. There are no openly “transgender

BRIEF OF AMICUS CURIAE LEGAL VOICE – 6
No. 2:17-cv-01297-MJP

members of the United States Congress or the federal judiciary.” *Adkins*, 143 F. Supp. 3d at 140; see also Courtney A. Powers, *Finding LGBT a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court’s Application of Heightened Scrutiny*, 17 Duke J. Gender L. & Pol’y 385, 391–93 (2010) (LGBT individuals are politically powerless in part because of their underrepresentation in federal political bodies). Only one out of more than 7,000 state legislators is openly transgender, and there are fewer than ten transgender individuals openly serving in the many thousands of local elected positions around the country. Marwa Eltagouri, *Transgender people have been elected before. But they can finally let the voters know.*, Wash. Post. (Nov. 9, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/11/08/transgender-people-have-been-elected-before-but-they-can-finally-let-the-voters-know/?utm_term=.16fb12d31916; see generally *Windsor*, 699 F.3d at 184 (minor political gain does not cure history of underrepresentation).

D. Being transgender is a core part of one’s identity.

Immutability—in the sense of a characteristic unable to be hidden or changed—is not a necessary element of the suspect class analysis. See *Cleburne*, 473 U.S. at 442 n.10 (“[T]here’s not much left of the immutability theory, is there?”). “Classifications based on alienage, illegitimacy, and national origin are all subject to heightened scrutiny, even though those characteristics do not declare themselves, and often may be disclosed or suppressed as a matter of preference.” *Windsor*, 699 F.3d at 183 (citations omitted). It is therefore “clear that by ‘immutability’ the Court has never meant strict immutability At a minimum, then, the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity.” *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring). Transgender people easily meet this standard. Transgender people’s gender identity is “inherent in who they are as people.” *Evancho*, 237 F. Supp. 3d at 288. “A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”

1 *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011). Transgender people thus “have
 2 ‘immutable [and] distinguishing characteristics that define them as a discrete group.’” *Highland*,
 3 208 F. Supp. 3d at 874 (alteration in original).

4 Although the Ninth Circuit has not considered whether being transgender is an immutable
 5 characteristic in the context of an equal protection claim, it has held, in the immigration context,
 6 that gender identity is immutable. See *Hernandez-Montiel v. Immigration & Naturalization*
 7 *Serv.*, 225 F.3d 1084, 1087 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*,
 8 409 F.3d 1177 (9th Cir. 2005) (en banc). The asylum petitioner in *Hernandez-Montiel* was a
 9 transgender woman from Mexico. *Id.* at 1087. The Board of Immigration Appeals (“BIA”)
 10 denied her asylum claim because she “failed to show that ‘[her] decision to dress as female was
 11 an immutable characteristic,’” *id.* at 1090, and, as a consequence, that the persecution she
 12 suffered was on account of her membership in a “particular social group,” 8 U.S.C.
 13 § 1101(a)(42) (defining refugee); *Henrique-Rivas v. Holder*, 707 F.3d 1081, 1084 (9th Cir. 2013)
 14 (en banc) (defining particular social group). The Ninth Circuit reversed. In granting petitioner’s
 15 asylum claim, it held that “[s]exual orientation and sexual identity”—including one’s identity as
 16 transgender—“are immutable; they are so fundamental to one’s identity that a person should not
 17 be required to abandon them.” 225 F.3d at 1093. Whether as part of an asylum claim or an equal
 18 protection case, one’s gender identity, is “inherent to one’s very identity as a person,” *id.*, and is
 19 thus “immutable,” *Watkins*, 875 F.2d at 726.

20 **E. Other courts’ reasoning supports a suspect class determination.**

21 Applying these four factors, courts around the country have held that at a minimum,
 22 transgender people meet the criteria for a quasi-suspect classification requiring heightened
 23 scrutiny. See *Doe 1*, 2017 WL 4873042, at *27–28 (in a parallel case challenging the
 24 Transgender Military Ban, holding that transgender people appear “at least” to satisfy the criteria
 25 of a quasi-suspect classification); *Evancho*, 237 F. Supp. 3d at 288 (against the backdrop set
 26 forth in *Cleburne*, holding that “an intermediate standard of Equal Protection review applies in

1 this case” involving a school district’s classification of transgender students); *Highland*, 208 F.
 2 Supp. 3d at 873 (“The Court agrees with the analysis of *Adkins* and largely incorporates it
 3 here.”); *Adkins*, 143 F. Supp. 3d at 140 (“[T]he Court concludes that transgender people are a
 4 quasi-suspect class.”). And in the context of discrimination based on sexual orientation, the
 5 Ninth Circuit has held that the Supreme Court’s decision *United States v. Windsor*, 133 S. Ct.
 6 2675 (2013), “requires that heightened scrutiny be applied to equal protection claims involving
 7 sexual orientation.” *SmithKline*, 740 F.3d at 481; *see also id.* at 484 (“[T]here can no longer be
 8 any question that gays and lesbians are no longer a ‘group or class of individuals normally
 9 subject to ‘rational basis review.’”).

10 The analysis in these cases equally supports a determination that transgender status meets
 11 the criteria for a suspect classification, which triggers strict scrutiny. The courts considering
 12 whether laws that classify transgender people warrant heightened scrutiny reviewed the four
 13 factors that apply to both suspect and quasi-suspect class analysis and found that all four factors
 14 were satisfied. Although none of the courts reached the question of whether classifications based
 15 on transgender status are suspect (rather than quasi-suspect), they plainly could have done so
 16 based on their analysis. In particular, because whether someone is transgender is “so seldom
 17 relevant to the achievement of any legitimate state interest that laws grounded in [this]
 18 consideration are deemed to reflect prejudice and antipathy,” application of strict scrutiny rather
 19 than intermediate scrutiny is appropriate. *See Cleburne*, 473 U.S. at 440; *see also* Erwin
 20 Chemerinsky, *Constitutional Law Principles & Policies* 688–89 (4th ed. 2011) (explaining the
 21 difference between suspect and quasi-suspect classifications). As a result, amicus urge the Court
 22 to reach the issue and to hold that discrimination based on transgender status meets the criteria
 23 for a suspect classification and requires strict scrutiny. This Court should not tolerate “the
 24 imposition of a second-class status on [transgender people]” stemming from the government’s
 25 “identification of such a class by the law for a separate and lesser public status that ‘makes them
 26 unequal.’” *SmithKline*, 740 F.3d at 482 (quoting *Windsor*, 133 S. Ct. at 2694)).

BRIEF OF AMICUS CURIAE LEGAL VOICE – 9
 No. 2:17-cv-01297-MJP

Perkins Coie LLP
 1201 Third Avenue, Suite 4900
 Seattle, WA 98101-3099
 Phone: 206.359.8000
 Fax: 206.359.9000

III. THE BAN ALSO DISCRIMINATES BASED ON SEX

Independently, the Court may apply heightened scrutiny to the Ban because it discriminates based on sex in two ways: the Ban is premised on perceived nonconformity to gender stereotypes, and it treats individuals differently based on their gender identity and/or transition.

First, the Ban targets transgender service members and aspiring service members because they do not conform to the gender stereotypes associated with their assigned sex at birth. This is sex discrimination: there is “a congruence” between discrimination against transgender individuals and “discrimination on the basis of gender-based behavioral norms.” *Glenn*, 663 F.3d at 1316. This is because “[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.” *Id.*; see also *Whitaker*, 858 F.3d at 1048 (“By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.”); *Doe 1*, 2017 WL 4873042, at *28 (“The defining characteristic of a transgender individual is that their inward identity, behavior, and possibly their physical characteristics, do not conform to stereotypes of how an individual of their assigned sex should feel, act and look.”).

The Supreme Court, in holding that Title VII barred discrimination based on gender stereotyping, explained that Title VII prohibits both discrimination based on the fact that the plaintiff was a woman and discrimination based on the fact that she did not conform to socially-constructed gender expectations. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”) (plurality); *id.* at 258–61 (White, J., concurring); *id.* at 272–73 (O’Connor, J., concurring). In *Price Waterhouse*, the Court considered a senior manager’s claim that she was denied partnership at a firm based on negative reactions to her personality because she was a woman. *Id.* at 235. Some partners had described her as “macho,” that she “overcompensated for being a woman,” and suggested she could improve her

chances for partnership if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.* The Court made clear that discrimination based on a person’s failure to conform to socially prescribed gender stereotypes is sex-based discrimination. *See id.* at 250–51.

Numerous appellate courts, applying *Price Waterhouse*, have held that discrimination against transgender individuals based on a perceived failure to conform to gender stereotypes is unlawful sex discrimination under various statutes and the Equal Protection Clause. *See, e.g., Glenn*, 663 F.3d at 1320 (“[A] government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.”); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004) (transgender plaintiff sufficiently pleaded Title VII and Equal Protections claims premised on the “failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance”); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2004) (“[d]iscrimination because one fails to act in the way expected of a man or a woman” is barred by Title VII, and encompasses instances in which “the perpetrator’s actions stem from the fact that he believed that the victim was a man who ‘failed to act like’ one,” and applying this reasoning to the Gender Motivated Violence Act); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000) (plaintiff adequately stated an Equal Credit Opportunity Act claim where he alleged that a loan officer turned him away because his attire “did not accord with his male gender”). District courts within this circuit are in accord. *See, e.g., Norsworthy*, 87 F. Supp. 3d at 1119; *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1005 (D. Nev. 2016).

Likewise, the government may not exclude transgender service members and aspiring service members from serving because “of [their] perceived gender-nonconformity.” *Glenn*, 663 F.3d at 1319. Heightened scrutiny under the Equal Protection Clause should be applied to the Ban because discrimination based on gender stereotypes is a form of sex-based discrimination.

BRIEF OF AMICUS CURIAE LEGAL VOICE – 11
No. 2:17-cv-01297-MJP

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Second, the Ban discriminates against individuals based on gender identity and gender transition, which are per se forms of sex discrimination. As the Ninth Circuit explained in *Schwenk*, gender refers to “an individual’s sexual identity” or “socially-constructed characteristics” and discrimination based on sex encompasses both sex and gender. *Schwenk*, 204 F.3d at 1201–02. Discrimination against a transgender person—whose gender identity does not match the sex assigned at birth—is sex discrimination. See *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 525–26 (D. Conn. 2016); *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012) (explaining that discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex). It also follows that discrimination against an individual who intends to or has transitioned “legally, culturally, and physically” from the sex that person was assigned at birth is also necessarily based on sex. See *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008) (analogizing to a religious convert, explaining that an employer who “harbors no bias toward either Christians or Jews but only ‘converts’” still discriminates based on religion).

The Ban discriminates based on sex—triggering heightened review—because it discriminates against transgender individuals based on (1) their perceived failure to conform to gender stereotypes, and (2) their gender identity and gender transition, which necessarily are components of sex.

IV. CONCLUSION

The Ban discriminates against service members and aspiring service members solely because they are transgender. Because discrimination against transgender people meets the criteria for a suspect classification, it should be subject to strict scrutiny. Independently, the Ban plainly constitutes sex discrimination and is subject to intermediate scrutiny for that reason. At a time when transgender people are facing discrimination at the highest level of government, amicus urge the Court to hold that the Ban is subject to strict scrutiny and grant summary judgment in favor of Plaintiffs.

BRIEF OF AMICUS CURIAE LEGAL VOICE – 12
No. 2:17-cv-01297-MJP

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

DATED: February 1, 2018

Respectfully submitted,

/s/ Amanda J. Beane

Amanda J. Beane, WSBA No. 33070
Lauren Watts Staniar, WSBA No. 48741
Cristina Sepe*
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
abeane@perkinscoie.com
lstaniar@perkinscoie.com
csepe@perkinscoie.com

Sara L. Ainsworth, WSBA No. 26656
Legal Voice
907 Pine Street, Suite 500
Seattle, WA 98101-1818
Telephone: 206.682.9552
sainsworth@legalvoice.org

**Pro Hac Vice Forthcoming*

Counsel for Amicus Curiae Legal Voice

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2018, I electronically filed the foregoing (1) Motion for Leave to File Amicus Brief (with the proposed Amicus Brief as an attached exhibit); and (2) Proposed Order Granting Leave to File Amicus Brief, with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all of the registered CM/ECF users for this case.

I hereby declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED this 1st day of February, 2018.

/s/ Lauren Watts Staniar
Lauren Watts Staniar, WSBA No. 48741

Exhibit A

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al,

Plaintiffs,

v.

DONALD TRUMP, et al,

Defendants.

STATE OF WASHINGTON,

Intervenor-Plaintiff,

v.

DONALD TRUMP, et al,

Intervenor-Defendants.

Case No: 2:17-cv-1297-MJP

BRIEF OF *AMICI* STATES
MASSACHUSETTS, CALIFORNIA,
CONNECTICUT, DELAWARE,
HAWAII, ILLINOIS, IOWA,
MARYLAND, NEW JERSEY,
NEW MEXICO, NEW YORK,
OREGON, PENNSYLVANIA,
RHODE ISLAND, VERMONT,
AND THE DISTRICT OF
COLUMBIA IN SUPPORT OF
PLAINTIFFS' AND INTERVENOR-
PLAINTIFF'S MOTIONS FOR
SUMMARY JUDGMENT

Note on Motion Calendar:
February 16, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI* STATES 1

ARGUMENT 2

 I. A BAN ON TRANSGENDER PEOPLE OPENLY SERVING IN THE
 MILITARY IS IRRATIONAL AND UNCONSTITUTIONAL..... 2

 A. Transgender People Are a Vital Part of the *Amici* States’ Communities,
 Yet Remain a Historically Marginalized Group. 2

 B. The Military Lifted Historical Prohibitions on Service by Transgender
 Individuals After a Lengthy, Deliberative Process. 4

 C. President Trump’s Abrupt Reversal of the Military’s Open Service Policy
 Is Unsupported by Any Defensible Rationale..... 7

 II. REINSTATING A BAN ON MILITARY SERVICE BY TRANSGENDER
 PEOPLE WILL HARM THE *AMICI* STATES AND OUR RESIDENTS..... 11

 A. The Ban Will Entangle the *Amici* States in Invidious Discrimination
 Harmful to Our National Guard. 11

 B. The Ban Will Entangle the *Amici* States in Harmful Discrimination
 Limiting Opportunities at Our Public Institutions of Higher Education. 14

 C. The Ban Will Harm the *Amici* States’ Veterans, Active Service Members,
 and Those Who Wish to Serve. 16

 D. The Ban Will Harm Our Transgender Communities More Broadly..... 19

CONCLUSION..... 20

TABLE OF AUTHORITIES

Cases

<i>Adkins v. City of New York</i> , 143 F. Supp. 3d 134 (S.D.N.Y. 2015)	2-3
<i>Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez</i> , 458 U.S. 592 (1982).....	20
<i>Ass’n of Civilian Technicians, Inc. v. United States</i> , 603 F.3d 989 (D.C. Cir. 2010).....	11-12, 13
<i>Doe 1 v. Trump</i> , No. 17-1597, 2017 WL 4873042 (D.D.C. Oct. 30, 2017).....	11
<i>Log Cabin Republicans v. United States</i> , No. CV 04-08425-VAP, 2010 U.S. Dist. LEXIS 93612 (C.D. Cal. Sept. 9, 2010)	17
<i>Romer v. Evans</i> , 517 U.S. 620 (1996)	11
<i>Stockman v. Trump</i> , No. 5:17-cv-1799 (C.D. Cal. Dec. 22, 2017).....	11
<i>Stone v. Trump</i> , No. 1:17-cv-2459, 2017 WL 5589122 (D. Md. Nov. 21, 2017)	11

Federal Statutes

10 U.S.C. § 983.....	15
10 U.S.C. § 2031(a)(2).....	15
10 U.S.C. § 2103.....	14
32 U.S.C. § 106.....	13
32 U.S.C. § 107.....	13
32 U.S.C. § 108.....	13

State Statutes

Cal. Civil Code § 51(b), (e)(5).....	3
Cal. Gov. Code § 12940(a)	3
Cal. Gov. Code § 12955	3
Cal Mil. & Vet. Code § 146(a)	12
Haw. Rev. Stat. § 368-1	3
Haw. Rev. Stat. § 378-2.....	3

1	Haw. Rev. Stat. § 489-3.....	3
2	Haw. Rev. Stat. § 515-16.....	3
3	Mass. Gen. Laws ch. 33, § 41(a)	12
4	Mass. Gen. Laws ch. 151B, § 4	3
5	Mass. Gen. Laws ch. 272, § 92A.....	3
6	Mass. Gen. Laws ch. 272, § 98.....	3
7	N.M. Stat. Ann. § 28-1-7	3
8	N.Y. Mil. Law § 6.....	12
9	N.Y. Comp. Codes R. & Regs. tit. 9, § 466.13.....	3
10	Vt. Stat. Ann. tit. 9 §§ 4500 et seq.....	3
11	Vt. Stat. Ann. tit. 6 § 1-11(26)(B)(iii).....	3
12	Vt. Stat. Ann. tit. 21 § 5-495.....	3
13	Periodicals and Professional Articles	
14	Aaron Belkin, <i>Caring for Our Transgender Troops – The Negligible Cost of</i> <i>Transition-Related Care</i> , 373:12 New Eng. J. Med. 1089 (Sept. 17, 2015)	8
15	Agnes Gereben Schaefer et al., <i>Assessing the Implications of Allowing</i> <i>Transgender Personnel to Serve Openly</i> , RAND Corp. (2016), available at https://www.rand.org/pubs/research_reports/RR1530.html	5, 9, 8, 10
16	Allison Ross, Note, <i>The Invisible Army: Why the Military</i> <i>Needs to Rescind Its Ban on Transgender Service Members</i> , 23 S. Cal. Interdisc. L. J. 185 (2014)	4, 8, 9, 10, 18, 19
17	Am. Psychol. Ass’n, <i>Answers to Your Questions about Transgender People,</i> <i>Gender Identity, and Gender Expression</i> (2014 update) http://www.apa.org/topics/lgbt/transgender.pdf	2, 3
18	Am. Psychol. Ass’n, <i>Guidelines for Psychological Practice with Transgender</i> <i>and Gender Nonconforming People</i> , 70 Am. Psychol. Ass’n 832 (2015).....	2, 3
19	Andrew R. Flores et al., <i>How Many Adults Identify as Transgender</i> <i>in the United States?</i> , The Williams Inst. (June 2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many- Adults-Identify-as-Transgender-in-the-United-States.pdf	2
20		
21		
22		
23		
24		
25		
26		

1	Bonnie Moradi, <i>Sexual Orientation Disclosure, Concealment, Harassment,</i>	
2	<i>and Military Cohesion: Perceptions of LGBT Military Veterans,</i>	
	21 Mil. Psychol. 513 (2009)	18
3	Gary J. Gates & Jody L. Herman, <i>Transgender Military Service in the</i>	
4	<i>United States</i> , The Williams Inst. (May 2014),	
	https://williamsinstitute.law.ucla.edu/wp-content/uploads/	
5	<i>Transgender-Military-Service-May-2014.pdf</i>	2, 13
6	Joycelyn Elders & Alan M. Steinman, <i>Report of the Transgender</i>	
7	<i>Military Service Commission</i> , The Palm Ctr. (March 2014),	
	http://archive.palmcenter.org/files/Transgender%20Military	
8	<i>%20Service%20Report.pdf</i>	4, 18
9	Matthew F. Kerrigan, <i>Transgender Discrimination in the Military:</i>	
	<i>The New Don't Ask, Don't Tell</i> , 18 Psychol. Pub. Pol'y & L. 500 (2012).....	4, 18
10	Sandy E. James et al., <i>The Report of the 2015 U.S. Transgender Survey,</i>	
	Nat'l Ctr. for Transgender Equality (Dec. 2016),	
	https://www.transequality.org/sites/default/files/docs/	
11	<i>USTS-Full-Report-FINAL.PDF</i>	2-3, 3n, 4n
12	Walter O. Bockting et al., <i>Stigma, Mental Health, and Resilience in an</i>	
13	<i>Online Sample of the US Transgender Population,</i>	
	103(5) Am. J. Public Health 943 (2013).....	3
14	William V. Padula et al., <i>Societal Implications of Health Ins. Coverage</i>	
15	<i>for Medically Necessary Services in the U.S. Transgender Population:</i>	
	<i>A Cost-Effectiveness Analysis</i> , Journal of General Internal Medicine	
16	(April 16, 2016), available at https://www.ncbi.nlm.nih.gov/pubmed/26481647	8
17	News, Press Releases, and Other Authorities	
18	Amanda Erickson, <i>Trump Said Transgender Troops Cause 'Disruption.'</i>	
	<i>These 18 Militaries Show Otherwise</i> , Wash. Post (July 26, 2017)	
	https://www.washingtonpost.com/news/worldviews/wp/2017/07/26/trump-said-	
19	<i>transgender-troops-cause-disruption-these-18-militaries-show-</i>	
20	<i>otherwise/?utm_term=.a04643d1b8b8</i>	9
21	Barbara Starr et al., <i>US Joint Chiefs blindsided by Trump's transgender ban,</i>	
	CNN (July 27, 2017), http://www.cnn.com/2017/07/27/politics/trump-military-	
22	<i>transgender-ban-joint-chiefs/index.html</i>	7
23	Cal. Dep't of Ins., <i>Economic Impact Assessment of Gender Nondiscrimination in</i>	
	<i>Health Insurance</i> 1–2, Reg. File No. REG-2011-00023 (Apr. 13, 2012),	
	available at http://transgenderlawcenter.org/wp-content/uploads	
24	<i>/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-</i>	
25	<i>Insurance.pdf</i>	9

1	<i>Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity</i> , Human Rights Campaign (last updated Jan. 28, 2017),	
2	https://www.hrc.org/resources/cities-and-counties-with-	
3	non-discrimination-ordinances-that-include-gender	3
4	Cornelius L. Bynum, <i>How a Stroke of the Pen Changed the Army Forever</i> ,	
5	Wash. Post (July 26, 2017), https://www.washingtonpost.com/news/	
6	made-by-history/wp/2017/07/26/how-a-stroke-of-the-pen-	
7	changed-the-army-forever/	19
8	Directive-Type Memorandum (DTM) 16-005, Military Service of Transgender	
9	Service Members, United States Secretary of Defense (June 30, 2016),	
10	<i>available at</i> https://www.defense.gov/Portals/1/features/2016/	
11	0616_policy/DTM-16-005.pdf	6
12	General John R. Allen et al., <i>Statement of Fifty-Six Retired Generals and</i>	
13	<i>Admirals Warn That President Trump's Anti-Transgender Tweets,</i>	
14	<i>If Implemented, Would Degrade Military Readiness</i> , The Palm Ctr.	
15	(August 1, 2017), http://www.palmcenter.org/fifty-six-retired-	
16	generals-admirals-warn-president-trumps-anti-transgender-tweets-	
17	implemented-degrade-military-readiness	6-7, 9, 14
18	Katie Keith, <i>15 States and DC Now Prohibit Transgender Insurance</i>	
19	<i>Exclusions</i> , CHIRblog (Mar. 30, 2016), http://chirblog.org/	
20	15-states-and-dc-now-prohibit-transgender-insurance-exclusions/	8
21	Major General Timothy J. Lowenberg, <i>The Role of the National Guard</i>	
22	<i>in National Defense and Homeland Security</i> , The National Guard	
23	Ass'n of the United States (last visited Jan. 31, 2018),	
24	https://www.ngaus.org/sites/default/files/pdf/primer%20fin.pdf	12
25	Maritime Administration, United States Department of Transportation	
26	(last visited Jan. 31, 2018), https://www.marad.dot.gov/education/	
	maritime-academies/	15-16
	Memorandum from Attorney General to United States Attorneys Heads of	
	Department Components (Oct. 4, 2017), <i>available at</i> https://thinkprogress.org/	
	wp-content/uploads/2017/10/20171005-doj-memo-title-vii.pdf	20
	<i>New York National Guard Economic Impact 2015</i> , New York State	
	Division of Military and Naval Affairs (Jan. 15, 2016), <i>available at</i>	
	https://dmna.ny.gov/NYNG_Economic_Impact.pdf	12
	<i>NGAUS Fact Sheet: Understanding the Guard's Duty Status</i> ,	
	The National Guard Ass'n of the United States (last visited Jan. 31, 2018),	
	https://www.ngaus.org/sites/default/files/Guard%20Statues.pdf	12
	Presidential Memorandum, 82 FR 41319 (Aug. 25, 2017), <i>available at</i>	
	https://www.whitehouse.gov/the-press-office/2017/08/25/	
	presidential-memorandum-secretary-defense-and-secretary-homeland.	7

1	<i>Safe Zone Program</i> , California Maritime Academy (last visited Jan. 31, 2018), https://www.csum.edu/web/diversity/home/safe-zone-program	10
2		
3	Secretary Ashton Carter, United States Department of Defense, Remarks on Ending the Ban on Transgender Service in the U.S. Military (June 30, 2016), <i>available at</i> https://www.defense.gov/News/Speeches/Speech-View/Article/821833/ remarks-on-ending-the-ban-on-transgender-service-in-the-us-military/	5
4		
5	Secretary of Defense, Military Service by Transgender Individuals – Interim Guidance (Sept. 14, 2017), <i>available at</i> https://www.defense.gov/Portals/1/Documents/PDFs/ Military-Service-By-Transgender-Individuals-Interim-Guidance.pdf	7
6		
7	Statement by Secretary of Defense Ashton Carter on DOD Transgender Policy, Release No. NR 272-15 (July 13, 2015) <i>available at</i> https://www.defense.gov/News/News-Releases/News-Release-View/ Article/612778/	4, 5, 10
8		
9	<i>Statement of Inclusion</i> , University of Massachusetts Lowell (last visited Jan. 31, 2018), https://www.uml.edu/docs/Inclusion%20 Statement_tcm18-167589.pdf.....	15
10		
11	<i>Strategic Midshipman Program</i> , Massachusetts Maritime Academy (last visited Jan. 31, 2018), https://www.maritime.edu/strategic- sealift-midshipman-program.....	16
12		
13	Tech. Sgt. Erich B. Smith et al., <i>Guard Members Ready For New</i> <i>DOD Transgender Policy</i> , National Guard Bureau (June 15, 2017), http://www.nationalguard.mil/News/Article/1215104/guard-members- ready-for-new-dod-transgender-policy/	13
14		
15	<i>Trans Inclusion Policy</i> , Massachusetts Maritime Academy (last visited Jan. 31, 2018), https://www.maritime.edu/trans-inclusion-policy	10
16		
17	<i>Transgender Service in the U.S. Military: An Implementation Handbook</i> , United States Dep’t of Defense (Sept. 30, 2016), https://www.defense.gov/Portals/1/features/2016/0616_policy/ DoDTGHandbook_093016.pdf	6
18		
19		
20		
21		
22		
23		
24		
25		
26		

INTEREST OF THE AMICI STATES

The Commonwealth of Massachusetts, with California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and the District of Columbia¹ (the “*Amici States*”), respectfully submit this *amicus curiae* brief in support of Plaintiffs’ Motion for Summary Judgment (ECF No. 129) and Intervenor-Plaintiff State of Washington’s Motion for Summary Judgment (ECF No. 150).

The *Amici States* share a strong interest in the readiness and effectiveness of our national defense, including an interest in ensuring that our Armed Forces and related institutions recruit, train, retain, and promote qualified service members. The *Amici States* also strongly support the rights of transgender people to live with dignity, to be free from discrimination, and to participate fully and equally in all aspects of civic life. These interests are all best served by allowing transgender people to serve openly in the military.

Many of the *Amici States* have enacted and enforce explicit civil rights protections for transgender people in areas such as employment, housing, health care, education, and public accommodations. We also command National Guard units, support Reserve Officer Training Corps programs, and run maritime academies that embrace principles of nondiscrimination and equality. Our collective experience demonstrates that the full inclusion of transgender people strengthens our communities, our state and federal institutions, and our nation as a whole. Discriminatory prohibitions on participation in civic life, on the other hand, impose significant harms on the *Amici States* and our residents. The *Amici States* therefore have a strong interest in ensuring that our Armed Forces move forward, not backward, and continue to allow transgender people to serve openly in all branches.

For these reasons, the *Amici States* urge the Court to find that the Trump Administration’s effort to reinstate a ban on open service by transgender individuals is unconstitutional and grant the Plaintiffs’ and Washington’s motions for summary judgment.

¹ For ease of reference, the District of Columbia shall be referred to herein as a “State.”

ARGUMENT

I. A BAN ON TRANSGENDER PEOPLE OPENLY SERVING IN THE MILITARY IS IRRATIONAL AND UNCONSTITUTIONAL.

A. Transgender People Are a Vital Part of the *Amici* States' Communities, Yet Remain a Historically Marginalized Group.

Nationwide, nearly 1.5 million people identify as transgender.² They live in the *Amici* States (as well as every other State, American Samoa, Guam, and Puerto Rico)³ and contribute to our communities in countless ways – as parents, educators, students, firefighters, police officers, musicians, writers, nurses, and doctors, to name a few. Approximately 150,000 veterans, active-duty service members, and members of the National Guard or Reserves identify as transgender, and transgender individuals volunteer to serve and protect our country through the Armed Forces at approximately twice the rate of other adults in the general population.⁴ Nothing about being transgender inhibits a person's ability to serve in the military or otherwise contribute to society.⁵ To the contrary, the experience of the *Amici* States shows that transgender individuals are just as capable as their non-transgender counterparts and make a meaningful positive impact in our schools, workplaces, and communities.

Still, the transgender community has suffered “a history of persecution and discrimination” that persists into the present day. *Adkins v. City of New York*, 143 F. Supp. 3d

² Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, The Williams Inst., 3 (June 2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

³ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equality, 53, 244 (Dec. 2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

⁴ Gary J. Gates & Jody L. Herman, *Transgender Military Service in the United States*, The Williams Inst., 1 (May 2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Transgender-Military-Service-May-2014.pdf> (estimating 134,300 transgender veterans and 15,500 members in active service, the National Guard, or Reserves).

⁵ See Am. Psychol. Ass'n, *Answers to Your Questions about Transgender People, Gender Identity, and Gender Expression*, 3 (2014 update), <http://www.apa.org/topics/lgbt/transgender.pdf>; Am. Psychol. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychol. Ass'n 832, 834 (2015); see also Declaration of George R. Brown, ECF No. 143, ¶¶ 20-22.

134, 139 (S.D.N.Y. 2015). According to the 2015 United States Transgender Survey (“2015 USTS”), transgender individuals face verbal harassment and physical violence at home, in school, and in their communities; grapple with mistreatment in the workplace and a higher rate of unemployment than the general United States population; confront homelessness and difficulty obtaining and maintaining housing; and endure myriad other forms of discrimination in education, employment, housing, and access to health care due to their gender identity.⁶ Such discrimination and the associated stigma often cause severe emotional and psychological distress and lead to disproportionately high rates of depression and anxiety in the transgender population.⁷

To combat such discrimination, twenty States – including many of the *Amici* States – have enacted civil rights protections for transgender people in education, employment, health care, housing, and/or public accommodations.⁸ And about 225 local governments prohibit discrimination based on gender identity or expression by public and private employers in their jurisdictions.⁹ As the experiences of the *Amici* States and these other jurisdictions show, transgender-inclusive policies help to ease the stigma on transgender people, thereby

⁶ 2015 USTS, *supra* note 3, at 8-16; see Walter O. Bockting et al., *Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population*, 103(5) Am. J. Public Health 943, 943 (2013) (“Transgender people face systematic oppression and devaluation as a result of social stigma attached to their gender nonconformity.”).

⁷ See Bockting, *supra* note 6, at 949 (noting that these mental health outcomes “were not merely a manifestation of gender dysphoria” and were associated “with enacted and felt stigma”); Am. Psychol. Ass’n, *Answers to Your Questions about Transgender People*, *supra* note 5, at 3 (explaining that “lack of acceptance within society, direct or indirect experiences with discrimination, or assault . . . may lead many transgender people to suffer with anxiety, depression or related disorders at higher rates than nontransgender persons”); Am. Psychol. Ass’n, *Guidelines*, *supra* note 5, at 840.

⁸ See, e.g., Mass. Gen. Laws ch. 151B, § 4; Mass. Gen. Laws ch. 272, §§ 92A, 98; Cal. Civil Code § 51(b), (e)(5); Cal. Gov. Code § 12940(a); Cal. Gov. Code § 12955; Haw. Rev. Stat. § 368-1; Haw. Rev. Stat. § 378-2; Haw. Rev. Stat. § 489-3; Haw. Rev. Stat. § 515-16; N.M. Stat. Ann. § 28-1-7; N.Y. Comp. Codes R. & Regs. tit. 9 § 466.13 (interpreting N.Y. Exec. Law § 296 (Human Rights Law) definition of “sex” to include gender identity); Vt. Stat. Ann. tit. 9 §§ 4500 et seq.; Vt. Stat. Ann. tit. 6 § 1-11(26)(B)(iii); Vt. Stat. Ann. tit. 21 § 5-495.

⁹ *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, Human Rights Campaign (last updated Jan. 28, 2017), <https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender>.

1 mitigating the negative impact on their educational, work, and health outcomes. Such policies
2 also foster a more just and productive society for all our residents.

3 **B. The Military Lifted Historical Prohibitions on Service by Transgender**
4 **Individuals After a Lengthy, Deliberative Process.**

5 As in other aspects of society, transgender individuals who volunteered to fight for our
6 country were long met with discrimination and excluded from military service in the Armed
7 Forces through a patchwork of medical and administrative regulations.¹⁰ To join and advance
8 in the military, thousands of individuals were thus forced to conceal their gender identity or
9 risk discharge.¹¹ Many other transgender recruits were unable to enlist in the first place. This
10 was the reality for decades – unchanged by the adoption of “Don’t Ask, Don’t Tell” (“DADT”) in
11 the 1990s and the subsequent repeal of that policy in 2011 (which ushered in the era of open
12 service by gay, lesbian, and bisexual individuals).¹² After the DADT repeal, however, the
13 public and the military began to reexamine the categorical prohibition against transgender
14 individuals serving in the military, and determined that it was not only untenable, but
15 counterproductive.¹³

16 Ultimately, in July 2015, then-Secretary of Defense Ashton Carter publicly
17 acknowledged that Department of Defense regulations regarding transgender service members
18 were “outdated,” “contrary to our value of service and individual merit,” and harmful to

19
20 ¹⁰ See e.g., Matthew F. Kerrigan, *Transgender Discrimination in the Military: The New Don’t Ask, Don’t Tell*, 18 Psychol. Pub. Pol’y & L. 500, 506-508 (2012).

21 ¹¹ *Id.* at 502; 2015 USTS, *supra* note 3, at 170-171; Statement by Secretary of Defense Ashton
22 Carter on DOD Transgender Policy, Release No. NR 272-15 (July 13, 2015) *available at*
23 <https://www.defense.gov/News/News-Releases/News-Release-View/Article/612778/> (“[T]ransgender
men and women in uniform have been there with us, even as they often had to serve in silence
alongside their fellow comrades in arms.”).

24 ¹² See Kerrigan, *supra* note 10, at 501, 503-504.

25 ¹³ See Joycelyn Elders & Alan M. Steinman, *Report of the Transgender Military Service*
26 *Commission*, The Palm Ctr., 3-5 (March 2014), <http://archive.palmcenter.org/files/Transgender%20Military%20Service%20Report.pdf>; Allison Ross, Note, *The Invisible Army: Why the Military Needs to Rescind Its Ban on Transgender Service Members*, 23 S. Cal. Interdisc. L. J. 185 (2014).

1 “transgender soldiers, sailors, airmen, and Marines – real, patriotic Americans.”¹⁴ Secretary
 2 Carter established a working group to study “the policy and readiness implications of
 3 welcoming transgender persons to serve openly” (the “DOD Working Group”).¹⁵ As the
 4 Plaintiffs cogently explain (and their supporting declarations show), the DOD Working Group
 5 executed its mission in a systematic and thoughtful manner: it sought to consider all issues that
 6 might arise from including openly transgender individuals in the military (including those
 7 related to readiness, operational effectiveness, and cost); consulted with experts, active
 8 transgender service members, and military personnel from inside and outside of the United
 9 States; and commissioned the RAND National Defense Research Institute (“RAND”) to
 10 analyze the potential health care needs of transgender service members, the potential readiness
 11 implications of allowing transgender individuals to serve openly, and the experience of foreign
 12 militaries that permit open service by transgender individuals.¹⁶ See Pl. Motion, ECF No. 129,
 13 at 2-4 (and declarations cited).

14 As a result of this year-long process, the DOD Working Group concluded that
 15 excluding transgender people from military service undermined effectiveness and readiness, *id.*
 16 at 4; and, on June 30, 2016, Secretary Carter declared an end to the ban.¹⁷ On the same day,
 17 the Secretary laid out plans to implement the military’s new, inclusive policies, under which:
 18 (i) otherwise qualified service members could no longer be involuntarily separated, discharged
 19 or denied reenlistment or continuation of service, solely on the basis of gender identity;
 20 (ii) current transgender service members were allowed to serve openly and have access to

21 ¹⁴ Statement by Secretary Carter, No. NR-272-15, *supra* note 11.

22 ¹⁵ *Id.*

23 ¹⁶ See Secretary Ashton Carter, United States Department of Defense, Remarks on Ending the
 24 Ban on Transgender Service in the U.S. Military (June 30, 2016), *available at*
 25 <https://www.defense.gov/News/Speeches/Speech-View/Article/821833/remarks-on-ending-the-ban-on-transgender-service-in-the-us-military/>; Agnes Gereben Schaefer et al., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, RAND Corp., xi-xii, 39-47 (2016), *available at*
 26 https://www.rand.org/pubs/research_reports/RR1530.html (hereinafter “RAND Report”).

¹⁷ Remarks of Secretary Carter (June 30, 2016), *supra* note 16.

gender-related medical care; and (iii) within one year, the military would begin accessing transgender individuals who met all physical and fitness standards.¹⁸ Three months later, the Department of Defense issued a 71-page handbook to guide service members and commanders through these changes.¹⁹ Among other things, this handbook outlined a framework for bringing gender-related medical care into the Military Health System and specified that the open service policy extended to admission to accession programs, like the Reserve Officers Training Corps (“ROTC”).²⁰

By late 2016, each of the military branches had taken steps necessary to implement the new open service policy, and transgender service members, National Guard members, and ROTC cadets in the *Amici* States and across the country were finally freed to disclose – and many did disclose – their gender identity to their command and to their fellow service members.²¹ Although a comprehensive study of the policy’s first year has not yet been conducted, there is no evidence that it has disrupted military readiness, operational effectiveness, or morale. To the contrary, anecdotal accounts indicate that the military’s new inclusive policies were quickly beginning to have a positive effect, as capable and well-qualified individuals who were already serving finally were able to do so authentically.²²

¹⁸ See Directive-Type Memorandum (DTM) 16-005, Military Service of Transgender Service Members, United States Secretary of Defense (June 30, 2016), *available at* https://www.defense.gov/Portals/1/features/2016/0616_policy/DTM-16-005.pdf.

¹⁹ *Transgender Service in the U.S. Military: An Implementation Handbook*, United States Dep’t of Defense (Sept. 30, 2016), https://www.defense.gov/Portals/1/features/2016/0616_policy/DoDTGHandbook_093016.pdf.

²⁰ *Id.* at 18, 31, 40

²¹ See, e.g., Pl. Motion, ECF No. 129, at 4-5; Declaration of Megan Winters (“Winters Decl.”), ECF No. 136, ¶¶ 11-17, 27; Declaration of Phillip Stephens (“Stephens Decl.”), ECF No. 135, ¶¶ 11-19; Declaration of Terece Lewis (“Lewis Decl.”), ECF No. 134, ¶¶ 11-15.

²² See Declaration of Deborah Lee James, ECF No. 146, ¶¶ 35, 38-39; Declaration of Eric Fanning, ECF No. 145, ¶¶ 51-53, 55; Declaration of Raymond Edwin Mabus, Jr., ECF No. 144, ¶ 24, 37, 43; Winters Decl., ECF No. 136, ¶¶ 16-18, 41-42; Stephens Decl., ECF No. 135, ¶¶ 18-20; Lewis Decl., ECF No. 134, ¶¶ 15, 18, 25; Declaration of Lindsey Muller, ECF No. 133, ¶¶ 19, 23-24; Declaration of Cathrine Schmid, ECF No. 131, ¶¶ 18-21; *see also* General John R. Allen et al., *Statement of Fifty-Six Retired Generals and Admirals Warn That President Trump’s Anti-Transgender Tweets, If Implemented, Would Degrade Military Readiness*, The Palm Ctr. (August 1, 2017),

C. President Trump’s Abrupt Reversal of the Military’s Open Service Policy Is Unsupported by Any Defensible Rationale.

On July 26, 2017, President Trump abruptly changed course, announcing in a series of Twitter posts that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. . . Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail.” The President expanded on this announcement one month later in a memorandum directing the Secretaries of Defense and Homeland Security: (i) to indefinitely refrain from accessing transgender individuals into the military; (ii) to halt “all use of DOD or DHS resources to fund sex reassignment surgical procedures [as of March 22, 2018], except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex”; and (iii) to “return” to the pre-June 2016 practice of excluding and separating transgender service members from the military by March 23, 2018.²³ In an effort to justify this abrupt step backward – apparently announced without any consultation with top military leaders²⁴– the President has cited to the allegedly negative impact that open service by transgender

<http://www.palmcenter.org/fifty-six-retired-generals-admirals-warn-president-trumps-anti-transgender-tweets-implemented-degrade-military-readiness> (hereinafter “Statement of Retired Military Leaders”) (“[T]ransgender troops have been serving honorably and openly for the past year, and have been widely praised by commanders.”).

²³ Presidential Memorandum, 82 FR 41319 §§ 1, 2 (Aug. 25, 2017), *available at* <https://www.whitehouse.gov/the-press-office/2017/08/25/presidential-memorandum-secretary-defense-and-secretary-homeland>. The fact that the Department of Defense has issued interim guidance allowing current transgender service members to remain in their posts and to reenlist until the Defense Secretary issues “final guidance” in March 2018 is cold comfort to transgender service members whose service and personhood the President devalued in a series of tweets and who are, at best, left in a state of uncertainty or sidelined until the Secretary issues additional guidance. *See* Secretary of Defense, *Military Service by Transgender Individuals – Interim Guidance* (Sept. 14, 2017), *available at* <https://www.defense.gov/Portals/1/Documents/PDFs/Military-Service-By-Transgender-Individuals-Interim-Guidance.pdf>.

²⁴ Barbara Starr et al., *US Joint Chiefs blindsided by Trump’s transgender ban*, CNN (July 27, 2017), <http://www.cnn.com/2017/07/27/politics/trump-military-transgender-ban-joint-chiefs/index.html>.

1 individuals would have on the military's budget and effectiveness and raised concerns about
 2 unit cohesion among the troops.²⁵ But each of these claims was discredited by the DOD
 3 Working Group, as well as by other researchers and scholars. They are also contradicted by
 4 the experience of the *Amici* States.

5 RAND and other researchers have already dispelled the myth that transition-related
 6 health care costs would strain military budgets.²⁶ To the contrary, they have concluded that –
 7 because only a small proportion of service members are statistically likely to seek transition-
 8 related treatment each year – the associated costs would “have little impact on and represent[]
 9 an exceedingly small proportion” of the military's overall health care expenditures.²⁷ This
 10 conclusion comports with the experience of many *Amici* States in extending comprehensive
 11 health care coverage to transgender individuals, as several States have done so without
 12 incurring heightened financial costs or increased premiums.²⁸ In California, for example, the
 13 Insurance Commissioner conducted an extensive cost-benefit analysis of prohibiting private

14
 15 ²⁵ See Presidential Memorandum, *supra* note 23, at § 3; Donald Trump (@realDonaldTrump),
 Twitter posts (July 26, 2017).

16 ²⁶ RAND Report, *supra* note 16, at xi-xii, 33-38, 70; Aaron Belkin, *Caring for Our*
 17 *Transgender Troops – The Negligible Cost of Transition-Related Care*, 373:12 New Eng. J. Med. 1089,
 1090-1091 (Sept. 17, 2015).

18 ²⁷ RAND Report, *supra* note 16, at xi-xii; *see id.* at 31-32, 70 (estimating that transition-related
 19 healthcare costs would increase military healthcare costs by \$2.4 million to \$8.4 million or – at most –
 0.13%); Belkin, *supra* note 26, at 1090 (estimating that transition-related care will cost the military \$5.6
 20 million annually and predicting that “under any plausible estimation method, the cost amounts to little
 21 more than a rounding error in the military's \$47.8 billion annual health care budget”); Ross, *supra* note
 22 13, at 210-212 (arguing that cost objections to open military serve are “exaggerated” and “speculative”
 in light of the experience of other countries, the small percentage of transgender service members who
 would seek gender affirmation surgery, and the cost of such surgery relative to the cost of surgery for
 common military injuries).

23 ²⁸ See Katie Keith, *15 States and DC Now Prohibit Transgender Insurance Exclusions*,
 CHIRblog (Mar. 30, 2016), [http://chirblog.org/15-states-and-dc-now-prohibit-transgender-insurance-](http://chirblog.org/15-states-and-dc-now-prohibit-transgender-insurance-exclusions/)
 24 [exclusions/](http://chirblog.org/15-states-and-dc-now-prohibit-transgender-insurance-exclusions/) (“[T]he removal of transgender exclusions [from health plans] does not impose significant
 25 costs.”); William V. Padula et al., *Societal Implications of Health Ins. Coverage for Medically*
 26 *Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, *Journal of*
General Internal Medicine (April 16, 2016), available at [https://www.ncbi.nlm.nih.gov/](https://www.ncbi.nlm.nih.gov/pubmed/26481647)
[pubmed/26481647](https://www.ncbi.nlm.nih.gov/pubmed/26481647) (“Health insurance coverage for the U.S. transgender population is affordable and
 cost-effective, and has a low budget impact on U.S. society.”).

1 insurers from denying coverage for transition-related services and found that such a prohibition
 2 would not only have an “immaterial” impact on premium costs, but would actually benefit
 3 individuals, employers, and insurance carriers because it would ultimately improve health
 4 outcomes for transgender individuals.²⁹

5 Likewise, RAND’s research for the DOD Working Group showed that allowing
 6 transgender people to serve openly would have no adverse impact on unit cohesion, operational
 7 effectiveness, or readiness.³⁰ As the RAND Report explained, transition-related constraints on
 8 the deployability of transgender service members would be “negligible” and have a “minimal
 9 impact on readiness.”³¹ Existing data also indicate that allowing transgender individuals to
 10 serve openly would have a minimal impact – if any – on unit cohesion, and may actually
 11 improve the bond among troops by removing stressors that decrease performance ability.³² For
 12 example, of the eighteen foreign nations – including Australia, Britain, Canada, Israel, and
 13 Sweden – that allow transgender individuals to serve openly, none has reported any ill
 14 effects.³³ Indeed, an extensive inquiry into Canada’s decision to open military service to
 15 transgender individuals revealed that “the increased diversity improved readiness by giving
 16

17 ²⁹ Cal. Dep’t of Ins., *Economic Impact Assessment of Gender Nondiscrimination in Health*
 18 *Insurance* 1–2, Reg. File No. REG-2011-00023 (Apr. 13, 2012), available at
 19 [http://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-](http://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf)
 20 [Nondiscrimination-In-Health-Insurance.pdf](http://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf) (referencing data from the City and County of San
 21 Francisco, the University of California, and a study of Fortune 500 companies demonstrating that
 22 “extremely low utilization result[ed] from elimination of gender discrimination [in health care plans], as
 23 would be expected with such a small population”).

24 ³⁰ RAND Report, *supra* note 16, at xiii, 39-47.

25 ³¹ *Id.* at 46-47.

26 ³² *Id.* at xii; Ross, *supra* note 13, at 204-206, 209-211.

³³ See Ross, *supra* note 13, at 206-208; Amanda Erickson, *Trump Said Transgender Troops*
 Cause ‘Disruption.’ These 18 Militaries Show Otherwise, Wash. Post (July 26, 2017)
[https://www.washingtonpost.com/news/worldviews/wp/2017/07/26/trump-said-transgender-troops-](https://www.washingtonpost.com/news/worldviews/wp/2017/07/26/trump-said-transgender-troops-cause-disruption-these-18-militaries-show-otherwise/?utm_term=.a04643d1b8b8)
 cause-disruption-these-18-militaries-show-otherwise/?utm_term=.a04643d1b8b8; Statement of Retired
 Military Leaders, *supra* note 22 (“Eighteen foreign nations, including the UK and Israel, allow
 transgender troops to serve, and none has reported any detriment to readiness.”).

1 units the tools to address a wider variety of situations and challenges.”³⁴ The historical
 2 experience of the United States military bolsters this finding: each time our country has
 3 diversified the Armed Forces – whether it be through racial integration, expanding combat
 4 opportunities for women, or allowing openly gay, lesbian, and bisexual individuals to serve –
 5 the military grappled with unit cohesion objections, rejected them, and grew stronger.³⁵

6 The experience of the *Amici* States contradicts the President’s stated rationale for
 7 reinstating a ban on openly transgender service members on this point as well. For years,
 8 transgender individuals have served in the National Guard and have done so with honor and
 9 distinction. After the ban was lifted in 2016, some of these Guard members came out to their
 10 superiors and peers, and the *Amici* States are unaware of any adverse consequences for the
 11 Guard. Transgender cadets in ROTC programs supported by many of our colleges and
 12 universities similarly disclosed their gender identities – also with no known adverse
 13 consequences. In addition, three *Amici* States are proud to support maritime academies that are
 14 designed to prepare students for military or civilian careers in maritime-related fields. These
 15 academies – the Massachusetts Maritime Academy, the California Maritime Academy, and the
 16 State University of New York Maritime College – welcome transgender students.³⁶ The *Amici*
 17 States’ experience with the National Guard, ROTC programs, and maritime academies is
 18 consistent with the broader lessons we have learned from implementing transgender-inclusive
 19 laws and policies: welcoming transgender individuals to live and participate openly in society
 20 not only improves their lives, but also makes our communities stronger as a whole.

21 ³⁴ RAND Report, *supra* note 16, at 45.

22 ³⁵ See Ross, *supra* note 13, at 205-206; Statement by Secretary Carter, No. NR-272-15, *supra*
 23 note 11 (“Over the last fourteen years of conflict, the Department of Defense has proven itself to be a
 24 learning organization. This is true . . . with respect to institutional activities, where we have learned
 from how we repealed ‘Don’t Ask, Don’t Tell,’ from our efforts to eliminate sexual assault in the
 military, and from our work to open up ground combat positions to women.”).

25 ³⁶ See, e.g., *Trans Inclusion Policy*, Massachusetts Maritime Academy (last visited Jan. 31,
 26 2018), <https://www.maritime.edu/trans-inclusion-policy>; *Safe Zone Program*, California Maritime
 Academy (last visited Jan. 31, 2018), <https://www.csum.edu/web/diversity/home/safe-zone-program>.

1 In sum, the Trump Administration has made an affirmative, irrational decision to
 2 reverse recent progress and reinstitute formal discrimination against transgender individuals in
 3 the military. As this Court and others across the country have already recognized, the
 4 Administration's purported justifications for reinstating the ban are contradicted by research,
 5 reason, and experience. See ECF No. 103 at 16-17; *Doe 1 v. Trump*, No. 17-1597, 2017 WL
 6 4873042, *30, 33 (D.D.C. Oct. 30, 2017); *Stone v. Trump*, No. 1:17-cv-2459, 2017 WL
 7 5589122, *16 (D. Md. Nov. 21, 2017); *Stockman v. Trump*, No. 5:17-cv-1799, at 20 (C.D. Cal.
 8 Dec. 22, 2017). It cannot withstand even minimal scrutiny. See *Romer v. Evans*, 517 U.S.
 9 620, 632 (1996) (where government action discriminates against a disadvantaged class, is
 10 "discontinuous with the reasons offered for it," and "seems inexplicable by anything but
 11 animus toward the class it affects," it cannot withstand even minimal scrutiny).

12 **II. REINSTATING A BAN ON MILITARY SERVICE BY TRANSGENDER** 13 **PEOPLE WILL HARM THE AMICI STATES AND OUR RESIDENTS.**

14 National security and emergency and disaster management are not simply matters of
 15 federal concern. All States play important roles – both direct and indirect – in providing for
 16 our collective security and have an interest in ensuring the strongest, most inclusive military
 17 possible. We also share an interest in avoiding becoming entangled in discriminatory federal
 18 policies. The Administration's decision to reinstitute a ban on open service by transgender
 19 individuals harms all of these interests. It also harms the *Amici* States' veterans, active service
 20 members, and those who wish to serve, and our transgender communities more broadly.

21 **A. The Ban Will Entangle the *Amici* States in Invidious Discrimination** 22 **Harmful to Our National Guard.**

23 Reinstating the ban will impede the *Amici* States' administration and control of the
 24 National Guard and undermine the efficacy of those forces in protecting our communities. The
 25 National Guard is a reserve component of the United States Armed Forces, yet remains a
 26 "hybrid entity that carefully combines both federal and state characteristics." *Ass'n of Civilian*
Technicians, Inc. v. United States, 603 F.3d 989, 992 (D.C. Cir. 2010) (quoting *Lipscomb v.*

1 *Fed. Labor Relations Auth.*, 333 F.3d 611, 614 (5th Cir. 2003)). While the National Guard is
 2 primarily funded by the federal government and subject to federal requirements for service, the
 3 state National Guards and their individual units generally operate under state control.³⁷ As a
 4 result, state actors oversee recruitment efforts, exercise day-to-day command over service
 5 members in training and most forms of active duty,³⁸ and deploy the Guard in response to
 6 natural or man-made disasters in their own States and across the country.³⁹ Each of the *Amici*
 7 States funds and supports its National Guard forces to ensure that its citizen-soldiers are highly
 8 trained and ready to perform a range of critical state missions and to support national defense
 9 operations as needed. For example, the California National Guard – which comprises over
 10 18,000 members – receives approximately \$50 million in state funds annually and is regularly
 11 deployed to assist with firefighting and law enforcement efforts, search and rescue missions,
 12 disaster response, homeland defense, and cyber-defense and -security. Similarly, in 2015, the
 13 New York National Guard, with over 15,000 members, received more than \$66 million in state
 14 funds to cover salaries, supplies, facilities, and education.⁴⁰

15
16
17
18
19 ³⁷ See Major General Timothy J. Lowenberg, *The Role of the National Guard in National*
 20 *Defense and Homeland Security*, The National Guard Ass’n of the United States, 3 (last visited Jan. 31,
 21 2018), <https://www.ngaus.org/sites/default/files/pdf/primer%20fin.pdf> (explaining that the National
 Guard is only under the exclusive control of the federal government when it is activated under Title 10
 to supplement the regular components of the federal ground and air forces).

22 ³⁸ *Ass’n of Civilian Technicians*, 603 F.3d at 993 (explaining that, under Title 32 of the United
 States Code, whenever not called to “federal duty by the President . . . a state National Guard is under
 the command of the state Governor and State Adjutant General, who is appointed by the Governor”).

23 ³⁹ See *NGAUS Fact Sheet: Understanding the Guard’s Duty Status*, The National Guard
 24 Ass’n of the United States (last visited Jan. 31, 2018), [https://www.ngaus.org/sites/default/files/Guard](https://www.ngaus.org/sites/default/files/Guard%20Statues.pdf)
 25 [%20Statues.pdf](https://www.ngaus.org/sites/default/files/Guard%20Statues.pdf); see, e.g., Mass. Gen. Laws ch. 33, § 41(a); Cal Mil. & Vet. Code § 146(a); N.Y. Mil.
 Law § 6.

26 ⁴⁰ See *New York National Guard Economic Impact 2015*, New York State Division of Military
 and Naval Affairs (Jan. 15, 2016), available at https://dmna.ny.gov/NYNG_Economic_Impact.pdf.

Over the years, transgender individuals have ably served the *Amici* States – and many States across the country – through the National Guard.⁴¹ After the Department of Defense lifted restrictions on service by transgender members, *see supra* Part I.B, the *Amici* States had to act swiftly to comply with the Department’s new policies and ensure that these individuals could serve openly, without fear of discharge.⁴² These efforts did not disrupt the operation of the National Guard. To the contrary, by empowering our individual members and diversifying our ranks, these initiatives further enhanced the capability and effectiveness of our state-sited defense and security forces.

Because of the hybrid nature of the National Guard, however, the *Amici* States are required to comply with any directive the Trump Administration issues with respect to transgender service members, or risk losing much-needed funding for our National Guard units. *See Ass’n of Civilian Technicians*, 603 F.3d at 993; 32 U.S.C. §§ 106-108. That would mean, absent any court intervention, enforcing a prohibition on accepting openly transgender recruits. If fully implemented, the ban also may require National Guard leadership in the *Amici* States to renege on assurances made to existing transgender service members who came out in reliance on the 2016 open service policy; to pass over qualified transgender individuals for promotion; or to discharge them from service altogether.

In effect, the Administration’s policy reversal threatens to require the *Amici* States to undo our efforts to provide an inclusive environment for current transgender service members, and instead foist upon us the discriminatory policies of the past. It will entangle the *Amici* States – once again – in a federal scheme that requires us to differentiate National Guard recruits and service members based on a characteristic that has been demonstrated to have

⁴¹ Gates & Herman, *supra* note 4, at 1 (estimating 15,500 members in active service, the National Guard, or Reserves).

⁴² *See* Tech. Sgt. Erich B. Smith et al., *Guard Members Ready For New DOD Transgender Policy*, National Guard Bureau (June 15, 2017), <http://www.nationalguard.mil/News/Article/1215104/guard-members-ready-for-new-dod-transgender-policy/>.

1 nothing to do with their ability to serve. Such discrimination is in direct conflict with the
 2 policies of the *Amici* States, including our prohibitions on discrimination based on gender
 3 identity in public or private employment and our laws extending civil rights protections to
 4 transgender residents in other aspects of civic life (such as housing and public
 5 accommodations). *See supra* note 8.

6 Equally important, excluding transgender individuals will diminish the effectiveness of
 7 the National Guard and thus hamper the *Amici* States' emergency and disaster response efforts.
 8 As described above, National Guard members are largely under state control and devoted to
 9 state-based missions, such as disaster relief and search and rescue operations. If forced to
 10 reinstate a complete ban on transgender service members, the *Amici* States could also lose the
 11 aggregate skills and knowledge of our many transgender service members and – with them –
 12 the value of the training and experience the *Amici* States provided through the Guard. Because
 13 the *Amici* States maintain and rely on the National Guard to assist us in times of emergency, a
 14 reduction in those forces inflicts a significant harm upon us.⁴³

15 **B. The Ban Will Entangle the *Amici* States in Harmful Discrimination**
 16 **Limiting Opportunities at Our Public Institutions of Higher Education.**

17 The harmful effects of banning open service by transgender individuals extend beyond
 18 the Armed Forces and National Guard to the *Amici* States' public colleges and universities that
 19 support ROTC programs and to state-run maritime academies.

20 ROTC programs are designed to train commissioned officers of the Armed Forces; they
 21 are located on and supported by college campuses but subject to federal entry requirements.⁴⁴

22 ⁴³ *See* Statement of Retired Military Leaders, *supra* note 22 (“The proposed ban, if
 23 implemented, would cause significant disruptions, deprive the military of mission-critical talent, and
 24 compromise the integrity of transgender troops who would be forced to live a lie, as well as non-
 25 transgender peers who would be forced to choose between reporting their comrades or disobeying
 26 policy. As a result, the proposed ban would degrade readiness even more than the failed ‘don’t ask,
 don’t tell policy.’”).

⁴⁴ *See* 10 U.S.C. § 2103. Similarly, many elementary and secondary schools in the *Amici* States
 host the Junior Reserve Officers' Training Corps (“JROTC”). JROTC is a program for high school and

1 Many public colleges and universities in the *Amici* States host ROTC programs, provide them
 2 with physical space, and, in some instances, financial support in the form of a budget or
 3 scholarship funds. For example, one public university in Massachusetts provides its Army and
 4 Air Force ROTC programs with a total annual budget of approximately \$30,000 and designates
 5 an additional \$200,000-\$300,000 per year for scholarships available only to ROTC cadets.
 6 Reinstating the ban on open service by transgender individuals will render these ROTC
 7 programs – together with the scholarship and career opportunities they provide – actually or
 8 effectively unavailable to transgender students, who will not be eligible to serve openly in the
 9 Armed Forces upon graduation. The ban will thus harm the *Amici* States’ public colleges and
 10 universities by limiting their ability to extend the same opportunities to all of their students, in
 11 direct contravention of many schools’ own transgender-inclusive policies and the *Amici* States’
 12 broader anti-discrimination laws.⁴⁵

13 The ban also works a distinct set of harms on one subset of state-run educational
 14 institutions: the specialized maritime academies operated by Massachusetts, California, and
 15 New York that serve as pathways for students interested in pursuing maritime professions or
 16 becoming commissioned officers in the Coast Guard or other branches of the Armed Forces.
 17 *See supra* at 10. In addition to the state-of-the-art training and curriculum they offer all
 18 students, maritime academies extend special benefits to those who intend to join the military,
 19 including funding conditioned on subsequent military service⁴⁶ and programs that enable
 20

21 middle school students that aims to “instill in students . . . the values of citizenship, service United
 22 States, and personal responsibility and a sense of accomplishment.” 10 U.S.C. § 2031(a)(2).

23 ⁴⁵ *See supra* note 8; *Statement of Inclusion*, University of Massachusetts Lowell (last visited
 24 Jan. 31, 2018), https://www.uml.edu/docs/Inclusion%20Statement_tcm18-167589.pdf. These public
 25 institutions also have no real recourse, as Congress has barred institutions of higher education that
 26 receive federal funding from preventing the Armed Forces from establishing or operating ROTC
 programs on campus. 10 U.S.C. § 983.

⁴⁶ The Student Incentive Payment (SIP) Program is offered for students of all the academies.
 Following graduation, SIP students must either enter the U.S. Armed Forces on active duty or must be
 in a reserve unit for at least six years, along with other requirements. *See* Maritime Administration,

1 students to obtain military commissions after graduation. For example, the maritime
 2 academies all offer a “Strategic Sealift Midshipman [or Officer] Program,” which allows
 3 students earning Coast Guard Licenses to be commissioned as officers in the Navy Reserve
 4 upon graduation and provides stipends to help pay for school.⁴⁷ As with the ROTC programs
 5 (and against these academies’ own anti-discrimination policies), reinstating a ban on
 6 transgender service members will effectively require these public institutions to offer different
 7 opportunities to their students based solely on their gender identity. That is, while non-
 8 transgender students will be eligible for the full range of services, scholarships, and programs
 9 at the academies, transgender students will be unable to take advantage of a number of benefits
 10 – those that depend on a future military career. In light of the more limited opportunities that
 11 will be available to transgender students after graduation, the overall education these
 12 academies provide will be of significantly lesser value. Both students and the maritime
 13 academies themselves will therefore be worse off as a result of the ban.

14 **C. The Ban Will Harm the *Amici* States’ Veterans, Active Service Members,**
 15 **and Those Who Wish to Serve.**

16 The Trump Administration’s irrational decision to reinstate the ban on openly
 17 transgender people from military service will also directly harm the residents of the *Amici*
 18 States: our veterans, active service members, and those who wish to serve.

19 The harm to the dignity of transgender veterans and soldiers alone is significant. The
 20 ban degrades the service of the 150,000 veterans, active-duty service members, and members
 21 of the National Guard and Reserves who identify as transgender, as well as the intentions of
 22 those who wish to serve. Reinstating the ban serves no purpose but to deny this particular
 23 group – deemed less worthy by the Administration – equal opportunity and equal treatment

24 United States Department of Transportation (last visited Jan. 31, 2018), <https://www.marad.dot.gov/education/maritime-academies/>.

25 ⁴⁷ See, e.g., *Strategic Midshipman Program*, Massachusetts Maritime Academy (last visited
 26 Jan, 31, 2018), <https://www.maritime.edu/strategic-sealift-midshipman-program>.

1 under the law. It relegates them to second-class status, sending the unmistakable message that
2 they are unfit to serve or that their service is not valued, simply due to their gender identity.

3 The ban also harms the many transgender residents of the *Amici* States who relied upon
4 the assurance of the federal government that they were welcome to serve openly. Many
5 service members in the National Guard and other branches of the military came out as
6 transgender to their command based upon that assurance, believing that they would not thereby
7 be deprived of their opportunity to serve (or their livelihoods). The Trump Administration has
8 broken that promise to the grave detriment of these individuals. Absent court intervention,
9 openly transgender service members may be targeted for discharge or other adverse action.
10 Even if current transgender service members are permitted to serve for the time being, the
11 Administration's intent – to ultimately bar all transgender individuals from serving by mid-
12 March 2018 – is clear. And in the meantime, these service members must continue their
13 service in limbo and with a shadow cast over them.⁴⁸

14 Similarly, transgender residents of the *Amici* States who took steps to prepare for
15 careers in the military, by joining ROTC or enrolling in maritime academies, for example, did
16 so in reliance on the promise that they would be able to serve openly. They too face losing the
17 opportunity to serve, and along with it the investment they have made in their careers thus far
18 and other opportunities foregone.

19 Finally, transgender service members who have not yet revealed their gender identities,
20 together with those who wish to pursue careers in the military, now face the Hobson's choice
21 of being honest about who they are and being discharged or denied accession outright, or
22 hiding their identities and serving in fear of being discovered.⁴⁹ Denying otherwise qualified

23 ⁴⁸ See Declaration of Mark J. Eitelberg, ECF No. 147, ¶¶ 6-17; Declaration of Ashley
24 Broadway, ECF No. 141, ¶¶ 7-10.

25 ⁴⁹ See Declaration of Jane Doe, ECF No. 138, ¶¶ 9-16; *cf. Log Cabin Republicans v. United*
26 *States*, No. CV 04-08425-VAP, 2010 U.S. Dist. LEXIS 93612, *29-65 (C.D. Cal. Sept. 9, 2010)
(recounting testimony of service members describing experience of serving under a “cloud of fear”
during Don't Ask Don't Tell).

transgender individuals the opportunity to serve denies them equal participation in a core civic activity. And forcing transgender individuals to hide their identities in order to enlist or continue serving is extremely harmful to their health and wellbeing⁵⁰ – a reality evidenced by the experiences of the thousands of gay, lesbian, and transgender service members who have served under previous discriminatory policies.⁵¹ Concealing core aspects of one’s identity has a negative impact on mental health.⁵² The need to hide their gender identity causes transgender service members to be less likely to seek necessary mental health and medical care; because there is limited confidentiality for communications with doctors and therapists in the military, these service members cannot be candid with their health care providers and are thus more likely to avoid treatment.⁵³

Further, prohibiting open service estranges transgender service members from their fellow troops, undermining the group’s ability to trust and bond.⁵⁴ “Concealment leads to . . .

⁵⁰ See Elders & Steinman, *supra* note 13, at 4 (“We determined not only that there is no compelling medical reason for the ban, but also that the ban itself is an expensive, damaging and unfair barrier to health care access for the approximately 15,450 transgender personnel who serve currently in the active, Guard and reserve components. . . . Research shows that depriving transgender service members of medically necessary health care poses significant obstacles to their well-being.”)

⁵¹ See, e.g., Declaration of Admiral Michael Mullen, ECF No. 148, ¶ 14 (“When I led our armed forces under [Don’t Ask Don’t Tell], I saw firsthand the harm to readiness and morale when we fail to treat all service members according to the same standards. There are thousands of transgender Americans currently serving and there is no reason to single them out[,] to exclude them[,] or deny them the medical care that they require.”).

⁵² Ross, *supra* note 13, at 209 (citing Moradi, *infra* note 54, at 514).

⁵³ See Kerrigan, *supra* note 10, at 513-14; Elders & Steinman, *supra* note 13, at 4 (“According to one recent study, ‘Mental health, medical and substance abuse services obtained outside the military are supposed to be communicated back to the military, so transgender people who seek these services elsewhere will risk exposure . . . This leads individuals to go without treatment, allowing symptoms to exacerbate, and causing some to treat symptoms with alcohol or drugs, which could lead to substance abuse or dependence.’”).

⁵⁴ See Ross, *supra* note 13, at 209; cf. Bonnie Moradi, *Sexual Orientation Disclosure, Concealment, Harassment, and Military Cohesion: Perceptions of LGBT Military Veterans*, 21 Mil. Psychol. 513 (2009) (studying the impact of concealment versus disclosure of sexual orientation in the military and finding that concealment relates negatively to unit social and task cohesion and conversely that disclosure positively impacts cohesion).

1 stress and isolation, which can lead to decreased performance ability.”⁵⁵ The negative
 2 repercussions of concealment are especially pertinent in the military, where “interpersonal
 3 connection, support, and trust among unit members are thought to be paramount to unit
 4 cohesion and effectiveness.”⁵⁶ Thus, depriving transgender service members of the trust and
 5 bonding with fellow service members that is so fundamental to the military experience not only
 6 harms them individually, it also undermines military readiness and effectiveness generally.

7 **D. The Ban Will Harm Our Transgender Communities More Broadly.**

8 The consequences of the Trump Administration’s reversal on transgender service
 9 members are not limited to the Armed Forces and may be felt across society at large. The
 10 military is among our country’s most integrated and diverse institutions. Historically, though
 11 progress has been slow and imperfect, when the military has accepted previously-excluded or
 12 marginalized groups into its ranks – African-Americans, women, immigrants, and gay and
 13 lesbian individuals – it has helped to lay the groundwork for broader social integration and
 14 acceptance.⁵⁷ So too here, at a time when – despite continued stigma, discrimination, and
 15 violence – acceptance of transgender individuals is on the rise, the military’s open service
 16 policy was an important step forward, both practically and symbolically. Now, worse than
 17 never having permitted them to serve openly in the first place, the Trump Administration has
 18 singled out transgender individuals for renewed exclusion, sending a message that threatens to

19 ⁵⁵ Ross, *supra* note 13, at 209.

20 ⁵⁶ *Id.*

21 ⁵⁷ See, e.g., Cornelius L. Bynum, *How a Stroke of the Pen Changed the Army Forever*, Wash.
 22 Post (July 26, 2017), <https://www.washingtonpost.com/news/made-by-history/wp/2017/07/26/how-a-stroke-of-the-pen-changed-the-army-forever/> (discussing the broader impact on the civil rights
 23 movement of President Harry Truman’s Executive Order 9981, which desegregated the military)
 24 (“Though the pace of full-scale change was slow, the executive order was one of the most significant
 25 steps toward equal justice since the Emancipation Proclamation in 1863 and the ratification of the 13th
 26 Amendment to the U.S. Constitution that abolished slavery in 1865. Indeed, when considered
 alongside other milestone civil rights achievements, E.O. 9981 is remarkable for its effectiveness and
 durability . . . Even the momentous civil rights actions that we collectively recognize as modern
 landmarks of racial progress fail to match the fundamental and lasting institutional change wrought by
 E.O. 9981.”).

1 slow recent progress and that will be heard and felt throughout our communities. Indeed, it
2 seems that may be the point.⁵⁸

3 The military has already concluded that allowing transgender individuals to serve
4 openly is in the nation's best interest. Reinstating the ban simply cannot be justified by
5 reference to costs, unit cohesion, or overall readiness. Rather, the Administration seeks to ban
6 otherwise qualified people from service simply because of who they are. In doing so, the
7 Administration would harm both the *Amici* States and our residents in profound ways. *See*,
8 *e.g.*, *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 609 (1982) ("This
9 Court has had too much experience with the political, social, and moral damage of
10 discrimination not to recognize that a State has a substantial interest in assuring its residents
11 that it will act to protect them from these evils."). Reinstating the ban on open service would
12 be a step backward for transgender people, for civil rights, and for the country as a whole.

13 CONCLUSION

14 For the foregoing reasons, the *Amici* States join in asking the Court to grant the
15 Plaintiffs' and Washington's Motions for Summary Judgment.

16
17
18
19
20
21
22
23
24 ⁵⁸ *See, e.g.*, Memorandum from Attorney General to United States Attorneys Heads of
25 Department Components (Oct. 4, 2017), *available at* [https://thinkprogress.org/wp-](https://thinkprogress.org/wp-content/uploads/2017/10/20171005-doj-memo-title-vii.pdf)
26 [content/uploads/2017/10/20171005-doj-memo-title-vii.pdf](https://thinkprogress.org/wp-content/uploads/2017/10/20171005-doj-memo-title-vii.pdf) (reversing Department of Justice policy
interpreting Title VII to prohibit discrimination based on gender identity).

1 Dated: February 1, 2018

Respectfully submitted,

2 MAURA HEALEY
3 Attorney General of Massachusetts

4 /s/ Kimberly A. Parr
5 Kimberly A. Parr (admitted *pro hac vice*)
6 Sara A. Colb*
7 Assistant Attorneys General
8 One Ashburton Place
9 Boston, MA 02108
10 (617) 727-2200
11 Kimberly.Parr@state.ma.us
12 Sara.Colb@state.ma.us

13 Attorneys General listing
14 continues on next page

15 *Affiliated attorney, not appearing

16 MACDONALD HOAGUE & BAYLESS,

17 /s/ Katherine C. Chamberlain
18 Katherine C. Chamberlain
19 Joseph R. Shaeffer
20 705 Second Avenue, Suite 1500
21 Seattle, WA 98104
22 206.622.1604
23 KatherineC@mhb.com
24 Joe@mhb.com

25 Local Counsel
26 Pursuant to Local Rule 83.1(d)

XAVIER BECERRA
Attorney General of California
1300 I St.
Sacramento, CA 95814

GEORGE JEPSEN
Attorney General of Connecticut
55 Elm Street
Hartford, CT 06106

MATTHEW P. DENN
Attorney General of Delaware
Carvel State Building, 6th Floor
820 North French Street
Wilmington, DE 19801

KARL A. RACINE
Attorney General of the District of Columbia
One Judiciary Square
441 4th Street, N.W.
Washington, D.C 20001

DOUGLAS S. CHIN
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street, 12th Floor
Chicago, IL 60601

TOM MILLER
Attorney General of Iowa
1305 E. Walnut Street
Des Moines, Iowa 50319

BRIAN E. FROSH
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202

GURBIR S. GREWAL
Attorney General of New Jersey
25 Market Street
Trenton, NJ 08625

HECTOR BALDERAS
Attorney General of New Mexico
408 Galisteo St.
Santa Fe, NM 87501

ERIC T. SCHNEIDERMAN
Attorney General of New York
120 Broadway
New York, NY 10271

ELLEN F. ROSENBLUM
Attorney General of Oregon
1162 Court Street N.E.
Salem, OR 97301

JOSH SHAPIRO
Attorney General of Pennsylvania
16th Fl., Strawberry Sq.
Harrisburg, PA 17120

PETER F. KILMARTIN
Attorney General of Rhode Island
150 S. Main Street
Providence, RI 02903

THOMAS J. DONOVAN, JR.
Attorney General of Vermont
109 State Street
Montpelier, Vermont 05609

CERTIFICATE OF SERVICE

I certify under penalty of perjury that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service of the foregoing will be accomplished by the CM/ECF system.

/s/ Kimberly A. Parr
Kimberly A. Parr

DATED: February 1, 2018

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

**DEFENDANTS' RULE 56(d)
RESPONSE TO PLAINTIFFS' AND
INTERVENOR'S MOTIONS FOR
SUMMARY JUDGMENT**

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 1

ARGUMENT 2

CONCLUSION 8

INTRODUCTION

Plaintiffs brought this action challenging the constitutionality of the President's memorandum regarding military service by transgender individuals. Relying heavily on twenty declarations and numerous exhibits, Plaintiffs, as well as the State of Washington as an intervenor, moved for summary judgment early in this litigation and before Defendants had had the opportunity to take any depositions or serve discovery. The Court should defer ruling on these summary judgment motions under Federal Rule of Civil Procedure 56(d) to allow Defendants the opportunity to take discovery. Discovery has just recently begun in this and three other related cases in other jurisdictions, and most of the depositions Defendants currently have scheduled of Plaintiffs' declarants will not occur until mid-to-late March. Moreover, as discussed in the attached declaration, discovery will enable Defendants to test the accuracy and completeness of the factual assertions contained in the numerous declarations submitted in support of Plaintiffs' summary judgment motion—assertions that Plaintiffs contend are material—and to develop additional facts that will further support, *inter alia*, why Plaintiffs lack standing to bring their claims and why summary judgment should be granted for Defendants.

By filing this Rule 56(d) motion, Defendants in no way concede that the facts asserted in support of Plaintiffs' and intervenor's summary judgment motions, if true, would entitle them to summary judgment. Courts, however, have held that a party "may not attempt to meet a summary judgment challenge head-on but fall back on [Rule 56(d)] if its first effort is unsuccessful." *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1235 (10th Cir. 2007); accord *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.*, 181 F.3d 15, 23 (1st Cir. 1999). Accordingly, Defendants have filed this Rule 56(d) response instead of attempting to oppose summary judgment without any discovery. *Been*, 495 at 1235. Defendants reserve the right to oppose the summary judgment motions even if discovery does not reveal any basis to dispute Plaintiffs' and the intervenor's asserted material facts or disclose any other material facts (in particular, facts related to this Court's jurisdiction).

BACKGROUND

On August 28, 2017, Plaintiffs filed a complaint in this action, Dkt. No. 1. They then filed an amended complaint and a motion for a preliminary injunction on September 14. *See* Dkt. Nos.

30, 32. On December 11, 2017, the Court dismissed Plaintiffs’ procedural due process claim, denied the remainder of Defendants’ motion to dismiss, and granted Plaintiffs’ motion for a preliminary injunction, which enjoined Defendants “from taking any action relative to transgender individuals that is inconsistent with their status quo that existed prior to President Trump’s July 26, 2017 announcement.” *See* Dkt. No. 103 at 22-23. On January 5, 2018, the Court issued an Order setting the date for the exchange of initial disclosures, the holding of the Rule 26(f) conference, and the submission of a Joint Status Report and Discovery Plan. *See* Dkt. No. 124. In particular, the Court ordered that the parties exchange initial disclosures on February 9, 2018, and submit a combined Joint Status Report and Discovery Plan on February 16, 2018. *Id.*

Although the parties had not yet submitted a discovery plan, and although the Secretary of Defense is scheduled to submit a plan to the President concerning transgender service members that may substantially affect this litigation in just over a week, Plaintiffs and Washington filed summary judgment motions contending that there are no genuine disputes of material fact and that they are entitled to judgment as a matter of law. Dkt. No. 129; Dkt. No. 150. In support of their motion, Plaintiffs submitted twenty declarations (totaling over 160 pages), including declarations from the nine individual Plaintiffs, the three organizational Plaintiffs, four former Service and Under Secretaries and a former Chairman of the Joint Chiefs of Staff, two purported expert witnesses, and an attorney declaration seeking to authenticate a host of exhibits. *See* Dkt. Nos. 130–49. Their motion relies heavily on those declarations.

ARGUMENT

Pursuant to Rule 56(d), Defendants are entitled to discovery before the Court rules on Plaintiffs’ and intervenor’s summary judgment motions. Plaintiffs’ summary judgment motion contains a lengthy “Statement of Undisputed Fact,” which is based upon twenty declarations and a number of attached exhibits. *See* Dkt. No. 129 at 2-8; Dkt. Nos. 130–49. Without the time and the opportunity for discovery, Defendants cannot contest these facts. This lack of a fair

1 opportunity to test these asserted facts will necessarily hinder Defendants' efforts to oppose
 2 Plaintiffs' and intervenor's summary judgment motions.¹

3 "[Rule 56(d)] allows a summary judgment motion to be denied, or the hearing on the
 4 motion to be continued, if the nonmoving party has not had an opportunity to make full
 5 discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986).² To prevail on a Rule 56(d) motion,
 6 "the parties opposing a motion for summary judgment must make (a) a timely application [that] (b)
 7 specifically identifies; (c) relevant information; (d) where there is some basis for believing that the
 8 information sought actually exists." *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1091 n.5 (9th Cir.
 9 2009) (citations and internal quotations omitted). And where, as here, "a summary judgment
 10 motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue
 11 discovery relating to its theory of the case, district courts should grant any Rule 56[(d)] motion
 12 fairly freely." *Burlington N. Santa Fe R.R. Co. v. Assiniboine Tribe*, 323 F.3d 767, 773 (9th Cir. 2003);
 13 *see also Berkeley v. Home Ins. Co.*, 68 F.3d 1409, 1414 (D.C. Cir. 1995) (holding that Rule 56(f)
 14 motions are granted "almost as a matter of course unless the nonmoving party has not diligently
 15 pursued discovery of the evidence") (citation and quotation omitted). Indeed, the specificity
 16 requirement is substantially relaxed where, like here, no discovery has taken place whatsoever as
 17 "the party making a Rule 56[(d)] motion cannot be expected to frame its motion with great

18
 19 ¹ Although the State of Washington's summary judgment motion purports to rely only upon "this Court's prior rulings
 20 and Defendants' evidence, briefing and public statements," Dkt. No. 150 at 1, Defendants' opposition to Washington's
 21 summary judgment motion also should be held in abeyance until Defendants have had an opportunity to engage in
 22 discovery. Washington's motion puts at issue identical questions to be resolved on the merits, and discovery obtained
 23 from many of Plaintiffs' declarants will be used in responding to Washington's summary judgment motion.
 24 Accordingly, given the substantial overlap in the legal and factual issues, resolution of Washington's summary
 25 judgment motion should proceed at the same time as the Plaintiffs' motion for summary judgment. *See Fed. R. Civ. P.*
 26 *1* (noting that the Federal Rules should be "construed, administered and employed by the court and the parties to
 27 secure the just, speedy, and inexpensive determination of every action and proceeding."). In addition, because
 28 Washington's status as a proper intervenor necessarily turns on the Court's conclusion that Plaintiffs possess standing,
 resolving Washington's summary judgment motion while Defendants are conducting discovery into Plaintiffs' standing
 would be particularly inappropriate. *See Sanford v. Memberworks, Inc.*, 625 F.3d 550, 560-61 (9th Cir. 2010) (holding that
 there is no right to intervene where plaintiffs lack standing). Deferring Washington's summary judgment motion to
 allow Defendants the opportunity to obtain discovery will not prejudice Washington because Defendants are currently
 enjoined 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." Dkt. No. 103 at 23. The Court's preliminary injunction will
 remain in effect pending resolution of this action on the merits or further order of this Court. *Id.*

² Pursuant to the 2010 amendments to the Federal Rules of Civil Procedure, Rule 56(f) was re-designated as Rule
 56(d). This re-designation did not substantively change the rule. *See Michelman v. Lincoln Nat'l Life Ins. Co.*, 685 F.3d
 887, 899 n.7 (9th Cir. 2012)

specificity as to the kind of discovery likely to turn up useful information, as the ground for such specificity has not yet been laid.” *Burlington N. Santa Fe*, 323 F.3d at 774.

Here, there can be no serious dispute that Defendants’ motion is timely. *Blough*, 574 F.3d at 1091 n.5. Defendants have not previously had an opportunity to fully pursue discovery in this case; indeed, the Court has yet to even issue a scheduling order. Dkt. No. 124. Moreover, on December 15 and December 22, 2017—more than a month before Plaintiffs and the intervenor filed their summary judgment motions—Defendants noted in a Joint Status Report and Supplement in the related case *Doe v. Trump* that it would be taking the depositions of Brad Carson on March 19, 2018; Deborah Lee James on March 21, 2018; Raymond Mabus, Jr., on March 26, 2018; Eric K. Fanning on March 29, 2018; George Richard Brown on March 5, 2018; and Mark Eitelberg on March 27, 2018. *See* Joint Status Report at 4-5, *Doe v. Trump*, No. 1:17-cv-01597-CKK (D.D.C. Dec. 15, 2017) Dkt. No. 76; Supplemental Joint Status Report at 3, *Doe*, No. 1:17-cv-01597-CKK (D.D.C. Dec. 22, 2017) Dkt. No. 77. These six individuals have submitted declarations in support of Plaintiffs’ summary judgment motion in this case, and appear to be offering the same testimony in all four related cases. *See* Dkt. No. 142–47. And, counsel for Plaintiffs here have been invited to attend the depositions.

Defendants, moreover, have satisfied their burden of showing how discovery will likely reveal relevant information. The attached declaration sets forth the specific facts Defendants hope to elicit through discovery and the reasons those sought-after facts would create a genuine issue of material fact (or warrant summary judgment in Defendants’ favor). *See* Decl. of Ryan B. Parker (Feb. 12, 2018). The declaration satisfies the requirements of Rule 56(d), because, at the very least, it “give[s] the [] court some idea of how the sought-after discovery might reasonably be supposed to create a factual dispute.” *Emplanar, Inc. v. Marsh*, 11 F.3d 1284, 1292 (5th Cir. 1994).

For example, Plaintiffs have submitted declarations from each of the nine individual Plaintiffs, *see* Dkt. Nos. 130–38, as well as the three organizational Plaintiffs, *see* Dkt. Nos. 139–41. Each of these declarations seek to support Plaintiffs’ standing to sue. *See* Dkt. No. 129 at 6-8. As the parties invoking federal jurisdiction, Plaintiffs bear the burden of satisfying the elements of jurisdiction. *See Lujan v. Defenders of the Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted). And

1 although this Court previously concluded that the Plaintiffs had standing for purposes of their
2 motion for a preliminary injunction, Plaintiffs burden on summary judgment is significantly more
3 exacting. *See id.* (“[E]ach element must be supported in the same way as any other matter on which
4 the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the
5 successive stages of the litigation.”) (citations omitted). Accordingly, at the summary judgment
6 stage, Plaintiffs “can no longer rest on [] ‘mere allegations,’ but must ‘set forth’ by affidavit or
7 other evidence ‘specific facts,’ which for purposes of the summary judgment motion will be taken
8 to be true.” *Id.* (citation omitted). When Plaintiffs use affidavits to support their standing
9 argument, courts grant defendants the opportunity to “test the assertions in Plaintiffs’ affidavits
10 through discovery.” *Bryant v. Woodall*, No. 1:16CV1368, 2017 WL 1292378, at *7 (M.D.N.C. Apr.
11 7, 2017) (finding that although the plaintiffs claimed that they asserted facts to establish standing in
12 their affidavits, the defendants should be afforded an opportunity to conduct discovery on the
13 issue); *MKB Mgmt. Corp. v. Burdick*, No. 1:13-CV-071, 2013 WL 6147204, at *5 (D.N.D. Nov. 15,
14 2013) (stating that “although it appears plaintiffs’ standing is well-established, some discovery
15 regarding that issue may be undertaken if the State is going to contest it”); *see also Greater Baltimore*
16 *Ctr. for Pregnancy Concerns, Inc. v. Mayor of Baltimore*, 721 F.3d 264, 285 (4th Cir. 2013) (stating that
17 “discovery is especially important where, as here, the relevant facts are exclusively in the control of
18 the summary judgment movant” (internal quotation omitted)). Thus, a court that enters a
19 preliminary injunction for a plaintiff may later enter judgment for the defendant on jurisdictional
20 grounds based on the factual record developed through discovery. *See, e.g., In re iPhone Application*
21 *Litig.*, 6 F. Supp. 3d 1004, 1016 (N.D. Cal. 2013) (noting that the court found standing at motion to
22 dismiss stage but concluded that plaintiffs lacked standing at summary judgment because the
23 defendant adduced “specific facts” through discovery that established a lack of evidence of
24 causation). *See generally People To End Homelessness, Inc. v. Develco Singles Apartments Assocs.*, 339 F.3d 1,
25 8 (1st Cir. 2003) (“As litigation progresses, Article III places an increasingly demanding evidentiary
26 burden on parties that seek to invoke federal jurisdiction. A plaintiff who has standing at the
27 motion to dismiss stage, does not automatically have standing at the summary judgment or trial
28 stage.”).

1 The “Statement of Undisputed Facts” in support of Plaintiffs’ summary judgment motion
2 relies heavily upon the declarations by the various Plaintiffs. *See* Dkt. No. 129 at 2-8. In particular,
3 it relies on the declarations to establish that the plaintiffs have suffered harm—a basic requirement
4 for establishing jurisdiction. *See id.* at 6–8; *Lujan*, 504 U.S. at 560. Yet many of the factual
5 contentions Plaintiffs assert are based on information that is not readily available to Defendants.
6 Before responding to Plaintiffs’ motion, Defendants are entitled to discovery that would enable
7 them to test Plaintiffs’ version of the facts. *See, e.g., Bischoff v. Osceola Cty.*, 222 F.3d 874, 876 (11th
8 Cir. 2000) (holding that the district court erred in granting summary judgment based on conflicting
9 affidavits concerning plaintiffs’ standing). For example, Plaintiff Ryan Karnoski states in
10 conclusory fashion in his declaration that he is “ready and able to pursue a military career,” Dkt.
11 No. 130 at ¶ 16, and that he is “fit to serve in the military.” *Id.* at ¶ 20. Defendants should be
12 afforded the opportunity to vet these conclusory assertions. Similarly, Plaintiff D.L. states that
13 “when [he] meet[s] the current requirements to enlist, [he] intend[s] to do so.” Dkt. No. 132 at ¶
14 16. Of course, this raises the question of whether he can, in fact, meet the eligibility requirements
15 for service in the military. Defendants, at a minimum, should have the opportunity to enquire into
16 these and other factual assertions by the Plaintiffs before the Court resolves Plaintiffs’ and
17 intervenor’s summary judgment motions.

18 In addition, many of the non-Plaintiff declarants express, in lengthy declarations, their
19 opinions about the previous Administration’s analysis of the issue of military service by
20 transgender individuals and what they perceive to be the current Administration’s policy on this
21 issue. In particular, Plaintiffs’ summary judgment motion relies heavily on these declarations for
22 their argument that the Government “lacks any justification” for the exclusion of transgender
23 individuals from military service, and that restrictions on transgender service members do not
24 further “military effectiveness, unit cohesion and cost.” Dkt. No. 129 at 14. Although Plaintiffs
25 have not clearly indicated whether they seek to offer this testimony as expert or fact testimony for
26 each of these witnesses, Defendants are entitled to test the basis and reliability of these sort of
27 “opinions” concerning what Plaintiffs believe to be the key facts and issues in this case. *1443*
28 *Chapin Street, L.P., v. PNC Bank, Nat’l Ass’n*, 258 F.R.D. 186, 188 (D.D.C. 2009) (party seeking

Rule 56(f) continuance is entitled to test the accuracy and/or qualifications of a purported expert through discovery rather than being forced to respond to summary judgment); *United States v. Nutri-Cology, Inc.*, No. C-91-1332, 1993 WL 13585505, *4 (N.D. Cal. Sept. 23, 1993) (granting continuance under Rule 56(f) so that party could take depositions of the summary judgment movant's experts). Defendants intend to depose each of these individuals to test the bases for their opinions concerning military readiness, unit cohesion, and costs, as well as uncover the underlying facts they have relied upon (or not relied upon) in reaching their opinions.³ Indeed, these individuals' depositions have already been scheduled throughout the month of March. *See* Decl. of Ryan B. Parker, ¶10.

Finally, a non-movant has "clearly met" its burden under Rule 56(d) when it is "not seeking additional discovery, but discovery at all." *Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345 (5th Cir. 1989). "[R]ush[ing] to summary judgment" without allowing the non-movant to engage in any discovery would "substantially handicap[]" the non-movant "in any attack on the facts asserted by the [summary judgment movant]." *Id.* at 355. Instead, courts "must afford" a non-movant "some protective armor . . . to properly defend against" a motion for summary judgment. *Int'l Shortstop, Inc. v. Rally's Inc.*, 939 F.2d 1257, 1268 (5th Cir. 1991); *see, e.g., Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 245 (4th Cir. 2002) (holding that court improperly denied Rule 56(d) relief where summary judgment was granted six weeks after complaint was filed and there had been almost no discovery conducted in the case).

Accordingly, this Court should not "substantially handicap" Defendants by denying them the time and opportunity to take discovery necessary to determine whether Plaintiffs' factual assertions are accurate and complete, and whether Plaintiffs have standing to support this Court's jurisdiction. Because this action was only recently filed, Defendants have had no opportunity to

³ Plaintiffs note in their summary judgment motion that the evidence they are relying upon "includes substantially similar declarations as those submitted in support of Plaintiffs' preliminary injunction motion, supplemented with relevant factual updates as appropriate, as well as declarations from former Secretary of the Army Eric Fanning and former Secretary of the Air Force Deborah Lee James." Dkt. No. 129 at 2 n.1. If Plaintiffs are suggesting that Defendants should be foreclosed from deposing their declarants at this juncture because Defendants should have deposed them during the pendency of the preliminary injunction briefing, such an argument lacks legal support. In any event, Plaintiffs acknowledge that their declarants have supplemented their preliminary injunction declarations and that they are submitting declarations from two new individuals.

1 pursue and complete discovery. Indeed, pursuant to the Court's January 5, 2018 Order, the parties
 2 did not even exchange initial disclosures until February 9, 2018, and will not submit a combined
 3 Joint Status Report and Discovery Plan until February 16, 2018. Dkt. No. 124. The Court,
 4 therefore, should not rely upon the Plaintiffs' "Statement of Undisputed Facts," Dkt. No. 129 at 2-
 5 8, without first allowing Defendants discovery to test those assertions and uncover other material
 6 facts relevant to the summary judgment motions.

7 CONCLUSION

8 For these reasons, the Court should defer ruling on Plaintiffs' and Washington's motions
 9 for summary judgment under Rule 56(d) to allow Defendants' to take discovery before filing their
 10 opposition to Plaintiffs' and Washington's summary judgment motions. If the Court denies
 11 Defendants' request, Defendants respectfully request 30 days to oppose the summary judgment
 12 motions.

13 Dated: February 12, 2018

Respectfully submitted,

14 CHAD A. READLER
 15 Acting Assistant Attorney General
 16 Civil Division

17 BRETT A. SHUMATE
 18 Deputy Assistant Attorney General

19 JOHN R. GRIFFITHS
 20 Branch Director

21 ANTHONY J. COPPOLINO
 22 Deputy Director

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

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2018, I electronically filed the foregoing Rule 56(d) Response To Plaintiffs' And Intervenor's Motions for Summary Judgment using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: February 12, 2018

/s/ Ryan Parker

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

Counsel for Defendants

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

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

Defendants.

Case No. 2:17-cv-01297-MJP

**PLAINTIFFS' REPLY TO
DEFENDANTS' RULE 56(d)
RESPONSE TO PLAINTIFFS' AND
INTERVENOR'S MOTIONS FOR
SUMMARY JUDGMENT**

NOTE ON MOTION CALENDAR:
February 16, 2018

TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	1
STANDARD	3
ARGUMENT	4
I. Defendants Failed to Exercise Diligence in Seeking Discovery Despite Substantial Advance Notice of Plaintiffs’ Motion for Summary Judgment	4
II. Defendants Have Failed to Show the Existence of “Specific” Facts—Rising Beyond Pure Speculation—Necessary to Oppose Summary Judgment	5
III. Defendants Have Failed to Identify Facts That Are “Essential” to Opposing Summary Judgment	6
CONCLUSION	8
CERTIFICATE OF SERVICE	10

INTRODUCTION

Any proof the government hopes to use to defend its own policy—a creature of President Trump’s personal making—is entirely within Defendants’ exclusive control. The justification for the policy, which Defendants have the burden of proving under heightened scrutiny, cannot be found by taking discovery of the Plaintiffs. Nor can the justification for the policy be found in a “study” conceived after the decision to bar transgender people from the military was already made, although Defendants’ request for a continuance under Rule 56(d) is a transparent tactic to stall for time so that the study can be used as part of their summary judgment opposition.

Defendants satisfy none of the requirements for a continuance under Rule 56(d). First, they have failed to exercise reasonable diligence to pursue any of the discovery they suddenly claim they need. Plaintiffs provided Defendants with significant advance notice of their motion for summary judgment, and Defendants took no steps to obtain any discovery whatsoever in the two months before their opposition deadline. Second, Defendants have failed to identify non-speculative and specific facts that they plan to obtain in discovery that would defeat summary judgment. Imagining that perhaps all twelve Plaintiffs and the State of Washington lack standing to sustain this action does not suffice. Third, and perhaps most critically, Defendants have not shown that the discovery sought is essential to opposing summary judgment. The burden of justifying President Trump’s discriminatory policy rests firmly with Defendants, and discharging that burden requires them to come forward with their own affirmative evidence, which is solely within their control.

BACKGROUND

The policy challenged in this case (the “Ban”) was announced on Twitter nearly seven months ago by President Trump on July 26, 2017. This case has been pending for nearly six months, since August 28, 2017. Dkt. No. 1. Plaintiffs’ legal and factual arguments challenging the Ban were extensively litigated in the context of both their motion for a preliminary injunction and their opposition to Defendants’ motion to dismiss. Dkt. Nos. 32, 84.

The day after this Court granted after Plaintiffs’ motion for a preliminary injunction, Plaintiffs provided Defendants advance notice that they intended to move for summary

judgment. On December 12, 2017—more than two months ago—Plaintiffs informed Defendants that they would be moving for summary judgment and that they anticipated filing the motion in January 2018. Decl. of Jordan Heinz ¶ 2. Plaintiffs again repeatedly confirmed to Defendants that this remained their plan at subsequent telephonic conferences between the parties on December 19, 2017, January 12, 2018, and January 17, 2018. *Id.* ¶ 3. Indeed, Plaintiffs also disclosed to Defendants that they intended to rely upon the same argument and evidence for their summary judgment motion as that submitted in support of the preliminary injunction motions filed in this and other cases challenging the Ban. *Id.* ¶ 4. On December 19, 2017, Plaintiffs specifically asked Defendants whether they planned to seek a Rule 56(d) continuance, and Defendants responded that they did not anticipate needing to lay out discovery. *Id.* ¶ 5. At no point prior to Defendants’ February 12, 2018 deadline for opposing Plaintiffs’ motion for summary judgment did Defendants seek discovery from Plaintiffs or even express any intent to do so. *Id.* ¶ 6.

In reality, Defendants’ Rule 56(d) request is an improper attempt to obtain more time to oppose Plaintiffs’ summary judgment motion for reasons *unrelated* to taking discovery of Plaintiffs. Shortly before Defendants’ opposition was due—and after the time for seeking an extension of time under the local rules had already passed—Defendants contacted counsel for Plaintiffs and the State of Washington seeking a 45-day extension of time to oppose summary judgment. *Id.* ¶ 7. When Plaintiffs and Washington probed the basis for the request, Defendants never stated that they needed additional time to take discovery of Plaintiffs. *Id.* ¶ 8. Instead, Defendants stated that their “primary motivation” for seeking delay was because they had been focused on document production in another case, *Doe v. Trump*, No. 17-1597 (D.D.C. filed Aug. 9, 2017). *Id.* They also indicated they wanted more time to be able to prepare declarations to submit from their own witnesses, who are necessarily under Defendants’ control rather than Plaintiffs. *Id.* Finally, they expressed that they believed the parties and Court should await the implementation plan and study due on February 21, 2018. *Id.* Plaintiffs declined Defendants’ request because Plaintiffs had already provided Defendants with significant advance notice of their motion, and the Ban cannot be supported by a *post hoc* justification. *Id.*, Ex. A.

Tellingly, shortly before representing to this Court that they needed more time for the purpose of conducting discovery, Defendants informed Plaintiffs they intended to seek a protective order to *freeze* further discovery. Defendants wrote that, in their view, “it does not make sense for the parties to plow forward with discovery beyond what is occurring in the other cases when there is a [preliminary injunction] in place and Plaintiffs and Washington have both filed potentially dispositive motions for summary judgment.” *Id.* ¶ 9, Ex. A. Thus, according to Defendants, the pendency of the motions for summary judgment *lessened* the need for discovery. Defendants’ newfound desire to pursue discovery only materialized at the eleventh hour, after they could not obtain an extension, which they had sought for reasons unrelated to discovery.

STANDARD

Pursuant to Federal Rule of Civil Procedure 56(b), a party “may move for summary judgment at any time.” *Heggen v. Congdon*, No. C08-0070-MJP, 2008 WL 4702741, at *1 n.1 (W.D. Wash. Oct. 21, 2008) (denying request for continuance to oppose summary judgment).

A party seeking additional time to oppose summary judgment under Federal Rule of Civil Procedure 56(d) must show by affidavit that it cannot present facts essential to justify its opposition. In addition to making a timely request, the non-movant must show: “(1) it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment.” *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.* (“*Family Home*”), 525 F.3d 822, 827 (9th Cir. 2008). Failure to meet these requirements “is a proper ground for denying discovery and proceeding to summary judgment.” *Id.* (emphasis added and internal quotation marks omitted). The burden rests with the party seeking to delay summary judgment. *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1091 (9th Cir. 2009).

Because district courts possess “wide latitude” in controlling discovery and case management, denial of a Rule 56(d) request is reviewed for abuse of discretion. *U.S. v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002). There is no abuse of discretion to deny a Rule 56(d) request where the non-movant has failed to pursue discovery diligently. *Emp’rs Teamsters Local Nos. 175 & 505 Pension Tr. Fund v. Clorox Co.* (“*Emp’rs Teamsters*”), 353

F.3d 1125, 1130 (9th Cir. 2004). Rule 56(d) also empowers the district court to issue “any . . . appropriate order” in response to a continuance request. Fed. R. Civ. P. 56(d).

ARGUMENT

I. Defendants Failed to Exercise Diligence in Seeking Discovery Despite Substantial Advance Notice of Plaintiffs’ Motion for Summary Judgment.

Defendants’ Rule 56(d) continuance request should be denied because they have not exercised reasonable diligence, under the circumstances presented here, to pursue discovery of information purportedly essential to opposing summary judgment. *Emp’rs Teamsters*, 353 F.3d at 1130. This case has been pending for nearly six months, and most critically, Plaintiffs provided Defendants with two months of notice before their summary judgment opposition was due. Yet Defendants admit they chose to take “no discovery . . . whatsoever,” Defs.’ Opp’n at 3, despite advance knowledge that they would need to oppose summary judgment. There is no basis for a Rule 56(d) continuance under these circumstances. *See Echlin v. Dynamic Collectors, Inc.*, 102 F. Supp. 3d 1179, 1183 (W.D. Wash. 2015) (denying 56(d) continuance where non-movant had already had two months to conduct discovery since summary judgment motion was filed and proceeding to decide summary judgment). Nothing prevented Defendants from pursuing the discovery they claim they need—just as Plaintiffs have already sought and obtained discovery from Defendants. Heinz Decl. ¶ 2.

Defendants’ lack of diligence is particularly egregious because the main issue on which they claim to need discovery was known to them from the inception of litigation. Specifically, Defendants now claim they need discovery from Plaintiffs to test their standing; but Defendants previously raised that issue in their motion to dismiss, Dkt. No. 69, making their subsequent failure to seek discovery on that topic inexcusable. The timing of their 56(d) request—made two-and-a-half weeks after Plaintiffs and Washington moved for summary judgment, and only *after* Defendants failed to secure an extension, which they had sought for reasons unrelated to discovery—also underscores a lack of diligence. *See Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 784 (9th Cir. 2002) (“[The party] lacked diligence as she waited two weeks after being

served with the summary judgment papers before seeking a continuance.”). As the facts set forth above show, Defendants’ Rule 56(d) request has been made in bad faith.

This is thus not a case where a party has been deprived of a “realistic opportunity to pursue discovery relating to its theory of the case.” *Cf. Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003) (party brought summary judgment motion less than one month *after filing suit*). Rather, it falls into the category of cases where the non-movant failed to exercise reasonable diligence under the relevant circumstances to conduct discovery, and where courts have routinely denied 56(d) requests. *See, e.g., Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151, 1161 (9th Cir. 2001) (affirming denial of 56(d) continuance where non-movant failed to diligently pursue discovery); *Echlin*, 102 F. Supp. 3d at 1183 (no diligence where non-movant failed to pursue discovery during two months before opposition deadline); *Blue Lake Rancheria v. Lanier*, 106 F. Supp. 3d 1134, 1137-38 (E.D. Cal. 2015) (no diligence where facts sought were known to non-movant from case inception); *Rocky Mountain Biologicals, Inc. v. Microbix Biosystems, Inc.*, 986 F. Supp. 2d 1187, 1203 (D. Montana 2013) (no diligence where non-movant failed to conduct “any discovery” during pendency of motion for summary judgment). Indeed, Defendants’ lack of diligence is especially pronounced here because, in contrast to the posture of most cases in which a 56(d) continuance is sought, Defendants were aware of Plaintiffs’ motion for summary judgment substantially in advance of when it was filed.

II. Defendants Have Failed to Show the Existence of “Specific” Facts—Rising Beyond Pure Speculation—Necessary to Oppose Summary Judgment.

Defendants have failed to meet their threshold burden of showing the existence of “specific” facts that they seek to obtain through discovery to oppose summary judgment. *Family Home*, 525 F.3d at 827. The party invoking Rule 56(d) must make a showing that rises beyond mere speculation. *See Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 888 (9th Cir. 1996) (affirming denial of continuance request where movant requested additional discovery to search for evidence that “may exist”); *Terrell v. Brewer*, 935 F.2d 1015, 1018 (9th Cir. 1991) (sought-after evidence was “object of pure speculation”). Courts routinely deny

requests based on conclusory or speculative assertions of what information is sought through discovery. *See, e.g., Paris v. Steinberg & Steinberg*, 828 F. Supp. 2d 1212, 1222 (W.D. Wash. 2011) (denying 56(f) request where facts identified were “too vague” to support continuance) (Pechman, J.); *Harris v. City of Seattle*, 315 F. Supp. 2d 1112, 1119 (W.D. Wash. 2004) (denying continuance request based on “vague and conclusory statements” about anticipated deposition testimony) (Pechman, J.).

Here, Defendants rely on vague and speculative assertions of facts they imagine discovery will adduce, mostly revolving around the fanciful notion that perhaps the Ban has not injured anyone at all. For example, Defendants assert that they intend to question the Plaintiffs currently serving in the military “regarding any alleged harms they have faced (including harms, if any, that are not included in their declarations).” Decl. of Ryan Parker ¶ 4. Apart from the fact that it is unclear how *additional* harms suffered by the Plaintiffs would help Defendants oppose summary judgment, Defendants fail to explain what facts known to Plaintiffs could conceivably demonstrate that they somehow have not been injured by the Ban, including the stigma that it inflicts. Similarly, Defendants engage in rank speculation about whether the Plaintiffs who wish to join the military can “meet the eligibility requirements for military service unrelated to their transgender status.” *Id.* As discussed below, that is legally irrelevant, and in any event, Defendants have offered no hint of what requirements they might not meet. There is likewise no articulation whatsoever of how the organizational Plaintiffs might lack standing. *Id.* ¶ 5.

Defendants similarly fail to explain what “specific” facts they believe that discovery of the non-Plaintiff declarants will produce and that they need to oppose summary judgment. Instead, they generically assert that they wish to “test the basis and reliability” of their testimony. *Id.* ¶ 6. That is not a “specific” fact. And if that were sufficient, then there would be no limit to what would justify continuances under Rule 56(d).

III. Defendants Have Failed to Identify Facts That Are “Essential” to Opposing Summary Judgment.

Perhaps most importantly, Defendants have not identified facts that are “essential” to opposing summary judgment. *Family Home*, 525 F.3d at 827. In other words, the facts identified

1 must be outcome-determinative to the motion. See *Qualls By & Through Qualls v. Blue Cross of*
 2 *Cal., Inc.*, 22 F.3d 839, 844 (9th Cir. 1994) (“the additional discovery would not have precluded
 3 summary judgment and was properly denied”).

4 Defendants’ reliance on the standing of a subset of Plaintiffs to challenge the Ban, Defs.’
 5 Opp’n at 6, cannot meet this requirement. First, although Defendants speculate that those seeking
 6 to join the military may not meet eligibility requirements for never-identified reasons, this Court
 7 already ruled that the inability to “compete for accession on equal footing with non-transgender
 8 individuals” is itself “injury in fact.” Dkt. No. 103 at 9. “Because the injury lies in the denial of
 9 an equal *opportunity* to compete, not the denial of the job itself, we do not inquire into the
 10 plaintiff’s qualifications (or lack thereof) when assessing standing.” *Shea v. Kerry*, 796 F.3d 42,
 11 50 (D.C. Cir. 2015). This Court also recognized that the Ban unquestionably inflicts “harms in
 12 the form of stigmatization and impairment of free expression.” Dkt. No. 103 at 8.

13 Second, “[i]f one plaintiff has standing, it does not matter whether the others do.”
 14 *Thorsted v. Gregoire*, 841 F. Supp. 1068, 1073 (W.D. Wash. 1994); accord *Oregon Advocacy*
 15 *Ctr. v. Mink*, 322 F.3d 1101, 1109 (9th Cir. 2003) (“We need only find that one petitioner has
 16 standing to allow a case to proceed.”) (internal quotation marks omitted). Defendants do not
 17 offer any non-speculative basis to believe that discovery would somehow show that *none* of the
 18 Plaintiffs have standing to challenge the Ban. Indeed, the presence of the State of Washington as
 19 a Plaintiff-Intervenor in this action alone negates that possibility. This Court has already found
 20 that Washington has standing to challenge the Ban, Dkt. No. 103 at 11, which provides an
 21 independent basis for jurisdiction. See *Benavidez v. Eu*, 34 F.3d 825, 830 (9th Cir. 1994).¹
 22 Defendants thus fail to identify facts that are “essential” to opposing summary judgment. See
 23 *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (affirming denial of summary
 24 judgment continuance because whether there was contamination at an *additional* property would
 25 not negate defendants’ liability and thus was not an essential fact).

26
 27 ¹ Defendants assert that Washington’s status as an intervenor is contingent upon Plaintiffs’ standing, but its cited
 28 authority does not support that proposition, particularly where intervention has already been granted. Cf. *Sanford v.*
Memberworks, Inc., 625 F.3d 550, 560-61 (9th Cir. 2010) (holding that the district court was not *required* to permit
 intervention where “the original named plaintiffs fail[ed] to state a cognizable claim from the outset”).

Defendants' reliance on discovery from the non-Plaintiff declarants is also insufficient to justify a continuance. Continuances are appropriately denied where the discovery sought would not be material under the relevant legal standard at issue. *See Columbia Pictures Indus., Inc. v. Prof'l Real Estate Inv'rs, Inc.*, 944 F.2d 1525, 1532-33 (9th Cir. 1991), *aff'd*, 508 U.S. 49 (1993). Here, it is *Defendants* who bear the burden of proof under heightened scrutiny to justify the Ban. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("[t]he burden of justification is demanding and it rests entirely on the State"). The depositions of Plaintiffs' witnesses cannot help Defendants meet their burden of proving, for example, that the Ban substantially advances any proffered interest. It is Defendants who have exclusive control over the evidence they plan to rely upon to defend the Ban. Indeed, as noted above, Defendants indicated that they wanted additional time so that they would be able to prepare declarations from their own witnesses—but plainly that is not a proper basis for Rule 56(d) request. *See Digital Control Inc. v. McLaughlin Mfg. Co.*, 213 F. Supp. 2d 1242, 1246 (W.D. Wash. 2002) (denying continuance request where information to oppose summary judgment was in possession of non-movant) (Pechman, J.).

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' Rule 56(d) request. The Court may proceed to directly resolve Plaintiffs and Washington's summary judgment motions based on the existing record, given that Defendants made the tactical choice to "raise only a limited defense to Plaintiff's motion."² *Digital Control*, 213 F. Supp. 2d at 1246.

In the alternative, Plaintiffs request that the Court order that Defendants file whatever additional opposition they intend to submit within five days after disposition of the Rule 56(d) request. *See Orr*, 285 F.3d at 784 (affirming denial of continuance request where district court gave non-movant five additional days to cure defects in opposition). By that point, Defendants

² Defendants' assertion that they were *prohibited* from filing a substantive opposition along with their Rule 56(d) request has no basis in law or logic, and is contradicted by practice. Defs.' Opp'n at 1. The case law they cite for that proposition merely confirms that a non-movant may not oppose summary judgment and then belatedly make a Rule 56(d) continuance request *after* its opposition is unsuccessful. *See Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1235 (10th Cir. 2007). But failure to satisfy the grounds for a Rule 56(d) continuance permits the district court "proceeding to summary judgment." *Family Home*, 525 F.3d at 827 (internal quotation marks omitted). Thus, non-movants who put all their eggs in the Rule 56(d) basket do so at their own peril.

1 will already have received significant additional time beyond when their opposition was due—
2 and thus received the benefit of an extension without ever satisfying the requirements for one.

3 Finally, should the Court grant Defendants' Rule 56(d) request, Plaintiffs request that
4 Defendants' opposition be due on March 29, 2018, which is 45 days after their original deadline,
5 and the maximum extension that Defendants previously sought from Plaintiffs and Washington.
6

7 Respectfully submitted February 16, 2018.

8 **NEWMAN DU WORS LLP**

9 

10 Derek A. Newman, WSBA #26967
11 dn@newmanlaw.com
12 Samantha Everett, WSBA #47533
13 samantha@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

14 **LAMBDA LEGAL DEFENSE AND EDUCATION
15 FUND, INC.**

16 Tara Borelli, WSBA #36759
17 tborelli@lambdalegal.org
18 Camilla B. Taylor (admitted pro hac vice)
19 Peter C. Renn (admitted pro hac vice)
20 Natalie Nardecchia (admitted pro hac vice)
21 Sasha Buchert (admitted pro hac vice)
22 Kara Ingelhart (admitted pro hac vice)
23 Carl Charles (admitted pro hac vice)

24 **OUTSERVE-SLDN, INC.**

25 Peter Perkowski (admitted pro hac vice)

26 **KIRKLAND & ELLIS LLP**

27 James F. Hurst, P.C. (admitted pro hac vice)
28 Jordan M. Heinz (admitted pro hac vice)
Scott Lerner (admitted pro hac vice)
Vanessa Barsanti (admitted pro hac vice)
Daniel I. Siegfried (admitted pro hac vice)
Ben Tyson (admitted pro hac vice)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on February 16, 2018.



Samantha Everett, WSBA #47533
samantha@newmanlaw.com
Newman Du Wors LLP
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' AND INTERVENOR'S
MOTIONS FOR SUMMARY
JUDGMENT AND CROSS-MOTION
FOR PARTIAL SUMMARY
JUDGMENT**

Noted for March 23, 2018

TABLE OF CONTENTS

1	INTRODUCTION	1
2		
3	ARGUMENT	2
4	I. The Summary Judgment Motions Must Be Denied Because There Are	
5	Numerous Genuine Issues Of Material Facts In Dispute.	2
6	A. Whether Plaintiffs Have Suffered Cognizable Injuries Is A Genuine Issue	
7	Of Fact In Dispute.	3
8	1. There Are Numerous Genuine Issues Of Disputed Material Fact	
9	Concerning Whether Plaintiffs Have Standing To Challenge The	
10	Accession Policy.	3
11	2. There Are Numerous Genuine Issues Of Disputed Material Fact	
12	Concerning Whether Plaintiffs Have Suffered Cognizable Injuries	
13	Caused By The Interim Guidance.	5
14	3. The Organizational Plaintiffs And Intervenor Have Not Satisfied	
15	Their Burden To Prove Standing To Sue.	8
16	B. Genuine Disputes of Material Fact Exist Concerning Which Policy Is	
17	Applicable In The Absence of a Preliminary Injunction.	9
18	C. Judicial Economy Is Not Served By Summary Judgment Proceedings at	
19	This Stage.	11
20	II. Plaintiffs and Intervenor Have Not Met Their Burden of Proving That the	
21	Applicable Policy Violates the Constitution.	12
22	A. Considerable Deference is Owed to Military Personnel Decisions.	13
23	B. The Applicable Policies Are Consistent With Constitutional Guarantees.	15
24	1. The Applicable Policies Do Not Violate Equal Protection.	16
25	a. Retention of Current Service Members.	16
26	b. Surgery.	16
27	c. Accessions.	17
28	2. The Applicable Policies Do Not Violate Due Process.	20
	3. The Applicable Policies Do Not Violate the First Amendment.	20
	III. The Injunction Relief Plaintiffs Seek Is Inappropriate.	21
	III. The Court Should Grant Partial Summary Judgment for Defendants on All	
	Claims Brought Against the President.	22

CONCLUSION 24

INTRODUCTION

Plaintiffs and Intervenor ask this Court to pre-judge the constitutionality of a future Government policy regarding military service by transgender individuals and issue the extraordinary relief of a worldwide permanent injunction. Although they are aware that a final policy will be issued in the near future, they chose to file premature summary judgment motions that entangle the Court in an abstract disagreement over a non-final policy that will be superseded shortly. For this reason alone, the Court should defer ruling on the motions.

In any event, Plaintiffs and Intervenor are not entitled to summary judgment because there are numerous genuine issues of disputed material facts. Among other things, the parties dispute underlying material facts relating to whether Plaintiffs have suffered a cognizable injury in fact sufficient to support legal standing; which is the applicable policy regarding service by transgender persons in the military; and, relatedly, whether there has been a final decision concerning military policy. In addition, they have failed to recognize the substantial deference that should be afforded to the military's personnel decisions and failed to meet their burden to show that the applicable policy violates their constitutional rights. Therefore, the Court should deny Plaintiffs' and Intervenor's summary judgment motions.

Defendants cross-move for partial summary judgment on all of Plaintiffs' and Intervenor's claims against the President of the United States. Although they seek an injunction and a declaratory judgment against all Defendants, the President cannot be subject to direct injunctive relief, *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866), or a declaratory judgment, *Franklin v. Massachusetts*, 505 U.S. 788, 827–28 (1992) (Scalia, J., concurring); *Nendow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010). Because the Court cannot issue a declaratory judgment or an order enjoining the President for his official, discretionary action, the Court should grant partial summary judgment as a matter of law to Defendants on all of the claims against the President.

ARGUMENT

As a preliminary matter, Defendants’ Opposition to the summary judgment motions is based on the evidence available to Defendants at this early stage in the litigation, as the Court denied Defendants’ Rule 56(d) motion seeking a deferral of the ruling on summary judgment to allow Defendants to take discovery. *See* Order, ECF No. 189¹; *see also Burlington Santa Fe v. Assinboine, Sioux Tribe*, 323 F.3d 767, 773 (9th Cir. 2003) (where “a summary judgment motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue discovery relating to its theory of the case, district courts should grant any Rule 56[d] motion fairly freely”); *Shelton v. Bledsoe*, 775 F.3d 554, 568 (3d Cir. 2015); *Snook v. Tr. Co. of Ga. Bank of Savannah*, 859 F.2d 865, 870 (11th Cir. 1988).

I. The Summary Judgment Motions Must Be Denied Because There Are Numerous Genuine Issues Of Material Facts In Dispute.

Because there are numerous genuine issues of disputed material facts—such as whether Plaintiffs have suffered a cognizable injury in fact sufficient to support Article III standing; which is the current applicable military policy for service by transgender persons; and whether there has been a final decision concerning the military policy—the Court must deny Plaintiffs’ and Intervenor’s summary judgment motions. *See* Fed. R. Civ. P. 56(a). Under Rule 56, courts “view the evidence in the light most favorable to the nonmoving party,” and “determine whether there are any genuine

¹ Respectfully, the Court’s opinion denying Defendants’ 56(d) motion overlooked several of Defendants’ arguments as to why ruling on summary judgment should be deferred to permit Defendants an opportunity to take discovery. First, in stating that Defendants have “failed to show that they were diligent” in seeking discovery while the “case has been pending for nearly six months,” Order, ECF No. 189, at 4, the Court ignored that Defendants were prohibited under Federal Rule of Civil Procedure 26 from taking depositions or serving written discovery until after the Rule 26(f) discovery conference, which did not take place until December 12, 2017. *See* Fed. R. Civ. P. 26(d) (“A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f) . . .”).

Additionally, although Defendants detailed in their 56(d) motion five categories of discovery they would seek to assist them in establishing that there are genuine issues of material fact, the Court’s opinion did not address the majority of these categories of discovery. The only category of discovery the Court directly addressed was related to the standing of the Plaintiffs not currently serving in the military, and the Court otherwise summarily stated that it “already found that the remaining Plaintiffs . . . have standing to challenge the constitutionality of the policy.” Order, ECF No. 189, at 4. However, the Court did not address the authority cited by Defendants demonstrating that Plaintiffs’ burden to establish standing is significantly more exacting at the summary judgment stage than at the preliminary injunction stage. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Even more problematic is the Court’s failure to address Defendants’ entitlement to expert discovery. *See* Fed. R. Civ. P. 26(b)(4)(A) (“A party may depose any person who has been identified as an expert If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.”). Indeed, the Government is unaware of any circumstances where Rule 56(d) discovery has been denied where a plaintiff moves for summary judgment early in the case, relies upon declarations from fact and expert witnesses, and the Court has not yet entered a scheduling order. If Rule 56(d) discovery were ever appropriate, it would be in these circumstances.

issues of material fact.” *Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 989 (9th Cir. 2016). Viewing the evidence in a light most favorable to Defendants, and because there are a number of genuine disputes of material fact, the summary judgment motions must be denied.

A. Whether Plaintiffs Have Suffered Cognizable Injuries Is A Genuine Issue Of Fact In Dispute.

Plaintiffs bear the burden of establishing jurisdiction. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted). Although this Court previously concluded that the Plaintiffs had standing for purposes of their preliminary injunction motion, Plaintiffs’ burden on summary judgment is significantly more exacting. *See id.* Now, Plaintiffs “can no longer rest on . . . ‘mere allegations,’ but must ‘set forth’ by affidavit or other evidence ‘specific facts.’” *Id.* (citation omitted).

Standing is “an indispensable part of each plaintiff’s case.” *Id.* Each Plaintiff bears the burden of establishing that they have standing in their own right to pursue their claims. *Ellis v. City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993). In addition, “[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint.” *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650–51 (2017).

Plaintiffs allege three primary categories of injuries. First, four Plaintiffs allege that they have been injured by the accessions policy. Second, Plaintiffs who are current service members allege that they have been injured because they may be discharged from the military in the future based on their transgender status. Third, one Plaintiff alleges that he will be injured because he will be barred from receiving sex reassignment surgery.²

1. There Are Numerous Genuine Issues Of Disputed Material Fact Concerning Whether Plaintiffs Have Standing to Challenge The Accession Policy.

Four Plaintiffs contend that they were denied the opportunity to compete to access into the military on an equal basis. Although Defendants were not provided an opportunity to test assertions

² In addition, Plaintiffs each allege that they have been harmed by a stigma resulting from allegedly unconstitutional discrimination. *See* Pls.’ Mot., ECF No. 129, at 7–8. But that sort of stigmatic injury “accords a basis for standing only to those persons who are personally denied equal treatment.” *Allen v. Wright*, 468 U.S. 737, 755 (1984) *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). As discussed below, because Plaintiffs have not shown that they themselves have been subject to discriminatory treatment, they cannot rely upon a claim of stigmatic injury. Instead, “stigmatic injury...requires identification of some concrete interest with respect to which respondents are personally subject to discriminatory treatment,” and “[t]hat interest must independently satisfy the causation requirement of standing doctrine.” *Id.* at 757 n.22. No such interest exists here.

1 Plaintiffs made in their declarations through the discovery process, Plaintiffs' declarations
2 nevertheless fail to establish standing to sue. Plaintiffs have not met their burden at this stage of the
3 litigation to establish an injury in fact traceable to the Interim Guidance that they seek to challenge.

4 As discussed below in Part I.B, when the evidence is viewed in the light most favorable to
5 Defendants, the Interim Guidance provides the terms and operation of the applicable policy
6 governing service by transgender individuals. Plaintiffs have not shown that the Interim Guidance
7 denies them an opportunity to access into the military that they would previously have been afforded.

8 To establish that they suffered cognizable injuries by the applicable accession policy,
9 Plaintiffs must show that the accession policy in the Interim Guidance denied them an opportunity
10 to access into the military that they previously possessed. Thus, Plaintiffs must show that they are
11 "able and ready" to access into the military under the Carter policy that preceded the Interim
12 Guidance. *See, e.g., Carroll v. Nakatani*, 342 F.3d 934, 942 (9th Cir. 2003). But the Carter policy,
13 which is currently in effect as the result of the Court's preliminary injunction, presumptively
14 disqualifies an individual from access into the military if the individual has a history of medical
15 treatment associated with gender transition. Such an individual may access into the military only if
16 (a) the applicant has completed all medical treatment associated with the transition, (b) the applicant
17 has been stable in the preferred gender for 18 months, and (c) the applicant, if receiving cross-sex
18 hormone therapy post-transition, has been stable on such therapy for at least 18 months. Decl. of
19 Ryan Parker, Exh. 1 (DTM-16-005).

20 Plaintiffs Ryan Karnoski, D.L., and Conner Callahan have not presented specific facts to
21 establish that they are eligible to access into the military under the Carter policy. They admit that
22 they are receiving or have received medical treatment associated with gender transition. Decl. of
23 Ryan Karnoski, ECF No. 130, ¶ 10; Decl. of D.L., ECF No. 132, ¶ 8; Decl. of Connor Callahan,
24 ECF No. 137, ¶ 8. They are therefore presumptively disqualified under the Carter policy. *See* DTM-
25 16-005. D.L. concedes that he has not been stable in his preferred gender for 18 months after the
26 completion of medical treatment associated with his transition. D.L. Decl. ¶ 5. And Karnoski and
27 Callahan have not proffered any evidence that they satisfy the Carter policy requirements to
28 overcome disqualification. When viewed in light most favorable to Defendants, this record contains

genuine issues of disputed fact whether Karnoski and D.L. have even completed all medical treatment associated with their transitions, and whether Karnoski and Callahan have been stable in their preferred gender for at least 18 months, or have been stable for at least 18 months if receiving cross-sex hormone therapy. Thus, Karnoski, D.L., and Callahan have not satisfied their burden to prove that they have standing to pursue their claims. *See Clapper*, 568 U.S. at 408.

Plaintiff Staff Sergeant Cathrine Schmid also has not established that she was deprived of an opportunity to become a warrant officer because of the Interim Guidance's accessions policy. Decl. of Cathrine Schmid, ECF No. 131, ¶¶ 29–30. The record establishes that any hold that may have been placed on her application packet has been lifted, and her packet was advanced to the selection board for consideration. *See* Decl. of Maria Martinez, ¶ 4. The board selection process, which is highly competitive, is prescribed by Army Pamphlet 601-6, and does not take a soldier's transgender status into consideration. *Id.* The board considered Schmid's application in February 2018, and did not select her. *Id.* ¶ 4. Schmid accordingly cannot establish any cognizable injury from the Interim Guidance. At a minimum, the evidence that she was not selected raises genuine issues of material fact about her standing that preclude summary judgment on her claims.

2. There Are Numerous Genuine Issues Of Disputed Material Fact Concerning Whether Plaintiffs Have Suffered Cognizable Injuries Caused By The Interim Guidance.

Plaintiffs also have not met their burden to establish cognizable injuries from the Interim Guidance's policies concerning retention and medical care. At a minimum, genuine issues of disputed material fact preclude summary judgment on their claims.

Plaintiff Schmid, who has failed to establish a cognizable injury from the accessions policy, also has failed to establish a cognizable injury from the retention policy. She states that the Interim Guidance has affected her "ability to maintain employment in the military," Schmid Decl. ¶ 25, but Schmid is not, and will not be, subject to separation or discharge based on her transgender status under the Interim Guidance, *see* Decl. of Timothy McCracken, ECF No. 70, ¶ 2. Nor will she be denied re-enlistment due to her transgender status. *Id.* Thus, Schmid has identified no specific facts to support her claims of injury from the retention policy in the Interim Guidance. At a minimum,

1 there is at least a genuine dispute about whether Schmid has suffered a cognizable legal injury from
2 that policy.

3 Plaintiff Chief Warrant Officer Three Lindsey Muller has failed to meet her burden to
4 establish standing to challenge both the retention and medical treatment policies in the Guidance.
5 With respect to the retention policy, although Muller contends that she is “afraid of losing [her] job”
6 in the Army, Decl. of Lindsey Muller, ECF No. 133, ¶ 3, her commanding officer has stated that
7 Muller is not, and will not be, subject to separation or discharge based on her transgender status
8 under the Interim Guidance, *see* Decl. of Jonathan Easley (Oct. 16, 2017), ECF No. 72, ¶ 3. And the
9 parties dispute whether Muller’s treatment plan includes any medically necessary surgical treatments
10 that have been, or would be, denied under the Guidance. *Compare* Muller Decl. ¶¶ 21–22 (declaring
11 that Muller has not had surgeries required as part of her transition), *with* Decl. of Jonathan Easley
12 (Feb. 26, 2018), ¶¶ 3–4 (declaring that Muller “has completed all of the medically necessary surgical
13 treatments approved as part of her medical treatment plan” and that she “may request an
14 evaluation . . . to determine if she is medically qualified to resume flying duties”). There is, at a
15 minimum, a genuine dispute whether Muller has suffered any cognizable injury from the Interim
16 Guidance, and summary judgment is not warranted.

17 Likewise, Plaintiff Petty Officer First Class Terece Lewis has not satisfied her burden of
18 establishing standing to sue. Lewis is an active duty sailor, who claims that the Interim Guidance
19 would affect her ability to re-enlist. Decl. of Terece Lewis, ECF No. 134, ¶¶ 3, 8, 26. But the Interim
20 Guidance directs that “[a]n otherwise qualified transgender Service member whose term of service
21 expires while this Interim Guidance remains in effect, may, at the Service member’s request, be
22 reenlisted in service under existing procedures.” Interim Guidance (Sept. 14, 2017), ECF No. 149-
23 3. It also directs that “no action may be taken to involuntarily separate or discharge an otherwise
24 qualified Service member solely on the basis of a gender dysphoria diagnosis or transgender status.”
25 *Id.* And Lewis’s commander confirmed that, consistent with the Interim Guidance, she will not be
26 involuntarily separated due to her transgender status. Decl. of Gregory Huffman, ECF No. 73, ¶ 3.
27 Lewis thus has not presented specific facts to support a cognizable legal injury from the retention
28 policy, or there is at least a genuine dispute about the facts underlying her claim of injury.

1 Plaintiff Petty Officer Second Class Philip Stephens also fails to establish cognizable injury
 2 from the retention and medical care policies. Stephens, an active duty sailor, states that the Interim
 3 Guidance places his military career in “jeopardy,” Decl. of Philip Stephens, ECF No. 135, ¶¶ 3, 26,
 4 but again the Interim Guidance directs that he will not be involuntarily separated solely on the basis
 5 of his transgender status, and that he may re-enlist under existing procedures. *See* Interim Guidance,
 6 ECF No. 149-3; Decl. of Nicolas Good, ECF No. 74, ¶ 5 (stating that Stephens will not face
 7 separation due to his transgender status under the Interim Guidance).

8 There are also genuine issues of material fact in dispute regarding Petty Officer Second Class
 9 Megan Winters’ standing. Winters bases her claims of injury on a separation notice she received, but
 10 her commanding officer has explained that such a separation notice was in error and that Winters is
 11 not pending separation or discharge due to her transgender status. Decl. of Susan Breyerjoyner,
 12 ECF No. 75, ¶ 6. Winters’ commanding officer has further stated that no member of her command
 13 will face separation on the basis of their transgender status absent a change in existing policy, and
 14 no member of her command will be denied re-enlistment due to transgender status. *Id.*

15 Finally, Plaintiff Jane Doe has not satisfied her burden to prove standing to sue. The Interim
 16 Guidance directs the military to ensure that no service member is separated or denied re-enlistment
 17 due to his or her transgender status. Interim Guidance, ECF No. 149-3. Doe’s conclusory
 18 statements to the contrary are speculative and insufficient to establish a cognizable injury from the
 19 retention policy at the summary judgment stage. *See Cafasso v. Gen. Dynamics*, 637 F.3d 1047, 1061
 20 (9th Cir. 2011) (“To survive summary judgment, a plaintiff must set forth non-speculative evidence
 21 of specific facts, not sweeping conclusory allegations.”). Likewise, Doe cannot establish standing to
 22 challenge the medical treatment policy with speculative statements that she will need surgical
 23 procedures as part of her transition. Decl. of Jane Doe, ECF No. 138, ¶ 13. Doe has not provided
 24 any foundation to conclude that she is qualified to offer a medical opinion, and her statement is
 25 therefore inadmissible.³ *See Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002) (only evidence that
 26 would be admissible may be considered in ruling on a motion for summary judgment). Furthermore,

27 _____
 28 ³ Had Defendants been given a chance to depose Jane Doe before responding to Plaintiffs’ motion, Defendants could
 have explored the bases for her conclusory statements. *See supra* n.1.

her conclusory testimony is contradicted by evidence that medical transition plans do not necessarily include surgical procedures. *See* Breyerjoyner Decl. ¶ 7. Accordingly, Plaintiff Jane Doe has not established standing for summary judgment purposes.

Finally, three Plaintiffs appear to allege that they will be denied medically necessary surgical treatments. Lewis Decl. ¶ 17; Stephen Decl. ¶ 16; Winters Decl. ¶¶ 32–34. As an initial matter, it is clear from the Interim Guidance that no Plaintiff is currently being denied medical treatment. Second, the Presidential Memorandum excepts from the directive to halt funding of sex reassignment surgeries for military personnel those procedures which are “necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex.” Presidential Memorandum, 82 Fed. Reg. 41,319. All three Plaintiffs have begun a course of treatment to reassign their sex and, therefore, potentially fall within the exception to the funding directive. Lewis Decl. ¶¶ 13, 16–17; Stephen Decl. ¶¶ 14–16; Winters Decl. ¶¶ 28–31. At this point, it is not clear whether the military will pay for Plaintiffs’ transition-related surgeries after March 2018, but uncertainty is not enough to establish standing or to present the Court with a ripe question of law. If Plaintiffs are ultimately informed that the military will not pay for specific surgeries, they can bring suit at that time. Until that time, the risk that they may be harmed by the sex reassignment surgery directive in the future is not sufficient to establish standing. *Cf. Doe v. Trump*, 275 F. Supp. 3d 167, 203–04 (D.D.C. 2017) (holding that the plaintiffs lacked standing to pursue their medical treatment claims because “the risk of being impacted by the Sex Reassignment Surgery Directive is not sufficiently great to confer standing”).

3. The Organizational Plaintiffs And Intervenor Have Not Satisfied Their Burden To Prove Standing To Sue.

The organizational Plaintiffs also have not satisfied their burden of establishing standing to sue at this stage in the litigation. To establish associational standing, each plaintiff organization must show: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Associated Gen. Contractors of Am. v. Cal. Dep’t of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013). Because the Interim

Guidance maintains the status quo, the organizational Plaintiffs cannot identify even a single member who has suffered an injury-in-fact. To the extent they rely upon the individual Plaintiffs who have not established standing for summary judgment purposes, the organizational Plaintiffs have likewise failed to establish standing for their claims.

In addition, because none of the individual or organizational plaintiffs has standing, and Washington cannot establish standing in its own right, Washington cannot proceed with this case as an Intervenor. “An intervenor’s right to continue a suit in the absence of the party on whose side intervention was permitted ‘is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.’” *Friends of Wild Swan v. Vermillion*, 694 F. App’x 475, 476 (9th Cir. 2017) (quoting *Diamond v. Charles*, 476 U.S. 54, 68 (1986)). Washington has not even attempted to satisfy its burden to demonstrate standing to sue. Rather, Washington simply asserts, without support from a declaration, certain state interests that it seeks to vindicate through this litigation, and notes that the Court recognized these interests as sufficient to support intervention. Int.’s Mot., ECF No. 150, at 4. Yet in granting Washington’s motion to intervene, the Court expressly declined to decide whether Washington possessed standing to sue. Order, ECF No. 101 at 3 n.1. And Washington has come forward with no admissible evidence of any cognizable injury caused by an operative policy of the Defendants that is redressable by the Court.

B. Genuine Disputes of Material Fact Exist Concerning Which Policy Is Applicable In The Absence of a Preliminary Injunction.

Perhaps recognizing that they cannot show any cognizable injury from the Interim Guidance, Plaintiffs argue that the President’s Twitter statement and the Presidential Memorandum constitute a “ban” on service in the military by transgender individuals and that it is this “ban” that they challenge. But it is beyond reasonable dispute from the face of the Interim Guidance that it would be the applicable policy concerning accession and retention in the absence of the Court’s preliminary injunction, and plaintiffs have suffered no legally cognizable injury from that Guidance. Until a final policy is issued, as contemplated by the Presidential Memorandum, there is no “ban” for Plaintiffs to challenge or for this Court to review. At a minimum, there is a genuine issue of disputed material

fact about the currently effective policy that necessitates denial of the summary judgment motions.⁴

Plaintiffs' claims rest on the faulty assumptions that the President has mandated that transgender individuals who are currently serving be involuntarily discharged. Pls.' Mot. at 5–6. Although Plaintiffs acknowledge that the President directed Secretary Mattis to study the issue, they argue that the “unequivocal purpose” of the study is “to implement the policy and directives in the Presidential Memorandum.” *Id.* at 11 (citation omitted). That argument, however, is misplaced.

The Memorandum directs Secretary Mattis to study future service by transgender individuals and does not predetermine the outcome of that study. The President stated in the Memorandum that, in his judgment, “further study is needed to ensure . . . that terminating the Departments’ longstanding policy and practice [regarding military service by transgender individuals] would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources” Presidential Memorandum, 82 Fed. Reg. 41,319 (Aug. 25, 2017). Based on that judgment, the President directed the Secretaries of Defense and Homeland Security to maintain the currently effective policy regarding accession of transgender individuals into the military “until such time as a sufficient basis exists upon which to conclude that terminating the policy and practice would not have the negative effects discussed above.” *Id.* He then directed the Secretary of Defense, in consultation with the Secretary of Homeland Security, to submit an implementation plan by February 21, 2018, affording the Secretary of Defense broad discretion to determine “what steps are appropriate and consistent with military effectiveness and lethality, budgetary constraints, and applicable law” in formulating that plan. *Id.* Critically, the President directed the Secretary of Defense to “determine how to address transgender individuals currently serving in the United States military” and stated unequivocally that, “[u]ntil the Secretary has made that determination, no action may be taken against such individuals” because of their transgender status. *Id.*

Secretary Mattis’s response to this Memorandum makes clear that no accession and retention policy has yet been decided. First, in response to the Presidential Memorandum, Secretary Mattis announced that he was assembling a panel of experts who would bring “mature experience, most

⁴ Of course, any concern about which of these documents reflects applicable policy will be moot upon issuance of the ultimate policy and, as discussed in Part I.C., below, this alone is a basis to defer or deny summary judgment.

notably in combat and deployed operations, and seasoned judgment” to the task of providing advice and recommendations regarding future policies concerning military service by transgender individuals. Parker Decl. Exh. 2 (Statement of Secretary Mattis, Release No: NR-312-17). Secretary Mattis explained that the panel would “thoroughly analyze all pertinent data, quantifiable and non-quantifiable.” *Id.* Then, on September 14, 2017, Secretary Mattis issued a Memorandum and Interim Guidance explaining that “[c]onsistent with military effectiveness and lethality, budgetary constraints, and applicable law, the implementation plan will establish the policy, standards and procedures for transgender individuals serving in the military.” Interim Guidance, ECF No. 149-3. Secretary Mattis noted that the Deputy Secretary of Defense and Vice Chairman of the Joint Chiefs of Staff, supported by the panel of experts, would provide him with recommendations “supported by appropriate evidence and information.” *Id.* And he stated that the Interim Guidance would take effect immediately and “will remain in effect until I promulgate DoD’s final policy in this matter.” *Id.* Put simply, Secretary Mattis initiated a full policy-making process that is being led by some of the most senior officials at the Departments of Defense and Homeland Security.⁵

The Interim Guidance was the applicable DoD policy concerning accession and retention in effect at the time the Court entered the preliminary injunction and Plaintiffs’ arguments to the contrary are mistaken. At a minimum, when viewed in the light most favorable to Defendants, the Interim Guidance creates a genuine dispute of material fact regarding the applicable policy governing military service by transgender individuals. For this reason alone, Plaintiffs’ and Intervenor’s motions for summary judgment must be denied.

C. Judicial Economy Is Not Served By Summary Judgment Proceedings at This Stage.

The Court should deny the motions for the additional reason that judicial economy is not served by resolving them at this early stage in the litigation and while policy concerning the service of transgender individuals in the military is still being developed. Plaintiffs and Intervenor made a strategic decision to file summary judgment motions early in the litigation, with the awareness that the policy concerning the service of transgender individuals in the military was still being developed.

⁵ That policy-making process is now complete, and Secretary Mattis has transmitted his policy recommendation to the President. Defendants will inform Plaintiffs and the Court promptly after a decision is publicly announced.

1 But the Court does not yet have before it the final policy concerning service by transgender persons
2 or the justifications for that final policy.

3 A judicial decision at this stage would only entangle the Court in an abstract disagreement
4 over a non-final policy that will be superseded shortly. Once the final policy is in place, the Court
5 will be in a position to assess what, if any, effect this policy has on Plaintiffs and whether Plaintiffs'
6 lawsuit may proceed. But any challenge to the non-final policy now in place will be moot. *See Burke*
7 *v. Barnes*, 479 U.S. 361, 363 (1987) (question of whether President's pocket veto prevented bill from
8 becoming law rendered moot because bill expired during pendency of appeal); *U.S. Dep't of Treasury*
9 *v. Galioto*, 477 U.S. 556, 559–60 (1986) (amendment to federal statute rendered case moot); *Kremens*
10 *v. Bartley*, 431 U.S. 119, 128–29 (1977) (lawsuit concerning commitment of minors is moot once
11 statute is repealed); *Gulf of Me. Fisherman's All. v. Daley*, 292 F.3d 84, 88 (1st Cir. 2002) ("The
12 promulgation of new regulations and amendment of old regulations are among such intervening
13 events as can moot a challenge to the regulation in its original form."); *Bunker Ltd. P'ship v. United*
14 *States*, 820 F.2d 308, 312 (9th Cir. 1987) (new legislation which superseded prior law rendered
15 arguments based on superseded law moot). And any decision based on the previous policy, if
16 appealed, likely would be vacated as moot. *See, e.g., Galioto*, 477 U.S. at 560 (1986) (vacating and
17 remanding decision where Congress amended challenged law, removing the asserted
18 unconstitutionality, which thereby mooted the dispute under *United States v. Munsingwear, Inc.*, 340
19 U.S. 36, 39 (1950)); *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1168 (9th Cir. 2011) (vacating
20 the district court decision when Congress amended the statute during the pendency of the appeal);
21 *Madison v. Tulalip Tribes of Wash.*, 163 F. App'x 499, 500 (9th Cir. 2006) (vacating district court decision
22 under *Munsingwear, Inc.* because controversy over concerned permit became moot once permit
23 expired). Judicial economy would be best served by denying or deferring summary judgment and
24 waiting for the new policy to be issued.

25 II. Plaintiffs and Intervenor Have Not Met Their Burden of Proving That the 26 Applicable Policy Violates the Constitution.

27 There are several additional reasons why the Court should deny the summary judgment
28 motions. As a preliminary matter, Plaintiffs and Intervenor ignore the considerable deference that

1 is owed to the President and the military in making military personnel decisions. Both the decision
 2 to conduct further study on a policy that could have adverse effects on the military and the decision
 3 to issue the Interim Guidance that maintains the *status quo* during the pendency of the study are
 4 reasonable and fully consistent with the Constitution. Furthermore, they have not met their burden
 5 to show that the applicable policy—the Interim Guidance—violates their constitutional rights.

6 **A. Considerable Deference is Owed to Military Personnel Decisions.**

7 Plaintiffs’ and Intervenor’s constitutional claims fail because considerable deference is owed
 8 to the President and the DoD in making military personnel decisions. With regard to the President’s
 9 decisions, “Courts have traditionally shown the utmost deference to Presidential responsibilities” in
 10 the field of “military and national security affairs.” *Dep’t of Navy v. Egan*, 484 U.S. 518, 529–30 (1988)
 11 (citation omitted). After all, “[t]he complex[,] subtle, and professional decisions as to the
 12 composition . . . of a military force are . . . subject always to civilian control of the Legislative and
 13 Executive Branches”; indeed, “[i]t is this power of oversight and control of military force by elected
 14 representatives and officials which underlies our entire constitutional system.” *Gilligan v. Morgan*, 413
 15 U.S. 1, 10 (1973).

16 Along with the deference shown to the Commander in Chief, courts also give substantial
 17 deference to decisions made by military authorities. Military authorities “have been charged by the
 18 Executive and Legislative Branches with carrying out our Nation’s military policy,” *Goldman v.*
 19 *Weinberger*, 475 U.S. 503, 507–08 (1986), under broad mandates, *see United States v. O’Brien*, 391 U.S.
 20 367, 377 (1968). To effectuate its mission, the military requires “overriding demands of discipline
 21 and duty” that make it “a specialized society separate from civilian society.” *Parker v. Levy*, 417 U.S.
 22 733, 743–44 (1974). The military’s distinct position also sets it “apart from and outside of many of
 23 the rules that govern ordinary civilian life in our country.” *Greer v. Spock*, 424 U.S. 828, 843 (1976)
 24 (Powell, J., concurring). Given its unique position and the notion that courts are “ill-equipped to
 25 determine the impact upon discipline that any particular intrusion upon military authority might
 26 have,” *Chappell v. Wallace*, 462 U.S. 296, 305 (1983), courts grant great deference to the judgment of
 27 the military, *see, e.g., Rostker v. Goldberg*, 453 U.S. 57, 64–67 (1981); *Orloff v. Willoughby*, 345 U.S. 83,
 28 93–94 (1953).

1 The special deference to the military applies even in the face of constitutional claims. For
 2 example, in *Orloff*, the Supreme Court held that petitioner could not challenge the Army’s failure to
 3 commission him when he declined, on grounds of a Fifth Amendment privilege against self-
 4 incrimination, to say whether he was a member of the Communist Party. 345 U.S. at 91. Similarly,
 5 in *Goldman*, the Court rejected a claim that application of an Air Force regulation that precluded
 6 plaintiff from wearing his yarmulke violated the First Amendment’s protection of the free exercise
 7 of religion. 475 U.S. at 509–10. In *Parker*, the Court rejected a First Amendment “overbreadth”
 8 challenge to certain articles of the Uniform Code of Military Justice, holding that “[w]hile the
 9 members of the military are not excluded from the protection granted by the First Amendment, the
 10 different character of the military community and of the military mission requires a different
 11 application of those protections.” 417 U.S. at 758; *see also Rostker*, 453 U.S. at 64–67 (rejecting an
 12 equal protection challenge to the requirement that males, but not females, must register for the draft).

13 Plaintiffs do not dispute that substantial deference is owed to military policy decisions. *See*
 14 Pls.’ Mot. at 15. Instead, Plaintiffs merely repeat the Court’s erroneous conclusion that the policy
 15 concerning military service by transgender individuals is not entitled to deference in this case because
 16 it was made without “considered reason or deliberation.” *Id.* (quoting Order, ECF No. 103, at 18);
 17 *see also Int.’s Mot.* at 13–14. That argument is without merit.⁶

18 By focusing on the President’s statement on Twitter, Plaintiffs fail to recognize that one
 19 month before the statement, DoD had already announced that more study was needed on the issue
 20 of transgender military service. On June 30, 2017, before the issuance of the Twitter statement or
 21 the Presidential Memorandum, Secretary Mattis “approved a recommendation by the services to
 22 defer accessing transgender applicants into the military” until January 1, 2018. Parker Decl. Exh. 3
 23 (Statement by Chief Pentagon Spokesperson Dana W. White on Transgender Accessions, NR-250-
 24 17). Based on input he received from the Service Chiefs and Secretaries, Secretary Mattis determined
 25 that DoD and the services needed “additional time to evaluate more carefully the impact of such
 26 accessions on readiness and lethality.” Parker Decl. Exh. 4 (Memorandum Regarding Accessions of

27 ⁶ Of course, substantial deference also would be owed to the military’s forthcoming policy, and it would be clear error
 28 for the Court to enter summary judgment before consideration of that policy and deference to the basis for that policy.
See Winter v. NRDC, Inc., 555 U.S. 7, 26–31 (2008).

Transgender Individuals into the Military Services (June 30, 2017)). Secretary Mattis stated that his “intent [was] to ensure that [he] personally [has] the benefit of the views of military leadership and of the civilian officials who are now arriving at the Department” before changing DoD’s longstanding policy of prohibiting transgender individuals from accessing into the military. *See id.* Thus, well before the President made statements on Twitter, Secretary Mattis received counsel from the Service Chiefs and Secretaries and determined that additional time was needed to study whether accessions of transgender individuals into the military would impact readiness and lethality. *See id.* The Secretary’s decision to continue studying the issue after he received counsel from the Service Chiefs and Secretaries was made with considered reason and deliberation and is thus entitled to substantial deference.

The subsequent Presidential Memorandum extended the accessions deadline indefinitely until there appears a sufficient basis to abandon the longstanding accessions policy. Presidential Memorandum, 82 Fed. Reg. 41,319. Secretary Mattis then issued the Interim Guidance, which maintains the *status quo* for military service by transgender individuals until a final policy is enacted. That reasonable, non-disruptive decision to maintain a longstanding policy while DoD continues studying the issue is also entitled to substantial deference.

B. The Applicable Policies Are Consistent With Constitutional Guarantees.

As set forth above, DoD is entitled to substantial deference for the applicable policies concerning service by transgender individuals in the military. And as Defendants have previously argued, the Government believes that heightened scrutiny does not apply in this context. Defs.’ Mot., ECF No. 69, at 28–30. Although this Court disagreed, we again reiterate our view that heightened scrutiny is not the proper standard of review, for purposes of preserving the issue for further review.⁷ In any event, the Interim Guidance maintains the *status quo* and does not violate the Constitution. Indeed, Plaintiffs offer no argument to the contrary.

⁷ Although *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), and the other cases cited by Plaintiffs, *see* Pls.’ Mot. at 16–18, could be interpreted as holding to the contrary, these cases are factually distinguishable and, in all events, Defendants preserve the issue for further review.

1 **1. The Applicable Policies Do Not Violate Equal Protection.**

2 **a. Retention of Current Service Members**

3 Plaintiffs' arguments that the Interim Guidance subjects them to unequal treatment is
 4 misplaced. The Interim Guidance explicitly directs that "transgender service members are subject
 5 to the same standards as any other Service member of the same gender." Interim Guidance, ECF
 6 No. 149-3. Indeed, Defendants have maintained throughout this litigation that neither the August
 7 25, 2017 Presidential Memorandum nor any implementing guidance permit the discharge of
 8 currently serving transgender soldiers. *See* Defs.' Mot. at 15–16; Defs.' Reply, ECF No. 90, at 2–5.
 9 "A denial of equal protection entails, at a minimum, a classification that treats individuals unequally."
 10 *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 707 (9th Cir. 1997). Plaintiffs Schmid, Muller, Lewis,
 11 Stephens, Winters, and Doe, who currently serve in the military, provide no evidence that they have
 12 been treated unequally under the Interim Guidance. To the contrary, Defendants have submitted
 13 declarations stating that, consistent with the Interim Guidance, these individuals will not be
 14 discharged from the military based on their transgender status. *See* McCracken Decl. ¶ 2; Easley
 15 Decl. (Oct. 16, 2017) ¶ 3; Good Decl. ¶ 5; Breyerjoyner Decl. ¶ 6; Huffman Decl. ¶ 3. Because the
 16 applicable policy does not classify service members based on transgender status, and even prohibits
 17 disparate treatment of existing service members based on transgender status, Plaintiffs have not met
 18 their burden of showing that the applicable policy concerning service of transgender individuals in
 19 the military violates their equal protection rights.

20 **b. Surgery**

21 Congress has provided the Secretary of Defense and the service secretaries the discretion to
 22 set the level of care provided at military facilities. 10 U.S.C. § 1074(a)(1); *see also* 10 U.S.C.
 23 § 1073(a)(b). Thus, DoD has broad discretion to shape the scope of services based on medical,
 24 policy, and military readiness concerns. Similarly, the Secretary of Defense has broad discretion to
 25 authorize a service member to obtain health care at a private health care facility. 10 U.S.C.
 26 § 1074(c)(1). However, Congress has specifically limited the Secretary's authority to pay for surgery
 27 in non-DoD facilities for "sex gender changes," but this is subject to "such exceptions as the
 28 Secretary of Defense considers necessary," as long as the waiver is based on a case-by-case medical

determination that it would be necessary and appropriate for the patient and not “elective private treatment.” 10 U.S.C. §§ 1074(c)(2)(A), 1079(a)(11), 1074(c)(1). And even the Carter policy permits sex-reassignment surgeries only on a “case-by-case basis.” Parker Decl. Exh. 1 § 4.

Similarly, the both Interim Guidance and the Presidential Memorandum provide that “no new sex reassignment surgical procedures for military personnel will be permitted after March 22, 2018, except to the extent necessary to protect the health of the individual who has already begun a course of treatment to reassign his or her sex.” Interim Guidance, ECF No. 149-3; *accord* Presidential Memorandum § 2(b). Thus, the relevant policies restate the restrictions already existing in Title 10 but provides for the possibility of a waiver when the Secretary of Defense deems the procedure necessary to protect the health of an individual who has already begun a course of treatment. And any difference between the treatment of sex-reassignment surgery under the Carter policy and the challenged policy—both of which authorize the procedure only on a case-by-case basis—is ultimately a matter of line-drawing that should not be second-guessed by the Judiciary. Because Plaintiffs may still receive waivers for medically necessary treatment like any other service member, Plaintiffs have not met their burden of showing that the applicable policy concerning service of transgender individuals in the military violates their equal protection rights.

c. Accessions

Given the considerable deference due to military personnel decisions, Plaintiffs and Intervenor cannot show that they are entitled to summary judgment concerning their equal protection challenge to the longstanding accessions policy. As both Secretary Mattis and the President have explained, there were significant concerns that abandoning this policy could “hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources.” Presidential Memorandum § 1(a); *see also* Parker Decl. Exh. 4 (stating that “additional time [was needed] to evaluate more carefully the impact of such accessions on readiness and lethality”). Although Plaintiffs and Intervenor claim that these rationales are a pretext for animus, the limited record in this case does not support that claim.

The military’s longstanding accessions policy—maintained by both the Presidential Memorandum and Interim Guidance—rests on the reasonable concern that at least some

transgender individuals, including those who have undergone sex reassignment surgical procedures, suffer from medical conditions or have undergone treatments that could impair the performance of their military duties or risk such impairments in the future. *See* Parker Decl. Exh. 5 (DODI 6130.03). Even the new accessions policy announced in 2016 acknowledged the legitimacy of this concern by providing that a history of gender dysphoria, medical treatment associated with gender transition, and sex reassignment surgery were disqualifying unless an applicant could prove that he had avoided complications for an 18-month period—a more lax standard than for other similar conditions. Parker Decl. Exh. 1; *see e.g.*, Parker Decl. Exh. 5 (DoDI 6330.03 at Encl. 4, ¶ 9.g) (disqualifying applicants with a history of depressive disorder unless applicant has been stable for the past 36 months). DoD’s expert panel was tasked with studying the relevant medical standards applicable to transgender persons, and in the interim it was not irrational for the President to maintain the *status quo* pending that panel’s review.

Also, the longstanding accessions policy rests on the reasonable conclusion that these conditions may limit the ability of transgender individuals to deploy and thus limit the readiness and lethality of the force. For decades, military professionals indicated that one basis for the policy was that complications associated with hormone therapy and sex-change procedures could impair soldiers from serving around the globe. *See, e.g., DeGroat v. Townsend*, 495 F. Supp. 2d 845, 850–52 (S.D. Ohio 2007) (discussing testimony of military doctor); *Doe v. Alexander*, 510 F. Supp. at 902, 905 (D. Minn. 1981) (discussing affidavit of Brigadier General). Although Plaintiffs rely on the RAND Report, *see* Pls.’ Mot. at 17, that report acknowledges that medical treatment would limit deployment capabilities, RAND Report 39–42, ECF No. 143-3. For example, the RAND report specifically noted that hormone treatments are a common treatment option for gender dysphoria, *id.* at 6, and that such treatments can leave service members ineligible for deployment, *id.* at xiv. Finally, in June 2017—before the President’s Twitter statement or the issuance of the Presidential Memorandum—Secretary Mattis consulted with the Service Chiefs and Secretaries about the accessions policy and determined that DoD needed additional time to study the impact of accession of transgender individuals into the military on the overall readiness and lethality of the force. Parker Decl. Exh. 4.

1 Plaintiffs and Intervenor have provided no evidence to dispute Secretary Mattis' determination that
2 more study was needed on these issues.

3 In addition, it is undisputed that changing the accessions policy would impose costs on the
4 military. Although Plaintiffs isolate one of those costs—"transition-related care"—and dismiss it as
5 "budget dust," Pls.' Mot. at 20, that ignores other costs associated with their desired policy change.
6 *See, e.g.*, Decl. of Lernes Hebert, ECF No. 107, ¶ 10 (discussing costs associated with changing an
7 accessions policy). Also, the military has the freedom to choose "among alternatives," *Rostker*, 453
8 U.S. at 71, which includes the ability to decide how best to spend its money. At a minimum, the
9 military is entitled to make the reasonable judgment that spending the millions of dollars necessary
10 to accommodate transgender individuals would more effectively accomplish its "primary
11 business"—in other words, "to fight or be ready to fight wars should the occasion arise." *Id.* at 70
12 (citation omitted).

13 Moreover, the President could reasonably conclude that the longstanding accessions policy
14 furthers "unit cohesion." Presidential Memorandum § 1(a). The RAND Report acknowledged that
15 "[a] key concern in allowing transgender personnel to serve openly is how this may affect unit
16 cohesion—a critical input for unit readiness," but stated that it did "not have direct survey evidence
17 or other data to directly assess the impact on the U.S. military." RAND Report at 44. Additionally,
18 although the RAND Report found that transgender service members were less deployable when
19 seeking treatment, it did not appear to consider whether an impact on deployability in itself would
20 affect unit cohesion. *See id.* at 40, 44–45. Given the limited information presently available, which
21 the RAND Report itself acknowledges, it is reasonable for the President to have concluded that
22 maintaining the accessions policy could rationally further unit cohesion, a matter that implicates
23 complex and significant privacy issues and that the matter warranted further study by military
24 officials. For example, a departure from that policy could complicate the operation of sex-based
25 standards in the areas of housing and physical training. *Cf. United States v. Virginia*, 518 U.S. 515, 550
26 n.19 (1996). In any event, it is not the role of the judiciary to second-guess a Commander in Chief's
27 judgment in this regard. As "the Supreme Court has indicated," "military decisions and assessments
28

1 of morale, discipline, and unit cohesion . . . are well beyond the competence of judges.” *Bryant v.*
 2 *Gates*, 532 F.3d 888, 899 (D.C. Cir. 2008) (Kavanaugh, J., concurring).

3 In sum, Plaintiffs and Intervenor are not entitled to summary judgment on the accessions
 4 policy because Secretary Mattis’ and the President’s decisions to maintain the *status quo* while the
 5 military studies the policy on service by transgender individuals easily passes constitutional muster—
 6 particularly in light of the limited evidence in the record and the deference owed the Executive in
 7 this area.

8 **2. The Applicable Policies Do Not Violate Due Process.**

9 Plaintiffs’ and Intervenor’s substantive due process claim fails for essentially the same reasons
 10 as their equal protection claim. Plaintiffs and Intervenor fail to show how Defendants have intruded
 11 upon any fundamental liberty interest, even if such interest were cognizable in the military context.
 12 *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The Interim Guidance provides that the
 13 currently serving Plaintiffs may not be discharged from the military based on their transgender status
 14 and may re-enlist if their terms of service expire. *See* Interim Guidance, ECF No. 149-3. Moreover,
 15 the President and DoD have provided reasons for maintaining the *status quo* while the military studies
 16 the policy on service by transgender individuals that pass constitutional muster under any standard,
 17 especially in light of the significant deference courts accord to military judgments regarding the
 18 composition of the fighting force. Plaintiffs have therefore failed to show that they are entitled to
 19 summary judgment on this claim.

20 **3. The Applicable Policies Do Not Violate the First Amendment.**

21 Plaintiffs claim that “the Ban constitutes a content-based regulation of speech because it
 22 ‘penalizes transgender service members—but not others—for disclosing their gender identity.’” Pls.’
 23 Mot. at 22 (quoting Order at 19–20). However, neither the Presidential Memorandum nor the
 24 Interim Guidance regulates speech at all, much less on the basis of its content. The Presidential
 25 Memorandum does not restrict expression; instead, it directs a further review of the military’s policy
 26 concerning accessions and reserves for the military the ability to address the treatment of current
 27 transgender service members. Nor have Plaintiffs explained how the Interim Guidance inhibits the
 28 expression of their transgender status. Similarly, the accession policy is not directed at restricting the

1 content of expression, but instead merely requires disclosure of information related to medical
 2 conditions, such as gender dysphoria, that may bar military service for failure to meet medical
 3 standards. *See id.*

4 Even assuming *arguendo* that the First Amendment was implicated here, a deferential standard
 5 of review applies to regulation of speech in the military context. *See Weinberger*, 475 U.S. at 507.
 6 Regulation of speech in the military survives review if it “restrict[s] speech no more than is reasonably
 7 necessary to protect the substantial government interest.” *Brown v. Glines*, 444 U.S. 348, 355 (1980).
 8 Defendants’ current policy on service by transgender persons meets this highly deferential standard
 9 because the Interim Guidance does not impede expression by current transgender service members
 10 or those seeking accession into the military. Accordingly, Plaintiffs’ summary judgment motion
 11 should be denied as a matter of law.

12 **III. The Injunctive Relief Plaintiffs Seek Is Inappropriate.**

13 The relief Plaintiffs seek—an injunction that would in theory apply to service members
 14 worldwide—is inappropriate. *See* Pls.’ Mot. at 24. Both constitutional and equitable principles
 15 require that injunctive relief be limited to redressing a plaintiff’s own cognizable injuries. “The
 16 actual-injury requirement [of Article III standing] would hardly serve [its] purpose . . . of preventing
 17 courts from undertaking tasks assigned to the political branches[,] if once a plaintiff demonstrated
 18 harm from one particular inadequacy in government administration, the court were authorized to
 19 remedy all inadequacies in that administration.” *Lewis v. Casey*, 518 U.S. 343, 357 (1996). Equitable
 20 principles independently require that an injunction “be no more burdensome to the defendant than
 21 necessary to provide complete relief to the plaintiffs.” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S.
 22 753, 765 (1994) (citation omitted). These constitutional and equitable limits apply with special force
 23 to injunctions concerning military policies. *See Meinhold v. U.S. Dep’t of Def.*, 34 F.3d 1469, 1473 (9th
 24 Cir. 1994) (after district court enjoined DoD “from discharging or denying enlistment to any person
 25 based on sexual orientation,” staying injunction to the extent it conferred relief on anyone other than
 26 the plaintiff).

27 Thus, any injunction here should be limited to Plaintiffs and not extend to other members
 28 or applicants not before this Court. Any cognizable injuries to Plaintiffs would be fully addressed

1 through an injunction concerning their individual ability either to accede into or continue serving in
 2 the military. And if other service members or applicants believe they are injured by the policies at
 3 issue, they are free to bring their own challenges—and a few have done so. *See, e.g., Doe v. Trump*,
 4 No. 1:17-cv-01587 (D.D.C., Filed Aug. 9, 2017). But to the extent Plaintiffs have a live case or
 5 controversy with the government, it is the role of this Court to resolve that case or controversy, not
 6 to resolve others that are pending or impending in others courts around the country.

7 Although the Court already has granted Plaintiffs’ motion for a worldwide preliminary
 8 injunction, *see* Order, ECF No. 103, at 23, a worldwide permanent injunction would be even more
 9 extraordinary, as it could indefinitely preclude the Executive Branch from taking certain actions
 10 related to military policy. *See World Wide Polymers, Inc. v. Shinkong Synthetic Fibers Corp.*, No. 03-CV-
 11 8843 LAP RME, 2010 WL 3155176, at *10 (S.D.N.Y. July 30, 2010), *aff’d*, 694 F.3d 155 (2d Cir.
 12 2012) (describing a permanent injunction as an “extraordinary remedy.”) (quotation omitted).

13 Worse, Plaintiffs seek that extraordinary remedy to prevent certain hypothetical adverse
 14 personnel actions that have not been taken against them and may never occur. In doing so, they
 15 subvert a carefully delineated administrative framework. The military personnel decisions that
 16 Plaintiffs speculate they will one day face are ordinarily reviewed by a district court on an
 17 administrative record under the Administrative Procedure Act *after* the military decision has been
 18 made. Service members would have the opportunity to raise a constitutional challenge then or
 19 through intra-military procedures such as the military corrections boards. *See Chappell v. Wallace*, 462
 20 U.S. 296, 303 (1983). That ordinary administrative framework would provide a more appropriate
 21 avenue of relief than the premature intrusion into military affairs they currently seek.

22 For all of these reasons, the injunctive relief Plaintiffs seek is inappropriate.

23 **IV. The Court Should Grant Partial Summary Judgment for Defendants on All Claims** 24 **Brought Against the President.**

25 In their complaints, both Plaintiffs and Intervenor name the President as a defendant and
 26 seek injunctive and declaratory relief against him for discretionary actions taken in his official
 27 capacity. *See* Am. Compl., ECF No. 30, ¶ 19; Compl., ECF No. 104, ¶ 12. Because the Court has
 28 no jurisdiction to impose injunctive or declaratory relief against the President for his official,

discretionary conduct, the Court should grant partial summary judgment to Defendants on all of Plaintiffs' and Intervenor's claims against the President.

The Supreme Court has long held that it has "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866); *id.* at 500 ("The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance."). A "majority of the Justices" reaffirmed this fundamental principle in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). *Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996). Writing for the plurality, Justice O'Connor stated that it was "extraordinary" that the district court had issued an injunction against the President and two other Government officials. *Franklin*, 505 U.S. at 802, 806. "At the threshold, the District Court should have evaluated whether injunctive relief against the President was available, and if not, whether appellees' injuries were nonetheless redressable." *Id.* at 803. Concurring in *Franklin*, Justice Scalia explained that, under *Mississippi*, courts may impose neither injunctive nor declaratory relief against the President in his official capacity. *Id.* at 827–28 (noting that such principle is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history"). Just as the President is absolutely immune from official capacity damages suits, so is he immune from efforts to enjoin him in his official capacity. *Id.* at 827 ("Many of the reasons [the Court] gave in *Nixon v. Fitzgerald*, [457 U.S. 731, 749 (1982)], for acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President's performance of executive functions").

Consistent with *Mississippi* and *Franklin*, courts in this and other circuits have rejected demands to enjoin the President in the performance of his official duties, regardless of the claim.⁸

⁸ See, e.g., *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 557, 605 (4th Cir.), *vacated and remanded on other grounds sub. nom. Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010); *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996); *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 632 (D. Md. 2017); *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539–40 (N.D. Cal. 2017), *appeal docketed* No. 17-16886 (9th Cir. Sept. 18, 2017); *Settle v. Obama*, No. 15-cv-365, 2015 WL 7283105, at *6 (E.D. Tenn. Nov. 17, 2015); *Day v. Obama*, No. 15-cv-00671, 2015 WL 2122289, *1 (D.D.C. May 1, 2015); *Willis v. Dep't of Health & Human Servs.*, 38 F. Supp. 3d 1274, 1277 (W.D. Okla. 2014); *McMeans v. Obama*, No. 11-cv-891, 2011 WL 6046634, at *3 (D. Del. Dec. 1, 2011); *Shreeve v.*

For example, in *Hawaii v. Trump*, Ninth Circuit held that the District Court of Hawaii had abused its discretion in enjoining the President from implementing and enforcing his Executive Order entitled “Protecting the Nation from Foreign Terrorist Entry Into the United States.” 859 F.3d 741, 757, 760 (9th Cir. 2017).⁹ Although the Ninth Circuit upheld the injunction as against other Executive Branch officials, it agreed with the Government that the injunction should not have extended to the President. As that court explained, “Plaintiffs’ injuries can be redressed fully by injunctive relief against the remaining Defendants, and . . . the extraordinary remedy of enjoining the President is not appropriate here.” *Id.* at 788 (citing *Franklin*, 505 U.S. at 803).

The *Mississippi v. Johnson* line of cases underscores that the President is not a proper defendant in this case. It is undisputed that Plaintiffs and Intervenor brought suit against the President in his official capacity, challenging discretionary actions he took concerning military policy in his role as Commander in Chief. *See* Am. Compl., ECF No. 30, ¶ 19; Compl., ECF No. 104, ¶ 12. It is also undisputed that Plaintiffs and Intervenor seek declaratory and injunctive relief against the President. *See* Am. Compl. at 39; Compl. ¶¶ 39–43. It is further undisputed that Plaintiffs could obtain full relief for their alleged injuries through injunctive relief against the other Defendants in this case. Accordingly, because this Court cannot issue a declaratory judgment or an order enjoining the President for his official, discretionary action, the Court should grant partial summary judgment to Defendants on all of Plaintiffs’ and Intervenor’s claims against the President.¹⁰

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs’ and Intervenor’s summary judgment motions and grant Defendants’ cross-motion for partial summary judgment.

Obama, No. 10-cv-71, 2010 WL 4628177, at *5 (E.D. Tenn. Nov. 4, 2010); *Anderson v. Obama*, No. CIV. PJM 10-17, 2010 WL 3000765, at *2 (D. Md. July 28, 2010); *Carlson v. Bush*, No. 6:07CV1129ORL19UAM, 2007 WL 3047138, at *3 (M.D. Fla. Oct. 18, 2007); *Comm. to Establish the Gold Standard v. United States*, 392 F. Supp. 504, 506 (S.D.N.Y. 1975); *Nat’l Ass’n of Internal Revenue Emps. v. Nixon*, 349 F. Supp. 18, 21–22 (D.D.C. 1972); *Reese v. Nixon*, 347 F. Supp. 314, 316–17 (C.D. Cal. 1972); *S.F. Redevelopment Agency v. Nixon*, 329 F. Supp. 672, 672 (N.D. Cal. 1971); *Suskin v. Nixon*, 304 F. Supp. 71, 72 (N.D. Ill. 1969).

⁹ Based on subsequent events, the Supreme Court vacated the judgment and remanded the case to the Ninth Circuit with instructions to dismiss the case as moot. *Trump v. Hawaii*, 138 S. Ct. 377 (2017).

¹⁰ For these same reasons, the Court should also dissolve the preliminary injunction “to the extent that the order runs against the President.” *Hawaii*, 859 F.3d at 788.

1 Dated: February 28, 2018

Respectfully submitted,

2 CHAD A. READLER
Acting Assistant Attorney General
3 Civil Division

4 BRETT A. SHUMATE
5 Deputy Assistant Attorney General

6 JOHN R. GRIFFITHS
7 Branch Director

8 ANTHONY J. COPPOLINO
9 Deputy Director

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

15 Counsel for Defendants
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2018, I electronically filed the foregoing Opposition to Plaintiffs' and Intervenor's Motions for Summary Judgment and Defendants' Cross-motion for Partial Summary Judgment using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: February 28, 2018

/s/ Ryan Parker

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

Counsel for Defendants

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

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

Defendants.

Case No. 2:17-cv-01297-MJP

**PLAINTIFFS' REPLY IN SUPPORT
OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

More than half a year after President Trump announced his decision to exclude transgender people from military service, the government continues to cling to the fiction that it has no policy on the issue. The millions who have seen President Trump’s Twitter feed would disagree. So has this Court. According to the government, however, its policy is only ready for judicial review when it has finished manufacturing the factual defense for the decision that President Trump announced back on July 26, 2017. Indeed, the government has already devised a strategy to disguise the *post hoc* nature of this evidence: the government will describe the current policy as “superseded.” But a plan to implement a policy does not create a “new” policy; it is a continuation of the same unconstitutional action. Regardless of how it is packaged or repackaged, President Trump’s policy of excluding transgender people from military service (the “Ban”) is squarely before the Court, and its constitutionality is ripe for final resolution.

Defendants premise their opposition on the theory that they may re-litigate *already decided legal* issues in order to generate disputes of material *fact*. But “a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda.” *S.A. Empresa v. Walter Kidde & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982). This Court has already held that the Ban rather than the Interim Guidance constitutes the relevant policy at issue, that Plaintiffs suffer myriad injuries under the Ban that confer standing, and that military deference cannot save the government’s naked discrimination from heightened scrutiny. While the federal machinery surrounding President Trump concocts the imagined reasons for the Ban, the transgender men and women who are willing to put themselves at risk for the rest of us are entitled to judgment based on the reality of what actually transpired.

I. DEFENDANTS’ ATTEMPTS TO RE-LITIGATE LEGAL ISSUES ALREADY DECIDED BY THIS COURT DO NOT GIVE RISE TO GENUINE DISPUTES OF MATERIAL FACT.

Defendants contend that “whether Plaintiffs have suffered a cognizable injury . . . sufficient to support Article III standing”; “which is the current applicable military policy”; and “whether there has been a final decision concerning the military policy” are factual disputes precluding summary judgment. Defs.’ Opp. to Mot. for Summ. J., Dkt. 194 (“Opp.”), at 2.

Underlying all of these contentions is the theory that, “when the evidence is viewed in the light

1 most favorable to Defendants, the Interim Guidance provides the terms and operation of the
2 applicable policy.” *Id.* at 4; *see also id.* at 9-11.

3 But whether “the Interim Guidance provides the terms and operation of the applicable
4 policy” is a legal issue, not a factual dispute over “credibility determinations, weighing of the
5 evidence,” or “drawing of legitimate inferences” appropriately reserved for trial. *Anderson v.*
6 *Liberty Lobby*, 477 U.S. 242, 265 (1986); *see also Campidoglio LLC v. Wells Fargo & Co.*, 870
7 F.3d 963, 973 (9th Cir. 2017) (interpretation of written law is a legal function). None of the
8 underlying facts—the sequencing of the tweets, Presidential Memorandum, and Interim
9 Guidance, and Secretary Mattis’ position as an official without power to overturn the President’s
10 controlling orders—are actually in dispute. Where “the only disputes relate to the legal
11 significance of underlying facts,” the issue is one of “law suitable to disposition on summary
12 judgment.” *Blue Lake Rancheria v. United States*, 653 F.3d 1112, 1115 (9th Cir. 2011).

13 The legal question of which policy controls, moreover, has already been decided by this
14 Court: it is “the policy of prohibiting transgender individuals from serving openly in the
15 military”—not the Interim Guidance. Dkt. 103 (“PI Order”) at 22; *see also id.* at 9 (concluding
16 that any protections afforded by the Interim Guidance are necessarily limited). Defendants offer
17 no basis to re-litigate that issue. They also cannot credit the Interim Guidance for curing the
18 Ban’s injuries, given that they have thus far refrained from discriminating against transgender
19 recruits only because this and other courts have preliminarily *enjoined* that discrimination.

20 Defendants’ promised “superseding” policy also does not create any dispute as to the
21 legally relevant policy challenged here. For avoidance of doubt, Plaintiffs’ constitutional
22 challenge is to the government’s underlying policy of exclusion—regardless of whether it is
23 reflected in President Trump’s tweets, the Presidential Memorandum, or a supposedly
24 “superseding” document with new window dressing. Plaintiffs’ requested injunctive relief has
25 always been tethered to enjoining *any* government action discriminating against transgender
26 people regarding military service. First Am. Compl., Dkt. 30, Prayer for Relief ¶ 2. And that the
27 Ban may be under some unspecified “study,” Opp. at 10, is likewise no reason to withhold
28 constitutional review. The government cannot run roughshod over critical constitutional

1 protections and yet avoid judicial remedy merely by continuing to “study” discriminatory
2 policies.

3 There also is no genuine material dispute that the Ban injures Plaintiffs in myriad
4 cognizable ways. This Court has already repeatedly rejected Defendants’ standing arguments, PI
5 Order at 6-11, Dkt. 189 (“56(d) Order”) at 3-4, and Defendants present no new arguments to
6 upend these holdings. True, standing on summary judgment requires evidence of “specific facts”
7 showing injury, Opp. at 3, but Plaintiffs have met that standard throughout this litigation, and in
8 support of summary judgment have tendered sworn declarations detailing the specific facts of the
9 harm that the Ban imposes on them. As demonstrated by this undisputed evidence, Plaintiffs
10 continue to be injured by each of the accessions, medical, and retention bans.¹

11 **Accessions Ban.** The accessions ban, for example, injures Plaintiffs Karnoski, D.L., and
12 Callahan. It flatly orders the military to “maintain the currently effective policy regarding
13 accession . . . into the military service beyond January 1, 2018,” Newman Decl., Ex. 2, Dkt. 149-
14 2, at § 2(a), and thereby deprives Plaintiffs of “opportunities to compete for accession on equal
15 footing with non-transgender individuals,” 56(d) Order at 3 (quoting PI Order at 7-8).
16 Defendants argue that the Ban may not injure Plaintiffs if they have not met certain medical
17 requirements for accession. Opp. at 4. But this Court has rightly rejected that argument already,
18 as “the injury lies in the denial of an equal *opportunity* to compete, not the denial of the job
19 itself,” and the “the Court need not ‘inquire into the plaintiffs’ qualifications (or lack thereof)
20 when assessing standing.” 56(d) Order at 3 (quoting *Shea v. Kerry*, 796 F.3d 42, 50 (D.C. Cir.
21 2015)); *see also* Pls.’ Opp. to Defs.’ Mot. to Dismiss, Dkt. 84, at 9.

22 There is thus no dispute of material fact that Karnoski, D.L., and Callahan, who wish to
23 pursue military careers, are injured, much less that they face the mere “credible threat” of injury
24 needed to establish standing. *Nat. Res. Def. Council v. EPA*, 735 F.3d 873, 878 (9th Cir. 2013);
25 *see also* Decl. of D.L., Dkt. 132, ¶ 5 (actively preparing to join upon meeting 18-month
26 requirement); Decl. of Ryan Karnoski, Dkt. 130, ¶ 22 (ready to join the military once certain “the
27

28 ¹ Even one Plaintiff with standing, moreover, is enough for this litigation to go forward. *See* 56(d) Order at 4 (“If one plaintiff has standing it does not matter whether the others do.”).

1 rug will not be pulled out from under me again”); Decl. of Connor Callahan, Dkt. 137, at ¶¶ 15-
 2 20 (actively seeking enlistment in Air Force Reserve). Nor is there any material dispute of fact
 3 that, although Plaintiff Schmid’s Warrant Officer application was initially denied after this
 4 Court’s preliminary injunction led to its evaluation, she faces a credible threat of injury again, as
 5 her application may be reconsidered. Decl. of Maria Martinez, Dkt. 195, ¶ 4.

6 **Medical Ban.** Plaintiffs likewise have standing to challenge the ban on medical
 7 treatment. They have “identified concrete interests in . . . medical treatment,” PI Order at 10, and
 8 indeed face an imminent, credible threat from the Ban’s impending March 23, 2018 prohibition
 9 on funding for surgical care. Plaintiffs Winters, Lewis, and Stephens all anticipate needing
 10 surgery after that date. Decl. of Megan Winters, Dkt. 136, ¶ 32; Decl. of Terece Lewis, Dkt. 134,
 11 ¶ 17; Decl. of Philip Stephens, Dkt. 135, ¶ 16.² While Defendants speculate that they might
 12 qualify under the exception for surgery “to the extent necessary to protect the health of an
 13 individual who has already begun a course of treatment to reassign his or her sex,” Dkt. 149-2,
 14 § 2(b), they provide no evidence to show that any Plaintiff will benefit from the exception. There
 15 thus remains a “credible threat” that Plaintiffs will be denied needed and planned medical
 16 treatment solely because of their transgender status. *Nat. Res. Def. Council*, 735 F.3d at 878.

17 In addition, there is a credible threat that Plaintiff Jane Doe, who has not yet begun a
 18 course of treatment to reassign her sex, will not qualify for any exception. Decl. of Jane Doe,
 19 Dkt. 138, ¶ 12. Defendants protest that Doe is not a medical expert, Opp. at 7, but a plaintiff
 20 “has personal knowledge of [her] own medical conditions.” *See Gossett v. Stewart*, No. CV 08-
 21 2120, 2012 WL 845588, at *3 n.3 (D. Ariz. Mar. 13, 2012). There is no dispute that Doe intends
 22 to seek transition-related surgical care, and that the Ban facially precludes her from receiving
 23 such care. Because the Ban would deny Doe and other service members medical treatment solely
 24 on the basis of their transgender status, Plaintiffs face a credible threat that needed surgery will
 25 be denied and thus have standing to challenge the medical ban.

26 **Retention Ban.** All presently-serving Plaintiffs similarly have standing to challenge the
 27

28 ² Plaintiff Muller noted that, as of January 23, 2018, she was also pursuing surgical treatment, Decl. of Lindsey Muller, Dkt. 133, ¶ 37, and she has since been able to obtain aspects of that care to date.

retention ban. Defendants’ standing arguments on this issue are again premised on the theory that the Interim Guidance prevents Plaintiffs’ involuntary discharge and constitutes the operative policy, Opp. at 5-8, a legal argument thoroughly rejected by this and other courts, *e.g.*, PI Order at 9. The Ban unambiguously makes Plaintiffs subject to discharge. *See* Dkt. 149-2, §§ 1(a), (b) (noting that “until June 2016,” military policy “authorized the discharge of [transgender individuals],” and directing the military “to return to th[at] longstanding policy and practice on military service by transgender individuals”). Speculation that President Trump may reverse his July 2017 proclamation that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military” does not change that present reality, Dkt. 149-1, and indeed, cannot cure the Ban’s immediate and tangible harms to service members.

Those harms include, first, the inability to serve under equal terms and conditions as other service members. PI Order at 9; *compare* Decl. of Mark J. Eitelberg, Dkt. 147, ¶¶ 6-7 (policy imposes “substantial limitations” on opportunities within the military, including because of reluctance to invest resources in those subject to discharge), *and* Muller Decl. ¶ 31 (“It is challenging to perform to standards when I am afraid of losing my job at any moment.”), *with* *Ariz. Dream Act. Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (“diminished opportunity” to pursue career goals constitutes injury). Second, the retention ban chills Plaintiffs’ self-expression and burdens their liberty interests. *Compare* Doe Decl. ¶ 10 (“Because of this change in policy, I have not come out to anyone in my chain of command.”), *with* PI Order at 8-9 (“Plaintiff Doe’s self-censorship is a constitutionally sufficient injury.”) (quotations omitted). And finally, the retention ban, like the accessions and medical bans, stigmatizes Plaintiffs as inferior. PI Order at 9.³ Because the individual Plaintiffs have standing to challenge the Ban, the organizational Plaintiffs, through them, do too. *See* PI Order at 10.

Defendants’ judicial economy arguments, moreover, do not justify delaying constitutional review. The threat of the Ban’s implementation continues to inflict harm and

³ Defendants argue that stigmatic injury does not support standing where persons are not themselves denied equal treatment. Opp. at 3 n.2. But, as this Court has already held, “Plaintiffs have identified concrete interests in accession, career advancement, and medical treatment, and have demonstrated that they are ‘personally denied equal treatment by the challenged discriminatory conduct.’” PI Order at 10 (quotations omitted).

demands final resolution. *See, e.g.*, Karnoski Decl. ¶ 22. Furthermore, as noted above, Plaintiffs challenge Defendants’ underlying policy of excluding transgender people from military service, regardless of how it is implemented or what document houses its most recent incarnation. In any event, “all laws are subject to change,” *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000), and the fact that the Ban might be altered or narrowed in some way “has nothing to do with whether it is subject to judicial review at the moment.” *Id.* This Court should proceed to the merits and permanently enjoin this unconstitutional policy.

II. THE BAN VIOLATES PLAINTIFFS’ CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION, DUE PROCESS, AND FREEDOM OF EXPRESSION.

Like their standing arguments, Defendants’ arguments on the constitutionality of the Ban revisit well-trodden ground, but fail to demonstrate any genuine dispute of material fact to preclude summary judgment. Defendants argue again that the Ban is entitled to “substantial deference,” that it is not subject to heightened constitutional scrutiny,⁴ and that it does not violate equal protection, substantive due process, or the First Amendment. Opp. at 14-21. Each of these arguments fails as a matter of law and, as a result, Plaintiffs are entitled to summary judgment.

A. The Defendants’ Ban on Military Service by Transgender Individuals Is Not Entitled to Deference.

Defendants assert once again that the Ban is entitled to “substantial deference” because it pertains to “military personnel decisions.” Opp. at 13; *see also id.* at 14-15. But, as the Court already held, the undisputed facts here do not call for any deference since the Ban was enacted “abruptly and without any evidence of considered reason or deliberation.” PI Order at 18. None of the facts or law underpinning that conclusion has changed, so neither should the result.

Recognizing this, Defendants shift focus and for the first time seek to justify the Ban by referencing Secretary Mattis’ June 30, 2017 announcement that the Department of Defense

⁴ Defendants put up no fight against Plaintiffs’ argument that the Ban must be analyzed under heightened scrutiny, *i.e.* strict scrutiny or, at a minimum, intermediate scrutiny. *See* Dkt. 129 at 10-13; *see also* Mem. Decision & Order, *F.V. v. Barron*, No. 17-CV-170, Dkt. 39, at 20-25 (D. Idaho Mar. 5, 2018) (discrimination based on transgender status demands heightened scrutiny), *available at* https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/msj_order.pdf. Instead, they merely reiterate their disagreement “for purposes of preserving the issue.” Opp. at 15.

1 would defer accession of transgender applicants until January 1, 2018. But Plaintiffs did not
 2 challenge that decision; they challenged the Ban. A six-month *pause* on *accessions* cannot
 3 conceivably justify the indefinite and sweeping scope of the Ban. There remains no evidence that
 4 the Ban was based on any considered reason and deliberation. To the contrary, all available
 5 evidence shows that the Ban was the result of abrupt, unthinking, and reflexive action, exactly
 6 the type of actions excepted from judicial deference. PI Order at 18 (citing *Rostker v. Goldberg*,
 7 453 U.S. 57, 71-72 (1981)). This conclusion is underscored by Secretary Mattis’ subsequent
 8 post-Ban announcement that the Department of Defense would comply with instructions to
 9 design and undertake a study on the issues identified by the President’s tweets and Presidential
 10 Memorandum. The need for study *after* the Ban was announced confirms that there was no
 11 actual military judgment underpinning the policy at the time it was announced. *Doe 1 v. Trump*,
 12 2017 WL 4873042, at *29.

13 Defendants cannot obtain judicial deference merely by invoking military buzzwords like
 14 “unit cohesion” or “lethality” at the time they issue a policy; rather, there must be reasoned and
 15 substantive military judgment to warrant any deference. *Stone v. Trump*, 2017 WL 5589122, at
 16 *15 (President’s tweets did not “emerge from a policy review” and Presidential Memorandum
 17 failed to “identify any policymaking process”). The undisputed record shows that the only
 18 “studies, conclusions, and judgment of the military itself” at the time “actually *contradicted*” the
 19 stated reasons for the Ban. PI Order at 16 (quoting *Doe*, 2017 WL 4873042, at *30).

20 Because the Ban is unmoored from any reasoned consideration or deliberation, the line of
 21 authority on which Defendants rely holds no sway.⁵ Indeed, when juxtaposed here, Defendants’
 22 case law reinforces the Court’s prior conclusion. For example, *Goldman* involved the Air Force’s
 23 promulgation of a 190-page uniform regulation that “describe[d] in minute detail all of the

24
 25 ⁵ Defendants’ reliance on *Orloff v. Willoughby*, 345 U.S. 83 (1953), is also misplaced, but for a different reason.
 26 Unlike here, the *Orloff* Court found an adequate justification for the intrusion on a constitutional right—the
 27 executive’s interest in the loyalty of its commissioned military officers. 345 U.S. at 90-91. *Orloff* has also been
 28 narrowly read to pertain to the military’s internal duty orders. It does not shield from judicial review “constitutional
 wrongs suffered in the course of military service.” *Chappell v. Wallace*, 462 U.S. 296, 304 (1983); *see also Emory v.*
Sec’y of Navy, 819 F.2d 291, 294 (D.C. Cir. 1987) (“Where . . . the armed forces have trenched upon constitutionally
 guaranteed rights through the promotion and selection process, the courts are not powerless to act. The military has
 not been exempted from constitutional provisions that protect the rights of individuals.”); *Denton v. Sec’y of Air*
Force, 483 F.2d 21, 24 (9th Cir. 1973) (no deference to military actions that “deprive [a party] of his livelihood”).

various items of apparel that must be worn as part of the Air Force Uniform.” 475 U.S. 503, 509 (1986). And *Rostker v. Goldberg*, 453 U.S. 57 (1981)—on which the Court relied in granting a preliminary injunction—deferred to military policy born out of “extensive review of legislative testimony, floor debates, and committee reports.” PI Order at 17-18 (citing 453 U.S. at 71-72). Put simply, unlike these authorities, there were no “complex[,] subtle, and professional” military judgments here that merit judicial deference. Opp. at 13 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)). And even if any deference were appropriate (it is not), that would not spare the Ban from heightened constitutional scrutiny under which it would still fail on the merits. *Witt v. Dept. of Air Force*, 527 F.3d 806, 811 (9th Cir. 2008) (applying heightened scrutiny to substantive due process claim where challenged anti-gay policy concerned “management of the military”).

B. The Ban Violates Plaintiffs’ Rights to Equal Protection and Substantive Due Process Because It Fails to Advance Any Proffered Government Interest.

Defendants effectively concede that their equal protection and substantive due process arguments rise and fall together. Opp. at 20. On both scores, Defendants have failed to meet their “demanding” burden to prove an “exceedingly persuasive” and “genuine” justification for the Ban. *United States v. Virginia (“VMI”)*, 518 U.S. 515, 533 (1996); *see also Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1696-97 (2017). Instead, at every turn, they offer the sort of overbroad, factually unsupported, and *post hoc* rationalizations that do not pass muster. They also offer no evidence to rebut the military and medical professional testimony submitted by Plaintiffs.

Notably, Defendants do not even attempt to offer any justification for the retention and medical bans beyond their erroneous contention that the Interim Guidance constitutes the operative policy. Opp. at 16-17. At best, Defendants attempt to characterize the medical ban as “a matter of line-drawing” compared to the preexisting policy, Opp. at 17, but the contrast between the two could not be more stark: the preexisting policy provided for transition-related care where it was medically necessary; the Ban expressly denies care even in situations where (as here) medical necessity is undisputed. Dkt. 149-2, § 2(b) (prohibiting surgical care unless it is *both* “necessary to protect the health of an individual” *and* the individual “has already begun a

1 course of treatment to reassign his or her sex”). In other words, under the Ban, medical necessity
2 is an insufficient basis for medical care.

3 **Readiness, Deployability, and Lethality.** With respect to the accessions ban, Defendants
4 assert that “some” transgender individuals may experience unspecified “medical conditions” or
5 might have undergone treatments that “could” affect performance. Opp. at 17-18. This well-worn
6 speculation still suffers from an incurable defect: “*all* service members might suffer from
7 medical conditions that could impede performance.” PI Order at 17. Indeed, since “it is common
8 for service members to be non-deployable for periods of time due to an array of [] conditions,”
9 there is no basis to selectively bar transgender individuals from military service. *Id.* Furthermore,
10 this argument is factually unsupported by record evidence,⁶ and it is particularly inapposite to the
11 accessions policy currently in effect. Transgender applicants must not only pass the military’s
12 rigorous and individualized accessions process, which assesses all applicants’ fitness to serve,
13 but, on top of that, they must also generally have completed transition-related medical treatment
14 18 months before joining the military.

15 Defendants’ response tacitly admits that their argument is a justification still in search of
16 support. Though they rely on Secretary Mattis’ June 30, 2017 announcement pausing accessions
17 for six months, Plaintiffs did not challenge that action, which “in no way presuppose[d] the
18 outcome of the review.” Decl. of Ryan Parker, Ex. 4. Instead, Plaintiffs challenged President
19 Trump’s Ban, which was announced less than a month later, notwithstanding the military’s
20 earlier determination that permitting open service would not undermine military effectiveness
21 and lethality and that “*prohibiting* open service would have negative impacts.” PI Order at 16.
22 President Trump did not “maintain” the status quo pending the outcome of a study; he *changed*
23 the status quo—which had permitted open service—without regard to the outcome of any study.

24 **Unit Cohesion.** Defendants offer no evidence to show that the Ban advances the
25 government’s interest in unit cohesion, nor do they explain how discriminating against
26 transgender people is “substantially related to the achievement of those objectives.” *VMI*, 518

27 ⁶ Although Defendants seek to re-litigate the Court’s denial of their Rule 56(d) request, their inability to come
28 forward with their own affirmative evidence to defend the Ban’s constitutionality is a problem of their own making.
Citing testimony presented in other cases, Opp. at 18, does not satisfy Defendants’ burden on summary judgment.
PLAINTIFFS’ REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT - 9
[Case No.: 2:17-cv-01297-MJP]

U.S. at 533. Instead, they assert that the RAND Report actually lends credence to their policy because it “did not appear to consider whether an impact on deployability in itself would affect unit cohesion.” Opp. at 19. On its face, this argument defies logic: the study reached the opposite conclusion of what Defendants urge. *See Doe*, 275 F. Supp. 3d at 212 (describing the RAND Report as “largely debunking any potential concerns about unit cohesion”). Indeed, the RAND Report explicitly found that preventing open service would actually cause “erosion of unit cohesion.” PI Order at 16. Defendants’ more fundamental problem, however, is that deployability issues affect *all* service members. Singling out transgender individuals for a reason that affects all service members is a quintessential equal protection violation.

Cost. Defendants again cite cost as a justification for the Ban. As a legal matter, they fail to rebut that cost savings standing alone cannot justify discrimination. Ptf’s Mot. at 19-21. As a factual matter, they do not contest that the RAND Report concluded that the costs for transition-related care are exceedingly minimal. Instead, they argue that there are unaccounted administrative costs “associated with [Plaintiffs’] desired policy change.” Opp. at 19. Those costs, however, are completely undefined and hypothetical; they relate to implementation efforts that have now already occurred to facilitate the open service policy; and they previously failed to persuade this Court to stay the preliminary injunction as to accessions. *See* Dkt. 121 at 4-5. Defendants’ arguments provide no stronger basis for denying permanent relief.

Defendants also have failed to present any evidence to show that the President was concerned with administrative costs when he decided to implement and announce the Ban and issued the Presidential Memorandum. President Trump’s July 2017 tweets mentioned only “medical costs”—a justification that this Court concluded was inadequate to survive heightened scrutiny. PI Order at 17-18. Defendants’ new hypothetical, *post hoc* rationalization of administrative costs also fails. *VMI*, 518 U.S. at 533; *see also Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (holding that purported administrative costs could not justify discrimination).

C. The Ban Violates Plaintiffs’ Right to Freedom of Expression.

Defendants present no new arguments relating to Plaintiffs’ First Amendment claim. They protest that the Ban does not “regulate[] speech at all, much less on the basis of its

content,” Opp at. 20, but this Court already rejected that argument, holding that the Ban constitutes a content-based regulation of speech, because it “penalizes transgender service members—but not others—for disclosing their gender identity.” PI Order at 19-20.

Defendants also seek deference under *Brown v. Glines*, 444 U.S. 348, 355 (1980), arguing that the Interim Guidance “does not impede expression by current transgender service members or those seeking accession into the military.” Opp. at 21. But they wholly ignore that viewpoint discrimination, as a particularly egregious form of content discrimination, requires strict scrutiny, including in the military context. Mot. at 23. In any event, even affording Defendants deference under *Brown*, this Court has already concluded that the Ban does not withstand scrutiny because Defendants are unable to demonstrate an important government interest that is furthered by intrusion upon protected expression. PI Order at 20. Because nothing has changed, Plaintiffs are entitled to summary judgment on their First Amendment claim.

III. THE COURT SHOULD ENTER A PERMANENT INJUNCTION THAT PREVENTS DEFENDANTS FROM ENFORCING THE BAN AGAINST ANY TRANSGENDER INDIVIDUAL.

Defendants challenge as overbroad Plaintiffs’ request for a permanent injunction precluding enforcement of the Ban against all transgender people. They insist that the Court should not grant relief to individuals who are not parties before it and, instead, that such individuals should be forced to “bring their own challenges” if they “believe they are injured by the policies at issue.” Opp. at 22. These same arguments were all presented—and all rejected—in the context of the preliminary injunction.

First, the appropriate scope of an injunction is determined by the “extent of the violation established, not by the geographic extent of the plaintiff[s].” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). Where, as here, “a law is unconstitutional on its face, and not simply in its application to certain plaintiffs,” broad injunctive relief is warranted. *Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017); see also *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017) (“Narrowing the injunction to apply only to Plaintiffs would not cure the statutory violations identified, which in all applications would violate provisions of the INA.”), *vacated as moot*, 874 F.3d 1112 (9th Cir. 2017).

CONCLUSION

WA SER 180

Respectfully submitted on March 7, 2018.

NEWMAN DU WORS LLP



Derek A. Newman, WSBA #26967
dn@newmanlaw.com
Samantha Everett, WSBA #47533
samantha@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

**LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.**

Tara Borelli, WSBA #36759
tborelli@lambdalegal.org
Camilla B. Taylor (admitted pro hac vice)
Peter C. Renn (admitted pro hac vice)
Natalie Nardecchia (admitted pro hac vice)
Sasha Buchert (admitted pro hac vice)
Kara Ingelhart (admitted pro hac vice)
Carl Charles (admitted pro hac vice)

OUTSERVE-SLDN, INC.

Peter Perkowski (admitted pro hac vice)

KIRKLAND & ELLIS LLP

James F. Hurst, P.C. (admitted pro hac vice)
Jordan M. Heinz (admitted pro hac vice)
Scott Lerner (admitted pro hac vice)
Vanessa Barsanti (admitted pro hac vice)
Daniel I. Siegfried (admitted pro hac vice)
Ben Tyson (admitted pro hac vice)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on March 7, 2018.



Samantha Everett, WSBA #47533
samantha@newmanlaw.com
Newman Du Wors LLP
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al,

Plaintiffs,

v.

DONALD TRUMP, et al,

Defendants.

Case No: 2:17-cv-1297-MJP

**REPLY IN SUPPORT OF
WASHINGTON'S MOTION
FOR SUMMARY
JUDGMENT**

Oral Argument: March 27, 2018

STATE OF WASHINGTON,

Intervenor-Plaintiff,

v.

DONALD TRUMP, et al,

Intervenor-Defendants.

REPLY IN SUPPORT OF
WASHINGTON'S MOTION FOR
SUMMARY JUDGMENT

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 442-4492

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ARGUMENT	1
A.	Summary Judgment Should Be Granted.....	1
B.	Defendants Raise No Material Disputed Issues of Fact About the Policy at Issue	2
1.	There is no dispute that Washington challenges Defendants’ Ban	2
2.	Defendants’ professed confusion about the state of their own Ban does not create a fact question.....	2
3.	The potential of future changes in the implementation plan does not render the Ban unreviewable.....	3
C.	There Are No Material Disputed Issues of Fact Regarding Washington’s Standing	5
1.	Washington has standing to protect its sovereign and quasi-sovereign <i>parens patriae</i> interests	5
a.	Washington has standing to protect its sovereign interests	5
b.	Washington has standing to protect its <i>parens patriae</i> interests	7
2.	Washington has standing to challenge the Ban independent from Private Plaintiffs	7
D.	The Ban Is Unconstitutional	8
1.	The Ban violates equal protection principles of the Fifth Amendment	9
2.	The Ban violates substantive due process protections of the Fifth Amendment	10
3.	This Court owes no deference to a policy that is not the result of a reasoned, well-vetted military decision.....	11
E.	Nationwide Relief is Appropriate	12
III.	CONCLUSION	12

TABLE OF AUTHORITIES

Cases

<i>Adarand Constructors, Inc. v. Slater</i> , 528 U.S. 216 (2000)	4
<i>Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez</i> , 458 U.S. 592 (1982).....	6, 7
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	1
<i>Ball v. Massanari</i> , 254 F.3d 817 (9th Cir. 2001).....	9
<i>Benavidez v. Eu</i> , 34 F.3d 825 (9th Cir. 1994).....	8
<i>Bunker Ltd. P’ship v. United States</i> , 820 F.2d 308 (9th Cir. 1987).....	4
<i>Burke v. Barnes</i> , 479 U.S. 361 (1987).....	4
<i>Califano v. Yamasaki</i> , 442 U.S. 682 (1979)	12
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	1
<i>City of Seattle v. Trump</i> , No. 17-497-RAJ, 2017 WL 4700144 (W.D. Wash. Oct. 19, 2017)	4, 5
<i>Cty of Los Angeles v. Davis</i> , 440 U.S. 625 (1979)	4
<i>Cty. of Santa Clara v. Trump</i> , 250 F. Supp. 3d 497 (N.D. Cal. 2017)	4, 12
<i>Diamond v. Charles</i> , 476 U.S. 54 (9th Cir. 1986).....	8
<i>Doe 1 v. Trump</i> , No. 17-1597 (CKK), 2017 WL 4873042 (D.D.C. Oct, 30, 2017).....	10
<i>Friends of Wild Swan v. Vermillion</i> , 694 Fed. Appx. 475 (9th Cir. 2017).....	8
<i>FTC v. Publ’g Clearing House, Inc.</i> , 104 F.3d 1168 (9th Cir. 1997).....	1
<i>Fuller v. Volk</i> , 351 F.2d 323 (3d Cir. 1965)	8
<i>Georgia v. Tennessee Copper Co.</i> , 206 U.S. 230 (1907)	5
<i>Glenn v. Brumby</i> , 663 F.3d 1312 (11th Cir. 2011)	9
<i>Gulf of Me. Fisherman’s All. v. Daley</i> , 292 F.3d 84 (1st Cir. 2002)	4
<i>Hawaii v. Trump</i> , 878 F.3d 662 (9th Cir. 2017)	4
<i>Indus. Commc’ns & Elecs., Inc. v. Town of Alton</i> , 646 F.3d 76 (1st Cir. 2011)	8
<i>Jacobus v. Alaska</i> , 338 F.3d 1095 (9th Cir. 2003).....	4

1	<i>Kremens v. Bartley</i> , 431 U.S. 119 (1977).....	4
2	<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	5
3	<i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007)	5
4	<i>Miss. Univ. for Women v. Hogan</i> , 458 U.S. 718 (1982).....	9
5	<i>Nelson v. Pima Cmty. Coll.</i> , 83 F.3d 1075 (9th Cir. 1996).....	1
6	<i>Rockwell Int’l Corp. v. United States</i> , 549 U.S. 457 (2007).....	8
7	<i>Rosebrock v. Mathis</i> , 745 F.3d 963 (9th Cir. 2014).....	4
8	<i>Rostker v. Goldberg</i> , 453 U.S. 57 (1981)	11
9	<i>Schwenk v. Hartford</i> , 204 F.3d 1187 (9th Cir. 2000)	9
10	<i>Sessions v. Morales-Santana</i> , 137 S. Ct. 1678 (2017).....	9, 10
11	<i>Standard Alaska Prod. Co. v. Schaible</i> , 874 F.2d 624 (9th Cir. 1989).....	4
12	<i>Stockman v. Trump</i> , No. 5:17-cv-1799-JGB (C.D. Cal. Dec. 22, 2017)	10
13	<i>Stone v. Trump</i> , No. MJG-17-2459, 2017 WL 5589122 (D. Md. Nov. 21, 2017)	10
14	<i>U.S. Dep’t of Treasury v. Galioto</i> , 477 U.S. 556 (1986).....	4
15	<i>United States v. Virginia</i> , 518 U.S. 515 (1996).....	9
16	<i>Washington v. Trump</i> , 847 F.3d 1151 (9th Cir. 2017).....	12
17	<i>Watkins v. U.S. Army</i> , 875 F.2d 699 (9th Cir. 1989).....	10, 11
18	<i>Whitaker v. Kenosha Unified Sch. Dist. No. 1</i> , 858 F.3d 1034 (7th Cir. 2017).....	9
19	<i>Witherow v. Paff</i> , 52 F.3d 264 (9th Cir. 1995)	1
20	<i>Witt v. Dep’t of the Air Force</i> , 527 F.3d 806 (9th Cir. 2008)	10, 11
21	<u>Statutes</u>	
22	10 U.S.C. § 12201(b).....	6
23	Fed. R. Civ. Pro. 56(a).....	1
24	Wash. Rev. Code § 49.60.010	6
25	Wash. Rev. Code § 49.60.030	6
26	Wash. Rev. Code § 49.60.040(26).....	6

1 Wash. Rev. Code § 49.60.180 6

2 **Other Authorities**

3 7C Wright, Miller & Kane, Federal Practice & Procedure § 1920 (3d ed. 2017) 8

I. INTRODUCTION

Defendants fail to adduce any evidence to justify the unconstitutional Transgender Military Service Ban (“Ban”) announced by the President on Twitter on July 26, 2017, memorialized in a subsequent Presidential Memorandum dated August 25, 2017, and long embedded in the historically discriminatory policies and practices of the military. The Ban has not been revoked or rescinded. Any alleged forthcoming implementation plans for the unconstitutional Ban fail to render the policy unreviewable. Summary judgment should be granted without further delay.

II. ARGUMENT

A. Summary Judgment Should Be Granted

Where the moving party establishes that it is entitled to judgment as a matter of law based on undisputed material facts, summary judgment should be granted. *See* Fed. R. Civ. Pro. 56(a). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Washington has met this standard, establishing through Defendants’ own statements and evidence that the facially discriminatory Ban is unrelated to any important governmental interest, and does not further the military’s goals of readiness, unit cohesion, or cost control. ECF 150. Rather than produce any evidence to the contrary that might “demonstrate[] that there is a genuine issue of material fact for trial,” Defendants continue to rely on naked allegations that the post hoc justification for the President’s unconstitutional policy is forthcoming. *FTC v. Publ’g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)). However, “mere allegation and speculation do not create a factual dispute for purposes of summary judgment.” *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081–82 (9th Cir. 1996) (citing *Witherow v. Paff*, 52 F.3d 264, 266 (9th Cir. 1995)). If evidence justifying the President’s unconstitutional Ban existed at the time he announced the policy, Defendants would have produced it. Defendants have failed to do so. Accordingly, the Court should grant Washington’s Motion for Summary Judgment without further delay.

B. Defendants Raise No Material Disputed Issues of Fact About the Policy at Issue

1. There is no dispute that Washington challenges Defendants’ Ban

Washington moves for summary judgment on Defendants’ longstanding “policy of prohibiting transgender individuals from serving openly in the military,” ECF 103 at 22, including the President’s Memorandum directing the United States Military to return to its longstanding discriminatory policy that authorizes the discharge of openly transgender service members (the “Retention Directive”); prohibits the accession of openly transgender individuals (the “Accession Directive”); and prohibits the funding of certain surgical procedures for transgender service members (the “Medical Care Directive”). ECF 150 at 2-3; ECF 104 ¶¶ 24-26; ECF 103 at 3-4, 23. The President announced the Ban on Twitter on July 26, 2017, and, one month later, on August 25, 2017, issued a Presidential Memorandum directing the Secretaries of Defense and Homeland Security to effectuate it, ordering that the Accession Directive takes effect on January 1, 2018, and that the Retention and Medical Care Directives take effect on March 23, 2018. ECF 34-6; ECF 34-7 §§ (1)(b), 2(a)-(b), (3). On September 14, 2017, Secretary of Defense Mattis issued Interim Guidance to the military identifying the intent of the Department of Defense (“DoD”) to “carry out the President’s policy and directives” and to identify “a plan to implement the policy and directives in the Presidential Memorandum.” ECF 69-1 at 2-3. These facts are undisputed and squarely identify the policy upon which Washington seeks summary judgment.

2. Defendants’ professed confusion about the state of their own Ban does not create a fact question

Defendants argue that there are open questions regarding “which is the current applicable military policy for service by transgender persons” and “whether there has been a final decision concerning the military policy.” ECF 194 at 2. But the policy announced by the President on Twitter and memorialized by Presidential Memorandum has never been revoked or rescinded. Professing confusion about the state of their own policy does not create a fact question where

1 none exists.

2 **3. The potential of future changes in the implementation plan does not render**
 3 **the Ban unreviewable**

4 Defendants urge the Court to delay ruling on Washington's motion for summary
 5 judgment pending the alleged future announcement of an updated implementation plan for the
 6 President's unconstitutional policy. ECF 194 at 9-12. However, any alleged forthcoming
 7 changes to the implementation plan have no bearing on Washington's motion against the
 8 undisputed policy. Thus, there is no reason for delay.

9 Defendants' own statements and evidence establish that Secretary Mattis is allegedly in
 10 the process of devising an updated implementation plan for the President's unconstitutional
 11 policy. In an August 29, 2017 statement, Secretary Mattis announced receipt of the Presidential
 12 Memorandum and DoD's intent to "carry out the President's policy direction." ECF 197, Ex. 2
 13 at 1. Secretary Mattis indicated that DoD, in consultation with the Department of Homeland
 14 Security, would develop an "implementation plan" for the President's policy. *Id.* ("To that end,
 15 I will establish a panel of experts serving within the Departments of Defense and Homeland
 16 Security to provide advice and recommendations on the implementation of the president's
 17 direction."). Secretary Mattis also stated that he "expect[ed] to issue interim guidance" to the
 18 military "concerning the President's direction" *Id.* He did so on September 14, 2017. In the
 19 Interim Guidance, Secretary Mattis stated more specifically that, "[n]ot later than February 21,
 20 2018, I will present the President with a plan to implement the policy and directives in the
 21 Presidential Memorandum." ECF 69-1 at 2. While February 21 has come and gone, Defendants'
 22 evidence makes plain that the alleged forthcoming announcement is an updated "implementation
 23 plan" for the President's unconstitutional policy. *Id.* Despite the possibility of future changes to
 24 the implementation plan, the President's unconstitutional policy itself remains in place,
 25 unrevoked and unrescinded.
 26

Defendants argue that judicial economy demands that this Court wait until Defendants develop a final implementation plan for the Ban before the Court determines whether the Ban is constitutional. A challenge to a policy is moot only when the challenged policy is clearly rescinded or superseded.¹ Instead, courts generally require more from Defendants than promises of future changes before finding a policy unreviewable or rejecting a claim as moot.² Even the cases that Defendants rely upon do not support this Court finding otherwise.³

Instead, courts have found that claims against the Government are “fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” *City of Seattle v. Trump*, No. 17-497-RAJ, 2017 WL 4700144, at *6 (W.D. Wash. Oct. 19, 2017) (quoting *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989)). See also *Hawaii v. Trump*, 878 F.3d 662, 678-79 (9th Cir. 2017) (rejecting Government’s argument that potential future discretionary actions make the Travel Ban unreviewable); *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 529 (N.D. Cal. 2017) (rejecting Government’s argument that policy was unreviewable because the Government was still determining enforcement mechanisms and finding that “[w]aiting for the Government to decide how it wants to apply the Order would only cause more hardship and would not resolve the legal question at

¹ See *Cty of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (holding that case is moot only where there is no reasonable expectation that alleged violation will recur, and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation); *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) (noting that when the Government asserts mootness based on such a change in its practices it bears a heavy burden of showing that the challenged conduct cannot reasonably be expected to start again).

² See *Jacobus v. Alaska*, 338 F.3d 1095, 1102-03 (9th Cir. 2003) (“[D]ismissal of a case ‘on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought’” and noting that likelihood of reenactment is a significant factor in the evaluation of mootness) (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000)).

³ See *Burke v. Barnes*, 479 U.S. 361, 363 (1987) (mooting a claim that *only* sought to “litigate the validity of a statute which by its terms had already expired”); *U.S. Dep’t of Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986) (finding claim moot *after* Congress altered the challenged statute and rectified the constitutional concerns raised by plaintiff’s lawsuit); *Kremens v. Bartley*, 431 U.S. 119, 128-29 (1977) (finding claim moot *after* statutory fix was made to protect plaintiffs’ constitutional rights); *Gulf of Me. Fisherman’s All. v. Daley*, 292 F.3d 84, 88 (1st Cir. 2002) (finding claim moot *after* a regulation had been “replaced by a series of subsequent” regulations); *Bunker Ltd. P’ship v. United States*, 820 F.2d 308, 312 (9th Cir. 1987) (finding moot claim “[w]here new legislation represents a complete substitution for the law as it existed at the time of a district court’s decision” but affirming that if “the new statutory provision has manifestly not changed the law, a controversy arising under the old statutory provision ... is not moot”).

issue”). This Court recently rejected similar arguments from the Government. *See Seattle*, 2017 WL 4700144, at *6. The Court should do so here.

C. There Are No Material Disputed Issues of Fact Regarding Washington’s Standing

Washington has standing to challenge the Ban at the summary judgment stage, consistent with *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). ECF 150 at 5. Washington has presented evidence supporting its standing to protect its sovereign and quasi-sovereign interests to challenge the Ban. *See* ECF 55; ECF 57; ECF 56-8; ECF 97. Further, Washington has an interest in protecting all Washington residents, including Washington-based Private Plaintiffs and similarly situated Washington residents, from the discriminatory impact of the Ban. ECF 35; ECF 36; ECF 39; ECF 130; ECF 131; ECF 134. Based on this evidence, this Court has already ruled that Washington has standing to challenge the Ban when it granted Plaintiffs’ request for a preliminary injunction. ECF 103 at 11-12.

Defendants fail to adduce any contrary evidence, and there are no material disputed issues of fact as to Washington’s standing. Defendants’ reliance on hollow arguments that “Washington has not even attempted to satisfy its burden to demonstrate standing to sue[,]” and that this Court “expressly declined to decide whether Washington possessed standing to sue” in granting its motion to intervene, ECF 194 at 9, are incorrect and unavailing.

1. Washington has standing to protect its sovereign and quasi-sovereign *parens patriae* interests

a. Washington has standing to protect its sovereign interests

The Ban injures Washington’s sovereign interests in protecting its territory and maintaining its antidiscrimination laws. ECF 103 at 11; ECF 57 ¶¶ 6-13. A state has sovereign protectable interest in “preserv[ing] its sovereign territory.” *Massachusetts v. EPA*, 549 U.S. 497, 518-19 (2007) (affirming that states have an “independent interest” in protecting the natural environments and resources within the state’s boundaries) (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)).

Recruitment for Washington's National Guard is subject to DoD policies governing accession into military service – including the Ban. ECF 57 ¶¶ 14-15; 10 U.S.C. § 12201(b). The Ban diminishes the number of individuals eligible to serve in emergency circumstances, when Washington needs assistance the most by excluding qualified Washingtonians from the pool of candidates who can join Washington's National Guard.⁴ ECF 103 at 11-12. Washington relies heavily on its National Guard to “assist with emergency preparedness and disaster recovery planning, including protecting Washington State’s natural resources from wildfires, landslides, flooding, and earthquakes.” ECF 103 at 11 (citing ECF 97 at 8); *see also* ECF 57 ¶¶ 6-11. Washington cannot afford to lose potential qualified Guard members or applicants, as each lost Guard member negatively impacts Washington’s ability to respond and mitigate harms to its territory. ECF 103 at 11-12. As the Ban excludes potential qualified individuals from Washington’s National Guard, it negatively impacts Washington’s ability to protect its residents in emergency situations and to protect its natural resources.

Washington also has sovereign interests in maintaining and enforcing its longstanding antidiscrimination laws. *See* Wash. Rev. Code § 49.60.010 (finding that discrimination “menaces the institutions and foundation of a free democratic state”). Protecting Washington’s legal code from the Ban is a legitimate exercise of Washington’s sovereign power and Washington has standing to protect its sovereign interests. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982). Washington also has standing because the Ban requires Washington to discriminate against its own people by forcing Washington to bar transgender individuals from serving in its National Guard in violation of Washington’s anti-discrimination laws.⁵ By permitting, and even requiring discrimination, the Ban impairs Washington’s unique interest in making and enforcing its civil rights protections.

⁴ The Ban also negatively impacts Washington’s ability to recruit non-transgender individuals to join the Washington National Guard as they may favor working for an inclusive and non-discriminatory employer.

⁵ *Contra* Wash. Rev. Code §§ 49.60.030; 49.60.040(26); 49.60.180 (guaranteeing a civil right to be free from sex or gender identity discrimination, including in employment).

Washington has significant protectable sovereign interests that give it standing to challenge the Ban. ECF 103 at 11-12. In issuing the preliminary injunction, this Court agreed. ECF 103 at 11-12. Defendants produce no evidence to the contrary.

b. Washington has standing to protect its *parens patriae* interests

Washington has standing as *parens patriae* to protect residents from “the harmful effects of discrimination.”⁶ *Snapp*, 458 U.S. at 609. Washington is home to approximately 60,000 active and reserve military service members. ECF 103 at 11; ECF 97 at 6. Washington also has approximately 8,000 citizen soldiers in its National Guard. ECF 57 ¶ 8. Each of these Washingtonians works for the military and is part of an organization that seeks to discriminate against transgender Washingtonians. As long as the Ban is in place, each Washington service member is impacted – regardless of whether they are transgender – because their service is governed by a policy that targets their colleagues and teaches them that the military is willing to discriminate against its own. Washington is also home to approximately 32,850 transgender adults. ECF 103 at 11; ECF 97 at 6. The Ban targets these individuals for disfavored treatment by subjecting them to a facially discriminatory government policy.

The Ban subjects thousands of Washingtonians to discriminatory stigma and restricted employment opportunities. This discrimination harms their “health and well-being – both physical and economic[.]” *Snapp*, 458 U.S. at 607. The harm the Ban constitutes to Washingtonians is sufficient injury to confer *parens patriae* standing on Washington. *Id.* at 601-04. The Court agreed and, based on the law and evidence, found Washington had standing to challenge the Ban. ECF 103 at 11. Defendants produce no evidence to the contrary.

2. Washington has standing to challenge the Ban independent from Private Plaintiffs

Defendants argue that “Washington cannot proceed with this case as an Intervenor,” ECF 194 at 9, relying on an unpublished Ninth Circuit decision, *Friends of Wild Swan v. Vermillion*,

⁶ The United States Supreme Court held that protecting residents from overt federal discrimination is squarely a state concern. *Snapp*, 458 U.S. at 609.

694 Fed. Appx. 475 (9th Cir. 2017). Their argument lacks merit. Even if *Friends of Wild Swan* were a binding, published decision, which it is not, it simply stands for the proposition that “[a]n intervenor’s right to continue a suit in the absence of the party on whose side intervention was permitted ‘is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.’” 694 Fed. Appx. 475, 476 (9th Cir. 2017) (quoting *Diamond v. Charles*, 476 U.S. 54, 68 (9th Cir. 1986)). However, Washington has shown that it has standing to vindicate its sovereign interests and to protect its residents and quasi-sovereign *parens patriae* interests from Defendants’ unconstitutional Ban.⁷ Because Washington’s sovereign and quasi-sovereign interests meet Article III standing requirements to challenge the Ban separately and distinctly from Private Plaintiffs’ standing, Washington is entitled to summary judgment. ECF 103 at 11-12.

D. The Ban Is Unconstitutional

The Ban fails to pass constitutional muster and summary judgment should be granted. ECF 150 at 8-18.

Betrayed by their own statements and evidence that reveal the discriminatory Ban is unrelated to any important government interest and lacks constitutional justification, Defendants have little choice but to make the same worn arguments: (1) that the forthcoming results of the “final” implementation plan will somehow provide ex-post substantiation for the Ban, *see* ECF 194 at 9-11; (2) that the Court owes “considerable deference” to Defendants’ military personnel decisions,” *id.* at 13-15, despite a lack of evidence warranting such deference; and (3) that the Ban is constitutional just because Defendants say it is so, *id.* at 15-20. None of these unavailing arguments supply what Defendants lack – evidence justifying the Ban at the time of its

⁷ Defendants’ argument further fails because an “intervenor is entitled to litigate fully on the merits once intervention is granted.” 7C Wright, Miller & Kane, *Federal Practice & Procedure* § 1920 (3d ed. 2017). As this Court exercises “independent grounds for jurisdiction of the intervenor’s claim,” Washington may proceed to judgment even if future developments – highly unlikely here – somehow eliminate the standing of each Private Plaintiff. *See Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 478 (2007) (citing cases and treatises); *see also Benavidez v. Eu*, 34 F.3d 825, 30 (9th Cir. 1994); *Indus. Comm’n & Elecs., Inc. v. Town of Alton*, 646 F.3d 76, 79 (1st Cir. 2011); *Fuller v. Volk*, 351 F.2d 323, 328–29 (3d Cir. 1965) (citing cases)).

announcement which Defendants would have produced if it existed. Accordingly, the Court should dismiss Defendants' meritless arguments and grant summary judgment.

1. The Ban violates equal protection principles of the Fifth Amendment

The Ban fails intermediate scrutiny because it openly discriminates against transgender individuals without substantially serving an important governmental interest. ECF 150 at 8-13.

Summary judgment should be granted on Washington's equal protection claim because Defendants fail to show an "exceedingly persuasive justification" for the Ban by proving that (1) it serves "important governmental objectives," and (2) "the discriminatory means employed are substantially related to the achievement of those objectives." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). See ECF 150 at 8-15. Defendants present no evidence of "important governmental objectives" served by the Ban or evidence that the Ban is "substantially related" to achieving those objectives.⁸ See generally ECF 197. Further, Defendants have simply presented no evidence – no declarations or documents – at any point during this litigation that support its arguments that military readiness, unit cohesion, and budgets are *actually* put at risk by allowing transgender service members to serve openly and to access surgical care or that those interests were the *actual* basis for the Ban. Instead, Defendants rest on unsupported assertions that these alleged governmental interests justify the Ban.⁹ However, without actual evidence of such governmental interests, Defendants'

⁸ Defendants object to the Court's prior determination that intermediate scrutiny applies to Plaintiffs' equal protection claims, ECF 194 at 15, but the Court correctly followed established precedent in applying heightened scrutiny in reviewing a policy that discriminates on the basis of transgender status, a quasi-suspect classification, ECF 103 at 15 (citing *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001)). Courts have long held that heightened scrutiny is the appropriate standard for reviewing policies that make distinctions based on sex and gender identity. See *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982); *Virginia*, 518 U.S. at 533; *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1048 (7th Cir. 2017); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011).

⁹ See ECF 194 at 19 (presenting no evidence to support the Accessions Directive but arguing that "the President could reasonably conclude that the longstanding accessions policy furthers "unit cohesion"); *Id.* at 17 (presenting no evidence to support the Medical Directive but arguing that Ban on new sex reassignment surgeries for transgender service members is similar to general military "discretion to set the level of care provided at military facilities"); *Id.* (presenting no evidence to support the Retention Directive but arguing that the Interim Guidance inoculates the Ban's Retention Directive from review).

1 Ban cannot survive equal protection scrutiny.¹⁰ Further, the Government’s own evidence
 2 demonstrates that the Ban undermines – not furthers – military readiness and unit cohesion.¹¹
 3 See ECF 150 at 14.

4 Apart from whether the Ban furthers important governmental interests, Defendants must
 5 show a substantial relationship between the Ban and their asserted governmental interests.
 6 *Morales-Santana*, 137 S. Ct. at 1690. Just as Defendants fail to present this Court with evidence
 7 of important governmental objectives supporting the Ban, Defendants fail to provide evidence
 8 that the Ban is substantially related to its purported governmental interests.

9 Moreover, Defendants’ continued promises to the Court that they will someday deliver a
 10 “final” implementation plan for the Ban, and supporting evidence, does not save the Ban from
 11 Washington’s constitutional challenge. Post-hoc rationales are legally insufficient to inoculate
 12 sex-based classifications from equal protection challenges, see *Morales-Santana*, 137 S. Ct. at
 13 1696-97. See also ECF 150 at 12-13. Defendants’ failure to provide this Court with evidence to
 14 justify the Ban or to show the Court that there are material disputed issues of fact, leave the Ban
 15 vulnerable to Washington’s Motion for Summary Judgment.

16 **2. The Ban violates substantive due process protections of the Fifth** 17 **Amendment**

18 The Ban also violates the substantive due process protections of the Fifth Amendment.
 19 ECF 150 at 15-18.

20 A restriction on a fundamental right – even in the military context – can only be sustained
 21 if: (1) the restriction advances an important governmental interest; (2) the intrusion significantly

22 ¹⁰ See *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) (accepting that “unit cohesion”
 23 may be an important governmental interest, but remanding for determination whether that interest was actually
 24 implicated by the facts); *Watkins v. U.S. Army*, 875 F.2d 699, 709 (9th Cir. 1989) (rejecting military’s attempt to
 25 bar an exemplary gay soldier from reenlistment where “no evidence” supported military’s concerns of a “degrading
 26 effect upon unit performance, morale or discipline . . . and job performance”).

¹¹ Other courts agree. See *Doe 1 v. Trump*, No. 17-1597 (CKK), 2017 WL 4873042, at *30-33 (D.D.C.
 Oct. 30, 2017); *Stone v. Trump*, No. MJG-17-2459, 2017 WL 5589122, at *16 (D. Md. Nov. 21, 2017); Order
 Denying Defendants’ Motion to Dismiss and Granting Plaintiffs’ Motion for Preliminary Injunction at 20, *Stockman*
v. Trump, No. 5:17-cv-1799-JGB (C.D. Cal. Dec. 22, 2017), ECF 79.

further that interest, and (3) a less intrusive means will not substantially achieve the government's interest. *Witt*, 527 F.3d at 819. In this case, the due process and equal protection analyses are closely related. As with the equal protection claim, Defendants fail to provide the Court with evidence sufficient to allow the Ban to meet any prong of the due process test: (1) Defendants have not provided this Court with any evidence of important governmental interests forwarded by the Ban; (2) Defendants' own evidence indicates that the Ban undercuts the purported governmental interests; and (3) Defendants have provided this Court with no evidence that the Ban is the least intrusive means to forward Defendants' purported governmental interests. Thus, there are no material issues of fact in dispute. Summary judgment is appropriate on Washington's claim.

3. This Court owes no deference to a policy that is not the result of a reasoned, well-vetted military decision

Courts only owe deference to well-reasoned policies or practices developed by military experts or the Legislature. *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). Although courts owe deference to well-reasoned military policies, blind deference to an unsupported policy is never warranted.¹² Here, the Court owes no deference to the Ban because there is no evidence to warrant such deference. ECF 150 13-15.

Defendants provide this Court with no evidence that the Ban was the result of measured consideration and study of military experts. Instead, Defendants imply that the Ban – first announced on Twitter – is somehow the result of measured study directly related to Secretary Mattis' decision to delay transgender accessions for six months. ECF 194 at 10. That argument proves too much. While Secretary Mattis may have been inclined to gather information and perform a review before making any policy changes, ECF 197 at 16 (delaying accessions for 6 months “to evaluate more carefully the impact of such accession on readiness and lethality” and

¹² See *Watkins*, 875 F.2d at 729 (reminding that there are limits to court deference in the military context and noting that “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”).

noting that the Memorandum “in no way presupposed the outcome of the review, nor does it change policies and procedures currently in effect”), President Trump apparently disagreed, spontaneously announcing his Ban on Twitter just a month later. The President’s blanket ban on military service by transgender individuals, and necessary surgical care for transgender service members, plainly did not result from measured military decision making. ECF 103 at 3 (tweeting “please be advised that the United States Government will not accept or allow ... Transgender individuals to serve in any capacity in the U.S. military”); ECF 56-1 (directing the “return to the longstanding policy and practice” of discriminating against transgender individuals).

Accordingly, Defendants fail to provide this Court any facts supporting their claim that the Ban is the result of well-reasoned military research and consideration requiring deference from this Court.

E. Nationwide Relief is Appropriate

“[W]here a law is unconstitutional on its face, and not simply in its application to certain plaintiffs, a nationwide injunction is appropriate.” *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017) (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (“[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff.”))¹³ The Ban is facially unconstitutional and should be enjoined nationwide to protect Washingtonians who serve in the military across the country. Without a nationwide injunction, Washington’s *parens patriae* interests will be inadequately protected.

III. CONCLUSION

For the foregoing reasons this Court should grant Washington’s Motion for Summary Judgment.

DATED this 7th day of March, 2018.

¹³ See also *Washington v. Trump*, 847 F.3d 1151, 1166–67 (9th Cir. 2017) (affirming nationwide injunction against executive travel ban order).

ROBERT W. FERGUSON
Washington Attorney General

/s/ La Rond Baker

LA ROND BAKER, WSBA No. 43610
COLLEEN MELODY, WSBA No. 42275
Assistant Attorneys General
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744
LaRondB@atg.wa.gov

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 7th day of March, 2018.

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

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

**DEFENDANTS' SUPPLEMENTAL
BRIEF IN OPPOSITION TO
PLAINTIFFS' AND INTERVENOR'S
MOTIONS FOR SUMMARY
JUDGMENT**

INTRODUCTION

At the hearing held on March 27, 2018, the Court directed the parties to file supplemental briefs on two issues. Mot. Hr’g Tr. at 49:8–12 (Mar. 27, 2018). First, the Court inquired as to the effective date of the new Department of Defense (“DoD”) policy governing military service by transgender individuals. *Id.* Although DoD desires to implement the new policy as soon as possible, DoD has not implemented its new policy and will not do so until the preliminary injunctions issued by this Court and the courts in three related cases are dissolved. Second, the Court requested briefing as to the effect of the new DoD policy on the Court’s analysis of Plaintiffs’ and Intervenor’s constitutional claims in their pending motions for summary judgment. *Id.* The issuance of the new DoD policy and the revocation of the President’s prior policy render those pending motions moot. And even if they were not moot, the Court should deny the motions because Plaintiffs and Intervenor have not established that they are currently injured—or would suffer any imminent harm from the DoD policy if it were implemented—and thus they lack standing at the summary judgment stage. Finally, even if the Court does not deny the motions on these threshold jurisdictional bases, the Court should nevertheless deny the motions because evidence amassed by DoD provides substantial support for the President’s decision to direct further study on the issue of military service by transgender individuals and to maintain the *status quo* while that study took place.

ARGUMENT

I. The Effective Date of the New DoD Policy

On August 25, 2017, the President issued a memorandum directing, *inter alia*, the Secretary of Defense to conduct “further study” into the risks of maintaining the policy on transgender service announced by former Secretary of Defense Carter in June 2016. Presidential Memorandum, 82 Fed. Reg. 41,319 (“2017 Memorandum”). Following the completion of an extensive study by a panel of senior military officials, DoD proposed to adopt a new policy that would allow some transgender individuals to serve in the military. Mattis Mem., Dkt. 224-1; DoD Report, Dkt. 224-2. In February 2018, Secretary of Defense Mattis, with the agreement of the Secretary of Homeland Security, sent the President a memorandum (“Mattis Memorandum”)

1 recommending that the President revoke his 2017 Memorandum so that the military could
 2 implement the new policy. *Id.* On March 23, 2018, the President issued a new memorandum
 3 concerning transgender military service (“2018 Memorandum”) that specifically “revoke[d]” the
 4 2017 Memorandum “and any other directive [the President] may have made with respect to
 5 military service by transgender individuals,” thereby allowing the Secretaries of Defense and
 6 Homeland Security to “exercise their authority to implement any appropriate policies concerning
 7 military service by transgender persons.” Dkt. 214-1.

8 Although DoD desires to implement the new policy as soon as possible, the Departments
 9 of Defense and Homeland Security have not yet implemented the policy as outlined in the Mattis
 10 Memorandum. Defendants respectfully maintain that the Court’s preliminary injunction, which
 11 addressed only certain directives in the 2017 Memorandum, *see* Order, Dkt. 103, does not extend
 12 to DoD’s new policy. But in an abundance of caution, Defendants will not implement DoD’s
 13 new policy unless and until this Court and the three other courts in related cases dissolve or
 14 clarify the preliminary injunctions. If all four courts, including this Court, dissolve the
 15 preliminary injunctions or clarify that they do not extend to the new DoD policy, then the
 16 Departments will formally implement the new policy.

17 **II. The Effect of the New DoD Policy on the Pending Summary Judgment Motions**

18 In addition to the reasons set forth in Defendants’ Opposition to Plaintiffs’ and
 19 Intervenor’s Motions for Summary Judgment, Dkt. 194, the Court should deny Plaintiffs’ and
 20 Intervenor’s motions for summary judgment for two threshold jurisdictional reasons: (1) their
 21 challenge to the revoked 2017 Memorandum is moot; and (2) they would lack standing to
 22 challenge the new DoD policy were it implemented. And even if they could establish
 23 jurisdiction, substantial record evidence precludes the entry of summary judgment for Plaintiffs
 24 and Intervenor with respect to the 2017 Memorandum currently at issue in the pending motions.

25 **A. The Court Must Consider the 2018 Presidential Memorandum, the Mattis 26 Memorandum, and the DoD Report.**

27 As a preliminary matter, the Court inquired during oral argument as to why the Court
 28 should consider evidence filed by Defendants outside “the timeframe for this motion.” Mot. Hr’g

Tr. at 43:4–44:12; *see also id.* at 28:16–31:21. Because the 2018 Memorandum revokes the 2017 Memorandum that is at issue in the pending motions, Defendants submit that the new policy renders Plaintiffs’ and Intervenor’s claims moot. *See infra* Part II.B. Given that the Court is “under a continuing duty to dismiss an action whenever it appears that the court lacks jurisdiction,” *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983), the Court should not disregard this jurisdictional issue merely because it was brought to the Court’s attention after submission of Defendants’ Opposition brief. Indeed, Defendants have noted from the inception of this lawsuit that a new policy would be issued, yet Plaintiffs nevertheless chose to move for summary judgment while that policy was being developed. *See, e.g.*, Defs.’ Mot. to Dismiss at 17–19, Dkt. 69.

Even if the evidence did not raise a jurisdictional issue, the Court may consider evidence filed after the submission of Defendants’ Opposition brief for good cause. *See Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1060 (9th Cir. 2005). Good cause exists here for Defendants’ filing of the 2018 Memorandum, the Mattis Memorandum, and the DoD Report after the submission of Defendants’ Opposition brief. The President did not revoke his 2017 Memorandum until March 23, 2018. Dkt. 214-1. That very same day, Defendants notified the Court of the new policy and filed the 2018 Memorandum, the Mattis Memorandum, and the DoD Report with the Court. *See* Notice, Dkt. 213; 2018 Mem., Dkt. 214-1; Mattis Mem., Dkt. 216-1; DoD Report, Dkt. 216-2. Defendants could not have reasonably been expected to file these documents before the President issued the 2018 Memorandum, and Defendants did so the same day the President acted. In any event, because this involves military interests, the Court should consider the professional judgment of senior military officials and not disregard that evidence merely because it was filed after the brief. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 26–28 (2008).

B. Plaintiffs’ and Intervenor’s Challenge to the 2017 Memorandum Is Moot.

Throughout this litigation, Plaintiffs and Intervenor have challenged the constitutionality of the 2017 Memorandum, which Plaintiffs characterize as a “Ban” on military service by transgender individuals. Am. Compl. ¶¶ 5, 224, 227, 233, Dkt. 30; Int.’s Compl. ¶¶ 24, 29, 35, 36, Dkt. 104 (referring to the 2017 Memorandum as a “Transgender Military Service Ban”); *see*

also Order at 1, Dkt. 103 (“Plaintiffs challenge the constitutionality of Defendant President Donald J. Trump’s Presidential Memorandum excluding transgender individuals from the military.”). In their motions for summary judgment, Plaintiffs and Intervenor request that the Court “declar[e] the Ban unconstitutional and permanently enjoin[] it from ever being implemented.” Pls.’ Mot. at 1, Dkt. 129; *see also* Int.’s Mot. at 19, Dkt. 150. Following the revocation of the 2017 Memorandum (and any other Presidential directives) and the issuance of DoD’s new policy, neither Plaintiffs nor Intervenor moved to supplement their complaints or amend their motions for summary judgment to challenge the new DoD policy. Instead, they continue to request that the Court enter final judgment on a policy that no longer exists, *see* Mot. Hr’g Tr. at 5:22, 15:4–21, 49:2–3, arguing that DoD’s new policy is merely a “continuation of the same unconstitutional action,” Pls.’ Reply at 1, Dkt. 201; *see also* Int.’s Reply at 3–5, Dkt. 202; Mot. Hr’g Tr. at 6:1–14.

The Court should decline to do so. To the extent that Plaintiffs and Intervenor now argue that the new DoD policy is unconstitutional, they did not challenge that policy in their complaints and should not be permitted to effectively supplement their complaints in their reply briefs or at oral argument. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008); *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006). Indeed, this Court has recognized that their motions concerned only the 2017 Memorandum. *See* Mot. Hr’g Tr. at 6:20–7:10 (The Court to Plaintiffs’ counsel: “[Y]ou’re going outside the ban that you originally moved on [Y]ou’re here to argue about the original ban that was put on.”).

More fundamentally, Plaintiffs’ and Intervenor’s claims regarding the constitutionality of the 2017 Memorandum are now moot. “A claim is moot if it has lost its character as a present, live controversy.” *Am. Rivers v. Nat’l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997), *as amended* (Sept. 16, 1997). As stated above, the President has “revoke[d]” the 2017 Memorandum “and any other directive [he] may have made with respect to military service by transgender individuals.” Dkt. 214-1. “[T]he Supreme Court and [the Ninth Circuit] have repeatedly held that a case is moot when the challenged statute is repealed, expires, or is amended to remove the challenged language.” *Log Cabin Republicans v. United States*, 658 F.3d 1162,

1 1166 (9th Cir. 2011). Given the revocation of the 2017 Memorandum (and any other Presidential
 2 directives regarding service by transgender individuals), a decision as to that Memorandum's
 3 constitutionality would amount to an advisory opinion. *See Am. Rivers*, 126 F.3d at 1123.

4 If Plaintiffs and Intervenor fear *future* injury from the new DoD policy, which they have
 5 not challenged, those harms would stem from the independent action of the Secretaries of
 6 Defense and Homeland Security in implementing that policy, not the 2017 Memorandum or the
 7 President's statements on Twitter. If Plaintiffs and Intervenor decide to challenge the new policy
 8 upon implementation, the Court can review such a challenge at that time.

9 Nor can Plaintiffs and Intervenor find refuge in the doctrine that "a defendant's voluntary
 10 cessation of a challenged practice" does not necessarily moot the case. *City of Mesquite v.*
 11 *Aladdin's Castle*, 455 U.S. 283, 289 (1982). When the Government repeals and replaces one of
 12 its policies, the relevant question is "whether the new [policy] is sufficiently similar to the
 13 repealed [one] that it is permissible to say that the challenged conduct continues," or, put
 14 differently, whether the policy "has been sufficiently altered so as to present a substantially
 15 different controversy from the one . . . originally decided." *Ne. Fla. Chapter of Associated Gen.*
 16 *Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 n.3 (1993) (quotation omitted).
 17 When a new policy has "changed substantially," the voluntary cessation exception does not
 18 apply, as there is "no basis for concluding that the challenged conduct [is] being repeated." *Id.*

19 Any dispute over the new policy "'present[s] a substantially different controversy'" than
 20 Plaintiffs' and Intervenor's challenge to the President's 2017 Memorandum. *Id.* The target of
 21 Plaintiffs' and Intervenor's complaints and motions for summary judgment was the President's
 22 action in 2017. Am. Compl. ¶¶ 1, 5, Dkt. 30; Int.'s Compl. ¶ 24, Dkt. 104; Pls.' Mot. at 1, Dkt.
 23 129; Int.'s Mot. at 19, Dkt. 150. This Court's preliminary injunction rested on its view that the
 24 President had ordered a categorical "prohibition on transgender service members . . . on Twitter,
 25 abruptly and without any evidence of considered reason or deliberation." Order at 18, Dkt. 103.
 26 The new policy, by contrast, was issued by DoD and is the product of independent military
 27 judgment following an extensive study that was documented in a 44-page report. *See Mattis*
 28 *Mem.*, Dkt. 224-1; DoD Report, Dkt. 224-2. Moreover, the new policy differs in important,

1 material respects from the challenged actions in that it contains several exceptions allowing some
 2 transgender individuals to serve. See Mattis Mem.; DoD Report; see also Defs.’ Mot. to Dissolve
 3 the Prelim. Inj. at 3–6, Dkt. 223 (providing additional details).

4 At a minimum, the replacement of the allegedly categorical “Ban” with DoD’s new,
 5 nuanced policy presents a substantially different controversy. In *Department of Treasury v.*
 6 *Galioto*, for instance, a lower court held that a federal statute barring all former mental patients
 7 who had been involuntarily committed from buying firearms was unconstitutional because it
 8 created an “‘irrebuttable presumption’” that anyone involuntarily committed was permanently a
 9 threat “no matter the circumstances.” 477 U.S. 556, 559 (1986) (per curiam). During the appeal,
 10 Congress amended the law to allow anyone prohibited from purchasing firearms to seek
 11 individualized relief from the Treasury Department. *Id.* Concluding that “no ‘irrebuttable
 12 presumption’ now exists since a hearing is afforded to anyone subject to firearms disabilities,”
 13 the Supreme Court held the issue moot. *Id.* This case is no different. Because Plaintiffs and
 14 Intervenor sought an injunction precluding enforcement of the 2017 Memorandum—and thereby
 15 effectively maintain the Carter policy, which, like the new policy, treats gender dysphoria as
 16 presumptively disqualifying—the heart of their challenge was necessarily limited to the
 17 (allegedly) categorical nature of that Memorandum. Their challenge to the 2017 Memorandum
 18 is thus moot, and the Court should deny their motions for summary judgment on that basis alone.

19 **C. Plaintiffs and Intervenor Would Lack Standing to Challenge the New Policy.**

20 The Court previously found that Plaintiffs had alleged injuries sufficient at the pleading
 21 stage to defeat Defendants’ motion to dismiss. Order at 2, Dkt. 103. Although the Court stated
 22 at oral argument that “[s]tanding has already been decided,” Mot. Hr’g Tr. at 26:5; see also *id.* at
 23 17:17–18, the question of standing must be examined again at the summary judgment stage of
 24 litigation, especially given that the revocation of the 2017 Memorandum and the issuance of the
 25 new DoD policy have significantly changed the analysis. As the Supreme Court has repeatedly
 26 held, “Article III demands that an ‘actual controversy’ persist throughout all stages of litigation.”
 27 *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (citation omitted); see also Fed. R. Civ. P.
 28 12(h)(3). Thus, even when a plaintiff establishes standing “[a]t the pleading stage,” he must do

1 so again—this time under a more demanding evidentiary standard—with respect to “a summary
2 judgment motion.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

3 Plaintiffs are obviously not suffering any harm from the revoked 2017 Memorandum, and
4 they would neither sustain an actual injury nor face an imminent threat of future injury if the new
5 policy were to take effect. To start, the new DoD policy allows “currently serving Service
6 members who have been diagnosed with gender dysphoria since the previous administration’s
7 policy took effect and prior to the effective date of this new policy . . . to continue to serve in
8 their preferred gender and receive medically necessary treatment for gender dysphoria.” Mattis
9 Mem. at 2. Five of the nine individual Plaintiffs (Cathrine Schmid, Lindsey Muller, Terece
10 Lewis, Philip Stephens, and Meghan Winters) are currently serving and have been diagnosed
11 with gender dysphoria within the relevant time period. See Schmid Decl. ¶¶ 4, 9, Dkt. 131;
12 Muller Decl. ¶¶ 4, 15, Dkt. 133; Lewis Decl. ¶¶ 4, 10, Dkt. 134; Stephens Decl. ¶¶ 3, 10, Dkt.
13 135; Winters Decl. ¶¶ 3, 10, Dkt. 136. These Plaintiffs therefore would be able to continue
14 serving in their preferred gender, change their gender marker, and receive all medically necessary
15 treatment if the new policy were to take effect. See Mattis Mem. at 2; DoD Report at 43. They
16 thus would not sustain any injury under the new policy.¹

17 As for the remaining litigants, they cannot establish standing to challenge, or irreparable
18 injury from, the new policy for the same reasons they failed to satisfy these requirements with
19 respect to the 2017 Memorandum. See Defs.’ Opp’n at 4–5, 7–9, Dkt. 194; see also Defs.’ Reply
20 at 2–7, Dkt. 90. For example, in addition to those reasons, see *id.*, the three individual Plaintiffs
21 who are not in the military (Ryan Karnoski, D.L., and Connor Callahan) may apply for a waiver
22 to access into the military under the new DoD policy. See DoD Report at 5, 9–10, 32, 42. These
23 Plaintiffs have not alleged that they would seek such a waiver, nor that they have ever been
24 denied entry into the military. See Karnoski Decl., Dkt. 130; D.L. Decl., Dkt. 132; Callahan
25 Decl., Dkt. 137. Also, because they are not currently serving, they are not eligible for DoD health
26 care. Thus, they cannot show they would sustain any injury from the new policy.

27 ¹ Jane Doe is currently serving, Doe Decl. ¶ 2, Dkt. 138, and may have been diagnosed with gender dysphoria, *id.*
28 ¶¶ 8, 13, though Defendants were not permitted to depose her, see Dkts. 178, 179, 189. If she has been diagnosed,
she may receive treatment. See Mattis Mem. at 2.

1 Based on standing alone, which must be revisited at the summary judgment stage, the
 2 Court lacks jurisdiction to consider Plaintiffs' and Intervenor's summary judgment motions.

3 **D. Substantial Record Evidence Precludes the Entry of Summary Judgment.**

4 Even if the Court finds that Plaintiffs' and Intervenor's claims are not moot, substantial
 5 record evidence precludes the entry of summary judgment on their prior claims challenging the
 6 2017 Memorandum. The new DoD Report, which was issued after an exhaustive study by senior
 7 military officials, supports not only the new DoD policy outlined in that Report and the Mattis
 8 Memorandum (not challenged in the still operative original complaints or pending motions), but
 9 also supports the President's decision in 2017 to direct further study on the issue of military
 10 service by transgender individuals and to maintain the *status quo* while that study took place.

11 The DoD Report is the product of a comprehensive review of the military's mental health,
 12 physical, and sex-based standards and provides an analysis of whether individuals who have been
 13 diagnosed with gender dysphoria are able to meet those standards. DoD Report at 19–31. During
 14 that review, the Panel of Experts “met with and received input from transgender Service
 15 members, commanders of transgender Service members, military medical professionals, and
 16 civilian medical professionals with experience in the care and treatment of individuals with
 17 gender dysphoria.” *Id.* at 18. “The Panel also reviewed information and analyses about gender
 18 dysphoria, the treatment of gender dysphoria, and the effects of currently serving individuals
 19 with gender dysphoria on military effectiveness, unit cohesion, and resources.” *Id.* The report
 20 includes this information, cites to numerous statutes and regulations, medical standards, and peer-
 21 reviewed studies, and contains “the Department’s own data and experience obtained since the
 22 Carter policy took effect.” *Id.* Thus, even assuming, *arguendo*, that the pending claims of
 23 Plaintiffs and Intervenor were not moot, the Mattis Memorandum and the DoD Report provide
 24 support for the directives outlined in the 2017 Presidential Memorandum for DoD to further study
 25 the issue of military service by transgender individuals and to maintain the *status quo* while doing
 26 so. As Secretary Mattis found in 2018, the Carter policy relied heavily on the RAND report, but
 27 that report “contained significant shortcomings” as it relied on “limited and heavily caveated
 28 data,” “glossed over the impacts of healthcare costs, readiness, and unit cohesion, and

erroneously relied on the selective experiences of foreign militaries with different operational requirements than our own.” Mattis Mem. at 2; *see also* DoD Report at 14, 26–27, 34–35, 38–40 (identifying limitations of the RAND report). These conclusions (and the Memorandum and Report in their entirety) substantially support the President’s 2017 decision—at issue in the pending motions—to further study military service by transgender individuals.

Plaintiffs and Intervenor argue in their replies that DoD’s new policy is merely a “continuation of the same unconstitutional action” because it is an implementation of the 2017 Memorandum. Pls.’ Reply at 1; *see also* Int.’s Reply at 3–5; Mot. Hr’g Tr. at 6:1–14. But this argument ignores both the history of DoD’s policies and record evidence. When the Carter policy was issued in June 2016, it anticipated that additional study and revisions to the policy would be necessary to determine, among other things, its impact on military readiness. Parker Decl. Exh. 1 at Attach. at 2, Dkt. 197. In June 2017, Secretary Mattis extended the deadline for revising the accession policy by six months to “evaluate more carefully the impact of such accessions on readiness and lethality.” *Id.* at Exhs. 3, 4. Thus, when the President issued his statements on Twitter, DoD had already determined that it needed further study on the impact of accessions of transgender individuals on military readiness and lethality. In addition, after the issuance of the 2017 Memorandum, Secretary Mattis did not direct the Panel of Experts to reach a particular policy recommendation; rather, Secretary Mattis “charged the Panel to provide its best military advice, based on increasing the lethality and readiness of America’s armed forces, *without regard to any external factors.*” Mattis Mem. at 1 (emphasis added). In response, the “Panel made recommendations based on each Panel member’s independent military judgment.” DoD Report at 4. Secretary Mattis then evaluated the recommendations using his “professional judgment.” Mattis Mem. at 2. As set forth in Defendants’ Opposition brief, substantial deference should be given to decisions made by military authorities. *See* Defs.’ Opp’n at 13–15.

At the oral argument, Plaintiffs argued that the Court should not consider the DoD Report because it is “post hoc evidence.” Mot. Hr’g Tr. at 46:6–47:5. But the 2017 Memorandum has been *rescinded*, and thus Defendants do not seek to support an *existing* policy with any *post hoc* evidence. Rather, if Plaintiffs and Intervenor insist on obtaining judicial review of a non-existent

1 policy, then the DoD Report stands as support for the President’s 2017 directive to maintain the
 2 *status quo* and to study military policy further.

3 In support of their argument, Plaintiffs cite to *United States v. Virginia*, 518 U.S. 515,
 4 533 (1996), and *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1697 (2017). Mot. Hr’g Tr. at
 5 46:13–17. But those cases did not involve principles of military deference, applicable here, and
 6 in the latter context, the Supreme Court has considered *post hoc* evidence. For example, in
 7 *Rostker v. Goldberg*, 453 U.S. 57, 59 (1981), the plaintiffs alleged that the Military Selective
 8 Service Act, 50 U.S.C. § 451 (1976), violated the Fifth Amendment because the statute
 9 authorized the President to require the registration of males, but not females. In considering the
 10 constitutionality of excluding females from registration, the Court examined the Congressional
 11 record created *decades* after the statute was first enacted. *See id.* at 72–83. The Court specifically
 12 “reject[ed] appellees’ argument that [the Court] must consider the constitutionality of [the
 13 statute] solely on the basis of the views expressed by Congress in 1948, when the [statute] was
 14 first enacted in its modern form,” *id.* at 74—even though those views consisted solely of
 15 impermissible “sexual stereotypes,” *Goldberg v. Rostker*, 509 F. Supp. 586, 597 n.15 (E.D. Pa.
 16 1980). Because Congress “thoroughly reconsider[ed] the question of exempting women from
 17 [the statute’s] provisions” in 1980, the “1980 legislative history is, therefore, highly relevant in
 18 assessing the constitutionality of the exemption.” 453 U.S. at 75. Accordingly, if the Court
 19 determines that it possesses jurisdiction, it should consider the Mattis Memorandum and the DoD
 20 Report and conclude that substantial evidence supported the challenged decision by the President
 21 in 2017 to study military policy further while maintaining the *status quo*. That alone precludes
 22 the entry of summary judgment for Plaintiffs and Intervenor.

23 CONCLUSION

24 For the foregoing reasons, and for the reasons set forth in Defendants’ Opposition to
 25 Plaintiffs’ and Intervenor’s Motions for Summary Judgment as well as Defendants’ Motion to
 26 Dissolve the Preliminary Injunction, the Court should deny Plaintiffs’ and Intervenor’s Motions
 27 for Summary Judgment. Defendants respectfully request that the Court rule on the summary
 28 judgment motions and motion to dissolve the preliminary injunction at the same time.

1 Dated: April 3, 2018

Respectfully submitted,

2 CHAD A. READLER
3 Acting Assistant Attorney General
4 Civil Division

5 BRETT A. SHUMATE
6 Deputy Assistant Attorney General

7 BRINTON LUCAS
8 Counsel to the Assistant Attorney General

9 JOHN R. GRIFFITHS
10 Branch Director

11 ANTHONY J. COPPOLINO
12 Deputy Director

13 /s/ Ryan B. Parker
14 RYAN B. PARKER
15 Senior Trial Counsel
16 ANDREW E. CARMICHAEL
17 Trial Attorney
18 United States Department of Justice
19 Civil Division, Federal Programs Branch
20 Telephone: (202) 514-4336
21 Email: ryan.parker@usdoj.gov

22 *Counsel for Defendants*
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2018, I electronically filed the foregoing Supplemental Brief in Opposition to Plaintiffs' and Intervenor's Motions for Summary Judgment using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: April 3, 2018

/s/ Ryan Parker

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

Counsel for Defendants

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

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

Defendants.

Case No. 2:17-cv-01297-MJP

**PLAINTIFFS' SUPPLEMENTAL
BRIEFING IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

The undisputed facts tell a simple story: Last summer, via @realDonaldTrump, the President announced that openly transgender individuals could not serve in the military and that the military would not provide transition-related medical care. Recognizing that policy implementation might require more than a few tweets, the President issued an August 25, 2017 Presidential Memorandum (the “2017 Memorandum”), in which he announced specific policies: In particular, that as of January 1, 2018, the Secretary of Defense was not to allow openly transgender individuals to join the military, and that as of March 23, 2018, the U.S. military was to return to a policy of authorizing the discharge of openly serving transgender individuals and denying them certain medical coverage. President Trump ordered the Secretary of Defense to provide to him an *implementation* plan for *how*—not *whether*—to implement those commands (the “Implementation Plan”). Following those explicit orders, the Secretary of Defense provided the President with the demanded Implementation Plan that implements the President’s commands. The President now has ordered the Secretary to put it into place.

On March 23, 2018, the government filed with the Court that Implementation Plan (consisting of a report, *see* Dkt. 216-2 (“Report”), and cover memorandum, *see* Dkt. 216-1 (“Mattis Memorandum”)), along with the President’s directive to Secretary Mattis to go forward with the Implementation Plan, *see* Dkt. 216-3 (the “2018 Memorandum”) (collectively the “March 23 Filings”).

The March 23 Filings do not change Plaintiffs’ entitlement to summary judgment. The Implementation Plan is not “new” policy; it merely implements the President’s commands that this Court already preliminarily enjoined. The case is not moot, as at least one plaintiff retains standing to challenge each element of the government’s ongoing discriminatory policies. And there is still no constitutionally sufficient justification for those policies. Nothing material has changed.

I. THERE IS NO “NEW” POLICY: THE MARCH 23 FILINGS MERELY IMPLEMENT THE PRESIDENT’S ANNOUNCED POLICIES ON MILITARY SERVICE BY TRANSGENDER PEOPLE.

The March 23 Filings are not “new” policies. They are merely the expected

1 implementation of the same policies that the President announced last summer—nothing more.

2 The manner in which the Implementation Plan arose makes clear that it does not contain
3 “new” policies. In his 2017 Memorandum, the President formally declared his policies on open
4 service, which consisted of three broad directives: (1) An *Accession Directive*, under which the
5 Secretary of Defense was, on January 1, 2018 (the date that the military was to begin accession
6 of transgender people into the military) to continue to bar openly transgender people from
7 military service indefinitely, see Dkt. 103 (“PI Order”) at 3; (2) a *Retention Directive*, under
8 which, as of March 23, 2018, the Secretary of Defense was to return to the military’s previous
9 policy “authorizing the discharge of openly transgender individuals,” *id.*; and (3) a *Medical Care*
10 *Directive*, under which, as of March 23, 2018, the Secretary of Defense was to prohibit the
11 funding of transition-related surgical care for transgender service members, *id.* In the 2017
12 Memorandum, the President ordered the Secretary of Defense to “submit to [him] a plan for
13 implementing both [his] general policy . . . and [his] specific directives” by February 21, 2018.
14 Dkt. 149-2 at 3. Notably, the 2017 Memorandum was **not** a request for “a study to determine
15 *whether* or not the directives should be implemented. Rather, it order[ed] the directives to be
16 implemented by specific dates.” *Stone v. Trump*, No. MJG-17-2459, 2017 WL 5589112, at *10
17 (D. Md. Nov. 21, 2017).

18 Secretary Mattis faithfully executed those orders from his Commander-in-Chief. On
19 August 29, Secretary Mattis stated via Department of Defense press release that he had received
20 the commands and would “carry out the President’s direction. . . . As directed, [he would]
21 develop a study and *implementation* plan” and would “provide advice and recommendation on
22 the *implementation* of the [P]resident’s policy direction.” Dkt. 197 at 11 (emphasis added). In
23 February, as commanded by the 2017 Memorandum, Secretary Mattis delivered the
24 Implementation Plan to the President. See Mattis Memorandum (date-stamped February 22,
25 2018). Now, the March 23, 2018 Presidential Memorandum, explicitly recognizing that the
26 Implementation Plan was created “[p]ursuant to [the President’s] memorandum of August 25,
27 2017,” contemplates that Secretary Mattis will put into place the Implementation Plan—that is,
28 will put into place a plan that implements the policies the President ordered in 2017. See 2018

Memorandum.

Secretary Mattis, in creating the Implementation Plan, followed through on the President's commands to him in August 2017 (to repeat, the 2017 Memorandum tasked Secretary Mattis not with figuring out *whether* a ban on military service by transgender people should be implemented, but *how*). Facially, the Implementation Plan adheres exactly to the President's commands in the 2017 Memorandum. In particular:

Accessions: The Implementation Plan provides that individuals "who require or have undergone gender transition are disqualified from military service," Mattis Memorandum at 2, and, moreover, even if a transgender individual has *not* transitioned, they will still be disqualified from service unless they suppress their gender identity and are "willing and able to adhere to all standards associated with their [birth-assigned] sex." Report at 5. In other words, a person can only serve if they somehow make themselves *not* transgender. That implements the President's directives to bar openly transgender individuals from military service. See PI Order at 3.

Retention: Similarly, the Implementation Plan's bar on individuals "who require or have undergone gender transition," and on those who have not transitioned but wish to live in accordance with their gender identity (and thus do not "adhere to all standards associated with their [birth-assigned] sex," Report at 5) implements the President's directives to re-authorize the discharge of openly transgender individuals. The Implementation Plan allows an extremely limited exception for currently serving transgender individuals who "were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy," but before the policy implementation announced by the March 23 Filings (the "Grandfather Exception"). Those few individuals who qualify under this Grandfather Exception may serve openly and receive "medically necessary" care (though notably the exception itself is subject to a severability clause). Report at 5, 43. These various provisions implement the 2017 Memorandum's request that the military itself "determine how to address transgender individuals currently serving in the United States military" as part of the Implementation Plan. 2017 Memorandum § 3.

Medical Care: Under the Implementation Plan, the U.S. military will not provide

transition-related surgical care to transgender individuals, as it will not allow individuals “who require gender transition” to accede into service, *see supra*. Additionally, if an individual requires gender transition after acceding into the military, they will be subject to discharge, as the Implementation Plan disqualifies from service all service members (except those few qualified under the Grandfather Exception) who “require a change of gender.” Mattis Memorandum at 2. The Implementation Plan thus faithfully continues President Trump’s order barring transition-related surgical care.

In sum, the Implementation Plan is not new policy; it does not change or in any way contravene the President’s 2017 Memorandum. Nor was it expected to, given the procedure that produced it. As this Court has already observed, “President Trump’s announcement on Twitter and his Presidential Memorandum did not order a study, but instead unilaterally proclaimed” his policies on military service by transgender people. PI Order at 13.¹ The Secretary of Defense faithfully followed the President’s commands; the Implementation Plan is the result.

II. THE MARCH 23 FILINGS DO NOT CHANGE THAT PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THE CONSTITUTIONALITY OF THE BAN.

The government makes three principal claims regarding the impact of the March 23 Filings: (1) that they moot Plaintiffs’ current challenges; (2) that they change the applicable level of scrutiny; and (3) that they satisfy heightened scrutiny. Each is wrong.

A. The March 23 Filings Create No Mootness or Standing Issues.

The government once again claims that justiciability doctrines prevent the Court from adjudicating the constitutionality of the President’s discriminatory policies. Once again, not so.

Courts evaluate standing at the beginning of each case, *see Yamade v. Snipes*, 786 F.3d 1182, 1203 (9th Cir. 2015), but “Article III nevertheless demands that an ‘actual controversy’

¹ It is mere pettifoggery to claim that the 2018 Memorandum somehow revokes the President’s earlier discriminatory policies on transgender service. While that memorandum purportedly rescinds the 2017 Memorandum, it did so only a full month *after* the Secretary of Defense delivered the Implementation Plan. The 2017 Memorandum told the Secretary of Defense what policies the Implementation Plan was to contain and the Secretary labored under the then-operative 2017 Memorandum in creating the Implementation Plan. The 2018 Memorandum now contemplates that Secretary Mattis will implement that Implementation Plan—that is, that he will implement the policies the President told the Secretary to adopt in the 2017 Memorandum.

1 persist throughout all stages of the litigation,” which generally requires Plaintiffs to face
 2 cognizable injury throughout the case, *see Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013).² At
 3 each point, however, only one Plaintiff needs standing for each form of relief sought. *See*
 4 *Thorsted v. Gregoire*, 841 F. Supp. 1068, 1073 (W.D. Wash. 1994).

5 At the beginning of the case, the Court concluded that the individual and organizational
 6 Plaintiffs—as well as the state of Washington—had standing to challenge the President’s policies
 7 on transgender military service. The Court found that the Accessions Directive denied Plaintiffs
 8 Karnoski, D.L., and Callahan “opportunities to compete for accession on an equal footing with
 9 non-transgender individuals.” PI Order at 7–8. The Court held that the Retention Directive
 10 placed Plaintiffs Schmid, Muller, Lewis, Stephens, Winters, and Doe under a “credible threat of
 11 discharge” on account of their transgender status. *Id.* at 7. And the Court found that as a result of
 12 the Medical Care Directive, Plaintiff Stephens faced a “credible threat of being denied surgical
 13 treatment.” *Id.* at 8. Accordingly, Plaintiffs had Article III standing at the start of the case.

14 At least one Plaintiff maintains standing to challenge each of the Accession, Retention,
 15 and Medical Care Directives (as announced last summer and as continued through the
 16 Implementation Plan), as they suffer the same Article III injuries-in-fact under the
 17 Implementation Plan that they suffered at the time of the preliminary injunction. As for the
 18 Accessions Directive: Plaintiffs D.L., Karnoski, and Callahan—each a transgender individual
 19 who “ha[s] taken clinically appropriate steps to transition”³—remain barred from joining the
 20 military under the Implementation Plan. *See Mattis Memorandum* at 2 (“Transgender persons
 21 who require or have undergone gender transition are disqualified from military service.”). As for
 22 the Retention Directive: Plaintiff Jane Doe—a transgender woman who has not yet come out and
 23 does not serve openly, but wishes to transition⁴—is still subject to discharge under the
 24 Implementation Plan if she seeks to serve openly. *See Mattis Memorandum* at 2 (noting
 25 transgender individuals coming out after entering into service may remain in service only if
 26

27 ² Even this requirement is qualified by the voluntary cessation exception, discussed *infra*, which independently
 28 satisfies Article III in this case.

³ *See* Dkt. 130 ¶ 10; Dkt. 132 ¶ 8; Dkt. 137 ¶ 8.

⁴ *See generally* Dkt. 138 (Doe Decl.).

1 “they do not require a change of gender”).⁵ As for the Medical Care Directive: Plaintiff Doe also
 2 seeks surgical care, see Doe Decl. ¶ 13, but cannot receive it under the Implementation Plan,
 3 which does not provide for surgical care at all.

4 As before, these injuries are directly traceable to the President’s policy decisions (as
 5 announced by the Tweets, as ordered by the 2017 Memorandum, and as implemented by the
 6 Implementation Plan), and they are redressable by the same injunctive and declaratory relief
 7 requested by Plaintiffs’ motion for summary judgment. Thus, at all times in this litigation,
 8 Plaintiffs have met Article III’s requirements.

9 In all events, moreover, the doctrine of voluntary cessation controls. *City of Mesquite v.*
 10 *Aladdin’s Castle*, 455 U.S. 283 (1982) provides the leading Supreme Court case. In that case, a
 11 city council passed a law that plaintiffs challenged as unconstitutional. While the litigation was
 12 pending, the city council repealed the objectionable pieces and sought to dismiss the case as
 13 moot. The Supreme Court found it “well settled that a defendant’s voluntary cessation of a
 14 challenged practice does not deprive a federal court of its power to determine the legality of the
 15 practice.” *Id.* at 289. Otherwise, “repeal of the objectionable [policy] would not preclude [the
 16 defendant] from reenacting precisely the same provision” once the litigation were dismissed. *Id.*

17 So too, here. The party claiming mootness from voluntary cessation must show that it is
 18 “absolutely clear” that the original harms will not reoccur. See *Buono v. Norton*, 371 F.3d 543,
 19 545–46 (9th Cir. 2004). For this reason alone, the Ninth Circuit has expressed doubts that
 20 unilateral executive action such as this—as opposed to repealing legislation—can ever moot a
 21 case through voluntary cessation. See *Bell v. City of Boise*, 709 F.3d 890, 899–901 (9th Cir.
 22 2013). Indeed, the threat of future harm is particularly credible here, given that most, if not all, of
 23 the original Plaintiffs suffer the same harms. See *supra*. That alone precludes a finding of

24 ⁵ Defendants contend that Plaintiffs Schmid, Muller, Lewis, Stephens, and Winters qualify for the Grandfather
 25 Exception. But, facially, the exception is subject to a severability clause, and it also seems to exclude any Plaintiffs
 26 who received a diagnosis *before* the Carter Policy. And while a Plaintiff qualifying for the exception also will receive
 27 “medically necessary” care, there is no guarantee such care includes surgery, in light of the President’s unequivocal
 28 pronouncements on the topic (which the Implementation Plan does not explicitly contradict). Moreover, in the shadow
 of an unequivocal ban announcing that transgender people are unfit for service, they suffer the “serious . . . injuries”
 that inhere in a policy branding a “disfavored group” as “innately inferior.” PI Order at 8 (internal quotation marks
 omitted). Thus, the Grandfather Exception does not erase their credible threats of (and actual) harm. Nevertheless,
 Plaintiff Doe’s continuing injuries are unimpeachable, rendering these inquiries irrelevant. See *Thorsted*, 841 F. Supp.
 at 1073 (“If one plaintiff has standing, it does not matter whether the others do.”).

voluntary mootness. *See Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1053–54 (9th Cir. 2013). And, as yet a further strike against mootness, the government has unflaggingly asserted the constitutionality of the President’s “original” policies. *See McCormack v. Herzog*, 788 F.3d 1017, 1024–26 (9th Cir. 2015) (no mootness under voluntary cessation doctrine when government never disclaimed legality of original practice). Here, the government does not even attempt to satisfy its high burden, instead only feebly offering that “if Plaintiffs fear future injury from the [Implementation Plan],” this Court can review it later. Dkt. 223 (“Mot.”) at 7. But avoiding that result is *precisely* the point of the doctrine.

B. The March 23 Filings Do Not Change the Applicable Level of Scrutiny.

This Court has already concluded that heightened scrutiny provides the appropriate level of review. *See* PI Order at 15. The government now argues that because of the March 23 Filings, only rational basis review applies. *See* Mot. at 13. That is wrong.

The government claims that rational basis review applies because the Implementation Plan purportedly “draws lines on the basis of a medical condition (gender dysphoria) and an associated treatment (gender transition), not transgender status.” Mot. at 9. But the lines drawn are inescapably based on transgender status, *see, e.g.*, 2018 Memorandum (referring seven times to transgender people, including in the subject line)—and therefore trigger the same level of scrutiny, *see Christian Legal Soc’y v. Martinez*, 561 U.S. 666, 689 (2010) (targeting same-sex conduct necessarily targets the status of being gay); *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993) (“A tax on wearing yarmulkes is a tax on Jews.”); *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1159 n.23 (9th Cir. 2013). Moreover, and in any event, the lines are equally impermissible if they discriminate against only a subset of transgender individuals. “It is the individual . . . who is entitled to the equal protection of the laws—not merely a group.” *Mitchell v. United States*, 313 U.S. 80, 97 (1941).⁶

⁶ *See also Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (*per curiam*) (discrimination against women with children is still sex discrimination even if women without children were not discriminated against).

1 The March 23 Filings do nothing to disturb the Court’s prior (and correct) conclusion that
2 heightened scrutiny applies to the President’s discrimination against transgender individuals.⁷

3 C. The Challenged Ban Still Fails Heightened Scrutiny.

4 Under heightened scrutiny, the government bears the burden of justifying the
5 discrimination at issue. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (“VMP”). As
6 explained in Plaintiffs’ motion for summary judgment, the government does not justify its
7 discriminatory policies. *See* Dkt. 129 at 14–21. The March 23 Filings do not change that.

8 i. The March 23 Filings Provide Only Impermissible Post Hoc 9 Justifications for the Ban.

10 As explained above, the March 23 Filings are nothing more than the *implementation* of
11 the ban on military service by transgender people, as conceived, announced, and ordered last
12 summer. But under heightened scrutiny, the government is limited to the actual and “genuine”
13 justifications that motivated its actions *at the time* it conceived of those actions; it cannot rely
14 upon hypothetical or *post hoc* justifications. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678,
15 1696–1697 (2017); *VMI*, 518 U.S. at 533; *W. States Paving Co. v. Wash State Dep’t of Transp.*,
16 407 F.3d 983, 991, 993 (9th Cir. 2005). Accordingly, the March 23 Filings—which do not even
17 purport to provide *any* justification for the President’s 2017 policy directives (*i.e.*, the directives
18 that commanded the production of the Implementation Plan)—are legally irrelevant to this
19 Court’s evaluation of the constitutionality of the government’s policy against military service by
20 transgender people.

21 This prohibition against *post hoc* justifications under heightened scrutiny applies equally
22 in the military context. *See Witt*, 527 F.3d at 819 (rejecting that “Don’t Ask, Don’t Tell” could be
23 justified by “some hypothetical, posthoc [sic] rationalization” under heightened scrutiny). The
24

25 ⁷ The government notes that “the tests and limitations to be applied may differ because of the military context.” Mot.
26 at 9 (internal citations omitted). But heightened scrutiny still applies in the military context, as Defendants have
27 previously conceded. *See* Dkt. 69 at 30. Indeed, *Rostker* plainly rejected the Solicitor General’s argument that, “on
28 the basis of . . . cases emphasizing deference . . . in the area of military affairs and national security . . . [.] this Court
should scrutinize the [Act] only to determine if the distinction drawn between men and women bears a rational relation
to some legitimate Government purpose, and should not examine the Act under the heightened scrutiny with which
we have approached gender-based discrimination.” 453 U.S. at 69–70 (internal citation omitted); *see generally Witt*
v. Dep’t of Air Force, 527 F.3d 806 (9th Cir. 2008) (applying heightened scrutiny to military justifications).

1 government's cited authorities, *Schlesinger v. Ballard*, 419 U.S. 498 (1975) and *Rostker v.*
 2 *Goldberg*, 453 U.S. 57 (1981), do not overcome that settled precedent. In *Ballard*, the
 3 government did not offer, and the Court did not consider, a single *post hoc* justification for the
 4 government's differential treatment of male and female naval officers. Rather, the Court
 5 examined what Congress was able to consider *at the time it passed the statute in question*,
 6 relying extensively (and exclusively) on the legislative history of the statute's *enactment*. See
 7 419 U.S. at 508 (citing H.R. Rep. No. 216) & n.12 (citing same H.R. and S. Rep. No. 676).

8 Nor does *Rostker* support the government's position. Again, *Rostker* expressly rejected
 9 "any further 'refinement' in the applicable tests" for gender discrimination based on the military
 10 context, 453 U.S. at 69; see also n.6, *supra*; and under controlling precedent, those tests
 11 unquestionably prohibit *post hoc* justifications, see *VMI*, 518 U.S. at 533. While the *Rostker*
 12 Court looked beyond the "the views expressed by Congress in 1948, when the [Military
 13 Selective Service Act] was first enacted in its modern form," *id.* at 75, it did so only in the
 14 context of addressing an argument concerning the degree to which "appropriations legislation"
 15 should be considered to modify "substantive legislation." 453 U.S. at 75. In any event, that case
 16 is plainly inapposite. It had been over 32 years since Congress had passed the Act, and the Court
 17 found that in the meantime Congress had "thoroughly reconsidered the question of exempting
 18 women from [the Act's] provisions, and its basis for doing so." *Id.* Indeed, the President had
 19 recommended that Congress abolish the exemption of women from draft registration, *id.* at 60,
 20 and Congress had declined to do so only after extensive debate. The March 23 Filings, in
 21 contrast, are merely the implementation of the President's express 2017 directives—they are
 22 nothing more than *post hoc* responses to this pending litigation.⁸ *Rostker* thus does not stand for
 23 the distinct and remarkable proposition urged by Defendants: that the military has the power to
 24 invent *post hoc* justifications out of whole cloth that could not have supported the challenged
 25 decision at the time it was made.

26
 27 ⁸ While litigation was pending during the 1980 legislative debate in *Rostker*, there is not even a hint that the litigation
 28 played any role in motivating the careful consideration Congress gave the issue. Rather, Congress took up the issue to
 consider the President's recommendation that draft registration commence for all genders in response to military
 needs. See 453 U.S. at 60–62. Indeed, the litigation had been dormant for nearly six years. See *id.* at 62.

ii. **Even If They Could Be Considered, the March 23 Filings Do Not Provide the “Exceedingly Persuasive” Justification Necessary.**

Even if the Court were to consider the *post hoc* “evidence” contained in the March 23 Filings, it would be insufficient to justify the President’s discriminatory policies. Indeed, the Report is strikingly light in offering any affirmative reasons for excluding transgender individuals from military service; rather, it reads like a legal rebuttal to the RAND Report (going so far as to contain its own severability clause), not a thoughtful policy analysis. Rather, it relies largely on the same “extremely overbroad” justifications this Court previously found constitutionally deficient as a matter of law. *See* PI Order at 17.⁹

Furthermore, no amount of rhetoric in the Report overcomes the undisputed facts: That the military, when it was not subject to a Presidential directive, conducted extensive studies on the exact same issues and reached the exact *opposite* conclusions, fewer than two years ago, when it concluded that “allowing transgender individuals to serve openly would not impact military effectiveness and readiness”; rather, “*prohibiting* open service would have negative impacts including loss of qualified personnel, erosion of unit cohesion, and erosion of trust in command.” *See* PI Order at 16.¹⁰ Nothing in the March 23 Filings—*post hoc*, or not—is sufficient to overcome those findings or the extensive record supplied by Plaintiffs in support of their motion for summary judgment, *see* Dkt. 130–149, to the degree necessary to pass heightened scrutiny.

CONCLUSION

Plaintiffs continue to be entitled to a permanent injunction and a declaratory judgment holding unconstitutional Defendants’ policies on military service by transgender individuals.

⁹ The Court has already properly ruled that the President’s transgender service policies do not get *Rostker* deference because “the prohibition on military service by transgender individuals was announced by President Trump on Twitter, abruptly and without any evidence of considered reason or deliberation.” PI Order at 18. As the March 23 Filings merely implement the President’s 2017 directives, they do not contain an independent decision-making process entitled to deference. *See supra* Section 1, *see also* Dkt 121 at 4 (“Defendants’ argument that Secretary Mattis has ‘independent authority’ . . . is unpersuasive . . . Secretary Mattis does not have authority to effectuate an unconstitutional policy.”).

¹⁰ *See also* PI Order at 16 (“All of the reasons proffered by the President for excluding transgender individuals from the military [are] not merely unsupported, but [are] actually *contradicted* by the studies, conclusions, and judgment of the military itself.”) (internal citation omitted).

Respectfully submitted April 3, 2018.

NEWMAN DU WORS LLP



Derek A. Newman, WSBA #26967
dn@newmanlaw.com
Samantha Everett, WSBA #47533
samantha@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

**LAMDBA LEGAL DEFENSE AND
EDUCATION FUND, INC.**

Tara Borelli, WSBA #36759
tborelli@lambdalegal.org
Camilla B. Taylor (admitted pro hac vice)
Peter C. Renn (admitted pro hac vice)
Natalie Nardecchia (admitted pro hac vice)
Sasha Buchert (admitted pro hac vice)
Kara Ingelhart (admitted pro hac vice)
Carl Charles (admitted pro hac vice)

OUTSERVE-SLDN, INC.

Peter Perkowski (admitted pro hac vice)

KIRKLAND & ELLIS LLP

James F. Hurst, P.C. (admitted pro hac vice)
Jordan M. Heinz (admitted pro hac vice)
Scott Lerner (admitted pro hac vice)
Vanessa Barsanti (admitted pro hac vice)
Daniel I. Siegfried (admitted pro hac vice)
Ben Tyson (admitted pro hac vice)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on April 3, 2018.



Samantha Everett, WSBA #47533
samantha@newmanlaw.com
Newman Du Wors LLP
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al,

Plaintiffs,

v.

DONALD TRUMP, et al,

Defendants.

Case No: 2:17-cv-1297-MJP

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

STATE OF WASHINGTON,

Intervenor-Plaintiff,

v.

DONALD TRUMP, et al,

Intervenor-Defendants.

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

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 442-4492

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF RELEVANT UNDISPUTED MATERIAL FACTS.....	1
III.	ARGUMENT	4
A.	The Second Presidential Memorandum, Together With the Implementation Plan and DoD Report, Finalizes – Not Revokes – the Ban	5
B.	Defendants’ Post-Hoc Justifications Do Not Save the Unconstitutional Ban	6
C.	Defendants’ Post-Hoc Justifications for the Ban Do Not Warrant Deference	8
D.	Defendants’ March 23, 2018 Filings Do Not Moot Washington’s Claims	9
IV.	CONCLUSION	10

TABLE OF AUTHORITIES

Cases

<i>Adarand Constructors, Inc. v. Slater</i> , 528 U.S. 216 (2000)	9
<i>ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire Prot. Dist.</i> , 724 F.3d 854 (7th Cir. 2013)	10
<i>Bunker Ltd. P’ship v. United States</i> , 820 F.2d 308 (9th Cir. 1987).....	10
<i>Burke v. Barnes</i> , 479 U.S. 361 (1987)	9
<i>City of Mesquite v. Aladdin’s Castle, Inc.</i> , 455 U.S. 283 (1982).....	10
<i>Gulf of Me. Fisherman’s All. v. Daley</i> , 292 F.3d 84 (1st Cir. 2002)	9
<i>Jacobus v. Alaska</i> , 338 F.3d 1095 (9th Cir. 2003).....	9
<i>Kremens v. Bartley</i> , 431 U.S. 119 (1977).....	9
<i>Los Angeles Cty. v. Davis</i> , 440 U.S. 625 (1979).....	9
<i>Ne. Fl. Chapt. of Assoc. Contractors of America v. City of Jacksonville, Fl.</i> , 508 U.S. 656 (1993).....	10
<i>Rostker v. Goldberg</i> , 453 U.S. 57 (1981)	7, 8
<i>Sessions v. Morales-Santana</i> , 137 S. Ct. 1678 (2017).....	6
<i>Smith v. Exec. Dir. of Ind. War Mem’ls Comm’n</i> , 742 F.3d 282 (7th Cir. 2014).....	10
<i>U.S. Dep’t of Treasury v. Galioto</i> , 477 U.S. 556 (1986)	9
<i>United States v. W.T. Grant Co.</i> , 345 U.S. 629 (1953).....	9

I. INTRODUCTION

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

II. STATEMENT OF RELEVANT UNDISPUTED MATERIAL FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This Court owes no deference to Defendants’ March 23rd filings. In reviewing military action for constitutional compliance, under appropriate circumstances courts may accord deference where the challenged restriction arises from military experience or developed research. *Rostker*, 453 U.S. at 67. Although courts owe deference to well-reasoned military policies, blind deference to discriminatory policies is never warranted.⁴ Courts owe deference only to well-reasoned policies or practices developed by military experts or the Legislature, as neither 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 (1989) (Norris, J., concurring).

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

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

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

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

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

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

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

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

4 IV. CONCLUSION

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

7 DATED this 3rd day of April, 2018.

8
 9 ROBERT W. FERGUSON
 Washington Attorney General

10 /s/ La Rond Baker

11 LA ROND BAKER, WSBA No. 43610
 12 COLLEEN MELODY, WSBA No. 42275
 Assistant Attorneys General
 Office of the Attorney General
 800 Fifth Avenue, Suite 2000
 14 Seattle, WA 98104
 (206) 464-7744
 15 LaRondB@atg.wa.gov

16
 17
 18
 19
 20

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 3rd day of April, 2018.

/s/ La Rond Baker

LA ROND BAKER, WSBA No. 43610

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-Cv-1297-MJP

**DEFENDANTS' MOTION TO STAY
PRELIMINARY INJUNCTION
PENDING APPEAL**

NOTED FOR CONSIDERATION:
May 18, 2018

INTRODUCTION

On April 13, 2018, this Court entered an order granting in part and denying in part Plaintiffs’ and Intervenor Washington’s motions for summary judgment, granting in part and denying in part Defendants’ motion for partial summary judgment, and striking Defendants’ motion to dissolve the preliminary injunction.¹ Mem. Op., ECF No. 233. In its order, the Court expanded its injunction to preclude Defendants other than the President from implementing the Department of Defense’s (“DoD”) new policy announced on March 23, 2018. *Id.* at 30–31. Defendants subsequently filed a timely notice of appeal, *see* ECF No. 236, and the Court’s order is now on appeal before the United States Court of Appeals for the Ninth Circuit.

Defendants now move to stay the Court’s preliminary injunction pending appeal, so that the Defense Department can implement its new policy. Unless stayed, the Court’s injunction will irreparably harm the government (and the public) by compelling the military to adhere to a policy it has concluded poses substantial risks. A stay, by contrast, would not likely injure any of the plaintiffs, many of whom may continue to serve under DoD’s new policy. Defendants are also likely to succeed on the merits of this case because they are defending a professional decision of military leaders, to which significant deference is due. At a minimum, the Court should stay the preliminary injunction insofar as it grants nationwide relief.

ARGUMENT

I. The Court Should Stay The Preliminary Injunction Pending Appeal, So That DoD Can Implement Its New Policy.

Federal Rule of Civil Procedure 62(c) grants district courts discretion to “suspend, modify, restore, or grant an injunction’ during the pendency of the defendant’s interlocutory appeal.” *Mayweathers v. Newland*, 258 F.3d 930, 935 (9th Cir. 2001) (quoting Fed. R. Civ. P. 62(c)). In deciding whether to stay a preliminary injunction pending appeal, district courts consider four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)

¹ The Court’s order striking Defendants’ Motion to Dissolve the Preliminary Injunction, without permitting the parties to finish briefing the issues, is understood as a denial of Defendants’ motion.

1 whether issuance of the stay will substantially injure the other parties interested in the proceeding;
 2 and (4) where the public interest lies.” *Doe v. Trump*, 284 F. Supp. 3d 1172, 1178 (W.D. Wash.
 3 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

4 To be sure, these are the same factors that governed Defendants’ Motion to Dissolve the
 5 Preliminary Injunction, which the Court recently denied. *See* Mem. Op. 31; *Lopez v. Heckler*,
 6 713 F.2d 1432, 1435 (9th Cir. 1983) (“The standard for evaluating stays pending appeal is similar
 7 to that employed by district courts in deciding whether to grant a preliminary injunction.”). But
 8 courts regularly find cause to stay their own rulings entering, dissolving, or modifying
 9 injunctions. *See, e.g., Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841,
 10 842 (D.C. Cir. 1977) (holding that district court did not abuse its discretion by entering permanent
 11 injunction and then staying it pending appeal); *Thiry v. Carlson*, 891 F. Supp. 563, 567 (D. Kan.
 12 1995) (granting stay pending appeal of court’s own order dissolving preliminary injunction).
 13 Although the Court ruled that its preliminary injunction now covers DoD’s new policy, the Court
 14 should stay its injunction pending Defendants’ appeal, so that the new policy can be
 15 implemented.

16 A stay is critical to prevent irreparable harm to military interests. The nation’s military
 17 leaders have concluded that absent implementation of the new policy, there will remain
 18 “substantial risks” that threaten to “undermine readiness, disrupt unit cohesion, and impose an
 19 unreasonable burden on the military that is not conducive to military effectiveness and lethality.”
 20 Memorandum by Secretary of Defense James Mattis (“Mattis Memorandum”) 2 (Feb. 22, 2018),
 21 ECF No. 216-1; *see also, e.g.,* Department of Defense Report and Recommendations on Military
 22 Service by Transgender Persons (“DoD Report”) 32–35, 41, 44 (Feb. 2018). In their professional
 23 military judgment, departing from the Carter framework is necessary to protect these military
 24 interests. DoD Report 30–32. Such “specific, predictive judgments” from senior military
 25 officials, including the Secretary of Defense himself, “about how the preliminary injunction
 26 would reduce the effectiveness” of the military, merit significant deference. *Winter v. NRDC*,
 27 555 U.S. 7, 27 (2008). The Court’s decision striking Defendants’ Motion to Dissolve the
 28

1 Preliminary Injunction did not grapple with these military judgments. Thus, the Court may still
 2 stay the preliminary injunction pending appeal, so that DoD can implement its new policy.

3 In contrast to Defendants, Plaintiffs face little risk of harm. Many of the individual
 4 Plaintiffs would qualify for the new policy's reliance exception—and thus would be able to
 5 continue serving in their preferred gender, obtain commissions, and receive medical treatment—
 6 because they received a diagnosis of gender dysphoria from a military medical provider while
 7 the Carter policy was in effect. See First Am. Compl. ¶¶ 53, 79, 88, 100, 111, ECF No. 30;
 8 Easley Decl. ¶ 3, ECF No. 72; DoD Report 43. These Plaintiffs are thus highly unlikely to sustain
 9 any injury under the new policy.² And as for the remaining Plaintiffs and Washington, although
 10 the Court has determined that they may have satisfied the requirements for Article III standing,
 11 it does not follow that they are likely to suffer an irreparable harm to any significant degree,
 12 especially in comparison to the critical military interests at stake. As Defendants have argued
 13 previously, see Defs.' Mot. to Dismiss 16, ECF 69, the individual Plaintiffs seeking to access
 14 into the armed forces have not demonstrated that they have been stable for at least 18 months
 15 post-transition, as required under the Carter policy. And even assuming that the implementation
 16 of the new policy during the appeal would prevent some plaintiffs from accessing, that harm
 17 would only be temporary, lasting at most the length of Defendants' appeal. Cf. *Hartikka v. United*
 18 *States*, 754 F.2d. 1516, 1518 (9th Cir. 1985) (damage to reputation as well as lost income,
 19 retirement, and relocation pay resulting from less-than-honorable discharge not irreparable). For
 20 similar reasons, neither the organizational plaintiffs nor Washington would face harm to any
 21 significant degree. Indeed, while Washington asserts that the new policy would “undermine the
 22 efficacy of its National Guard,” Mem. Op. 19, senior military leaders have studied the issue
 23 extensively and come to the opposite conclusion. Accordingly, the judgment of military leaders

24
 25 ² In the Court's decision, it suggested that the record did not support the conclusion that the
 26 current service member Plaintiffs were diagnosed with gender dysphoria by a military medical
 27 provider after June 30, 2016. Mem. Op. 15–16, 15 n.7. But the Court did not address the fact
 28 that service members could receive treatment under the Carter policy—which all of these
 Plaintiffs did—only if they had received a diagnosis of gender dysphoria by a military medical
 provider after that policy took effect. See Declaration of Ryan B. Parker, Exh. 1 (Department of
 Defense Instruction 1300.28).

1 is that not implementing the new policy would undermine the readiness and efficacy of the
 2 military—including the Washington National Guard. Mattis Memorandum 2; *see also, e.g.*, DoD
 3 Report 32–35, 41, 44; *cf. Winter*, 555 U.S. 7, 27 (2008) (“The lower courts failed properly to
 4 defer to senior Navy officers’ specific, predictive judgments about how the preliminary
 5 injunction would reduce the effectiveness of the Navy’s SOCAL training exercises.”).

6 The likelihood of success on the merits also favors granting a stay. In the Court’s
 7 decision, it expressly reserved final ruling on the degree of deference that DoD’s new policy
 8 should receive. Mem. Op. at 27. When the Ninth Circuit and/or this Court ultimately address
 9 that question, they are highly likely to conclude that significant deference is appropriate.
 10 Although the armed forces are subject to constitutional constraints, “the tests and limitations to
 11 be applied may differ because of the military context.” *Rostker v. Goldberg*, 453 U.S. 57, 67
 12 (1981). For instance, judicial “review of military regulations challenged on First Amendment
 13 grounds is far more deferential than constitutional review of similar laws or regulations destined
 14 for civilian society.” *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). As one of the many
 15 “complex, subtle, and professional decisions as to the composition ... of a military force, which
 16 are essentially professional military judgments,” *Winter*, 555 U.S. at 24 (quoting *Gilligan v.*
 17 *Morgan*, 413 U.S. 1, 10 (1973)), the Department’s new policy, which simply declines to generally
 18 accommodate gender transition, survives the highly deferential review applicable here. Drawing
 19 on the experience and judgment of senior military leadership, evidence from before and after the
 20 adoption of the Carter policy, and its experience with the Carter policy so far, the Department
 21 concluded that continuing to provide a general accommodation for gender transition would pose
 22 unacceptable risks to military interests. DoD Report 18. The Department’s professional military
 23 judgments on these interests, which involved a sensitive consideration of risks, costs, and internal
 24 discipline, clearly satisfy the deferential form of review required of such determinations.³

25 ³ It is also likely that the Ninth Circuit will disagree with the Court’s conclusion that DoD’s new
 26 policy is subject to strict scrutiny. Mem. Op. 24. As an initial matter, the new policy applies to
 27 a medical condition and its attendant treatment—gender dysphoria and transition—not on the
 28 basis of whether a person is transgender. Yet even if that were not the case, the Court’s decision
 did not cite to a single instance where a court had ruled that a policy that classifies on the basis
 of transgender status was subject to strict scrutiny. *See generally id.* Relatedly, the Ninth Circuit

1 The public interest favors staying the Court’s preliminary injunction as well. The Court’s
 2 previous ruling on the President’s 2017 Memorandum and statement on Twitter hinged on its
 3 belief that the Carter policy had no “documented negative effects.” Order 22, ECF No. 103. That
 4 is no longer accurate. DoD has now detailed the risks associated with the Carter policy and
 5 explained why, in its professional military judgment, it was “necessary” to depart from that
 6 framework. DoD Report 32. Staying the Court’s preliminary injunction pending appeal serves
 7 the public interest by allowing the military to implement the policy that will best serve military
 8 interests, and therefore the security of the public.

9 Finally, at a minimum, the Court should stay the preliminary injunction insofar as it grants
 10 nationwide relief. Under Article III, “[t]he remedy” sought must “be limited to the inadequacy
 11 that produced the injury in fact that the plaintiff has established.” *Lewis v Casey*, 518 U.S. 343,
 12 357 (1996). Likewise, equitable principles require that an injunction “be no more burdensome
 13 to the defendant than necessary to provide complete relief to the plaintiffs.” *Madsen v. Women’s*
 14 *Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). The Court determined that nine individuals have
 15 standing to challenge the new policy. Mem. Op. 15–17. But it did not limit its remedy to their
 16 injuries; instead, it barred implementation of the new policy “nationwide.” *Id.* at 2. A narrow
 17 injunction, barring the application of the new policy to the nine individual plaintiffs, would
 18 provide those plaintiffs with full preliminary relief. *See U.S. Dep’t of Def. v. Meinhold*, 510 U.S.
 19 939 (1993) (staying injunction against military policy to the extent it conferred relief on anyone
 20 other than plaintiff); *Meinhold v. U.S. Dep’t of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994) (vacating
 21 injunction save to the extent it applied to plaintiff).

22 **II. Request For Expedited Ruling**

23 If this Court has not ruled on Defendants’ motion by May 4, 2018, Defendants intend to
 24 file for a stay of the Court’s preliminary injunction with the Ninth Circuit Court of Appeals. If
 25 this Court rules on Defendants’ motion after Defendants’ have filed their motion with the Ninth
 26 Circuit, Defendants will provide the Ninth Circuit with this Court’s ruling.

27 _____
 28 is also likely to reject the Court’s implicit conclusions that Plaintiffs are likely to succeed on the
 merits of their equal protection, substantive due process, and First Amendment claims.

1 Defense counsel has conferred with counsel for both Plaintiffs and Washington regarding
2 this motion. Washington opposes the motion. Plaintiffs' counsel requested that Defendants
3 include the following statement of Plaintiffs' position: "Plaintiffs intend to oppose the motion to
4 stay. Plaintiffs also respectfully request that the Court refrain from ruling on Defendants' motion
5 until after receiving Plaintiffs' opposition which will be timely filed in accordance with the Local
6 Rules."

7
8 Dated: April 30, 2018

Respectfully submitted,

9 CHAD A. READLER
10 Acting Assistant Attorney General
Civil Division

11 BRETT A. SHUMATE
12 Deputy Assistant Attorney General

13 JOHN R. GRIFFITHS
14 Branch Director

15 ANTHONY J. COPPOLINO
16 Deputy Director

17 /s/ Ryan B. Parker
18 RYAN B. PARKER
19 Senior Trial Counsel
20 ANDREW E. CARMICHAEL
21 Trial Attorney
22 United States Department of Justice
23 Civil Division, Federal Programs Branch
24 Telephone: (202) 514-4336
25 Email: ryan.parker@usdoj.gov

26
27 *Counsel for Defendants*
28

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2018, I electronically filed the foregoing Motion to Stay Preliminary Injunction Pending Appeal using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: April 30, 2018

/s/ Ryan Parker

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

Counsel for Defendants

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

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

Defendants.

Case No. 2:17-cv-01297-MJP

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO STAY
PRELIMINARY INJUNCTION PENDING
APPEAL**

NOTED FOR CONSIDERATION:
May 18, 2018

TABLE OF CONTENTS

Introduction	1
Background	1
Argument	2
A. Defendants Cannot Meet the High Standard for a Stay Pending Appeal of a Preliminary Injunction	2
1. Defendants Have Not—and Cannot—Make the Strong Showing of Likelihood of Success on the Merits Required to Justify a Stay	3
2. The Government Does Not Show Irreparable Harm Pending Appeal, While a Stay Would Harm Plaintiffs and the Public Interest	9
Conclusion	10
Certificate of Service	12

TABLE OF AUTHORITIES

Cases

<i>Bray v. Alexandria Women’s Health Clinic</i> , 506 U.S. 263 (1993).....	7
<i>Christian Legal Soc’y v. Martinez</i> , 561 U.S. 661 (2010).....	7
<i>Cnty. House, Inc. v. City of Boise</i> , 490 F.3d 1041 (9th Cir. 2007)	5
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003).....	7
<i>Hernandez v. Sessions</i> , 872 F.3d 976 (9th Cir. 2017)	13
<i>Johnson v. California</i> , 543 U.S. 499 (2005).....	9, 11
<i>Latta v. Otter</i> , 771 F.3d 456 (9th Cir. 2014)	13
<i>Melendres v. Arpaio</i> , 695 F.3d 990 (9th Cir. 2012)	13
<i>Mem. Hosp. v. Maricopa Cnty.</i> , 415 U.S. 250 (1974).....	11
<i>Nken v. Holder</i> , 556 U.S. 418, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009).....	5
<i>Pac. Shores Props. LLC v. City of Newport Beach</i> , 730 F.3d 1142 (9th Cir. 2013)	7
<i>Rostker v. Goldberg</i> , 453 U.S. 57 (1981).....	7
<i>Schwenk v. Hartford</i> , 204 F.3d 1187 (9th Cir. 2000)	7
<i>Sessions v. Morales-Santana</i> , 137 S.Ct. 1678 (2012).....	9
<i>Sharp v. Weston</i> , 233 F.3d 1166 (9th Cir. 2000)	6

1	<i>Sports Form, Inc. v. United Press Int’l, Inc.</i> ,	
	686 F.2d 750 (9th Cir. 1982)	5
2	<i>Stone v. Trump</i> ,	
3	No. MJG-17-2459, 2017 WL 5589122 (D. Md. Nov. 21, 2017).....	4
4	<i>United States v. Virginia</i> ,	
5	518 U.S. 515 (1996).....	9
6	<i>W. States Paving Co. v. Wash. State Dep’t of Transp.</i> ,	
	407 F.3d 983 (9th Cir. 2005)	9
7	<i>Washington v. Trump</i> ,	
8	847 F.3d 1151 (9th Cir. 2017)	5, 6
9	<i>Witt v. Dep’t of Air Force</i> ,	
10	527 F.3d 806 (9th Cir. 2008)	8

INTRODUCTION

On December 11, 2017, this Court preliminarily enjoined all Defendants and anyone acting on their behalf from implementing the government’s Ban on open service by transgender persons, finding the prohibition “likely unconstitutional.” (See Dkt. No. 103 at 2.) On April 13, 2018, in ruling on the parties’ summary judgment motions, the Court ordered that the very same injunction was to remain in effect. (See Dkt. No. 233.) For the second time, and again faced with an unfavorable ruling, Defendants seek to stay the preliminary injunction pending appeal so they may immediately alter the status quo and commence implementing the Ban and engaging in unconstitutional discrimination. (See Dkt. No. 106, #238.) They did not meet the standard before, and they do not meet it now.

BACKGROUND

Defendants’ stay request is predicated on an erroneous proposition: that Department of Defense’s (“DoD”) Report and Recommendations on Military Service by Transgender Persons (the “Implementation Plan”) is a “new” policy that is different from the one this Court already enjoined. The facts show otherwise. President Trump’s 2017 Memorandum ordered DoD to “submit to [the President] a plan for implementing both the general polic[ies] . . . and the specific directives” it announced. (Dkt. No. 34, Ex. 7.) In other words, on its face it “order[ed] the directives to be implemented by specific dates”—it did *not* request “a study to determine whether or not the directives should be implemented,” as the government continually argues. *Stone v. Trump*, No. MJG-17-2459, 2017 WL 5589122, at *10 (D. Md. Nov. 21, 2017); *accord* (Dkt. No. 103, at 13.) Following those explicit orders, DoD provided the President with the requested Implementation Plan—which, unsurprisingly, implements the President’s commands. Then, Implementation Plan in hand, the President issued a new memorandum, in which he purportedly “revoke[d]” his previous directives so DoD could go forward with the Implementation Plan *he ordered* and the Secretary created to “carry out the President’s policy and directives.” (Dkt. No. 69-1 at 1.) This Court correctly concluded President Trump’s 2018 Memorandum and the Implementation Plan continued “the very same violations that caused it and other courts to enjoin the Ban in the first place.” (Dkt. No. 233 at 12.)

Against that backdrop, Defendants fail to meet the stringent requirements for a stay, let alone show that the Court abused its discretion in continuing to keep the preliminary injunction in place. The thrust of Defendants' motion is that they will supposedly suffer irreparable harm if they are not permitted to continue discriminating against transgender persons who wish to join and serve in the military on equal footing with their fellow Americans. At the same time, Defendants completely ignore the substantial constitutional harms that a stay would impose upon transgender service members and those seeking to join the military. All the while, Plaintiffs remain likely to succeed on the merits of their claims against Defendants' unconstitutional Ban. Defendants' insistence that the most sophisticated military in the world cannot maintain the status quo pending appeal without incurring grave risk rings hollow, as confirmed by the experience and judgment of senior military leaders.

ARGUMENT

A. Defendants Cannot Meet the High Standard for a Stay Pending Appeal of a Preliminary Injunction

This Court should stay the preliminary injunction—now in force for over five months, following Defendants' voluntary dismissal of their initial appeal. A stay pending appeal “is an intrusion into the ordinary processes of administration and judicial review.” *Nken v. Holder*, 556 U.S. 418, 427, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009) (internal citation and quotation marks omitted). It is therefore “not a matter of right, even if irreparable injury might otherwise result.” *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017) (internal citation and quotation marks omitted). When determining whether to grant a stay, a court considers (1) whether the government “has made a strong showing that [it] is likely to succeed on the merits, (2) whether the [government] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.* Defendants' already demanding burden to show they are likely to succeed on the merits of their appeal is elevated even higher by the “limited and deferential” abuse-of-discretion standard of review for preliminary injunctions. *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1047 (9th Cir. 2007); *see also Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d

750, 752 (9th Cir. 1982).

1. Defendants Have Not—and Cannot—Make the Strong Showing of Likelihood of Success on the Merits Required to Justify a Stay

Defendants’ request for a stay fails at the outset, coming nowhere close to a “strong showing” that they are “likely to succeed on the merits.” *Washington*, 847 F.3d at 1164. Because the government sought to dissolve a preliminary injunction, it was required to show “a significant change in facts or law warrants revision or dissolution of the injunction.” *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). Instead, Defendants offer only a perfunctory recitation of arguments this Court has already considered and properly rejected. Indeed, the government admits the very same factors that led to the Court’s decision both to enter, and maintain, the preliminary injunction govern the outcome here—yet the government offers nothing new to suggest the outcome should be any different the third time around. (See Dkt. No. 238 at 2.) Defendants’ only argument on this point is that they are likely to succeed on their deference claim, which they submit should apply to the “new” policy. (*Id.*) Yet, as this Court already found, the Implementation Plan does not “substantively rescind or revoke the Ban,” but rather threatens “the very same violations that caused [this and other courts] to enjoin the Ban in the first place.” (Dkt. No. 233 at 12.) Moreover, the government mischaracterizes this Court’s most recent ruling as “expressly reserv[ing] final ruling on the degree of deference that DoD’s *new policy* should receive.” (Dkt. No. 238 at 4 (emphasis added).) To the contrary, the Court concluded that “whether *the Ban*”—the very same Ban that has been in existence at every stage of this case—“is entitled to deference raises an unresolved question of fact.” (Dkt. No. 233 at 26 (emphasis added).) This is a far cry from finding that Defendants are likely to succeed on their deference claim.

Indeed, the government fails to make the required strong showing of likelihood of success on the merits of its appeal for the very same reasons that Plaintiffs continue to show a likelihood of success on their constitutional claims. *First*, as this Court has already found, the Ban is subject to strict scrutiny because it discriminates based on a suspect classification. (See Dkt. No. 233 at 20–24.) *Second*, the Ban cannot survive strict scrutiny for two independent reasons: (a) the

1 government only offers impermissible *post hoc* justifications for the Ban, and (b) the
 2 government's scant *post hoc* evidence fails to provide a compelling governmental interest, or to
 3 show that the Ban is narrowly tailored to achieve it. *See Grutter v. Bollinger*, 539 U.S. 306, 333
 4 (2003).

5 a. The Ban Is Subject to Strict Scrutiny

6 As this Court has held, discrimination against transgender people exhibits all the indicia
 7 of a suspect classification. (See Dkt. No. 233, at 21–24.) And it is settled law in this circuit that
 8 discrimination on the basis of gender identity or perceived gender nonconformity also is a form
 9 of gender discrimination, requiring intermediate scrutiny. *See Schwenk v. Hartford*, 204 F.3d
 10 1187, 1201–02 (9th Cir. 2000). The Ban therefore triggers some form of heightened scrutiny
 11 under equal protection. Additionally, at a minimum, heightened scrutiny is also required under
 12 due process and the First Amendment, because the Ban burdens a fundamental liberty interest to
 13 live in accordance with one's gender identity. (Dkt. No. 103 at 18–20.)

14 The government offers two responses to this obvious result, but neither helps. *First*, the
 15 government claims rational basis review applies because the Implementation Plan purportedly
 16 draws lines on the basis of “a medical condition and its attendant treatment—gender dysphoria
 17 and transition—not on the basis of whether a person is transgender.” (Dkt. No. 238 at 4 n.3.)
 18 This assertion strains credulity and logic. The classifications are inescapably based on
 19 transgender status—the President's 2018 Memorandum alone refers seven times to transgender
 20 people, including in the subject line; and the Implementation Plan's *title* refers to “Military
 21 Service by Transgender Persons”—and thus trigger strict scrutiny. This tactic built on sophistry
 22 has been attempted before and has failed each time. *See, e.g., Christian Legal Soc'y v. Martinez*,
 23 561 U.S. 661, 689 (2010) (targeting same-sex conduct necessarily targets the status of being
 24 gay); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993); *Pac. Shores Props.*
 25 *LLC v. City of Newport Beach*, 730 F.3d 1142, 1159 n.23 (9th Cir. 2013).

26 *Second*, the government argues a lower tier of scrutiny applies to the military context.
 27 (Dkt. No. 238, at 5.) Not so. The Supreme Court explicitly rejected this argument in *Rostker v.*
 28 *Goldberg*, 453 U.S. 57, 69–71 (1981) (declining “to apply a different equal protection test

because of the military context”); *accord Witt v. Dep’t of Air Force*, 527 F.3d 806 (9th Cir. 2008) (applying heightened scrutiny to military justifications for “Don’t Ask, Don’t Tell”). Nor is any deference due to the Implementation Plan, for it is not the product of an independent decision-making process to which this Court could even defer. DoD had previously confirmed it would “carry out the President’s direction,” and “develop a study and implementation plan” for the policies in the 2017 Memorandum and “provide advice and recommendations on the implementation of the [P]resident’s policy direction.” (Dkt. No. 197, Ex. 2.) It promised to “develo[p] an Implementation Plan” that would “effect the policy and directives in the August 25, 2017 Presidential Memorandum.” (Declaration of Daniel Siegfried (“Siegfried Decl.”) Ex. 2.) That is exactly what it did.

The hasty review process that led to the Implementation Plan (attached as Exhibit B to the Declaration of George R. Brown (“Brown Decl.”)), based on limited data and rife with unsupported conclusions, prevents it from even approximating the thorough analysis and considered judgment that characterize the military’s usual policymaking process. As explained in detail by 34 high-ranking retired military officers and national security officials, the process here starkly departs in material ways from the military’s prior searching review and examination of major personnel policies. (*See generally* Siegfried Decl. Ex. 10; *id.* at 6–7 (decision to repeal Don’t Ask, Don’t Tell was reached after 95 forums at 51 military bases, input from about 400,000 service-members, and a comprehensive, 256-page report); *id.* at 7–8 (removal of barriers to service by women in combat roles proceeded over at least three years and involved over thirty studies).) The Implementation Plan’s irregular process resulted in aberrant results that contravene the overwhelming consensus of leading medical organizations. (*See* Brown Decl. Ex. D (DoD “mischaracterize[s] and reject[s] the wide body of peer-reviewed research”); *accord id.* Ex. C (“misuse[s] . . . psychological science”).)

b. The Ban Fails Strict Scrutiny

The President’s discriminatory Ban cannot survive any form of heightened scrutiny for two fundamental reasons. *First*, under heightened scrutiny, the burden is on the government to justify its discrimination, limited only to the actual and genuine reasons that motivated its actions *at the*

time it commenced the discriminatory actions; the government cannot rely on justifications that are conceived to buttress a decision already made. *See Sessions v. Morales-Santana*, 137 S.Ct. 1678, 1696–97 (2012); *United States v. Virginia*, 518 U.S. 515, 533 (1996); *W. States Paving Co. v. Wash. State Dep’t of Transp.*, 407 F.3d 983, 991, 993 (9th Cir. 2005). Here, however, the government does not offer a single scrap of evidence that its purported justifications for the Ban pre-existed its announcement, leaving Defendants in the same position as had they offered no justification at all. (*See, e.g.*, Dkt. No. 211 at 2 (“Defendants . . . do not intend to rely on information concerning the President’s deliberative process that led to . . . the policy announced on Twitter by President Trump on July 26, 2017[.]”).) Rather, the government points only to the Implementation Plan to justify its discriminatory policies. It is beyond dispute the Ban was announced and ordered in 2017, through the President’s tweets and 2017 Memorandum. The government’s purported likelihood of success is premised entirely on the Court accepting the President’s counterfactual reality by expunging the history leading to the Implementation Plan and pretending at the end of the process *he ordered* that he actually had no role in the decision *he made* and instructed his subordinates to justify.

Second, the government must establish that its discrimination is narrowly tailored to further a compelling governmental interest. *Johnson v. California*, 543 U.S. 499, 505 (2005). Even if the Court were to consider the improper *post hoc* evidence in the Implementation Plan, it would still be insufficient to justify the President’s discriminatory policies. The Implementation Plan’s recommendation is replete with baseless assumptions, and most importantly, provides no new information that justifies the Ban’s sweeping exclusion of transgender persons from open service and overturning the military’s own prior judgment based on RAND Corporation and the Carter Working Group’s (the “Working Group”) thorough and impartial analysis.

Standing in stark contrast to the Implementation Plan’s cursory and conclusory process, in July 2015 the Working Group convened approximately 25 senior uniformed officers and civilian officials from each service branch, including Surgeons General, to identify practical issues related to open service and analyze whether such service was consistent with maximum “military effectiveness and readiness.” (Dkt. No. 46-1.) It conducted a careful, “evidence-based

assessment” of “all the available evidence” and consulted with experts in medicine, health insurance, personnel, and readiness, as well as military commanders. (Declaration of Brad R. Carson (“Carson Decl.”) ¶ 6, 18.) The Working Group also commissioned RAND Corporation—a non-profit, non-partisan research institution with decades of experience advising the military—which over the course of nine months conducted a multidisciplinary, detailed, and data-driven approach to study (1) the health care needs of the transgender population; (2) the readiness implications of open service; and (3) the experiences of foreign militaries. (Dkt. No. 46-2 at Preface.) In contrast, the lack of careful analysis that led to the Implementation Plan is apparent on its face.

For example, the Implementation Plan’s recommendations cite no evidence contradicting the Working Group’s finding that open service would have “no greater impact on deployability than service by individuals with many other medical conditions that are not disqualifying.” (Carson Decl. ¶ 14.) Whereas the Carter policy was tailored to “minimiz[e] any impact on deployability” and included provisions that mitigated such impacts in a manner that was “consistent with medical standards” and satisfied “military readiness concerns,” (*Id.* ¶¶ 16, 17), the Implementation Plan’s recommendations paint transgender service-members with overbroad generalizations. Citing *no data* whatsoever, the Implementation Plan speculates that transition-related care “could” render a transgender service-member non-deployable for “perhaps even a year.” Implementation Plan at 33. The Implementation Plan never disputes the RAND Report’s conclusion that the “impact [of open service] on readiness would be minimal—e.g., 0.0015% of available deployable labor-years[.]” *Id.* at 34, and it fails to explain why transgender service-members should be treated differently from service-members with equally temporary and limited periods of non-deployability due to conditions like pregnancy, sleep apnea, appendicitis, or gall bladder disease. (See Carson Decl. ¶ 20.) To the contrary, a former Chair of the Joint Chiefs of Staff determined, based on the evidence, that an “[i]nclusive policy for transgender troops promotes readiness.” (Dkt. No. 148 ¶ 7 (Declaration of Admiral Mullen) (emphasis added).)

Nor do the Implementation Plan’s recommendations provide any support for its repeated and conclusory assertion that open service threatens “unit cohesion.” The Working Group

1 addressed the very same questions about privacy and good order and discipline that the
 2 Implementation Plan frames as insuperable obstacles and made an evidence-based determination
 3 that service by transgender persons had not led to “any significant issues or impacted morale or
 4 unit cohesion.” (Carson Decl. ¶ 23.) The Implementation Plan fails to address any of the negative
 5 impacts on readiness, morale, and cohesion imposed by forcing transgender service-members to
 6 serve in silence and ignores the military’s experience with policies permitting women to serve in
 7 combat positions and allowing open service by gay and lesbian personnel, where fears about
 8 “unit cohesion” proved equally unfounded. (*Id.* ¶ 26.)

9 Most strikingly, open service has been in place for nearly two years, and the military
 10 leadership’s own recent testimony to Congress on that experience flatly rejects the
 11 Implementation Plan’s conclusions. Notably, Army Chief of Staff General Mark Milley testified
 12 to Congress that “he monitor[s] very closely” the situation, and “received precisely *zero* reports .
 13 . . of issues of cohesion, discipline, morale and all those sorts of things.” (Siegfried Decl. Ex. 14
 14 at 99–100 (emphasis added).) Chief of Naval Operations Admiral John Richardson and Marine
 15 Corps Commandant General Robert Neller both likewise testified that they have had no reports
 16 of negative impacts to good order and discipline or unit cohesion. (*Id.* Ex. 15 at 83, 85; *see also*
 17 *id.* Ex. 16 at 71–73).) The Implementation Plan’s outcome-driven speculation to the contrary
 18 cannot withstand the actual evidence.

19 Perhaps the most gaping hole in the Implementation Plan’s recommendations relates to its
 20 cost justification—a purported justification that is both legally impermissible *and* unsupported
 21 by the evidence. The Supreme Court has long made clear that cost savings alone cannot justify
 22 discrimination. *See Mem. Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263 (1974) (government
 23 cannot “protect the public fisc by drawing an invidious distinction between classes” of persons).
 24 Even if it could, the Implementation Plan still fails to provide *any* new data that undermines the
 25 conclusions of the Working Group and RAND. Rather than conducting the detailed, evidence-
 26 based analysis necessary to estimate the cost of transition-related care, the Implementation Plan’s
 27 recommendation assumes such care is “disproportionately costly” based on decontextualized
 28 anecdotes and vague concerns that “it remains to be seen how many [transgender service

members] will ultimately obtain surgeries.” Implementation Plan at 41. Nowhere does the Implementation Plan contradict the RAND Report’s upper-bound estimate of annual transition-related care of \$8.4 million (out of an annual active duty health care budget of \$6.2 *billion*)—“budget dust” and “hardly even a rounding error” according to former Secretary of the Navy Ray Mabus. (Dkt. No. 46-2 at 36; Dkt. No. 48 ¶ 41.) Nor does the Implementation Plan account for the significant costs associated with the Ban, including the loss of qualified personnel. (See Dkt. No. 46 ¶ 32.) Legal flaws aside, the Implementation Plan’s failure to do the math renders its purported cost justifications factually inadequate to sustain the Ban too.

2. The Government Does Not Show Irreparable Harm Pending Appeal, While a Stay Would Harm Plaintiffs and the Public Interest

Independently, the Court should deny the government’s motion because the government cannot meet its burden of showing it will suffer irreparable harm absent a stay pending appeal. At the same time, a stay would severely injure Plaintiffs and the public interest.

As the Court has already concluded, Plaintiffs face a variety of legally cognizable and irreparable harms from the Ban, including exclusion from joining the military, discharge from the military, and denial of medical treatment.¹ These injuries are not abstract. And they are coupled with the ongoing harm Plaintiffs would suffer, in the absence of an injunction, by being marked as unworthy of military service. Even those “grandfathered” in will bear the “depr[ivation] of dignity,” and “stigmatization” from being labeled as part of an “innately inferior” class. (Dkt. No. 103, at 8.) “The Supreme Court has repeatedly emphasized [that] discrimination itself, by perpetuating archaic and stereotypic notions or by stigmatizing members of the disfavored group as innately inferior and therefore less worthy participants, can cause severe injuries to those who are denied equal treatment solely because of their membership in a

¹ Defendants’ assertion that service members who received a diagnosis of gender dysphoria before the Carter policy can still qualify for the “grandfather” exception flatly contradicts the plain terms of the Implementation Plan, and the document they cite (Department of Defense Instruction 1300.28) also does not support their assertion. Plaintiffs Schmid and Muller were both diagnosed with gender dysphoria before the Carter policy, subjecting them to discharge under the Implementation Plan. (See Dkt. No. 233 at 15–17; *see also* Declaration of Lindsey Muller; Declaration of Cathrine Schmid.)

1 disfavored group.” *Latta v. Otter*, 771 F.3d 456, 467 n.7 (9th Cir. 2014) (internal quotation
2 marks and citation omitted).

3 These irreparable injuries threatening Plaintiffs outweigh any claimed harm to the
4 government pending appeal. Notably, though the Carter Policy allowing open service has now
5 given the government nearly two years of live experience with open service, the government
6 relies almost exclusively on hypothetical and speculative concerns. But as Admiral Richardson
7 testified on the Navy’s direct experience with open service: “It’s steady as she goes.” (Siegfried
8 Decl. Ex. 15 at 84.) Tellingly, the “best illustration” of a supposedly insurmountable problem the
9 government can muster from two years of open service—the best justification for placing
10 thousands of lives and livelihoods in immediate jeopardy—is that a single commander was
11 “confronted with dueling equal opportunity complaints” arising from a dispute between a
12 transgender woman and a non-transgender woman. Implementation Plan at 37.

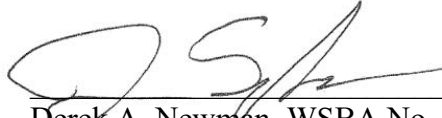
13 As the status quo remains “steady,” the government’s claims of irreparable harm pending
14 appeal fall flat. In contrast, a stay would irreparably injure Plaintiffs, including through
15 deprivation of their constitutional rights. “[I]t is always in the public interest to prevent the
16 violation of a party’s constitutional rights.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir.
17 2012) (Internal citations and quotation marks omitted); *see also Hernandez v. Sessions*, 872 F.3d
18 976, 1000 (9th Cir. 2017). Moreover, maintaining the status quo pending appeal serves to further
19 the goal of a strong national defense by continuing and permitting the employment of skilled and
20 qualified service-members dedicated to their country.

21 CONCLUSION

22 Due in no small part to the preliminary injunction, transgender troops have continued to
23 serve openly with honor and distinction for nearly two years, and without any of the ill effects
24 the Implementation Plan speculates might occur. Flying in the face of logic, experience, and the
25 Constitution’s promise of equal dignity, the government asks this Court for permission to reverse
26 course and return to an era of unjustified discrimination on the basis of a characteristic that has
27 no bearing on an individual’s fitness to serve. The government has not borne its burden of
28 showing that a stay should issue, and this Court should therefore deny its motion.

Respectfully submitted May 14, 2018.

NEWMAN DU WORS LLP



Derek A. Newman, WSBA No. 26967
dn@newmanlaw.com
Jason B. Sykes, WSBA No. 44369
jason@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

**LAMDBA LEGAL DEFENSE AND
EDUCATION FUND, INC.**

Tara Borelli, WSBA No. 36759
tborelli@lambdalegal.org
Camilla B. Taylor (admitted pro hac vice)
Peter C. Renn (admitted pro hac vice)
Natalie Nardecchia (admitted pro hac vice)
Sasha Buchert (admitted pro hac vice)
Kara Ingelhart (admitted pro hac vice)
Carl Charles (admitted pro hac vice)

OUTSERVE-SLDN, INC.

Peter Perkowski (admitted pro hac vice)

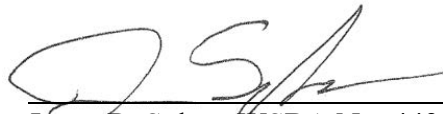
KIRKLAND & ELLIS LLP

James F. Hurst, P.C. (admitted pro hac vice)
Jordan M. Heinz (admitted pro hac vice)
Scott Lerner (admitted pro hac vice)
Vanessa Barsanti (admitted pro hac vice)
Daniel I. Siegfried (admitted pro hac vice)
Ben Tyson (admitted pro hac vice)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on May 14, 2018.



Jason B. Sykes, WSBA No. 44369
jason@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al,

Plaintiffs,

v.

DONALD TRUMP, et al,

Defendants.

Case No: 2:17-cv-1297-MJP

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

STATE OF WASHINGTON,

Intervenor-Plaintiff,

v.

DONALD TRUMP, et al,

Intervenor-Defendants.

NOTED FOR CONSIDERATION:
May 18, 2018

TABLE OF CONTENTS

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

TABLE OF AUTHORITIES

1		
2	<i>Adarand Constructors, Inc. v Slater</i> , 528 U.S. 216 (2000)	5
3	<i>Am. Hotel & Lodging Assoc. v. Los Angeles</i> , 834 F.3d 958 (9th Cir. 2016)	4
4	<i>Ashcroft v. Am. Civil Liberties Union</i> , 542 U.S. 656 (2004)	4
5	<i>Credit Suisse First Boston Corp. v. Grunwalk</i> , 400 F.3d 1119 (2005)	4
6	<i>Doe 1 v. Trump</i> , 275 F. Supp. 3d 167 (D.D.C. 2017).....	10
7	<i>Giovani Carandola, Ltd. v. Bason</i> , 303, F.3d 507 (4th Cir. 2002)	11
8	<i>Golden v. Washington</i> , No. 17-5424, 2017 WL 3224674 (U.S. Nov. 13, 2017).....	4
9	<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003).....	6, 8
10	<i>Hawaii v. Trump</i> , 871 F.3d 646 (9th Cir. 2017).....	12
11	<i>Hilton v. Braunskill</i> , 481 U.S. 770 (1987)	4
12	<i>Jacobus v. Alaska</i> , 338 F.3d 1095 (9th Cir. 2003).....	5
13	<i>Melendres v. Arpaio</i> , 695 F.3d 990 (9th Cir. 2012).....	11
14	<i>Nken v. Holder</i> , 556 U.S. 418 (2009)	3, 4
15	<i>Palmore v. Sidoti</i> , 466 U.S. 429 (1984).....	7
16	<i>Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1996)	8
17	<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984)	9
18	<i>Rostker v. Goldberg</i> , 453 U.S. 57 (1981)	9
19	<i>See Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015)	9
20	<i>Sessions v. Santana Morales</i> , 137 S.Ct. 1678 (2017)	8
21	<i>Shaw v. Hunt</i> , 517 U.S. 899 (2008)	8
22	<i>Sw. Voter Registration Educ. Project v. Shelley</i> , 344 F.3d 914 (9th Cir. 2003).....	4
23	<i>Trump v. Int’l Refugee Assistance Project</i> , 137 S. Ct. 2080 (2017).....	12
24	<i>United States v. Virginia</i> , 518 U.S. 515 (1996)	6, 8
25	<i>Washington v. Trump</i> , 847 F.3d 1151, 1164 (9th Cir. 2017).....	4, 12
26	<i>Watkins v. U.S. Army</i> , 875 F.2d 699 (9th Cir. 1989)	10

1	<i>Winter v. Nat. Res. Def. Council, Inc.</i> , 555 U.S. 7 (2008).....	11
2	<i>Witt v. Dept. of Air Force</i> , 527 F.3d 806 (9th Cir. 2008)	10
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		

I. INTRODUCTION

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

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

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

1 injunction or Washington’s claims.

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

8 II. BACKGROUND

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

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

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

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

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

22 III. ARGUMENT

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

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

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

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

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

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

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

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

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

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

The Ninth Circuit is clear: “[D]ismissal of a case ‘on grounds of mootness would be justified 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) (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000)). As the Court correctly found that the the Implementation Plan does not constitute a “new” policy and does not substantively revoke or rescind the Ban, Washington still needs the Court to protect it from the irreparable harms the Ban would cause to its sovereign and quasi-sovereign interests. As such, these implementing documents do not moot Washington’s claims.

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

b. The Ban violates Equal Protection guarantees

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

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

(1) The Ban cannot survive heightened scrutiny

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

First, Defendants’ 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 at Senate hearings that there was no negative impact on the military from open service by transgender military servicemembers. ECF 255-9; ECF 225-14; ECF 225-15; ECF 225-16.

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

servicemembers who also wish to be exempted from uniform and grooming standards; and (4) assuring non-transgender servicemembers experiencing a sense of “unfairness” because transgender servicemembers are held to standards associated with their gender identity. ECF 216-2 at 32-36. These asserted interests cannot justify the Ban, as the rationale for each of these interests is non-transgender servicemembers’ bias against transgender individuals. Indeed, 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.* As such, none of these purported government interests can be relied upon to justify the Ban.

Third, Defendants claim that transgender individuals are at greater risk of (1) psychiatric hospitalizations; (2) suicidal behavior – even after transition; and (3) significant periods of non-deployability that justify the Ban. See ECF 216-1; ECF 216-2. However, these claims have been outright rejected by the medical community.³ Indeed, the American Medical Association unwaiveringly affirmed that “[t]here is no medically valid reason to exclude transgender individuals from military service.” ECF 255-4. Similarly, the American Psychiatric Association (“APA”) issued a statement in response to the DoD Implementation Plan noting 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.” ECF 251-3. Even former Surgeons General have critiqued DoD’s characterization of “the effectiveness of transgender medical care as demonstrating ‘considerable scientific

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 875 F.2d 699, 729 (9th Cir. 1989) (Norris, J. concurring). Following this suit, in a companion
12 challenge to the Ban, the District Court of the District of Columbia recently noted that “[t]he
13 military has not been exempted from constitutional provisions that protect the rights of
14 individuals’ and, indeed, ‘[i]t is precisely the role of courts to determine whether those rights
15 have been violated.’” *Doe 1 v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017). Thus, even in the
16 military context, courts apply heightened scrutiny, and deference does not mean the application
17 of rational basis review.

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

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

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

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

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

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

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

20 The equities and public interest strongly favor denying Defendants’ requested stay. The
21 discriminatory Ban tramples transgender Washingtonians’ Fifth Amendment equal protection
22 and substantive due process guarantees and the balance of equities and public interest always
23 favors “prevent[ing] the violation of a party’s constitutional rights[.]” *Melendres v. Arpaio*, 695
24 F.3d 990, 1002 (9th Cir. 2012). *See also* *Giovani Carandola, Ltd. v. Bason*, 303, F.3d 507, 521
25 (4th Cir. 2002) (“[U]pholding constitutional rights surely serves the public interest.”).
26

1 **4. Nationwide Injunctive Relief Was Appropriate**

2 “The purpose of [a preliminary injunction] is not to conclusively determine the rights of
3 the parties but to balance the equities as the litigation moves forward.” *Trump v. Int’l Refugee*
4 *Assistance Project*, 137 S. Ct. 2080, 2087 (2017)). Washington has 32,850 transgender adult
5 residents and each of these individuals is stigmatized and impacted by the Ban, as well as every
6 Washingtonian servicemember that is stationed throughout the country. ECF 233 at 19. The same
7 is true for Washington residents that may be temporarily deployed to locations outside of
8 Washington. The District Court was well within its discretion to maintain a nationwide
9 injunction, which is necessary to protect Washington residents from the discriminatory Ban. *See*
10 *Washington*, 847 F.3d at 1166-67; *Hawaii v. Trump*, 871 F.3d 646 (9th Cir. 2017) (affirming
11 nationwide injunction).

12 **IV. CONCLUSION**

13 For the foregoing reasons, this Court should deny Defendants’ Motion for Stay Pending
14 Appeal.

15 DATED this 14th day of May, 2018.

17 ROBERT W. FERGUSON
18 Washington Attorney General

19 /s/ La Rond Baker
20 LA ROND BAKER, WSBA No. 43610
21 COLLEEN MELODY, WSBA No. 42275
22 Assistant Attorneys General
23 Office of the Attorney General
24 800 Fifth Avenue, Suite 2000
25 Seattle, WA 98104
26 (206) 464-7744
 LaRondB@atg.wa.gov

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 14th day of May, 2018.

/s/ La Rond Baker

LA ROND BAKER, WSBA No. 43610

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-Cv-1297-MJP

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

NOTED FOR CONSIDERATION:
May 18, 2018

INTRODUCTION

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

ARGUMENT

I. Defendants Are Likely To Succeed On The Merits.

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

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

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

9 In addition, DoD’s new policy resulted from an extensive, independent review of the issue
 10 of military service by transgender individuals—a review that had already begun before the
 11 President’s statements on Twitter. *See* ECF No. 216-1; *see also* ECF No. 197. The Panel of
 12 Experts engaged in “an independent multi-disciplinary review,” ECF No. 224-2 at 17, and was
 13 charged to provide its “best military advice ... without regard to any external factors,” ECF No.
 14 224-1 at 1. It considered evidence and testimony on all sides and “made recommendations based
 15 on each Panel member’s independent military judgment.” ECF No. 224-2 at 4. The new policy
 16 is the product of “the Panel’s professional military judgment,” “the Department’s best military
 17 judgment,” and Secretary Mattis’s “own professional judgment,” ECF No. 224-1 at 2. Plaintiffs
 18 fail to acknowledge any of these facts, much less explain why representations by senior military
 19 leadership, including the Secretary of Defense himself, should be called into question.

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

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

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

13 Second, DoD’s new policy is based on gender dysphoria and its associated treatment and
 14 is, therefore, plainly subject to rational basis review. Plaintiffs’ assertion that DoD’s new policy
 15 is based on “transgender status,” Pls. Opp. at 14, cannot be squared with the terms of the DoD’s
 16 new policy, which, like the Carter policy, imposes restrictions only on those “transgender persons
 17 with a history or diagnosis of gender dysphoria.” ECF No. 224-3 at 1; see also ECF No. 224-1.
 18 And Plaintiffs cannot credibly maintain that gender-dysphoria classifications necessarily target
 19 transgender status. Pls. Opp. at 14. As Plaintiffs themselves have explained, gender dysphoria
 20 is a medical condition that only “a subset of transgender people may experience,” and restrictions
 21 based on this condition and treatment are distinct from a “sweeping exclusion of transgender
 22 people.” ECF No.129 at 17. That gender dysphoria affects a subset of transgender individuals
 23 does not transform the policy into a status-based classification. Cf. *Geduldig v. Aiello*, 417 U.S.
 24 484, 496 n.20 (1974) (“While it is true that only women can become pregnant it does not follow
 25 that every legislative classification concerning pregnancy is a sex-based classification ...”).

26
 27
 28 Ask, Don’t Tell,” 527 F.3d at 821, has no bearing on how to resolve a facial challenge to a
 military policy that turns on the medical condition of gender dysphoria.

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

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

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

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

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

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

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

17 **II. The Remaining Factors Favor A Stay.**

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

1 was diagnosed with gender dysphoria prior to the effective date of the Carter policy and has
 2 continued to serve and receive treatment pursuant to the Carter policy after it took effect.” See
 3 Declaration of Stephanie A. Barna, ¶6. In any event, asserted harms regarding military
 4 employment are not irreparable. See *Hartikka v. United States*, 754 F.2d. 1516, 1518 (9th Cir.
 5 1985) (damage to reputation as well as lost income, retirement, and relocation pay resulting from
 6 less-than-honorable discharge not irreparable). Nor is stigma alone sufficient to demonstrate
 7 standing, much less irreparable harm. *Allen v. Wright*, 468 U.S. 737, 750 (1984). Washington,
 8 for its part, fails to explain why its asserted harms are irreparable. See Wash. Opp.

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

17 **III. This Court Should Stay The Preliminary Injunction At Least Insofar As It Grants** 18 **Nationwide Relief.**

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

26 **CONCLUSION**

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

1 Dated: May 18, 2018

Respectfully submitted,

2 CHAD A. READLER
3 Acting Assistant Attorney General
4 Civil Division

5 BRETT A. SHUMATE
6 Deputy Assistant Attorney General

7 JOHN R. GRIFFITHS
8 Branch Director

9 ANTHONY J. COPPOLINO
10 Deputy Director

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

19 *Counsel for Defendants*

CERTIFICATE OF SERVICE

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

Dated: May 18, 2018

/s/ Ryan Parker

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

Counsel for Defendants

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.,

Defendant.

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

**SUPPLEMENTAL EXCERPTS OF RECORD
VOLUME III**

ROBERT W. FERGUSON
Attorney General

La Rond Baker, WSBA No. 43610
Assistant Attorney General
Washington State Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744

**INDEX TO
SUPPLEMENTAL EXCERPTS OF RECORD**

Ryan Karnoski, et al., State of Washington v. Donald J. Trump.
United States Court of Appeals
for the Ninth Circuit
No. 18-35347
United States District Court
for the Western District of Washington, Seattle
No. 2:17-cv-01297-MJP

Dkt #	Date Filed	Document Description	Vol.	SER
Vol I				
221	3/27/2018	Mar. 27, 2018 Order on Motion for Summary Judgment Hearing	I	WA SER 001-003
283	6/15/2018	Order Denying Motion to Stay Preliminary Injunction	I	WA SER 004-009

Vol II				
150	1/25/2018	Washington State's Motion for Summary Judgment	II	WA SER 010-025
163-1	1/31/2018	Amicus Brief Constitutional Accountability Center	II	WA SER 026-063
169	2/1/2018	Agreed Motion For Leave To File Amicus Brief-Legal Voice	II	WA SER 064-084
170-2	2/1/2018	Amicus Brief of the Commonwealth of-Massachusetts and Amici States	II	WA SER 085-115
178	2/12/2018	Defendants Response To Plaintiff-Intervenor Washington's Motion for Summary Judgment	II	WA SER 116-126
185	2/16/2018	Plaintiff's Reply on Summary Judgment	II	WA SER 127-138
194	2/28/2018	Cross-Motion for Summary Judgment and Opposition To Plaintiffs And Interveners Motions for Summary Judgment	II	WA SER 139-167
201	3/7/2018	Plaintiff's Reply in Support of Motion for Summary Judgment	II	WA SER 168-182
202	3/7/2018	Plaintiff Intervenor Washington's reply in support of Motion for Summary Judgment	II	WA SER 183-201
226	4/3/2018	Defendants Supplemental Brief In Opposition To Plaintiffs MSJ	II	WA SER 202-214
227	4/3/2018	Plaintiff's Supplemental Briefing in Support of MSJ	II	WA SER 215-227

228	4/3/2018	Washington's Supplemental Brief In Support Of Own MSJ	II	WA SER 228-241
238	4/30/2018	Motion to Stay Preliminary Injunction	II	WA SER 242-249
250	5/14/2018	Plaintiff's Opposition to Defendant's Motion to Stay	II	WA SER 250-265
257	5/14/2018	Response, by Intervenor Plaintiff State of Washington, to Motion to Stay Preliminary Injunction Pending Appeal	II	WA SER 266-282
261	5/18/2018	Reply, filed by Intervenor Defendants Department of Homeland Security, Elaine C. Duke, Defendants James N Mattis, Donald J. Trump, United States Department of Defense, United States of America, to Response Motion to Stay Preliminary Injunction Pending Appeal	II	WA SER 283-291

VOL III				
152-2	1/29/2018	Amicus Brief of Retired Military Officers	III	WA SER 292-316
187-1	2/16/2018	Declaration La Rond Baker In Support Of Washington's MSJ	III	WA SER 317-318
187-2	2/16/2018	Exhibit A-E-mails Dated 2/6/2018 Re: Request For Extension To File Opposition To MSJ	III	WA SER 319-323
197	2/28/2018	Declaration of Parker In Support of Defendant's Motion for Summary Judgment	III	WA SER 324-392
215	3/23/2018	Motion to Dissolve Preliminary Injunction	III	WA SER 393-420
224	3/29/2018	Declaration Of Ryan Parker In Support Of Motion To Dissolve Preliminary Injunction	III	WA SER 421-422
224-2	3/29/2018	Exhibit 2-Department of Defense Report And Recommendation On Military Service By Transgender Persons February 2008	III	WA SER 423-468
251-3	5/14/2018	American Psychological Association, APA Statement Regarding Transgender Individuals Serving in the Military Mar. 26, 2018	III	WA SER 469-470
251-4	5/14/2018	American Medical Association, Letter to James Mattis Apr. 3, 2018	III	WA SER 471-472
255-4	5/14/2018	Ford, Zack, Pence Secretly Drafted Trumps Latest Transgender Military Ban Mar. 25, 2018	III	WA SER 473-487
255-6	5/14/2018	Palm Center, Former Surgeons Gen. Debunk Pentagon Assertions About Medical Fitness Transgender Troops Mar. 28, 2018	III	WA SER 488-494
255-8	5/14/2018	Palm Center, DoD's Rationale for Reinstating the Transgender Ban Is Contradicted by Evidence April 2018	III	WA SER 495-551

255-9	5/14/2018	Copp, Tara, "All Four Service Chiefs On Record: New Harm Units Transgender Circles" Mar. 24, 2018	III	WA SER 552-555
255-14	5/14/2018	Exhibit 14 Transcript Before The Committee On Armed Services U.S. Senate 4/12/2018	III	WA SER 556-561
255-15	5/14/2018	Exhibit 15 Transcript Before Committee On Armed Services U.S. Senate 4/19/2018	III	WA SER 562-569
255-16	3/14/2018	Exhibit 15 Transcript Before Committee On Armed Services U.S. Senate 4/24/2018	III	WA SER 570-575
258	5/14/2018	Declaration La Rond Baker in Support of Washington's Response to Def's Mtn to Stay PI	III	WA SER 576-579
258-1	5/14/2018	Dept Policy HR-209-02 Equal Opportunity/Affirm. Action	III	WA SER 580-583
258-2	5/14/2018	Exhibit B – Dept. Policy HR-208-01 Anti-Discrimination	III	WA SER 584-587
258-3	5/14/2018	Directive of The Governor 16-11 6/23/2016	III	WA SER 588-590
258-4	5/14/2018	Proclamation by the Governor 18-03	III	WA SER 591-593
258-5	5/14/2018	Proclamation by the Governor 17-13	III	WA SER 594-596
258-6	5/14/2018	Proclamation by the Governor 17-12	III	WA SER 597-599

VOL IV				
34-1	9/14/2017	Department of Defense Press Briefing – Secretary Carter	IV	WA SER 600-617
34-3	9/14/2017	Statement of Chief Pentagon Spokesperson D. White On Transgender Accessions	IV	WA SER 618-619
34-6	9/14/2017	President Donald J. Trump Twitter Announcement	IV	WA SER 620-621
46	9/14/2017	Declaration of Brad R. Carson in Support of Pltf's Mtn for Prelim. Injunction	IV	WA SER 622-631
48-6	9/14/2017	Exhibit F – Implementation Guidance	IV	WA SER 632-704
56-8	9/25/2017	Department Policy No. HR-253-02 State Active-Duty Injury/Illness-Death Reporting Process	IV	WA SER 705-711
56-9	9/25/2017	WAARING Recruiting Overview	IV	WA SER 712-714

Exhibit A

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.

Case No. 2:17-cv-01297-MJP

**BRIEF OF RETIRED MILITARY
OFFICERS AND FORMER NATIONAL
SECURITY OFFICIALS AS AMICI
CURIAE IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

**NOTED ON MOTION CALENDAR:
February 16, 2018**

I. INTEREST OF AMICI CURIAE

Amici are retired military officers and former national security officials who have collectively devoted countless decades to strengthening U.S. security interests. They have been responsible for the readiness of the service members under their command in times of hostilities and peace, and supervised and participated in policy processes involving military readiness and personnel at the senior-most levels of the U.S. government, across the administrations of both major political parties. They greatly appreciate and value military expertise and the need for the judiciary to defer to it when the circumstances demand. They file this submission to offer their perspective that this is not a case where deference is

*BRIEF OF RETIRED MILITARY OFFICERS AND FORMER
NATIONAL SECURITY OFFICIALS AS AMICI CURIAE IN
SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT - (2:17-cv-01297-MJP) - 1*

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Tel: (206) 623-1745 Fax: (206) 623-7789

warranted, in light of the absence of any considered military policymaking process, and the sharp departure from decades of precedent on the approach of the U.S. military to major personnel policy changes. Furthermore, amici contend that the categorical exclusion of transgender individuals on the basis of group characteristics rather than individual fitness to serve is inimical to the national security interests of the United States.

II. ARGUMENT

On the morning of July 26, 2017, President Donald Trump issued three tweets that suddenly announced a ban on transgender service members serving in the military. The tweets did not emerge from a policy review of any kind. In advance of his decision, he did not consult his military officials; his Joint Chiefs of Staff were unaware that he planned to make this decision at all. Less than a month later, President Trump issued a Presidential Memorandum that formalized the tweets, but that document again did not identify any policymaking process or consultations with senior military officials leading to the decision. The Presidential Memorandum also did not point to a single piece of evidence demonstrating that the ban was necessary for reasons of military necessary, national security, or any other legitimate national interest.¹

He now seeks to shield that decision from judicial review, claiming throughout his papers that he is owed “the utmost deference” in cases “involving the judgment of military authorities.”² These assertions neglect the very simple fact that the President’s tweets and

¹ Presidential Memorandum from the President of the United States to Secretaries of Defense and Homeland Security, 82 Fed. Reg. 41,319 (Aug. 25, 2017) (hereinafter “Presidential Memorandum”).

² Defs.’ Mot. to Dismiss and Opp’n to Pls.’ Mot. for a Preliminary Inj., *Karnoski v. Trump*, 2:17-cv-1297-MJP, Oct. 16, 2017, Dkt. #69 at p. 6, 28 (hereinafter “Def. Mot.”); *see also id.* at 29-33.

Memorandum did not involve the judgment of any military authorities at all. In fact, the President's actions at issue here are about as far removed as one could imagine from those cases where courts have deferred to the genuine "considered" or "professional judgment" of the executive branch on military matters. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008) (quotations and citations omitted); *Goldman v. Weinberger*, 475 U.S. 503, 508-09 (1986).

Defendants are unable to point to a single case where a court afforded deference to a President's military judgment when that President undertook no considered review, consulted no military officials, and cited no evidence in support of his decision. Indeed, the President's actions here represent a remarkable departure from decades of practice across multiple administrations regarding the proper approach to making major policy changes on personnel issues within the U.S. military. And perhaps it should not come as a surprise that such an arbitrary process resulted in a policy that the evidence overwhelmingly shows will impair our military's readiness, harm unit cohesion, deplete urgently needed military resources, and undermine the foreign policy of the United States.

Although this case *affects* national security, it involves no identifiable national security *judgment* of the sort that deserves—much less compels—judicial deference. Amici know quite well the critical importance of military expertise to the security of our nation, and the need for the judiciary to defer to that expertise when the circumstances demand. However, the President should not be allowed to hide behind a cloak of deference a capricious and discriminatory act that involved no considered consultation, no professional military decision-makers, and no evidentiary basis or review, and will do grievous harm not only to

the service members immediately affected, but to the national security and foreign policy interests of the United States.

A. The President's actions departed sharply from decades of practice involving similar military policy changes.

Throughout its history, the U.S. military has exercised great care in the selection, training, and retention of qualified personnel as an integral aspect of military readiness. Significant changes to its personnel policies—particularly those involving the categorical exclusion of entire groups from military service—have been subjected time and again to a process that includes: 1) a searching policy review, 2) involving senior military officials, 3) that thoroughly examines the best available evidence on the impact and consequences of the change. This practice is a reflection of the gravity of such decisions and a realization that even incremental changes in military policy can dramatically affect our Armed Forces' overall readiness to protect our country.

The paradigmatic case of a major personnel change in the U.S. military is President Truman's decision seven decades ago to integrate African Americans into the Armed Forces. Although African Americans had served in the United States military since the Revolutionary War,³ many had served in segregated units due to perceived concerns about unit cohesion and morale.⁴ Prompted by growing concern about racial inequality and unrest in the United States, on December 5, 1946 President Truman issued an Executive Order appointing the President's Committee on Civil Rights, a presidential commission comprised of senior defense officials, religious leaders, and civil rights activists to study, *inter alia*, the

³ Michael Lee Lanning, *African Americans in the Revolutionary War* 73 (2000).

⁴ Martin Binkin & Mark J. Eitelberg, *Blacks and the Military* 25-26 (1982).

1 desegregation of the military.⁵ Over nearly a year, the Committee deliberated across ten
 2 meetings, undertook multiple studies, heard from numerous witnesses in public and private
 3 hearings, received hundreds of communications from private organizations and individuals,
 4 and was assisted in its work by twenty-five agencies across the federal government.⁶

5
 6 In December 1947, the Committee issued its final report. The report found that the
 7 practices of the military services in excluding African-Americans was “indefensible,”
 8 concluding that that practice had “cost[] lives and money in the inefficient use of human
 9 resources,” “weaken[ed] our defense” by “preventing entire groups from making their
 10 maximum contribution to the national defense,” and “impose[d] heavier burdens on the
 11 remainder of the population.”⁷ As a result, the Committee called for an immediate end to
 12 discrimination and segregation based on “race, color, creed, or national origin, in the
 13 organization and activities of all branches of the Armed Services.”⁸ Several months later,
 14 President Truman issued an executive order declaring that it would be the policy of the United
 15 States to require equality of treatment and opportunity for all persons in the U.S. Armed
 16 Services without regard to race, and convening a Committee on Equality of Treatment and
 17

18
 19
 20
 21
 22 ⁵ Harry S. Truman Library and Museum, *Records of the President’s Committee on Civil Rights* (2000), available
 23 at <http://www.trumanlibrary.org/hstpape/pccr.htm>.

24 ⁶ President’s Committee on Civil Rights, *To Secure These Rights: The Report of the President’s Committee on*
Civil Rights XI (1947), <http://www.trumanlibrary.org/civilrights/srights1.htm>; *Records of the President’s*
Committee on Civil Rights, *supra* note 5.

25 ⁷ *To Secure These Rights: The Report of the President’s Committee on Civil Rights XI*, *supra* note 5, at 46-47,
 162-63.

26 ⁸ *Id.* at 163.

1 Opportunity in the Armed Services to “recommend revisions in military regulations in order
2 to implement the government’s policy of desegregation of the armed services.”⁹

3 The Obama Administration’s repeal of the Don’t Ask, Don’t Tell directive, which
4 allowed gay, lesbian or bisexual people to serve openly in the military, followed a similarly
5 searching process. The repeal came on the heels of a comprehensive Pentagon review. In
6 March 2010, Secretary of Defense Gates convened a working group co-chaired by General
7 Counsel Jeh Johnson of the Department of Defense and General Carter F. Ham of the U.S.
8 Army, and comprised of senior civilian and military leaders from across the Armed Services,
9 to undertake a comprehensive review of the impacts of a repeal of the law.¹⁰ The working
10 group conducted 95 “information exchange forums” at 51 bases and installations around the
11 world, conducted 140 focus groups, solicited input from nearly 400,000 active duty and
12 reserve service members, engaged the RAND Corporation to update its earlier 1993 study,
13 *Sexual Orientation and U.S. Military Personnel Policy*, studied foreign militaries’ integration
14 of gays and lesbians, and conducted a thorough legal review.¹¹

17 On November 30, 2010, the working group issued a 256-page report rejecting the
18 contention that allowing gays to serve openly in the military would result in long-lasting and
19 detrimental effects on unit cohesion or the ability of units to conduct military missions.¹² It
20 also offered a series of recommendations for implementing a repeal of the law in the areas of
21

22 ⁹ Harry S. Truman Library and Museum, *Records of the President’s Committee on Equality of Treatment and*
23 *Opportunity in the Armed Services*, available at <http://www.trumanlibrary.org/hstpape/fahy.htm>; Exec. Order
No. 9981, 13 Fed. Reg. 4313 (July 28, 1948).

24 ¹⁰ U.S. Dep’t of Defense, *Report of the Comprehensive Review of the Issues Associated with a Repeal of “Don’t*
25 *Ask, Don’t Tell,”* Nov. 30, 2010,
[http://archive.defense.gov/home/features/2010/0610_dadt/DADTRReport_FINAL_20101130\(secure-hires\).pdf](http://archive.defense.gov/home/features/2010/0610_dadt/DADTRReport_FINAL_20101130(secure-hires).pdf).

26 ¹¹ *Id.* at 33-39.

¹² *Id.* at 119.

1 leadership, training, education, and the management of moral and religious objections.¹³
 2 Shortly thereafter, Secretary Gates and Chairman of the Joint Chiefs Admiral Mullen called
 3 on Congress to immediately repeal the Don't Ask, Don't Tell law. Congress passed just such
 4 a bill, which President Obama signed into law. Seven months later, President Obama, newly
 5 confirmed Secretary of Defense Panetta, and Admiral Mullen formally certified under the new
 6 statute that the American military was ready to repeal the old policy.¹⁴
 7

8 The decision to include female service members in combat roles likewise emerged
 9 from a careful evidence-based process—this time, a congressionally mandated policy and
 10 legal review undertaken by the Secretary of Defense, in consultation with the Military
 11 Department Secretaries, of the policies and regulations that had officially barred women from
 12 serving in combat positions. The process involved an “extensive review” of the policies and
 13 laws governing the assignment of women in the Armed Forces, and the feasibility of opening
 14 to women military occupational specialties that were then closed to them. After that review,
 15 the Department of Defense found in a February 2012 report that, given the “dynamics of the
 16 modern-day battlefield . . . there is no compelling reason for continuing the portion of the
 17 policy that precludes female service members from being assigned to . . . direct ground
 18 combat units,” and declared its intent to rescind the “co-location rule” that prevented female
 19 Service members from being assigned to units that were doctrinally required to physically co-
 20 locate with direct ground combat units.¹⁵
 21
 22

23
 24 ¹³ *Id.* at 3.

25 ¹⁴ Jody Feder, “Don't Ask, Don't Tell”: A Legal Analysis, CRS Rep. R40795, Aug. 6, 2013.

26 ¹⁵ U.S. Dep't of Defense, *Report to Congress on the Review of Laws, Policies, and Regulations Restricting the Service of Female Members in the U.S. Armed Forces*, Feb. 2012; Fact Sheet: Women in Service Review (WISR) Implementation, https://www.defense.gov/Portals/1/Documents/pubs/Fact_Sheet_WISR_FINAL.pdf.

Secretary Panetta also issued a directive at that time to conduct an in-depth review of the remaining barriers to service for women. After several months of additional study, on January 24, 2013, Secretary Panetta announced that the Department would rescind the Direct Combat Exclusion Rule on women serving in previously restricted occupations.¹⁶ He also called on each of the services to undertake their own separate “women in the service” reviews of how to move forward with the integration of women into previously closed positions, and identify any recommended exemptions for particular positions.¹⁷ This process led to more than thirty additional studies over the next three years to inform the contours of the policy change.¹⁸ After the Secretaries of each of the services completed their reviews and submitted their final recommendations, Secretary of Defense Ashton Carter on December 3, 2015 ordered the military to open all combat jobs to women who meet the validated occupational standards.¹⁹

Finally, the very opening of military service to transgender personnel that President Trump now seeks summarily to reverse emerged from its own rigorous policymaking process. In July 2015, Secretary Carter issued a directive creating a formal working group to study the “policy and readiness implications of welcoming transgender persons to serve openly” in the military.²⁰ Over the course of the following year, the working group engaged in what one

¹⁶ Kristy N. Kamarck, *Women in Combat: Issues for Congress*, Cong. Res. Serv. R42075, Dec. 13, 2016.

¹⁷ U.S. Dep’t of Defense, *Statement from Pentagon Press Secretary Peter Cook on Secretary Carter’s Approval of Women in Service Review Implementation Plans*, March 10, 2016.

¹⁸ Fact Sheet, *supra* note 15.

¹⁹ U.S. Sec’y of Defense, *Remarks on the Women-in-Service Review*, Dec. 3, 2015, <https://www.defense.gov/News/Speeches/Speech-View/Article/632495/remarks-on-the-women-in-service-review/>; Kamarck, *supra* note 16.

²⁰ U.S. Dep’t of Defense, *Statement by Secretary of Defense Ash Carter on DOD Transgender Policy*, Release No: NR-272-15, July 13, 2015.

senior member described as a “detailed, deliberative, [and] carefully run process.”²¹ Each military service was represented in the working group by a senior uniformed officer, a senior civilian official, and various staff members.²² The working group created sub-groups to investigate specific issues, consulted with medical, personnel, and readiness experts, and spoke with health insurance companies and commanders of transgender service members.²³ At the end of this comprehensive process, the working group unanimously concluded that transgender individuals should be permitted to serve openly in the Armed Forces.²⁴

Meanwhile, the Department also had commissioned a separate, independent study from the RAND Corporation. The study focused on seven broad research questions, among them the cost of providing medical coverage to transgender individuals, the readiness implications of the proposed policy, and any applicable lessons from the eighteen foreign militaries that already allowed open transgender service.²⁵ RAND laid out its findings in a 71-page report, concluding that allowing transgender people to serve openly would place an “exceedingly small” burden on health care expenditures and have a “minimal impact” on readiness.²⁶ Based on the thorough review carried out by these two groups, Secretary Carter announced the policy change in June 2016. For more than a year after that change, transgender individuals currently in the military were able to serve openly alongside their

²¹ Decl. of Raymond Edwin Mabus, Jr. In Support of Plaintiffs’ Motion for Preliminary Injunction at 3, *Karnoski v. Trump*, No. 2:17-cv-1297, Dkt. #48 at p. 3 (W.D. Wash. 28 Aug. 2017).

²² Decl. of Brad R. Carson in Support of Plaintiffs’ Motion for Preliminary Injunction at 3, *Karnoski v. Trump*, No. 2:17-cv-1297, Dkt. #46 at p. 3 (W.D. Wash. 28 Aug. 2017).

²³ *Id.* at 3.

²⁴ *Id.* at 7.

²⁵ RAND Corp., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly* ix (2016).

²⁶ *Id.* at xi and 47.

1 fellow service members. The Department released a 71-page handbook specifying
 2 implementation strategies,²⁷ and issued guidelines for both in-service medical transition
 3 procedures and treatment of gender dysphoria.²⁸ But for President Trump’s abrupt about-
 4 face, this studied, measured, and incremental process would have concluded on January 1,
 5 2018 with the accession of openly transgender individuals into the U.S. military.
 6

7 Each of the above personnel decisions was the product of a rigorous policy review
 8 involving senior military officials and an evidence-based examination of the likely impact of
 9 the proposed change. In sharp contrast, on the morning of July 26, 2017, President Trump
 10 suddenly announced a ban on transgender persons serving in the military. In a series of three
 11 tweets, the President (speaking as @realDonaldTrump) declared,
 12

13 “The United States Government will not accept or allow . . . [t]ransgender
 14 individuals to serve in any capacity in the U.S. Military. Our military must be
 15 focused on decisive and overwhelming . . . victory and cannot be burdened
 16 with the tremendous medical costs and disruption that transgender [sic] in the
 17 military would entail. Thank you[.]”

18 No effort was made—nor evidence presented—to show that this pronouncement
 19 resulted from any analysis of the cost or disruption allegedly caused by allowing transgender
 20 individuals to serve openly in the military. The Joint Chiefs of Staff were not consulted at all
 21 on the decision before the President issued the tweet. Secretary of Defense James N. Mattis,
 22 who was on vacation at the time, was given only a single day’s notice that the decision was
 23

24 ²⁷ U.S. Dep’t of Defense, *Transgender Service in the U.S. Military: An Implementation Handbook* (2016).

25 ²⁸ U.S. Dep’t of Defense, *Instr. 1300.28, In-Service Transition for Transgender Service Members* (Oct. 1, 2016);
 26 Memorandum, Assistant Secretary of Defense for Health Affairs, to Assistant Secretary of the Army et al.,
Guidance for Treatment of Gender Dysphoria for Active and Reserve Component Service Members, July 29,
 2016.

1 coming.²⁹ The decision was announced so abruptly that White House and Pentagon officials
 2 were unable to explain the most basic of details about how it would be carried out.³⁰

3 About four weeks later, President Trump followed up the tweets with a Memorandum
 4 entitled “Military Service by Transgender Individuals,” directed to the Secretary of Defense
 5 and the Secretary of Homeland Security.³¹ This Memorandum instructs the Department of
 6 Defense to return to the earlier policy of discrimination against transgender service members,
 7 including by involuntary or dishonorable discharge, and maintains and extends in time the
 8 current bar on accession of transgender individuals into the military.³² Again, the
 9 Memorandum does not point to any policy process that led to the decision, does not cite
 10 consultations with any military officers, and does not identify a single piece of evidence to
 11 support the decision. The Memorandum suggests in passing that the Departments would
 12 “continue to study the issue,” even as it declares a sweeping change affecting thousands of
 13 transgender service-members.
 14
 15

16 The President now seeks to shield this decision from judicial scrutiny by invoking “the
 17 highly deferential review” that the Constitution has historically afforded national security and
 18 military judgments.³³ He claims that such deference is appropriate here because the lawsuit is
 19
 20

21 ²⁹ Barbara Starr et al., *US Joint Chiefs blindsided by Trump’s transgender ban*, CNN (July 27, 2017),
 22 <http://www.cnn.com/2017/07/27/politics/trump-military-transgender-ban-joint-chiefs/index.html>; Julie
 23 Hirschfeld Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*,
 24 N.Y. Times (July 26, 2017), [https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-](https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html?_r=0)
 25 [military.html?_r=0](https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html?_r=0).

26 ³⁰ Davis & Cooper, *supra* note 29.

³¹ Presidential Memorandum, *supra* note 1.

³² The Proclamation states that the new policies will go into effect by March 23, 2018, and the Department of
 Defense has already started to develop plans to carry out the directive. Presidential Memorandum, *supra* note 1;
 Statement by Secretary of Defense Jim Mattis on Military Service by Transgender Individuals, Aug. 29, 2017.

³³ Def. Mot. at 6.

challenging “military decision-making,” and “professional military judgments.”³⁴ However, there is no sign of respect for military decision-making or professional military judgments to be found anywhere in the President’s actions. He not only failed to involve senior military officials in his decision at all, but he is seeking to displace the considered judgment of military officials regarding the treatment of transgender individuals in the military from just a year earlier. The Supreme Court in fact has given “great deference to the *professional judgment of military authorities* concerning the relative importance of a particular military interest,” *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008) (emphasis added) (quotations and citations omitted), and the “*considered professional judgment*” of “appropriate military officials,” *Goldman v. Weinberger*, 475 U.S. 503, 508-09 (1986) (emphasis added). But the record in this case hints at nothing remotely resembling a considered or professional judgment of this sort.

Earlier cases show how the courts have looked for considered judgment before affording constitutional deference to the coordinate branches in areas of policy making involving military personnel. For example, in *Rostker v. Goldman*, 453 U.S. 57 (1981), the Supreme Court upheld the constitutionality of provisions that authorized the President to require men, but not women, to register for the draft. The Court deferred to “Congress’ evaluation of th[e] evidence,” noting that “[t]his case is quite different from several of the gender-based discrimination cases we have considered in that . . . Congress did not act ‘unthinkingly’ or ‘reflexively and not for any considered reason.’” *Id.* at 72, 83 (quoting Br. for Appellees) (emphasis omitted). The Court pointed to the fact that the issue was

³⁴ Def. Mot. at 6, 29.

1 “extensively considered by Congress in hearings, floor debate, and in committee.” *Id.* at 72;
 2 *see also, e.g., id.* at 63, 79.

3 On the other hand, the U.S. District Court for the District of Columbia found
 4 unconstitutional a statutory provision barring the assignment of female personnel to duty on
 5 Navy vessels other than hospital ships and transports. *Owens v. Brown*, 455 F. Supp. 291
 6 (D.D.C. 1978). The court acknowledged that “a high degree of deference is owed to the
 7 political branches of government in the area of military affairs,” in part because “oversight of
 8 military operations typically involves complex, subtle, and professional judgments that are
 9 best left to those steeped in the pertinent learning.” *Id.* at 299 (quotations and citations
 10 omitted). But the court noted that the provision in that case “was added casually, over the
 11 military’s objections and without significant deliberation,” and the court found compelling
 12 “the results of the experiment conducted by the Navy on the USS Sanctuary . . . that assigning
 13 women to noncombat duty on vessels will pose no insurmountable obstacles.” *Id.* at 305, 309.

14 The courts have also chosen or declined to afford deference to the national security
 15 prerogatives of the executive based on whether the decision reflected a considered
 16 policymaking process. In *Thomasson v. Perry*, the Fourth Circuit premised its decision
 17 upholding the constitutionality of the Don’t Ask, Don’t Tell policy on a lengthy discussion of
 18 the policy deliberations that took place before the enactment of the directive, including studies
 19 and reviews undertaken by the Department of Defense, the RAND Corporation, and
 20 congressional committees, and consultations with the Joint Chiefs of Staff and leaders of each
 21 service. 80 F.3d 915, 921-23 (4th Cir. 1996). Emphasizing that the directive emerged from
 22 an “exhaustive review” and “extensive deliberation” by the executive branch and Congress,
 23
 24
 25
 26

the court only then went on to defer to what it described as the “considered judgment” of those coordinate branches of government. *Id.* at 922-27.

But when the record shows no such considered judgment or process, the courts have chosen not to defer to the President. Recently, in *Int’l Refugee Assistance Project (“IRAP”) v. Trump*, the Fourth Circuit ruled that the plaintiffs challenging President Trump’s second Executive Order³⁵ restricting the entry of individuals from several Muslim-majority countries would likely succeed on the merits of their Establishment Clause claim, over the President’s attempt to invoke deference on national security grounds. 857 F.3d 554 (4th Cir. 2017), *vacated as moot sub nom., Trump v. Int’l Refugee Assistance Project*, __ S. Ct. __, 2017 WL 4518553.³⁶ In reaching that conclusion, the Court gave significant weight to “the exclusion of national security agencies from the decision-making process,” and the fact that “President Trump issued the First Executive Order without consulting the relevant national security agencies,” to conclude that the Order’s “stated national security interest was provided in bad faith, as a pretext for its religious purpose.” *Id.* at 592, 596.

President Trump’s actions in this case show no signs of the policy judgment that traditionally has given rise to judicial deference on military issues. This is not a case involving the “professional judgment” of “appropriate military officials,” as no military officials were involved in the decision at all. *Goldman*, 475 U.S. at 508-09. Nor is this a case where the decision resulted from an “exhaustive review,” as in fact there was no review to

³⁵ Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

³⁶ Although the decision was vacated as moot, such decisions are relied on by courts for their persuasive value, including those in the Ninth Circuit. *See, e.g., In re SNTL Corp.*, 571 F.3d 826, 843 n.19 (9th Cir. 2009); *DHX, Inc. v. Allianz AGF MAT, Ltd.*, 425 F.3d 1169, 1176 (9th Cir. 2005); *Gherebi v. Bush*, 374 F.3d 727, 737 n.14 (9th Cir. 2004); *Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001); *Orhorhaghe v. INS*, 38 F.3d 488, 493 n.4 (9th Cir. 1994).

1 speak of. *Thomasson*, 80 F.3d at 927. The President’s tweets and Memorandum far more
 2 closely resemble those where the decision was made “casually,” *Owens*, 455 F. Supp. at 305,
 3 or “reflexively and not for any considered reason,” *Rostker*, 453 U.S. at 72, or “without
 4 consulting the relevant national security agencies” in the process, *IRAP*, 857 F.3d at 596.
 5

6 Indeed, the process that led to the decision in this case is not only wanting, but is a
 7 departure from the steps that were followed in considering similar personnel changes in cases
 8 throughout history. The Supreme Court has emphasized that “[d]epartures from the normal
 9 procedural sequence . . . might afford evidence that improper purposes are playing a role” in
 10 government action. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267
 11 (1977). The President’s failure to consult any military experts, his failure to ground his
 12 decision in any evidence or facts, indeed his failure to undertake any considered review at all,
 13 is so dramatic a break from precedent for such a major personnel change that it only provides
 14 further reason to question his insistence now to this Court that national security concerns, and
 15 not discriminatory animus, motivated the decision.
 16

17 **B. The President’s actions will harm the national security and foreign policy**
 18 **interests of the United States.**

19 The Presidential Memorandum asserts that a ban on transgender service members is
 20 necessary to avoid “hinder[ing] military effectiveness and lethality, disrupt[ing] unit cohesion,
 21 or tax[ing] military resources.”³⁷ However, the Memorandum offers not a single piece of
 22 evidence to support these assertions. In fact, the evidence is overwhelmingly to the
 23 contrary—the categorical exclusion of transgender individuals on the basis of group
 24

25
 26 ³⁷ Presidential Memorandum, *supra* note 1.

1 characteristics rather than individual fitness will gravely harm the effectiveness of our
2 military and the national security and foreign policy interests of the United States.

3 First, the President's actions will negatively impact military readiness. Imposing a
4 ban on transgender service will significantly disrupt and distract from the core mission of the
5 military services by pulling people out of mission-ready, mission-critical units. President
6 Trump proposes to expand the number of active duty Army and Marine Corps service
7 members by 70,000 personnel—but to accomplish such an ambitious goal without degrading
8 the effectiveness of our troops, the U.S. military will need to recruit all qualified individuals,
9 not to exclude entire groups from military service based on rank prejudice and sweeping
10 generalizations and without regard for individuals' capacity to serve.³⁸ Significantly, the
11 RAND Corporation found that transition-related health care would have a negligible impact
12 on the ability of any affected soldiers to deploy.³⁹

15 Second, these actions pose a serious threat to unit cohesion. They order transgender
16 troops to live a lie, authorize discriminatory behavior among fellow service members, and
17 place troops in the unconscionable position of having “to choose between reporting their
18 comrades or disobeying policy.”⁴⁰ Transgender service members have long been allowed to
19 serve openly in the militaries of such close United States allies as Israel and the United
20 Kingdom without any evidence of harm to unit cohesion, and these transgender service
21 members have already served alongside U.S. troops in NATO units without any demonstrated
22

23
24 ³⁸ K.K. Rebecca Lai et al., *Is America's Military Big Enough?*, N.Y. Times, Mar. 22, 2017.

25 ³⁹ RAND Corp., *supra* note 25.

26 ⁴⁰ Palm Center, Fifty-Six Retired Generals and Admirals Warn That President Trump's Anti-Transgender Tweets, If Implemented, Would Degrade Military Readiness 1 (Aug. 1, 2017), <http://www.palmcenter.org/wp-content/uploads/2017/08/56-GOFO-statement-2.pdf>.

1 adverse effect. In fact, the RAND study looked at the experiences of the 18 foreign countries
 2 that permit open transgender military service and found not only that such a policy did not
 3 negatively affect cohesion, but “direct interactions with transgender individuals significantly
 4 reduce negative perceptions and increase acceptance, which would suggest that those who
 5 have previously interacted with transgender individuals would be more likely to be accepting
 6 of them in the future.”⁴¹

8 Third, the President’s decision will deplete the military of valuable funds at a moment
 9 of budget austerity. According to one estimate, the financial cost to recruit, replace, and
 10 retrain the estimated 12,800 service members who would be ejected from the military under
 11 the new policy would be \$960 million.⁴² On the other side of the ledger, the RAND report
 12 found that even in “the most extreme scenario that we were able to identify using the private
 13 health insurance data, we expect only a 0.13-percent (\$8.4 million out of \$6.2 billion) increase
 14 in active component health care spending” as a result of incorporating openly transgender
 15 troops into the military.⁴³ And so, the President’s decision will cost the U.S. military more
 16 money than it saves by a ratio of nearly 115 to 1.

18 Finally, judicial deference to the President’s actions would send a troubling signal to
 19 those abroad, showing both allies and adversaries that the United States military is willing to
 20 distort its justly admired personnel policies to serve prejudice and political expediency. The
 21 President’s tweets and Memorandum convey to the world that able and patriotic American
 22

24 ⁴¹ RAND Corp., *supra* note 25, at 44 (internal citations omitted).

25 ⁴² Palm Center, Discharging Transgender Troops Would Cost \$960 Million (Aug. 2017),
<http://www.palmcenter.org/wp-content/uploads/2017/08/cost-of-firing-trans-troops-3.pdf>.

26 ⁴³ RAND Corp., *supra* note 25, at xi-xii. **Error! Bookmark not defined.**

1 citizens, eager and qualified to serve their country's military, can nevertheless be denied equal
 2 rights and opportunity based on illusory arguments. That message undermines the efforts of
 3 the U.S. government to advance principles of non-discrimination and equality throughout the
 4 world as a longstanding central tenet of its foreign policy, and erodes the credibility of the
 5 United States as a leader in seeking to hold governments accountable to their human rights
 6 obligations, not least of all as a critical avenue for promoting peace and security and avoiding
 7 humanitarian crises around the globe.

8
 9 Against all of the above evidence of harm, the President's tweets and Memorandum
 10 did not cite a single piece of information to the contrary. In their court papers, Defendants
 11 mostly have gestured towards language from the RAND study that they claim could have
 12 served as the basis for this decision, while even they are forced to acknowledge the study's
 13 own conclusions (still undisputed in this record) that there will be a "negligible" impact on
 14 readiness, a "minimal" impact on unit cohesion and relatively low costs.⁴⁴ For the most part
 15 though, Defendants have sought to defend the President's actions not on the evidence or the
 16 facts, but by falling back on their core argument: "it is not this Court's role to resolve a battle
 17 of the experts in reviewing a military policy."⁴⁵ But there is no battle, because they cite no
 18 experts as the basis for this decision to overturn abruptly a considered policy, only tweets and
 19 a memorandum benefiting from no process, citing no evidence, and soliciting none of the vast
 20 professional expertise that comprises the ranks of our Nation's military leaders.
 21
 22
 23
 24

25 ⁴⁴ Def. Mot. at 7; RAND Corp. *supra* note 5, at 47, 70.

26 ⁴⁵ Def. Mot. at 34.

For all of the foregoing reasons, the plaintiffs' request for relief should be granted.

Respectfully Submitted,

By s/ Jake Ewart

*Attorneys for Amici Curiae Retired Military
Officers and Former National Security Officials*

Harold Hongju Koh
Matthew S. Blumenthal
RULE OF LAW CLINIC
Yale Law School
127 Wall Street, Suite 4600
P.O. Box 208215
New Haven, CT 06520-8215
Telephone: (203) 432-4932
Email: harold.koh@YlsClinics.org

Phillip Spector
MESSING & SPECTOR LLP
1200 Steuart Street #2112
Baltimore, MD 21230
Telephone: (202) 277-8173
Email: ps@messingspector.com

*Affiliated Attorneys for Amici Curiae Retired
Military Officers and Former National Security
Officials, but not appearing*

CERTIFICATE OF SERVICE

I, Jake Ewart, certify under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in this case are registered CM/ECF users. I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, and that service of the foregoing document will be accomplished by the CM/ECF system on January 26, 2018.

DATED this 26th day of January, 2018.

HILLIS CLARK MARTIN & PETERSON P.S.

By s/ Jake Ewart

Jake Ewart, WSBA #38655
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789
Email: jake.ewart@hcmp.com

*Attorneys for Amici Curiae Retired Military
Officers and Former National Security Officials*

APPENDIX

LIST OF AMICI

1. Brigadier General (Ret.) Clara L. Adams-Ender, USA.
2. Brigadier General Ricardo Aponte, USAF (Ret.).
3. Vice Admiral Donald Arthur, USN (Ret.).
4. Major General (Ret.) Donna Barbisch, USA.
5. Michael R. Carpenter served as Deputy Assistant Secretary of Defense for Russia, Ukraine, Eurasia from 2015 to 2017.
6. Brigadier General Stephen A. Cheney, USMC (Ret.).
7. Brigadier General (Ret.) Julia Cleckley, USA.
8. Derek Chollet served as Assistant Secretary of Defense for International Security Affairs from 2012 to 2015.
9. Rear Admiral Christopher Cole, USN (Ret.).
10. Major General J. Gary Cooper, USMC (Ret.).
11. Rudy DeLeon served as Deputy Secretary of Defense from 2000 to 2001. Previously, he served as Under Secretary of Defense for Personnel and Readiness from 1997 to 2000.
12. Rear Admiral Jay A. DeLoach, USN (Ret.).
13. Brigadier General John W. Douglass, USAF (Ret.) served as Assistant Secretary of the Navy for Research, Development and Acquisition from 1995 to 1998.
14. Major General (Ret.) Paul D. Eaton, USA.
15. Major General (Ret.) Mari K. Eder, USA.
16. Andrew Exum served as Deputy Assistant Secretary of Defense for Middle East Policy from 2015 to 2017.
17. Brigadier General (Ret.) Evelyn "Pat" Foote, USA.

18. Lieutenant General Walter E. Gaskin, USMC (Ret.).
19. Vice Admiral Kevin P. Green, USN (Ret.).
20. General Michael Hayden, USAF (Ret.), served as Director of the Central Intelligence Agency from 2006 to 2009, and Director of the National Security Agency from 1995 to 2005.
21. Chuck Hagel served as Secretary of Defense from 2013 to 2015. From 1997 to 2009, he served as U.S. Senator for Nebraska.
22. Kathleen Hicks served as Principal Deputy Under Secretary of Policy from 2012 to 2013.
23. Brigadier General (Ret.) David R. Irvine, USA.
24. Lieutenant General Arlen D. Jameson (USAF) (Ret.), served as the Deputy Commander of U.S. Strategic Command.
25. Brigadier General (Ret.) John H. Johns, USA.
26. Colin H. Kahl served as Deputy Assistant to the President and National Security Advisor to the Vice President. Previously, he served as Deputy Assistant Secretary of Defense for the Middle East from 2009 to 2011.
27. Rear Admiral Gene Kendall, USN (Ret.).
28. Lieutenant General (Ret.) Claudia Kennedy, USA.
29. Major General (Ret.) Dennis Laich, USA.
30. Major General (Ret.) Randy Manner, USA.
31. Brigadier General (Ret.) Carlos E. Martinez, USAF (Ret.).
32. General (Ret.) Stanley A. McChrystal, USA, served as Commander of Joint Special Operations Command from 2003 to 2008, and Commander of the International Security Assistance Force and Commander, U.S. Forces Afghanistan from 2009 to 2010.
33. Kelly E. Magsamen served as Principal Deputy Assistant Secretary of Defense for Asian and Pacific Security Affairs from 2014 to 2017.

34. Leon E. Panetta served as Secretary of Defense from 2011 to 2013. From 2009 to 2011, he served as Director of the Central Intelligence Agency.
35. Major General (Ret.) Gale S. Pollock, CRNA, FACHE, FAAN.
36. Rear Admiral Harold Robinson, USN (Ret.).
37. Brigadier General (Ret.) John M. Schuster, USA.
38. David Shear served as the Assistant Secretary of Defense for Asian and Pacific Security Affairs from July 2014 to June 2016.
39. Rear Admiral Michael E. Smith, USN (Ret.).
40. Brigadier General (Ret.) Paul Gregory Smith, USA.
41. Julianne Smith served as Deputy National Security Advisor to the Vice President of the United States from 2012 to 2013. Previously, she served as the Principal Director for European and NATO Policy in the Office of the Secretary of Defense in the Pentagon.
42. Admiral James Stavridis, USN (Ret.), served as the 16th Supreme Allied Commander at NATO.
43. Brigadier General (Ret.) Marianne Watson, USA.
44. William Wechsler served as Deputy Assistant Secretary for Special Operations and Combating Terrorism at the U.S. Department of Defense from 2012 to 2015.
45. Christine E. Wormuth served as Under Secretary of Defense for Policy from 2014 to 2016.
46. Rear Admiral Dick Young, USN (Ret.).

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD TRUMP, et al.,

Defendants.

Case No: 2:17-cv-1297-MJP

**DECLARATION OF
LA ROND BAKER IN
SUPPORT OF
WASHINGTON'S SUMMARY
JUDGMENT REPLY**

STATE OF WASHINGTON,

Intervenor-Plaintiff,

v.

DONALD TRUMP, et al,

Intervenor-Defendants.

Pursuant to 28 U.S.C. § 1746(2), I, La Rond Baker, hereby declare as follows:

1. I am counsel of record for Washington, am over the age of eighteen (18), and am competent to testify and make this declaration based on my personal knowledge.

2. I am counsel for the State of Washington, and I make this declaration as a representative of the State of Washington in support of Washington's Reply on Summary Judgment.

3. Attached hereto as **Exhibit A** is an email communication between Ryan Parker and counsel for Washington and Private Plaintiffs.

4. Attached hereto as **Exhibit B** are Defendants' Initial Disclosures dated February 9, 2018.

Dated this 16th day of February, 2018.

ROBERT W. FERGUSON
Washington Attorney General

/s/ La Rond Baker

LA ROND BAKER, WSBA No. 43610
COLLEEN MELODY, WSBA No. 42275
Assistant Attorneys General
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744
LaRondB@atg.wa.gov

Baker Declaration Exhibit A

From: [Melody, Colleen \(ATG\)](#)
To: "Peter Renn"; vanessa.barsanti@kirkland.com; [Parker, Ryan \(CIV\)](#); [Baker, La Rond \(ATG\)](#); jheinz@kirkland.com
Cc: [Carmichael, Andrew E. \(CIV\)](#); [Skurnik, Matthew \(CIV\)](#); [Natalie Nardecchia](#); [Tyson, Ben](#)
Subject: RE: Karnoski v. Trump: Call
Date: Tuesday, February 06, 2018 5:41:44 PM

Ryan:

I appreciate our call of earlier today.

Washington is likewise unable to consent to your request for an extension of 45 days to file your opposition to summary judgment in this case. Washington relied exclusively on Defendants' evidence and public documents in support of its motion for summary judgment, and the arguments and evidence offered by the Private Plaintiffs are familiar from this and other litigation on these same issues.

As you mentioned on today's call, Defendants take the position that the February 21 implementation plan may have a significant impact on this case. To the extent that Defendants' extension request is intended to allow time for the further development, finalization, and release of the implementation plan, Washington's position is that the development of post hoc evidence is to justify the challenged policy is an insufficient ground for a briefing extension.

Under Local Rule 7(d)(2)(A), and because nearly two weeks have passed since Washington and the Private Plaintiffs filed their motions, we do not believe there is sufficient time for the parties to brief any motion for relief from a deadline before next Monday's responsive briefing deadline. If Defendants nonetheless intend to proceed with a motion, please let me know so that I may provide Washington's statement of position for your motion.

Sincerely,

Colleen

Colleen M. Melody

Civil Rights Unit Chief
Office of the Washington State Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-5342

From: Peter Renn [<mailto:prenn@lambdalegal.org>]
Sent: Tuesday, February 06, 2018 4:54 PM
To: vanessa.barsanti@kirkland.com; Parker, Ryan (CIV) <Ryan.Parker@usdoj.gov>; Baker, La Rond (ATG) <LaRondB@ATG.WA.GOV>; jheinz@kirkland.com
Cc: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Skurnik, Matthew (CIV) <Matthew.Skurnik@usdoj.gov>; Melody, Colleen (ATG) <ColleenM1@ATG.WA.GOV>; Natalie Nardecchia <nNardecchia@lambdalegal.org>; Tyson, Ben <ben.tyson@kirkland.com>

Subject: RE: Karnoski v. Trump: Call

Ryan,

Thank you for speaking with us this morning regarding your request for a 45-day extension of time to oppose the summary judgment motions. Although we are generally willing to work with you on deadlines, including most recently in granting you a two-week extension on your response to our document requests and interrogatories, we aren't able to agree to your extension request on this occasion.

We informed you back in December that we would be moving for summary judgment. In addition, the argument and evidence submitted in support of our motion for summary judgment is substantially similar to that filed in support of the preliminary injunction motion in this and other cases challenging the policy. We also informed you of that similarity in advance of when we actually filed the motion for summary judgment. Likewise, the amicus briefs filed in support of the Plaintiffs were in large part previously filed in the other cases several months ago.

Furthermore, we understand that Defendants recently represented to the court in the Stone case that the reason you did not identify any witnesses in your initial disclosures is because you intend to defend only whatever finalized policy emerges from the implementation plan that must be completed by February 21st. If that is your position, and you intend to argue that Plaintiffs' current challenge is moot, we don't see why you would need the additional time requested to prepare your opposition.

Finally, on the discovery front, because Defendants plan to oppose the summary judgment motion, we still need to continue to prosecute our own case and prepare for trial. We therefore cannot agree to a protective order that prevents us from pursuing discovery to the extent such discovery is not already sought in other cases challenging the policy.

Regards,
Peter

Peter Renn
Senior Attorney
Lambda Legal
Western Regional Office
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010-3512
Tel 213-382-7600 ext. 228
Fax 213-351-6050
prenn@lambdalegal.org
www.lambdalegal.org

Admitted to practice in California

To become a member or make a donation, visit <http://www.lambdalegal.org/join>

Lambda Legal: Making the case for equality

CONFIDENTIALITY NOTICE: This email transmission from Lambda Legal Defense and Education Fund, Inc. and any documents, files or previous email messages attached to it may contain confidential information that is legally privileged. If you are not the intended recipient, or a person responsible for delivering it to the intended recipient, you are hereby notified that any disclosure, copying, distribution or use of any of the information contained in or attached to this transmission is STRICTLY PROHIBITED. If you have received this transmission in error, please immediately notify us by reply email or by telephone at (213) 382-7600, ext. 228, and destroy the original transmission and its attachments without reading or saving it in any manner. Thank you.

From: Barsanti, Vanessa [<mailto:vanessa.barsanti@kirkland.com>]
Sent: Monday, February 5, 2018 1:22 PM
To: Parker, Ryan (CIV) <Ryan.Parker@usdoj.gov>; Peter Renn <prenn@lambdalegal.org>;
*LaRondB@ATG.WA.GOV <LaRondB@ATG.WA.GOV>; jheinz@kirkland.com;
daniel.siegfried@kirkland.com
Cc: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Skurnik, Matthew (CIV)
<Matthew.Skurnik@usdoj.gov>; ColleenM1@ATG.WA.GOV
Subject: RE: Karnoski v. Trump: Call

Ryan,

Apologies, but we are not available this afternoon. We are generally available tomorrow morning. I'm also looping in Colleen for her availability as I understand LaRond may be out this week.

Vanessa Barsanti

*** KIRKLAND & ELLIS LLP ***
KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 2205
F +1 312 862 2200

*** VANESSA BARSANTI ***
vanessa.barsanti@kirkland.com

From: Parker, Ryan (CIV) [<mailto:Ryan.Parker@usdoj.gov>]
Sent: Monday, February 5, 2018 11:25 AM
To: *prenn@lambdalegal.org <prenn@lambdalegal.org>; *LaRondB@ATG.WA.GOV <LaRondB@ATG.WA.GOV>; Barsanti, Vanessa <vanessa.barsanti@kirkland.com>; Heinz, Jordan M. <jheinz@kirkland.com>; Siegfried, Daniel I. <daniel.siegfried@kirkland.com>
Cc: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Skurnik, Matthew (CIV) <Matthew.Skurnik@usdoj.gov>
Subject: Karnoski v. Trump: Call

All,

Could we set up a brief call this afternoon? I'd like to discuss a few items that I'll preview in this email.

First, we are going to need additional time to respond to the two motions for summary judgment,

dozens of declarations, and many amicus briefs that have been filed in this case. Would you be willing to consent to a 45 day enlargement of time for our oppositions? We will, of course, give Plaintiffs and Washington as much time as they need for their replies.

Second, we are planning to file a motion for a limited protective order that would relieve Defendants of the burden of responding to Plaintiffs latest discovery requests or producing witnesses for depositions while Plaintiffs' motion for summary judgment is pending. We are, of course, still planning to respond to Plaintiffs' first set of discovery requests this Friday and would allow Plaintiffs and Washington to participate in any of the depositions that occur in the other cases. In our view, it does not make sense for the parties to plow forward with discovery beyond what is occurring in the other cases when there is a PI in place and Plaintiffs and Washington have both filed potentially dispositive motions for summary judgment.

Third, I'd like to discuss a few discovery issues in advance of our production and responses on Friday.

Thanks,

Ryan B. Parker
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: 202-514-4336 | ryan.parker@usdoj.gov

The information contained in this communication is confidential, may be attorney-client privileged, may constitute inside information, and is intended only for the use of the addressee. It is the property of Kirkland & Ellis LLP or Kirkland & Ellis International LLP. Unauthorized use, disclosure or copying of this communication or any part thereof is strictly prohibited and may be unlawful. If you have received this communication in error, please notify us immediately by return email or by email to postmaster@kirkland.com, and destroy this communication and all copies thereof, including all attachments.

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
RYAN B. PARKER**

I, Ryan B. Parker, swear under penalty of perjury under the laws of the United States to the following:

1. I am a Senior Trial Counsel at the United States Department of Justice and counsel of record for Defendants in this action. I submit this declaration in support of Defendants' Opposition to Plaintiffs' and Intervenor's Motions for Summary Judgment and Cross-Motion for Partial Summary Judgement.

2. Attached to this declaration as Exhibit 1 is a true and correct copy of Directive-type Memorandum (DTM) 16-005, "Military Service of Transgender Service Members," dated June 30, 2016, available at:

https://www.defense.gov/Portals/1/features/2016/0616_policy/DTM-16-005.pdf (last visited Feb. 28, 2018).

3. Attached to this declaration as Exhibit 2 is a true and correct copy of the August 29, 2017 Statement of Secretary Jim Mattis, Release No: NR-312-17, available at:

DECLARATION OF RYAN B. PARKER

Karnoski, et al. v. Trump, et al., No. 2:17-cv-1297 (MJP)

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

1 <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1294351/> (last
2 visited on Feb. 28, 2018).

3 4. Attached to this declaration as Exhibit 3 is a true and correct copy of the June 30,
4 2017 Statement by Chief Pentagon Spokesperson Dana W. White on Transgender Accessions,
5 Release No: NR-250-17, available online at: [https://www.defense.gov/News/News-](https://www.defense.gov/News/News-Releases/News-Release-View/Article/1236145/statement-by-chief-pentagon-spokesperson-dana-w-white-on-transgender-accessions/)
6 [Releases/News-Release-View/Article/1236145/statement-by-chief-pentagon-spokesperson-dana-](https://www.defense.gov/News/News-Releases/News-Release-View/Article/1236145/statement-by-chief-pentagon-spokesperson-dana-w-white-on-transgender-accessions/)
7 [w-white-on-transgender-accessions/](https://www.defense.gov/News/News-Releases/News-Release-View/Article/1236145/statement-by-chief-pentagon-spokesperson-dana-w-white-on-transgender-accessions/) (last visited on Feb. 28, 2018).

8 5. Attached to this declaration as Exhibit 4 is a true and correct copy of the
9 Memorandum Regarding Accessions of Transgender Individuals into the Military Services, issued
10 by Secretary Mattis on June 30, 2017.

11 6. Attached to this declaration as Exhibit 5 is a true and correct copy of Department
12 of Defense Instruction (DoDI) 6130.03, available at:
13 <http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003p.pdf> (last visited
14 on Feb. 28, 2018).

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

17
18 EXECUTED this 28th day of February, 2018.

19
20 

21 RYAN B. PARKER
22 Senior Trial Counsel
23 United States Department of Justice
24 Civil Division, Federal Programs Branch
25
26
27
28

Exhibit 1



SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

JUN 30 2016

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DEPUTY CHIEF MANAGEMENT OFFICER
CHIEF OF THE NATIONAL GUARD BUREAU
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, COST ASSESSMENT AND PROGRAM
EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
DEPARTMENT OF DEFENSE CHIEF INFORMATION OFFICER
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE
AFFAIRS
ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC
AFFAIRS
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Directive-type Memorandum (DTM) 16-005, "Military Service of Transgender Service Members"

References: DoD Directive 1020.02E, "Diversity Management and Equal Opportunity in the DoD," June 8, 2015
DoD Directive 1350.2, "Department of Defense Military Equal Opportunity (MEO) Program," August 18, 1995
DoD Instruction 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services," April 28, 2010, as amended

Purpose. This DTM:

- Establishes policy, assigns responsibilities, and prescribes procedures for the standards for retention, accession, separation, in-service transition, and medical coverage for transgender personnel serving in the Military Services.
- Except as otherwise noted, this DTM will take effect immediately. It will be converted to a new DoDI. This DTM will expire effective June 30, 2017.

Applicability. This DTM applies to OSD, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the

Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD.

Policy.

- The defense of the Nation requires a well-trained, all-volunteer force comprised of Active and Reserve Component Service members ready to deploy worldwide on combat and operational missions.
- The policy of the Department of Defense is that service in the United States military should be open to all who can meet the rigorous standards for military service and readiness. Consistent with the policies and procedures set forth in this memorandum, transgender individuals shall be allowed to serve in the military.
- These policies and procedures are premised on my conclusion that open service by transgender Service members while being subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability, and retention, is consistent with military readiness and with strength through diversity.

Responsibilities

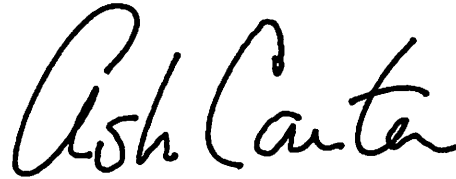
- The Secretaries of the Military Departments will:
 - Take immediate action to identify all DoD, Military Department, and Service issuances, the content of which relate to, or may be affected by, the open service of transgender Service members.
 - Draft revisions to the issuances identified, and, as necessary and appropriate, draft new issuances, consistent with the policies and procedures in this memorandum.
 - Submit to the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) the text of any proposed revisions to existing Military Department and Service regulations, policies, and guidance, and of any proposed new issuance, no later than 30 days in advance of the proposed publication date of each.
- The USD(P&R) will:
 - Take immediate action to identify all DoD, Military Department, and Service issuances, the content of which relate to, or may be affected by, the open service of transgender Service members.

DTM-16-005

- Draft revisions to the issuances identified in this memorandum and, as necessary and appropriate, draft new issuances consistent with the policies and procedures in this memorandum.

Procedures. See Attachment.

Releasability. **Cleared for public release.** This DTM is available on the DoD Issuances Website at <http://www.dtic.mil/whs/directives>.

A handwritten signature in black ink that reads "Ash Carter". The signature is written in a cursive, flowing style.

Attachment:

As stated

cc:

Secretary of Homeland Security

Commandant, United States Coast Guard

ATTACHMENT

PROCEDURES

1. SEPARATION AND RETENTION

a. Effective immediately, no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity.

b. Transgender Service members will be subject to the same standards as any other Service member of the same gender; they may be separated, discharged, or denied reenlistment or continuation of service under existing processes and basis, but not due solely to their gender identity or an expressed intent to transition genders.

c. A Service member whose ability to serve is adversely affected by a medical condition or medical treatment related to their gender identity should be treated, for purposes of separation and retention, in a manner consistent with a Service member whose ability to serve is similarly affected for reasons unrelated to gender identity or gender transition.

2. ACCESSIONS

a. Medical standards for accession into the Military Services help to ensure that those entering service are free of medical conditions or physical defects that may require excessive time lost from duty. Not later than July 1, 2017, the USD(P&R) will update DoD Instruction 6130.03 to reflect the following policies and procedures:

(1) A history of gender dysphoria is disqualifying, **unless**, as certified by a licensed medical provider, the applicant has been stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months.

(2) A history of medical treatment associated with gender transition is disqualifying, **unless**, as certified by a licensed medical provider:

(a) the applicant has completed all medical treatment associated with the applicant's gender transition; and

(b) the applicant has been stable in the preferred gender for 18 months;
and

(c) If the applicant is presently receiving cross-sex hormone therapy post-gender transition, the individual has been stable on such hormones for 18 months.

(3) A history of sex reassignment or genital reconstruction surgery is disqualifying, **unless**, as certified by a licensed medical provider:

(a) a period of 18 months has elapsed since the date of the most recent of any such surgery; and

(b) no functional limitations or complications persist, nor is any additional surgery required.

b. The Secretaries of the Military Departments and the Commandant, United States Coast Guard, may waive or reduce the 18-month periods, in whole or in part, in individual cases for applicable reasons.

c. The standards for accession described in this memorandum will be reviewed no later than 24 months from the effective date of this memorandum and may be maintained or changed, as appropriate, to reflect applicable medical standards and clinical practice guidelines, ensure consistency with military readiness, and promote effectiveness in the recruiting and retention policies and procedures of the Armed Forces.

3. IN-SERVICE TRANSITION

a. Effective October 1, 2016, DoD will implement a construct by which transgender Service members may transition gender while serving, in accordance with DoDI 1300.28, which I signed today.

b. Gender transition while serving in the military presents unique challenges associated with addressing the needs of the Service member in a manner consistent with military mission and readiness needs.

4. MEDICAL POLICY. Not later than October 1, 2016, the USD(P&R) will issue further guidance on the provision of necessary medical care and treatment to transgender Service members. Until the issuance of such guidance, the Military Departments and Services will handle requests from transgender Service members for particular medical care or to transition on a case-by-case basis, following the spirit and intent of this memorandum and DoDI 1300.28.

5. EQUAL OPPORTUNITY

a. All Service members are entitled to equal opportunity in an environment free from sexual harassment and unlawful discrimination on the basis of race, color, national origin, religion, sex, or sexual orientation. It is the Department's position, consistent with the U.S. Attorney General's opinion, that discrimination based on gender identity is a form of sex discrimination.

b. The USD(P&R) will revise DoD Directives (DoDDs) 1020.02E, "Diversity Management and Equal Opportunity in the DoD," and 1350.2, "Department of Defense Military Equal Opportunity (MEO) Program," to prohibit discrimination on the basis of gender identity and to incorporate such prohibitions in all aspects of the DoD MEO program. The USD(P&R) will prescribe the period of time within which Military Department and Service issuances implementing the MEO program must be conformed accordingly.

6. EDUCATION AND TRAINING

a. The USD(P&R) will expeditiously develop and promulgate education and training materials to provide relevant, useful information for transgender Service members, commanders, the force, and medical professionals regarding DoD policies and procedures on transgender service. The USD(P&R) will disseminate these training materials to all Military Departments and the Coast Guard not later than October 1, 2016.

b. Not later than November 1, 2016, each Military Department will issue implementing guidance and a written force training and education plan. Such plan will detail the Military Department's plan and program for training and educating its assigned force (to include medical professionals), including the standards to which such education and training will be conducted, and the period of time within which it will be completed.

7. IMPLEMENTATION AND TIMELINE

a. Not later than October 1, 2016, the USD(P&R) will issue a Commander's Training Handbook, medical guidance, and guidance establishing procedures for changing a Service member's gender marker in DEERS.

b. In the period between the date of this memorandum and 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 this memorandum and DoDI 1300.28.

Exhibit 2

IMMEDIATE RELEASE

Statement by Secretary of Defense Jim Mattis on Military Service by Transgender Individuals

Press Operations

Release No: NR-312-17

Aug. 29, 2017

The Department of Defense has received the Presidential Memorandum, dated August 25, 2017, entitled “Military Service by Transgender Individuals.” The department will carry out the president’s policy direction, in consultation with the Department of Homeland Security. As directed, we will develop a study and implementation plan, which will contain the steps that will promote military readiness, lethality, and unit cohesion, with due regard for budgetary constraints and consistent with applicable law. The soon arriving senior civilian leadership of DOD will play an important role in this effort. The implementation plan will address accessions of transgender individuals and transgender individuals currently serving in the United States military.

Our focus must always be on what is best for the military’s combat effectiveness leading to victory on the battlefield. To that end, I will establish a panel of experts serving within the Departments of Defense and Homeland Security to provide advice and recommendations on the implementation of the president’s direction. Panel members will bring mature experience, most notably in combat and deployed operations, and seasoned judgment to this task. The panel will assemble and thoroughly analyze all pertinent data, quantifiable and non-quantifiable. Further information on the panel will be forthcoming.

Once the panel reports its recommendations and following my consultation with the secretary of Homeland Security, I will provide my advice to the president concerning implementation of his policy direction. In the interim, current policy with respect to currently serving members will remain in place. I expect to issue interim guidance to the force concerning the president’s direction, including any necessary interim adjustments to procedures, to

ensure the continued combat readiness of the force until our final policy on this subject is issued.

Exhibit 3

IMMEDIATE RELEASE

Statement by Chief Pentagon Spokesperson Dana W. White on Transgender Accessions

Press Operations

Release No: NR-250-17

June 30, 2017

Secretary Mattis today approved a recommendation by the services to defer accessing transgender applicants into the military until Jan. 1, 2018.

The services will review their accession plans and provide input on the impact to the readiness and lethality of our forces.

Exhibit 4



SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

JUN 30 2017

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Accession of Transgender Individuals into the Military Services

Since becoming the Secretary of Defense, I have emphasized that the Department of Defense must measure each policy decision against one critical standard: will the decision affect the readiness and lethality of our armed forces? Put another way, how will the decision affect the ability of America's military forces to defend the Nation? It is against this standard that I provide the following guidance on the way forward in accessing transgender individuals into the military Services.

Under existing DoD policy, such accessions were anticipated to begin on July 1, 2017. The Deputy Secretary directed the Services to assess their readiness to begin accessions. Building upon that work and after consulting with the Service Chiefs and Secretaries, I have determined that it is necessary to defer the start of accessions for six months. We will use this additional time to evaluate more carefully the impact of such accessions on readiness and lethality. This review will include all relevant considerations.

My intent is to ensure that I personally have the benefit of the views of the military leadership and of the senior civilian officials who are now arriving in the Department. This action in no way presupposes the outcome of the review, nor does it change policies and procedures currently in effect under DoD Instruction 1300.28, "In-Service Transition for Transgender Service Members." I am confident we will continue to treat all Service members with dignity and respect.

The Under Secretary of Defense for Personnel and Readiness will lead this review and will report the results to me not later than December 1, 2017.

A handwritten signature in black ink, reading "John M. Mattis", is located in the lower right portion of the page.

CJCS_00000053

Exhibit 5



Department of Defense INSTRUCTION

NUMBER 6130.03

April 28, 2010

Incorporating Change 1, September 13, 2011

USD(P&R)

SUBJECT: Medical Standards for Appointment, Enlistment, or Induction in the Military Services

References: See Enclosure 1

1. PURPOSE. This Instruction:

a. Reissues DoD Directive (DoDD) 6130.3 (Reference (a)) as a DoD Instruction (DoDI) in accordance with the authority in DoDD 5124.02 (Reference (b)) to establish policy, assign responsibilities, and prescribe procedures for physical and medical standards for appointment, enlistment, or induction in the Military Services.

b. Establishes medical standards, which, if not met, are grounds for rejection for military service. Other standards may be prescribed for a mobilization for a national emergency.

c. Incorporates and cancels DoDI 6130.4 (Reference (c)).

2. APPLICABILITY. This Instruction applies to:

a. OSD, the Military Departments (including the Coast Guard at all times, including when it is a service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as the "DoD Components").

b. The Reserve Components, which include the Army and the Air National Guards of the United States, in accordance with title 10, United States Code (Reference (d)).

c. The United States Merchant Marine Academy in accordance with section 310.56 of title 46, Code of Federal Regulations (Reference (e)).

DoDI 6130.03, April 28, 2010

3. DEFINITIONS. See Glossary.

4. POLICY. It is DoD policy to:

a. Utilize common physical standards for the appointment, enlistment, or induction of Service personnel and eliminate inconsistencies and inequities based on race, sex, or location of examination in the application of these standards by the Military Services.

b. Precisely define any medical condition that causes a personnel action, such as separation, medical waiver, or assignment limitation, by utilizing the International Classification of Diseases (ICD) (Reference (f)), Current Procedural Terminology (CPT) (Reference (g)), and the Healthcare Common Procedure Coding System (HCPCS) (Reference (h)), and annotate qualification decisions by standard medical terminology, rather than codes. The standards in this Instruction shall be for the acquisition of personnel in the Military Services.

c. Ensure that individuals under consideration for appointment, enlistment, or induction into the Military Services are:

(1) Free of contagious diseases that probably will endanger the health of other personnel.

(2) Free of medical conditions or physical defects that may require excessive time lost from duty for necessary treatment or hospitalization, or probably will result in separation from the Service for medical unfitness.

(3) Medically capable of satisfactorily completing required training.

(4) Medically adaptable to the military environment without the necessity of geographical area limitations.

(5) Medically capable of performing duties without aggravation of existing physical defects or medical conditions.

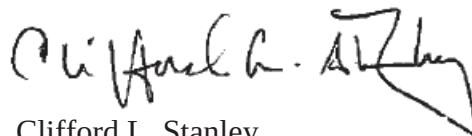
5. RESPONSIBILITIES. See Enclosure 2.

6. PROCEDURES. See Enclosure 3 for Medical and Personnel Executive Steering Committee (MEDPERS) information. Procedures and standards for implementation are in Enclosure 4.

7. RELEASABILITY. UNLIMITED. This Instruction is approved for public release and is available on the Internet from the DoD Issuances Website at <http://www.dtic.mil/whs/directives>.

DoDI 6130.03, April 28, 2010

8. EFFECTIVE DATE. This Instruction is effective immediately.

A handwritten signature in black ink, appearing to read "Clifford L. Stanley". The signature is stylized with a large, sweeping "S" at the end.

Clifford L. Stanley
Under Secretary of Defense for
Personnel and Readiness

Enclosures

1. References
 2. Responsibilities
 3. Medical and Personnel Executive Steering Committee
 4. Medical Standards for Appointment, Enlistment, or Induction
- Glossary

TABLE OF CONTENTS

ENCLOSURE 1: REFERENCES.....	6
ENCLOSURE 2: RESPONSIBILITIES.....	7
PRINCIPAL DEPUTY UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS (PDUSD(P&R))	7
ASSISTANT SECRETARY OF DEFENSE FOR HEALTH AFFAIRS (ASD(HA)).....	7
SECRETARIES OF THE MILITARY DEPARTMENTS.....	7
ENCLOSURE 3: MEDICAL AND PERSONNEL EXECUTIVE STEERING COMMITTEE.....	9
ENCLOSURE 4: MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION	10
GENERAL.....	10
APPLICABILITY.....	10
HEAD	10
EYES.....	11
VISION	14
EARS	14
HEARING.....	14
NOSE, SINUSES, MOUTH, AND LARYNX.....	15
DENTAL.....	16
NECK.....	16
LUNGS, CHEST WALL, PLEURA, AND MEDIASTINUM	16
HEART	18
ABDOMINAL ORGANS AND GASTROINTESTINAL SYSTEM.....	21
FEMALE GENITALIA	2325
MALE GENITALIA.....	2426
URINARY SYSTEM.....	2527
SPINE AND SACROILIAC JOINTS	2629
UPPER EXTREMITIES	2730
LOWER EXTREMITIES	2832
MISCELLANEOUS CONDITIONS OF THE EXTREMITIES.....	3134
VASCULAR SYSTEM	3235
SKIN AND CELLULAR TISSUES	3336
BLOOD AND BLOOD-FORMING TISSUES.....	3437
SYSTEMIC.....	3538
ENDOCRINE AND METABOLIC	3740
RHEUMATOLOGIC	42
NEUROLOGIC.....	3843
SLEEP DISORDERS.....	4146

DoDI 6130.03, April 28, 2010

LEARNING, PSYCHIATRIC, AND BEHAVIORAL	4146
TUMORS AND MALIGNANCIES.....	4448
MISCELLANEOUS	4449
GLOSSARY	4551
ABBREVIATIONS AND ACRONYMS	4551
DEFINITIONS.....	4652

DoDI 6130.03, April 28, 2010

ENCLOSURE 1

REFERENCES

- (a) DoD Directive 6130.3, “Physical Standards for Appointment, Enlistment, or Induction,” December 15, 2000 (hereby cancelled)
- (b) DoD Directive 5124.02, “Under Secretary of Defense for Personnel and Readiness (USD(P&R)),” June 23, 2008
- (c) DoD Instruction 6130.4, “Medical Standards for Appointment, Enlistment, or Induction in the Armed Forces,” January 18, 2005 (hereby cancelled)
- (d) Title 10, United States Code
- (e) Section 310.56 of title 46, Code of Federal Regulations
- (f) International Classification of Diseases, Ninth Revision, Clinical Modification (ICD-9-CM)¹
- (g) American Medical Association, Current Procedural Terminology (CPT®), Fourth Edition, 2010 Revision, Chicago, IL, 2010²
- (h) 2010 Healthcare Common Procedure Coding System (HCPCS) Level II Codes from Centers for Medicare and Medicaid Services (CMS)²
- (i) American National Standards Institute ANSI S3.6-2004, “Specification for Audiometers”³
- (j) Joint Publication 1-02, “Department of Defense Dictionary of Military and Associated Terms,” current edition

¹ Available at <http://www.cdc.gov/NCHS/icd/icd9cm.htm>.

² Available at https://catalog.ama-assn.org/Catalog/cpt/cpt_home.jsp

³ Available from the American National Standards Institute, 1819 L Street, N.W., Washington, D.C. 20036 or on the Internet at <http://www.ansi.org/>

DoDI 6130.03, April 28, 2010

ENCLOSURE 2

RESPONSIBILITIES

1. PRINCIPAL DEPUTY UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS (PDUSD(P&R)). The PDUSD(P&R), under the authority, direction, and control of the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), shall:

- a. Ensure that the standards in Enclosure 4 are implemented throughout the U.S. Military Entrance Processing Command.
- b. Eliminate inconsistencies and inequities based on race, sex, or location of examination in the application of these standards by the Military Services.
- c. Convene the MEDPERS under the joint guidance of the Deputy Under Secretary of Defense for Military Personnel Policy (DUSD(MPP)) and Principal Deputy Assistant Secretary of Defense for Health Affairs (PDASD(HA)). MEDPERS responsibilities are in Enclosure 3.

2. ASSISTANT SECRETARY OF DEFENSE FOR HEALTH AFFAIRS (ASD(HA)). The ASD(HA), under the authority, direction, and control of the USD(P&R), shall:

- a. Review, approve, and issue to the Secretaries of the Military Departments technical modifications to the standards in Enclosure 4.
- b. Provide guidance to the DoD Medical Examination Review Board to implement the standards in Enclosure 4.
- c. Eliminate inconsistencies and inequities based on race, sex, or location of examination in the application of these standards by the Military Services.

3. SECRETARIES OF THE MILITARY DEPARTMENTS AND COMMANDANT OF THE COAST GUARD. The Secretaries of the Military Departments and Commandant of the Coast Guard shall:

- a. Direct their respective Services to apply and uniformly implement the standards contained in this Instruction.
- b. Authorize the waiver of the standards in individual cases for applicable reasons and ensure uniform waiver determinations.
- c. Authorize the changes in Service-specific visual standards (particularly for officer accession programs) and establish other standards for special programs. Notification of any

DoDI 6130.03, April 28, 2010

proposed changes in standards shall be provided to the ASD(HA) at least 60 days before implementation.

d. Ensure that accurate ICD codes are assigned to all medical conditions resulting in a personnel action, such as separation, waiver, or assignment limitation, and that such codes are included in all records of such actions.

e. Eliminate inconsistencies and inequities based on race, sex, or examination location in the application of these standards by the Military Services.

DoDI 6130.03, April 28, 2010

ENCLOSURE 3

MEDPERS

1. MEDPERS convenes quarterly under the joint guidance of the DUSD(MPP) and PDASD(HA).
2. MEDPERS shall:
 - a. Provide policy oversight and guidance to the accession medical and physical standards setting process through the Accession Medical Standards Working Group.
 - b. Direct research and studies as necessary to produce evidence-based accession standards utilizing the Accession Medical Standards Analysis and Research Activity.
 - c. Ensure medical and personnel community coordination when formulating policy changes that affect each community and other relevant DoD *and* Department of Homeland Security, ~~and Department of Transportation~~ organizations.

ENCLOSURE 4MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION1. APPLICABILITY. The medical standards in this enclosure apply to:

- a. Applicants for appointment as commissioned or warrant officers in the Active and Reserve Components.
- b. Applicants for enlistment in the Military Services. For medical conditions or defects predating original enlistment, these standards apply to enlistees' first 6 months of active duty.
- c. Applicants for enlistment in the Reserve Components and federally recognized units or organizations of the National Guard. For medical conditions or defects predating original enlistment, these standards apply during the enlistees' initial period of active duty for training until their return to Reserve or National Guard units.
- d. Applicants for reenlistment in Regular and Reserve Components and in federally recognized units or organizations of the National Guard after a period of more than 12 months have elapsed since discharge.
- e. Applicants for the Scholarship or Advanced Course Reserve Officer Training Corps (ROTC), and all other Military Services' special officer personnel procurement programs.
- f. Cadets and midshipmen at the U.S. Service academies and students enrolled in ROTC scholarship programs applying for retention in their respective programs.
- g. Individuals on the Temporary Disability Retired List (TDRL) who have been found fit on reevaluation by the Physical Disability Evaluation System (PDES) and who elect to return to active duty or to active status in the Reserve Components within the time standards prescribed by Service Regulations. These individuals are exempt from this Instruction for the conditions for which they were found fit on reevaluation by the PDES.
- h. All individuals being inducted into the Military Services.

2. MEDICAL STANDARDS. Throughout this enclosure, ICD, CPT and HCPCS codes are included with most medical conditions and procedures, usually parenthetically, to aid cross-referencing. Unless otherwise stipulated, the conditions listed in this enclosure are those that do NOT meet the standard by virtue of current diagnosis, or for which the candidate has a verified past medical history. The medical standards for appointment, enlistment, or induction into the Military Services are classified by the general systems described in *sections 3-3031* of this enclosure.

DoDI 6130.03, April 28, 2010

3. HEAD

a. Deformities of the skull, face, or mandible (738.19, 744.9, 754.0) of a degree that shall prevent the individual from the proper wearing of a protective mask or military headgear.

b. Loss, or absence of the bony substance of the skull (756.0 or 738.19) not successfully corrected by reconstructive materials, or leaving any residual defect in excess of 1 square inch (6.45 square centimeters), or the size of a 25-cent piece.

4. EYES

a. Lids

(1) Current symptomatic blepharitis (373.0x).

(2) Current blepharospasm (333.81).

(3) Current dacryocystitis, acute (375.32), or chronic (375.42).

(4) Defect or deformity of the lids or other disorders affecting eyelid function (374.4x, 374.50, 374.85, 374.89, 743.62), complete, or significant ptosis (374.3x, 743.61), sufficient to interfere with vision or impair protection of the eye from exposure.

(5) Current growths or tumors of the eyelid (173.1, 198.2, 216.1, 232.1, 238.8, 239.89), other than small, non-progressive, asymptomatic, benign lesions.

b. Conjunctiva

(1) Current acute or chronic conjunctivitis (372.1x, 077.0). Seasonal allergic conjunctivitis (372.14) DOES meet the standard.

(2) Current pterygium (372.4x) if condition encroaches on the cornea in excess of 3 millimeters, interferes with vision, is progressive, or a history of recurrence after any prior surgical removal (372.45).

c. Cornea

(1) Corneal dystrophy or degeneration of any type (371.x), including but not limited to keratoconus (371.6x) of any degree.

(2) History of any incisional corneal surgery including, but not limited to, partial or full thickness corneal transplant, radial keratotomy (RK), astigmatic keratotomy (AK), or corneal implants (Intacs®)

DoDI 6130.03, April 28, 2010

(3) Corneal refractive surgery performed with an excimer laser, including but not limited to photorefractive keratectomy (PRK) (HCPCS S0810), laser epithelial keratomileusis (LASEK), and laser-assisted in situ keratomileusis (LASIK) (HCPCS S0900) (ICD-9 code for each is P11.7) if any of the following conditions are met:

(a) Pre-surgical refractive error in either eye exceeded a spherical equivalent of +8.00 or -8.00 diopters.

(b) Pre-surgical astigmatism exceeded 3.00 diopters.

(c) For corneal refractive surgery, at least 180 days recovery period has not occurred between last refractive surgery or augmenting procedure and accession medical examination.

(d) There have been complications and/or medications or ophthalmic solutions, or any other therapeutic interventions such as sunglasses, are required.

(e) Post-surgical refraction in each eye is not stable as demonstrated by at least two separate refractions at least 1 month apart, with initial refraction at least 90 days post-procedure, and the most recent of which demonstrates more than +/- 0.50 diopters difference for spherical vision and/or more than +/- 0.50 diopters for cylinder vision.

(4) Current or recurrent keratitis (370.xx)

(5) Documented herpes simplex virus keratitis (054.42, 054.43).

(6) Current corneal neovascularization, unspecified (370.60), or corneal opacification (371.00, 371.03) from any cause that is progressive or reduces vision below the standards prescribed in this Instruction.

(7) Current or history of uveitis or iridocyclitis (364.00-364.3).

d. Retina

(1) Current or history of any abnormality of the retina (361.00-362.89, 363.14-363.22), choroid (363.00-363.9) or vitreous (379.2x).

e. Optic Nerve

(1) Any current or history of optic nerve disease (377.3), including but not limited to optic nerve inflammation (363.05), optic nerve swelling, or optic nerve atrophy (377.12, 377.14).

(2) Any optic nerve anomaly.

f. Lens

DoDI 6130.03, April 28, 2010

(1) Current aphakia (379.31, 743.35), history of lens implant (V45.61, V43.1) (CPT 66982-66986), or current or history of dislocation of a lens (379.32-379.34, 743.37).

(2) Current or history of opacities of the lens (366.xx), including cataract (366.9).

g. Ocular Mobility and Motility

(1) Current or recurrent diplopia (368.2).

(2) Current nystagmus (379.5x) other than physiologic “end-point nystagmus.”

(3) Esotropia (378.0x), exotropia (378.1x), and hypertropia (378.31): For entrance into Service academies and officer programs, the individual Military Services may set additional requirements. The Military Services shall determine special administrative criteria for assignment to certain specialties.

h. Miscellaneous Defects and Diseases

(1) Current or history of abnormal visual fields (368.9) due to diseases of the eye or central nervous system (368.4x), or trauma.

(2) Absence of an eye (V43.0, V45.78), clinical anophthalmos, unspecified congenital (743.00) or acquired, or current or history of other disorders of globe (360.xx).

(3) Current unilateral or bilateral exophthalmoses (376.21-376.36).

(4) Current or history of glaucoma (365.xx), ocular hypertension, pre-glaucoma (365.0-365.04), or glaucoma suspect.

(5) Any abnormal pupillary reaction to light (379.4x) or accommodation (367.5x).

(6) Asymmetry of pupil size greater than 2mm.

(7) Current night blindness (264.5, 368.6x).

(8) Current or history of intraocular foreign body (360.50-360.69, 871.x).

(9) Current or history of ocular tumors (190.0, 190.8-190.9, 198.4, 224.0, 224.8-224.9, 234.0, 238.8, 239.89, V10.84).

(10) Current or history of any abnormality of the eye (360) or adnexa (376, 379.9), not specified in subparagraphs 4.h.(1)-(9) of this enclosure, which threatens vision or visual function V41.0-V41.1, V52.2, V59.5).

DoDI 6130.03, April 28, 2010

5. VISION

a. Current distant visual acuity of any degree that does not correct with spectacle lenses to at least one of the following (367):

(1) 20/40 in one eye and 20/70 in the other eye (369.75).

(2) 20/30 in one eye and 20/100 in the other eye (369.75).

(3) 20/20 in one eye and 20/400 in the other eye (369.73).

b. Current near visual acuity of any degree that does not correct to 20/40 in the better eye (367.1-367.32).

c. Current refractive error (hyperopia (367.0), myopia (367.1), astigmatism (367.2x)), in excess of -8.00 or +8.00 diopters spherical equivalent or astigmatism in excess of 3.00 diopters.

d. Any condition requiring contact lenses for adequate correction of vision, such as corneal scars and opacities (370.0x) and irregular astigmatism (367.22).

e. Color vision (368.5x) requirements shall be set by the individual Services.

6. EARS

a. Current atresia of the external ear (744.02) or severe microtia (744.23), congenital or acquired stenosis (380.5x), chronic otitis externa (380.15-380.16, 380.23), or severe external ear deformity (380.32, 738.7, 744.01, 744.3) that prevents or interferes with the proper wearing of hearing protection.

b. Current or history of Ménière's Syndrome or other chronic diseases of the vestibular system (386.xx).

c. History of cochlear implant.

d. Current or history of cholesteatoma (385.3x)

e. History of any inner (P20) (CPT 69801-69930) or middle (P19) (CPT 69631-69636, 69676) ear surgery excluding successful tympanoplasty (CPT 69635) performed during the preceding 180 days.

f. Current perforation of the tympanic membrane (384.2x) or history of surgery to correct perforation during the preceding 180 days (P19) (CPT 69433, 69436, 69610, 69631-69646).

g. Chronic Eustachian tube dysfunction as evidenced by retracted tympanic membrane, or recurrent otitis media, or the need for pressure-equalization (PE) tube within the last 3 years.

DoDI 6130.03, April 28, 2010

7. HEARING All hearing defects are coded with ICD-9 code 389.xx.

a. Audiometric hearing levels are measured by audiometers calibrated to the standards in American National Standards Institute (ANSI S3.6-2004) (Reference (i)) and shall be used to test the hearing of all applicants.

b. Current hearing threshold level in either ear greater than that described in subparagraphs 7.b.(1)-(3) of this enclosure does not meet the standard:

(1) Pure tone at 500, 1000, and 2000 cycles per second for each ear of not more than 30 decibels (dB) on the average with no individual level greater than 35 dB at those frequencies.

(2) Pure tone level not more than 45 dB at 3000 cycles per second or 55 dB at 4000 cycles per second for each ear.

(3) There is no standard for 6000 cycles per second.

c. Current or history of hearing aid use (V53.2).

8 NOSE, SINUSES, MOUTH, AND LARYNX

a. Current cleft lip or palate defects (749.xx) not satisfactorily repaired by surgery or that interfere with use or wear of military equipment, or that prevent drinking from a straw.

b. Current ulceration of oral mucosa, including tongue (528.6), excluding aphthous ulcers.

c. Current chronic conditions of larynx including vocal cord paralysis (478.3x) or history of laryngeal papillomatosis.

d. History of non-benign polyps, (478.4) chronic hoarseness (78.49), chronic laryngitis (476.0) or spasmodic dysphonia.

e. Current anosmia or parosmia (781.1).

f. History of recurrent epistaxis with more than one episode per week of bright red blood from the nose occurring over a 3-month period (784.7) within the last 3 years.

g. Current nasal polyp or history of nasal polyps (471.x), unless more than 12 months have elapsed since nasal polypectomy (CPT 30110, 30115, 31237-31240) and/or sinus surgery, and asymptomatic.

h. Current perforation of nasal septum (478.1, 478.19, 748.1).

DoDI 6130.03, April 28, 2010

i. Current chronic sinusitis (473) as evidenced by chronic purulent discharge, symptoms requiring frequent medical attention, or computed tomography (CT) scan.

j. Current or history of deformities, or conditions or anomalies of the upper alimentary tract (750.9), mouth (750.26), tongue (750.1x), palate, throat, pharynx, larynx (748.3), and nose (748.1), that interfere with chewing (V41.6), swallowing, speech, or breathing.

9 DENTAL

a. Current diseases or pathology of the jaws or associated tissues that prevent normal functioning. Those diseases or conditions include but are not limited to temporomandibular disorders (524.6x) and/or myofascial pain (784.0). A minimum of 6 months healing time must elapse for any individuals completing surgical treatment of any maxillofacial pathology lesions.

b. Current severe malocclusion (524.00-524.29, 524.4), which interferes with normal chewing or requires immediate and protracted treatment, or a relationship between the mandible and maxilla that prevents satisfactory future prosthodontic replacement.

c. Eight or more grossly (visually) cavitated and/or carious teeth (521.0x). Applicants who are edentulous must have functioning dentures. Lack of a serviceable prosthesis that prevents adequate biting and chewing of a normal diet. Individuals undergoing endodontic care are acceptable for entry into the Delayed Entry Program (DEP) only if a civilian or military dentist or endodontist provides documentation that active endodontic treatment shall be completed prior to being sworn to active duty.

d. Current orthodontic appliances (mounted or removable, i.e., Invisalign[®]) for continued active treatment (V53.4). Permanent or removable retainers are permissible. Individuals undergoing active orthodontic care are acceptable for accession (including DEP) only if a civilian or military orthodontist provides documentation that active orthodontic treatment shall be completed prior to being sworn into active duty. Entrance to active duty will not occur until all orthodontic treatment is documented to be completed.

10 NECK

a. Current symptomatic cervical ribs (756.2).

b. Current congenital cyst(s) (744.4x) of branchial cleft origin or those developing from the remnants of the thyroglossal duct (759.2).

c. Current contraction (723.5, 754.1)) of the muscles of the neck, spastic or non-spastic, or cicatricial contracture of the neck to the extent it interferes with the proper wearing of a uniform or military equipment, or is so disfiguring as to interfere with or prevent satisfactory performance of military duty.

11. LUNGS, CHEST WALL, PLEURA, AND MEDIASTINUM

a. Current abnormal elevation of the diaphragm (either side) (756.6). Any nonspecific abnormal findings on radiological and other examination of body structure, such as lung field (793.1) or other thoracic or abdominal organ (793.2).

b. Current abscess of the lung (513.0) or mediastinum (513.1).

c. Current or history of recurrent acute infectious processes of the lung, including but not limited to viral pneumonia (480.x), pneumococcal pneumonia (481), bacterial pneumonia (482.xx), pneumonia due to other specified organism (483.x), pneumonia infectious disease classified elsewhere (484.x), bronchopneumonia (organism unspecified) (485), and pneumonia (organism unspecified) (486).

d. Airway hyper responsiveness including asthma (493.xx), reactive airway disease, exercise-induced bronchospasm (519.11) or asthmatic bronchitis (493.90), reliably diagnosed and symptomatic after the 13th birthday.

(1) Reliable diagnostic criteria may include any of the following elements: substantiated history of cough, wheeze, chest tightness, and/or dyspnea which persists or recurs over a prolonged period of time, generally more than 12 months.

(2) Individuals **DO** MEET the standard if within the past 3 years they meet ALL of the criteria in subparagraphs 11.d.(2)(a)-(d).

(a) No use of controller or rescue medications (including, but not limited to inhaled corticosteroids, leukotriene receptor antagonists, or short-acting beta agonists).

(b) No exacerbations requiring acute medical treatment.

(c) No use of oral steroids.

(d) A current normal spirometry (within the past 90 days), performed in accordance with American Thoracic Society (ATS) guidelines and as defined by current National Heart, Lung, and Blood Institute (NHLBI) standards.

e. Chronic obstructive pulmonary disease (491).

(1) Current or history of bullous or generalized pulmonary emphysema (492).

(2) Current bronchitis (490), acute or chronic symptoms over 3 months occurring at least twice a year (491).

f. Current or history of bronchiectasis (494). Bronchiectasis during the first year of life is not disqualifying if there are no residual or sequelae.

- g. Current or history of bronchopleural fistula (510.0), unless resolved with no sequelae.
- h. Current chest wall malformation (754.89), including but not limited to pectus excavatum (754.81) or pectus carinatum (754.82), if these conditions interfere with vigorous physical exertion.
- i. History of empyema (510.9).
- j. Pulmonary fibrosis (515).
- k. Current foreign body in lung (934.8, 934.9), trachea (934.0), or bronchus (934.1).
- l. History of thoracic surgery (32-33), (CPT 32035-32999, 33010-33999, 43020-43499) including open and endoscopic procedures.
- m. Current or history of pleurisy with effusion (511.9) within the previous 2 years.
- n. Current or history of pneumothorax (512) occurring during the year preceding examination if due to trauma (860) or surgery, or occurring during the 2 years preceding examination from spontaneous (512.8) origin.
- o. Recurrent spontaneous pneumothorax (512.8).
- p. History of chest wall surgery (34-34.9), including breast (85-85.9), during the preceding 6 months, or with persistent functional limitations.

12. HEART

- a. History of valvular repair or replacement (CPT 33400-33478).
 - (1) Current or history of the following valvular conditions as defined by the current American College of Cardiology and American Heart Association guidelines:
 - (a) Severe pulmonic regurgitation.
 - (b) Severe tricuspid regurgitation.
 - (c) Moderate pulmonic regurgitation unless documented mean pulmonary artery pressure is less than 25 mmHg.
 - (d) Moderate tricuspid regurgitation unless documented mean pulmonary artery pressure is less than 25 mmHg.
 - (e) Moderate or severe mitral regurgitation.

DoDI 6130.03, April 28, 2010

- (f) Mild, moderate, or severe aortic regurgitation.
- (2) The following are considered normal variants that meet accession standards:
 - (a) Trace or mild pulmonic regurgitation.
 - (b) Trace or mild tricuspid regurgitation.
 - (c) Trace or mild mitral regurgitation in the absence of mitral valve prolapse.
 - (d) Trace aortic insufficiency.
- b. Mitral valve prolapsed (396.3) with normal exercise tolerance not requiring medical therapy DOES meet the standard.
- c. Bicuspid aortic valve (746.4), in the absence of stenosis or regurgitation as in *sub*paragraphs 12.a.(1)(a)-(f), DOES meet the standard.
- d. All valvular stenosis (396).
- e. Current or history of atherosclerotic coronary artery disease (410).
- f. Current or history of pacemaker or defibrillator implantation (CPT 3320-33249).
- g. History of supraventricular tachycardia (427.0).
 - (1) History of recurrent atrial fibrillation (427.31) or flutter (427.32).
 - (2) Supraventricular tachycardia (427.0) associated with an identifiable reversible cause and no recurrence during the preceding 2 years while off all medications DOES meet the standard.
 - (3) Those with identified atrioventricular nodal reentrant tachycardia or atrioventricular reentrant tachycardia (such as Wolff-Parkinson-White (WPW) syndrome) (426.7) who have undergone successful ablative therapy with no recurrence of symptoms after 3 months and with documentation of normal electrocardiograph (ECG) meet the standard.
- h. Premature atrial or ventricular contractions sufficiently symptomatic to require treatment, or result in physical or psychological impairment.
- i. Abnormal ECG patterns (794.31):
 - (1) Long QT (426.82).
 - (2) Brugada pattern.

DoDI 6130.03, April 28, 2010

(3) WPW syndrome (426.7) pattern unless associated with low risk accessory pathway by appropriate diagnostic testing.

j. Current or history of ventricular arrhythmias (427.1) including ventricular fibrillation, tachycardia, or multifocal premature ventricular contractions. Occasional asymptomatic unifocal premature ventricular contractions meet the standard.

k. Current or history of conduction disorders, including but not limited to disorders of sinus arrest, asystole, Mobitz type II second-degree atrioventricular (AV) block (426.12), and third-degree AV block (426.0).

l. In the absence of cardiovascular symptoms, the following meet the standard:

- (1) Sinus arrhythmia.
- (2) First degree AV block (426.11).
- (3) Left axis deviation of less than -45 degrees.
- (4) Early repolarization.
- (5) Incomplete right bundle branch block.
- (6) Wandering atrial pacemaker (427.89) or ectopic atrial rhythm (427.89).
- (7) Sinus bradycardia (427.81).
- (8) Mobitz type I second-degree AV block (426.13).

m. Current or history of conduction disturbances such as left anterior hemiblock (426.2), right or left bundle branch block (426.4) do not meet the standard unless asymptomatic with a normal echocardiogram.

n. Current or history of cardiomyopathy (425), cardiomegaly, hypertrophy (defined as septal wall thickness of 15 mm or greater), dilation (429.3), or congestive heart failure (428).

o. History of myocarditis (422) or pericarditis (420) unless the individual is free of all cardiac symptoms, does not require medical therapy, and has normal echocardiography for at least 1 year.

p. Current persistent tachycardia (785.0) (as evidenced by average heart rate of 100 beats per minute or greater over a 24-hour period of continuous monitoring).

DoDI 6130.03, April 28, 2010

q. Current or history of congenital anomalies of heart and great vessels (746). The following conditions meet the standard with an otherwise normal current (within 6 months) echocardiogram.

- (1) Dextrocardia (746.87) with situs inversus (759.3) without any other anomalies.
- (2) Ligated or occluded patent ductus arteriosus (747.0).
- (3) Corrected atrial septal defect (745.9) or patent foramen ovale (745.5) without residua.
- (4) Corrected ventricular septal defect (745.4) without residua.

r. History of recurrent syncope and or presyncope (780.2), including black out, fainting, loss or alteration of level of consciousness (excludes vasovagal reactions with identified trigger such as venipuncture) unless there has been no recurrence during the preceding 2 years while off all medication.

s. Unexplained ongoing or recurring cardiopulmonary symptoms (to include but not limited to syncope, presyncope, chest pain, palpitations, and dyspnea on exertion) that impairs a physically active lifestyle.

t. History of rheumatic fever (390).

13. ABDOMINAL ORGANS AND GASTROINTESTINAL SYSTEM

a. Esophageal Disease

(1) Current or history of esophageal disease (530.0-530-9), including but not limited to ulceration, varices, fistula, or achalasia.

(2) Gastro-Esophageal Reflux Disease (GERD) (530.81), with complications, ~~including stricture, or maintenance on acid suppression medication, other dysmotility disorders; or chronic or recurrent esophagitis (530.1).~~

(a) Stricture or B-ring.

(b) Dysphagia.

(c) Recurrent symptoms or esophagitis despite maintenance medication.

(d) Barrett's esophagitis.

(e) Extraesophageal complications; reactive airway disease; recurrent sinusitis or dental complications.

~~(3) Current or history of reactive airway disease associated with GERD (530.81).~~

DoDI 6130.03, April 28, 2010

(43) History of surgical correction (*fundoplication or dilation*) for GERD within 6 months (~~P42-esophageal correction, P43-stomach correction, and P45-intestinal correction~~) (CPT ~~43257~~)(45.89).

(54) Current or history of dysmotility disorders ~~and chronic or recurrent esophagitis (530)~~, to include *diffuse esophageal spasm, nutcracker esophagus, non-specific motility disorder, and achalasia*.

(5) *Eosinophilic esophagitis*.

(6) *Other esophageal strictures, for example lye or other caustic ingestion*.

b. Stomach and Duodenum

(1) Current ~~gastritis, chronic or severe (535), or non-ulcerative dyspepsia that requires maintenance medication~~ dyspepsia requiring medication; or history of dyspepsia lasting 3 or more consecutive months and requiring medication within the preceding 12 months.

(2) ~~Current or history of ulcer of the stomach or duodenum confirmed by X-ray or endoscopy (533)~~. Gastric or duodenal ulcers:

(a) *Current ulcer or history of treated ulcer within the last 3 months*.

(b) *Recurrent or complicated by bleeding, obstruction, or perforation within preceding 5 years confirmed by endoscopy*.

(3) History of surgery for peptic ulceration or perforation (533.0-599.9).

(4) *History of gastroparesis*.

(5) *History of bariatric surgery of any type (e.g., lap-band or gastric bypass surgery for weight loss)*.

(6) *History of gastric varices*.

c. Small and Large Intestine

(1) Current or history of inflammatory bowel disease, including but not limited to ~~unspecified indeterminate (558.9), regional enteritis or~~ Crohn's disease (555), ulcerative colitis (556), or ulcerative proctitis (556.2).

(2) *Current infectious colitis not otherwise specified (009.1)*.

(23) Current or history of intestinal malabsorption syndromes (579.9), including but not limited to *celiac sprue, pancreatic insufficiency*, post-surgical and idiopathic (579). Lactase

DoDI 6130.03, April 28, 2010

deficiency does not meet the standard only if of sufficient severity to require frequent intervention, or to interfere with normal function.

(34) Current or history of gastrointestinal functional and motility disorders within the past 2 years, including but not limited to pseudo-obstruction, megacolon, history of volvulus, or chronic constipation (564.0) and or diarrhea (787.91), regardless of cause, persisting or symptomatic in the past 2 years.

(45) History of gastrointestinal bleeding (578), including positive occult blood (792.1), if the cause has not been corrected. Meckel's diverticulum (751.0), if surgically corrected more than 6 months prior DOES meet the standard.

(56) Current or history of irritable bowel syndrome (564.1) of sufficient severity to require frequent intervention *or prescription medication* or to interfere with normal function.

(67) History of bowel resection (CPT 44202-44203).

(78) Current or history of symptomatic diverticular disease of the intestine (562).

(9) Personal or family history of familial adenomatous polyposis syndrome or hereditary non-polyposis colon cancer syndrome.

d. Hepatic-Biliary Tract

(1) Current acute or chronic hepatitis, hepatitis carrier state (070), hepatitis in the preceding 6 months or persistence of symptoms after 6 months, or objective evidence of impairment of liver function.

(2) Current or history of cirrhosis (571), hepatic cysts (573.8), abscess (572.0), or sequelae of chronic liver disease (571.3).

(3) Current or history of symptomatic cholecystitis (575.10), unless successfully surgically corrected, ~~acute or chronic, with or without cholelithiasis (574)~~; postcholecystectomy syndrome; or other disorders of the gallbladder and biliary system (576). Cholecystectomy DOES meet the standard if performed more than 6 months prior to examination and patient remains asymptomatic. *Fiberoptic Endoscopic* procedure to correct ~~sphincter dysfunction or cholelithiasis~~ *choledocholithiasis*, if performed more than 6 months prior to examination and patient remains asymptomatic, MAY meet the standard.

(4) History of sphincter of Oddi dysfunction.

(5) Choledochocyst.

(6) Primary biliary cirrhosis or primary sclerosing cholangitis.

(47) Current or history of pancreatitis, acute (577.0) or chronic (577.1).

DoDI 6130.03, April 28, 2010

(8) *Pancreatic cyst.*

(9) *History of pancreatic surgery.*

(510) Current or history of metabolic liver disease, including but not limited to hemochromatosis (275.0), Wilson's disease (275.1), or alpha-1 anti-trypsin deficiency (273.4). *Gilbert's syndrome DOES meet the standard.*

(611) Current enlargement of the liver from any cause (789.1).

e. Anorectal

(1) Current anal fissure or anal fistula (565).

(2) Current or history of anal or rectal polyp (569.0), prolapse (569.1), stricture (569.2), or fecal incontinence (787.6), within the last 2 years. *History of removal of juvenile or inflammatory polyp DOES meet the standard.*

(3) Current hemorrhoid (internal or external), when large, symptomatic, or with a history of bleeding (455) within the last 60 days.

f. Spleen

~~(1) Current splenomegaly (789.2).~~

~~(2) History of splenectomy (P41.5) (CPT 38100-38129), except when resulting from trauma.~~

g. Abdominal Wall

(1) Current hernia (except for small or asymptomatic umbilical hernias), including but not limited to uncorrected inguinal (550) and other abdominal wall hernias (553).

(2) History of open or laparoscopic abdominal surgery (CPT 22900-22999, 43500-49999) during the preceding 6 months (P54). Uncomplicated laparoscopic appendectomies (CPT 44970) meet the standard after 3 months.

hg. Obesity. History of any gastrointestinal procedure for the control of obesity (CPT 43644-43645, 43770-43775, 43842-43848, 43886-43888) or artificial openings, including but not limited to ostomy (V44).

14. FEMALE GENITALIA

a. Current or history of abnormal ~~uterine bleeding (626.2)~~ *menstruation unresponsive to medical management within the last 12 months*, including but not limited to menorrhagia, metrorrhagia, or polymenorrhea.

b. ~~Current unexplained~~ *Primary* amenorrhea (626.0).

c. *Current unexplained secondary amenorrhea (626.0).*

~~ed.~~ Current ~~or history of~~ dysmenorrhea (625.3) that is *unresponsive to medical therapy and is* incapacitating to a degree recurrently ~~necessitating requiring~~ absences of more than a few hours from routine activities.

~~de.~~ ~~Current or history of~~ Endometriosis (617) *that is unresponsive to medical therapy.*

~~ef.~~ History of major abnormalities or defects of the genitalia ~~such as including but not limited to~~ change of sex (P64.5) (CPT 55970, 55980), hermaphroditism, pseudohermaphroditism, or pure gonadal dysgenesis (752.7).

~~fg.~~ ~~Current or history of~~ Persistent or clinically significant ovarian cyst(s) (620.2) ~~when persistent or symptomatic.~~

h. Polycystic ovarian syndrome (256.4) with metabolic complications.

~~gi.~~ Current ~~pPelvic~~ inflammatory disease (614) ~~or history of recurrent pelvic inflammatory disease. Current or history of chronic pelvic pain or unspecified symptoms associated with female genital organs (625.9) within the preceding 30 days.~~

j. Chronic pelvic pain or unspecified symptoms associated with female genital organs (625.9).

~~hk.~~ Current ~~pP~~regnancy (V22), ~~until through~~ 6 months after the ~~end completion~~ of the pregnancy (CPT 59150, 59151, 59400, 59409, 59510, 59514, 59610, 59612, 59812-59857).

~~i.~~ History of congenital absence of the uterus (752.3).

~~jl.~~ ~~Current~~ Symptomatic uterine enlargement due to any cause (621.2).

~~km.~~ Current or history of genital infection or ulceration, including but not limited to herpes genitalis (054.11) or condyloma acuminatum (078.11), if of sufficient severity ~~requiring to require~~ frequent intervention or to interfere with normal function. *Herpes does not meet the standard if:*

(1) Current lesions are present.

DoDI 6130.03, April 28, 2010

- (2) Chronic suppressive therapy is needed.*
- (3) There are three or more outbreaks per year.*
- (4) Any outbreak in the past 12 months interfered with normal function.*
- (5) Treatment included hospitalization or intravenous therapy.*

~~fn. Current or history of a~~ Abnormal gynecologic cytology *within the preceding 2 years*, including but not limited to unspecified abnormalities of the Papanicolaou smear of the cervix (795.0), excluding atypical squamous cells of undetermined significance without human papillomavirus (079.4) and confirmed low-grade squamous intraepithelial lesion (622.9). For the purposes of this Instruction, confirmation is by colposcopy or repeat cytology.

15. MALE GENITALIA

- a. Absence of one or both testicles, congenital (752.89) or undescended (752.51). ~~Unilateral loss of a testis, unrelated to cancer, DOES meet the standard.~~
- b. Current *or history of* epispadias (752.62) ~~or hypospadias (752.61), when accompanied by evidence of urinary tract infection, urethral stricture, or voiding dysfunction.~~
- c. *Current or history of surgery for proximal hypospadias (752.61).*
- d. *Distal (coronal) hypospadias without history of surgery DOES meet the standard.*
- e. *Distal (coronal) hypospadias treated with surgery when accompanied by evidence of urinary tract infection, urethral stricture, or voiding dysfunction.*
- ~~ef.~~ Current enlargement or mass of testicle ~~or~~, epididymis (608.9), *or spermatic cord.*
- ~~dg.~~ Current *or history of recurrent* orchitis or epididymitis (604.90).
- ~~eh.~~ History of penis amputation (878.0) (CPT 54125, 54130-54135).
- i. *Current penile curvature if associated with pain.*
- ~~fj.~~ Current or history of genital infection or ulceration, including but not limited to herpes genitalis (054.13) or condyloma acuminatum (078.11), if of sufficient severity to require frequent intervention or to interfere with normal function. *Herpes does not meet the standard if:*
 - (1) Current lesions are present.*
 - (2) Use of chronic suppressive therapy is needed.*

DoDI 6130.03, April 28, 2010

- (3) *There are three or more outbreaks per year.*
- (4) *Any outbreak in the past 12 months interfered with normal function.*
- (5) *Treatment included hospitalization or intravenous therapy.*
- k. *Current or history of urethral condyloma acuminatum.*
- gl. Current acute prostatitis (601.0) ~~or~~, chronic prostatitis (601.1), *or chronic pelvic pain syndrome.*
- hm. Current hydrocele (603) ~~with greatest dimension of 4 centimeters or greater or symptomatic or spermatacele associated with pain or which precludes a complete exam of the scrotal contents.~~
- in. Left varicocele (456.4), if *painful or* symptomatic, or associated with testicular atrophy, or varicocele larger than the testis.
- o. *Left varicocele (456.4) that does not reduce or decompress completely when supine.*
- jp. ~~Any~~ *Bilateral or* right varicocele (456.4).
- kq. Current or history of chronic *or recurrent* scrotal pain or unspecified symptoms associated with male genital organs (608.9).
- lr. History of major abnormalities or defects of the genitalia such as change of sex (P64.5) (CPT 55970, 55980), hermaphroditism, pseudohermaphroditism, or pure gonadal dysgenesis (752.7).

16. URINARY SYSTEM

- a. Current ~~cystitis~~, or history of chronic ~~or~~ recurrent cystitis (595), *interstitial cystitis, or painful bladder syndrome.*
- b. Current urethritis, or history of chronic or recurrent urethritis (597.80).
- c. History ~~of enuresis (788.30) or incontinence of urine (788.30), or the control of it with medication or other treatment past the 15th birthday, or treatment of the following voiding symptoms within the previous 12 months:~~
 - (1) *Urinary frequency or urgency more than every 2 hours on a daily basis.*
 - (2) *Nocturia more than two episodes during sleep period.*
 - (3) *Enuresis (788.30).*

DoDI 6130.03, April 28, 2010

(4) *Incontinence of urine, such as urge or stress.*

(5) *Urinary retention.*

(6) *Dysuria.*

d. *History of need for urinary catheterization with intermittent or indwelling catheter for any period greater than 2 weeks.*

e. *History of bladder augmentation, urinary diversion, or urinary tract reconstruction.*

df. *Current hematuria (599.7), pyuria, or other findings indicative of urinary tract disease (599); or history of abnormal urinary findings:*

(1) *Gross hematuria (599.7).*

(2) *Microscopic hematuria (3 or more red blood cells per high-powered field on 2 of 3 properly collected urinalyses).*

(3) *Pyuria (6 or more white blood cells per high-powered field in 2 or 3 properly collected urinalyses).*

eg. *Current or recurrent urethral or ureteral stricture (598) or fistula (599.1) involving the urinary tract.*

fh. *Conditions associated with the kidneys, including:*

(1) *Current absence of one kidney, congenital (753.0) or acquired (V45.73) (CPT 50220-50236).*

(2) *Asymmetry in size or function of kidneys.*

(3) *History of renal transplant.*

(24) *Current chronic or recurrent pyelonephritis (590.0) (chronic or recurrent), or any other unspecified infections of the kidney (590.9).*

(35) *Current or history of polycystic kidney (753.1).*

(46) *Current or history of horseshoe kidney (753.3).*

(57) *Current or history of hydronephrosis (591).*

(68) *Current or history of acute (580) nephritis or chronic (582) nephritis kidney disease of any type.*

DoDI 6130.03, April 28, 2010

(9) History of acute kidney injury requiring dialysis.

~~(710) Current or history of proteinuria (791.0) greater than 200 milligrams in 24 hours or with a protein-to-creatinine ratio greater than 0.2 in a random urine sample, if greater more than 48 hours after strenuous activity, unless consultation determines the condition to be benign orthostatic proteinuria. Benign orthostatic proteinuria MEETS the standard.~~

~~(811) Current or history of symptomatic urolithiasis (592) within the preceding 12 months. Recurrent calculus, nephrocalcinosis, or bilateral renal calculi at any time.~~

(12) History of stone(s) greater than 4mm in size, recurrent calculus, nephrocalcinosis, or bilateral renal calculi at any time.

(13) History of urolithiasis requiring surgical treatment or intervention requiring hospitalization.

17. SPINE AND SACROILIAC JOINTS

a. Ankylosing spondylitis or other inflammatory spondylopathies (720).

b. Current or history of any condition, including but not limited to the spine or sacroiliac joints, with or without objective signs, if:

(1) It prevents the individual from successfully following a physically active vocation in civilian life (724), or is associated with local or referred pain to the extremities, muscular spasms, postural deformities, or limitation in motion.

(2) It requires external support.

(3) It requires limitation of physical activity or frequent treatment.

c. Current deviation or curvature of spine (737) from normal alignment, structure, or function if:

(1) It prevents the individual from following a physically active vocation in civilian life.

(2) It interferes with the proper wearing of a uniform or military equipment.

(3) It is symptomatic.

(4) There is lumbar or thoracic scoliosis greater than 30 degrees, or kyphosis and lordosis greater than 50 degrees when measured by the Cobb Method.

DoDI 6130.03, April 28, 2010

- d. History of congenital fusion (756.15) involving more than two vertebral bodies or any surgical fusion of spinal vertebrae (P81.0) (CPT 22532-22812).
- e. Current or history of fracture or dislocation of the vertebra (805).
 - (1) Vertebral fractures that do NOT meet the standard:
 - (a) Compression fractures involving more than or equal to 25 percent of a single vertebra.
 - (b) Compression fractures involving less than 25 percent of a single vertebra occurring within the past 12 months or it is symptomatic.
 - (c) Any compression fracture that is symptomatic.
 - (2) Vertebral fractures that DO MEET the standard:
 - (a) Compression fractures involving less than 25 percent of a single vertebra if it occurred more than 1 year before the accession examination and the applicant is asymptomatic.
 - (b) A history of fractures of the transverse or spinous process IF the applicant is asymptomatic.
- f. History of juvenile epiphysitis (732.6) with any degree of residual change indicated by X-ray or kyphosis.
- g. Current herniated nucleus pulposus (722) or history of surgery to correct (CPT 63001-63200). A surgically corrected asymptomatic single-level lumbar or thoracic disectomy with full resumption of unrestricted activity DOES meet the standard.
- h. Current or history of spina bifida (741) when symptomatic, when there is more than one vertebral level involved, or with dimpling of the overlying skin. History of surgical repair of spina bifida.
- i. Current or history of spondylolysis congenital (756.10-756.12) or acquired (738.4).
- j. Current or history of spondylolisthesis congenital (756.12) or acquired (738.4).

18. UPPER EXTREMITIES

- a. Limitation of Motion. Current active joint ranges of motion less than:
 - (1) Shoulder (726.1)
 - (a) Forward elevation to 90 degrees.

DoDI 6130.03, April 28, 2010

- (b) Abduction to 90 degrees.
- (2) Elbow (726.3)
 - (a) Flexion to 130 degrees.
 - (b) Extension to 15 degrees.
- (3) Wrist (726.4). A total range of 60 degrees (extension plus flexion), or radial and ulnar deviation combined arc 30 degrees.
- (4) Hand (726.4)
 - (a) Pronation to 45 degrees.
 - (b) Supination to 45 degrees.
- (5) Fingers and Thumb (726.4). Inability to clench fist, pick up a pin, grasp an object, or touch tips of at least three fingers with thumb.

b. Hand and Fingers

- (1) Absence of the distal phalanx of either thumb (885).
- (2) Absence of any portion of the index finger.
- (3) Absence of distal and middle phalanx of the middle or ring finger of either hand irrespective of the absence of the little finger (886).
- (4) Absence of more than the distal phalanx of any two of the following: index, middle, or ring finger of either hand (886).
- (5) Absence of hand or any portion thereof (887), except for specific absence of fingers as noted in subparagraphs 18.b.(1)-(4).
- (6) Current polydactyly (755.0).
- (7) Intrinsic paralysis or weakness of upper limbs, including but not limited to nerve paralysis, carpal tunnel and cubital syndromes, lesion of ulnar, median, or radial nerve (354), sufficient to produce physical findings in the hand such as muscle atrophy and weakness.

c. Residual Weakness and Pain. Current disease, injury, or congenital condition with residual weakness or symptoms that prevents satisfactory performance of duty, including but not limited to chronic joint pain associated with the shoulder (719.41), the upper arm (719.42), the forearm (719.43), and the hand (719.44); or chronic joint pain as a late effect of fracture of the

upper extremities (905.2), as a late effect of sprains without mention of injury (905.7), and as late effects of tendon injury (905.8).

19. LOWER EXTREMITIES

a. General

(1) Current deformities, disease, or chronic joint pain of pelvic region, thigh (719.45), lower leg (719.46), knee (717.9), ankle and or foot (719.47) that have interfered with function to such a degree as to prevent the individual from following a physically active vocation in civilian life, or that would interfere with walking, running, weight bearing, or the satisfactory completion of training or military duty.

(2) Current leg-length discrepancy resulting in a limp (736.81).

b. Limitation of Motion. Current active joint ranges of motion less than:

(1) Hip (due to disease (726.5) or injury (905.2))

- (a) Flexion to 90 degrees.
- (b) No demonstrable flexion contracture.
- (c) Extension to 10 degrees (beyond 0 degrees).
- (d) Abduction to 45 degrees.
- (e) Rotation of 60 degrees (internal and external combined).

(2) Knee (due to disease (726.6) or injury (905.4))

- (a) Full extension to 0 degrees.
- (b) Flexion to 110 degrees.

(3) Ankle (due to disease (726.7) or injury (905.4) or congenital)

- (a) Dorsiflexion to 10 degrees.
- (b) Planter flexion to 30 degrees.
- (c) Subtalar eversion and inversion totaling 5 degrees.

c. Foot and Ankle

DoDI 6130.03, April 28, 2010

- (1) Current absence of a foot or any portion thereof (896).
- (2) Absence of a single lesser toe or any portion thereof that is asymptomatic and does not impair function DOES meet the standard.
- (3) Deformity of the toes (735.9) that prevents the proper wearing of military footwear or impairs walking, marching, running, maintaining balance, or jumping.
- (4) Symptomatic deformity of the toes (acquired (735) or congenital (755.66)), including but not limited to conditions such as hallux valgus (735.0), hallux varus (735.1), hallux rigidus (735.2), hammer toe(s) (735.4), claw toe(s) (735.5), or overriding toe(s) (735.8).
- (5) Clubfoot (754.70) or pes cavus (754.71) that prevents the proper wearing of military footwear or causes symptoms when walking, marching, running, or jumping.
- (6) Rigid or symptomatic pes planus (acquired (734) or congenital (754.61)).
- (7) Current ingrown toenails (703.0), if infected or symptomatic.
- (8) Current or history of recurrent plantar fasciitis (728.71).
- (9) Symptomatic neuroma (355.6).

d. Leg, Knee, Thigh, and Hip

- (1) Current loose or foreign body in the knee joint (717.6).
- (2) History of uncorrected anterior (717.83) or posterior (717.84) cruciate ligament injury.
- (3) History of surgical reconstruction of knee ligaments (P81.4) (CPT 27427-27429) DOES meet the standard if 12 months has elapsed since reconstruction, and the knee is asymptomatic and stable.
- (4) Recurrent ACL reconstruction (CPT 27427, 27407).
- (5) Symptomatic medial (717.82) or lateral (717.42) meniscal injury. The following DOES meet the standard if asymptomatic and released to full and unrestricted activity:
 - (a) Meniscal repair (CPT 27403), more than 6 months after surgery.
 - (b) Partial meniscectomy (CPT 27332-27333) more than 3 months after surgery.
- (6) Meniscal transplant (CPT 29868).
- (7) Symptomatic medial (844.1) and lateral (844.0) collateral ligament instability.

DoDI 6130.03, April 28, 2010

(8) Current or history of congenital dislocation of the hip (754.3), osteochondritis of the hip (Legg-Calve-Perthes Disease) (732.1), or slipped capital femoral epiphysis of the hip (732.2).

(9) Hip dislocation (835) within 2 years preceding examination. Hip dislocation after 2 years DOES meet the standard if asymptomatic and released to full unrestricted activity.

(10) Symptomatic osteochondritis of the tibial tuberosity (Osgood-Schlatter Disease) (732.4) within the past year.

(11) Stress fractures (733.95, V13.52), recurrent or single episode during the past year.

20. MISCELLANEOUS CONDITIONS OF THE EXTREMITIES

a. Current or history of chondromalacia (717.7), including but not limited to chronic patello-femoral pain syndrome and retro-patellar pain syndrome (719.46), osteoarthritis (715.3), or traumatic arthritis (716.1).

b. Current joint dislocation if unreduced, or history of recurrent dislocation, subluxation or instability of the hip (835), elbow (832), ankle (837), or foot.

c. History of any dislocation, subluxation or instability of the knee (718.86) or shoulder.

d. Current or history of osteoarthritis (715.3) or traumatic arthritis (716.1) of isolated joints that has interfered with a physically active lifestyle, or that prevents the satisfactory performance of military duty.

e. Fractures

(1) Current malunion or non-union of any fracture (733.8) (except asymptomatic ulnar styloid process fracture).

(2) Current retained hardware (including plates, pins, rods, wires, or screws) used for fixation that is symptomatic or interferes with proper wearing of equipment or military uniform. Retained hardware is not disqualifying if fractures are healed, ligaments are stable, and there is no pain.

f. Current orthopedic implants or devices to correct congenital or post-traumatic orthopedic abnormalities (V43).

g. Current or history of contusion of bone or joint (923, 924), ; an injury of more than a minor nature that shall interfere or prevent performance of military duty, or shall require frequent or prolonged treatment, without fracture, nerve injury, open wound, crush, or dislocation, that occurred in the preceding 6 months and recovery has not been sufficiently completed or rehabilitation resolved.

DoDI 6130.03, April 28, 2010

h. History of joint replacement or resurfacing of any site (V43.6) (CPT 24363, 27130-27132, 27447).

i. Current or history of neuromuscular paralysis, weakness, contracture, or atrophy (728) of sufficient degree to interfere with or prevent satisfactory performance of military duty, or requires frequent or prolonged treatment.

j. Current symptomatic osteochondroma or history of multiple osteochondromatous exostoses (727.82).

k. Current osteoporosis (733.0) as demonstrated by a reliable test such as a dual energy x-ray absorptiometry scan (DEXA).

l. Current osteopenia (733.9) until resolved.

m. Current osteomyelitis (730.0) or history of recurrent osteomyelitis.

n. Current or history of *osteochondral defect, formerly known as* osteochondritis dissecans (732.7).

o. History of cartilage surgery, including but not limited to cartilage debridement, chondroplasty, microfracture, or cartilage transplant procedure (CPT 20910, 20912, 21230, 21235, 27412, 27415, 29866-29867).

p. Current or history of any post-traumatic (958.9) or exercise-induced (729.7-79) compartment syndrome.

q. Current or history of avascular necrosis of any bone.

r. Current or history of recurrent tendon disorder, including but not limited to tendonitis, tendonopathy, tenosynovitis.

21. VASCULAR SYSTEM

a. Current or history of abnormalities of the arteries (447), including but not limited to aneurysms (442), arteriovenous malformations, atherosclerosis (440), or arteritis (such as Kawasaki's disease) (446).

b. Current or medically managed hypertension (401). Hypertension is defined as systolic pressure greater than 140 mmHg and or diastolic pressure greater than 90 mmHg confirmed by manual blood pressure cuff averaged over two or more properly measured, seated, blood pressure readings on each of 2 or more consecutive days (isolated, single-day blood pressure elevation is not disqualifying unless confirmed on 2 or more consecutive days).

DoDI 6130.03, April 28, 2010

c. Current or history of peripheral vascular disease (443.9), including but not limited to diseases such as Raynaud's Disease (443.0) and vasculidities.

d. Current or history of venous diseases, including but not limited to recurrent thrombophlebitis (451), thrombophlebitis during the preceding year, or evidence of venous incompetence, such as large or symptomatic varicose veins, edema, or skin ulceration (454).

e. Current or history of deep venous thrombosis (453.40).

f. History of operation or endovascular procedure on the arterial or venous systems, including but not limited to vena cava filter, angioplasty, venoplasty, thrombolysis, or stent placement (CPT 34001-37799).

g. History of Marfan's Syndrome (759.82).

22. SKIN AND CELLULAR TISSUES

a. Current diseases of sebaceous glands including severe and or cystic acne (706), or hidradenitis suppurativa (704-705), if extensive involvement of the neck, scalp, axilla, groin, shoulders, chest, or back is present or shall be aggravated by or interfere with the proper wearing of military equipment. Applicants under treatment with systemic retinoids, including, but not limited to isotretinoin (Accutane[®]), do not meet the standard until 8 weeks after completion of therapy.

b. Current or history of atopic dermatitis (691) or eczema (692.9) after the 12th birthday.

(1) Atopic Dermatitis. Active or history of residual or recurrent lesions in characteristic areas (face, neck, antecubital and or popliteal fossae, occasionally wrists and hands).

(2) Non-Specific Dermatitis. Current or history of recurrent or chronic non-specific dermatitis to include contact (692) (irritant or allergic), or dyshidrotic dermatitis (705.81) requiring more than treatment with over the counter medications.

c. Cysts if:

(1) The current cyst (706.2) (other than pilonidal cyst) is of such a size or location as to interfere with the proper wearing of military equipment.

(2) The current pilonidal cyst (685) is evidenced by the presence of a tumor mass or a discharging sinus, or is a surgically resected pilonidal cyst (CPT 11770-11772) that is symptomatic, unhealed, or less than 6 months post-operative.

d. Current or history of bullous dermatoses (694), including but not limited to dermatitis herpetiformis, pemphigus, and epidermolysis bullosa, (757.39). Resolved bullous impetigo DOES meet the standard.

DoDI 6130.03, April 28, 2010

- e. Current or chronic lymphedema (457.1).
- f. Current or history of furunculosis or carbuncle (680) if extensive, recurrent, or chronic.
- g. Current or history of severe hyperhidrosis of hands or feet (705.2, 780.8) unless controlled by topical medications.
- h. Current or history of congenital (757) or acquired (216) anomalies of the skin, such as nevi or vascular tumors that interfere with function, or are exposed to constant irritation. History of Dysplastic Nevus Syndrome (232).
- i. Current or history of keloid formation (701.4), including but not limited to pseudofolliculitis and keloidalis nuchae (706.1), if that tendency is marked or interferes with the proper wearing of military equipment.
- j. Current lichen planus (cutaneous and/or oral) (697.0).
- k. Current or history of neurofibromatosis (Von Recklinghausen's Disease) (237.7).
- l. History of photosensitivity (692.72), including but not limited to any primary sun-sensitive condition, such as polymorphous light eruption or solar urticaria, or any dermatosis aggravated by sunlight, such as lupus erythematosus.
- m. Current or history of psoriasis (696.1).
- n. Current or history of radiodermatitis (692.82).
- o. Current or history of scleroderma (710.1).
- p. Current or history of chronic urticaria lasting longer than 6 weeks or recurrent episodes of urticaria (708.8) within the past 24 months not associated with angioedema, hereditary angioedema (277.6), or maintenance therapy for chronic urticaria, even if not symptomatic.
- q. Current symptomatic plantar wart(s) (078.19).
- r. Current scars (709.2), or any other chronic skin disorder of a degree or nature that requires frequent outpatient treatment or hospitalization, which in the opinion of the certifying authority shall interfere with proper wearing of military clothing or equipment, or which exhibits a tendency to ulcerate or interferes with the satisfactory performance of duty.
- s. Prior burn (949) injury involving 18 percent or more body surface area (including graft sites), or resulting in functional impairment to such a degree, due to scarring, as to interfere with the satisfactory performance of military duty due to decreased range of motion, strength, or agility.

DoDI 6130.03, April 28, 2010

t. Current localized types of fungus infections (117), interfering with the proper wearing of military equipment or the performance of military duties. For systemic fungal infections, refer to paragraph 24.wq. of this enclosure.

23. BLOOD AND BLOOD-FORMING TISSUES

a. Current hereditary or acquired anemia, which has not been corrected with therapy before appointment or induction. ICD-9 codes for diagnosed anemia include hereditary hemolytic anemia (282), sickle cell disease (282.6), acquired hemolytic anemia (283), aplastic anemia (284), or unspecified anemias (285).

b. Current or history of coagulation defects (286), including but not limited to von Willebrand's Disease (286.4), idiopathic thrombocytopenia (287), or Henoch-Schönlein Purpura (287.0).

c. Current or history of diagnosis of any form of chronic or recurrent agranulocytosis and/or leukopenia (288.0).

d. Spleen

(1) Current splenomegaly (789.2).

(2) History of splenectomy (P41.5) (CPT 38100-38129), except when accomplished for trauma or conditions unrelated to the spleen or for hereditary spherocytosis (282.0).

24. SYSTEMIC

a. Current or history of disorders involving the immune mechanism, including immunodeficiencies (279).

b. Presence of human immunodeficiency virus or serologic evidence of infection (042, V08) or false-positive screening test(s) with ambiguous results on confirmatory immunologic testing.

~~c. Current or history of lupus erythematosus (710.0) or mixed connective tissue disease variant (710.9).~~

~~d. Current or history of progressive systemic sclerosis (710.1), including Calcinosis, Raynaud's phenomenon, Esophageal dysmotility, sclerodactyly, telangiectasia (CREST) Variant.~~

~~e. Current or history of Reiter's disease (099.3).~~

~~f. Current or history of rheumatoid arthritis (714.0).~~

~~g. Current or history of Sjögren's syndrome (710.2).~~

DoDI 6130.03, April 28, 2010

~~h. Current or history of vasculitis, including but not limited to polyarteritis nodosa and allied conditions (446.0), arteritis (447.6), Behçet's (136.1), and Wegener's granulomatosis (446.4).~~

~~ic.~~ Tuberculosis (010)

(1) Current active tuberculosis or substantiated history of active tuberculosis in any form or location, regardless of past treatment, in the previous 2 years.

(2) Current residual physical or mental defects from past tuberculosis that shall prevent the satisfactory performance of duty.

(3) Individuals with a past history of active tuberculosis more than 2 years before appointment, enlistment, or induction meet the standard if they have received a complete course of standard chemotherapy for tuberculosis.

(4) Current or history of untreated latent tuberculosis (positive Purified Protein Derivative with negative chest X-ray) (795.5). Individuals with a tuberculin reaction in accordance with ATS and United States Public Health Service (USPHS) guidelines are eligible for enlistment, induction, and appointment, provided they have received chemoprophylaxis in accordance with ATS and USPHS guidelines. A negative QuantiFERON[®]-TB Gold (QFT[®]-G) with a positive tuberculin skin test DOES meet the standard.

~~jd.~~ Current untreated syphilis (097).

~~ke.~~ History of anaphylaxis (995.0).

(1) History of anaphylaxis to stinging insects (989.5). A cutaneous only reaction to a stinging insect under the age of 16 DOES meet the standard. Applicants who have been treated for 3-5 years with maintenance venom immunotherapy DO meet the standard.

(2) History of systemic allergic reaction to food or food additives (995.60-995.69). Systemic allergic reaction may be defined as a temporally related, systemic, often multi-system, reaction to a specific food. The presence of a food-specific immunoglobulin E antibody without a correlated clinical history DOES meet the standard.

(3) Oral allergy syndrome.

(4) Hypersensitivity to latex (V15.07).

(5) Exercise-induced anaphylaxis (with or without food).

(6) Idiopathic anaphylaxis (995.0).

(7) Acute, early, or immediate anaphylactic onset.

DoDI 6130.03, April 28, 2010

(8) History of systemic allergic reaction or angioedema.

~~lf~~. Current residual of tropical fevers, including but not limited to fevers, such as malaria (084) and various parasitic or protozoan infestations that prevent the satisfactory performance of military duty.

~~mg~~. History of malignant hyperthermia (995.86).

~~nh~~. History of industrial solvent or other chemical intoxication (982) with sequelae.

~~oi~~. History of motion sickness (994.6) resulting in recurrent incapacitating symptoms or of such a severity to require pre-medication in the previous 3 years.

~~pj~~. History of rheumatic fever (390).

~~qk~~. Current or history of muscular dystrophies (359) or myopathies.

~~rl~~. Current or history of amyloidosis (277.3).

~~sm~~. Current or history of eosinophilic granuloma (277.8) and all other forms of histiocytosis (202.3). Healed eosinophilic granuloma, when occurring as a single localized bony lesion and not associated with soft tissue or other involvement, DOES meet the standard.

~~tn~~. Current or history of polymyositis (710.4) or dermatomyositis complex (710.3) with skin involvement.

~~uo~~. History of rhabdomyolysis (728.88).

~~vp~~. Current or history of sarcoidosis (135).

~~wq~~. Current systemic fungus infections (117). For localized fungal infections, refer to paragraph 22.t. of this enclosure.

25. ENDOCRINE AND METABOLIC

a. Current ~~or history of~~ adrenal dysfunction (255).

b. ~~Current or history of diabetes mellitus (249.xx, 250.xx). Diabetes mellitus (250) disorders, including:~~

(1) Current or history of diabetes mellitus (250).

(2) Current or history of pre-diabetes mellitus defined as fasting plasma glucose 110-125 milligrams per deciliter (mg/dL) and glycosylated hemoglobin greater than 5.7 percent.

DoDI 6130.03, April 28, 2010

(3) History of gestational diabetes mellitus.

(4) Current persistent glycosuria, when associated with impaired glucose tolerance (250) or renal tubular defects (271.4).

c. Current or history of pituitary dysfunction (253), *to include history of growth hormone use. Non-functional microadenoma (less than 1cm) DOES meet the standard.*

d. Current or history of ~~gout (274).~~ *diabetes insipidus.*

e. Current or history of hyperparathyroidism (252.0) or hypoparathyroidism (252.1).

f. The following thyroid disorders:

(1) Current goiter (240). *Symmetrical simple goiter less than two times normal size with no nodules by ultrasound and normal thyroid function tests DOES meet the standard.*

(2) Thyroid nodule (241.0). *A solitary thyroid nodule less than 5mm or less than 3cm with benign histology or cytology DOES meet the standard.*

(23) Current hypothyroidism (244) ~~uncontrolled by medication.~~ *Individuals with two normal thyroid stimulating hormone tests within the preceding 6 months DOES meet the standard.*

(34) Current or history of hyperthyroidism (242.9). *In remission off of anti-thyroidal medication with normal thyroid function tests for a minimum of 12 months and without evidence of thyroid associated ophthalmopathy DOES meet the standard.*

~~(4) Current thyroiditis (245).~~

g. Current nutritional deficiency diseases, including but not limited to beriberi (265.0), pellagra (265.2), and scurvy (267).

~~h. Current persistent glycosuria, when associated with impaired glucose tolerance (250) or renal tubular defects (271.4).~~

~~i.h.~~ *i.* Current or history of acromegaly, including but not limited to gigantism (253.0), or other disorders of pituitary function (253).

~~j.i.~~ *j.* Dyslipidemia ~~on medical management requiring more than one medication.~~ *with low-density lipoprotein (LDL) greater than 200mg/dL or triglycerides greater than 400 mg/dL. Dyslipidemia requiring more than one medication or LDL greater than 190 mg/dL on therapy.* All those on medical management must have demonstrated no medication side effects (such as myositis, myalgias, or transaminitis) for a period of 6 months.

DoDI 6130.03, April 28, 2010

k.j. Metabolic syndrome beyond the 35th birthday. Metabolic syndrome is defined in accordance with NHLBI and American Heart Association (2005) as any three of the following:

- (1) Medically controlled hypertension or elevated blood pressure of greater than 130 mmHg systolic or greater than 85 mmHg diastolic.
- (2) Waist circumference greater than 35 inches for women and greater than 40 inches for men.
- (3) Medically controlled dyslipidemia or triglycerides greater than 150 mg/dl.
- (4) Medically controlled dyslipidemia or high-density lipoprotein less than 40 mg/dl in men or less than 50 mg/dl in women.
- (5) Fasting glucose greater than 100 mg/dl.

k. Metabolic bone disease.

- (1) *Osteopenia, osteoporosis, or low bone mass with history of fragility fracture.*
- (2) *Paget's disease.*
- (3) *Osteomalacia.*
- (4) *Osteogenesis imperfecta.*

l. Male hypogonadism.

m. Current or history of islet-cell tumors, nesideoblastosis, or hypoglycemia.

26. RHEUMATOLOGIC

- a. Current or history of lupus erythematosus (710.0) or mixed connective tissue disease variant (710.9).*
- b. Current or history of progressive systemic sclerosis (710.1), including calcinosis, Raynaud's disease or phenomenon, esophageal dysmotility, sclerodactyly, telangiectasia (CREST) variant.*
- c. Current or history of Reiter's disease (099.3).*
- d. Current or history of rheumatoid arthritis (714.0).*
- e. Current or history of Sjögren's syndrome (710.2).*

DoDI 6130.03, April 28, 2010

f. Current or history of vasculitis, including but not limited to polyarteritis nodosa and allied conditions (446.0), arteritis (447.6), Behçet's (136.1), and Wegener's granulomatosis (446.4). Henoch-Schonlein Purpura occurring before the age of 19 with 2 years remission and no sequelae DOES meet the standard.

g. History of congenital fusion (756.15) involving more than two vertebral bodies or any surgical fusion of spinal vertebrae (P81.0).

h. Current or history of gout (274).

i. Current or history of inflammatory myopathy including polymyositis or dermatomyositis.

j. Current or history of non-inflammatory myopathy to include but not limited to metabolic myopathy such as glycogen storage disease, lipid storage disease, and mitochondrial myopathy.

k. Current or history of fibromyalgia, myofascial pain, or chronic wide-spread pain.

l. Current or history of chronic fatigue syndrome.

m. Current or history of spondyloarthritis including ankylosing spondyloarthritis, psoriatic arthritis, reactive arthritis, or spondyloarthritis associated with inflammatory bowel disease.

n. Current or history of joint hypermobility syndrome.

o. Current or history of hereditary connective tissue disorders including but not limited to Marfan's syndrome, Ehlers-Danlos syndrome, and osteogenesis imperfecta.

267. NEUROLOGIC

a. Current or history of cerebrovascular conditions, including but not limited to subarachnoid (430) or intracerebral (431) hemorrhage, vascular stenosis, aneurysm, stroke, transient ischemic attack or arteriovenous malformation (437).

b. History of congenital or acquired anomalies of the central nervous system (742) or meningocele (741.9).

c. Current or history of disorders of meninges, including but not limited to cysts (349.2). Asymptomatic incidental arachnoid cyst demonstrated to be stable by neurological imaging over a 6-month or greater time period DO meet the standard.

d. Current or history of neurodegenerative disorders, including but not limited to those disorders affecting the cerebrum (330), basal ganglia (333), cerebellum (334), spinal cord (335), peripheral nerves (337), or muscles (728).

DoDI 6130.03, April 28, 2010

e. History of headaches (784.0), including but not limited to migraines (346) and tension headaches (307.81) that:

(1) Are severe enough to disrupt normal activities (such as loss of time from school or work) ~~of~~ more than twice per year in the past 2 years.

(2) Require prescription medications more than twice per year within the last 2 years.

f. Migraine (346) or migraine variant (346.2) associated with neurological deficits other than scotoma.

g. Cluster headaches (339.0).

h. History of head injury (854.0) if associated with:

(1) Post-traumatic seizure(s) occurring more than 30 minutes after injury.

(2) Persistent motor, sensory, vestibular, visual, or any other focal neurological deficit.

(3) Persistent impairment of cognitive function.

(4) Persistent alteration of personality or behavior.

(5) Unconsciousness of 24 hours or more post-injury

(6) Amnesia or disorientation of person, place, or time of 7 days duration or longer post-injury.

(7) Cerebral traumatic findings, including but not limited to epidural, subdural, subarachnoid, or intracerebral hematoma on neurological imaging until resolved and 12 months has elapsed since injury.

(8) Associated abscess (326) or meningitis (958.8).

(9) Cerebrospinal fluid rhinorrhea (349.81) or otorrhea (388.61) persisting more than 7 days.

(10) Penetrating brain injury to include radiographic evidence of retained foreign body or bony fragments secondary to the trauma and/or operative procedure in the brain.

i. History of moderate head injury (854.03).

(1) Moderate head injuries are defined as:

(a) Unconsciousness of more than 30 minutes but less than 24 hours, or

DoDI 6130.03, April 28, 2010

(b) Amnesia, or disorientation of person, place, or time, alone or in combination, more than 24 hours but less than 7 days duration post-injury, or

(c) Linear skull fracture.

(2) After 12 months post-injury, applicants may be qualified if neurological examination shows no residual dysfunction or complications.

j. History of mild head injury (854.02).

(1) Mild head injury is defined as:

(a) Unconsciousness of less than 30 minutes post-injury.

(b) Amnesia or disorientation of person, place, or time, alone or in combination, of less than 24 hours post-injury.

(2) After 1 month post-injury, applicants may be qualified if neurological examination shows no residual dysfunction or complications.

k. History of persistent post-concussive symptoms (310.2) that interfere with normal activities or have duration of more than 1 month. Such symptoms include but are not limited to headache, vomiting, disorientation, spatial disequilibrium, impaired memory, poor mental concentration, shortened attention span, dizziness, or altered sleep patterns.

l. Current or history of infectious processes of the central nervous system, including but not limited to meningitis (322), encephalitis (323), neurosyphilis (094), or brain abscess (324), if occurring within 1 year before examination, required surgical treatment, or if there are residual neurological defects.

m. Current or history of paralysis, weakness, lack of coordination, chronic pain (including but not limited to chronic regional pain syndrome or neuralgias), or sensory disturbance or other specified paralytic syndromes (344), including but not limited to Guillain-Barre Syndrome (357.0).

n. Any seizure occurring beyond the 6th birthday, unless the applicant has been free of seizures for a period of 5 years while taking no medication for seizure control, and has a normal sleep-deprived electroencephalogram and normal neurology evaluation while taking no medications for seizure control.

o. Chronic nervous system disorders, including but not limited to myasthenia gravis (358.0), multiple sclerosis (340), tremor (333.1), and tic disorders (307.20) (e.g., Tourette's (307.23)).

p. Current or history of central nervous system shunts of all kinds (V45.2).

q. Syncope or atraumatic loss of consciousness. History of recurrent syncope or presyncope (780.2), including blackout, fainting, loss or alteration of level of consciousness (excludes single episode of vasovagal reaction with identified trigger such as venipuncture), unless there has been no recurrence during the preceding 2 years while off all medication for treatment of this condition.

278. SLEEP DISORDERS

a. Chronic insomnia (780.5). Within the past year, had difficulty sleeping, or used medications to promote sleep for more than 3 nights per week, over a period of 3 months.

b. Sleep-related breathing disorders (327). Current diagnosis or treatment of sleep-related breathing disorders, including but not limited to sleep apnea (327.2).

c. Current or history of narcolepsy, cataplexy (347-347.11), or other hypersomnia disorders (327.13-19).

d. Circadian rhythm disorders requiring treatment (307.45).

e. Current or history of parasomnia (327.44, 327.49), including but not limited to sleepwalking, enuresis, or night terrors (307.46), after the age of 15.

f. Current diagnosis or treatment of sleep-related movement disorders to include restless leg syndrome (327.5).

289. LEARNING, PSYCHIATRIC, AND BEHAVIORAL

a. Attention Deficit Hyperactivity Disorder (ADHD) (314) UNLESS the following criteria are met:

(1) The applicant has not required an Individualized Education Program or work accommodations since the age of 14.

(2) There is no history of comorbid mental disorders.

(3) The applicant has never taken more than a single daily dosage of medication or has not been prescribed medication for this condition for more than 24 cumulative months after the age of 14.

(4) During periods off of medication after the age of 14, the applicant has been able to maintain at least a 2.0 grade point average without accommodations.

(5) Documentation from the applicant's prescribing provider that continued medication is not required for acceptable occupational or work performance.

DoDI 6130.03, April 28, 2010

(6) Applicant is required to enter service and pass Service-specific training periods with no prescribed medication for ADHD.

b. History of learning disorders (315), including but not limited to dyslexia (315.02), UNLESS applicants demonstrated passing academic and employment performance without utilization of academic and or work accommodations at any time since age 14.

c. Pervasive developmental disorders (299 series) including Asperger Syndrome, autistic spectrum disorders, and pervasive developmental disorder-not otherwise specified (299.9).

d. Current or history of disorders with psychotic features such as schizophrenic disorders (295), delusional disorders (297), or other and unspecified psychoses (298).

e. History of bipolar disorders (296.4-7) and affective psychoses (296.8).

f. History of depressive disorders, including but not limited to major depression (296), dysthymic disorder (300.4), and cyclothymic disorder requiring outpatient care for longer than 12 months by a physician or other mental health professional (to include V65.40), or any inpatient treatment in a hospital or residential facility.

g. Depressive disorder not otherwise specified (311), or unspecified mood disorder (296.90), UNLESS:

(1) Outpatient care was not required for longer than 24 months (cumulative) by a physician or other mental health professional (to include V65.40).

(2) The applicant has been stable without treatment for the past 36 continuous months.

(3) The applicant did not require any inpatient treatment in a hospital or residential facility.

h. History of a single adjustment disorder (309) within the previous 3 months, or recurrent episodes of adjustment disorders.

i. Current or history of disturbance of conduct (312), impulse control (312.3), oppositional defiant (313.81), other behavior disorders (313), or personality disorder (301).

(1) History (demonstrated by repeated inability to maintain reasonable adjustment in school, with employers or fellow workers, or other social groups), interview, or psychological testing revealing that the degree of immaturity, instability, of personality inadequacy, impulsiveness, or dependency shall likely interfere with adjustment in the Military Services.

(2) Recurrent encounters with law enforcement agencies (excluding minor traffic violations) or antisocial behaviors are tangible evidence of impaired capacity to adapt to military service.

DoDI 6130.03, April 28, 2010

- j. Encopresis (307.7) after 13th birthday.
- k. History of anorexia nervosa (307.1) or bulimia (307.51).
- l. Other eating disorders (307.50; 52-54) including unspecified disorders of eating (307.59) occurring after the 13th birthday.
- m. Any current receptive or expressive language disorder, including but not limited to any speech impediment or stammering and stuttering (307.0) of such a degree as to significantly interfere with production of speech or *the ability* to repeat commands.
- n. History of suicidal behavior, including gesture(s) or attempt(s) (300.9) or history of self-mutilation or injury used as a way of dealing with life and emotions.
- o. History of obsessive-compulsive disorder (300.3) or post-traumatic stress disorder (309.81).
- p. History of anxiety disorders (300.01), anxiety disorder not otherwise specified (300.00), panic disorder (300.2), agoraphobia (300.21, 300.22), social phobia (300.23), simple phobias (300.29), other acute reactions to stress (308) UNLESS:
 - (1) The applicant did not require any treatment in an inpatient or residential facility.
 - (2) Outpatient care was not required for longer than 12 months (cumulative) by a physician or other mental health professional (to include V65.40).
 - (3) The applicant has not required treatment (including medication) for the past 24 continuous months.
 - (4) The applicant has been stable without loss of time from normal pursuits for repeated periods even if of brief duration; and without symptoms or behavior of a repeated nature that impaired social, school, or work efficiency for the past 24 continuous months.
- q. Current or history of dissociative, conversion, or factitious disorders (300.1), depersonalization (300.6), hypochondriasis (300.7), somatoform disorders (300.8), or pain disorder related to psychological factors (307.80 and .89).
- r. Current or history of psychosexual conditions (302), including but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias.
- s. Current or history of alcohol dependence (303), drug dependence (304), alcohol abuse (305.0), or other drug abuse (305.2 thru 305.9).
- t. Current or history of other mental disorders (all 290-319 not listed) that, in the opinion of the civilian or military medical examiner, shall interfere with or prevent satisfactory performance of military duty.

- u. Prior psychiatric hospitalization for any cause.

2930. TUMORS AND MALIGNANCIES

- a. Current benign tumors (~~M8000~~) or conditions that interfere with function, prevent the proper wearing of the uniform or protective equipment, shall require frequent specialized attention, or have a high malignant potential, such as Dysplastic Nevus Syndrome.
- b. Current or history of malignant tumors (V10).
- c. Skin cancer (other than malignant melanoma) that is removed with no residual DOES meet the standard.

301. MISCELLANEOUS

- a. Current or history of parasitic diseases, if symptomatic or carrier state, including but not limited to filariasis (125), trypanosomiasis (086), schistosomiasis (120), hookworm (uncinariasis) (126.9), or unspecified infectious and parasitic disease (136.9).
- b. Current or history of other disorders, including but not limited to cystic fibrosis (277.0) or porphyria (277.1), that prevent satisfactory performance of duty, or require frequent or prolonged treatment.
- c. Current or history of cold-related disorders, including but not limited to frostbite, chilblain, immersion foot (991), or cold urticaria (708.2).
- d. Current residual effects of cold-related disorders (991.9), including but not limited to paresthesias, easily traumatized skin, cyanotic amputation of any digit, ankylosis, trench foot, or deep-seated ache.
- e. History of angioedema, including hereditary angioedema (277.6).
- f. History of receiving organ or tissue transplantation (V42).
- g. History of pulmonary (415) or systemic embolization (444).
- h. History of untreated acute or chronic metallic poisoning, including but not limited to lead, arsenic, silver (985), beryllium (985.3), or manganese (985.2), or current complications or residual symptoms of such poisoning.
- i. History of heat pyrexia (992.0), heatstroke (992.0), or sunstroke (992.0).
- j. History of three or more episodes of heat exhaustion (992.3).

DoDI 6130.03, April 28, 2010

k. Current or history of a predisposition to heat injuries (992.0-992.8), including disorders of sweat mechanism (705.0-705.9), combined with a previous serious episode.

l. Current or history of any unresolved sequelae of heat injury (992.0-992.8), including but not limited to nervous, cardiac, hepatic, or renal systems.

m. Current or history of any condition that, in the opinion of the medical officer, shall significantly interfere with the successful performance of military duty or training (should use specific ICD code whenever possible, or 796.9).

n. Any current acute pathological condition, including but not limited to acute communicable diseases, until recovery has occurred without sequelae.

GLOSSARYPART I. ABBREVIATIONS AND ACRONYMS

ADHD	Attention Deficit Hyperactivity Disorder
ANSI	American National Standards Institute
ASD(HA)	Assistant Secretary of Defense for Health Affairs
ATS	American Thoracic Society
AV	atrioventricular
CPT	Current Procedural Terminology
CREST	Calcinosis, Raynaud's phenomenon, Esophageal dysmotility, sclerodactyly, telangiectasia
dB	decibel
DEP	Delayed Entry Program
DoDD	Department of Defense Directive
DoDI	Department of Defense Instruction
DUSD(MPP)	Deputy Under Secretary of Defense for Military Personnel Policy
ECG	electrocardiograph
GERD	Gastro-Esophageal Reflux Disease
HCPCS	Healthcare Common Procedure Coding System
HHS	Department of Health and Human Services
ICD	International Classification of Diseases
LASEK	laser epithelial keratomileusis
LASIK	laser-assisted in situ keratomileusis
<i>LDL</i>	<i>low-density lipoprotein</i>
LTBI	latent tuberculosis infection
MEDPERS	Medical and Personnel Executive Steering Committee
mg/dl	milligrams per deciliter
mmHg	millimeters of mercury
NHLBI	National Heart, Lung, and Blood Institute
NIH	National Institutes of Health
PRK	photorefractive keratectomy
PDASD(HA)	Principal Deputy Assistant Secretary of Defense for Health Affairs
PDES	Physical Disability and Evaluation System
PDUSD(P&R)	Principal Deputy Under Secretary of Defense for Personnel and Readiness

QFT [®] -G	QuantiFERON [®] -TB Gold
ROTC	Reserve Officer Training Corps
USD(P&R)	Under Secretary of Defense for Personnel and Readiness
USPHS	United States Public Health Service
WPW	Wolff-Parkinson-White

PART II. DEFINITIONS

Unless otherwise noted, these terms and their definitions are for the purpose of this Instruction.

anemia. A hemoglobin level of less than 13.5 for males and less than 12 for females.

Department of Health and Human Services (HHS). The U.S. Government's principal agency for protecting the health of all Americans and providing essential human services, especially for those who are least able to help themselves.

Military Department. Defined in Joint Publication 1-02 (Reference (j)).

Military Service(s). Defined in Reference (j).

NHLBI. An agency within the National Institutes of Health (NIH) that provides global leadership for a research, training, and education program to promote the prevention and treatment of heart, lung, and blood diseases and enhance the health of all individuals so that they can live longer and more fulfilling lives.

NIH. An agency within the HHS that serves as the steward of medical and behavioral research for the Nation. Its mission is science in pursuit of fundamental knowledge about the nature and behavior of living systems and the application of that knowledge to extend healthy life and reduce the burdens of illness and disability.

QFT[®]-G. An in vitro laboratory diagnostic test using a whole blood specimen. It is an indirect test for Mycobacterium tuberculosis-complex (i.e., M. tuberculosis, M. bovis, M. africanum, M. microti, M. canetti) infection, whether tuberculosis disease or latent tuberculosis infection (LTBI). It cannot distinguish between tuberculosis disease and LTBI, and is intended for use in conjunction with risk assessment, radiography, and other medical and diagnostic evaluations.

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

**DEFENDANTS' MOTION TO
DISSOLVE THE PRELIMINARY
INJUNCTION**

NOTED FOR CONSIDERATION:
APRIL 13, 2018

TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	2
I. History of Policies Concerning Transgender Service Before 2017	2
II. Development of the New Policy	3
III. The New Policy	5
ARGUMENT	7
I. Plaintiffs Cannot Demonstrate A Likelihood of Success On The Merits	7
A. The Current Challenge to the 2017 Presidential Memorandum Is Moot	7
B. The New Policy Withstands Constitutional Scrutiny	9
1. The new policy is consistent with equal protection principles	9
a. The new policy is subject to highly deferential review	9
b. The new policy survives highly deferential scrutiny	13
i. Military Readiness	14
ii. Order, Discipline, Leadership, and Unit Cohesion	17
iii. Disproportionate Costs	20
c. The new policy is consistent with the Court's prior reasoning	22
2. The new policy survives Plaintiffs' other constitutional challenges	23
II. Plaintiffs Have Not Satisfied The Equitable Factors For A Preliminary Injunction	23
CONCLUSION	24

INTRODUCTION

Last December, this Court entered a preliminary injunction forbidding the enforcement of several directives in a Presidential Memorandum from August 2017 concerning military service by transgender individuals (2017 Memorandum). Dkt. 103 (Op.). The Court understood these directives to institute a categorical policy “excluding transgender individuals from the military” that was based on reasons “‘contradicted by the studies, conclusions, and judgment of the military itself.’” Op. 1, 16. On that understanding, the Court issued a preliminary injunction precluding Defendants from implementing those specific directives. Op. 1.

The bases for that preliminary injunction no longer exist. Last month, the Secretary of Defense, with the agreement of the Secretary of Homeland Security, sent the President a memorandum recommending that the President revoke his 2017 Memorandum so that the military can implement a new policy. Mattis Memorandum, Exhibit 1. After an extensive review of the issue, the Department of Defense concluded that maintaining the policy on transgender service put in place by Secretary Carter in 2016 would pose substantial risks to military readiness and therefore proposed to adopt a new policy. *Id.* at 1–2. Far from a categorical ban based on transgender status, this new policy, like the Carter policy before it, would turn on the medical condition of gender dysphoria and contains a nuanced set of exceptions allowing some transgender individuals, including many Plaintiffs here, to serve. *Id.* at 2–3. Along with this memorandum, Secretary Mattis sent the President a 44-page report providing a detailed explanation for why, in the professional, independent judgment of the Defense Department, this new policy is necessary to further military interests. Department of Defense Report and Recommendations on Military Service by Transgender Persons (Feb. 2018) (Report), Exhibit 2. The President then issued a new memorandum on March 23, 2018, revoking his 2017 Memorandum, thus allowing the military to implement its preferred policy. Presidential Memorandum (2018 Memorandum), Exhibit 3.

In light of these changed circumstances, the preliminary injunction should be dissolved. Simply put, Plaintiffs can no longer meet any of the four criteria for this extraordinary relief. On the merits, their challenge to the revoked 2017 Memorandum no longer presents a live controversy and, in any event, the military’s new policy is constitutional. Plaintiffs—many of whom may continue

1 serving under the new policy—cannot show that they would suffer any cognizable injury from the
2 new policy, much less an irreparable one. And given the Department’s judgment that retaining the
3 Carter policy would pose risks to military readiness, the balance of the equities and the public interest
4 strongly cut against prolonging this state of affairs.

5 To be clear, Defendants respectfully maintain that the Court’s preliminary injunction, which
6 addressed only certain directives in the President’s 2017 Memorandum, does not extend to Secretary
7 Mattis’s new policy. But in an abundance of caution, Defendants urge this Court to dissolve the
8 preliminary injunction in order to permit the military to implement the policy it believes will best
9 ensure our Nation’s defense. To the extent that Plaintiffs may seek to challenge that new policy,
10 that independent controversy should not be litigated under the shadow of a preliminary injunction
11 of a Presidential Memorandum that is no longer in effect.

12 BACKGROUND

13 I. History of Policies Concerning Transgender Service Before 2017

14 For decades, military standards presumptively barred the accession and retention of certain
15 transgender individuals. Report 7. This approach was consistent with the third edition of the
16 Diagnostic and Statistical Manual of Mental Disorders (DSM), published by the American
17 Psychiatric Association (APA), which treated “transsexualism” as a disorder. *Id.* at 10.

18 In 2013, the APA published the fifth edition of the DSM, which replaced the term “gender
19 identity disorder” (itself a substitute for “transsexualism” in the fourth) with “gender dysphoria.” *Id.*
20 at 10, 12. The change reflected the APA’s conclusion that, by itself, identification with a gender
21 different from one’s biological sex—*i.e.*, transgender status—was not a disorder. *Id.* at 12. As the
22 APA stressed, “not all transgender people suffer from gender dysphoria.” *Id.* at 20 (brackets
23 omitted). Instead, the mental condition of “gender dysphoria” was defined in the DSM as a “marked
24 incongruence between one’s experience/expressed gender and assigned gender, of at least 6 months
25 duration” and “associated with clinically significant distress or impairment.” *Id.* 12–13.

26 In the wake of these changes, then-Secretary Carter ordered the creation of a working group
27 in July 2015 to study the possibility of “welcoming transgender persons to serve openly,” and
28

1 instructed it to “start with the presumption that transgender persons can serve openly without
 2 adverse impact on military effectiveness and readiness.” *Id.* at 13. As part of this review, the
 3 Department commissioned RAND to study the issue. *Id.* The resulting RAND report concluded
 4 that allowing transgender service members to serve in their preferred gender would limit
 5 deployability, impede readiness, and impose costs on the military, but dismissed these burdens as
 6 “negligible,” “marginal,” or “minimal.” Dkt. 46-2, at xii, 39–42, 46–47, 69–70; *accord* Report 14.

7 After this review, then-Secretary Carter ordered the Defense Department on June 30, 2016,
 8 to adopt a new policy on transgender service. First, the military had until July 1, 2017, to revise its
 9 accession standards. Report 14. Under this revision, a history of “gender dysphoria,” “medical
 10 treatment associated with gender transition,” or “sex reassignment or genital reconstruction surgery”
 11 would be disqualifying unless an applicant provided a certificate from a licensed medical provider
 12 that the applicant had been stable or free from associated complications for 18 months. *Id.* at 15.
 13 Second, and effective immediately, current service members could not be discharged based solely on
 14 their “gender identity” or their “expressed intent to transition genders,” Dkt. 48-3, at 4, but, if
 15 diagnosed with gender dysphoria, could transition genders, Report 14. Transgender service
 16 members who do not meet the clinical criteria for gender dysphoria, however, had to continue to
 17 serve in their biological sex. *Id.* at 15.

18 **II. Development of the New Policy**

19 Before the Carter accession standards took effect on July 1, 2017, the Deputy Secretary of
 20 Defense “directed the Services to assess their readiness to begin accessions” and received their input.
 21 Dkt. 197-4. “Building upon that work and after consulting with the Service Chiefs and Secretaries,”
 22 Secretary Mattis “determined that it [was] necessary to defer the start of [these] accessions” so that
 23 the military could “evaluate more carefully the impact of such accessions on readiness and lethality.”
 24 *Id.* Based on the recommendation of the services and in the exercise of his independent discretion
 25 and judgment, he thus delayed the implementation of the new accession standards on June 30, 2017,
 26 until January 1, 2018. *Id.*; *see* Report 4; Dkt. 197-3. He also ordered the Under Secretary of Defense
 27 for Personnel and Readiness to lead a review, which would “include all relevant considerations” and
 28

1 last for five months, with an end date of December 1, 2017. Dkt. 197-4. Secretary Mattis explained
2 that this study would give him “the benefit of the views of the military leadership and of the senior
3 civilian officials who are now arriving in the Department,” and that he “in no way presupposes the
4 outcome of the review.” *Id.*; see Report 17.

5 While that review was ongoing, the President stated on Twitter on July 26, 2017, that “the
6 United States Government will not accept or allow transgender individuals to serve in any capacity
7 in the U.S. Military.” Op. 2. The President then issued his 2017 Memorandum on August 25, 2017,
8 calling for, *inter alia*, “further study” into the risks of maintaining the Carter policy in its entirety.
9 Report 17.¹ In response, Secretary Mattis established a Panel of Experts on September 14, 2017, to
10 “conduct an independent multi-disciplinary review and study of relevant data and information
11 pertaining to transgender Service members.” Report 17. The Panel consisted of the members of
12 senior military leadership who had “the statutory responsibility to organize, train, and equip military
13 forces” and were “uniquely qualified to evaluate the impact of policy changes on the combat
14 effectiveness and lethality of the force.” *Id.* at 18.

15 In 13 meetings over the course of 90 days, the Panel met with commanders of transgender
16 service members, military medical professionals, civilian medical professionals, and transgender
17 service members themselves. *Id.* It reviewed information regarding gender dysphoria, its treatment,
18 and the effects this condition had on military effectiveness, unit cohesion, and military resources. *Id.*
19 It received briefing from three working groups or committees dedicated to issues involving
20 personnel, medical treatment, and military lethality. *Id.* It drew on the military’s experience with the
21 Carter policy thus far, and considered evidence that both supported and cut against its
22 recommendations. *Id.* And, unlike those responsible for the Carter policy, it did not “start with the
23 presumption that transgender persons can serve openly without adverse impact on military
24 effectiveness and readiness,” but made “no assumptions” at all. *Id.* at 19. Exercising its professional
25 military judgment, the Panel provided Secretary Mattis with recommendations. *Id.*

26 After considering these recommendations, along with additional information, Secretary
27

28 ¹ Given the Court’s familiarity, this filing omits a description of the 2017 Memorandum and the litigation up to now.

1 Mattis, with the agreement of the Secretary of Homeland Security, sent the President a memorandum
 2 in February 2018 proposing a new policy consistent with the Panel’s conclusions. *Id.*; *see* Mattis
 3 Memo. The memorandum was accompanied by a 44-page report setting forth in detail the bases for
 4 the Department’s recommended new policy. Mattis Memo 3; *see* Report.

5 **III. The New Policy**

6 In his memorandum, Secretary Mattis explained why a departure from the Carter policy was
 7 necessary. “Based on the work of the Panel and the Department’s best military judgment,” the
 8 Department had concluded “that there are substantial risks associated with allowing the accession
 9 and retention of individuals with a history or diagnosis of gender dysphoria and require, or have
 10 already undertaken, a course of treatment to change their gender.” Mattis Memo 2. In addition, it
 11 had found “that exempting such persons from well-established mental health, physical health, and
 12 sex-based standards ... could undermine readiness, disrupt unit cohesion, and impose an
 13 unreasonable burden on the military that is not conducive to military effectiveness and lethality.” *Id.*
 14 And although Secretary Carter had concluded otherwise on the basis of the RAND study, that report
 15 “contained significant shortcomings.” *Id.* It relied on “limited and heavily caveated data”; and
 16 “glossed over the impacts of healthcare costs, readiness, and unit cohesion, and erroneously relied
 17 on the selective experiences of foreign militaries with different operational requirements than our
 18 own.” *Id.*

19 Therefore, “in light of the Panel’s professional military judgment and [his] own professional
 20 judgment,” Secretary Mattis proposed a policy that continued some parts of the Carter policy and
 21 departed from others. *Id.*; *see id.* at 2–3; Report 4–6, 33–43. Like the Carter policy, the new policy
 22 does not draw lines on the basis of transgender status, but presumptively disqualifies individuals with
 23 a certain medical condition, gender dysphoria, from service. *Compare* Report 4–6, 19, *with* Dkt. 48-
 24 3. The key difference between the two policies is the exceptions to that presumptive disqualification.

25 Under the new policy, like the Carter policy, individuals who “identify as a gender other than
 26 their biological sex” but do not suffer clinically significant “distress or impairment of functioning in
 27 meeting the standards associated with their biological sex”—and therefore have no history or
 28

1 diagnosis of gender dysphoria—may serve if “they, like all other persons, satisfy all standards and
2 are capable of adhering to the standards associated with their biological sex.” Report 4.

3 Individuals who both are “diagnosed with gender dysphoria, either before or after entry into
4 service,” and “require transition-related treatment, or have already transitioned to their preferred
5 gender,” are presumptively “ineligible for service.” *Id.* at 5. This presumptive bar is subject to both
6 individualized “waivers or exceptions” that generally apply to all Department and Service-specific
7 standards and policies as well as a categorical reliance exception for service members who relied on
8 the Carter policy. *Id.* Specifically, service members “who were diagnosed with gender dysphoria by
9 a military medical provider after the effective date of the Carter policy, but before the effective date
10 of any new policy,” including those who entered the military “after January 1, 2018,” “may continue
11 to receive all medically necessary care, to change their gender marker in the Defense Enrollment
12 Eligibility Reporting System (DEERS), and to serve in their preferred gender, even after the new
13 policy commences.” *Id.* at 5–6.

14 Individuals who “are diagnosed with, or have a history of, gender dysphoria” but who neither
15 require nor have undergone gender transition are likewise “generally disqualified from accession or
16 retention.” *Id.* at 5. This presumptive disqualification is subject to the same exceptions discussed
17 above as well as two new categorical ones. *Id.* With respect to accession, individuals with a history
18 of gender dysphoria may enter the military if they (1) can demonstrate “36 consecutive months of
19 stability (i.e., absence of gender dysphoria) immediately preceding their application”; (2) “have not
20 transitioned to the opposite gender”; and (3) “are willing and able to adhere to all standards
21 associated with their biological sex.” *Id.* With respect to retention, those diagnosed with gender
22 dysphoria after entering the military may remain so long as they (1) can comply with Department
23 and Service-specific “non-deployab[ility]” rules; (2) do “not require gender transition”; and (3) “are
24 willing and able to adhere to all standards associated with their biological sex.” *Id.*

25 On March 23, 2018, the President issued a new memorandum concerning transgender
26 military service. 2018 Memorandum. The 2018 Memorandum revoked the 2017 Memorandum
27 “and any other directive [the President] may have made with respect to military service by
28

transgender individuals,” thereby allowing the Secretaries of Defense and Homeland Security to “exercise their authority to implement any appropriate policies concerning military service by transgender persons.” *Id.*

ARGUMENT

“Because injunctive relief is drafted in light of what the court believes will be the future course of events, a court must never ignore significant changes in the law or circumstances underlying an injunction lest the decree be turned into an instrument of wrong.” *Salazar v. Buono*, 559 U.S. 700, 714–15 (2010) (plurality op.) (internal quotation marks, ellipsis, and citation omitted). Courts thus regularly dissolve preliminary injunctions when changed circumstances undermine the basis for the interlocutory relief. *See, e.g., CTLA-The Wireless Ass’n v. City of Berkeley*, 854 F.3d 1105, 1111 (9th Cir. 2017). Ordinarily, “dissolution should depend on the same considerations that guide a judge in deciding whether to grant or deny a preliminary injunction in the first place”—*i.e.*, “[t]he familiar quartet” of “likelihood of success, the threat of irreparable injury to the party seeking interim relief, the equities and the public interest.” *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 15 F.3d 1222, 1225 (1st Cir. 1994). The changed circumstances here bar Plaintiffs from meeting these criteria.

I. Plaintiffs Cannot Demonstrate A Likelihood of Success On The Merits

A. The Current Challenge to the 2017 Presidential Memorandum Is Moot

To start, Plaintiffs are no longer likely to succeed because their challenge is moot. A case is moot “when it is impossible for a court to grant any effectual relief to the prevailing party,” *Chafin v. Chafin*, 568 U.S. 165, 172 (2013), and that is the situation here. The only relief Plaintiffs seek is a declaration that the policy implemented by “President Trump” in his 2017 Memorandum is unconstitutional and an injunction of its enforcement. Dkt. 30, at 2, 39; *accord* Dkt. 104, at 5, 7. But because that Memorandum has been revoked, a declaration from this Court as to the constitutionality of that Memorandum would amount to an impermissible advisory opinion. If Plaintiffs fear *future* injury from the proposed new policy, which they have not challenged, those harms would stem from the independent action of the Secretaries of Defense and Homeland Security in implementing that policy, not the 2017 or 2018 Memoranda. If Plaintiffs decide to challenge the

new policy upon implementation, courts can review it at that time.²

Nor can Plaintiffs find refuge in the doctrine that “a defendant’s voluntary cessation of a challenged practice” does not necessarily moot the case. *City of Mesquite v. Aladdin’s Castle*, 455 U.S. 283, 289 (1982). When the government repeals and replaces one of its policies, the relevant question is “whether the new [policy] is sufficiently similar to the repealed [one] that it is permissible to say that the challenged conduct continues,” or, put differently, whether the policy “has been ‘sufficiently altered so as to present a substantially different controversy from the one ... originally decided.’” *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 n.3 (1993). When a new policy has “changed substantially,” the voluntary cessation exception does not apply, as there is “no basis for concluding that the challenged conduct [is] being repeated.” *Id.*

Any dispute over the new policy “present[s] a substantially different controversy” than Plaintiffs’ challenge to the President’s 2017 Memorandum. *Id.* The target of Plaintiffs’ amended complaint was a “categorical ban” on service “simply because [one is] transgender” in the face of what they described as “extensive study and deliberation” by former military leadership. Dkt. 30, at 2. Likewise, this Court’s preliminary injunction rested on its view that the President had ordered a categorical “prohibition on transgender service members ... on Twitter, abruptly and without any evidence of considered reason or deliberation” or support from “the ‘considered professional judgment’ of the military.” Op. 18 & n.7. The new policy, by contrast, contains several exceptions allowing some transgender individuals, including many Plaintiffs here, to serve, and it is the product of independent military judgment following an extensive study. *See infra* Parts I.B.1.c, II.

At a minimum, the replacement of an alleged categorical exclusion with a more nuanced regime presents a substantially different controversy. In *Department of Treasury v. Galioto*, 477 U.S. 556 (1986) (per curiam), for instance, a lower court held that a federal statute barring all former mental patients who had been involuntarily committed from buying firearms was unconstitutional because it created an “irrebuttable presumption” that anyone involuntarily committed was permanently a threat “no matter the circumstances.” *Id.* at 559. During the appeal, Congress amended the law to

² Any review in that scenario, which would be governed by the Administrative Procedure Act, would be limited to the administrative record. *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

allow anyone prohibited from purchasing firearms to seek individualized relief from the Treasury Department. *Id.* Concluding that “no ‘irrebuttable presumption’ now exists since a hearing is afforded to anyone subject to firearms disabilities,” the Supreme Court held the issue moot. *Id.*³ This case is no different. Because Plaintiffs sought an injunction precluding enforcement of the 2017 Memorandum—and thereby effectively maintain the Carter policy, which, like the new policy, treats gender dysphoria as presumptively disqualifying, Op. 14—the heart of their challenge was necessarily limited to the (allegedly) categorical nature of that Memorandum. With that issue no longer live, the appropriate course is to dissolve the preliminary injunction.⁴

B. The New Policy Withstands Constitutional Scrutiny

In all events, Plaintiffs are not entitled to an injunction barring implementation of the new policy, as it does not violate equal protection, substantive due process, or free speech principles.

1. The new policy is consistent with equal protection principles

a. The new policy is subject to highly deferential review

On its face, the new policy triggers rational basis review. That policy, like the Carter policy before it, draws lines on the basis of a medical condition (gender dysphoria) and an associated treatment (gender transition), not transgender status. *Compare* Report 3–5, *with* Dkt. 48-3, at 4–5. Such classifications receive rational basis review, which is why no one ever challenged the Carter policy on grounds that it was subject to heightened scrutiny. *See, e.g., Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 365–68 (2001); *Geduldig v. Aiello*, 417 U.S. 484, 494–97 & n.20 (1974).⁵

³ In addressing Washington’s challenge to the executive orders barring entry of certain foreign nationals, this Court took a similar tack. *Washington v. Trump*, No. 17-0141, 2017 WL 1045950 (W.D. Wash. Mar. 16, 2017) (Robart, J.). It held that its preliminary injunction against the first order did not extend to the second because of a new exception for lawful permanent residents and certain foreign nationals and a clarification that individuals could seek asylum. *Id.* at *3, *4.

⁴ If the Court finds both that the challenge to the 2017 Memorandum still presents a live controversy and that at least some of the Plaintiffs would have standing to challenge the new policy, *but see infra* Part II, enjoining that Memorandum would not redress any of their purported injuries. If the new policy itself would necessarily disqualify any of those Plaintiffs from military service, an injunction against that (non-existent) Memorandum would not cure that harm.

⁵ Even if the new policy could be characterized as turning on transgender status, such classifications warrant rational basis review, not intermediate scrutiny. *See, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227–28 (10th Cir. 2007) (rational basis review applies to classifications on the basis of transgender status, even in civilian context). Although this Court disagrees, and although cases such as *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), could be read as holding to the contrary, they are distinguishable and, in all events, Defendants respectfully reiterate this position to preserve the issue for further review. Defendants agree with the Court, however, that strict scrutiny is inappropriate. *See* Op. 15–16.

1 But even assuming *arguendo* that the new policy would trigger intermediate scrutiny outside
 2 of the military context, that context, unquestionably present here, requires a far less searching form
 3 of review. While the government is not “free to disregard the Constitution” when acting “in the
 4 area of military affairs,” it is equally true that “the tests and limitations to be applied may differ
 5 because of the military context.” *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). “[R]eview of military
 6 regulations challenged on First Amendment grounds,” for example, “is far more deferential than
 7 constitutional review of similar laws or regulations destined for civilian society.” *Goldman v.*
 8 *Weinberger*, 475 U.S. 503, 507 (1986). And the same is true for the constitutional “rights of
 9 servicemembers” more generally, including those within the Due Process Clause. *Weiss v. United*
 10 *States*, 510 U.S. 163, 177 (1994); *see also Solorio v. United States*, 483 U.S. 435, 448 (1987) (listing “variety
 11 of contexts” where deferential review applied). In short, “constitutional rights must be viewed in
 12 light of the special circumstances and needs of the armed forces,” and “[r]egulations which might
 13 infringe constitutional rights in other contexts may survive scrutiny because of military necessities.”
 14 *Beller v. Middendorf*, 632 F.2d 788, 810–11 (9th Cir. 1980) (Kennedy, J.).

15 This different standard of review is necessary not only because the Constitution itself
 16 commits military decisions to “the political branches directly responsible—as the Judicial Branch is
 17 not—to the electoral process,” but also because “it is difficult to conceive of an area of governmental
 18 activity in which the courts have less competence.” *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see*
 19 *Rostker*, 453 U.S. at 65–66. That is particularly true with respect to the “‘complex, subtle, and
 20 professional decisions as to the composition ... of a military force,’ which are ‘essentially professional
 21 military judgments.’” *Winter v. NRDC*, 555 U.S. 7, 24 (2008).

22 Although the Supreme Court has expressly refused to attach a “label[]” to the standard of
 23 review applicable to military policies alleged to trigger heightened scrutiny, *Rostker*, 453 U.S. at 70,
 24 several features of its decisions in this area demonstrate that rational basis review most closely
 25 describes its approach in practice. First, while the Court has generally refused “to hypothesize or
 26 invent governmental purposes for gender classifications *post hoc* in response to litigation,” *Sessions v.*
 27 *Morales-Santana*, 137 S. Ct. 1678, 1697 (2017) (internal quotation marks, brackets, and citation
 28

omitted), it has done so when military deference is required. In *Schlesinger v. Ballard*, 419 U.S. 498 (1975), it upheld a statutory scheme under which male naval officers were subject to mandatory discharge for failing twice to be promoted within roughly 10 years of service, while female officers were afforded 13 years to obtain equivalent promotions. *Id.* at 499–505, 510. The Court explained that “Congress may ... quite rationally have believed” that female officers “had less opportunity for promotion than did their male counterparts” and that this framework would correct the imbalance. *Id.* at 577. In response, the main dissent criticized the choice “to conjure up a legislative purpose which may have underlain the gender-based distinction.” *Id.* at 511 (Brennan, J.); *cf. Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975) (“recitation of a benign, compensatory purpose is not an automatic shield ... against any inquiry into the actual purposes” of civilian sex-based classifications).

Similarly, the Court in *Rostker* rejected an equal protection challenge to a statute exempting women from the requirement to register for the draft. 453 U.S. at 83. Even though the suit had been filed in 1971, the Court relied on Congress’s analysis of the issue nine years later, when it declined to amend the statute to permit the conscription of women at President Carter’s urging. *See id.* at 60–63. In doing so, it rejected the argument that it “must consider the constitutionality of the [relevant statute] solely on the basis of the views expressed by Congress in 1948, when the [law] was first enacted in its modern form.” *Id.* at 74. Instead, because Congress in 1980 had “reconsider[ed] the question of exempting women from [the draft], and its basis for doing so,” its views from that time were “highly relevant in assessing the constitutional validity of the exemption.” *Id.* at 75.

Second, whereas the Court has rejected certain evidentiary defenses of sex-based classifications in the civilian context, *see, e.g., Craig v. Boren*, 429 U.S. 190, 199–204 (1976), it has deferred to the political branches on military matters even in the face of significant evidence to the contrary, including evidence from former military officials. In *Goldman*, it rejected a free-exercise challenge to the Air Force’s prohibition of a Jewish officer from wearing a yarmulke while working as a clinical psychologist in an Air Force base hospital, even though that claim would have triggered strict scrutiny at the time had it been raised in the civilian context. 475 U.S. at 510; *see id.* at 506. The Court did so even in the face of “expert testimony” from a former Chief Clinical Psychologist

1 to the Air Force that religious exceptions to a military dress code would “increase morale,” and even
 2 though the “Air Force’s assertion to the contrary [was] mere *ipse dixit*, with no support from actual
 3 experience or a scientific study in the record.” *Id.* at 509; see Br. for Pet’r at 21, *Goldman*, 475 U.S.
 4 503 (No. 84-1097); 1985 WL 669072, at *21. In the Court’s view, the beliefs of such “expert
 5 witnesses” were “quite beside the point,” as current “military officials ... are under no constitutional
 6 obligation to abandon their considered professional judgment.” 475 U.S. at 509.⁶

7 Third, whereas concerns about “administrative convenience” ordinarily cannot be used to
 8 survive intermediate scrutiny, *e.g.*, *Califano v. Goldfarb*, 430 U.S. 199, 205 (1977), they may play a key
 9 role in challenges to policies concerning the military. In *Rostker*, Congress “did not consider it worth
 10 the added burdens of including women in draft and registration plans” in light of the “administrative
 11 problems such as housing and different treatment with regard to dependency, hardship and physical
 12 standards.” 453 U.S. at 81. The Court reasoned that it was not its place “to dismiss such problems
 13 as insignificant in the context of military preparedness.” *Id.* Again, the dissents criticized the Court
 14 for jettisoning requirements of intermediate scrutiny. See *id.* at 94 (Brennan, J.) (“This Court has
 15 repeatedly stated that ... administrative convenience ... is not an adequate constitutional justification
 16 under the *Craig v. Boren* test.”); *id.* at 85 (White, J.) (same).

17 Fourth, the political branches enjoy significant latitude to choose “among alternatives” in
 18 furthering military interests. *Id.* at 72 (majority op.). In *Rostker*, President Carter and military
 19 leadership urged a sex-neutral alternative that they believed “would materially increase [military]
 20 flexibility,” but Congress rejected it in favor of retaining its sex-based approach. 453 U.S. at 63; see
 21 *id.* at 70. Invoking the “deference due” Congress in this area, the Court refused “to declare
 22 unconstitutional [that] studied choice of one alternative in preference to another.” *Id.* at 71–72. And
 23 again, the main dissent attacked the Court’s approach as “significantly different from” its analysis in
 24

25 ⁶ Likewise, in *Rostker*, President Carter recommended that Congress require women to register for the draft, 453 U.S. at
 26 60, and provided “testimony of members of the Executive and the military in support of that decision,” *id.* at 79. In
 27 light of the “testimony and hearing evidence presented to Congress by representatives of the military and the Executive
 28 Branch,” a lower court held that Congress’s refusal to require women to register was unconstitutional because “military
 opinion, backed by extensive study, is that the availability of women registrants would materially increase flexibility, not
 hamper it.” *Id.* at 63. The Supreme Court reversed, noting that the lower court had “palpably exceeded its authority”
 in “relying on this testimony,” as Congress had “rejected it.” *Id.* at 81–82.

1 ordinary sex-discrimination cases, as the government had not shown that “a gender-neutral statute
2 would be a less effective means” of accomplishing military objectives. *Id.* at 94 (Brennan, J.).

3 Finally, arguable inconsistencies resulting from line-drawing have not been enough to render
4 military decisions invalid. In *Goldman*, the Court acknowledged that the Air Force had an “exception
5 ... for headgear worn during indoor religious ceremonies” and gave commanders “discretion” to
6 allow “visible religious headgear ... in designated living quarters.” 475 U.S. at 509. Additionally,
7 service members could “wear up to three rings and one [I.D.] bracelet,” even if those items
8 “associate[d] the wearer with a denominational school or a religious or secular fraternal organization”
9 and thereby served as “emblems of religious, social, and ethnic identity.” *Id.* at 518 (Brennan, J.,
10 dissenting). Yet the Court deferred to the Air Force’s judgment that creating an exception for a
11 psychologist who wanted to wear religious headgear in a hospital on base “would detract from the
12 uniformity sought by [its] dress regulations.” *Id.* at 510 (majority op.). If this case was in the civilian
13 context and strict scrutiny was applied, it is doubtful that the regulation would have been sustained.

14 Given the Court’s substantial departure from core aspects of intermediate and even strict
15 scrutiny in cases involving military deference, Defendants believe the most appropriate description
16 of the applicable standard is rational basis review. But at a minimum, even if the Court prefers to
17 label the standard a peculiar form of “intermediate scrutiny,” Op. 15, its substantive analysis of the
18 new policy should track the Supreme Court’s highly deferential approach in this area. *See Rostker*,
19 453 U.S. at 69–70 (disavowing the utility of traditional scrutiny labels in cases involving military
20 deference). Said differently, regardless of the standard of review the Court ultimately employs, the
21 basic elements of traditional intermediate scrutiny should not apply in this case.

22 **b. The new policy survives highly deferential scrutiny**

23 The new policy survives the applicable level of scrutiny. As a threshold matter, certain
24 aspects of the policy should not be at issue. To start, its treatment of transgender individuals without
25 gender dysphoria—who are eligible to serve in their biological sex—is consistent with the Carter
26 policy and hence this Court’s preliminary injunction. *See* Dkt. 48-3, at 4. Nor can those with gender
27 dysphoria dispute being held to the same retention standards, including deployability requirements,
28

1 as all other service members. And the 36-month period of stability for accession—as opposed to
 2 the Carter policy’s 18 months—is not constitutionally significant, especially since it “is the same
 3 standard the Department currently applies to persons with a history of depressive disorder,” whereas
 4 the 18-month period “has no analog with respect to any other mental condition listed in [the
 5 accession standards].” Report 42.

6 The only change in the policy that is even arguably legally significant is its presumptive
 7 disqualification of individuals with gender dysphoria who require or have undergone gender
 8 transition, along with the corollary requirement that service members generally serve in their
 9 biological sex, and that change easily survives the highly deferential review applicable here. In the
 10 Department’s considered judgment, accommodating gender transition would create unacceptable
 11 risks to military readiness; undermine good order, discipline, and unit cohesion; and create
 12 disproportionate costs. Mattis Memo 2. There is no dispute that the need to avoid those harms
 13 constitutes at least an “important governmental interest[.]” Op. 16. Indeed, courts must “give great
 14 deference to the professional judgment of military authorities concerning the relative importance of
 15 a particular military interest,” *Winter*, 555 U.S. at 24, and here, the Department has concluded that
 16 minimizing these risks is “absolutely essential,” Mattis Memo 2. Thus, the only issue is whether this
 17 Court should defer to the military’s judgment that the new policy is necessary to effectuating that
 18 critical interest. *See, e.g.*, Report 32. That should not be a close question.

19 i. Military Readiness

20 In the Department’s professional military judgment, service by those who require or have
 21 undergone gender transition poses at least two significant risks to military readiness. First, in light
 22 of “evidence that rates of psychiatric hospitalization and suicide behavior remain higher for persons
 23 with gender dysphoria, even after treatment” (including sex reassignment surgery) compared to
 24 others, as well as “considerable scientific uncertainty” over whether these “treatments fully remedy
 25 ... the mental health problems associated with gender dysphoria,” the Department found that “the
 26 persistence of these problems is a risk for readiness.” Report 32. This risk-based assessment—
 27 grounded in an extensive review of evidence, including materials unavailable at the time the Carter
 28

1 policy was adopted—is a classic military judgment meriting deference. *See id.* at 19–27.⁷

2 The need to “proceed cautiously” in this area is particularly compelling given the uniquely
3 stressful nature of a military environment. *Id.* at 27. Although none of the available studies “account
4 for the added stress of military life, deployments, and combat,” *id.* at 24, preliminary data show that
5 service members with gender dysphoria are “eight times more likely to attempt suicide” and “nine
6 times more likely to have mental health encounters” than service members as a whole, *id.* at 21–22.
7 Thus, in Secretary Mattis’s judgment, the Department should not risk “compounding the significant
8 challenges inherent in treating gender dysphoria with the unique, highly stressful circumstances of
9 military training and combat operations.” Mattis Memo 2.

10 In short, the Department concluded that the military risks stemming from the uncertain
11 efficacy of a particular medical treatment for a particular medical condition outweighed the possible
12 benefits of allowing individuals with that condition to serve as a general matter. That is precisely the
13 sort of analysis the military must perform with respect to any medical accession or retention standard,
14 and the cautious approach it took here is hardly out of the norm. *See* Report 3. Indeed, even the
15 Carter policy implicitly acknowledged that gender dysphoria or gender transition could impede
16 military readiness by requiring applicants to demonstrate that they had been stable or had avoided
17 complications for an 18-month period. *See* Dkt. 48-3. Given that even administrative convenience
18 concerns cannot be dismissed in this context, *see Rostker*, 453 U.S. at 81, then the military’s assessment
19 of the tolerable level of risk from a medical condition and treatment should not be second-guessed.
20

21 ⁷ For example, the Centers for Medicare and Medicaid Services (CMS) issued a study in August 2016, over a month after
22 the Carter policy was announced, concluding that there was “not enough high quality evidence to determine whether
23 gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria.” Report 24.
24 Although this study was primarily concerned with Medicare beneficiaries, it “conducted a comprehensive review” of
25 “the universe of literature regarding sex reassignment surgery,” which consisted of “over 500 articles, studies, and
26 reports” addressing a more general population. *Id.* Of these materials, only “33 studies” were “sufficiently rigorous to
27 merit further review,” and “[o]verall, the quality and strength of evidence” in even these studies “were low.” *Id.* In fact,
28 only “six studies” provided “useful information” on the efficacy of sex reassignment surgery in general, and “the four
best designed and conducted” ones “did not demonstrate clinically significant changes or differences in psychometric
test results” following the procedure. *Id.* And “one of the most robust” of those six studies, a Swedish “nationwide
population-based, long-term follow-up” of those who had undergone the surgery, “found increased mortality [due to
suicide and cardiovascular disease] and psychiatric hospitalization for patients who had undergone sex reassignment
surgery as compared to a healthy control group.” *Id.* at 25. As that study concluded, “post[-]surgical transsexuals are a
risk group that need long-term psychiatric and somatic follow-up,” and “[e]ven though surgery and hormonal therapy
alleviates gender dysphoria, it is apparently not sufficient to remedy the high rates of morbidity and mortality found
among transsexual persons.” *Id.* at 26.

Second, even if it were guaranteed that the risks associated with gender dysphoria could be fully addressed by gender transition, “most persons requiring transition-related treatment could be non-deployable for a potentially significant amount of time.” Report 35. In the military’s view, that limitation on deployability itself posed a separate “readiness risk.” *Id.* at 33. After documenting the restrictions associated with transition-related medical treatments—including reports by some commanders that some transitioning service members would be non-deployable for up to two-and-half-years—the Department made an assessment that these burdens on military readiness were unacceptable. *Id.* at 33–35. In addition to being inherently problematic in isolation, these limitations would more broadly harm the service members’ units. After all, any “increase in the number of non-deployable military personnel places undue risk and personal burden” on those service members who are “qualified and eligible to deploy.” *Id.* at 35. In addition to these personal costs, there are impacts on the families of service members who are deployed “more often to backfill or compensate for non-deployable” ones. *Id.* All of this poses a “significant challenge for unit readiness.” *Id.*

This analysis should not be controversial. Even Secretary Carter noted that “[g]ender transition while serving in the military presents unique challenges associated with addressing the needs of the Service member in a manner consistent with military mission and readiness needs,” Dkt. 48-3, at 5. So did RAND, which concluded that the relevant limitations on deployability would “have a negative impact on readiness.” Report 34–35. Although RAND dismissed this harm as “minimal” due to its estimation of the “exceedingly small number of transgender Service members who would seek transition-related treatment,” *id.*, in the Department’s judgment, that was the wrong question: “The issue is not whether the military can absorb periods of non-deployability in a small population” but “whether an individual with a particular condition can meet the standards for military duty and, if not, whether the condition can be remedied through treatment that renders the person non-deployable for as little time as possible.” *Id.* at 35. After all, “by RAND’s standard, the readiness impact of many medical conditions that the Department has determined to be disqualifying—from bipolar disorder to schizophrenia—would be minimal because they, too, exist only in relatively small numbers.” *Id.* RAND “failed to analyze the impact” on “unit readiness” at

1 “the micro level” by taking a “macro” view of the entire military. *Id.* at 14. Given that even Congress
 2 may disagree with testimony by some military officers based on legislative concerns about
 3 deployability, *see Rostker*, 453 U.S. at 82, then military leadership between administrations should
 4 likewise be able to differ over what limitations on deployability are acceptable.

5 **ii. Order, Discipline, Leadership, and Unit Cohesion**

6 The Department similarly agreed with the RAND Report’s analysis of “the intangible
 7 ingredients of military effectiveness”—namely, “leadership, training, good order and discipline,” and
 8 “unit cohesion.” Report 3. While RAND recognized that “unit cohesion” was “a critical input for
 9 unit readiness,” it concluded that accommodating gender transition would likely have “no significant
 10 effect” based on the experiences of four foreign militaries that had “fairly low numbers of openly
 11 serving transgender personnel.” Dkt. 46-2, at 44–45. By adopting this approach, however, RAND,
 12 in the Department’s judgment, again failed to “examine the potential impact on unit readiness,
 13 perceptions of fairness and equity, personnel safety, and reasonable expectations of privacy”—“all
 14 of which are critical to unit cohesion”—“at the unit and sub-unit levels.” Report 14. Aside from
 15 potential harms to unit cohesion from limits on deployability, *see supra* Part I.B.1.b.i, accommodating
 16 gender transition would undermine the “good order and discipline, steady leadership, unit cohesion,
 17 and ultimately military effectiveness and lethality” served by the military’s sex-based standards in
 18 several ways, Report 28.

19 First, the Department reasonably concluded that any accommodation policy that does not
 20 require full sex-reassignment surgery threatens to “erode reasonable expectations of privacy that are
 21 important in maintaining unit cohesion, as well as good order and discipline.” *Id.* at 37. As the
 22 Department explained, “[g]iven the unique nature of military service,” service members often must
 23 “live in extremely close proximity to one another.” *Id.* To protect their reasonable expectations of
 24 privacy, the Department “has long maintained separate berthing, bathroom, and showering facilities
 25 for men and women.” *Id.* Far from a suspect practice, the Supreme Court has acknowledged that
 26 it is “necessary to afford members of each sex privacy from the other sex in living arrangements,”
 27 *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996), and “[i]n the context of recruit training, this
 28

1 separation is even mandated by Congress,” Report 37 (collecting statutes).

2 Accommodating gender transition, the Department reasoned, at least as to those individuals
 3 who have not undergone a full sex reassignment, would “undermine” these efforts to honor service
 4 members’ “reasonable expectations of privacy.” *Id.* at 36. Allowing transgender service members
 5 “who have developed, even if only partially, the anatomy of their identified gender” to use the
 6 facilities of either their identified gender or biological sex “would invade the expectations of privacy”
 7 of the non-transgender service members who share those quarters. *Id.* at 37. Absent the creation
 8 of separate facilities for transgender service members, which may well be both “logistically
 9 impracticable” for the Department and unacceptable to those individuals, the military would face
 10 irreconcilable privacy demands. *Id.* For example, the Panel received a report from a commander
 11 who faced dueling equal opportunity complaints under the Carter policy over allowing a transgender
 12 service member who identified as a female but had male genitalia to use the female shower
 13 facilities—one from the female service members in the unit and one from the transgender service
 14 member. *Id.* These concerns are consistent with reports from commanding officers in the Canadian
 15 military that “they would be called on to balance competing requirements” by “meeting [a] trans
 16 individual’s expectations ... while avoiding creating conditions that place extra burdens on others or
 17 undermined the overall team effectiveness.” *Id.* at 40.

18 In the Department’s judgment, such collisions of privacy demands “are a direct threat to unit
 19 cohesion and will inevitably result in greater leadership challenges without clear solutions.” *Id.* at 37.
 20 Accommodating gender transition would mean the “routine execution of daily activities” could be a
 21 recurring source of “discord in the unit,” requiring commanders “to devote time and resources to
 22 resolve issues not present outside of military service.” *Id.* at 38. And any delayed or flawed solution
 23 to these conflicts by commanders “can degrade an otherwise highly functioning team,” as any
 24 “appearance of unsteady or seemingly unresponsive leadership to Service member concerns erodes
 25 the trust that is essential to unit cohesion and good order and discipline.” *Id.*

26 In addition, accommodating gender transition, at least in the context of basic recruiting, puts
 27 the Department at risk of violating federal law. As it observed, Congress has “required by statute
 28

that the sleeping and latrine areas provided for ‘male’ recruits be physically separated from the sleeping and latrine areas provided for ‘female’ recruits during basic training and that access by drill sergeants and training personnel ‘after the end of the training day’ be limited to persons of the ‘same sex as the recruits’ to ensure ‘after-hours privacy for recruits during basic training.’” *Id.* at 29. Accommodating the gender transition of recruits, drill sergeants, or training personnel in the context of basic recruiting places the Department in jeopardy of contravening those statutory mandates. The new policy advances the military’s obvious interest in avoiding that legal risk.⁸

Second, accommodating gender transition creates safety risks for, and perceptions of unfairness among, service members by applying “different biologically-based standards to persons of the same biological sex based on gender identity, which is irrelevant to standards grounded in physical biology.” Report 36. For example, “pitting biological females against biological males who identify as female, and vice versa,” in “physically violent training and competition” could pose “a serious safety risk.” *Id.* In addition, service members who are not transgender would likely be frustrated by a “biological male who identifies as female” but “remain[s] a biological male in every respect” and yet is “governed by female standards” in “training and athletic competition,” which tend to be less exacting than male training and athletic standards. *Id.*

Again, these are legitimate concerns, as both Congress and the Supreme Court have recognized that it is “necessary” to “adjust aspects of the physical training programs” for service members to address biological differences between the sexes. *Virginia*, 518 U.S. at 550 n.19 (citing statute requiring standards for women admitted to the service academies to “be the same as those ... for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals”). Especially given that

⁸ The Department cannot safely assume that courts will construe these statutes to accommodate gender transition. Instead, because these laws do not provide any specialized definition for “sex,” “male,” or “female,” courts may conclude that the terms retain their ordinary meaning, *e.g.*, *Johnson v. United States*, 559 U.S. 133, 138 (2010), which turns on biology rather than gender identity, *see, e.g.*, *Oxford American English Dictionary* 622 (1980) (defining “sex” as “either of the two main groups (*male* and *female*) into which living things are placed according to their reproductive functions, the fact of belonging to these”); *id.* at 401 (defining “male” as “of the sex that can beget offspring by fertilizing egg cells produced by the female”); *id.* at 237 (defining “female” as “of the sex that can bear offspring or produce eggs”); *Webster’s Third New International Dictionary* 836, 1366, 2081 (1993) (similar). That is likely given that Congress has confirmed this understanding by prohibiting discrimination on the basis of “gender identity” in addition to, rather than within, discrimination on the basis of “sex” or “gender.” *See, e.g.*, 18 U.S.C. § 249(a)(2); 42 U.S.C. § 13925(b)(13)(A).

“physical competition[] is central to the military life and indispensable to the training ... of warriors,” Report 36, the Department’s concerns about the risks in this area should not be ignored.

Third, the Department was concerned that exempting transgender service members from uniform and grooming standards associated with their biological sex would create friction in the ranks. As it explained, “allowing a biological male to adhere to female uniform and grooming standards” would “create[] unfairness for other males who would also like to be exempted from male uniform and grooming standards as a means of expressing their own sense of identity.” *Id.* at 31. That is particularly likely in cases where the standards prohibit non-transgender service members from expressing core aspects of their identity.

Given these concerns, the Department found that accommodating gender transition “risks unnecessarily adding to the challenges faced by leaders at all levels, potentially fraying unit cohesion, and threatening good order and discipline.” Report 40. Due to “the vital interests at stake—the survivability of Service members, including transgender persons, in combat and the military effectiveness and lethality of our forces”—it therefore decided to take a cautious approach. *Id.* That careful military judgment merits significant deference. “Not only are courts ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have, but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation’s military policy.” *Goldman*, 475 U.S. at 507–08. Indeed, the Supreme Court has repeatedly deferred to similar judgments in this military context in the past. *See id.* at 509–10 (deferring to the military’s judgment that “the wearing of religious apparel such as a yarmulke ... would detract from the uniformity sought by the dress regulations”); *Rostker*, 453 U.S. at 57 (deferring to Congress’s concerns about “administrative problems such as housing and different treatment with regard to ... physical standards”). And it did so even though in each case, others, including current and former military officials, disagreed. *See supra* pp. 11–12. There is no reason why the military’s judgment here should be treated any differently.

iii. Disproportionate Costs

Finally, the Department explained that in its experience with the Carter policy,

1 accommodating gender transition was “proving to be disproportionately costly on a per capita basis.”
 2 Report 41. Since the Carter policy’s implementation, the medical costs for service members with
 3 gender dysphoria have “increased nearly three times—or 300%—” compared to others. *Id.* And
 4 that is “despite the low number of costly sex reassignment surgeries that have been performed so
 5 far”—only 34 non-genital sex reassignment surgeries and one genital surgery—which is likely to
 6 increase as more service members with gender dysphoria avail themselves of these procedures. *Id.*
 7 Notably, “77% of the 424 Service member treatment plans available for review”—*i.e.*, approximately
 8 327 plans—“include requests for transition-related surgery” of some kind. *Id.*⁹

9 In light of the military’s general interest in maximizing efficiency through minimizing costs,
 10 the Department decided that its disproportionate expenditures on accommodating gender transition
 11 could be better devoted elsewhere. *See id.* at 3, 41. Such a conclusion is not to be second-guessed.
 12 Even when alleged constitutional rights are involved, judgments by the political branches as to
 13 whether a benefit “consumes the resources of the military to a degree ... beyond what is warranted”
 14 are entitled to significant deference. *Middendorf v. Henry*, 425 U.S. 25, 45 (1976).

15 * * *

16 Based on these concerns, the Department made a “military judgment” that no longer
 17 providing a general accommodation for gender transition was “a necessary departure from the Carter
 18 policy.” Report 32. While it was “well aware that military leadership from the prior administration,
 19 along with RAND, reached a different judgment,” the Department’s latest review revealed that “the
 20 realities associated with service by transgender individuals are more complicated than the prior
 21 administration or RAND had assumed.” *Id.* at 44. In fact, even RAND had “concluded that
 22 allowing gender transition would impede readiness, limit deployability, and burden the military with
 23 additional costs,” but dismissed “such harms [as] negligible in light of the small size of the
 24

25 _____
 26 ⁹ Several commanders also reported that providing transition-related treatment for members of their units “had a
 27 negative budgetary impact because they had to use operations and maintenance funds to pay for [their] extensive travel
 28 throughout the United States to obtain specialized medical care.” *Id.* This is not surprising given that “transition requires
 frequent evaluations” by both a mental health professional and an endocrinologist, and most military treatment facilities
 “lack one or both of these specialty services.” *Id.* at 41 n.164. Service members therefore “may have significant
 commutes to reach their required specialty care,” and those “stationed in more remote locations face even greater
 challenges of gaining access to military or civilian specialists within a reasonable distance from their duty stations.” *Id.*

transgender population.” *Id.* But the Department was “not convinced that these risks could be responsibly dismissed or that even negligible harms” (at the macro level) “should be incurred given [its] grave responsibility.” *Id.* It therefore “weighed the risks associated with maintaining the Carter policy against the costs of adopting a new policy that was less risk-favoring,” and concluded that the “balances struck” by the new policy “provide the best solution currently available.” *Id.* That careful cost-benefit analysis by the military survives deferential review.

c. The new policy is consistent with the Court’s prior reasoning

The new policy addresses all of the concerns underlying the Court’s preliminary injunction. To start, this Court declined to apply a deferential form of review at that point due to its belief that the President’s directives were based on neither “considered reason or deliberation” nor the “considered professional judgment of military officials.” Op. 18 & n.7. Defendants respectfully disagree, but, in any event, both of those factors are obviously present with respect to the new policy.

Likewise, the reasons why this Court found the 2017 Memorandum would likely fail intermediate scrutiny are no longer present. *See* Op. 16–18.¹⁰ First, the explanations for the new policy were not obviously “contradicted by the studies, conclusions, and judgment of the military itself.” Op. 16. To be sure, the former officials responsible for the Carter policy may object to the Department’s current approach, but, as *Goldman* and *Rostker* illustrate, such disagreement does not alter the deferential analysis required. *See supra* pp. 11–12.

Second, the reasons for this nuanced policy are neither “hypothetical” nor “extremely overbroad.” Op. 16–17. Instead, they are rooted in extensive studies, *see, e.g.*, Report 19–27; experience under the Carter policy, *see, e.g., id.* at 8, 34, 37, 41; and the considered professional judgment of military officials, *see, e.g., id.* at 4, 18, 32, 41, 44. And even where the new policy appears to sweep broadly, the Department explained why it does so. For example, the Department considered, but rejected, allowing those individuals who had undergone “a full sex reassignment surgery” to serve. *Id.* at 31. As it explained, that measure would be “at odds with current medical practice, which allows for a wide range of individualized treatment” for gender dysphoria. *Id.* It also

¹⁰ In other words, even if an ordinary form of intermediate scrutiny applied, the new policy would survive it. *A fortiori*, the policy would withstand rational basis review. *Cf.* Op. 18 n.8 (ruling otherwise with respect to the Memorandum).

1 would have little practical effect, as the “rates for genital surgery are exceedingly low.” *Id.* And in
 2 any event, it would not address concerns about “the inconclusive scientific evidence that transition-
 3 related treatment restores persons with gender dysphoria to full mental health.” *Id.* at 41.

4 Finally, far from being “abruptly” announced, the new policy was the product of a formal
 5 process involving “considered reason [and] deliberation.” Op. 18. The Department’s independent
 6 reexamination of the Carter policy—begun without any direction from the President and well before
 7 his July 25, 2017 statement on Twitter—was an extensive deliberative process lasting over seven
 8 months and involving many of the Department’s high-ranking officials as well as experts in a variety
 9 of subjects. *See* Mattis Memo 1–2; Report 17–18. The Department considered evidence that
 10 supported and cut against its approach, including the materials underlying, and its experience with,
 11 the Carter policy, and explained why it was departing from that policy to some extent. *See, e.g.,*
 12 Report 18, 44. And while much of this deliberative process occurred while litigation was ongoing,
 13 the same was true in *Rostker*, and that did not render Congress’s decision suspect. *See supra* p. 11.

14 2. The new policy survives Plaintiffs’ other constitutional challenges

15 Plaintiffs are also unlikely to prevail on their substantive due process or First Amendment
 16 claims. Although this Court held otherwise in issuing its preliminary injunction, that was due to its
 17 belief that the 2017 Memorandum’s alleged “intrusion” on their “fundamental liberty interest” and
 18 “protected expression” was unnecessary “to further an important government interest.” Op. 19–
 19 20. For the reasons above, the same cannot be said about any such intrusion by the new policy.¹¹

20 II. Plaintiffs Have Not Satisfied The Equitable Factors For A Preliminary Injunction

21 Even if Plaintiffs could show a live controversy in which they were likely to succeed, they
 22 cannot meet any of the equitable factors needed for an order barring adoption of the new policy.

23 To start, Plaintiffs have not shown that they would suffer any irreparable injury under the
 24 new policy. Indeed, they have not even proven that they would have standing to press a challenge
 25 to this policy, and it is clear that most of them would not. At the outset, five of the nine individual
 26

27 ¹¹ In any event, Defendants respectfully maintain for preservation purposes that the new policy would not intrude on
 28 any constitutional interest. Even if this policy were to deprive Plaintiffs of “career opportunities,” Op. 19, no one has a
 fundamental right to serve in the U.S. military. Nor is this policy, which, like the Carter policy before it, simply requires
 the disclosure of information concerning a medical condition, a “content-based restriction” on speech. Op. 20.

1 Plaintiffs (Schmid, Muller, Lewis, Stephens, and Winter) would qualify for the new policy’s reliance
 2 exception—and would therefore be able to continue serving in their preferred gender, obtain
 3 commissions, and receive medical treatment—because each received a diagnosis of gender dysphoria
 4 from a military medical provider during the time the Carter policy was in effect. *See* Dkt. 30, at 9,
 5 12, 14–15, 17; Dkt. 72, at 2; Report 43. These Plaintiffs therefore will not sustain any injury under
 6 the new policy, let alone an irreparable one. And as for the remaining Plaintiffs and Washington,
 7 Defendants respectfully maintain for preservation purposes that these litigants cannot establish
 8 standing to challenge, or irreparable injury from, the new policy for the same reasons they failed to
 9 satisfy these requirements with respect to the 2017 Memorandum. *See* Dkt. 69.

10 Nor have Plaintiffs established that the balance of the equities or the public interest favors
 11 an injunction against the new policy. In contrast to the absence of any irreparable harm associated
 12 with dissolving the preliminary injunction, such an order will force the Defense Department to
 13 adhere to a policy that it has concluded poses “substantial risks” and threatens to “undermine
 14 readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not
 15 conducive to military effectiveness and lethality.” Mattis Memo 2; *see also, e.g.*, Report 32–35, 41, 44.
 16 These “specific, predictive judgments” from “senior” military officials—including the Secretary of
 17 Defense himself—“about how the preliminary injunction would reduce the effectiveness” of the
 18 military merit significant deference. *Winter*, 555 U.S. at 27. After all, the military is not “required to
 19 wait until the injunction actually results in an inability” to effectively prepare “for the national defense
 20 before seeking its dissolution.” *Id.* at 31 (internal quotation marks, brackets, and ellipsis omitted).¹²

21 CONCLUSION

22 This Court should dissolve the preliminary injunction issued on December 11, 2017. In light
 23 of the Department of Defense’s judgment that maintaining the Carter policy poses substantial risks
 24 to military readiness, Defendants respectfully request a ruling on this motion as soon as possible and
 25 no later than May 23, 2018.

26
 27 ¹² Although this Court held that the equities favored granting a preliminary injunction with respect to the 2017
 28 Memorandum, that ruling hinged on its belief that the Carter policy had no “documented negative effects.” Op. 22.
 The Defense Department has now detailed the harms associated with the Carter policy and explained why, in its
 professional military judgment, it was “necessary” to depart from that framework. Report 32.

1 Dated: March 23, 2018

Respectfully submitted,

2 CHAD A. READLER
3 Acting Assistant Attorney General
4 Civil Division

5 BRETT A. SHUMATE
6 Deputy Assistant Attorney General

7 BRINTON LUCAS
8 Counsel to the Assistant Attorney General

9 JOHN R. GRIFFITHS
10 Branch Director

11 ANTHONY J. COPPOLINO
12 Deputy Director

13 /s/ Ryan B. Parker
14 RYAN B. PARKER
15 Senior Trial Counsel

16 ANDREW E. CARMICHAEL
17 Trial Attorney
18 United States Department of Justice
19 Civil Division, Federal Programs Branch
20 Telephone: (202) 514-4336
21 Email: ryan.parker@usdoj.gov

22 *Counsel for Defendants*

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2018, I electronically filed the foregoing Motion to Dissolve the Preliminary Injunction using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: March 23, 2018

/s/ Ryan Parker

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

Counsel for Defendants

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
RYAN B. PARKER**

I, Ryan B. Parker, swear under penalty of perjury under the laws of the United States to the following:

1. I am a Senior Trial Counsel at the United States Department of Justice and counsel of record for Defendants in this action. I submit this declaration in support of Defendants' Motion to Dissolve the Preliminary Injunction.

2. Attached to this declaration as Exhibit 1 is a true and correct copy of Secretary Mattis's February 22, 2018 Memorandum regarding military service by transgender individuals.

3. Attached to this declaration as Exhibit 2 is a true and correct copy of the Department of Defense's Report and Recommendations on Military Service by Transgender Persons, dated February 2018.

DECLARATION OF RYAN B. PARKER

Karnoski, et al. v. Trump, et al., No. 2:17-cv-1297 (MJP)

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

4. Attached to this declaration as Exhibit 3 is a true and correct copy of the President's March 23, 2018 Memorandum regarding military service by transgender individuals.

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

EXECUTED this 29th day of March 2018.

/s/ Ryan B. Parker

RYAN B. PARKER
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch

DECLARATION OF RYAN B. PARKER

Karnoski, et al. v. Trump, et al., No. 2:17-cv-1297 (MJP)

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

Exhibit 2

**Department of Defense Report and Recommendations on
Military Service by Transgender Persons (Feb. 2018)**

**DEPARTMENT OF DEFENSE REPORT AND RECOMMENDATIONS
ON
MILITARY SERVICE BY TRANSGENDER PERSONS**



FEBRUARY 2018

Table of Contents

Executive Summary	2
History of Policies Concerning Transgender Persons	7
Transgender Policy Prior to the Carter Policy	8
A. Accession Medical Standards	8
B. Retention Standards	11
The Carter Policy	12
A. Changes to the DSM	12
B. The Department Begins Review of Transgender Policy	13
C. New Standards for Transgender Persons	14
1. Retention Standards	14
2. Accession Standards	15
Panel of Experts Recommendation	17
Recommended Policy	19
Discussion of Standards	19
A. Mental Health Standards	19
B. Physical Health Standards	27
C. Sex-Based Standards	28
New Transgender Policy	32
A. Transgender Persons Without a History or Diagnosis of Gender Dysphoria, Who Are Otherwise Qualified for Service, May Serve, Like All Other Service Members, in Their Biological Sex	32
B. Transgender Persons Who Require or Have Undergone Gender Transition Are Disqualified	32
1. Undermines Readiness	32
2. Incompatible with Sex-Based Standards	35
3. Imposes Disproportionate Costs	41
C. Transgender Persons With a History or Diagnosis of Gender Dysphoria Are Disqualified, Except Under Certain Limited Circumstances	41
1. Accession of Individuals Diagnosed with Gender Dysphoria	42
2. Retention of Service Members Diagnosed with Gender Dysphoria	42
3. Exempting Current Service Members Who Have Already Received a Diagnosis of Gender Dysphoria	42
Conclusion	44

Executive Summary

It is a bedrock principle of the Department of Defense that any eligible individual¹ who can meet the high standards for military service without special accommodations should be permitted to serve. This is no less true for transgender persons than for any other eligible individual. This report, and the recommendations contained herein, proceed from this fundamental premise.

The starting point for determining a person's qualifications for military duty is whether the person can meet the standards that govern the Armed Forces. Federal law requires that anyone entering into military service be "qualified, effective, and able-bodied."² Military standards are designed not only to ensure that this statutory requirement is satisfied but to ensure the overall military effectiveness and lethality of the Armed Forces.

The purpose of the Armed Forces is to fight and win the Nation's wars. No human endeavor is more physically, mentally, and emotionally demanding than the life and death struggle of battle. Because the stakes in war can be so high—both for the success and survival of individual units in the field and for the success and survival of the Nation—it is imperative that all Service members are physically and mentally able to execute their duties and responsibilities without fail, even while exposed to extreme danger, emotional stress, and harsh environments.

Although not all Service members will experience direct combat, standards that are applied universally across the Armed Forces must nevertheless account for the possibility that any Service member could be thrust into the crucible of battle at any time. As the Department has made clear to Congress, "[c]ore to maintaining a ready and capable military force is the understanding that each Service member is required to be available and qualified to perform assigned missions, including roles and functions outside of their occupation, in any setting."³ Indeed, there are no occupations in the military that are exempt from deployment.⁴ Moreover, while non-combat positions are vital to success in war, the physical and mental requirements for those positions should not be the barometer by which the physical and mental requirements for all positions, especially combat positions, are defined. Fitness for combat must be the metric against which all standards and requirements are judged. To give all Service members the best chance of success and survival in war, the Department must maintain the highest possible standards of physical and mental health and readiness across the force.

While individual health and readiness are critical to success in war, they are not the only measures of military effectiveness and lethality. A fighting unit is not a mere collection of individuals; it is a unique social organism that, when forged properly, can be far more powerful than the sum of its parts. Human experience over millennia—from the Spartans at Thermopylae to the band of brothers of the 101st Airborne Division in World War II, to Marine squads fighting building-to-building in Fallujah—teaches us this. Military effectiveness requires

¹ 10 U.S.C. §§ 504, 505(a), 12102(b).

² 10 U.S.C. § 505(a).

³ Under Secretary of Defense for Personnel and Readiness, "Fiscal Year 2016 Report to Congress on the Review of Enlistment of Individuals with Disabilities in the Armed Forces," pp. 8-9 (Apr. 2016).

⁴ *Id.*

transforming a collection of individuals into a single fighting organism—merging multiple individual identities into one. This transformation requires many ingredients, including strong leadership, training, good order and discipline, and that most intangible, but vital, of ingredients—unit cohesion or, put another way, human bonding.

Because unit cohesion cannot be easily quantified, it is too often dismissed, especially by those who do not know what Justice Oliver Wendell Holmes called the “incommunicable experience of war.”⁵ But the experience of those who, as Holmes described, have been “touched with fire” in battle and the experience of those who have spent their lives studying it attest to the enduring, if indescribable, importance of this intangible ingredient. As Dr. Jonathan Shay articulated it in his study of combat trauma in Vietnam, “[s]urvival and success in combat often require soldiers to virtually read one another’s minds, reflexively covering each other with as much care as they cover themselves, and going to one another’s aid with little thought for safety.”⁶ Not only is unit cohesion essential to the health of the unit, Dr. Shay found that it was essential to the health of the individual soldier as well. “Destruction of unit cohesion,” Dr. Shay concluded, “cannot be overemphasized as a reason why so many psychological injuries that might have healed spontaneously instead became chronic.”⁷

Properly understood, therefore, military effectiveness and lethality are achieved through a combination of inputs that include individual health and readiness, strong leadership, effective training, good order and discipline, and unit cohesion. To achieve military effectiveness and lethality, properly designed military standards must foster these inputs. And, for the sake of efficiency, they should do so at the least possible cost to the taxpayer.

To the greatest extent possible, military standards—especially those relating to mental and physical health—should be based on scientifically valid and reliable evidence. Given the life-and-death consequences of warfare, the Department has historically taken a conservative and cautious approach in setting the mental and physical standards for the accession and retention of Service members.

Not all standards, however, are capable of scientific validation or quantification. Instead, they are the product of professional military judgment acquired from hard-earned experience leading Service members in peace and war or otherwise arising from expertise in military affairs. Although necessarily subjective, this judgment is the best, if not only, way to assess the impact of any given military standard on the intangible ingredients of military effectiveness mentioned above—leadership, training, good order and discipline, and unit cohesion.

For decades, military standards relating to mental health, physical health, and the physiological differences between men and women operated to preclude from military service transgender persons who desired to live and work as the opposite gender.

⁵ *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.*, p. 93 (Richard Posner, ed., University of Chicago Press 1992).

⁶ Jonathan Shay, *Achilles in Vietnam*, p. 61 (Atheneum 1994).

⁷ *Id.* at 198.

Relying on a report by an outside consultant, the RAND National Defense Research Institute, the Department, at the direction of Secretary Ashton Carter, reversed that longstanding policy in 2016. Although the new policy—the “Carter policy”—did not permit all transgender Service members to change their gender to align with their preferred gender identity, it did establish a process to do so for transgender Service members who were diagnosed with gender dysphoria—that is, the distress or impairment of functioning that is associated with incongruity between one’s biological sex and gender identity. It also set in motion a new accession policy that would allow applicants who had a history of gender dysphoria, including those who had already transitioned genders, to enter into military service, provided that certain conditions were met. Once a change of gender is authorized, the person must be treated in all respects in accordance with the person’s preferred gender, whether or not the person undergoes any hormone therapy or surgery, so long as a treatment plan has been approved by a military physician.

The new accession policy had not taken effect when the current administration came into office. Secretary James Mattis exercised his discretion and approved the recommendation of the Services to delay the Carter accession policy for an additional six months so that the Department could assess its impact on military effectiveness and lethality. While that review was ongoing, President Trump issued a memorandum to the Secretary of Defense and the Secretary of Homeland Security with respect to the U.S. Coast Guard expressing that further study was needed to examine the effects of the prior administration’s policy change. The memorandum directed the Secretaries to reinstate the longstanding preexisting accession policy until such time that enough evidence existed to conclude that the Carter policy would not have negative effects on military effectiveness, lethality, unit cohesion, and military resources. The President also authorized the Secretary of Defense, in consultation with the Secretary of Homeland Security, to address the disposition of transgender individuals who were already serving in the military.

Secretary Mattis established a Panel of Experts that included senior uniformed and civilian leaders of the Department and U.S. Coast Guard, many with experience leading Service members in peace and war. The Panel made recommendations based on each Panel member’s independent military judgment. Consistent with those recommendations, the Department, in consultation with the Department of Homeland Security, recommends the following policy to the President:

A. Transgender Persons Without a History or Diagnosis of Gender Dysphoria, Who Are Otherwise Qualified for Service, May Serve, Like All Other Service Members, in Their Biological Sex. Transgender persons who have not transitioned to another gender and do not have a history or current diagnosis of gender dysphoria—i.e., they identify as a gender other than their biological sex but do not currently experience distress or impairment of functioning in meeting the standards associated with their biological sex—are qualified for service, provided that they, like all other persons, satisfy all standards and are capable of adhering to the standards associated with their biological sex. This is consistent with the Carter policy, under which transgender persons without a history or diagnosis of gender dysphoria must serve, like everyone else, in their biological sex.

B. Transgender Persons Who Require or Have Undergone Gender Transition Are Disqualified. Except for those who are exempt under this policy, as described below, and except where waivers or exceptions to policy are otherwise authorized, transgender persons who are diagnosed with gender dysphoria, either before or after entry into service, and require transition-related treatment, or have already transitioned to their preferred gender, should be ineligible for service. For reasons discussed at length in this report, the Department concludes that accommodating gender transition could impair unit readiness; undermine unit cohesion, as well as good order and discipline, by blurring the clear lines that demarcate male and female standards and policies where they exist; and lead to disproportionate costs. Underlying these conclusions is the considerable scientific uncertainty and overall lack of high quality scientific evidence demonstrating the extent to which transition-related treatments, such as cross-sex hormone therapy and sex reassignment surgery—interventions which are unique in psychiatry and medicine—remedy the multifaceted mental health problems associated with gender dysphoria.

C. Transgender Persons With a History or Diagnosis of Gender Dysphoria Are Disqualified, Except Under Certain Limited Circumstances. Transgender persons who are diagnosed with, or have a history of, gender dysphoria are generally disqualified from accession or retention in the Armed Forces. The standards recommended here are subject to the same procedures for waiver or exception to policy as any other standards. This is consistent with the Department's handling of other mental conditions that require treatment. As a general matter, only in the limited circumstances described below should persons with a history or diagnosis of gender dysphoria be accessed or retained.

1. *Accession of Individuals Diagnosed with Gender Dysphoria.* Persons with a history of gender dysphoria may access into the Armed Forces, provided that they can demonstrate 36 consecutive months of stability (i.e., absence of gender dysphoria) immediately preceding their application; they have not transitioned to the opposite gender; and they are willing and able to adhere to all standards associated with their biological sex.

2. *Retention of Service Members Diagnosed with Gender Dysphoria.* Consistent with the Department's general approach of applying less stringent standards to retention than to accession in order to preserve the Department's substantial investment in trained personnel, Service members who are diagnosed with gender dysphoria after entering military service may be retained without waiver, provided that they are willing and able to adhere to all standards associated with their biological sex, the Service member does not require gender transition, and the Service member is not otherwise non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months).⁸

3. *Exempting Current Service Members Who Have Already Received a Diagnosis of Gender Dysphoria.* 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, may continue to receive all medically necessary care,

⁸ Under Secretary of Defense for Personnel and Readiness, "DoD Retention Policy for Non-Deployable Service Members" (Feb. 14, 2018).

to change their gender marker in the Defense Enrollment Eligibility Reporting System (DEERS), and to serve in their preferred gender, even after the new policy commences. This includes transgender Service members who entered into military service after January 1, 2018, when the Carter accession policy took effect by court order. The Service member must, however, adhere to the Carter policy procedures and may not be deemed to be non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months). While the Department believes that its solemn promise to these Service members, and the investment it has made in them, outweigh the risks identified in this report, should its decision to exempt these Service members be used by a court as a basis for invalidating the entire policy, this exemption is and should be deemed severable from the rest of the policy.

Although the precise number is unknown, the Department recognizes that many transgender persons who desire to serve in the military experience gender dysphoria and, as a result, could be disqualified under the recommended policy set forth in this report. Many transgender persons may also be unwilling to adhere to the standards associated with their biological sex as required by longstanding military policy. But others have served, and are serving, with distinction under the standards for their biological sex, like all other Service members. Nothing in this policy precludes service by transgender persons who do not have a history or diagnosis of gender dysphoria and are willing and able to meet all standards that apply to their biological sex.

Moreover, nothing in this policy should be viewed as reflecting poorly on transgender persons who suffer from gender dysphoria, or have had a history of gender dysphoria, and are accordingly disqualified from service. The vast majority of Americans from ages 17 to 24—that is, 71%—are ineligible to join the military without a waiver for mental, medical, or behavioral reasons.⁹ Transgender persons with gender dysphoria are no less valued members of our Nation than all other categories of persons who are disqualified from military service. The Department honors all citizens who wish to dedicate, and perhaps even lay down, their lives in defense of the Nation, even when the Department, in the best interests of the military, must decline to grant their wish.

Military standards are high for a reason—the trauma of war, which all Service members must be prepared to face, demands physical, mental, and moral standards that will give all Service members the greatest chance to survive the ordeal with their bodies, minds, and moral character intact. The Department would be negligent to sacrifice those standards for any cause. There are serious differences of opinion on this issue, even among military professionals, but in the final analysis, given the uncertainty associated with the study and treatment of gender dysphoria, the competing interests involved, and the vital interests at stake—our Nation's defense and the success and survival of our Service members in war—the Department must proceed with caution.

⁹ The Lewin Group, Inc., "Qualified Military Available (QMA) and Interested Youth: Final Technical Report," p. 26 (Sept. 2016).

History of Policies Concerning Transgender Persons

For decades, military standards have precluded the accession and retention of certain transgender persons.¹⁰ Accession standards—i.e., standards that govern induction into the Armed Forces—have historically disqualified persons with a history of “transsexualism.” Also disqualified were persons who had undergone genital surgery or who had a history of major abnormalities or defects of the genitalia. These standards prevented transgender persons, especially those who had undergone a medical or surgical gender transition, from accessing into the military, unless a waiver was granted.

Although retention standards—i.e., standards that govern the retention and separation of persons already serving in the Armed Forces—did not require the mandatory processing for separation of transgender persons, it was a permissible basis for separation processing as a physical or mental condition not amounting to a disability. More typically, however, such Service members were processed for separation because they suffered from other associated medical conditions or comorbidities, such as depression, which were also a basis for separation processing.

At the direction of Secretary Carter, the Department made significant changes to these standards. These changes—i.e., the “Carter policy”—prohibit the separation of Service members on the basis of their gender identity and allow Service members who are diagnosed with gender dysphoria to transition to their preferred gender.

Transition-related treatment is highly individualized and could involve what is known as a “medical transition,” which includes cross-sex hormone therapy, or a “surgical transition,”

¹⁰ For purposes of this report, the Department uses the broad definition of “transgender” adopted by the RAND National Defense Institute in its study of transgender service: “an umbrella term used for individuals who have sexual identity or gender expression that differs from their assigned sex at birth.” RAND National Defense Research Institute, *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, p.75 (RAND Corporation 2016), available at https://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/RAND_RR1530.pdf (“RAND Study”). According to the Human Rights Campaign, “[t]he transgender community is incredibly diverse. Some transgender people identify as male or female, and some identify as genderqueer, nonbinary, agender, or somewhere else on or outside of the spectrum of what we understand gender to be.” Human Rights Campaign, “Understanding the Transgender Community,” <https://www.hrc.org/resources/understanding-the-transgender-community> (last visited Feb. 14, 2018). A subset of transgender persons are those who have been diagnosed with gender dysphoria. According to the *Diagnostic and Statistical Manual of Mental Disorders* published by the American Psychiatric Association, “gender dysphoria” is a “marked incongruence between one’s experienced/expressed gender and assigned gender” that “is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.” American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, pp. 452-53 (5th ed. 2013). Based on these definitions, a person can be transgender without necessarily having gender dysphoria (i.e., the transgender person does not suffer “clinically significant distress or impairment” on account of gender incongruity). A 2016 survey of active duty Service members estimated that approximately 1% of the force—8,980 Service members—identify as transgender. Office of People Analytics, Department of Defense, “2016 Workplace and Gender Relations Survey of Active Duty Members, Transgender Service Members,” pp. 1-2. Currently, there are 937 active duty Service members who have been diagnosed with gender dysphoria since June 30, 2016. In addition, when using the term “biological sex” or “sex,” this report is referring to the definition of “sex” in the RAND study: “a person’s biological status as male or female based on chromosomes, gonads, hormones, and genitals (intersex is a rare exception).” RAND Study at 75.

which includes sex reassignment surgery. Service members could also forego medical transition treatment altogether, retain all of their biological anatomy, and live as the opposite gender—this is called a “social transition.”

Once the Service member’s transition is complete, as determined by the member’s military physician and commander in accordance with his or her individualized treatment plan, and the Service member provides legal documentation of gender change, the Carter policy allows for the Service member’s gender marker to be changed in the DEERS. Thereafter, the Service member must be treated in every respect—including with respect to physical fitness standards; berthing, bathroom, and shower facilities; and uniform and grooming standards—in accordance with the Service member’s preferred gender. The Carter policy, however, still requires transgender Service members who have not changed their gender marker in DEERS, including persons who identify as other than male or female, to meet the standards associated with their biological sex.

The Carter policy also allows accession of persons with gender dysphoria who can demonstrate stability in their preferred gender for at least 18 months. The accession policy did not take effect until required by court order, effective January 1, 2018.

The following discussion describes in greater detail the evolution of accession and retention standards pertaining to transgender persons.

Transgender Policy Prior to the Carter Policy

A. Accession Medical Standards

DoD Instruction (DoDI) 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services*, establishes baseline accession medical standards used to determine an applicant’s medical qualifications to enter military service. This instruction is reviewed every three to four years by the Accession Medical Standards Working Group (AMSWG), which includes medical and personnel subject matter experts from across the Department, its Military Services, and the U.S. Coast Guard. The AMSWG thoroughly reviews over 30 bodily systems and medical focus areas while carefully considering evidence-based clinical information, peer-reviewed scientific studies, scientific expert consensus, and the performance of existing standards in light of empirical data on attrition, deployment readiness, waivers, and disability rates. The AMSWG also considers inputs from non-government sources and evaluates the applicability of those inputs against the military’s mission and operational environment, so that the Department and the Military Services can formally coordinate updates to these standards.

Accession medical standards are based on the operational needs of the Department and are designed to ensure that individuals are physically and psychologically “qualified, effective, and able-bodied persons”¹¹ capable of performing military duties. Military effectiveness requires that the Armed Forces manage an integrated set of unique medical standards and qualifications because all military personnel must be available for worldwide duty 24 hours a day without

¹¹ 10 U.S.C. § 505(a).

restriction or delay. Such duty may involve a wide range of demands, including exposure to danger or harsh environments, emotional stress, and the operation of dangerous, sensitive, or classified equipment. These duties are often in remote areas lacking immediate and comprehensive medical support. Such demands are not normally found in civilian occupations, and the military would be negligent in its responsibility if its military standards permitted admission of applicants with physical or emotional impairments that could cause harm to themselves or others, compromise the military mission, or aggravate any current physical or mental health conditions that they may have.

In sum, these standards exist to ensure that persons who are under consideration for induction into military service are:

- free of contagious diseases that probably will endanger the health of other personnel;
- free of medical conditions or physical defects that may require excessive time lost from duty for necessary treatment or hospitalization, or probably will result in separation from service for medical unfitness;
- medically capable of satisfactorily completing required training;
- medically adaptable to the military environment without the necessity of geographical area limitations; and
- medically capable of performing duties without aggravation of existing physical defects or medical conditions.¹²

Establishing or modifying an accession standard is a risk management process by which a health condition is evaluated in terms of the probability and effect on the five listed outcomes above. These standards protect the applicant from harm that could result from the rigors of military duty and help ensure unit readiness by minimizing the risk that an applicant, once inducted into military service, will be unavailable for duty because of illness, injury, disease, or bad health.

Unless otherwise expressly provided, a current diagnosis or verified past medical history of a condition listed in DoDI 6130.03 is presumptively disqualifying.¹³ Accession standards reflect the considered opinion of the Department's medical and personnel experts that an applicant with an identified condition should only be able to serve if they can qualify for a waiver. Waivers are generally only granted when the condition will not impact the individual's assigned specialty or when the skills of the individual are unique enough to warrant the additional risk. Waivers are not generally granted when the conditions of military service may aggravate the existing condition. For some conditions, applicants with a past medical history may nevertheless be eligible for accession if they meet the requirements for a certain period of "stability"—that is, they can demonstrate that the condition has been absent for a defined period

¹² Department of Defense Instruction 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services* (Apr. 28, 2010), incorporating Change 1, p. 2 (Sept. 13, 2011) ("DoDI 6130.03").

¹³ *Id.* at 10.

of time prior to accession.¹⁴ With one exception,¹⁵ each accession standard may be waived in the discretion of the accessing Service based on that Service's policies and practices, which are driven by the unique requirements of different Service missions, different Service occupations, different Service cultures, and at times, different Service recruiting missions.

Historically, mental health conditions have been a great concern because of the unique mental and emotional stresses of military service. Mental health conditions frequently result in attrition during initial entry training and the first term of service and are routinely considered by in-service medical boards as a basis for separation. Department mental health accession standards have typically aligned with the conditions identified in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), which is published by the American Psychiatric Association (APA). The DSM sets forth the descriptions, symptoms, and other criteria for diagnosing mental disorders. Health care professionals in the United States and much of the world use the DSM as the authoritative guide to the diagnosis of mental disorders.

Prior to implementation of the Carter policy, the Department's accession standards barred persons with a "[h]istory of psychosexual conditions, including but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias."¹⁶ These standards were consistent with DSM-III, which in 1980, introduced the diagnosis of transsexualism.¹⁷ In 1987, DSM-III-R added gender identity disorder, non-transsexual type.¹⁸ DSM-IV, which was published in 1994, combined these two diagnoses and called the resulting condition "gender identity disorder."¹⁹ Due to challenges associated with updating and publishing a new iteration of DoDI 6130.03, the DoDI's terminology has not changed to reflect the changes in the DSM, including further changes that will be discussed later.

DoDI 6130.03 also contains other disqualifying conditions that are associated with, but not unique to, transgender persons, especially those who have undertaken a medical or surgical transition to the opposite gender. These include:

- a history of chest surgery, including but not limited to the surgical removal of the breasts,²⁰ and genital surgery, including but not limited to the surgical removal of the testicles;²¹

¹⁴ See, e.g., *id.* at 47.

¹⁵ The accession standards for applicants with HIV are not waivable absent a waiver from both the accessing Service and the Under Secretary of Defense for Personnel and Readiness. See Department of Defense Instruction 6485.01, *Human Immunodeficiency Virus (HIV) in Military Service Members* (Jun. 7, 2013).

¹⁶ DoDI 6130.03 at 48.

¹⁷ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-III)*, pp. 261-264 (3rd ed. 1980).

¹⁸ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)*, pp. 76-77 (3rd ed. revised 1987).

¹⁹ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*, pp. 532-538 (4th ed. 1994).

²⁰ DoDI 6130.03 at 18.

²¹ *Id.* at 25-27.

- a history of major abnormalities or defects of the genitalia, including but not limited to change of sex, hermaphroditism, penis amputation, and pseudohermaphroditism;²²
- mental health conditions such as suicidal ideation, depression, and anxiety disorder;²³ and
- the use of certain medications, or conditions requiring the use of medications, such as hormone therapies and anti-depressants.²⁴

Together with a diagnosis of transsexualism, these conditions, which were repeatedly validated by the AMSWG, provided multiple grounds for the disqualification of transgender persons.

B. Retention Standards

The standards that govern the retention of Service members who are already serving in the military are generally less restrictive than the corresponding accession standards due to the investment the Department has made in the individual and their increased capability to contribute to mission accomplishment.

Also unlike the Department's accession standards, each Service develops and applies its own retention standards. With respect to the retention of transgender Service members, these Service-specific standards may have led to inconsistent outcomes across the Services, but as a practical matter, before the Carter policy, the Services generally separated Service members who desired to transition to another gender. During that time, there were no express policies allowing individuals to serve in their preferred gender rather than their biological sex.

Previous Department policy concerning the retention (administrative separation) of transgender persons was not clear or rigidly enforced. DoDI 1332.38, *Physical Disability Evaluation*, now cancelled, characterized "sexual gender and identity disorders" as a basis for allowing administrative separation for a condition not constituting a disability; it did not require mandatory processing for separation. A newer issuance, DoDI 1332.18, *Disability Evaluation System (DES)*, August 5, 2014, does not reference these disorders but instead reflects changes in how such medical conditions are characterized in contemporary medical practice.

Earlier versions of DoDI 1332.14, *Enlisted Administrative Separations*, contained a cross reference to the list of conditions not constituting a disability in former DoDI 1332.38. This was how "transsexualism," the older terminology, was used as a basis for administrative separation. Separation on this basis required formal counseling and an opportunity to address the issue, as well as a finding that the condition was interfering with the performance of duty. In practice, transgender persons were not usually processed for administrative separation on account of gender dysphoria or gender identity itself, but rather on account of medical comorbidities (e.g., depression or suicidal ideation) or misconduct due to cross dressing and related behavior.

²² Id.

²³ Id. at 47-48.

²⁴ Id. at 48.

The Carter Policy

At the direction of Secretary Carter, the Department began formally reconsidering its accession and retention standards as they applied to transgender persons with gender dysphoria in 2015. This reevaluation, which culminated with the release of the Carter policy in 2016, was prompted in part by amendments to the DSM that appeared to change the diagnosis for gender identity disorder from a disorder to a treatable condition called gender dysphoria. Starting from the assumption that transgender persons are qualified for military service, the Department sought to identify and remove the obstacles to such service. This effort resulted in substantial changes to the Department's accession and retention standards to accommodate transgender persons with gender dysphoria who require treatment for transitioning to their preferred gender.

A. Changes to the DSM

When the APA published the fifth edition of the DSM in May 2013, it changed “gender identity disorder” to “gender dysphoria” and designated it as a “condition”—a new diagnostic class applicable only to gender dysphoria—rather than a “disorder.”²⁵ This change was intended to reflect the APA's conclusion that gender nonconformity alone—without accompanying distress or impairment of functioning—was not a mental disorder.²⁶ DSM-5 also decoupled the diagnosis for gender dysphoria from diagnoses for “sexual dysfunction and paraphilic disorders, recognizing fundamental differences between these diagnoses.”²⁷

According to DSM-5, gender dysphoria in adolescents and adults is “[a] marked incongruence between one's experience/expressed gender and assigned gender, of at least 6 months' duration, as manifested by at least two of the following”:

- A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics).
- A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).

²⁵ See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, pp. 451-459 (5th ed. 2013) (“DSM-5”).

²⁶ RAND Study at 77; see also Hayes Directory, “Sex Reassignment Surgery for the Treatment of Gender Dysphoria” (May 15, 2014), p. 1 (“This change was intended to reflect a consensus that gender nonconformity is not a psychiatric disorder, as it was previously categorized. However, since the condition may cause clinically significant distress and since a diagnosis is necessary for access to medical treatment, the new term was proposed.”); Irene Folaron & Monica Lovasz, “Military Considerations in Transsexual Care of the Active Duty Member,” *Military Medicine*, Vol. 181, pp. 1182-83 (2016) (“In the DSM-5, [gender dysphoria] has replaced the diagnosis of ‘gender identity disorder’ in order to place the focus on the dysphoria and to diminish the pathology associated with identity incongruence.”).

²⁷ Irene Folaron & Monica Lovasz, “Military Considerations in Transsexual Care of the Active Duty Member,” *Military Medicine*, Vol. 181, p. 1183 (2016).

- A strong desire for the primary and/or secondary sex characteristics of the other gender.
- A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).
- A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).
- A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).

Importantly, DSM-5 observed that gender dysphoria “is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.”²⁸

B. The Department Begins Review of Transgender Policy

On July 28, 2015, then Secretary Carter issued a memorandum announcing that no Service members would be involuntarily separated or denied reenlistment or continuation of service based on gender identity or a diagnosis of gender dysphoria without the personal approval of the Under Secretary of Defense for Personnel and Readiness.²⁹ The memorandum also created the Transgender Service Review Working Group (TSRWG) “to study the policy and readiness implications of welcoming transgender persons to serve openly.”³⁰ The memorandum specifically directed the working group to “start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness, unless and except where objective practical impediments are identified.”³¹

As part of this review, the Department commissioned the RAND National Defense Research Institute to conduct a study to “(1) identify the health care needs of the transgender population, transgender Service members’ potential health care utilization rates, and the costs associated with extending health care coverage for transition-related treatments; (2) assess the potential readiness impacts of allowing transgender Service members to serve openly; and (3) review the experiences of foreign militaries that permit transgender Service members to serve openly.”³² The resulting report, entitled *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, reached several conclusions. First, the report estimated that there are between 1,320 and 6,630 transgender Service members already serving in the active component of the Armed Forces and 830 to 4,160 in the Selected Reserve.³³ Second, the report predicted “annual gender transition-related health care to be an extremely small part of the overall health care provided to the [active component] population.”³⁴ Third, the report estimated that active component “health care costs will increase by between \$2.4 million and \$8.4 million annually—an amount that will have little impact on and represents an exceedingly small proportion of

²⁸ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, p. 453 (5th ed. 2013).

²⁹ Memorandum from Ashton Carter, Secretary of Defense, “Transgender Service Members” (July 28, 2015).

³⁰ *Id.*

³¹ *Id.*

³² RAND Study at i.

³³ *Id.* at x-xi.

³⁴ *Id.* at xi.

[active component] health care expenditures (approximately \$6 billion in FY 2014).³⁵ Fourth, the report “found that less than 0.0015 percent of the total available labor-years would be affected, based on estimated gender transition-related health care utilization rates.”³⁶ Finally, the report concluded that “[e]xisting data suggest a minimal impact on unit cohesion as a result of allowing transgender personnel to serve openly.”³⁷ “Overall,” according to RAND, “our study found that the number of U.S. transgender Service members who are likely to seek transition-related care is so small that a change in policy will likely have a marginal impact on health care costs and the readiness of the force.”³⁸

The RAND report thus acknowledged that there will be an adverse impact on health care utilization and costs, readiness, and unit cohesion, but concluded nonetheless that the impact will be “negligible” and “marginal” because of the small estimated number of transgender Service members relative to the size of the active component of the Armed Forces. Because of the RAND report’s macro focus, however, it failed to analyze the impact at the micro level of allowing gender transition by individuals with gender dysphoria. For example, as discussed in more detail later, the report did not examine the potential impact on unit readiness, perceptions of fairness and equity, personnel safety, and reasonable expectations of privacy at the unit and sub-unit levels, all of which are critical to unit cohesion. Nor did the report meaningfully address the significant mental health problems that accompany gender dysphoria—from high rates of comorbidities and psychiatric hospitalizations to high rates of suicide ideation and suicidality—and the scope of the scientific uncertainty regarding whether gender transition treatment fully remedies those problems.

C. New Standards for Transgender Persons

Based on the RAND report, the work of the TSRWG, and the advice of the Service Secretaries, Secretary Carter approved the publication of DoDI 1300.28, *In-service Transition for Service Members Identifying as Transgender*, and Directive-type Memorandum (DTM) 16-005, “Military Service of Transgender Service Members,” on June 30, 2016. Although the new retention standards were effective immediately upon publication of the above memoranda, the accession standards were delayed until July 1, 2017, to allow time for training all Service members across the Armed Forces, including recruiters, Military Entrance Processing Station (MEPS) personnel, and basic training cadre, and to allow time for modifying facilities as necessary.

1. *Retention Standards.* DoDI 1300.28 establishes the procedures by which Service members who are diagnosed with gender dysphoria may administratively change their gender. Once a Service member receives a gender dysphoria diagnosis from a military physician, the physician, in consultation with the Service member, must establish a treatment plan. The treatment plan is highly individualized and may include cross-sex hormone therapy (i.e., medical transition), sex reassignment surgery (i.e., surgical transition), or simply living as the opposite gender but without any cross-sex hormone or surgical treatment (i.e., social

³⁵ Id. at xi-xii.

³⁶ Id. at xii.

³⁷ Id.

³⁸ Id. at 69.

transition). The nature of the treatment is left to the professional medical judgment of the treating physician and the individual situation of the transgender Service member. The Department does not require a Service member with gender dysphoria to undergo cross-sex hormone therapy, sex reassignment surgery, or any other physical changes to effectuate an administrative change of gender. During the course of treatment, commanders are authorized to grant exceptions from physical fitness, uniform and grooming, and other standards, as necessary and appropriate, to transitioning Service members. Once the treating physician determines that the treatment plan is complete, the Service member's commander approves, and the Service member produces legal documentation indicating change of gender (e.g., certified birth certificate, court order, or U.S. passport), the Service member may request a change of gender marker in DEERS. Once the DEERS gender marker is changed, the Service member is held to all standards associated with the member's transitioned gender, including uniform and grooming standards, body composition assessment, physical readiness testing, Military Personnel Drug Abuse Testing Program participation, and other military standards congruent to the member's gender. Indeed, the Service member must be treated in all respects in accordance with the member's transitioned gender, including with respect to berthing, bathroom, and shower facilities. Transgender Service members who do not meet the clinical criteria for gender dysphoria, by contrast, remain subject to the standards and requirements applicable to their biological sex.

2. *Accession Standards.* DTM 16-005 directed that the following medical standards for accession into the Military Services take effect on July 1, 2017:

- (1) A history of gender dysphoria is disqualifying, unless, as certified by a licensed medical provider, the applicant has been stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months.
- (2) A history of medical treatment associated with gender transition is disqualifying, unless, as certified by a licensed medical provider:
 - (a) the applicant has completed all medical treatment associated with the applicant's gender transition; and
 - (b) the applicant has been stable in the preferred gender for 18 months; and
 - (c) if the applicant is presently receiving cross-sex hormone therapy post-gender transition, the individual has been stable on such hormones for 18 months.
- (3) A history of sex reassignment or genital reconstruction surgery is disqualifying, unless, as certified by a licensed medical provider:
 - (a) a period of 18 months has elapsed since the date of the most recent of any such surgery; and

- (b) no functional limitations or complications persist, nor is any additional surgery required.³⁹

³⁹ Memorandum from Ashton Carter, Secretary of Defense, "Directive-type Memorandum (DTM) 16-005, 'Military Service of Transgender Service Members,'" Attachment, pp. 1-2 (June 30, 2016).

Panel of Experts Recommendation

The Carter policy's accession standards for persons with a history of gender dysphoria were set to take effect on July 1, 2017, but on June 30, after consultation with the Secretaries and Chiefs of Staff of each Service, Secretary Mattis postponed the new standards for an additional six months "to evaluate more carefully the impact of such accessions on readiness and lethality."⁴⁰ Secretary Mattis specifically directed that the review would "include all relevant considerations" and would last for five months, with a due date of December 1, 2017.⁴¹ The Secretary also expressed his desire to have "the benefit of the views of the military leadership and of the senior civilian officials who are now arriving in the Department."⁴²

While Secretary Mattis's review was ongoing, President Trump issued a memorandum, on August 25, 2017, directing the Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to reinstate longstanding policy generally barring the accession of transgender individuals "until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice" would not "hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources."⁴³ The President found that "further study is needed to ensure that continued implementation of last year's policy change would not have those negative effects."⁴⁴ Accordingly, the President directed both Secretaries to maintain the prohibition on accession of transgender individuals "until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the contrary" that is convincing.⁴⁵ The President made clear that the Secretaries may advise him "at any time, in writing, that a change to this policy is warranted."⁴⁶ In addition, the President gave both Secretaries discretion to "determine how to address transgender individuals currently serving" in the military and made clear that no action be taken against them until a determination was made.⁴⁷

On September 14, 2017, Secretary Mattis established a Panel of Experts to study, in a "comprehensive, holistic, and objective" manner, "military service by transgender individuals, focusing on military readiness, lethality, and unit cohesion, with due regard for budgetary constraints and consistent with applicable law."⁴⁸ He directed the Panel to "conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members."⁴⁹

⁴⁰ Memorandum from James N. Mattis, Secretary of Defense, "Accession of Transgender Individuals into the Military Services" (June 30, 2017).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Memorandum from Donald J. Trump, President of the United States, "Military Service by Transgender Individuals" (Aug. 25, 2017).

⁴⁴ *Id.* at 1.

⁴⁵ *Id.* at 2.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Memorandum from James N. Mattis, Secretary of Defense, "Terms of Reference—Implementation of Presidential Memorandum on Military Service by Transgender Individuals," pp. 1-2 (Sept. 14, 2017).

⁴⁹ *Id.* at 2.

The Panel consisted of the Under Secretaries of the Military Departments (or officials performing their duties), the Armed Services' Vice Chiefs (including the Vice Commandant of the U.S. Coast Guard), and the Senior Enlisted Advisors, and was chaired by the Under Secretary of Defense for Personnel and Readiness or an official performing those duties. The Secretary of Defense selected these senior leaders because of their experience leading warfighters in war and peace or their expertise in military operational effectiveness. These senior leaders also have the statutory responsibility to organize, train, and equip military forces and are uniquely qualified to evaluate the impact of policy changes on the combat effectiveness and lethality of the force. The Panel met 13 times over a span of 90 days.

The Panel received support from medical and personnel experts from across the Departments of Defense and Homeland Security. The Transgender Service Policy Working Group, comprised of medical and personnel experts from across the Department, developed policy recommendations and a proposed implementation plan for the Panel's consideration. The Medical and Personnel Executive Steering Committee, a standing group of the Surgeons General and Service Personnel Chiefs, led by Personnel and Readiness, provided the Panel with an analysis of accession standards, a multi-disciplinary review of relevant data, and information about medical treatment for gender dysphoria and gender transition-related medical care. These groups reported regularly to the Panel and responded to numerous queries for additional information and analysis to support the Panel's review and deliberations. A separate working group tasked with enhancing the lethality of our Armed Forces also provided a briefing to the Panel on their work relating to retention standards.

The Panel met with and received input from transgender Service members, commanders of transgender Service members, military medical professionals, and civilian medical professionals with experience in the care and treatment of individuals with gender dysphoria. The Panel also reviewed information and analyses about gender dysphoria, the treatment of gender dysphoria, and the effects of currently serving individuals with gender dysphoria on military effectiveness, unit cohesion, and resources. Unlike past reviews, the Panel's analysis was informed by the Department's own data and experience obtained since the Carter policy took effect.

To fulfill its mandate, the Panel addressed three questions:

- Should the Department of Defense access transgender individuals?
- Should the Department allow transgender individuals to transition gender while serving, and if so, what treatment should be authorized?
- How should the Department address transgender individuals who are currently serving?

After extensive review and deliberation, which included evidence in support of and against the Panel's recommendations, the Panel exercised its professional military judgment and made recommendations. The Department considered those recommendations and the information underlying them, as well as additional information within the Department, and now proposes the following policy consistent with those recommendations.

Recommended Policy

To maximize military effectiveness and lethality, the Department, after consultation with and the concurrence of the Department of Homeland Security, recommends cancelling the Carter policy and, as explained below, adopting a new policy with respect to the accession and retention of transgender persons.

The Carter policy assumed that transgender persons were generally qualified for service and that their accession and retention would not negatively impact military effectiveness. As noted earlier, Secretary Carter directed the TSRWG, the group charged with evaluating, and making recommendations on, transgender service, to “start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness, unless and except where objective practical impediments are identified.”⁵⁰ Where necessary, standards were adjusted or relaxed to accommodate service by transgender persons. The following analysis makes no assumptions but instead applies the relevant standards applicable to everyone to determine the extent to which transgender persons are qualified for military duty.

For the following reasons, the Department concludes that transgender persons should not be disqualified from service solely on account of their transgender status, provided that they, like all other Service members, are willing and able to adhere to all standards, including the standards associated with their biological sex. With respect to the subset of transgender persons who have been diagnosed with gender dysphoria, however, those persons are generally disqualified unless, depending on whether they are accessing or seeking retention, they can demonstrate stability for the prescribed period of time; they do not require, and have not undergone, a change of gender; and they are otherwise willing and able to meet all military standards, including those associated with their biological sex. In order to honor its commitment to current Service members diagnosed with gender dysphoria, those Service members who were diagnosed after the effective date of the Carter policy and before any new policy takes effect will not be subject to the policy recommended here.

Discussion of Standards

The standards most relevant to the issue of service by transgender persons fall into three categories: mental health standards, physical health standards, and sex-based standards. Based on these standards, the Department can assess the extent to which transgender persons are qualified for military service and, in light of that assessment, recommend appropriate policies.

A. Mental Health Standards

Given the extreme rigors of military service and combat, maintaining high standards of mental health is essential to military effectiveness and lethality. The immense toll that the burden and experience of combat can have on the human psyche cannot be overstated. Therefore, putting individuals into battle, who might be at increased risk of psychological injury, would be reckless, not only for those individuals, but for the Service members who serve beside them as well.

⁵⁰ Memorandum from Ashton Carter, Secretary of Defense, “Transgender Service Members” (July 28, 2015).

The Department's experience with the mental health issues arising from our wars in Afghanistan and Iraq, including post-traumatic stress disorder (PTSD), only underscores the importance of maintaining high levels of mental health across the force. PTSD has reached as high as 2.8% of all active duty Service members, and in 2016, the number of active duty Service members with PTSD stood at 1.5%.⁵¹ Of all Service members in the active component, 7.5% have been diagnosed with a mental health condition of some type.⁵² The Department is mindful of these existing challenges and must exercise caution when considering changes to its mental health standards.

Most mental health conditions and disorders are automatically disqualifying for accession absent a waiver. For example, persons with a history of bipolar disorder, personality disorder, obsessive-compulsive disorder, suicidal behavior, and even body dysmorphic disorder (to name a few) are barred from entering into military service, unless a waiver is granted.⁵³ For a few conditions, however, persons may enter into service without a waiver if they can demonstrate stability for 24 to 36 continuous months preceding accession. Historically, a person is deemed stable if they are without treatment, symptoms, or behavior of a repeated nature that impaired social, school, or work efficiency for an extended period of several months. Such conditions include depressive disorder (stable for 36 continuous months) and anxiety disorder (stable for 24 continuous months).⁵⁴ Requiring a period of stability reduces, but does not eliminate, the likelihood that the individual's depression or anxiety will return.

Historically, conditions associated with transgender individuals have been automatically disqualifying absent a waiver. Before the changes directed by Secretary Carter, military mental health standards barred persons with a "[h]istory of psychosexual conditions, including but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias."⁵⁵ These standards, however, did not evolve with changing understanding of transgender mental health. Today, transsexualism is no longer considered by most mental health practitioners as a mental health condition. According to the APA, it is not a medical condition for persons to identify with a gender that is different from their biological sex.⁵⁶ Put simply, transgender status alone is not a condition.

Gender dysphoria, by contrast, is a mental health condition that can require substantial medical treatment. Many individuals who identify as transgender are diagnosed with gender dysphoria, but "[n]ot all transgender people suffer from gender dysphoria and that distinction," according to the APA, "is important to keep in mind."⁵⁷ The DSM-5 defines gender dysphoria as

⁵¹ Deployment Health Clinical Center, "Mental Health Disorder Prevalence among Active Duty Service Members in the Military Health System, Fiscal Years 2005-2016" (Jan. 2017).

⁵² *Id.*

⁵³ DoDI 6130.03 at 47-48.

⁵⁴ *Id.*

⁵⁵ *Id.* at 48.

⁵⁶ DSM-5 at 452-53.

⁵⁷ American Psychiatric Association, "Expert Q & A: Gender Dysphoria," available at <https://www.psychiatry.org/patients-families/gender-dysphoria/expert-qa> (last visited Feb. 14, 2018). Conversely, not all persons with gender dysphoria are transgender. "For example, some men who are disabled in combat, especially if their injury includes genital wounds, may feel that they are no longer men because their bodies do not conform to their concept of manliness. Similarly, a woman who opposes plastic surgery, but who must undergo mastectomy because of breast

a “marked incongruence between one’s experience/expressed gender and assigned gender, of at least 6 months duration,” that is manifested in various specified ways.⁵⁸ According to the APA, the “condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.”⁵⁹

Transgender persons with gender dysphoria suffer from high rates of mental health conditions such as anxiety, depression, and substance use disorders.⁶⁰ High rates of suicide ideation, attempts, and completion among people who are transgender are also well documented in the medical literature, with lifetime rates of suicide attempts reported to be as high as 41% (compared to 4.6% for the general population).⁶¹ According to a 2015 survey, the rate skyrockets to 57% for transgender individuals without a supportive family.⁶² The Department is concerned that the stresses of military life, including basic training, frequent moves, deployment to war zones and austere environments, and the relentless physical demands, will be additional contributors to suicide behavior in people with gender dysphoria. In fact, there is recent evidence that military service can be a contributor to suicidal thoughts.⁶³

Preliminary data of Service members with gender dysphoria reflect similar trends. A review of the administrative data indicates that Service members with gender dysphoria are eight times more likely to attempt suicide than Service members as a whole (12% versus 1.5%).⁶⁴

cancer, may find that she requires reconstructive breast surgery in order to resolve gender dysphoria arising from the incongruence between her body without breasts and her sense of herself as a woman.” M. Jocelyn Elders, George R. Brown, Eli Coleman, Thomas Kolditz & Alan Steinman, “Medical Aspects of Transgender Military Service,” *Armed Forces & Society*, p. 5 n.22 (Mar. 2014).

⁵⁸ DSM-5 at 452.

⁵⁹ DSM-5 at 453.

⁶⁰ Cecilia Dhejne, Roy Van Vlerken, Gunter Heylens & Jon Arcelus, “Mental health and gender dysphoria: A review of the literature,” *International Review of Psychiatry*, Vol. 28, pp. 44-57 (2016); George R. Brown & Kenneth T. Jones, “Mental Health and Medical Health Disparities in 5135 Transgender Veterans Receiving Healthcare in the Veterans Health Administration: A Case-Control Study,” *LGBT Health*, Vol. 3, p. 128 (Apr. 2016).

⁶¹ Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey*, p. 2 (American Foundation for Suicide Prevention and The Williams Institute, University of California, Los Angeles, School of Law 2014), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf>; H.G. Virupaksha, Daliboyina Muralidhar & Jayashree Ramakrishna, “Suicide and Suicide Behavior among Transgender Persons,” *Indian Journal of Psychological Medicine*, Vol.38, pp. 505-09 (2016); Claire M. Peterson, Abigail Matthews, Emily Copps-Smith & Lee Ann Conard, “Suicidality, Self-Harm, and Body Dissatisfaction in Transgender Adolescents and Emerging Adults with Gender Dysphoria,” *Suicide and Life Threatening Behavior*, Vol. 47, pp. 475-482 (Aug. 2017).

⁶² Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey*, pp. 2, 12 (American Foundation for Suicide Prevention and The Williams Institute, University of California, Los Angeles, School of Law 2014), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf>.

⁶³ Raymond P. Tucker, Rylan J. Testa, Mark A. Reger, Tracy L. Simpson, Jillian C. Shipherd, & Keren Lehavot, “Current and Military-Specific Gender Minority Stress Factors and Their Relationship with Suicide Ideation in Transgender Veterans,” *Suicide and Life Threatening Behavior* DOI: 10.1111/sltb.12432 (epub ahead of print), pp. 1-10 (2018); Craig J. Bryan, AnnaBelle O. Bryan, Bobbie N. Ray-Sannerud, Neysa Etienne & Chad E. Morrow, “Suicide attempts before joining the military increase risk for suicide attempts and severity of suicidal ideation among military personnel and veterans,” *Comprehensive Psychiatry*, Vol. 55, pp. 534-541 (2014).

⁶⁴ Data retrieved from Military Health System data repository (Oct. 2017).

Service members with gender dysphoria are also nine times more likely to have mental health encounters than the Service member population as a whole (28.1 average encounters per Service member versus 2.7 average encounters per Service member).⁶⁵ From October 1, 2015 to October 3, 2017, the 994 active duty Service members diagnosed with gender dysphoria accounted for 30,000 mental health visits.⁶⁶

It is widely believed by mental health practitioners that gender dysphoria can be treated. Under commonly accepted standards of care, treatment for gender dysphoria can include: psychotherapy; social transition—also known as “real life experience”—to allow patients to live and work in their preferred gender without any hormone treatment or surgery; medical transition to align secondary sex characteristics with patients’ preferred gender using cross-sex hormone therapy and hair removal; and surgical transition—also known as sex reassignment surgery—to make the physical body—both primary and secondary sex characteristics—resemble as closely as possible patients’ preferred gender.⁶⁷ The purpose of these treatment options is to alleviate the distress and impairment of gender dysphoria by seeking to bring patients’ physical characteristics into alignment with their gender identity—that is, one’s inner sense of one’s own gender.⁶⁸

Cross-sex hormone therapy is a common medical treatment associated with gender transition that may be commenced following a diagnosis of gender dysphoria.⁶⁹ Treatment for women transitioning to men involves the administration of testosterone, whereas treatment for men transitioning to women requires the blocking of testosterone and the administration of estrogens.⁷⁰ The Endocrine Society’s clinical guidelines recommend laboratory bloodwork every 90 days for the first year of treatment to monitor hormone levels.⁷¹

As a treatment for gender dysphoria, sex reassignment surgery is “a unique intervention not only in psychiatry but in all of medicine.”⁷² Under existing Department guidelines

⁶⁵ Data retrieved from Military Health System data repository (Oct. 2017). Study period was Oct. 1, 2015 to July 26, 2017.

⁶⁶ Data retrieved from Military Health System data repository (Oct. 2017).

⁶⁷ RAND Study at 5-7, Appendices A & C; see also Hayes Directory, “Sex Reassignment Surgery for the Treatment of Gender Dysphoria,” p. 1 (May 15, 2014) (“The full therapeutic approach to [gender dysphoria] consists of 3 elements or phases, typically in the following order: (1) hormones of the desired gender; (2) real-life experience for 12 months in the desired role; and (3) surgery to change the genitalia and other sex characteristics (e.g., breast reconstruction or mastectomy). However, not everyone with [gender dysphoria] needs or wants all elements of this triadic approach.”); Irene Folaron & Monica Lovasz, “Military Considerations in Transsexual Care of the Active Duty Member,” *Military Medicine*, Vol. 181, p. 1183 (Oct. 2016) (“The Endocrine Society proposes a sequential approach in transsexual care to optimize mental health and physical outcomes. Generally, they recommend initiation of psychotherapy, followed by cross-sex hormone treatments, then [sex reassignment surgery].”).

⁶⁸ RAND Study at 73.

⁶⁹ Wylie C. Hembree, Peggy Cohen-Kettenis, Lous Gooren, Sabine Hannema, Walter Meyer, M. Hassan Murad, Stephen Rosenthal, Joshua Safer, Vin Tangpricha, & Guy T’Sjoen, “Endocrine Treatment of Gender-Dysphoric/Gender Incongruent Persons: An Endocrine Society Clinical Practice Guideline,” *The Journal of Clinical Endocrinology & Metabolism*, Vol. 102, pp. 3869-3903 (Nov. 2017).

⁷⁰ Id. at 3885-3888.

⁷¹ Id.

⁷² Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, “Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden,” *PLoS One*, Vol. 6, pp. 1-8 (Feb. 2011); see also Hayes Directory, “Sex Reassignment Surgery for the Treatment of

implementing the Carter policy, men transitioning to women may obtain an orchiectomy (surgical removal of the testicles), a penectomy (surgical removal of the penis), a vaginoplasty (surgical creation of a vagina), a clitoroplasty (surgical creation of a clitoris), and a labiaplasty (surgical creation of the labia). Women transitioning to men may obtain a hysterectomy (surgical removal of the uterus), a mastectomy (surgical removal of the breasts), a metoidioplasty (surgical enlargement of the clitoris), a phalloplasty (surgical creation of a penis), a scrotoplasty (surgical creation of a scrotum) and placement of testicular prostheses, a urethroplasty (surgical enlargement of the urethra), and a vaginectomy (surgical removal of the vagina). In addition, the following cosmetic procedures may be provided at military treatment facilities as well: abdominoplasty, breast augmentation, blepharoplasty (eyelid lift), hair removal, face lift, facial bone reduction, hair transplantation, liposuction, reduction thyroid chondroplasty, rhinoplasty, and voice modification surgery.⁷³

The estimated recovery time for each of the surgical procedures, even assuming no complications, can be substantial. For example, assuming no complications, the recovery time for a hysterectomy is up to eight weeks; a mastectomy is up to six weeks; a phalloplasty is up to three months; a metoidioplasty is up to eight weeks; an orchiectomy is up to six weeks; and a vaginoplasty is up to three months.⁷⁴ When combined with 12 continuous months of hormone therapy, which is required prior to genital surgery,⁷⁵ the total time necessary for surgical transition can exceed a year.

Although relatively few people who are transgender undergo genital reassignment surgeries (2% of transgender men and 10% of transgender women), we have to consider that the rate of complications for these surgeries is significant, which could increase a transitioning Service member's unavailability.⁷⁶ Even according to the RAND study, 6% to 20% of those receiving vaginoplasty surgery experience complications, meaning that "between three and 11 Service members per year would experience a long-term disability from gender reassignment

Gender Dysphoria," p. 2 (May 15, 2014) (noting that gender dysphoria "does not readily fit traditional concepts of medical necessity since research to date has not established anatomical or physiological anomalies associated with [gender dysphoria]"); Hayes Annual Review, "Sex Reassignment Surgery for the Treatment of Gender Dysphoria" (Apr. 18, 2017).

⁷³ Memorandum from Defense Health Agency, "Information Memorandum: Interim Defense Health Agency Procedures for Reviewing Requests for Waivers to Allow Supplemental Health Care Program Coverage of Sex Reassignment Surgical Procedures" (Nov. 13, 2017); see also RAND Study at Appendix C.

⁷⁴ University of California, San Francisco, Center of Excellence for Transgender Health, "Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People," available at <http://transhealth.ucsf.edu/trans?page=guidelines-home> (last visited Feb. 16, 2018); Discussion with Dr. Loren Schechter, Visiting Clinical Professor of Surgery, University of Illinois at Chicago (Nov. 9, 2017).

⁷⁵ RAND Study at 80; see also Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181, p. 1184 (Oct. 2016) (noting that Endocrine Society criteria "require that the patient has been on continuous cross-sex hormones and has had continuous [real life experience] or psychotherapy for the past 12 months").

⁷⁶ Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey*, pp. 100-103 (National Center for Transgender Equality 2016) available at <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

surgery.”⁷⁷ The RAND study further notes that of those receiving phalloplasty surgery, as many as 25%—one in four—will have complications.⁷⁸

The prevailing judgment of mental health practitioners is that gender dysphoria can be treated with the transition-related care described above. While there are numerous studies of varying quality showing that this treatment can improve health outcomes for individuals with gender dysphoria, the available scientific evidence on the extent to which such treatments fully remedy all of the issues associated with gender dysphoria is unclear. Nor do any of these studies account for the added stress of military life, deployments, and combat.

As recently as August 2016, the Centers for Medicare and Medicaid Services (CMS) conducted a comprehensive review of the relevant literature, over 500 articles, studies, and reports, to determine if there was “sufficient evidence to conclude that gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria.”⁷⁹ After reviewing the universe of literature regarding sex reassignment surgery, CMS identified 33 studies sufficiently rigorous to merit further review, and of those, “some were positive; others were negative.”⁸⁰ “Overall,” according to CMS, “the quality and strength of evidence were low due to mostly observational study designs with no comparison groups, subjective endpoints, potential confounding . . . small sample sizes, lack of validated assessment tools, and considerable [number of study subjects] lost to follow-up.”⁸¹ With respect to whether sex reassignment surgery was “reasonable and necessary” for the treatment of gender dysphoria, CMS concluded that there was “not enough high quality evidence to determine whether gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria and whether patients most likely to benefit from these types of surgical intervention can be identified prospectively.”⁸²

Importantly, CMS identified only six studies as potentially providing “useful information” on the effectiveness of sex reassignment surgery. According to CRS, “the four best designed and conducted studies that assessed the quality of life before and after surgery using validated (albeit, non-specific) psychometric studies did not demonstrate clinically significant changes or differences in psychometric test results after [sex reassignment surgery].”⁸³

⁷⁷ RAND Study at 40-41.

⁷⁸ *Id.* at 41.

⁷⁹ Tamara Jensen, Joseph Chin, James Rollins, Elizabeth Koller, Linda Gousis & Katherine Szarama, “Final Decision Memorandum on Gender Reassignment Surgery for Medicare Beneficiaries with Gender Dysphoria,” Centers for Medicare & Medicaid Services, p. 9 (Aug. 30, 2016) (“CMS Report”).

⁸⁰ *Id.* at 62.

⁸¹ *Id.*

⁸² *Id.* at 65. CMS did not conclude that gender reassignment surgery can never be necessary and reasonable to treat gender dysphoria. To the contrary, it made clear that Medicare insurers could make their own “determination of whether or not to cover gender reassignment surgery based on whether gender reassignment surgery is reasonable and necessary for the individual beneficiary after considering the individual’s specific circumstances.” *Id.* at 66. Nevertheless, CMS did decline to require all Medicare insurers to cover sex reassignment surgeries because it found insufficient scientific evidence to conclude that such surgeries improve health outcomes for persons with gender dysphoria.

⁸³ *Id.* at 62.

Additional studies found that the “cumulative rates of requests for surgical reassignment reversal or change in legal status” were between 2.2% and 3.3%.⁸⁴

A sixth study, which came out of Sweden, is one of the most robust because it is a “nationwide population-based, long-term follow-up of sex-reassigned transsexual persons.”⁸⁵ The study found increased mortality and psychiatric hospitalization for patients who had undergone sex reassignment surgery as compared to a healthy control group.⁸⁶ As described by CMS: “The mortality was primarily due to completed suicides (19.1-fold greater than in [the control group]), but death due to neoplasm and cardiovascular disease was increased 2 to 2.5 times as well. We note, mortality from this patient population did not become apparent until after 10 years. The risk for psychiatric hospitalization was 2.8 times greater than in controls even after adjustment for prior psychiatric disease (18%). The risk for attempted suicide was greater in male-to-female patients regardless of the gender of the control.”⁸⁷

According to the Hayes Directory, which conducted a review of 19 peer-reviewed studies on sex reassignment surgery, the “evidence suggests positive benefits,” including “decreased [gender dysphoria], depression and anxiety, and increased [quality of life],” but “because of serious limitations,” these findings “permit only weak conclusions.”⁸⁸ It rated the quality of evidence as “very low” due to the numerous limitations in the studies and concluded that there is

⁸⁴ Id.

⁸⁵ Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, “Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden,” *PLoS One*, Vol. 6, p. 6 (Feb. 2011); see also id. (“Strengths of this study include nationwide representativity over more than 30 years, extensive follow-up time, and minimal loss to follow-up. . . . Finally, whereas previous studies either lack a control group or use standardised mortality rates or standardised incidence rates as comparisons, we selected random population controls matched by birth year, and either birth or final sex.”).

⁸⁶ Id. at 7; see also at 6 (“Mortality from suicide was strikingly high among sex-reassigned persons, also after adjustment for prior psychiatric morbidity. In line with this, sex-reassigned persons were at increased risk for suicide attempts. Previous reports suggest that transsexualism is a strong risk factor for suicide, also after sex reassignment, and our long-term findings support the need for continued psychiatric follow-up for persons at risk to prevent this. Inpatient care for psychiatric disorders was significantly more common among sex-reassigned persons than among matched controls, both before and after sex reassignment. It is generally accepted that transsexuals have more psychiatric ill-health than the general population prior to the sex reassignment. It should therefore come as no surprise that studies have found high rates of depression, and low quality of life, also after sex reassignment. Notably, however, in this study the increased risk for psychiatric hospitalization persisted even after adjusting for psychiatric hospitalization prior to sex reassignment. This suggests that even though sex reassignment alleviates gender dysphoria, there is a need to identify and treat co-occurring psychiatric morbidity in transsexual persons not only before but also after sex reassignment.”).

⁸⁷ CMS Report at 62. It bears noting that the outcomes for mortality and suicide attempts differed “depending on when sex reassignment was performed: during the period 1973-1988 or 1989-2003.” Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, “Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden,” *PLoS One*, Vol. 6, p. 5 (Feb. 2011). Even though both mortality and suicide attempts were greater for transsexual persons than the healthy control group across both time periods, this did not reach statistical significance during the 1989-2003 period. One possible explanation is that mortality rates for transsexual persons did not begin to diverge from the healthy control group until after 10 years of follow-up, in which case the expected increase in mortality would not have been observed for most of the persons receiving sex reassignment surgeries from 1989-2003. Another possible explanation is that treatment was of a higher quality from 1989-2003 than from 1973-1988.

⁸⁸ Hayes Directory, “Sex Reassignment Surgery for the Treatment of Gender Dysphoria,” p. 4 (May 15, 2014).

not sufficient “evidence to establish patient selection criteria for [sex reassignment surgery] to treat [gender dysphoria].”⁸⁹

With respect to hormone therapy, the Hayes Directory examined 10 peer-reviewed studies and concluded that a “substantial number of studies of cross-sex hormone therapy each show some positive findings suggesting improvement in well-being after cross-sex hormone therapy.”⁹⁰ Yet again, it rated the quality of evidence as “very low” and found that the “evidence is insufficient to support patient selection criteria for hormone therapy to treat [gender dysphoria].”⁹¹ Importantly, the Hayes Directory also found: “Hormone therapy and subsequent [sex reassignment surgery] failed to bring overall mortality, suicide rates, or death from illicit drug use in [male-to-female] patients close to rates observed in the general male population. It is possible that mortality is nevertheless reduced by these treatments, but that cannot be determined from the available evidence.”⁹²

In 2010, Mayo Clinic researchers conducted a comprehensive review of 28 studies on the use of cross-sex hormone therapy in sex reassignment and concluded that there was “very low quality evidence” showing that such therapy “likely improves gender dysphoria, psychological functioning and comorbidities, sexual function and overall quality of life.”⁹³ Not all of the studies showed positive results, but overall, after pooling the data from all of the studies, the researchers showed that 80% of patients reported improvement in gender dysphoria, 78% reported improvement in psychological symptoms, and 80% reported improvement in quality of life, after receiving hormone therapy.⁹⁴ Importantly, however, “[s]uicide attempt rates decreased after sex reassignment but stayed higher than the normal population rate.”⁹⁵

The authors of the Swedish study discussed above reached similar conclusions: “This study found substantially higher rates of overall mortality, death from cardiovascular disease and suicide, suicide attempts, and psychiatric hospitali[z]ations in sex-reassigned transsexual individuals compared to a healthy control population. This highlights that post[-]surgical transsexuals are a risk group that need long-term psychiatric and somatic follow-up. Even though surgery and hormonal therapy alleviates gender dysphoria, it is apparently not sufficient to remedy the high rates of morbidity and mortality found among transsexual persons.”⁹⁶

Even the RAND study, which the Carter policy is based upon, confirmed that “[t]here have been no randomized controlled trials of the effectiveness of various forms of treatment, and

⁸⁹ Id. at 3.

⁹⁰ Hayes Directory, “Hormone Therapy for the Treatment of Gender Dysphoria,” pp. 2, 4 (May 19, 2014).

⁹¹ Id. at 4.

⁹² Id. at 3.

⁹³ Mohammad Hassan Murad, Mohamed B. Elamin, Magaly Zumaeta Garcia, Rebecca J. Mullan, Ayman Murad, Patricia J. Erwin & Victor M. Montori, “Hormonal therapy and sex reassignment: a systematic review and meta-analysis of quality of life and psychosocial outcomes,” *Clinical Endocrinology*, Vol. 72, p. 214 (2010).

⁹⁴ Id. at 216.

⁹⁵ Id.

⁹⁶ Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, “Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden,” *PLoS One*, Vol. 6, pp. 1-8 (Feb. 2011).

most evidence comes from retrospective studies.”⁹⁷ Although noting that “[m]ultiple observational studies have suggested significant and sometimes dramatic reductions in suicidality, suicide attempts, and suicides among transgender patients after receiving transition-related treatment,” RAND made clear that “none of these studies were randomized controlled trials (the gold standard for determining treatment efficacy).”⁹⁸ “In the absence of quality randomized trial evidence,” RAND concluded, “it is difficult to fully assess the outcomes of treatment for [gender dysphoria].”⁹⁹

Given the scientific uncertainty surrounding the efficacy of transition-related treatments for gender dysphoria, it is imperative that the Department proceed cautiously in setting accession and retention standards for persons with a diagnosis or history of gender dysphoria.

B. Physical Health Standards

Not only is maintaining high standards of mental health critical to military effectiveness and lethality, maintaining high standards of physical health is as well. Although technology has done much to ease the physical demands of combat in some military specialties, war very much remains a physically demanding endeavor. Service members must therefore be physically prepared to endure the rigors and hardships of military service, including potentially combat. They must be able to carry heavy equipment sometimes over long distances; they must be able to handle heavy machinery; they must be able to traverse harsh terrain or survive in ocean waters; they must be able to withstand oppressive heat, bitter cold, rain, sleet, and snow; they must be able to endure in unsanitary conditions, coupled with lack of privacy for basic bodily functions, sometimes with little sleep and sustenance; they must be able to carry their wounded comrades to safety; and they must be able to defend themselves against those who wish to kill them.

Above all, whether they serve on the frontlines or in relative safety in non-combat positions, every Service member is important to mission accomplishment and must be available to perform their duties globally whenever called upon. The loss of personnel due to illness, disease, injury, or bad health diminishes military effectiveness and lethality. The Department’s physical health standards are therefore designed to minimize the odds that any given Service member will be unable to perform his or her duties in the future because of illness, disease, or injury. As noted earlier, those who seek to enter military service must be free of contagious diseases; free of medical conditions or physical defects that could require treatment, hospitalization, or eventual separation from service for medical unfitness; medically capable of satisfactorily completing required training; medically adaptable to the military environment; and medically capable of performing duties without aggravation of existing physical defects or medical conditions.¹⁰⁰ To access recruits with higher rates of anticipated unavailability for deployment thrusts a heavier burden on those who would deploy more often.

⁹⁷ RAND Study at 7.

⁹⁸ Id. at 10 (citing only to a California Department of Insurance report).

⁹⁹ Id.

¹⁰⁰ DoDI 6130.03 at 2.

Historically, absent a waiver, the Department has barred from accessing into the military anyone who had undergone chest or genital surgery (e.g., removal of the testicles or uterus) and anyone with a history of major abnormalities or defects of the chest or genitalia, including hermaphroditism and pseudohermaphroditism.¹⁰¹ Persons with conditions requiring medications, such as anti-depressants and hormone treatment, were also disqualified from service, unless a waiver was granted.¹⁰²

These standards have long applied uniformly to all persons, regardless of transgender status. The Carter policy, however, deviates from these uniform standards by exempting, under certain conditions, treatments associated with gender transition, such as sex reassignment surgery and cross-sex hormone therapy. For example, under the Carter policy, an applicant who has received genital reconstruction surgery may access without a waiver if a period of 18 months has elapsed since the date of the most recent surgery, no functional limitations or complications persist, and no additional surgery is required. In contrast, an applicant who received similar surgery following a traumatic injury is disqualified from military service without a waiver.¹⁰³ Similarly, under the Carter policy, an applicant who is presently receiving cross-sex hormone therapy post-gender transition may access without a waiver if the applicant has been stable on such hormones for 18 months. In contrast, an applicant taking synthetic hormones for the treatment of hypothyroidism is disqualified from military service without a waiver.¹⁰⁴

C. Sex-Based Standards

Women have made invaluable contributions to the defense of the Nation throughout our history. These contributions have only grown more significant as the number of women in the Armed Forces has increased and as their roles have expanded. Today, women account for 17.6% of the force,¹⁰⁵ and now every position, including combat arms positions, is open to them.

The vast majority of military standards make no distinctions between men and women. Where biological differences between males and females are relevant, however, military standards do differentiate between them. The Supreme Court has acknowledged the lawfulness of sex-based standards that flow from legitimate biological differences between the sexes.¹⁰⁶ These sex-based standards ensure fairness, equity, and safety; satisfy reasonable expectations of privacy; reflect common practice in society; and promote core military values of dignity and respect between men and women—all of which promote good order, discipline, steady leadership, unit cohesion, and ultimately military effectiveness and lethality.

¹⁰¹ *Id.* at 25-27.

¹⁰² *Id.* at 46-48.

¹⁰³ *Id.* at 26-27.

¹⁰⁴ *Id.* at 41.

¹⁰⁵ Defense Manpower Data Center, Active and Reserve Master Files (Dec. 2017).

¹⁰⁶ For example, in *United States v. Virginia*, the Court noted approvingly that “[a]dmitting women to [the Virginia Military Institute] would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs.” 518 U.S. 515, 550-51 n.19 (1996) (citing the statute that requires the same standards for women admitted to the service academies as for the men, “except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals”).

For example, anatomical differences between males and females, and the reasonable expectations of privacy that flow from those differences, at least partly account for the laws and regulations that require separate berthing, bathroom, and shower facilities and different drug testing procedures for males and females.¹⁰⁷ To maintain good order and discipline, Congress has even required by statute that the sleeping and latrine areas provided for “male” recruits be physically separated from the sleeping and latrine areas provided for “female” recruits during basic training and that access by drill sergeants and training personnel “after the end of the training day” be limited to persons of the “same sex as the recruits” to ensure “after-hours privacy for recruits during basic training.”¹⁰⁸

In addition, physiological differences between males and females account for the different physical fitness and body fat standards that apply to men and women.¹⁰⁹ This ensures equity and fairness. Likewise, those same physiological differences also account for the policies that regulate competition between men and women in military training and sports, such as boxing and combatives.¹¹⁰ This ensures protection from injury.

¹⁰⁷ See, e.g., Department of the Army, Training and Doctrine Command, TRADOC Regulation 350-6, “Enlisted Initial Entry Training Policies and Administration,” p. 56 (Mar. 20, 2017); Department of the Air Force, Air Force Instruction 32-6005, “Unaccompanied Housing Management,” p. 35 (Jan 29., 2016); Department of the Army, Human Resources Command, AR 600-85, “Substance Abuse Program” (Dec. 28, 2012) (“Observers must . . . [b]e the same gender as the Soldier being observed.”).

¹⁰⁸ See 10 U.S.C. § 4319 (Army), 10 U.S.C. § 6931 (Navy), and 10 U.S.C. § 9319 (Air Force) (requiring the sleeping and latrine areas provided for “male” recruits to be physically separated from the sleeping and latrine areas provided for “female” recruits during basic training); 10 U.S.C. § 4320 (Army), 10 U.S.C. § 6932 (Navy), and 10 U.S.C. § 9320 (Air Force) (requiring that access by drill sergeants and training personnel “after the end of the training day” be limited to persons of the “same sex as the recruits”).

¹⁰⁹ See, e.g., Department of the Army, Army Regulation 600-9, “The Army Body Composition Program,” pp. 21-31 (June 28, 2013); Department of the Navy, Office of the Chief of Naval Operations Instruction 6110.1J, “Physical Readiness Program,” p. 7 (July 11, 2011); Department of the Air Force, Air Force Instruction 36-2905, “Fitness Program,” pp. 86-95, 106-146 (Aug. 27, 2015); Department of the Navy, Marine Corps Order 6100.13, “Marine Corps Physical Fitness Program,” (Aug. 1, 2008); Department of the Navy, Marine Corps Order 6110.3A, “Marine Corps Body Composition and Military Appearance Program,” (Dec. 15, 2016); see also United States Military Academy, Office of the Commandant of Cadets, “Physical Program Whitebook AY 16-17,” p. 13 (specifying that, to graduate, cadets must meet the minimum performance standard of 3:30 for men and 5:29 for women on the Indoor Obstacle Course Test); Department of the Army, Training and Doctrine Command, TRADOC Regulation 350-6, “Enlisted Initial Entry Training Policies and Administration,” p. 56 (Mar. 20, 2017) (“Performance requirement differences, such as [Army Physical Fitness Test] scoring are based on physiological differences, and apply to the entire Army.”).

¹¹⁰ See, e.g., Headquarters, Department of the Army, TC 3-25.150, “Combatives,” p. A-15 (Feb. 2017) (“Due to the physiological difference between the sexes and in order to treat all Soldiers fairly and conduct gender-neutral competitions, female competitors will be given a 15 percent overage at weigh-in.”); id. (“In championships at battalion-level and above, competitors are divided into eight weight class brackets. . . . These classes take into account weight and gender.”); Major Alex Bedard, Major Robert Peterson & Ray Barone, “Punching Through Barriers: Female Cadets Integrated into Mandatory Boxing at West Point,” *Association of the United States Army* (Nov. 16, 2017), <https://www.ausea.org/articles/punching-through-barriers-female-cadets-boxing-west-point> (noting that “[i]n]atching men and women according to weight may not adequately account for gender differences regarding striking force” and that “[w]hile conducting free sparring, cadets must box someone of the same gender”); RAND Study at 57 (noting that, under British military policy, transgender persons “can be excluded from sports that organize around gender to ensure the safety of the individual or other participants”); see also International Olympic Committee Consensus Meeting on Sex Reassignment and Hyperandrogensim (Nov. 2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_

Uniform and grooming standards, to a certain extent, are also based on anatomical differences between males and females. Even those uniform and grooming standards that are not, strictly speaking, based on physical biology nevertheless flow from longstanding societal expectations regarding differences in attire and grooming for men and women.¹¹¹

Because these sex-based standards are based on legitimate biological differences between males and females, it follows that a person's physical biology should dictate which standards apply. Standards designed for biological males logically apply to biological males, not biological females, and vice versa. When relevant, military practice has long adhered to this straightforward and logical demarcation.

By contrast, the Carter policy deviates from this longstanding practice by making military sex-based standards contingent, not necessarily on the person's biological sex, but on the person's gender marker in DEERS, which can be changed to reflect the person's gender identity.¹¹² Thus, under the Carter policy, a biological male who identifies as a female (and changes his gender marker to reflect that gender) must be held to the standards and regulations for females, even though those standards and regulations are based on female physical biology, not female gender identity. The same goes for females who identify as males. Gender identity alone, however, is irrelevant to standards that are designed on the basis of biological differences.

Rather than apply only to those transgender individuals who have altered their external biological characteristics to fully match that of their preferred gender, under the Carter policy, persons need not undergo sex reassignment surgery, or even cross-sex hormone therapy, in order to be recognized as, and thus subject to the standards associated with, their preferred gender. A male who identifies as female could remain a biological male in every respect and still must be treated in all respects as a female, including with respect to physical fitness, facilities, and uniform and grooming. This scenario is not farfetched. According to the APA, not "all individuals with gender dysphoria desire a complete gender reassignment. . . . Some are satisfied with no medical or surgical treatment but prefer to dress as the felt gender in public."¹¹³ Currently, of the 424 approved Service member treatment plans, at least 36 do not include cross-

consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf; NCAA Office of Inclusion; NCAA Inclusion of Transgender Student-Athletes (Aug. 2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

¹¹¹ "The difference between men's and women's grooming policies recognizes the difference between the sexes; sideburns for men, different hairstyles and cosmetics for women. Establishing identical grooming and personal appearance standards for men and women would not be in the Navy's best interest and is not a factor in the assurance of equal opportunity." Department of the Navy, Navy Personnel Command, Navy Personnel Instruction 156651, "Uniform Regulations," Art. 2101.1 (July 7, 2017); see also Department of the Army, Army Regulation 670-1, "Wear and Appearance of Army Uniforms and Insignia," pp. 4-16 (Mar. 31, 2014); Department of the Air Force, Air Force Instruction 26-2903, "Dress and Personal Appearance of Air Force Personnel," pp. 17-27 (Feb. 9, 2017); Department of the Navy, Marine Corps Order P1020.34G, "Marine Corps Uniform Regulations," pp. 1-9 (Mar. 31, 2003).

¹¹² Department of Defense Instruction 1300.28, *In-service Transition for Service Members Identifying as Transgender*, pp. 3-4 (June 30, 2016).

¹¹³ American Psychiatric Association, "Expert Q & A: Gender Dysphoria," available at <https://www.psychiatry.org/patients-families/gender-dysphoria/expert-qa> (last visited Feb. 14, 2018).

sex hormone therapy or sex reassignment surgery.¹¹⁴ And it is questionable how many Service members will obtain any type of sex reassignment surgery. According to a survey of transgender persons, only 25% reported having had some form of transition-related surgery.¹¹⁵

The variability and fluidity of gender transition undermine the legitimate purposes that justify different biologically-based, male-female standards. For example, by allowing a biological male who retains male anatomy to use female berthing, bathroom, and shower facilities, it undermines the reasonable expectations of privacy and dignity of female Service members. By allowing a biological male to meet the female physical fitness and body fat standards and to compete against females in gender-specific physical training and athletic competition, it undermines fairness (or perceptions of fairness) because males competing as females will likely score higher on the female test than on the male test and possibly compromise safety. By allowing a biological male to adhere to female uniform and grooming standards, it creates unfairness for other males who would also like to be exempted from male uniform and grooming standards as a means of expressing their own sense of identity.

These problems could perhaps be alleviated if a person's preferred gender were recognized only after the person underwent a biological transition. The concept of gender transition is so nebulous, however, that drawing any line—except perhaps at a full sex reassignment surgery—would be arbitrary, not to mention at odds with current medical practice, which allows for a wide range of individualized treatment. In any event, rates for genital surgery are exceedingly low—2% of transgender men and 10% of transgender women.¹¹⁶ Only up to 25% of surveyed transgender persons report having had some form of transition-related surgery.¹¹⁷ The RAND study estimated that such rates “are typically only around 20 percent, with the exception of chest surgery among female-to-male transgender individuals.”¹¹⁸ Moreover, of the 424 approved Service member treatment plans available for study, 388 included cross-sex hormone treatment, but only 34 non-genital sex reassignment surgeries and one genital surgery have been completed thus far. Only 22 Service members have requested a waiver for a genital sex reassignment surgery.¹¹⁹

Low rates of full sex reassignment surgery and the otherwise wide variation of transition-related treatment, with all the challenges that entails for privacy, fairness, and safety, weigh in favor of maintaining a bright line based on biological sex—not gender identity or some variation thereof—in determining which sex-based standards apply to a given Service member. After all, a person's biological sex is generally ascertainable through objective means. Moreover, this approach will ensure that biologically-based standards will be applied uniformly to all Service members of the same biological sex. Standards that are clear, coherent, objective, consistent, predictable, and uniformly applied enhance good order, discipline, steady leadership, and unit cohesion, which in turn, ensure military effectiveness and lethality.

¹¹⁴ Data reported by the Departments of the Army, Navy, and Air Force (Oct. 2017).

¹¹⁵ *Id.*

¹¹⁶ Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anaf, *The Report of the 2015 U.S. Transgender Survey*, pp. 100-103 (National Center for Transgender Equality 2016) available at <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

¹¹⁷ *Id.* at 100.

¹¹⁸ RAND Study at 21.

¹¹⁹ Defense Health Agency, Supplemental Health Care Program Data (Feb. 2018).

New Transgender Policy

In light of the forgoing standards, all of which are necessary for military effectiveness and lethality, as well as the recommendations of the Panel of Experts, the Department, in consultation with the Department of Homeland Security, recommends the following policy:

A. Transgender Persons Without a History or Diagnosis of Gender Dysphoria. Who Are Otherwise Qualified for Service, May Serve, Like All Other Service Members, in Their Biological Sex.

Transgender persons who have not transitioned to another gender and do not have a history or current diagnosis of gender dysphoria—i.e., they identify as a gender other than their biological sex but do not currently experience distress or impairment of functioning in meeting the standards associated with their biological sex—are eligible for service, provided that they, like all other persons, satisfy all mental and physical health standards and are capable of adhering to the standards associated with their biological sex. This is consistent with the Carter policy, under which a transgender person's gender identity is recognized only if the person has a diagnosis or history of gender dysphoria.

Although the precise number is unknown, the Department recognizes that many transgender persons could be disqualified under this policy. And many transgender persons who would not be disqualified may nevertheless be unwilling to adhere to the standards associated with their biological sex. But many have served, and are serving, with great dedication under the standards for their biological sex. As noted earlier, 8,980 Service members reportedly identify as transgender, and yet there are currently only 937 active duty Service members who have been diagnosed with gender dysphoria since June 30, 2016.

B. Transgender Persons Who Require or Have Undergone Gender Transition Are Disqualified.

Except for those who are exempt under this policy, as described below in C.3, and except where waivers or exceptions to policy are otherwise authorized, persons who are diagnosed with gender dysphoria, either before or after entry into service, and require transition-related treatment, or have already transitioned to their preferred gender, should be disqualified from service. In the Department's military judgment, this is a necessary departure from the Carter policy for the following reasons:

1. *Undermines Readiness.* While transition-related treatments, including real life experience, cross-sex hormone therapy, and sex reassignment surgery, are widely accepted forms of treatment, there is considerable scientific uncertainty concerning whether these treatments fully remedy, even if they may reduce, the mental health problems associated with gender dysphoria. Despite whatever improvements in condition may result from these treatments, there is evidence that rates of psychiatric hospitalization and suicide behavior remain higher for persons with gender dysphoria, even after treatment, as compared to persons without gender dysphoria.¹²⁰ The persistence of these problems is a risk for readiness.

¹²⁰ See *supra* at pp. 24-26.

Another readiness risk is the time required for transition-related treatment and the impact on deployability. Although limited and incomplete because many transitioning Service members either began treatment before the Carter policy took effect or did not require sex reassignment surgery, currently available in-service data already show that, cumulatively, transitioning Service members in the Army and Air Force have averaged 167 and 159 days of limited duty, respectively, over a one-year period.¹²¹

Transition-related treatment that involves cross-sex hormone therapy or sex reassignment surgery could render Service members with gender dysphoria non-deployable for a significant period of time—perhaps even a year—if the theater of operations cannot support the treatment. For example, Endocrine Society guidelines for cross-sex hormone therapy recommend quarterly bloodwork and laboratory monitoring of hormone levels during the first year of treatment.¹²² Of the 424 approved Service member treatment plans available for study, almost all of them—91.5%—include the prescription of cross-sex hormones.¹²³ The period of potential non-deployability increases for those who undergo sex reassignment surgery. As described earlier, the recovery time for the various sex reassignment procedures is substantial. For non-genital surgeries (assuming no complications), the range of recovery is between two and eight weeks depending on the type of surgery, and for genital surgeries (again assuming no complications), the range is between three and six months before the individual is able to return to full duty.¹²⁴ When combined with 12 continuous months of hormone therapy, which is recommended prior to genital surgery,¹²⁵ the total time necessary for sex reassignment surgery could exceed a year. If the operational environment does not permit access to a lab for monitoring hormones (and there is certainly debate over how common this would be), then the Service member must be prepared to forego treatment, monitoring, or the deployment. Either outcome carries risks for readiness.

Given the limited data, however, it is difficult to predict with any precision the impact on readiness of allowing gender transition. Moreover, the input received by the Panel of Experts varied considerably. On one hand, some commanders with transgender Service members

¹²¹ Data reported by the Departments of the Army and Air Force (Oct. 2017).

¹²² Wylie C. Hembree, Peggy Cohen-Kettenis, Lous Gooren, Sabine Hannema, Walter Meyer, M. Hassan Murad, Stephen Rosenthal, Joshua Safer, Vin Tangpricha, & Guy T'Sjoen, "Endocrine Treatment of Gender-Dysphoric/Gender Incongruent Persons: An Endocrine Society Clinical Practice Guideline," *The Journal of Clinical Endocrinology & Metabolism*, Vol. 102, pp. 3869-3903 (Nov. 2017).

¹²³ Data reported by the Departments of the Army, Navy, and Air Force (Oct. 2017). Although the RAND study observed that British troops who are undergoing hormone therapy are generally able to deploy if the "hormone dose is steady and there are no major side effects," it nevertheless acknowledged that "deployment to all areas may not be possible, depending on the needs associated with any medication (e.g., refrigeration)." RAND Study at 59.

¹²⁴ For example, assuming no complications, the recovery time for a hysterectomy is up to eight weeks; a mastectomy is up to six weeks; a phalloplasty is up to three months; a metoidioplasty is up to 8 weeks; an orchiectomy is up to 6 weeks; and a vaginoplasty is up to three months. See University of California, San Francisco, Center of Excellence for Transgender Health, "Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People," available at <http://transhealth.ucsf.edu/trans?page=guidelines-home> (last visited Feb. 16, 2018); see also Discussion with Dr. Loren Schechter, Visiting Clinical Professor of Surgery, University of Illinois at Chicago (Nov. 9, 2017).

¹²⁵ RAND Study at 80; see also id. at 7; Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181, p. 1184 (Oct. 2016) (noting that Endocrine Society criteria "require that the patient has been on continuous cross-sex hormones and has had continuous [real life experience] or psychotherapy for the past 12 months").

reported that, from the time of diagnosis to the completion of a transition plan, the transitioning Service members would be non-deployable for two to two-and-a-half years.¹²⁶ On the other band, some commanders, as well as transgender Service members themselves, reported that transition-related treatment is not a burden on unit readiness and could be managed to avoid interfering with deployments, with one commander even reporting that a transgender Service member with gender dysphoria under his command elected to postpone surgery in order to deploy.¹²⁷ This conclusion was echoed by some experts in endocrinology who found no harm in stopping or adjusting hormone therapy treatment to accommodate deployment during the first year of hormone use.¹²⁸ Of course, postponing treatment, especially during a combat deployment, has risks of its own insofar as the treatment is necessary to mitigate the clinically significant distress and impairment of functioning caused by gender dysphoria. After all, “when Service members deploy and then do not meet medical deployment fitness standards, there is risk for inadequate treatment within the operational theater, personal risk due to potential inability to perform combat required skills, and the potential to be sent home from the deployment and render the deployed unit with less manpower.”¹²⁹ In short, the periods of transition-related non-availability and the risks of deploying untreated Service members with gender dysphoria are uncertain, and that alone merits caution.

Moreover, most mental health conditions, as well as the medication used to treat them, limit Service members’ ability to deploy. Any DSM-5 psychiatric disorder with residual symptoms, or medication side effects, which impair social or occupational performance, require a waiver for the Service member to deploy.¹³⁰ The same is true for mental health conditions that pose a substantial risk for deterioration or recurrence in the deployed environment.¹³¹ In managing mental health conditions while deployed, providers must consider the risk of exacerbation if the individual were exposed to trauma or severe operational stress. These determinations are difficult to make in the absence of evidence on the impact of deployment on individuals with gender dysphoria.¹³²

The RAND study acknowledges that the inclusion of individuals with gender dysphoria in the force will have a negative impact on readiness. According to RAND, foreign militaries that allow service by personnel with gender dysphoria have found that it is sometimes necessary to restrict the deployment of transitioning individuals, including those receiving hormone therapy and surgery, to austere environments where their healthcare needs cannot be met.¹³³ Nevertheless, RAND concluded that the impact on readiness would be minimal—e.g., 0.0015% of available deployable labor-years across the active and reserve components—because of the

¹²⁶ Minutes, Transgender Review Panel (Oct. 13, 2017).

¹²⁷ *Id.*

¹²⁸ Minutes, Transgender Review Panel (Nov. 9, 2017).

¹²⁹ Institute for Defense Analyses, “Force Impact of Expanding the Recruitment of Individuals with Auditory Impairment,” pp. 60-61 (Apr. 2016).

¹³⁰ Modification Thirteen to U.S. Central Command Individual Protection and Individual, Unit Deployment Policy, Tab A, p. 8 (Mar. 2017).

¹³¹ *Id.*

¹³² See generally Memorandum from the Assistant Secretary of Defense for Health Affairs, “Clinical Practice Guidance for Deployment-Limiting Mental Disorders and Psychotropic Medications,” pp. 2-4 (Oct. 7, 2013).

¹³³ RAND Study at 40.

exceedingly small number of transgender Service members who would seek transition-related treatment.¹³⁴ Even then, RAND admitted that the information it cited “must be interpreted with caution” because “much of the current research on transgender prevalence and medical treatment rates relies on self-reported, nonrepresentative samples.”¹³⁵ Nevertheless, by RAND’s standard, the readiness impact of many medical conditions that the Department has determined to be disqualifying—from bipolar disorder to schizophrenia—would be minimal because they, too, exist only in relatively small numbers.¹³⁶ And yet that is no reason to allow persons with those conditions to serve.

The issue is not whether the military can absorb periods of non-deployability in a small population; rather, it is whether an individual with a particular condition can meet the standards for military duty and, if not, whether the condition can be remedied through treatment that renders the person non-deployable for as little time as possible. As the Department has noted before: “[W]here the operational requirements are growing faster than available resources,” it is imperative that the force “be manned with Service members capable of meeting all mission demands. The Services require that every Service member contribute to full mission readiness, regardless of occupation. In other words, the Services require all Service members to be able to engage in core military tasks, including the ability to deploy rapidly, without impediment or encumbrance.”¹³⁷ Moreover, the Department must be mindful that “an increase in the number of non-deployable military personnel places undue risk and personal burden on Service members qualified and eligible to deploy, and negatively impacts mission readiness.”¹³⁸ Further, the Department must be attuned to the impact that high numbers of non-deployable military personnel places on families whose Service members deploy more often to backfill or compensate for non-deployable persons.

In sum, the available information indicates that there is inconclusive scientific evidence that the serious problems associated with gender dysphoria can be fully remedied through transition-related treatment and that, even if it could, most persons requiring transition-related treatment could be non-deployable for a potentially significant amount of time. By this metric, Service members with gender dysphoria who need transition-related care present a significant challenge for unit readiness.

2. *Incompatible with Sex-Based Standards.* As discussed in detail earlier, military personnel policy and practice has long maintained a clear line between men and women where their biological differences are relevant with respect to physical fitness and body fat standards; berthing, bathroom, and shower facilities; and uniform and grooming standards. This line promotes good order and discipline, steady leadership, unit cohesion, and ultimately military

¹³⁴ Id. at 42.

¹³⁵ Id. at 39.

¹³⁶ According to the National Institute of Mental Health, 2.8% of U.S. adults experienced bipolar disorder in the past year, and 4.4% have experienced the condition at some time in their lives. National Institute of Mental Health, “Bipolar Disorder” (Nov. 2017) <https://www.nimh.nih.gov/health/statistics/bipolar-disorder.shtml>. The prevalence of schizophrenia is less than 1%. National Institute of Mental Health, “Schizophrenia” (Nov. 2017) <https://www.nimh.nih.gov/health/statistics/schizophrenia.shtml>.

¹³⁷ Under Secretary of Defense for Personnel and Readiness, “Fiscal Year 2016 Report to Congress on the Review of Enlistment of Individuals with Disabilities in the Armed Forces,” p. 9 (Apr. 2016).

¹³⁸ Id. at 10.

effectiveness and lethality because it ensures fairness, equity, and safety; satisfies reasonable expectations of privacy; reflects common practice in the society from which we recruit; and promotes core military values of dignity and respect between men and women. To exempt Service members from the uniform, biologically-based standards applicable to their biological sex on account of their gender identity would be incompatible with this line and undermine the objectives such standards are designed to serve.

First, a policy that permits a change of gender without requiring any biological changes risks creating unfairness, or perceptions thereof, that could adversely affect unit cohesion and good order and discipline. It could be perceived as discriminatory to apply different biologically-based standards to persons of the same biological sex based on gender identity, which is irrelevant to standards grounded in physical biology. For example, it unfairly discriminates against biological males who identify as male and are held to male standards to allow biological males who identify as female to be held to female standards, especially where the transgender female retains many of the biological characteristics and capabilities of a male. It is important to note here that the Carter policy does not require a transgender person to undergo any biological transition in order to be treated in all respects in accordance with the person's preferred gender. Therefore, a biological male who identifies as female could remain a biological male in every respect and still be governed by female standards. Not only would this result in perceived unfairness by biological males who identify as male, it would also result in perceived unfairness by biological females who identify as female. Biological females who may be required to compete against such transgender females in training and athletic competition would potentially be disadvantaged.¹³⁹ Even more importantly, in physically violent training and competition, such as boxing and combatives, pitting biological females against biological males who identify as female, and vice versa, could present a serious safety risk as well.¹⁴⁰

This concern may seem trivial to those unfamiliar with military culture. But vigorous competition, especially physical competition, is central to the military life and is indispensable to the training and preparation of warriors. Nothing encapsulates this more poignantly than the words of General Douglas MacArthur when he was superintendent of the U.S. Military Academy and which are now engraved above the gymnasium at West Point: "Upon the fields of friendly

¹³⁹ See *supra* note 109. Both the International Olympic Committee (IOC) and the National Collegiate Athletic Association (NCAA) have attempted to mitigate this problem in their policies regarding transgender athletes. For example, the IOC requires athletes who transition from male to female to demonstrate certain suppressed levels of testosterone to minimize any advantage in women's competition. Similarly, the NCAA prohibits an athlete who has transitioned from male to female from competing on a women's team without changing the team status to a mixed gender team. While similar policies could be employed by the Department, it is unrealistic to expect the Department to subject transgender Service members to routine hormone testing prior to biannual fitness testing, athletic competition, or training simply to mitigate real and perceived unfairness or potential safety concerns. See, e.g., International Olympic Committee Consensus Meeting on Sex Reassignment and Hyperandrogenism (Nov. 2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf; NCAA Office of Inclusion, NCAA Inclusion of Transgender Student-Athletes (Aug. 2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

¹⁴⁰ See *supra* note 109.

strife are sown the seeds that, upon other fields, on other days will bear the fruits of victory.”¹⁴¹ Especially in combat units and in training, including the Service academies, ROTC, and other commissioning sources, Service members are graded and judged in significant measure based upon their physical aptitude, which is only fitting given that combat remains a physical endeavor.

Second, a policy that accommodates gender transition without requiring full sex reassignment surgery could also erode reasonable expectations of privacy that are important in maintaining unit cohesion, as well as good order and discipline. Given the unique nature of military service, Service members of the same biological sex are often required to live in extremely close proximity to one another when sleeping, undressing, showering, and using the bathroom. Because of reasonable expectations of privacy, the military has long maintained separate berthing, bathroom, and shower facilities for men and women while in garrison. In the context of recruit training, this separation is even mandated by Congress.¹⁴²

Allowing transgender persons who have not undergone a full sex reassignment, and thus retain at least some of the anatomy of their biological sex, to use the facilities of their identified gender would invade the expectations of privacy that the strict male-female demarcation in berthing, bathroom, and shower facilities is meant to serve. At the same time, requiring transgender persons who have developed, even if only partially, the anatomy of their identified gender to use the facilities of their biological sex could invade the privacy of the transgender person. Without separate facilities for transgender persons or other mitigating accommodations, which may be unpalatable to transgender individuals and logistically impracticable for the Department, the privacy interests of biological males and females and transgender persons could be anticipated to result in irreconcilable situations. Lieutenants, Sergeants, and Petty Officers charged with carrying out their units’ assigned combat missions should not be burdened by a change in eligibility requirements disconnected from military life under austere conditions.

The best illustration of this irreconcilability is the report of one commander who was confronted with dueling equal opportunity complaints—one from a transgender female (i.e., a biological male with male genitalia who identified as female) and the other from biological females. The transgender female Service member was granted an exception to policy that allowed the Service member to live as a female, which included giving the Service member access to female shower facilities. This led to an equal opportunity complaint from biological females in the unit who believed that granting a biological male, even one who identified as a female, access to their showers violated their privacy. The transgender Service member responded with an equal opportunity complaint claiming that the command was not sufficiently supportive of the rights of transgender persons.¹⁴³

The collision of interests discussed above are a direct threat to unit cohesion and will inevitably result in greater leadership challenges without clear solutions. Leaders at all levels

¹⁴¹ Douglas MacArthur, *Respectfully Quoted: A Dictionary of Quotations* (1989), available at <http://www.bartleby.com/73/1874.html>.

¹⁴² See *supra* note 108.

¹⁴³ Minutes, Transgender Review Panel (Oct. 13, 2017). Limited data exists regarding the performance of transgender Service members due to policy restrictions in Department of Defense 1300.28, *In-Service Transition for Transgender Service Members* (Oct. 1, 2016), that prevent the Department from tracking individuals who may identify as transgender as a potentially unwarranted invasion of personal privacy.

already face immense challenges in building cohesive military units. Blurring the line that differentiates the standards and policies applicable to men and women will only exacerbate those challenges and divert valuable time and energy from military tasks.

The unique leadership challenges arising from gender transition are evident in the Department's handbook implementing the Carter policy. The handbook provides guidance on various scenarios that commanders may face. One such scenario concerns the use of shower facilities: "A transgender Service member has expressed privacy concerns regarding the open bay shower configuration. Similarly, several other non-transgender Service members have expressed discomfort when showering in these facilities with individuals who have different genitalia." As possible solutions, the handbook offers that the commander could modify the shower facility to provide privacy or, if that is not feasible, adjust the timing of showers. Another scenario involves proper attire during a swim test: "It is the semi-annual swim test and a female to male transgender Service member who has fully transitioned, but did not undergo surgical change, would like to wear a male swimsuit for the test with no shirt or other top coverage." The extent of the handbook's guidance is to advise commanders that "[i]t is within [their] discretion to take measures ensuring good order and discipline," that they should "counsel the individual and address the unit, if additional options (e.g., requiring all personnel to wear shirts) are being considered," and that they should consult the Service Central Coordination Cell, a help line for commanders in need of advice.

These vignettes illustrate the significant effort required of commanders to solve challenging problems posed by the implementation of the current transgender service policies. The potential for discord in the unit during the routine execution of daily activities is substantial and highlights the fundamental incompatibility of the Department's legitimate military interest in uniformity, the privacy interests of all Service members, and the interest of transgender individuals in an appropriate accommodation. Faced with these conflicting interests, commanders are often forced to devote time and resources to resolve issues not present outside of military service. A failure to act quickly can degrade an otherwise highly functioning team, as will failing to seek appropriate counsel and implementing a faulty solution. The appearance of unsteady or seemingly unresponsive leadership to Service member concerns erodes the trust that is essential to unit cohesion and good order and discipline.

The RAND study does not meaningfully address how accommodations for gender transition would impact perceptions of fairness and equity, expectations of privacy, and safety during training and athletic competition and how these factors in turn affect unit cohesion. Instead, the RAND study largely dismisses concerns about the impact on unit cohesion by pointing to the experience of four countries that allow transgender service—Australia, Canada, Israel, and the United Kingdom.¹⁴⁴ Although the vast majority of armed forces around the world do not permit or have policies on transgender service, RAND noted that 18 militaries do, but only four have well-developed and publicly available policies.¹⁴⁵ RAND concluded that "the available research revealed no significant effect on cohesion, operational effectiveness, or

¹⁴⁴ RAND Study at 45.

¹⁴⁵ *Id.* at 50.

readiness.”¹⁴⁶ It reached this conclusion, however, despite noting reports of resistance in the ranks, which is a strong indication of an adverse effect on unit cohesion.¹⁴⁷ Nevertheless, RAND acknowledged that the available data was “limited” and that the small number of transgender personnel may account for “the limited effect on operational readiness and cohesion.”¹⁴⁸

Perhaps more importantly, however, the RAND study mischaracterizes or overstates the reports upon which it rests its conclusions. For example, the RAND study cites *Gays in Foreign Militaries 2010: A Global Primer* by Nathaniel Frank as support for the conclusions that there is no evidence that transgender service has had an adverse effect on cohesion, operational effectiveness, or readiness in the militaries of Australia and the United Kingdom and that diversity has actually led to increases in readiness and performance.¹⁴⁹ But that particular study has nothing to do with examining the service of transgender persons; rather, it is about the integration of homosexual persons into the military.¹⁵⁰

With respect to transgender service in the Israeli military, the RAND study points to an unpublished paper by Anne Speckhard and Reuven Paz entitled *Transgender Service in the Israeli Defense Forces: A Polar Opposite Stance to the U.S. Military Policy of Barring Transgender Soldiers from Service*. The RAND study cites this paper for the proposition that “there has been no reported effect on cohesion or readiness” in the Israeli military and “there is no evidence of any impact on operational effectiveness.”¹⁵¹ These sweeping and categorical claims, however, are based only on “six in-depth interviews of experts on the subject both inside and outside the [Israeli Defense Forces (IDF)]: two in the IDF leadership—including the spokesman’s office; two transgender individuals who served in the IDF, and two professionals who serve transgender clientele—before, during and after their IDF service.”¹⁵² As the RAND report observed, however: “There do appear to be some limitations on the assignment of transgender personnel, particularly in combat units. Because of the austere living conditions in these types of units, necessary accommodations may not be available for Service members in the midst of a gender transition. As a result, transitioning individuals are typically not assigned to combat units.”¹⁵³ In addition, as the RAND study notes, under the Israeli policy at the time, “assignment of housing, restrooms, and showers is typically linked to the birth gender, which does not change in the military system until after gender reassignment surgery.”¹⁵⁴ Therefore, insofar as a Service member’s change of gender is not recognized until after sex reassignment

¹⁴⁶ Id. at 45.

¹⁴⁷ Id.

¹⁴⁸ Id.

¹⁴⁹ Id.

¹⁵⁰ Nathaniel Frank, “Gays in Foreign Militaries 2010: A Global Primer,” p. 6 *The Palm Center* (Feb. 2010), <https://www.palmcenter.org/wpcontent/uploads/2017/12/FOREIGNMILITARIESPRIMER2010FINAL.pdf> (“This study seeks to answer some of the questions that have been, and will continue to be, raised surrounding the instructive lessons from other nations that have lifted their bans on openly gay service.”).

¹⁵¹ Rand Study at 45.

¹⁵² Anne Speckhard & Reuven Paz, “Transgender Service in the Israeli Defense Forces: A Polar Opposite Stance to the U.S. Military Policy of Barring Transgender Soldiers from Service,” p. 3 (2014), <http://www.researchgate.net/publication/280093066>.

¹⁵³ RAND Study at 56.

¹⁵⁴ Id. at 55.

surgery, the Israeli policy—and whatever claims about its impact on cohesion, readiness, and operational effectiveness—are distinguishable from the Carter policy.

Finally, the RAND study cites to a journal article on the Canadian military experience entitled *Gender Identity in the Canadian Forces: A Review of Possible Impacts on Operational Effectiveness* by Alan Okros and Denise Scott. According to RAND, the authors of this article “found no evidence of any effect on unit or overall cohesion.”¹⁵⁵ But the article not only fails to support the RAND study’s conclusions (not to mention the article’s own conclusions), but it confirms the concerns that animate the Department’s recommendations. The article acknowledges, for example, the difficulty commanders face in managing the competing interests at play:

Commanders told us that the new policy fails to provide sufficient guidance as to how to weigh priorities among competing objectives during their subordinates’ transition processes. Although they endorsed the need to consult transitioning Service members, they recognized that as commanding officers, they would be called on to balance competing requirements. They saw the primary challenge to involve meeting trans individual’s expectations for reasonable accommodation and individual privacy while avoiding creating conditions that place extra burdens on others or undermined the overall team effectiveness. To do so, they said that they require additional guidance on a range of issues including clothing, communal showers, and shipboard bunking and messing arrangements.¹⁵⁶

Notwithstanding its optimistic conclusions, the article also documents serious problems with unit cohesion. The authors observe, for instance, that the chain of command “has not fully earned the trust of the transgender personnel,” and that even though some transgender Service members do trust the chain of command, others “expressed little confidence in the system,” including one who said, “I just don’t think it works that well.”¹⁵⁷

In sum, although the foregoing considerations are not susceptible to quantification, undermining the clear sex-differentiated lines with respect to physical fitness; berthing, bathroom, and shower facilities; and uniform and grooming standards, which have served all branches of Service well to date, risks unnecessarily adding to the challenges faced by leaders at all levels, potentially fraying unit cohesion, and threatening good order and discipline. The Department acknowledges that there are serious differences of opinion on this subject, even among military professionals, including among some who provided input to the Panel of Experts,¹⁵⁸ but given the vital interests at stake—the survivability of Service members, including

¹⁵⁵ Id. at 45.

¹⁵⁶ Alan Okros & Denise Scott, “Gender Identity in the Canadian Forces,” *Armed Forces and Society* Vol. 41, p. 8 (2014).

¹⁵⁷ Id. at 9.

¹⁵⁸ While differences of opinion do exist, it bears noting that, according to a Military Times/Syracuse University’s Institute for Veterans and Military Families poll, 41% of active duty Service members polled thought that allowing gender transition would hurt their unit’s readiness, and only 12% thought it would be beneficial. Overall, 57% had a negative opinion of the Carter policy. Leo Shane III, “Poll: Active-duty troops worry about military’s transgender

transgender persons, in combat and the military effectiveness and lethality of our forces—it is prudent to proceed with caution, especially in light of the inconclusive scientific evidence that transition-related treatment restores persons with gender dysphoria to full mental health.

3. *Imposes Disproportionate Costs.* Transition-related treatment is also proving to be disproportionately costly on a per capita basis, especially in light of the absence of solid scientific support for the efficacy of such treatment. Since implementation of the Carter policy, the medical costs for Service members with gender dysphoria have increased nearly three times—or 300%—compared to Service members without gender dysphoria.¹⁵⁹ And this increase is despite the low number of costly sex reassignment surgeries that have been performed so far.¹⁶⁰ As noted earlier, only 34 non-genital sex reassignment surgeries and one genital surgery have been completed,¹⁶¹ with an additional 22 Service members requesting a waiver for genital surgery.¹⁶² We can expect the cost disparity to grow as more Service members diagnosed with gender dysphoria avail themselves of surgical treatment. As many as 77% of the 424 Service member treatment plans available for review include requests for transition-related surgery, although it remains to be seen how many will ultimately obtain surgeries.¹⁶³ In addition, several commanders reported to the Panel of Experts that transition-related treatment for Service members with gender dysphoria in their units had a negative budgetary impact because they had to use operations and maintenance funds to pay for the Service members' extensive travel throughout the United States to obtain specialized medical care.¹⁶⁴

Taken together, the foregoing concerns demonstrate why recognizing and making accommodations for gender transition are not conducive to, and would likely undermine, the inputs—readiness, good order and discipline, sound leadership, and unit cohesion—that are essential to military effectiveness and lethality. Therefore, it is the Department's professional military judgment that persons who have been diagnosed with, or have a history of, gender dysphoria and require, or have already undergone, a gender transition generally should not be eligible for accession or retention in the Armed Forces absent a waiver.

C. Transgender Persons With a History or Diagnosis of Gender Dysphoria Are Disqualified, Except Under Certain Limited Circumstances.

policies," *Military Times* (July 27, 2017) available at <https://www.militarytimes.com/news/pentagon-congress/2017/07/27/poll-active-duty-troops-worry-about-militarys-transgender-policies/>.

¹⁵⁹ Minutes, Transgender Review Panel (Nov. 21, 2017).

¹⁶⁰ Minutes, Transgender Review Panel (Nov. 2, 2017).

¹⁶¹ Data retrieved from Military Health System Data Repository (Nov. 2017).

¹⁶² Defense Health Agency Data (as of Feb. 2018).

¹⁶³ Data reported by the Departments of the Army, Navy, and Air Force (Oct. 2017).

¹⁶⁴ Minutes, Transgender Review Panel (Oct. 13, 2017); see also Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181, p. 1185 (Oct. 2016) ("As previously discussed, a new diagnosis of gender dysphoria and the decision to proceed with gender transition requires frequent evaluations by the [mental health professional] and endocrinologist. However, most [military treatment facilities] lack one or both of these specialty services. Members who are not in proximity to [military treatment facilities] may have significant commutes to reach their required specialty care. Members stationed in more remote locations face even greater challenges of gaining access to military or civilian specialists within a reasonable distance from their duty stations.").

As explained earlier in greater detail, persons with gender dysphoria experience significant distress and impairment in social, occupational, or other important areas of functioning. Gender dysphoria is also accompanied by extremely high rates of suicidal ideation and other comorbidities. Therefore, to ensure unit safety and mission readiness, which is essential to military effectiveness and lethality, persons who are diagnosed with, or have a history of, gender dysphoria are generally disqualified from accession or retention in the Armed Forces. The standards recommended here are subject to the same procedures for waiver as any other standards. This is consistent with the Department's handling of other mental conditions that require treatment. As a general matter, only in the limited circumstances described below should persons with a history or diagnosis of gender dysphoria be accessed or retained.

1. *Accession of Individuals Diagnosed with Gender Dysphoria.* Given the documented fluctuations in gender identity among children, a history of gender dysphoria should not alone disqualify an applicant seeking to access into the Armed Forces. According to the DSM-5, the persistence of gender dysphoria in biological male children "has ranged from 2.2% to 30%," and the persistence of gender dysphoria in biological female children "has ranged from 12% to 50%."¹⁶⁵ Accordingly, persons with a history of gender dysphoria may access into the Armed Forces, provided that they can demonstrate 36 consecutive months of stability—i.e., absence of gender dysphoria—immediately preceding their application; they have not transitioned to the opposite gender; and they are willing and able to adhere to all standards associated with their biological sex. The 36-month stability period is the same standard the Department currently applies to persons with a history of depressive disorder. The Carter policy's 18-month stability period for gender dysphoria, by contrast, has no analog with respect to any other mental condition listed in DoDI 6130.03.

2. *Retention of Service Members Diagnosed with Gender Dysphoria.* Retention standards are typically less stringent than accession standards due to training provided and on-the-job performance data. While accession standards endeavor to predict whether a given applicant will require treatment, hospitalization, or eventual separation from service for medical unfitness, and thus tend to be more cautious, retention standards focus squarely on whether the Service member, despite his or her condition, can continue to do the job. This reflects the Department's desire to retain, as far as possible, the Service members in which it has made substantial investments and to avoid the cost of finding and training a replacement. To use an example outside of the mental health context, high blood pressure does not meet accession standards, even if it can be managed with medication, but it can meet retention standards so long as it can be managed with medication. Regardless, however, once they have completed treatment, Service members must continue to meet the standards that apply to them in order to be retained. Therefore, Service members who are diagnosed with gender dysphoria after entering military service may be retained without waiver, provided that they are willing and able to adhere to all standards associated with their biological sex, the Service member does not require gender transition, and the Service member is not otherwise non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months).¹⁶⁶

¹⁶⁵ DSM-5 at 455.

¹⁶⁶ Under Secretary of Defense for Personnel and Readiness, "DoD Retention Policy for Non-Deployable Service Members" (Feb. 14, 2018).

3. *Exempting Current Service Members Who Have Already Received a Diagnosis of Gender Dysphoria.* The Department is mindful of the transgender 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. The reasonable expectation of these Service members that the Department would honor their service on the terms that then existed cannot be dismissed. Therefore, 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, 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. This includes transgender Service members who entered into military service after January 1, 2018, when the Carter accession policy took effect by court order. The Service member must, however, adhere to the procedures set forth in DoDI 1300.28, and may not be deemed to be non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months). While the Department believes that its commitment to these Service members, including the substantial investment it has made in them, outweigh the risks identified in this report, should its decision to exempt these Service members be used by a court as a basis for invalidating the entire policy, this exemption instead is and should be deemed severable from the rest of the policy.

Conclusion

In making these recommendations, the Department is well aware that military leadership from the prior administration, along with RAND, reached a different judgment on these issues. But as the forgoing analysis demonstrates, the realities associated with service by transgender individuals are more complicated than the prior administration or RAND had assumed. In fact, the RAND study itself repeatedly emphasized the lack of quality data on these issues and qualified its conclusions accordingly. In addition, that study concluded that allowing gender transition would impede readiness, limit deployability, and burden the military with additional costs. In its view, however, such harms were negligible in light of the small size of the transgender population. But especially in light of the various sources of uncertainty in this area, and informed by the data collected since the Carter policy took effect, the Department is not convinced that these risks could be responsibly dismissed or that even negligible harms should be incurred given the Department's grave responsibility to fight and win the Nation's wars in a manner that maximizes the effectiveness, lethality, and survivability of our most precious assets—our Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen.

Accordingly, the Department weighed the risks associated with maintaining the Carter policy against the costs of adopting a new policy that was less risk-favoring in developing these recommendations. It is the Department's view that the various balances struck by the recommendations above provide the best solution currently available, especially in light of the significant uncertainty in this area. Although military leadership from the prior administration reached a different conclusion, the Department's professional military judgment is that the risks associated with maintaining the Carter policy—risks that are continuing to be better understood as new data become available—counsel in favor of the recommended approach.

Exhibit C



AMERICAN PSYCHOLOGICAL ASSOCIATION

March 26, 2018

APA Statement Regarding Transgender Individuals Serving in Military

WASHINGTON — Following is a statement by Arthur C. Evans Jr., PhD, regarding President Trump's placing new limits on transgender individuals serving in the military:

"The American Psychological Association 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."

"Substantial psychological research shows that gender dysphoria is a treatable condition, and does not, by itself, limit the ability of individuals to function well and excel in their work, including in military service. The science is clear that individuals who are adequately treated for gender dysphoria should not be considered mentally unstable. Additionally, the incidence of gender dysphoria is extremely low."

"No scientific evidence has shown that allowing transgender people to serve in the armed forces has an adverse impact on readiness or unit cohesion. What research does show is that discrimination and stigma undermine morale and readiness by creating a significant source of stress for sexual minorities that can harm their health and well-being."

APA's governing Council of Representatives adopted a resolution (<http://www.apa.org/about/policy/chapter-12b.aspx#transgender>) in 2008 supporting full equality for transgender and gender-variant people and calling for legal and social recognition of transgender individuals.

The American Psychological Association, in Washington, D.C., is the largest scientific and professional organization representing psychology in the United States. APA's membership includes nearly 115,700 researchers, educators, clinicians, consultants and students. Through its divisions in 54 subfields of psychology and affiliations with 60 state, territorial and Canadian provincial associations, APA works to advance the creation, communication and application of psychological knowledge to benefit society and improve people's lives.

Find this article at:

<https://www.apa.org/news/press/releases/2018/03/transgender-military.aspx>

Exhibit D



JAMES L. MADARA, MD
EXECUTIVE VICE PRESIDENT, CEO

ama-assn.org
t (312) 464-5000

April 3, 2018

The Honorable James N. Mattis
Secretary
Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Secretary Mattis:

On behalf of the physician and medical student members of the American Medical Association (AMA), I am writing to express our concern about the new policy recently approved by President Trump imposing limits on transgender individuals serving in the military. This new policy, based on recommendations you made in February to President Trump, states that “transgender persons with a history or diagnosis of gender dysphoria—individuals who the policies state may require substantial medical treatment, including medications and surgery—are disqualified from military service except under certain limited circumstances” (Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security Regarding Military Service by Transgender Individuals, May 23, 2018).

We believe there is no medically valid reason—including a diagnosis of gender dysphoria—to exclude transgender individuals from military service. Transgender individuals have served, and continue to serve, our country with honor, and we believe they should be allowed to continue doing so. We share [the concerns recently expressed by former Surgeons General M. Joycelyn Elders and David Satcher](#) 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. This research, demonstrating that medical care for gender dysphoria is effective, was the rationale for the AMA’s adoption of policy by our House of Delegates in 2015, that there is no medically valid reason to exclude transgender individuals from military service.

The AMA also supports public and private health insurance coverage for treatment of gender dysphoria as recommended by the patient’s physician. We support the finding of the RAND study conducted for the Department of Defense on the impact of transgender individuals in the military that the financial cost is negligible and a rounding error in the defense budget. It should not be used as a reason to deny patriotic Americans an opportunity to serve their country. We should be honoring their service.

Sincerely,

A handwritten signature in black ink, appearing to read "James L. Madara". The signature is fluid and cursive, with a large initial "J" and "M".

James L. Madara, MD

Exhibit 4

Pence secretly drafted Trump's latest transgender military ban

Junk science informed the new order, not military readiness.

ZACK FORD 

MAR 25, 2018, 12:51 PM



CREDIT: MARK WILSON/GETTY IMAGES

When President Trump announced a new ban on transgender people serving in the military late Friday, it was somewhat of a surprise — Defense Secretary Jim Mattis had reportedly recommended in February that Trump allow transgender people to serve. It turns out that Vice President Pence and some of the country's most prominent anti-LGBTQ activists had a role in reversing the outcome, which explains why the report explaining the decision is rife with anti-trans junk science.

Slate's Mark Joseph Stern reported Friday night that, according to multiple sources, Pence played "a leading role" in creating the report, along with Ryan T.

Anderson of the Heritage Foundation, which has been dubbed "Trump's favorite think tank," and Tony Perkins of the Family Research Council (FRC), an anti-LGBTQ hate group. Both Heritage and FRC praised the report Friday. According to Stern's reporting, it was true that Mattis favored allowing transgender military service, but Pence "effectively overruled" him.

Advertisement

A separate source independently confirmed to ThinkProgress Saturday that Pence was involved, characterizing him as forming his own ad hoc "working group," including Anderson and Perkins, separate from the panel of experts Mattis had assembled. Though it bears Mattis' signature, the report released Friday appears to reflect the findings of Pence's working group and not the committee report that Mattis submitted to Trump last month. Mattis' original document was not currently publicly available at the time of the recommendation, but it was widely reported that Mattis favored an inclusive approach that resembled what had originally been proposed by Defense Secretary Ash Carter under President Obama in 2016. His February recommendation, also released Friday, jibes with the new report, contradicting reports at the time.

How exactly Pence overruled Mattis' recommendation over the past month the source did not know. But his working group's influence is apparent. In particular, the report features numerous anti-trans talking points that FRC and other anti-LGBTQ groups have used in various campaigns favoring discrimination against transgender people. It also attempts to distort the research on transgender health in ways that directly parallel Anderson's recently released book, *When Harry Became Sally: Responding to the Transgender Moment*. Anderson likewise argued

in his book against supporting trans people in their gender transitions, and the recommendations in the report rely on a strikingly similar framing.

Asked directly on Saturday whether he was involved in the report, Anderson cheekily responded in a series of tweets that “there’s no evidence” he was involved in crafting the report, but he repeatedly refused to directly deny his participation.

“Privacy” concerns and “unit cohesion”

One of the most obvious biases in the new report is an emphasis on concerns about how transgender people in the military might somehow infringe on the privacy of other soldiers — particularly women. These are the same arguments Perkins, Anderson, and others have made in justifying overturning LGBTQ protections in Houston or defending North Carolina’s HB2, a law that mandated discrimination against transgender people.

Advertisement

According to the report, transgender people would violate other troops’ privacy simply by sharing a space with them — to the detriment of unit cohesion:

Allowing transgender persons who have not undergone a full sex reassignment [sic], and thus retain at least some of the anatomy of their biological sex, to use the facilities of their identified gender would invade the expectations of privacy that the strict male-female demarcation in berthing, bathroom, and shower facilities is meant to serve.

As examples of these burdens, it notes suggestions from the Carter policy about modifying shower facilities to provide more privacy or adjusting the timing of showers to accommodate service members who express "discomfort" sharing a facility with a transgender person. While these accommodations sound simple, the report instead characterizes them as requiring "significant effort... to solve challenging problems."

Borrowing a related argument opponents of trans equality frequently use (including Anderson in his book), the report also expresses concern that respecting transgender identities would be unfair and even dangerous to other service members when it comes to athletics and training. "Biological females who may be required to compete against such transgender females in training and athletic competition would potentially be disadvantaged," the report claims. This ignores that the NCAA and International Olympic Committee have both established clear standards for allowing transgender people to compete according to their gender identity, recognizing that transitioning mitigates gender-related advantages.

Not so subtly, the report concludes that unit cohesion will deteriorate if the anti-transgender prejudices of other service members are not catered to. "The potential for discord in the unit during the routine execution of daily activities is substantial," it argues. The RAND study that informed the Carter policy had dismissed concerns that lifting the ban would impact cohesion and readiness.

Advertisement

Experts on transgender military service have made clear that lifting the ban will not impact unit cohesion. Three former armed forces secretaries even testified in one of the lawsuits challenging the ban that it is unjustified.

Moreover, “unit cohesion” is the same hollow argument that was previously used to defend “Don’t Ask, Don’t Tell” (DADT), a law that prohibited lesbian, gay, and bisexual people from serving openly in the military. Such warnings even included near-identical concerns about shared shower use. Following DADT’s repeal, a study showed that LGB inclusion had no negative impact on military morale, despite similar warnings.

“Considerable scientific uncertainty”

The report also contorts itself considerably to misrepresent both the experience of transitioning as well as the research about the health and well-being of transgender people. This is where the report most noticeably resembles Anderson’s book, as it uses several of the exact same sources and distorts them in the exact same way.

One of the overarching themes in both the report and Anderson’s book is that the “quality” of the research showing the benefits of transition is allegedly subpar. It’s an attempt to claim that no matter how much research there is showing transition is an effective way to treat gender dysphoria, it simply isn’t reliable for reasons like small sample sizes. Anderson has used this approach to justify his position that trans people should be discouraged from transitioning, while the report uses it to justify skepticism about whether people who have transitioned can be trusted to serve capably.

Two examples the new report use are a Centers for Medicare and Medicaid Services (CMS) review from August 2016 and a Hayes Directory review, both of which found that there were actually few studies of the same breadth and rigor

that is often used to assess coverage of other medical concerns. But the report relegates to a footnote that CMS still covers transition-related procedures on a case-by-case basis and likewise ignores entirely that, as ThinkProgress has previously pointed out, the Hayes Directory review is actually frequently cited by various health insurance policies to explain why it is the plans *will* cover transition-related procedures. In other words, these reviews of the research tend to support the exact opposite conclusion that the report (and likewise Anderson) draws from them.

Advertisement

The report expresses concern that there have been no “randomized controlled trials” on the effectiveness of hormone replacement therapy (HRT) or gender confirmation surgeries. Because of the nature of transgender identities, however, it would be difficult and likely unethical to take such an approach. That’s because gender dysphoria is uniquely a mental health concern treated with physical changes to the body. An individual who was receiving a placebo instead of hormones would easily notice that their body was not undergoing the expected changes. Moreover, given the overwhelming evidence that transgender people do benefit from transitioning, a human subjects review board would likely consider it unethical to deny them medically necessary treatment as part of such a study. The small population of transgender people also limits the size and scope of such studies.

Nowhere does the report even mention that every major medical organization in the U.S. has arrived at a consensus that transgender people should be affirmed in their gender identities and supported in their transitions. The American Medical

Association has even explicitly expressed support for lifting the military's ban on transgender service. The report likewise makes no mention of the widely-used standards of care developed by the World Professional Association of Transgender Health (WPATH), which recognize the benefits of affirmative care.

As has become inevitable in just about every attempt to justify anti-trans discrimination (including Anderson's book), the study also wildly distorts studies about the suicidality of transgender people.

"High rates of suicide ideation, attempts, and completion among people who are transgender are also well documented in the medical literature," the report asserts. It cites an analysis of the National Transgender Discrimination Survey (NTDS), which found that 41 percent of trans people had attempted suicide at some point in their life. It also cites a Swedish study, which the report claims found mortality and psychiatric hospitalization for patients who had undergone sex reassignment surgery as compared to a healthy control group."

What the report downplays is the context of both studies. The NTDS study found significant connections between the high suicide rate and anti-trans discrimination, including factors such as racial stigma, poverty, unemployment, having less education, how easily they were perceived as trans, homelessness, bullying and violence, family rejection, and health care discrimination.

Likewise, the Swedish study did not find significantly higher suicide rates in transgender people who underwent surgery after 1989. Its author, Cecilia Dhejne, explained in an interview that the older group's experience "likely reflects a time when trans health and psychological care was less effective and social stigma was far worse," emphasizing that transition "won't resolve the effects of crushing social oppression." She has repeatedly rebuked those who use the study to justify rejecting the legitimacy of transgender identities. "I have said many times that the

study is not design to evaluate the outcome of medical transition," she said in a [Reddit AMA](#) last year. "[I]t does say that people who have transition[ed] are more vulnerable and that we need to improve care."

The report essentially manufactures doubt about the health outcomes of transgender people to justify the very kind of discrimination that is the most significant factor for trans people's negative experiences. This is most apparent when the report attempts to rationalize allowing current transgender service members to continue serving:

While the Department believes that its commitment to these Service members, including the substantial investment it has made in them, outweigh the risks identified in this report, should its decision to exempt these Service members be used by a court as a basis for invalidating the entire policy, this exemption instead is and should be deemed severable from the rest of the policy.

In other words, if the courts conclude that the policy is blatantly hypocritical by allowing some trans people to continue to serve while banning others from joining, the military will respond by kicking them all out to achieve consistency.

The ex-trans framing

What is perhaps most bizarre about the report is its attempts to show how a transgender person could still serve under the new policy. Essentially, they have to be ex-trans.

The report states that a diagnosis of gender dysphoria is inherently disqualifying for service. This is despite the fact that the American Psychiatric Association does not recognize gender dysphoria [as a disorder](#). It maintains diagnostic criteria for people who are distressed by their gender identity because such a diagnosis is often required for insurance companies to cover transition treatment.

Besides the exemption for current trans troops, the report offers only two ways that someone diagnosed with gender dysphoria could still serve:

1. If an individual is trying to join the military but has previously been diagnosed with gender dysphoria, they must show that they have gone three full years without symptoms and be "willing and able to adhere to all standards associated with their biological sex."
2. If a current service member is newly diagnosed with gender dysphoria, they may continue serving so long as they do not require gender transition and are "willing and able to adhere to all standards associated with their biological sex."

Given that transitioning is the best proven way to resolve the distress of gender dysphoria, it's unclear who would qualify to serve under these circumstances.

This approach, however, reflects prominent anti-trans views. FRC publicly advocates against affirming transgender people, insisting, "There is no rational or compassionate reason to affirm a distorted psychological self-concept that one's 'gender identity' is different from one's biological sex." Anderson's book likewise focuses on a few exceptional individuals who regretted steps they took to transition their gender, which he argues proves that transition is not helpful or necessary. Anderson, however, did not ask permission from these "detransitioners" to use their narratives and they subsequently objected to being used in a book that rejects transgender people.

The bottom line of the report is that the only good way to be trans in the military is to not be trans. This flies in the face of countless military experts and is easily disproven by the thousands of transgender people already capably serving in the

U.S. as well as in 19 other countries, including Australia, the United Kingdom, France, Germany, Spain, Canada, and Israel.

But as the report largely reflects the views of Pence, a longtime opponent of LGBTQ equality, and some of the top anti-LGBTQ activists in the country, it's easy to see how it arrived at such discriminatory conclusions.

UPDATE: This post has been updated to reflect the release of Mattis' February recommendation to Trump.

OUR ACCOUNTABILITY JOURNALISM HAS HELPED PUT THE GUN LOBBY ON DEFENSE.

NOW THE NRA IS FIGHTING BACK.

After a massive swell of public outrage following the Parkland shooting, ThinkProgress' reporting exposed the companies that incentivize people to become NRA members by providing special benefits. This reporting spurred a massive social media backlash that resulted in dozens of major corporations ending these deals.

Now, the NRA has announced an effort to sign up 100,000 new members in 100 days.

We've shown how our reporting can make a difference. If you value this work, we need your support.



PLEASE JOIN US

#DONALD TRUMP, #FAMILY RESEARCH COUNCIL, #HATE GROUPS, #LGBTQ, #MIKE
PENCE, #MLITARY, #POLITICS, #RYAN T. ANDERSON, #TONY PERKINS,
#TRANSGENDER

Sponsored Content

This Full-Body Circuit Helps You Burn Fat and Build Muscle at the

Same Time!

Bowflex

Mathnasium Is One of The Best Franchise Opportunities

www.mathnasium.com

The Facial That Celebrities Say "Takes 10 Years Off" Your Face

Elle | Hanacure

5 Best Incontinence Underwear

Hexa

How To: Boost Telomeres At Home

LCR Health

These Are Not Just Socks

Cup of Jo | Bombas Socks

It's Like eBay, But Everything Sells in 90 Seconds.

Tophatter

How Much Money Do You Really Get from a Reverse Mortgage?

NewRetirement

Sponsored Links by Taboola

More From ThinkProgress

Michael Cohen reportedly breaks his silence, takes shot at Rudy Giuliani

Thinkprogress.org

3 U.S. prisoners held in North Korea have finally been released

Thinkprogress.org

Sarah Sanders waives the white flag on Stormy Daniels

Thinkprogress.org

Trump started tweeting about Stormy Daniels and it's an unmitigated disaster

Thinkprogress.org

George Zimmerman charged with stalking

Thinkprogress.org

The media's 2016 freak out over Clinton's pneumonia looks really suspect today

Thinkprogress.org

NFL cheerleaders reportedly had to pose topless, escort men out to a nightclub

Thinkprogress.org

Woman

Sign up

by Taboola

About Contact Us Membership Newsletter Tips Careers Masthead Pitches

© 2018 ThinkProgress

Powered by WordPress.com VIP

Exhibit 6

PALM CENTER

BLUEPRINTS FOR SOUND PUBLIC POLICY

MENU ≡

MARCH 28, 2018

Former Surgeons General Debunk Pentagon Assertions about Medical Fitness of Transgender Troops



SAN FRANCISCO, CA — Following this week's statement by the American Psychological Association expressing alarm over the Trump 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," the Palm Center today released the following statement by former U.S. Surgeons General M. Joycelyn Elders and David Satcher:

“We are troubled that the Defense Department’s report on transgender military service has mischaracterized the robust body of peer-reviewed research on the effectiveness of transgender medical care as demonstrating ‘considerable scientific uncertainty.’ In fact, there is a global medical consensus that such care is reliable, safe, and effective. An expectation of certainty is an unrealistic and counterproductive standard of evidence for health policy—whether civilian or military—because even the most well-established medical treatments could not satisfy that standard. Indeed, setting certainty as a standard suggests an inability to refute the research. A wide body of reputable, peer-reviewed research has demonstrated to psychological and health experts that treatments for gender dysphoria are effective. Research on the effectiveness of medical care for gender dysphoria was the basis of the American Medical Association’s 2015 resolution that ‘there is no medically valid reason to exclude transgender individuals from service in the U.S. military,’ and we expressed our

support for the resolution at the time of its passage. In light of last week’s announcement concerning military policy for transgender service members, we underscore that transgender troops are as medically fit as their non-transgender peers and that there is no medically valid reason—including a diagnosis of gender dysphoria—to exclude them from military service or to limit their access to medically necessary care.”

M. Joycelyn Elders, M.D., M.S.

15th Surgeon General of the United States

David Satcher, M.D., Ph.D., FAAFP, FACPM, FACP

16th Surgeon General of the United States

###

PRESS CONTACT

Kristofer Eisenla

kristofer@lunaeisenlamedia.com

[202-670-5747](tel:202-670-5747)

ABOUT THE PALM CENTER

The Palm Center is an independent research institute committed to sponsoring state-of-the-art scholarship to enhance the quality of public dialogue about critical and controversial issues of the day.

For the past decade, the Palm Center's research on sexual minorities in the military has been published in leading social scientific journals. The Palm Center seeks to be a resource for university-affiliated as well as independent scholars, students, journalists, opinion leaders, and members of the public. For more information, see palmcenter.org

HEALTH CARE

Featured Research and Press Releases

PRESS RELEASE

Expert Report Refutes Pentagon Rationale for Transgender Ban

[READ MORE](#)

PRESS RELEASE

Military Chiefs of Staff Unanimous: Transgender Inclusion Has Not Harmed Unit Cohesion

[READ MORE](#)

PRESS RELEASE

Six Former Surgeons General Rebut Pentagon Assertions About Medical Fitness of Transgender Troops

READ MORE

© 2018 Palm Center

Design & Development by



Exhibit 8

PALM CENTER

BLUEPRINTS FOR SOUND PUBLIC POLICY

DoD's Rationale for Reinstating the Transgender Ban Is Contradicted by Evidence

Vice Admiral Donald C. Arthur, USN (Ret.)
Former Surgeon General of the U.S. Navy

Major General Gale Pollock, USA (Ret.)
Former Acting Surgeon General of the U.S. Army

Rear Admiral Alan M. Steinman, USPHS/USCG (Ret.)
Former Director of Health and Safety (Surgeon General equivalent) of the U.S. Coast Guard

Nathaniel Frank, PhD
Director, What We Know Project, Cornell University

Professor Diane H. Mazur, JD
Legal Research Director, Palm Center

Professor Aaron Belkin, PhD
Director, Palm Center

April 2018

PALM CENTER

BLUEPRINTS FOR SOUND PUBLIC POLICY

Executive Summary

On March 23, 2018, the White House released a report, endorsed by Defense Secretary James Mattis, entitled, “Department of Defense Report and Recommendations on Military Service by Transgender Persons” (“Implementation Report”). The 44-page document contains recommendations that, if enacted into policy, would have the effect of banning many transgender individuals from military service. As of the writing of this study, inclusive policy for transgender individuals remains in effect because federal courts have enjoined the administration from reinstating the ban, and because the Report’s recommendations have not yet been entered into the Federal Register or enacted into policy. The Justice Department, however, has asked the courts to allow the administration to reinstate the ban.

Given the possibility that the Implementation Report’s recommendations could become policy, it is important to assess the plausibility of DoD’s justification for reinstating the ban. This report undertakes that assessment and finds its rationale wholly unpersuasive.

The Implementation Report claims that inclusive policy would compromise medical fitness because there is “considerable scientific uncertainty” about the efficacy of medical care for gender dysphoria (incongruity between birth gender and gender identity), and because troops diagnosed with gender dysphoria are medically unfit and less available for deployment. Cohesion, privacy, fairness, and safety would be sacrificed because inclusive policy blurs the “clear lines that demarcate male and female standards and policies.” Finally, according to the Report, financial costs would burden the military’s health care system because the annual cost of medical care for service members diagnosed with gender dysphoria is three times higher than for other troops.

After carefully considering the recommendations and their justification in the Implementation Report, we have concluded that the case for reinstating the transgender ban is contradicted by ample evidence clearly demonstrating that transition-related care is effective, that transgender personnel diagnosed with gender dysphoria are deployable and medically fit, that inclusive policy has not compromised cohesion and instead promotes readiness, and that the financial costs of inclusion are not high. Specifically, we make the following eight findings:

1. **Scholars and experts agree that transition-related care is reliable, safe, and effective.** The Implementation Report makes a series of erroneous assertions and mischaracterizations about the scientific research on the mental health and fitness of individuals with gender dysphoria. Relying on a highly selective review of the evidence, and distorting the findings of the research it cites, the Report

inaccurately claims there is “considerable scientific uncertainty” about the efficacy of transition-related care, ignoring an international consensus among medical experts that transition-related care is effective and allows transgender individuals to function well.

2. **The proposed ban would impose double standards on transgender service members, applying medical rules and expectations to them that do not apply to any other members.** The Implementation Report’s claim that individuals who transition gender are unfit for service only appears tenable when applying this double standard. When service members diagnosed with gender dysphoria are held to the same standards as all other personnel, they meet medical, fitness, and deployability standards.
3. **Scholarly research and DoD’s own data confirm that transgender personnel, even those with diagnoses of gender dysphoria, are deployable and medically fit.** Research shows that individuals who are diagnosed with gender dysphoria and receive adequate medical care are no less deployable than their peers. DoD’s own data show that 40 percent of service members diagnosed with gender dysphoria deployed to the Middle East and only one of those individuals could not complete deployment for mental health reasons.
4. **The Implementation Report offers no evidence that inclusive policy has compromised or could compromise cohesion, privacy, fairness, or safety.** Despite the lack of evidence, DoD advances these implausible claims anyway, citing only hypothetical scenarios and “professional military judgment.” Yet the military’s top Admirals and Generals have explicitly stated that, while the impact on cohesion is being “monitored very closely,” they have received “precisely zero reports of issues of cohesion, discipline, morale,” and related concerns after two years of inclusive service.
5. **The Report’s contention that inclusive policy could compromise cohesion, privacy, fairness, and safety echoes discredited rationales for historical prohibitions against African Americans, women, and gays and lesbians.** In each of these historical cases, military leaders advanced unsupported arguments about cohesion, privacy, fairness, and safety. In each case, evidence showed that inclusive policies did not bring about the harmful consequences that were predicted, suggesting the fears were misplaced and unfounded.
6. **Research shows that inclusive policy promotes readiness, while exclusion harms it.** A more rigorous and comprehensive assessment of the implications of transgender service shows that a policy of equal treatment improves readiness by promoting integrity, reinforcing equal standards, increasing morale for minorities, and expanding the talent pool available to the military, while banning transgender service or access to health care harms readiness through forced dishonesty, double standards, wasted talent, and barriers to adequate care.

7. **The Implementation Report fails to consider the readiness benefits of inclusive policy or the costs to readiness of the proposed ban.** All policy changes involve costs and benefits, yet DoD's research focuses solely on the costs of inclusion, entirely ignoring the readiness benefits of inclusion and the costs of exclusion.
8. **The Implementation Report's presentation of financial cost data inaccurately suggests that transition-related care is expensive.** The Report states that medical costs for troops with gender dysphoria are higher than average, but isolating any population for the presence of a health condition will raise the average cost of care for that population. In truth, DoD's total cost for transition-related care in FY2017 was just \$2.2 million, less than one tenth of one percent of its annual health care budget for the Active Component, amounting to just 9¢ (nine cents) per service member per month, or \$12.47 per transgender service member per month.

Introduction¹

On March 23, 2017, the White House released “Department of Defense Report and Recommendations on Military Service by Transgender Persons” (“Implementation Report”), a 44-page document whose recommendations would, if enacted into policy, have the effect of banning many transgender individuals from military service. Alongside the Implementation Report, the White House released a “Memorandum for the President” in which Defense Secretary James Mattis endorsed the Implementation Report’s recommendations. As of the writing of this study, inclusive policy for transgender individuals remains in effect because federal courts have enjoined the administration from reinstating the ban, and because the Report’s recommendations have not yet been entered into the Federal Register or enacted into policy. Although inclusive policy remains in effect at this time, the Justice Department has asked courts to dissolve the preliminary injunctions that prevent the administration from banning transgender service members. If courts grant the request, the administration will almost certainly reinstate the ban by implementing recommendations contained in the Implementation Report.

Given the possibility that the Implementation Report’s recommendations could be enacted into policy, it is important to assess the plausibility of DoD’s justification for the proposed reinstatement of the ban. According to DoD’s Implementation Report, inclusive policy for transgender service members could compromise the medical fitness of the force; undermine unit cohesion, privacy, fairness, and safety; and impose burdensome financial costs. According to the Report, inclusive policy would compromise medical fitness because there is “considerable scientific uncertainty” about the efficacy of medical care for gender dysphoria (incongruity between birth gender and gender identity), and because troops diagnosed with gender dysphoria are medically unfit and less available for deployment. Cohesion, privacy, fairness, and safety would be sacrificed because inclusive policy “blur[s] the clear lines that demarcate male and female standards and policies.”² Finally, according to the Report, financial costs would burden the military’s health care system because the annual cost of medical care for service members diagnosed with gender dysphoria is three times higher than for other troops.

After carefully considering the recommendations and their justification in the Implementation Report, we have concluded that the case for reinstating the transgender ban is contradicted by the evidence: (1) Scholars and experts agree that transition-related care is, in fact, reliable, safe, and effective; (2) The proposed ban would impose double standards on transgender service members, in that DoD would apply medical rules and expectations to them that it does not apply to any other members; (3) Scholarly research as well as DoD’s own data confirm that transgender personnel, even those with diagnoses of gender dysphoria, are deployable and medically fit; (4) The Report does not offer any evidence that inclusive policy has compromised or could compromise cohesion, privacy, fairness, and safety, and assertions and hypothetical scenarios offered in support of these concerns are implausible; (5) The Report’s contention that inclusive policy could compromise cohesion, privacy, fairness, and safety echoes discredited rationales for historical prohibitions against African Americans, women, and gays and lesbians; (6) A more comprehensive assessment of costs and benefits indicates that inclusive policy

promotes readiness, while the proposed ban would compromise it; (7) The Report fails to consider the benefits of inclusive policy or the costs of the proposed ban; and (8) The Report's presentation of financial cost data inaccurately suggests that transition-related care is expensive.

Gender Transition Is Effective

The Implementation Report relies on a series of erroneous assertions and mischaracterizations about the substantial scientific research on the mental health and fitness of transgender individuals with gender dysphoria. As a result, it draws unfounded conclusions about the efficacy of gender transition and related care in successfully treating gender dysphoria and the health conditions that are sometimes associated with it. The Implementation Report argues that there is “considerable scientific uncertainty” about the efficacy of transition-related care, and that the military cannot be burdened with a group of service members for whom medical treatment may not restore medical fitness and “fully remedy” symptoms. This assertion, however, relies on a highly selective review of the relevant scientific evidence. In truth, the data in this field show a clear scholarly consensus, rooted in decades of robust research, that transgender individuals who have equal access to health care can and do function effectively.³

Consensus about the efficacy of care

An international consensus among medical experts affirms the efficacy of transition-related health care. The consensus does not reflect advocacy positions or simple value judgments but is based on tens of thousands of hours of clinical observations and on decades of peer-reviewed scholarly studies. This scholarship was conducted using multiple methodologies, study designs, outcome measures, and population pools widely accepted as standard in the disciplinary fields in which they were published. In many cases, the studies evaluated the complete universe of a country or region's medically transitioning population, not a selection or a sample.

The American Medical Association (AMA) has stated that “An established body of medical research demonstrates the effectiveness and medical necessity of mental health care, hormone therapy and sex reassignment surgery as forms of therapeutic treatment” for those with gender dysphoria. In response to the publication of DoD's Implementation Report, the AMA reiterated its view that “there is no medically valid reason—including a diagnosis of gender dysphoria—to exclude transgender individuals from military service.” The AMA stated that the Pentagon's rationale for banning transgender service “mischaracterized and rejected the wide body of peer-reviewed research on the effectiveness of transgender medical care.”⁴

The American Psychological Association responded to the publication of the Implementation Report by stating that “substantial psychological research shows that gender dysphoria is a treatable condition, and does not, by itself, limit the ability of individuals to function well and excel in their work, including in military service.” A statement released by six former U.S. Surgeons General cited “a global medical

consensus” that transgender medical care “is reliable, safe, and effective.” The American Psychiatric Association has recognized that “appropriately evaluated transgender and gender variant individuals can benefit greatly from medical and surgical gender transition treatments.” The World Professional Association for Transgender Health has stated that gender transition, when “properly indicated and performed as provided by the Standards of Care, has proven to be beneficial and effective in the treatment of individuals with transsexualism, gender identity disorder, and/or gender dysphoria” and that “sex reassignment plays an undisputed role in contributing toward favorable outcomes” in transgender individuals.⁵

The global consensus reflected in this scholarship—that gender transition is an effective treatment for gender dysphoria—is made clear in numerous comprehensive literature reviews conducted across the last thirty years (which themselves confirm conclusions reached in earlier research). By conducting systematic, global literature searches and classifying the studies generated by the search, researchers and policymakers can avoid basing conclusions and policies on cherry-picked evidence that can distort the full range of what is known by scholars in the field.

Most recently, researchers at Cornell University’s “What We Know Project” conducted a global search of peer-reviewed studies that addressed transgender health to assess the findings on the impact of transition-related care on the well-being of transgender people. The research team conducted a keyword search that returned 4,347 articles on transgender health published over the last 25 years. These were evaluated by reading titles, abstracts, and text to identify all those that directly address the impact of transition-related care on overall well-being of transgender individuals. Of the final 56 peer-reviewed studies that conducted primary research on outcomes of individuals who underwent gender transition, the team found that 52, or 93 percent, showed overall improvements, whereas only 4, or 7 percent, found mixed results or no change. No studies were found that showed harms. The research team concluded there was a “robust international consensus in the peer-reviewed literature that gender transition, including medical treatments such as hormone therapy and surgeries, improves the overall well-being of transgender individuals.”⁶

The “What We Know” researchers assessed evidence from the last 25 years because it represents the most recent generation of scholarship. But the consensus dates to well before this period. In 1992, one of the first comprehensive literature reviews on transitioning outcomes was published in Germany. It examined 76 follow-up studies from 12 countries published between 1961 and 1991, covering more than 2,000 individuals. The review concluded that overall outcomes of gender transition were positive, stating that “sex reassignment, properly indicated and performed, has proven to be a valuable tool in the treatment of individuals with transgenderism.”⁷ A 1999 study notes that, throughout the 1990s, comparative research found uniformly positive outcomes from gender transition surgery, stating: “A review of postoperative cases [during this decade] concluded that transsexuals who underwent such surgery were many times more likely to have a satisfactory outcome than transsexuals who were denied this surgery.”⁸

The positive results of research on transition-related care have only grown more robust with time. For more detailed information on the global consensus that transition-related care is effective, please see the Appendix.

DoD's critique of efficacy literature is contradicted by evidence

The Implementation Report claims that permitting service by transgender individuals treated for gender dysphoria poses an unacceptable risk to military effectiveness because “the available scientific evidence on the extent to which such treatments fully remedy all of the issues associated with gender dysphoria is unclear.” The Report argues that the evidence that does exist is insufficient or of too poor quality to form a robust consensus. In support of that claim, the Implementation Report cites one government report by the U.S. Centers for Medicare and Medicaid Services (CMS) concluding that there is “not enough high quality evidence to determine whether gender reassignment surgery improves health outcomes” for individuals with gender dysphoria. In addition, the Implementation Report cites two literature reviews and one research study suggesting that the quality of efficacy evidence is low.

Yet DoD's findings rely on a selective reading of scholarship. Despite decades of peer-reviewed research, the Implementation Report could identify only four studies to sustain its conclusion. Critically, even these four studies, supposedly representing the best evidence documenting the uncertainty about transition-related care's efficacy, all conclude that such care mitigates symptoms of gender dysphoria. As we show below, these four studies do not sustain the Implementation Report's assertion about scientific uncertainty.

Before addressing each study that the Implementation Report relies on individually, several observations about standards of evidence require elaboration. To begin, the Implementation Report's critique that efficacy studies are not randomized controlled trials does not, in and of itself, impeach the quality or the force of the evidence. The Implementation Report places considerable weight on the absence of randomized controlled trials in the efficacy literature, but it fails to acknowledge that there are many criteria for assessing the quality of clinical research and many acceptable study designs. The CMS study that the Implementation Report relies on to indict the efficacy literature explains that while “randomized controlled studies have been typically assigned the greatest strength, . . . a well-designed and conducted observational study with a large sample size may provide stronger evidence than a poorly designed and conducted randomized controlled trial.” CMS concludes that “Methodological strength is, therefore, a multidimensional concept that relates to the design, implementation, and analysis of a clinical study.”⁹

Elsewhere, CMS explains that random trials are not the only preferred form of evidence, which can include “randomized clinical trials or other definitive studies.”¹⁰ CMS continues that other forms of evidence can support Medicare policy as well, including “scientific data or research studies published in peer-reviewed journals” and “Consensus of expert medical opinion.”¹¹ Finally, there is a good reason why the efficacy literature

does not include randomized controlled trials of treatments for gender dysphoria: the condition is rare, and treatments need to be individually tailored. Given these circumstances, randomized controlled trials are unrealistic.¹²

The Implementation Report mentions four times that transition-related care does not “fully remedy” symptoms of gender dysphoria, but that is not a standard that the military or other public health entities apply to efficacy evaluation. Using this phrase falsely implies that the military enjoys a level of complete certainty about the medical evidence on which it relies in all other areas of health policy formulation. Yet as six former U.S. Surgeons General explain in a recent response to the Implementation Report, “An expectation of certainty is an unrealistic and counterproductive standard of evidence for health policy—whether civilian or military—because even the most well-established medical treatments could not satisfy that standard. Indeed, setting certainty as a standard suggests an inability to refute the research.”¹³ Many medical conditions are not categorically disqualifying for accession or retention, and none come with a guarantee that available treatments always “fully remedy” them, suggesting that a double standard is being applied to the transgender population. As documented above, decades of research confirm the efficacy of medical treatments for gender dysphoria, and recent research underscores that as treatments have improved and social stigma has decreased, transgender individuals who obtain the care that they need can achieve health parity with non-transgender individuals.

Parallel to its “fully remedy” double standard, the Implementation Report attempts to indict the efficacy literature because studies do not “account for the added stress of military life, deployments, and combat.”¹⁴ Given the historical transgender ban, it is unclear how efficacy literature could ever meet this standard, as DoD did not allow treatment for gender dysphoria while the ban was in effect, so service members could not have participated as subjects in efficacy studies. Generally, service members are not subjects in civilian research studies, and while service member medical and performance data, such as disability separation statistics, are studied to inform policy decisions about accession standards, civilian studies on the efficacy of medical treatments are not.¹⁵

CMS Study

The Implementation Report relies heavily on a 2016 CMS review of literature to sustain its claim about scientific uncertainty concerning the efficacy of gender transition surgery. According to the Implementation Report, CMS “conducted a comprehensive review of the relevant literature, [including] over 500 articles, studies, and reports, [and] identified 33 studies sufficiently rigorous to merit further review.” It then cited CMS’s conclusion that “the quality and strength of evidence were low.”¹⁶

Yet the Implementation Report’s interpretation and application of the CMS findings are highly misleading. By omitting a crucial point of context, the Implementation Report implies that CMS ultimately found insufficient evidence for the efficacy of gender reassignment surgery, when in fact it found the opposite. That point of context turns on the distinction between negative and affirmative National Coverage Determinations

(NCDs). Negative NCDs are blanket denials of coverage that prohibit Medicare from reimbursing for the cost of medical treatment. Prior to 2014, a negative NCD prohibited Medicare from covering the cost of gender reassignment surgery, but a Department of Health and Human Services Appeals Board (“Board”) overturned the NCD after a comprehensive review of the efficacy literature determined surgery to be safe, effective, and medically necessary. As a result, under Medicare policy the need for gender reassignment surgery is determined on a case-by-case basis after consultation between doctor and patient, and there is no surgical procedure that is required in every case.

An affirmative NCD, by contrast, is a blanket entitlement mandating reimbursement of a treatment, the mirror opposite of a negative NCD. Affirmative NCDs are rare. The CMS review that the Implementation Report relies on did not contradict the Board’s 2014 conclusion that there is “a consensus among researchers and mainstream medical organizations that transsexual surgery is an effective, safe and medically necessary treatment for transsexualism.”¹⁷ Nor did it contradict the Board’s 2014 findings that “concern about an alleged lack of controlled, long-term studies is not reasonable in light of the new evidence”¹⁸ and that “Nothing in the record puts into question the authoritativeness of the studies cited in new evidence based on methodology (or any other ground).” Rather, CMS concluded in 2016 that there was not enough evidence to sustain a blanket mandate that would automatically entitle *every* Medicare beneficiary diagnosed with gender dysphoria to surgery.

In addition, CMS only found that the evidence was “inconclusive *for the Medicare population*,” not for all persons with gender dysphoria. CMS acknowledged that gender reassignment surgery “may be a reasonable and necessary service for certain beneficiaries with gender dysphoria,” and confined its conclusions to the Medicare population, noting that “current scientific information is not complete for CMS to make a NCD that identifies *the precise patient population for whom the service would be reasonable and necessary*.” CMS explained that the Medicare population “is different from the general population” and “due to the biology of aging, older adults may respond to health care treatments differently than younger adults. These differences can be due to, for example, multiple health conditions or co-morbidities, longer duration needed for healing, metabolic variances, and impact of reduced mobility. All of these factors can impact health outcomes.”¹⁹

The Board’s 2014 repeal of the negative NCD and CMS’s 2016 decision not to establish an affirmative NCD means that, like most medical treatments, the need for gender reassignment surgery is determined on a case-by-case basis after consultation between doctor and patient under Medicare policy. The Implementation Report’s depiction of the 2016 CMS review, however, obscures that point. In noting that CMS “decline[d] to require all Medicare insurers to cover sex reassignment surgeries,” DoD mischaracterizes the CMS decision and erroneously states that its review “found insufficient scientific evidence to conclude that such surgeries improve health outcomes for persons with gender dysphoria.” CMS did not bar transition-related coverage for the Medicare population, but determined that care should be offered on an individualized basis, which is the general standard applied to most medical care.

Perhaps the most misleading aspect of the Implementation Report's discussion is the suggestion that the 2016 CMS review undercuts the case for inclusive policy and the provision of medically necessary care. Quite to the contrary, both the 2014 Board review and the 2016 CMS review closely align Medicare policy with DoD's inclusive policy established by former Defense Secretary Ashton Carter. Under the Carter policy, treatment for gender dysphoria is determined on a case-by-case basis after consultation between doctor and patient, and there is no blanket entitlement to care for service members diagnosed with gender dysphoria. The 2016 CMS review may undercut the case for a blanket entitlement to gender reassignment surgery for Medicare beneficiaries. But it does not, as the Implementation Report insists, undercut the rationale for providing care to service members on an individualized basis as determined by doctor and patient.

According to Andrew M. Slavitt, Acting Administrator of CMS from March 2015 to January 2017, "It is dangerous and discriminatory to fire transgender service members and deny them the medical care they need. It is particularly disingenuous to justify it by a purposeful misreading of an unrelated 2016 CMS decision. Both the 2014 Board review and the 2016 CMS review closely align Medicare policy with DoD's inclusive policy established by former Secretary Carter. Under both Medicare and military policy, treatment for gender dysphoria is determined on a case-by-case basis after consultation between doctor and patient."²⁰

Hayes Directory

DoD's Implementation Report cites the Hayes Directory in arguing that there is "considerable scientific uncertainty" about whether transition-related treatment fully remedies symptoms of gender dysphoria:

According to the Hayes Directory, which conducted a review of 19 peer-reviewed studies on sex reassignment surgery, the "evidence suggests positive benefits," . . . but "because of serious limitations," these findings "permit only weak conclusions." It rated the quality of evidence as "very low" due to the numerous limitations in the studies . . . With respect to hormone therapy, the Hayes Directory examined 10 peer-reviewed studies and concluded that a "substantial number of studies of cross-sex hormone therapy each show some positive findings suggesting improvement in well-being after cross-sex hormone therapy." Yet again, it rated the quality of evidence as "very low" . . . Importantly, the Hayes Directory also found: "Hormone therapy and subsequent [gender transition surgery] failed to bring the overall mortality, suicide rates, or death from illicit drug use in [male-to-female] patients close to rates observed in the general male population."²¹

Hayes is not a scholarly organization and the Hayes Reports have not been published in a peer-reviewed journal, unlike the numerous literature reviews cited above. But Dr. Nick Gorton, a nationally recognized expert on transgender health, conducted a critical

analysis of the report cited by DoD as well as a 2004 Hayes Report addressing related research, and he shared his findings with us in a memo. “The Hayes Reports evaluating transition-related care,” writes Dr. Gorton, “make repeated substantive errors, evidence poor systematic review technique, are inconsistent in applying their criteria to the evidence, make conclusions not supported by the evidence they present, misrepresent the statements made by professional organizations treating transgender patients, and have a strong systematic negative bias.” He concludes that “these problems fatally damage the credibility of their analysis, casting substantial doubt on their conclusions. The reports cannot be relied upon as a valid systematic clinical review of the evidence on transition-related health care.”²²

For example, Hayes claims that its reports are comprehensive, but its 2004 report omitted dozens of relevant studies from its analysis. Dr. Gorton identified 31 applicable scholarly articles that Hayes failed to include in its review.²³ Hayes labels 13 studies it chose for one analysis as consisting only of “chart reviews or case series studies” and concludes that the “studies selected for detailed review were considered to be very poor.” But Hayes does not explain why it selected what it considered to be poor quality studies when numerous high quality studies were available. Furthermore, the 13 studies Hayes did choose to review were not, in fact, only chart reviews and case series studies, but included cohort studies, which are considered higher quality evidence. “By mislabeling all the studies as ‘chart reviews or case series,’” Dr. Gorton observed, Hayes is “saying they are lower level evidence than what is actually found in that group of studies.”²⁴ Finally, Hayes erroneously states that none of the 13 studies “assessed subjective outcome measures before treatment.” Dr. Gorton’s review of the studies, however, shows that three of the studies included such baseline measures.

Hayes also asserts that a 2012 Task Force report of the American Psychiatric Association “concluded that the available evidence for treatment of gender dysphoria was low for all populations and treatments, and in some cases insufficient for support of evidence-based practice guidelines.” Yet Hayes misrepresents the conclusion of the Task Force by taking quotes out of context and omitting mention of the higher quality evidence the APA also cites—and uses as a basis for recommending consensus-based treatment options that include gender transition. The “insufficient” evidence conclusion that Hayes cites applied only to studies of children and adolescents. What the Task Force concluded about adults with gender dysphoria was that there is sufficient evidence to recommend that treatment including gender transition be made available.²⁵

Quoting the APA fully on this matter illustrates Hayes’s misrepresentation: “The quality of evidence pertaining to most aspects of treatment in all subgroups was determined to be low; however, areas of broad clinical consensus were identified and were deemed sufficient to support recommendations for treatment in all subgroups. With subjective improvement as the primary outcome measure, current evidence was judged sufficient to support recommendations for adults in the form of an evidence-based APA Practice Guideline with gaps in the empirical data supplemented by clinical consensus.”²⁶

Finally, Dr. Gorton observes that, “Hayes writes reports that are aimed to please their customers who are all health care payers interested in being able to refuse to cover expensive or, in the case of transgender patients, politically controversial care. They obscure the nature of their systematically biased analysis by preventing scientists and clinicians from reading the reports and calling attention to their poor quality and systematic bias as would happen to any other evidence based review of health care treatments.” Thus, clients of Hayes who may have paid for the meta-analyses could have a financial interest in declining to reimburse patients for transition-related care.²⁷

Swedish research

Of the four studies that the Implementation Report cited to sustain its claim that there is scientific uncertainty about the efficacy of transition-related care, only one, a 2011 study from Sweden co-authored by Cecilia Dhejne, offers original research. According to the Swedish study, individuals receiving gender transition surgery had higher mortality rates than a healthy control group.

Yet much of the data on which the 2011 Swedish study relied in assessing outcomes was collected decades prior, when life for transgender individuals was more grim, with many subjects in the study undergoing gender transition as long ago as 1973. Importantly, the Swedish study, which assessed health data across three decades, compared outcomes from the first 15 years to those from the more recent 15 years and found that individuals who underwent transition since 1989 fared far better. This “improvement over time” is elaborated on in a more recent study co-authored by the same Swedish scholar in 2016 that states, “Rates of psychiatric disorders and suicide became more similar to controls over time; for the period 1989–2003, there was *no difference* in the number of suicide attempts compared to controls.”²⁸

Dhejne’s 2016 study reviewed more than three dozen cross-sectional and longitudinal studies of prevalence rates of psychiatric conditions among people with gender dysphoria. The authors found, contrary to research cited in the Implementation Report, that transgender individuals who obtain adequate care can be just as healthy as their peers. Among its study sample, most diagnoses were of the common variety (general anxiety and depression) whereas “major psychiatric disorders, such as schizophrenia and bipolar disorder, were rare and were no more prevalent than in the general population.” They concluded that, even when individuals start out with heightened anxiety or depression, they “improve following gender-confirming medical intervention, in many cases reaching *normative values*.”²⁹

In a 2015 interview, Dhejne explained that anti-transgender advocates consistently “misuse the study” she published in 2011 “to support ridiculous claims,” including that transition-related care is not efficacious, which is not what her study found. She said that, “If we look at the literature, we find that several recent studies conclude that WPATH Standards of Care compliant treatment decrease[s] gender dysphoria and improves mental health.”³⁰

Mayo Clinic research

Similar to the CMS study, the Hayes Directory, and the Swedish research, the Mayo Clinic study actually concludes that transition-related care mitigates the symptoms of gender dysphoria, with 80 percent of subjects reporting “significant improvement” in gender dysphoria and quality of life, and 78 percent reporting “significant improvement” in psychological symptoms. Moreover, data cited in the Mayo Clinic report reach as far back as 1966, more than 50 years ago, covering a period when the social and medical climates for gender transition were far less evolved than they are today. As we show in this report, more recent research demonstrates even more positive results.³¹

As we note above, the AMA responded to the release of the Implementation Report by stating that DoD “mischaracterized and rejected the wide body of peer-reviewed research on the effectiveness of transgender medical care,” and six former U.S. Surgeons General responded to DoD by citing “a global medical consensus” that transgender medical care “is reliable, safe, and effective.” Similar to AMA, both APAs, WPATH, and the former Surgeons General, we are wholly unpersuaded by the Implementation Report’s contention that there is “considerable scientific uncertainty” about the efficacy of transition-related care. Such a conclusion relies on a selective reading of a much larger body of evidence that flatly contradicts these claims.

Ban Would Create Separate Standards for Transgender Personnel

DoD’s current, inclusive regulations hold transgender personnel to the same medical, fitness, and deployability standards as all other personnel. Contrary to the Implementation Report’s assertion that former Defense Secretary Carter “relaxed” standards for transgender personnel,³² the policy that he established requires transgender service members to meet all general medical, fitness, and deployability requirements. There are no exceptions for transgender personnel or for gender transition. The proposed ban, in contrast, would impose double standards on transgender troops, as DoD would apply unique rules and expectations to them that it does not apply to any other members. The Implementation Report’s recommendations are not about requiring transgender personnel to meet military standards, because they already do. Under the guise of maintaining standards, the recommendations are about establishing separate standards that target transgender people alone. Separate standards, in other words, are bans in disguise.

The Implementation Report frequently emphasizes the importance of military standards and the necessity that all service members be required to meet them. It refers to “standards” well over one hundred times in the course of the Report. In endorsing the Implementation Report, the Secretary of Defense also pointed to the importance of standards, writing the following with respect to accession and retention of individuals with a history of gender dysphoria:

Furthermore, the Department also finds that exempting such persons from well-established mental health, physical health, and sex-based standards,

which apply to all Service members, including transgender Service members without gender dysphoria, could undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality.³³

No one objects to the fundamental principle that a single standard should apply equitably to all service members. But the Implementation Report redefines the usual military understanding of a “standard” in order to create what are in fact two separate standards, one for transgender service members and one for everyone else.

DoD’s regulation on disability evaluation offers a pertinent example of a true single standard, applicable to all. It states that service members will be referred for medical evaluation possibly leading to separation if they have a medical condition that may “prevent the Service member from reasonably performing the duties of their office, grade, rank, or rating . . . for more than 1 year after diagnosis”; or that “represents an obvious medical risk to the health of the member or to the health or safety of other members”; or that “imposes unreasonable requirements on the military to maintain or protect the Service member.”³⁴

A February 2018 memo from the Under Secretary of Defense, Personnel and Readiness, announced a stricter enforcement of this retention policy with respect to availability for deployment. It directed, consistent with the DoD regulation, that “Service members who have been non-deployable for more than 12 consecutive months, for any reason” will be processed for administrative or disability separation, absent a waiver at the service headquarters level.³⁵ Again, however, the standard that service members cannot remain non-deployable for more than 12 consecutive months is presumably a standard that applies across the board to all who are subject to the policy.

The Implementation Report on transgender policy turns the idea of a single standard on its head. Rather than determining whether transgender service members, who have been serving openly for almost two years now, have met this or other generally applicable standards, the Implementation Report recommends a behavior-based standard that only affects transgender personnel. Moreover, the only way to meet this targeted standard is to behave as if one is not transgender. The Implementation Report attempts to cast this as a single standard—that no one can behave as if they are transgender—but it obviously works as a ban targeted only at transgender personnel.

According to the Implementation Report, transgender individuals are eligible to serve if they can prove themselves indistinguishable from individuals who are not transgender. For example, at accession, transgender applicants with a history of gender dysphoria must submit medical documentation showing they are stable living in birth gender—not the gender in which they identify—for at least three years.³⁶ For transgender persons already in uniform (other than a specifically excepted registry of service members diagnosed with gender dysphoria prior to an effective date), retention is technically permitted but only if they serve in birth gender for the duration and receive no medical care in support of gender identity.³⁷

In other words, transgender service members can be retained only if they suppress or conceal their identity as transgender. The Implementation Report characterized this as an equal treatment of, and a single standard for, all service members, whether transgender or not. Nominally, everyone must serve in birth gender, and no one can receive medical care in support of a gender identity that is inconsistent with birth gender:

Service members who are diagnosed with gender dysphoria after entering military service may be retained without waiver, provided that they are *willing and able to adhere to all standards associated with their biological sex*, the Service member *does not require gender transition*, and the Service member is not otherwise non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months).³⁸

This is the “standard” to which all service members will be held. According to the Implementation Report, this standard is necessary to maintain equity not only with colleagues who are not transgender, but also with transgender colleagues who, “like all other persons, satisfy all mental and physical health standards and are capable of adhering to the standards associated with their biological sex.”³⁹ This incorrectly suggests that the problem with transgender personnel is that they cannot meet the standard, but the “standard” is drafted to target them by definition. The Implementation Report also casts those needing to transition gender as simply “unwilling” to meet standards, as in “unwilling to adhere to the standards associated with their biological sex.”⁴⁰

The Implementation Report carefully avoids any direct evaluation of transgender service members under a true single standard of fitness. It even misstates current accession standards in a way that makes it appear transgender individuals cannot meet them. For example, the Implementation Report incorrectly states that a history of chest surgery is disqualifying for enlistment.⁴¹ The actual enlistment standard states that a history of chest surgery is only disqualifying for six months, assuming no persistent functional limitations.⁴² The Implementation Report also incorrectly states that hormone therapy is specifically disqualifying.⁴³ It is not. The actual enlistment standard in fact permits enlistment by women who are prescribed hormones for medical management of gynecological conditions.⁴⁴

The consistent theme of the Implementation Report is that transgender service members are so uniquely unfit and uniquely disruptive that they must be measured by unique and separate standards. But the strength of a traditional and single standard is that each service member is measured by the same expectation. Standards are no longer standards when they are not consistent across all members and are instead targeted narrowly to exclude or disqualify only one group.

This is why the current DoD regulation that governs gender transition in military service made clear that not only must transgender members be “subject to the same standards and procedures as other members with regard to their medical fitness,” but also that command

decisions and policies should ensure individuals in comparable circumstances are treated comparably. For example, the primary regulation governing gender transition directs as follows:

Any determination that a transgender Service member is non-deployable at any time will be consistent with established Military Department and Service standards, as applied to other Service members whose deployability is similarly affected in comparable circumstances unrelated to gender transition.⁴⁵

The Implementation Report's recommendations are not about requiring transgender personnel to meet military standards because, as we show in the next section of this study, they already do. The recommendations are about establishing separate standards that target transgender people alone. Those separate standards are nothing less than bans in disguise.

Transgender Service Members Are Medically Fit

According to a statement by six former U.S. Surgeons General, “transgender troops are as medically fit as their non-transgender peers and there is no medically valid reason—including a diagnosis of gender dysphoria—to exclude them from military service or to limit their access to medically necessary care.”⁴⁶ The Implementation Report concludes, however, that individuals who transition gender are uniquely unfit for service. As we demonstrate below, when service members diagnosed with gender dysphoria are held to the same standards as all other personnel, they meet medical, fitness, and deployability standards. The Implementation Report's characterization of unfitness depends on the application of standards that apply only to transgender service members, but not to anyone else.

DOD's claim: Medically unfit by definition

The Implementation Report contends that service members with gender dysphoria who need to transition gender are, *by definition*, medically unfit. According to the Report, transgender service members may or may not be medically fit. But any transgender service member with a medical need to transition gender is automatically unfit. The Report observes that, “Today, transsexualism is no longer considered by most mental health practitioners as a mental health condition . . . Gender dysphoria, by contrast, is a mental health condition that can require substantial medical treatment . . . According to the APA, the ‘condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.’”⁴⁷

Although the Implementation Report is correct in noting that “clinically significant distress or impairment” is a criterion of the diagnosis, it failed to contextualize the observation in terms of the American Psychiatric Association's (APA) reasoning for defining gender dysphoria in this way. In creating the diagnosis, APA was well aware that many transgender individuals who need to transition are fully functional. In the

American medical system, however, patients cannot obtain treatment without a diagnosis code. Insurance companies tend not to reimburse care for mental health conditions that do not include the “clinically significant distress or impairment” language.

At the same time, APA was mindful that defining gender dysphoria in terms of clinically significant symptoms could risk stigmatizing transgender individuals as mentally ill. According to Dr. Jack Drescher, who helped create the gender dysphoria diagnosis during his service on the APA’s DSM-5 Workgroup on Sexual and Gender Identity Disorders, “one challenge has been to find a balance between concerns related to the stigmatization of mental disorders and the need for diagnostic categories that facilitate access to healthcare.”⁴⁸ Dr. Drescher explained to us in a personal communication why a diagnosis of gender dysphoria should not be conflated with unfitness:

Many transgender individuals who receive gender dysphoria diagnoses are fully functional in all aspects of their lives. When APA revised the diagnosis, words were chosen carefully. Thus, making a diagnosis requires the presence of distress *or* impairment, not distress *and* impairment. One cannot and should not conflate “clinically significant distress” with impairment, as many recipients of the diagnosis experience no impairment whatsoever. In addition, “clinically significant distress” is a purely subjective measure that is difficult to objectively quantify. Many fully functional individuals may have clinically significant distress, such as a soldier separated from his family during deployment. However, being distressed does not mean the individual is impaired.⁴⁹

The fact that DoD’s own data reveal, as we discuss below, that 40 percent of service members diagnosed with gender dysphoria have deployed in support of Operations Enduring Freedom, Iraqi Freedom, or New Dawn, and that after the ban was lifted only one individual deploying with a diagnosis of gender dysphoria was unable to complete the deployment for mental health reasons, underscores the inaccuracy of conflating a diagnosis of gender dysphoria with unfitness. In response to DoD’s release of the Implementation Report, the American Psychiatric Association’s CEO and Medical Director Saul Levin stated that, “Transgender people do not have a mental disorder; thus, they suffer no impairment whatsoever in their judgment or ability to work.”⁵⁰

Artificial restrictions on deployment status

The Implementation Report’s discussion of deployability illustrates how attributions of unfitness to transgender personnel depend on double standards. The Report overlooks that the small minority of transgender service members who are unfit, or who become unfit as a result of gender transition, can be managed under existing standards that apply to all service members. This includes the small minority of transgender personnel who, like other personnel, may be temporarily non-deployable. As with its recommendation for accession and retention policy, however, the Implementation Report avoids evaluating transgender members under existing deployability standards and instead assumes a separate standard that no one else will be required to meet. It assumes that transgender

members are uniquely at risk of becoming non-deployable and then concludes—contrary to policy—that therefore they must be measured by unique standards.

The Implementation Report makes the uncontroversial observation that deployment is a universal military obligation. No one disagrees that all must take their fair share of the burden:

Above all, whether they serve on the frontlines or in relative safety in non-combat positions, every Service member is important to mission accomplishment and must be available to perform their duties globally whenever called upon . . . To access recruits with higher rates of anticipated unavailability for deployment thrusts a heavier burden on those who would deploy more often.⁵¹

Determination of medical eligibility for deployment, however, requires an individual assessment of fitness. Army deployment standards, as a representative example, state: “Because of certain medical conditions, some Soldiers may require administrative consideration when assignment to combat areas or certain geographical areas is contemplated.”⁵² The Army guidance goes on in greater detail to describe considerations that should be taken into account when evaluating certain conditions, including mental health conditions. For example, most psychiatric disorders are not disqualifying, provided the individual can “demonstrate a pattern of stability without significant symptoms for at least 3 months prior to deployment.”⁵³ Medications are also generally not disqualifying for deployment, although the regulation includes a list of medications “most likely to be used for serious and/or complex medical conditions that could likely result in adverse health consequences,” and these medications should be reviewed as part of a complete medical evaluation. Hormones, however, are not on this list of medications most likely to be used for serious or complex medical conditions.⁵⁴

Given that medical deployment standards would not appear to be a significant obstacle for service members who are *not* transgender but have been diagnosed with a mental health condition or may be taking prescription medication, the Implementation Report’s conclusion that gender transition makes someone uniquely unfit for deployment is difficult to understand. The Implementation Report does not rely on general standards that apply to service members across the board. Instead, the Report shifts focus to what “could” happen to “render Service members with gender dysphoria non-deployable for a significant period of time—perhaps even a year” or longer.⁵⁵

Neither does the Implementation Report take into account the prior DoD professional judgment that gender transition can often be planned in ways that do not interfere with deployment or pose a risk to service member health. Instead, the Implementation Report sets up a false choice between assuming the risk of treatment and assuming the risk of complete denial of treatment.⁵⁶ In contrast, the Commander’s Handbook—a DoD document containing military judgment on best practices for managing gender transition—relies on planning a schedule of transition care “that meets the individual’s medical requirements and unit readiness requirements.”⁵⁷ The policy explicitly authorizes

commanders to schedule gender transition so as not to interfere with deployment, and this balance is no different from the balance that commanders apply in managing deployment readiness for any other service member. Indeed, current military regulation requires that all service members be determined fit or unfit for deployment in accordance with established standards, “as applied to other Service members whose deployability is similarly affected in comparable circumstances unrelated to gender transition.”⁵⁸

The Implementation Report claims that “limited data” make it “difficult to predict with any precision the impact on readiness of allowing gender transition,” but it cites the “potential” that individuals who transition gender will be “sent home from the deployment and render the deployed unit with less manpower.”⁵⁹ But DoD’s own data on deployment of service members diagnosed with gender dysphoria show these conclusions to be incorrect. Out of 994 service members diagnosed with gender dysphoria in FY2016 and the first half of 2017, 393 (40 percent) deployed in support of Operation Enduring Freedom, Operation Iraqi Freedom, or Operation New Dawn. *Exactly one* individual deploying with a diagnosis of gender dysphoria was unable to complete the deployment for mental health reasons since policy protecting transgender personnel from arbitrary dismissal was established in June 2016.⁶⁰ While the Implementation Report stated that “the Panel’s analysis was informed by the Department’s own data and experience obtained since the Carter policy took effect,”⁶¹ the Panel’s use of data is selective in nature. This information about actual deployment did not appear in the Implementation Report.

What did appear in the Implementation Report instead was a reference to service data showing that “cumulatively, transitioning Service members in the Army and Air Force have averaged 167 and 159 days of limited duty, respectively, over a one-year period.”⁶² This data was not connected to deployment and did not demonstrate any failure to meet a deployment obligation. What it did demonstrate, however, is the arbitrary way in which separate standards for fitness, targeted specifically against transgender personnel, can make them appear less medically fit and less deployable than their peers. Note that the Implementation Report’s discussion of limited-duty status did not include the Navy. That is because, as the data source itself explains, the Navy does not automatically assign limited-duty status for gender transition without specific justification, which leads to a much smaller percentage of individuals on limited duty.⁶³ It stands to reason that average days of limited duty will be higher if the status is assigned arbitrarily without individual assessment, unlike the standard practice for personnel who are not transgender.

The Implementation Report cites the specific deployment guidelines⁶⁴ applicable to the U.S. Central Command (CENTCOM) combatant command in support of its contention that gender dysphoria limits ability to deploy and also presents risk to the service member and to others in a deployed environment.⁶⁵ First, as was the case with respect to accession standards, the Implementation Report mischaracterizes the content of CENTCOM deployment standards in order to buttress its case that service members who will transition gender cannot meet them. Second, the CENTCOM deployment standards supply another example of creating a separate standard that targets only transgender

service members, rather than applying a single standard that evaluates fitness in comparable fashion to personnel who are not transgender.

It is correct, as the Implementation Report states, that diagnosed psychiatric conditions can, in some circumstances, require individual waiver prior to deployment. However, it is not correct that “most mental health conditions, as well as the medication used to treat them, limit Service members’ ability to deploy.”⁶⁶ Waivers are normally required only if the condition presents special risk: residual impairment of social and/or occupational performance, substantial risk of deterioration, or need for periodic counseling.⁶⁷ A judgment based on these factors would necessarily be individual and case-by-case. All other psychiatric concerns in the CENTCOM standard are tied to the use of particular psychiatric medication such as benzodiazepines, recent hospitalization or suicide ideation/attempt, or recent treatment for substance abuse.⁶⁸

Gender dysphoria, however, stands apart as the only condition requiring waiver regardless of lack of impairment, regardless of lack of risk of deterioration, and regardless of need for counseling. The CENTCOM standard automatically designates gender dysphoria as a condition with “complex needs” that must be treated differently. Not only does the standard require waiver in every instance regardless of mental fitness and stability, it specifically recommends that waiver should *not* be granted (“generally disqualified”) for the duration of gender transition, “until the process, including all necessary follow-up and stabilization, is completed.”⁶⁹

Standards that designate anyone as automatically unfit for indefinite periods of time, without consideration of individual fitness, are extremely rare. In fact, the only mental health diagnoses that CENTCOM designates as a greater risk than gender dysphoria are psychotic and bipolar disorders, which are “strictly” disqualifying rather than “generally” disqualifying. This is clearly a circumstance in which gender dysphoria and gender transition are being evaluated under a standard that is unique to transgender service members. No other service members with mental health diagnoses are so completely restricted from deployment, with extremely rare and justified exception. This artificial restriction on deployment is then used to justify a ban on transgender service members and gender transition.

Service members routinely deploy with medication requirements, including hormones, but a transgender person’s use of hormones is again assessed in unique fashion. The CENTCOM standard states that hormone therapies for endocrine conditions must be stable, require no laboratory monitoring or specialty consultation, and be administered by oral or transdermal means.⁷⁰ Part of the justification for the Implementation Report’s conclusion that gender transition is inconsistent with deployment is the assumption that hormone therapy requires quarterly lab monitoring for the first year of treatment.⁷¹ The Implementation Report cited civilian Endocrine Society guidelines in support of that monitoring requirement. According to the Implementation Report:

Endocrine Society guidelines for cross-sex hormone therapy recommend quarterly bloodwork and laboratory monitoring of hormone levels during the

first year of treatment . . . If the operational environment does not permit access to a lab for monitoring hormones (and there is certainly debate over how common this would be), then the Service member must be prepared to forego treatment, monitoring, or the deployment. Either outcome carries risks for readiness.⁷²

While it is true that Endocrine Society standards of care recommend one year of monitoring after the commencement of hormone therapy, the Implementation Report did not disclose that the author of those guidelines communicated in writing to DoD to explain his medical judgment that monitoring hormone levels for three months prior to deployment, not twelve, was easily sufficient and that “there is no reason to designate individuals as non-deployable after the commencement of hormone replacement therapy.”⁷³ Dr. Wylie C. Hembree, author of the Endocrine Society’s standards of care, wrote the following in an October 2015 letter to the Pentagon’s transgender policy group:

- (1) The recommendation for clinical monitoring was intended to cover a diverse, civilian population, including older, unreliable and/or unhealthy individuals who are not characteristic of the population of service members;
- (2) An initial monitoring at the 2–3 month mark is important to determine whether the initial prescribed hormone dose is appropriate for bringing an individual’s hormone levels into the desired range. The initial dose will be accurate for approximately 80% of young, healthy individuals. Of the remaining 20% whose hormone levels will be discovered to be slightly too high or too low at the initial monitoring, adjusting the dose to bring levels into the desired clinical range is a simple matter;
- (3) Of the approximately 20% whose hormone levels will be discovered to be slightly too high or too low at initial monitoring, the health consequences of being slightly out of range are not significant;
- (4) The monitoring and, if necessary, re-adjustment of prescribed doses do not need to be performed by endocrinologists or specialists. Any physicians or nurses who have received a modest amount of training can perform these tasks;
- (5) Research is quite clear that hormone replacement therapy, especially for young, healthy individuals, is safe, with complication rates of less than 5%.

Hembree concluded that “There is no reason to designate individuals as non-deployable after the commencement of hormone replacement therapy. While individuals might be placed on limited duty (office work) until the initial monitoring at the 2–3 month mark, they can perform their jobs overseas in a wide range of deployed settings both before and after the initial monitoring.”

The Hembree letter was provided directly to a Pentagon official who played a prominent role on the Transgender Service Review Working Group (TSRWG) that former Defense Secretary Carter created to study readiness implications of inclusive policy. The TSWRG, in turn, relied on the letter in determining how to implement inclusive policy without compromising readiness. That same official played a prominent role in Secretary Mattis’s Panel of Experts, but the Implementation Report did not mention the Hembree

letter. Instead, it inaccurately claimed that a need for long-term monitoring would preclude deployment. The Report then established a false choice in claiming that service members commencing hormone therapy would have to “forego treatment, monitoring, or the deployment.”⁷⁴ The Report added that “some experts in endocrinology . . . found no harm in stopping or adjusting hormone therapy treatment to accommodate deployment during the first year of hormone use.”⁷⁵ As the author of the Endocrine Society’s standards of care explained, however, there is no need to forego deployment after the initial 2–3 month period of monitoring.

Nor is refrigeration an obstacle to deployment. The Implementation Report cites a RAND study observation that British service members taking hormones serve in deployed settings, but that “deployment to all areas may not be possible, depending on the needs associated with any medication (e.g. refrigeration).”⁷⁶ However, hormone medications do not require refrigeration.

More broadly, singling out transgender service members as warranting a downgrade in medical fitness or deployment status is at odds with the way that the Defense Department treats hormone therapy for non-transgender troops. In 2014, former U.S. Surgeon General Joycelyn Elders co-directed a commission with a co-author of this study (Steinman), and the commission published a peer-reviewed study addressing hormones, gender identity, deployability, and fitness. While the commission’s discussion of hormones is lengthy, we quote it in full because it underscores the contrast between the Implementation Report’s treatment of hormone therapy for transgender personnel and the way that non-transgender service members requiring hormones are managed. The commission conducted its research before the implementation of inclusive policy, yet its observations about the double standards of the historical ban are fully applicable to the Implementation Report’s proposed ban:

[T]he military consistently retains non-transgender men and women who have conditions that may require hormone replacement. For example, the military lists several gynecological conditions (dysmenorrhea, endometriosis, menopausal syndrome, chronic pelvic pain, hysterectomy, or oophorectomy) as requiring referral for evaluation only when they affect duty performance. And the only male genitourinary conditions that require referral for evaluation involve renal or voiding dysfunctions. The need for cross-sex hormone treatment is not listed as a reason for referral for either men or women. The military also allows enlistment in some cases despite a need for hormone replacement. DoDI 6130.03, for example, does not disqualify all female applicants with hormonal imbalance. Polycystic ovarian syndrome is not disqualifying unless it causes metabolic complications of diabetes, obesity, hypertension, or hypercholesterolemia. Virilizing effects, which can be treated by hormone replacement, are expressly not disqualifying.

Hormonal conditions whose remedies are biologically similar to cross-sex hormone treatment are grounds neither for discharge nor even for referral for medical evaluation, if service members develop them once they join the

armed forces. Male hypogonadism, for example, is a disqualifying condition for enlistment, but does not require referral for medical evaluation if a service member develops it after enlisting. Similarly, DoDI 6130.03 lists “current or history of pituitary dysfunction” and various disorders of menstruation as disqualifying enlistment conditions, but personnel who develop these conditions once in service are not necessarily referred for evaluation. Conditions directly related to gender dysphoria are the only gender-related conditions that carry over from enlistment disqualification and continue to disqualify members during military service, and gender dysphoria appears to be the only gender-related condition of any kind that requires discharge irrespective of ability to perform duty.

Military policy allows service members to take a range of medications, including hormones, while deployed in combat settings. According to a Defense Department study, 1.4 percent of all US service members (approximately 31,700 service members) reported prescription anabolic steroid use during the previous year, of whom 55.1 percent (approximately 17,500 service members) said that they obtained the medications from a military treatment facility. One percent of US service members exposed to high levels of combat reported using anabolic steroids during a deployment. According to Defense Department deployment policy, “There are few medications that are inherently disqualifying for deployment.” And, Army deployment policy requires that “A minimum of a 180-day supply of medications for chronic conditions will be dispensed to all deploying Soldiers.” A former primary behavioral health officer for brigade combat teams in Iraq and Afghanistan told Army Times that “Any soldier can deploy on anything.” Although Tricare officials claimed not to have estimates of the amounts and types of medications distributed to combat personnel, Tricare data indicated that in 2008, “About 89,000 antipsychotic pills and 578,000 anti-convulsants [were] being issued to troops heading overseas.” The Military Health Service maintains a sophisticated and effective system for distributing prescription medications to deployed service members worldwide.⁷⁷

The Implementation Report’s contention that transgender service members commencing hormone therapy must “forego treatment, monitoring, or the deployment” is inaccurate. Such therapy is not grounds for characterizing transgender service members as non-deployable or medically unfit beyond the initial 2–3 month monitoring period. Nor are such characterizations consistent with DoD’s willingness to access, retain, and deploy tens of thousands of non-transgender service members who require hormones.

DoD’s rationale for reinstating the ban cannot be about lost duty time during gender transition, because DoD’s latest policy recommendation disqualifies from enlistment applicants who have already transitioned gender. The consistent theme across the Implementation Report is to create separate standards that target gender dysphoria and gender transition as uniquely disqualifying circumstances requiring uniquely

disqualifying measures, but to disregard generally applicable standards that transgender members would in fact meet. This allows the Implementation Report to suggest that transgender service members must be seeking “special accommodations,”⁷⁸ when the only accommodation they seek is the opportunity to meet general standards that apply to all.

Mental health encounters mandated by policy

The Implementation Report observes that “Service members with gender dysphoria are also nine times more likely to have mental health encounters than the Service member population as a whole (28.1 average encounters per Service member versus 2.7 average encounters per Service member).”⁷⁹ [The encounters took place over 22 months, from October 2015 to July 2017.] However, the Implementation Report overlooked the main reason why service members diagnosed with gender dysphoria have high mental health utilization, leaving the incorrect impression that high usage is a reflection of medical unfitness or the difficulty of treating gender dysphoria.

In particular, the Implementation Report neglected to consider over-prescription of appointments for administrative rather than medical reasons. We determined in our research that service members with gender dysphoria diagnoses have high rates of utilization not because they are medically unfit, but because the military has over-prescribed visits as part of the process of providing transition-related care, requiring numerous medically unnecessary encounters for service members diagnosed with gender dysphoria, but not other medical conditions.

The over-prescription of appointments in the military has resulted from two distinct considerations, neither of which reflects medical unfitness. First, it has resulted from the medicalization of administrative matters, as aspects of care that would normally be handled administratively have been assigned to medical providers. As a result, the gender transition process can require a dozen or more mental health appointments regardless of the individual’s actual mental health status and without regard to stability, fitness, or need for care. For example, a command decision to grant permission to wear a different uniform to work (exception to policy) requires a mental health workup and recommendation. Each step of the transition process, regardless of import or need, requires mental health workup and recommendation, and the medicalization of non-medical decisions inevitably increases usage.

The reason for the extra layer of administrative “ticket-punching” is not medical. It is the result, rather, of a military determination that it cannot allow transition-related medical care to occur without command supervision designed to ensure that changes in uniforms, grooming standards, facilities use, and the like do not undermine good order and discipline. And while these considerations are important and necessary to maintain operational readiness, they are not indicators of impaired mental health in the transgender member. The military, of course, follows standard professional guidelines for the diagnosis of gender dysphoria, the prescription of hormone therapy, and the authorization of surgery. The generation of unnecessary mental health visits comes not from these

decisions directly, but from the fact that, in the military, mental health providers serve as emissaries between the medical system and commanders. Mental health providers need to sign off on various administrative decisions along the way that have no counterpart in the civilian system, and no counterpart in the military's treatment of other mental health conditions. The military adds on an extra layer of medical approval to what otherwise would be purely administrative or workplace decisions, and this necessarily affects the degree to which medical providers are involved.

We reviewed a range of documents that mandate or guide the steps taken by military medical teams responsible for the care of transgender service members. For example, the principal DoD regulation governing gender transition⁸⁰ expands a medical provider's responsibility beyond making medical diagnoses and determining medically necessary treatment. In addition to those traditional and necessary aspects of health care, medical providers are responsible for justifying those medical judgments "for submission to the commander."⁸¹ Medical providers must "advise the commander" on matters of gender transition, and in turn commanders must "coordinate with the military medical provider regarding any medical care or treatment provided to the Service member, and any medical issues that arise in the course of a Service member's gender transition."⁸² The commander must approve every step along the path of gender transition, including the timing of any medical treatment and the timing of gender transition itself. Even with respect to military matters such as an exception to policy to wear a different-gender uniform, a military medical provider is responsible for consultation as part of requesting a commander's approval. These extra administrative consultations cannot help but increase medical utilization, even though they are not medically necessary in a traditional sense and do not reflect any lack of medical fitness.

The Commander's Handbook similarly emphasizes the unusual dual layer of justification and approval for decisions affecting transgender service members: "The oversight and management of the gender transition process is a team effort with the commander, the Service member, and the military medical provider."⁸³ Our observations are not intended to suggest there is anything inappropriate or militarily unnecessary about regulatory requirements that medical providers serve as emissaries between the medical system and the command structure. The point is simply that these dual layers of consultation and approval cannot help but drive up utilization of mental health care, but for reasons that are unrelated to mental health or fitness for duty.

Service-specific regulations produce over-prescriptions as well. According to interim guidance contained in a Navy Bureau of Medicine and Surgery document, a mental health diagnosis of gender dysphoria, coupled with a provider's determination that gender transition is medically necessary to relieve gender dysphoria, is only the first step in a series of requirements for approval of that medical care. Once a diagnosis and a recommendation for treatment is made, that diagnosis and recommendation must be referred for another layer of medical approval from the Transgender Care Team (TGCT). The TGCT will either validate or revise those medical decisions and forward the plan back to the originating provider. These decisions must then be documented once again as part of the package prepared to obtain a commander's approval: "Once the . . . medical

provider has received the validated medical treatment plan from the TGCT, the Service member and . . . medical provider should incorporate the validated medical treatment plan into the full gender transition plan for the Service member's commanding officer's review."⁸⁴

Even at the end of the process of gender transition, the service member's "psychological stability" must be validated by a treating provider, validated a second time by the TGCT, and then validated a third time by a commander, all before an official gender marker change can occur. It might make sense to rely on a service member's duty performance as part of the judgment of whether he or she "consistently demonstrated psychological stability to transition to the preferred gender,"⁸⁵ but service-level procedures can instead substitute arbitrary numbers of mental-health visits over arbitrary minimums of time to satisfy a finding of "psychological stability." An "Individualized TGCT Care Plan" obtained from the Naval Medical Center in San Diego recommends that "At a minimum, the service member [undergoing transition] should follow up with a mental health provider or psychosocial support group on a monthly basis." These at-least-monthly visits are used to demonstrate a "6 month period of stability in real life experience documented by a mental health professional" and a "6 month period of emotional/psychosocial stability documented by a mental health professional."⁸⁶

A senior military psychologist who has worked with transgender military members confirmed to us that in order to transition gender, a medical team must document several benchmarks of readiness for treatment and also for permission to change one's gender marker in the military identification system. As a result, he explained, many transgender service members may be required to attend multiple, inexpensive support group sessions that are essentially used as "ticket-punching" to verify administrative requirements. "It almost requires them to have those individual sessions on an ongoing basis," the psychologist said.⁸⁷ These requirements established by departments throughout the military health system are far more voluminous than anything required by the civilian medical system. Satisfying them necessitates extensive documentation, which creates incentives for over-prescribing health care appointments.

Lack of experience is the second reason for the over-prescribing of mental health visits, as well-intentioned medical providers inexperienced in transition-related care have been overly cautious in documenting gender stability. It is inevitable that an adjustment period would be needed for the military medical system, given how new it is to transgender health care. A survey of military medical providers found that even after the lifting of the ban, physicians were unprepared to treat transgender service members, as most respondents "did not receive any formal training on transgender care, most had not treated a patient with known gender dysphoria, and most had not received sufficient training" to oversee cross-hormone therapy.⁸⁸ This inevitable learning curve is closely connected to the over-prescribing of visits, in that overly cautious medical providers are requiring numerous, medically unnecessary appointments to document stability.

One social worker who is a clinical case manager for transgender service members explained that "The only way to verify that someone has been stable in their gender for

six months is if they communicate with someone showing that they're stable. So they must be checking in at least once per month," and sometimes more. As a result of that requirement, he said his department put recommendations in their transition treatment plans that service members check in with either a primary care provider or mental health provider regularly, or that they attend one of the transgender support groups. "Most of the naval hospitals within our region have a weekly trans support group," he said, "and that tends to be provided through the mental health department. People may be attending those meetings every week and that would show up in their notes as going to a mental health appointment every week." In short, to establish required stability, individuals "have to be reporting that to someone so it's documented so we can point to it and say, 'See? They're stable,' so we can draft a memo verifying it."⁸⁹

A Veterans Affairs psychiatrist familiar with the military's management of transgender personnel told us that doctors "could be requiring the person to go to a mental health provider to check on their stability, and they *have* to go. These are situations that would be absent any specific need for mental health on the part of the service member. They're either explicitly required to go or implicitly required: you can't demonstrate stability if you're not seen by someone." He estimated that "people may have four to seven appointments, *absent any particular need*, just to demonstrate that they're stable in the course of their in-service transition." He added that most military clinicians "are unfamiliar with the process, and they don't yet have capacity. They're trying to learn this as they go along, and so they're being cautious. There's a kind of learning curve. As the system becomes more adept at working with this population, it could be that the number of visits goes down because the clinicians don't need the comfort of seeing the people as often as they do now."⁹⁰

Transgender service members confirm that most of their mental health encounters are the result of over-prescribing visits, not medical need. We assessed the experiences of ten Active Duty transgender troops who transitioned or started to transition over the past two years. Out of 81 total mental health visits reported, 97.5 percent (79 visits) were classified as obligatory. A large number of these visits were mandated monthly counseling sessions that helped provide administrators with ways to document readiness and stability of transitioning service members. An Army First Lieutenant told us that upon beginning hormone therapy, he had "monthly checkups with my behavioral health clinical social worker, monthly checkups with my nurse case manager." A sailor reported that "I have to go for a five-minute consultation for them just to say, 'this is when your surgery is.'"⁹¹

An analysis by the Veterans Health Administration demonstrates that when a system is not characterized by over-prescribing, mental health care utilization among transgender individuals is far lower than the rate reported by DoD, and also that utilization among transgender and non-transgender individuals is roughly equivalent (as suggested below by the California Health Interview Survey). VHA data reveal that from FY2011 to FY2016, transgender patients averaged between 2.3 and 4.4 mental health encounters per year, as compared to slightly lower utilization among non-transgender patients diagnosed with depression.⁹² These data suggest that DoD's finding that service members diagnosed

with gender dysphoria have an average of 15.3 mental health encounters per year is not a reflection of medical need.

Table 1. Incidence proportion of mental health utilization among VA patients by FY

	FY11	FY12	FY13	FY14	FY15	FY16
TRANSGENDER GROUP	n	n	n	n	n	n
Total unique patients	396	487	562	680	879	1089
Total # of mental health encounters	923	1454	1584	2653	2943	4806
Incidence of encounters/patient	2.3	3.0	2.8	3.9	3.3	4.4
SAMPLE OF NONTRANSGENDER PATIENTS						
Total unique patients	1188	1461	1686	2040	2637	3267
Total patients with depression diagnosis	173	201	230	276	338	446
Total # of mental health encounters	248	274	432	438	745	1381
Incidence of encounters/patient	1.4	1.4	1.9	1.6	2.2	3.1

Research indicates that when health care delivery is not over-prescribed, utilization among transgender and non-transgender adults is roughly equivalent. A 2018 study drew on California Health Interview Survey (CHIS) data to assess “utilization rates in access to primary and specialty care among a large cohort of insured transgender and cisgender [i.e., not transgender] patients.” The authors calculated the “percentage of patients accessing primary care providers or specialty care providers among patients who reported having insurance coverage” and categorized patients as low, medium, or high utilizers. The results were that transgender patients “accessed both primary and specialty care services at a lower frequency than cisgender individuals and were more likely to fall into the low and medium utilizer groups.” Fully 72.9 percent of transgender individuals were low utilizers (0–3 annual visits) compared to 70.9 percent of non-transgender individuals. Just 0.8 percent of transgender individuals were high utilizers (13–25 annual visits) compared to 4.6 percent of non-transgender people. The authors concluded that “transgender individuals are less likely to utilize healthcare services” than the overall population.⁹³

Table 2: Frequency of Doctor Visits by Gender Identity

NUMBER OF DOCTOR VISITS IN PAST YEAR	GENDER IDENTITY					
	Not transgender (i.e., cisgender)		Transgender or gender non-conforming		All	
Low Utilizers (0–3 visits)	70.9%	15,117,000	72.9%	81,000	70.9%	15,197,000
Medium Utilizers (4–12 visits)	24.4%	5,203,000	26.3%	29,000	24.4%	5,232,000
High Utilizers (13–25 visits)	4.6%	990,000	0.8%	1,000	4.6%	991,000
Total	100%	21,310,000	100%	110,000	100%	21,421,000

High utilization is not evidence of unfitness, the burdensome needs of transgender troops, or the difficulty of treating gender dysphoria. To the extent that service members diagnosed with gender dysphoria log more mental health visits than average, it is because the system treats them differently and requires more engagement with mental health providers. It has little to do with need for care or fitness for duty. Military medical providers are taking extra steps, sometimes to comply with regulations, and other times out of excessive caution, to justify medical and administrative decisions during the transition process. DoD's failure to address this possibility in its research creates the misimpression that excessive utilization demonstrates the medical unfitness of transgender troops. But it is the military bureaucracy that creates elevated usage figures, not transgender service members.

Suicide is a military problem, not a transgender problem

Children of service members are more than 50 percent more likely to have attempted suicide than the general population, yet the military does not bar individuals in this high-risk group from entry.⁹⁴ The Implementation Report, however, attempts to invoke an analogous risk factor among transgender people in general as a basis for disqualification. The Implementation Report claims that "high rates of suicide ideation, attempts, and completion among people who are transgender are also well documented in the medical literature," and cites research indicating lifetime rates of suicide attempts among transgender civilians ranging from 41 percent to as high as 57 percent. But neither applicants for military service nor serving members in uniform are evaluated by characteristics of larger groups; they are measured by standards as individuals.

The Implementation Report also mischaracterizes and selectively cites DoD data on military personnel that, if accurately presented, would in fact demonstrate that rates of suicidal ideation among transgender and non-transgender service members are roughly equivalent. The Implementation Report claims that among military personnel, "Service members with gender dysphoria are eight times more likely to attempt suicide than Service members as a whole (12% versus 1.5%)" during a 22-month study window.⁹⁵ This is an inaccurate reading of DoD's own data as well as an inaccurate interpretation of what the data mean. First, the DoD data do not show that service members with gender dysphoria were eight times more likely to *attempt* suicide than other service members during the 22-month study period, but to *contemplate* suicide, a major distinction that the Implementation Report misconstrued.

Second, service members with gender dysphoria are not eight times more likely to contemplate suicide than other service members, because the data under-report the frequency of suicidal thoughts among service members as a whole. The reported 1.5 percent suicidal ideation rate among service members as a whole was based on a review of administrative records.⁹⁶ When DoD used more sophisticated methods to determine rates of suicidality among service members not being treated for behavioral health problems, military researchers determined that 14 percent of service members have had suicidal thoughts at some time in their lives, 11 percent had suicidal thoughts at some

point during their military careers, and 6 percent had suicidal thoughts during the past year.⁹⁷ Suicide is a military problem. It is not a transgender problem.

Finally, while DoD data indicate that service members diagnosed with gender dysphoria are slightly more prone to suicidal ideation than other service members, the Implementation Report did not take the historical legacy of the transgender ban into account. Extensive research has confirmed that both stigma and the denial of medically necessary care can lead to suicidality.⁹⁸ The historical transgender ban, in other words, contributed to stigma and deprivation of health care, which exacerbates the problems the Implementation Report has deemed disqualifying.

The reaction of professional mental health providers to this circular reasoning—denying necessary health care to transgender troops and then citing suboptimal health as the reason for exclusion—is summed up by statements recently released by two of the largest mental health associations in America. The CEO of the American Psychological Association recently stated that he was “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.”⁹⁹ And the American Psychiatric Association stated that the Pentagon’s anti-transgender “discrimination has a negative impact on the mental health of those targeted.”¹⁰⁰ If inclusive policy remains in effect, DoD will continue to provide medically necessary care to transgender service members. As a result, we would expect the slightly elevated ideation rate among service members diagnosed with gender dysphoria to disappear over time.

Unit Cohesion Has Not Been Compromised

The Implementation Report concludes that inclusive policy for transgender personnel could compromise unit cohesion, privacy, fairness, and safety by allowing transgender men who retain some physiological characteristics of their birth sex and transgender women who retain some physiological characteristics of their birth sex to serve in the military, thus blurring the line that distinguishes male and female bodies:

[B]y allowing a biological male who retains male anatomy to use female berthing, bathroom, and shower facilities, it [inclusive policy] undermines the reasonable expectations of privacy and dignity of female Service members. By allowing a biological male to meet the female physical fitness and body fat standards and to compete against females in gender-specific physical training and athletic competition, it undermines fairness (or perceptions of fairness) because males competing as females will likely score higher on the female test than on the male test and possibly compromise safety.¹⁰¹

According to the Implementation Report, “sex-based standards ensure fairness, equity, and safety; satisfy reasonable expectations of privacy; reflect common practice in society; and promote core military values of dignity and respect between men and women—all of which promote good order, discipline, steady leadership, unit cohesion, and ultimately

military effectiveness and lethality.”¹⁰² Yet the Report does not include any evidence to support its contention that inclusive policy has had these effects. Three weeks after the Report’s publication, Army Chief of Staff General Mark Milley responded to Senator Kirsten Gillibrand, who asked whether he had heard “anything about how transgender service members are harming unit cohesion,” by testifying that “I have received precisely zero reports of issues of cohesion, discipline, morale and all those sorts of things.”¹⁰³ Chief of Naval Operations Admiral John Richardson, Air Force Chief of Staff General David Goldfein, and Marine Corps Commandant General Robert Neller subsequently confirmed that inclusive policy has not compromised cohesion.¹⁰⁴

The Implementation Report’s explanation for failing to provide evidence is that cohesion “cannot be easily quantified” and that “Not all standards . . . are capable of scientific validation or quantification. Instead, they are the product of professional military judgment acquired from hard-earned experience leading Service members in peace and war or otherwise arising from expertise in military affairs. Although necessarily subjective, this judgment is the best, if not only, way to assess the impact of any given military standard on the intangible ingredients of military effectiveness mentioned above—leadership, training, good order and discipline, and unit cohesion.”¹⁰⁵

This contention, however, does not withstand scrutiny. In response to Senator Gillibrand’s question about whether transgender troops have harmed unit cohesion, General Milley testified that “it is monitored very closely because I am concerned about that.”¹⁰⁶ In addition, many military experts have quantified cohesion and other dimensions of readiness, and have assessed cause-and-effect claims about those phenomena in their research.¹⁰⁷ In 2011 and 2012, for example, a group of Service Academy professors used multiple methods including surveys, interviews, field observations, and longitudinal analysis to assess whether the repeal of “don’t ask, don’t tell” (DADT) had impacted readiness and its component dimensions, including unit cohesion and morale, and results were published in a leading peer-reviewed military studies journal.¹⁰⁸

In the case at hand, DoD could have studied the validity of its contentions about cohesion, privacy, fairness, and safety without difficulty. For example, DoD could have (1) assessed readiness by comparing the performance of units that include a service member diagnosed with gender dysphoria with units that do not include anyone with a diagnosis; (2) measured cohesion via interviews, surveys, and/or field observations and then compared results from units that include a service member diagnosed with gender dysphoria with units that do not include anyone with a diagnosis; (3) assessed privacy and fairness via interviews, surveys, and/or field observations and then compared results from units that include a service member diagnosed with gender dysphoria with units that do not include anyone with a diagnosis; and (4) assessed safety by comparing disciplinary records of units that include a service member diagnosed with gender dysphoria with units that do not include anyone with a diagnosis.

Instead, and in lieu of evidence, the Implementation Report offers three scenarios, two of which are hypothetical, to sustain its assertions. The scenarios, however, do not sustain

the conclusion that inclusive policy has compromised or could compromise cohesion, privacy, fairness, or safety. Under the first hypothetical scenario, fairness and safety are compromised when transgender women compete with cisgender women in sporting events, for example boxing competitions.¹⁰⁹ The Report assumes incorrectly that “biologically-based standards will be applied uniformly to all Service members of the same biological sex,” contrary to current practice in which gender-based presumptions are adjustable based on circumstances. At the U.S. Military Academy, for example, the Implementation Report observes that “Matching men and women according to weight may not adequately account for gender differences regarding striking force.” But the Report ignores that Cadets’ skill level and aggression, not just weight, are factored into safety decisions, and West Point allows men and women to box each other during training.¹¹⁰

While sex-based standards are used in concert with other factors to promote fairness and safety, male-female segregation is not absolute—and it is not sufficient. Ensuring fairness and safety in combative training is always a command concern because of the wide variation in body size and weight within gender even when gender is defined by birth. Commanders at all levels are able to make judgments about how to conduct training in ways that adequately protect the participants, and they are able to do the same thing for transgender service members when and if needed. This hypothetical scenario does not lend any credence to the contention that inclusive policy has compromised or could compromise cohesion, privacy, fairness, or safety.

Under the second hypothetical scenario, a transgender man who has not had chest-reduction surgery wants to perform a swim test with no shirt and breasts exposed. It is farfetched to imagine a transgender service member making such a request, and the Implementation Report does not offer any actual examples to buttress this hypothetical concern despite almost two years of inclusive policy. Despite the low likelihood of such a scenario, the Commander’s Handbook guides commanders in what to do, and the guidance is sufficient. The Handbook holds the transgender service member responsible for maintaining decorum: “It is courteous and respectful to consider social norms and mandatory to adhere to military standards of conduct.”¹¹¹ Then, the Handbook advises commanders that they may counsel the service member on this responsibility, but also may consider other options such as having everyone wear a shirt. Ultimately, according to the Handbook, the fundamental principle for commanders is that, “It is within your discretion to take measures ensuring good order and discipline.”¹¹² Similar to the first hypothetical scenario, this scenario does not sustain a conclusion that inclusive policy has compromised or could compromise cohesion, privacy, fairness, or safety.

The third scenario, the only scenario that is not hypothetical, describes a cisgender female who claimed that the presence in shower facilities of a transgender female who retained some physiological characteristics of birth sex undermined her privacy, and the transgender service member claimed that her commander had not been supportive of her rights.¹¹³ DoD guidance offers commanders tools that should have been sufficient for resolving the matter. The situation closely matches scenarios 11 and 15 in the Commander’s Handbook, which emphasize that all members of the command should be

treated with dignity and respect: “In every case, you may employ reasonable accommodations to respect the privacy interests of Service members.”¹¹⁴ Commanders are given the following guidance on reasonable accommodations: “If concerns are raised by Service members about their privacy in showers, bathrooms, or other shared spaces, you may employ reasonable accommodations, such as installing shower curtains and placing towel and clothing hooks inside individual shower stalls, to respect the privacy interests of Service members. In cases where accommodations are not practicable, you may authorize alternative measures to respect personal privacy, such as adjustments to timing of the use of shower or changing facilities.”¹¹⁵

The Commander’s Handbook also makes clear that the transgender service member has responsibility: “Maintaining dignity and respect for all is important. You will need to consider both your own privacy needs and the privacy needs of others. This includes, but is not limited to, maintaining personal privacy in locker rooms, showers, and living quarters. One strategy might include adjusting personal hygiene hours.”¹¹⁶

Inclusive policy cannot be blamed if commanders fail to follow the guidance or to implement it properly, and this scenario does not lend any credibility to the Implementation Report’s contention that inclusive policy has compromised or could compromise cohesion, privacy, fairness, or safety. Army training materials are even more straightforward, essentially reminding Soldiers that military life involves a loss of privacy and instructing them that it is not the Army’s job to protect tender sensibilities: “Understand that you may encounter individuals in barracks, bathrooms, or shower facilities with physical characteristics of the opposite sex despite having the same gender marker in DEERS.”¹¹⁷

Cohesion and Related Concerns Have Historically Proven Unfounded

The Implementation Report’s contention that inclusive policy could compromise cohesion, privacy, fairness, and safety echoes discredited rationales for historical prohibitions against African Americans, women, and gays and lesbians. In each case, military leaders made arguments about cohesion, privacy, fairness, and safety.¹¹⁸ In the case of “don’t ask, don’t tell,” for example, leaders insisted that because heterosexual service members did not like or trust gay and lesbian peers, lifting the ban would undermine unit cohesion. One of the principal architects of the policy, the late professor Charles Moskos, insisted that allowing gay men and lesbians to shower with heterosexuals would compromise privacy, and a judge advocate general argued that a “privacy injury” would take place every time an openly gay or lesbian service member witnessed the naked body of a heterosexual peer.¹¹⁹ Others argued that the repeal of DADT would lead to an increase in male-male sexual assault.¹²⁰ One year after the ban’s repeal, military professors published a study repudiating these predictions, and the New York Times editorialized that “politicians and others who warned of disastrous consequences if gay people were allowed to serve openly in the military are looking pretty foolish.”¹²¹

Inclusive Policy Promotes Readiness

Scholarly research has shown that inclusive policy for transgender personnel promotes military readiness. According to a comprehensive implementation analysis by retired General Officers and scholars writing before the 2016 lifting of the ban, “when the US military allows transgender personnel to serve, commanders will be better equipped to take care of the service members under their charge.”¹²² While scholars have explored the relationship between readiness and inclusive policy for transgender personnel from a variety of angles including medical fitness, implementation, command climate, and deployability, all available research has reached the same conclusion: At worst, inclusive policy does not compromise readiness. At best, it enhances readiness by holding all service members to a single standard and promoting medical readiness.¹²³

After a year of in-depth research, the Pentagon’s Transgender Service Review Working Group (TSRWG) reached that very conclusion. Former Secretary of Defense Carter created the TSWG on July 28, 2015, to study “the policy and readiness implications of welcoming transgender persons to serve openly.”¹²⁴ The TSWG included dozens of civilian and military policy analysts who engaged in extensive research, and who concluded that holding transgender service members “to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability, and retention, is consistent with military readiness.”¹²⁵ DoD senior civilian leaders as well as the Service Chiefs signed off on the lifting of the transgender ban on June 30, 2016, because they concluded that inclusive policy would be “consistent with military readiness.” The Office of the Secretary of Defense as well as the Services published 257 pages of implementing guidance spread across 14 documents and regulations.¹²⁶ These documents instruct commanders and service members how to implement inclusive policy without compromising readiness.

As part of the TSWG’s research, DoD commissioned the RAND Corporation to study whether inclusive policy for transgender personnel would compromise readiness. RAND studied the health care needs of transgender service members and estimated expected health care utilization rates as well as the expected financial cost of providing care following the lifting of the ban. In addition, RAND studied the impact of inclusive policy on unit cohesion and availability to deploy. Finally, RAND studied whether readiness had been compromised in foreign militaries that allow transgender personnel to serve openly. RAND published a 91-page study concluding that the impact of inclusive policy would be “negligible.”¹²⁷

Organizational experiences confirm the findings of the scholarly research. Eighteen foreign militaries allow transgender personnel to serve openly, and none has reported any compromise to readiness, cohesion, or any other indicator of military performance. A peer-reviewed study of 22 years of inclusive policy for transgender personnel in the Canadian Forces concluded that “allowing transgender personnel to serve openly has not harmed the CF’s effectiveness.”¹²⁸ According to RAND’s analysis of foreign militaries that allow transgender personnel to serve openly, “In no case was there any evidence of

an effect on the operational effectiveness, operational readiness, or cohesion of the force.”¹²⁹

In the U.S., transgender service members have been serving openly for almost two years and have been widely praised by commanders. We interviewed four former senior DoD officials who oversaw personnel policy for more than 6 months of inclusive policy, as well as one current senior DoD official who oversaw personnel policy for more than 9 months of inclusive policy. During their combined 35 months of collective responsibility for personnel policy, none of these senior officials was aware of any evidence that inclusive policy compromised readiness. According to one of the former officials, “As of the time we left office, we had not seen any evidence that the Department’s new transgender policy had resulted in a negative impact on readiness.” When we asked former Navy Secretary Ray Mabus if inclusive policy for transgender personnel promoted readiness, he observed, “Absolutely . . . A more diverse force enhances readiness and combat effectiveness.”¹³⁰

DoD’s critique of prior readiness research is unsupported by evidence

In recommending reinstatement of the ban, however, the Implementation Report takes aim at RAND’s methodology as well as the validity of its conclusions. According to a memorandum from Secretary Mattis that accompanied the release of the Implementation Report, the RAND study “contained significant shortcomings. It referred to limited and heavily caveated data to support its conclusions, glossed over the impacts of healthcare costs, readiness, and unit cohesion, and erroneously relied on the selective experiences of foreign militaries with different operational requirements than our own.”¹³¹ The Implementation Report elaborated:

The RAND report thus acknowledged that there will be an adverse impact on health care utilization, readiness, and unit cohesion, but concluded nonetheless that the impact will be “negligible” and “marginal” because of the small estimated number of transgender Service members . . . Because of the RAND report’s macro focus, however, it failed to analyze the impact at the micro level of allowing gender transition by individuals with gender dysphoria. For example, . . . the report did not examine the potential impact on unit readiness, perceptions of fairness and equity, personnel safety, and reasonable expectations of privacy at the unit and sub-unit levels, all of which are critical to unit cohesion. Nor did the report meaningfully address the significant mental health problems that accompany gender dysphoria—from high rates of comorbidities and psychiatric hospitalizations to high rates of suicide ideation and suicidality—and the scope of the scientific uncertainty regarding whether gender transition treatment fully remedies those problems.¹³²

Referring to both the TSRWG as well as the RAND study, the Implementation Report concludes that “the realities associated with service by transgender individuals are more complicated than the prior administration or RAND had assumed.”¹³³

The Implementation Report's critique of the RAND study is unsupported by evidence. Before addressing flaws in the critique, we underscore the depth of RAND's military expertise and trustworthiness. The RAND Corporation is perhaps the most distinguished and trusted research institute in the U.S. on matters of defense and national security, and RAND operates three federally funded research and development centers engaging in military research: RAND Arroyo Center, sponsored by the U.S. Army, RAND Project Air Force, sponsored by the U.S. Air Force, and RAND National Defense Research Institute, sponsored by the Office of the Secretary of Defense, the Joint Staff, the Unified Combatant Commands, the Department of the Navy, and other defense agencies.

While these centers are not government entities, they cooperate closely with their Defense Department sponsors. According to RAND Arroyo's 2015 annual report, for example, the Arroyo Center Policy Committee consisted of 17 General Officers (including the U.S. Army Vice Chief of Staff, the Chief of the National Guard Bureau, five Deputy Chiefs of Staff, and the Commanding General of U.S. Army Forces Command) and five Assistant Secretaries of the Army. RAND Arroyo's Director reported that "We collaborate closely with our Army sponsors not only as we develop our research agenda and design individual analysis, but also as we conduct our research."¹³⁴

The Defense Department relies on RAND to provide nonpartisan, methodologically sophisticated research studies on strategy, doctrine, resources, personnel, training, health, logistics, weapons acquisition, intelligence, and other critically important topics. During the past several decades, RAND has published more than 2,500 military reports, and three of those reports concerned military service by LGBT individuals. In 1993, DoD commissioned RAND to do a \$1.3 million study of whether allowing gays and lesbians to serve openly in the military would undermine readiness. RAND assembled a team of 53 researchers who studied foreign militaries, police and fire departments, prior experiences of minority integration into the military, and other aspects of the topic. RAND then published a 518-page report concluding that sexual orientation was "not germane" to military service and that lifting the ban would not undermine readiness. Military and political leaders disagreed with that conclusion, however, and the report was shelved. Seventeen years later, in 2010, DoD hired RAND to replicate its earlier study, and RAND again engaged in comprehensive research and again concluded that allowing gay men and lesbians to serve openly would not compromise readiness. DADT was repealed shortly after the publication of the second RAND study, and subsequent research confirmed the validity of RAND's 1993 and 2010 analyses, in that inclusion did not undermine any aspect of readiness including unit cohesion, morale, retention, and recruitment.¹³⁵

The Implementation Report's critique of the 2016 RAND study on transgender military service is no more persuasive than earlier critiques of RAND's studies on gays and lesbians in the military. First, as argued throughout this study, and despite almost two years of inclusive policy, the Implementation Report has not produced any evidence showing that inclusive policy for transgender personnel has compromised any aspect of readiness, including medical fitness, unit cohesion, or good order and discipline. It is instructive that in its extensive analysis of the ways in which inclusive policy is expected

to undermine cohesion, privacy, fairness, and safety, the Implementation Report did not offer any supporting data. The Implementation Report critiques RAND for failing to assess unit cohesion “at the unit and sub-unit levels,” but as noted above, three Service Chiefs confirmed after the Report’s publication that inclusive policy has not compromised unit cohesion, including Army Chief of Staff Milley’s testimony that cohesion “is monitored very closely because I am concerned about that and want to make sure that they [transgender Soldiers] are in fact treated with dignity and respect and no, I have received precisely zero reports of issues of cohesion, discipline, morale and all those sorts of things.”

Second, DoD data validate most of RAND’s statistical predictions. RAND estimated that between 1,320 and 6,630 transgender service members serve in the Active Component, and DoD data now show that there are 8,980 active duty transgender troops. RAND estimated that transgender service members in the Active Component would require an overall total of 45 surgeries per year, and DoD data indicate that the actual number was 34 surgeries during a 12-month window, from September 1, 2016, to August 31, 2017.¹³⁶ RAND estimated that transition-related health care would cost between \$2.4 and \$8.4 million per year, and DoD data indicate that the cost in FY2017 was \$2.2 million.¹³⁷

Third, the Implementation Report mischaracterized RAND’s overall finding by drawing selectively from the study. According to the Implementation Report, RAND “acknowledged that there will be an adverse impact on health care utilization, readiness, and unit cohesion, but concluded nonetheless that the impact will be ‘negligible’ and ‘marginal’ because of the small estimated number of transgender Service members.” But the Implementation Report misconstrues RAND’s analysis. Any policy change yields some costs and some benefits, and RAND found that inclusive policy for transgender troops would have some negative effects, such as the financial cost of health care. But RAND found that inclusive policy would have some positive effects as well, and that continuing to ban transgender troops would entail some costs.¹³⁸ RAND did conclude that the effect of lifting the ban would be “negligible” because of the small number of transgender troops, but the Implementation Report fails to acknowledge the context of that conclusion, namely that RAND identified the benefits of inclusive policy and the costs of reinstating the ban, both of which would offset the minor downsides of the policy shift.

Fourth, while it is true that RAND did not address “perceptions of fairness and equity, personnel safety, and reasonable expectations of privacy at the unit and sub-unit levels, all of which are critical to unit cohesion,” RAND had a good reason for restricting the scope of its analysis, in that available evidence indicated that cohesion was not compromised in any military force allowing transgender personnel to serve openly. Hence, there was no reason to focus on cohesion at a more granular level. Given that DoD has not offered any evidence to sustain any of its assertions about cohesion, privacy, fairness, and safety despite almost two years of inclusive policy, it seems unreasonable to critique RAND for neglecting to address a problem that does not exist.

Fifth and finally, the Implementation Report's critique of RAND's analysis of foreign militaries is unsupported by evidence. Neither RAND nor DoD has identified any evidence that any foreign military that allows transgender personnel to serve openly has experienced a decline in readiness or cohesion. But the Implementation Report mischaracterizes evidence in the RAND study to obscure that simple fact. An in-depth study of transgender military service in the Canadian Forces (CF) "found no evidence of any effect on unit or overall cohesion," but did find that the CF's failure to provide commanders with sufficient guidance and failure to train service members in inclusive policy led to implementation problems. But the CF's failure to provide implementation guidance does not mean that inclusive policy compromised readiness or cohesion. Rather, it means that the CF should have provided more guidance. Secretary Carter's TSRWG studied the Canadian example, learned from it, and issued extensive guidance and training materials, thus avoiding the CF's implementation challenges.

The Implementation Report claims that because the CF chain of command "has not fully earned the trust of the transgender personnel," there are "serious problems with unit cohesion." But according to the authors of the study, one of whom is a professor at the Canadian Forces College and one of the world's leading experts on personnel policy in the CF, the lack of trust is not evidence that inclusive policy has compromised unit cohesion. Rather, it is a reflection of the CF's failure to implement inclusive policy effectively, for the reasons discussed above.

The study of the CF that informed the RAND report was published in a leading, peer-reviewed military studies journal and was based on careful methodology, including an "extensive literature review, using 216 search permutations, to identify all relevant media stories, governmental reports, books, journal articles and chapters."¹³⁹ In addition, the authors received written, interview, and focus group data from 26 individuals, including 2 senior military leaders, 10 commanders, 2 non-transgender service members who served with transgender peers, 4 transgender service members and veterans, and 8 scholarly experts on readiness in the CF. By contrast, the Implementation Report presents exactly zero original research on the CF. If a professor in the Canadian Forces College concludes in a peer-reviewed study, and on the basis of extensive research, that inclusive policy, despite implementation problems, has not compromised readiness or cohesion, DoD cannot dismiss the weight of the conclusion by selectively relying on a handful of quotes.

The Implementation Report makes a similar attempt to dismiss RAND's conclusions about readiness and inclusive policy in the Israel Defense Forces (IDF). Available research on transgender service in the IDF is not as thorough as research on the CF, but RAND nonetheless analyzed a study that was based on several interviews, including interviews with two senior IDF leaders who confirmed that inclusive policy had not compromised readiness or cohesion. The Implementation Report dismisses these "sweeping and categorical claims," but offers no evidence to the contrary. If two senior leaders in a military organization confirm that a policy has a certain effect, that counts as data, especially absent contradictory evidence, and especially when the data line up with evidence from other military forces.

The Implementation Report is correct that operational and other differences distinguish the U.S. armed forces from other militaries. That does not detract, however, from the fact that RAND was unable to find any evidence that readiness or cohesion had declined as a result of inclusive policy in any of the 18 nations that allow transgender personnel to serve openly.

DoD Does Not Consider Benefits of Inclusive Policy or Costs of Ban

Every change of policy involves costs and benefits, and when analysts study whether or not to abandon the status quo in favor of an alternative policy option, typically they address the costs and benefits of both the status quo as well as the contemplated policy modification. DoD's research, however, was artificially narrowed at the outset to focus exclusively on the costs of inclusion, and the Implementation Report did not include any assessment of the benefits of inclusive policy or the costs of the proposed ban. DoD could have framed its research question broadly by asking, "What impact has inclusive policy for transgender troops had on military readiness?" Instead, the Implementation Report addressed only the costs of inclusive policy and failed to consider overall readiness implications. A more rigorous and comprehensive assessment of readiness indicates that inclusive policy for transgender personnel promotes readiness, while banning transgender personnel and denying them medically necessary care compromises it.

Failure to consider benefits of inclusive policy

If DoD researchers had studied benefits as well as costs, they could have assessed promotion rates, time-in-service, and commendations to determine whether transgender personnel have served successfully. They could have conducted case studies of transgender personnel who have completed gender transition to determine whether transitions have been effective. DoD researchers could have studied the experience of Lieutenant Colonel Bryan (Bree) Fram, an astronautical engineer currently serving as the Air Force's Iraq Country Director at the Pentagon, overseeing all Air Force security cooperation and assistance activity for operations in Iraq. They could have evaluated the experience of Air Force Staff Sergeant Logan Ireland, who deployed to Afghanistan after transitioning gender and was named "NCO of the Quarter." DoD could have studied the experience of Staff Sergeant Ashleigh Buch, whose commander said that "She means the world to this unit. She makes us better. And we would have done that [supported gender transition] for any airman but it made it really easy for one of your best." Or DoD could have assessed the experience of Lance Corporal Aaron Wixson, whose commander reported that "We are lucky to have such talent in our ranks and will benefit from his retention if he decides to undertake a subsequent tour of duty . . . Enabling LCpl Wixson to openly serve as a transgender Marine necessarily increases readiness and broadens the overall talent of the organization."¹⁴⁰

The Implementation Report's explanation for failing to study the performance of transgender troops is that "Limited data exists regarding the performance of transgender Service members due to policy restrictions . . . that prevent the Department from tracking individuals who may identify as transgender as a potentially unwarranted invasion of

personal privacy.”¹⁴¹ But this excuse is unpersuasive, as DoD researchers could have asked data analysts to match medical records of service members diagnosed with gender dysphoria with administrative records concerning promotion rates, time-in-service, commendations, and other indicators of performance without revealing names or identifying details. Instead, DoD failed to consider any benefits of inclusive policy, and it focused exclusively on costs.

By omitting any analysis of benefits, the Implementation Report failed to address critical ways in which the accession and retention of transgender personnel promote readiness. To begin, inclusive policy for transgender service members promotes medical readiness by ensuring adequate health care to a population that would otherwise serve “underground.” As we mention in our discussion of efficacy, a robust body of scholarly research shows that transgender people who receive the care they need are better off and function well at work and beyond.¹⁴²

After the repeal of “don’t ask, don’t tell,” gay and lesbian service members experienced a decline in harassment, because they could approach offending colleagues and politely point out that unprofessional behavior was no longer acceptable in the workplace, or could safely report inappropriate behavior if it persisted.¹⁴³ Inclusive policy for transgender personnel is expected to produce a similar effect, but the Implementation Report does not address this possibility.

Finally, the Implementation Report ignores the financial gains of retaining transgender personnel. DoD data indicate that the per-person cost of care in FY2017 was \$18,000 for each service member diagnosed with gender dysphoria, but the Report does not mention that by DoD’s own estimate, recruiting and training one service member costs \$75,000.¹⁴⁴ It is much cheaper to provide medical care than to replace service members who need it.

Failure to consider costs of the ban

In response to DoD’s release of the Implementation Report, the American Psychiatric Association’s CEO and Medical Director Saul Levin stated that the proposed transgender ban “not only harms those who have chosen to serve our country, but it also casts a pall over all transgender Americans. This discrimination has a negative impact on the mental health of those targeted.” The Implementation Report, however, seems premised on the notion that the proposed ban would incur no costs. In addition to evidence that enables us to assess costs directly, scholars and experts have produced a great deal of evidence concerning the costs of “don’t ask, don’t tell,” and it is not unreasonable to expect that some of the burdens associated with that failed policy could recur if the transgender ban were reinstated.

Research on transgender military service as well as DADT suggests that reinstating the ban could (1) undermine medical readiness by depriving 14,700 transgender service members of medically necessary care should they require it;¹⁴⁵ (2) increase harassment of transgender personnel, just as DADT promoted harassment of gay men and lesbians;¹⁴⁶ and (3) drain financial resources due to the cost of replacing transgender personnel and

the cost of litigation.¹⁴⁷ In addition, the ban could (4) compromise unit cohesion by introducing divisiveness in the ranks; (5) discourage enlistment and re-enlistment by lesbians, gays, and bisexuals, who would be wary of serving in an anti-LGBT atmosphere; (6) discourage enlistment and re-enlistment by women, because this ban is based on discomfort with people who cross gender lines or otherwise violate traditional gender roles; and (7) promote policy instability. The ban would constitute the fifth policy on transgender military service over the past two years. As former U.S. Navy Judge Advocate General Admiral John D. Hutson observed, “Whatever one thinks about transgender service . . . , there is no question that careening personnel policy from one pole to the other is bad for the armed forces.”¹⁴⁸

Similar to DADT, the reinstatement of the ban would (8) force many transgender service members to hide their gender identity, given the stigma that the Implementation Report implicitly authorizes. Scholars have demonstrated that the requirement to serve in silence effectively forces troops to lie about their identity, leading to elevated incidence of depression and anxiety.¹⁴⁹ (9) When service members lie about their identity, peers suspect that they are not being forthcoming, and both social isolation and general distrust can result.¹⁵⁰ In turn, (10) forcing service members to lie about their identity compromises military integrity. Prior to the repeal of DADT, former Chairman of the Joint Chiefs of Staff Admiral Mike Mullen said that, “I cannot escape being troubled by the fact that we have in place a policy which forces young men and women to lie about who they are in order to defend their fellow citizens. For me, personally, it comes down to integrity—theirs as individuals and ours as an institution.”¹⁵¹

Finally, (11) the ban would signal to the youth of America that the military is not a modern institution. Scholarly research established that DADT was an ongoing public relations embarrassment for the Pentagon and that ripple effects impacted recruitment. Every major editorial page in the U.S. opposed DADT, and anti-military activists used the policy to rally opposition.¹⁵² Approximately three-quarters of the public opposed DADT.¹⁵³ According to one report, high schools denied military recruiters access to their campuses on 19,228 separate occasions in 1999 alone, in part as an effort “to challenge the Pentagon’s policy on homosexuals in the military.”¹⁵⁴ In the case of military service by transgender personnel, the Implementation Report cites one poll suggesting that service members oppose inclusive policy. Other polling, however, indicates that service members, veterans, retirees, and military family members favor inclusion, as does the public at large.¹⁵⁵ There is every reason to believe that the transgender ban would be just as unpopular as was DADT.

DoD Cites Misleading Figures on Financial Costs of Inclusion

The Implementation Report observed that “Since the implementation of the Carter policy, the medical costs for Service members with gender dysphoria have increased nearly three times—or 300 percent—compared to Service members without gender dysphoria.”¹⁵⁶ While the Implementation Report’s claim is correct, the cost data are taken out of context and reported in a misleading way. DoD data indicate that the average annual per-person cost for service members diagnosed with gender dysphoria is approximately \$18,000, as

opposed to the \$6,000 annual cost of care for other service members.¹⁵⁷ But the higher average per-person cost would appear any time a population is selected *for the presence of a specific health condition* and then compared to an average cohort of all other service members.

The Report's claim that medical costs for service members diagnosed with gender dysphoria are three times, or 300 percent, higher than for other troops implies that medical care for transgender personnel is expensive. But the Report does not mention that DoD's total cost for transition-related care in FY2017 was only \$2.2 million, which is less than one tenth of one percent of DoD's annual health care budget for the Active Component.

Insurance actuaries sometimes calculate costs in terms of the cost of care per plan member per month of coverage. With financial costs of transition-related care distributed force-wide, the cost of providing transition-related care is 9¢ (nine cents) per service member per month.¹⁵⁸ Even if the per-member/per-month cost estimate were restricted to the cohort of transgender service members, the financial impact of providing care would be low, because very few of the currently serving 14,700 transgender troops required *any* transition-related care during FY2017: \$2.2 million / 14,700 = \$149.66 per transgender service member per year; \$149.66 / 12 = \$12.47 per transgender service member per month.

Higher average per-person costs would appear any time a population is selected for the presence of a specific condition and then compared to an average cohort of other service members. Even setting this qualification aside, reporting the cost of care for service members with gender dysphoria as 300 percent higher than the cost of care for other troops, without contextualizing the observation in terms of the low overall cost, could mislead readers into believing that transition-related care is expensive, which it is not.

Conclusion

Scholars and experts agree that transition-related care is reliable, safe, and effective, and medical research as well as DoD's own data confirm that transgender personnel, even those with diagnoses of gender dysphoria, are deployable and medically fit. In advancing its case for the reinstatement of the transgender ban, however, the Implementation Report mischaracterized the medical research that sustains these conclusions. The proposed transgender ban is based on double standards consisting of rules and expectations that DoD would apply only to transgender service members, but to no one else. The Report did not present any evidence showing that inclusive policy has compromised or could compromise cohesion, privacy, fairness, or safety. Finally, the Implementation Report's justification depends on partial and misleading assessments of costs and benefits, as DoD neglected to assess the benefits of inclusive policy or the costs of the ban.

The RAND study was correct in concluding that inclusive policy was unlikely to pose a meaningful risk to the readiness of the armed forces. If anything, the evidence suggests that inclusive policy for transgender service members has promoted readiness. Just like

justifications for prohibitions against women and African Americans in the military as well as the failed DADT policy, the case for banning transgender individuals from the armed forces is not supported by evidence and is unpersuasive.

Appendix

Efficacy of transition-related care

As we described earlier, an international consensus among medical experts affirms the efficacy of transition-related health care. This Appendix details that scholarship, showing that the DoD Report selected only a small slice of available evidence to reach its conclusions about the efficacy of transition-related care.

A large Dutch study published in 2007 reported follow-up data of 807 individuals who underwent surgical gender transition. Summarizing their results, the authors reaffirmed the conclusion of a much-cited 1990 study that gender transition dramatically reduces the symptoms of gender dysphoria, and hence “is the most appropriate treatment to alleviate the suffering of extremely gender dysphoric individuals.” They found that, across 18 outcome studies published over two decades, 96 percent of subjects were satisfied with transitioning, and “regret was rare.” The authors wrote that, even though there were “methodological shortcomings” to many of the studies they reviewed (lacking controls or randomized samples), “we conclude that SRS [sex reassignment surgery] is an effective treatment for transsexualism and the only treatment that has been evaluated empirically with large clinical case series.” Gender transition, they stated, “is not strongly theory driven, but a pragmatic and effective way to strongly diminish the suffering of persons with gender dysphoria.” It must be noted that not all studies of the efficacy of gender transition lack controls. The Dutch authors cite a controlled study from 1990 that compared a waiting-list condition with a treatment condition and found “strong evidence for the effectiveness” of surgical gender transition.¹⁵⁹

In a 2010 meta-analysis noted by the Implementation Report, researchers at the Mayo Clinic conducted a systematic review of 28 scholarly studies enrolling 1,833 participants who underwent hormone therapy as part of gender transition. The reviewed studies were published between 1966 and February 2008. Results indicated that 80 percent of individuals reported “significant improvement” in gender dysphoria and in quality of life, and 78 percent reported “significant improvement” in psychological symptoms. The authors concluded that “sex reassignment that includes hormonal interventions... likely improves gender dysphoria, psychological functioning and comorbidities, sexual function and overall quality of life.”¹⁶⁰

A 2015 Harvard and University of Houston longitudinal study of testosterone treatment also reviewed prior literature and found that numerous recent cross-sectional studies “suggest that testosterone treatment among transgender men is associated with improved mental health and well-being,” including improved quality of life, less anxiety, depression and social distress, and a reduction in overall mental stress.¹⁶¹

A 2016 literature review screened 647 studies to identify eleven longitudinal studies providing data on transgender individuals. Ten of them found “an improvement of psychiatric morbidity and psycho-pathology following” medical intervention (hormone therapy and/or gender-confirming surgery). Sizing up the overall research body on

transgender psychiatric outcomes, Cecilia Dhejne and her co-authors wrote: “This review found that longitudinal studies investigating the same cohort of trans people pre- and post-interventions showed an overall improvement in psychopathology and psychiatric disorders post-treatment. In fact, the findings from *most studies showed that the scores of trans people following GCMi were similar to those of the general population.*”¹⁶²

Another 2016 study, a systematic review of literature, identified numerous longitudinal studies finding that “depression, global psychopathology, and psychosocial functioning difficulties appear to reduce” in transgender individuals who get treatment for gender dysphoria, leading to “improved mental health.”¹⁶³

Copious studies reflecting a wide range of methodologies, population samples, and nationalities reached similarly positive conclusions to what was found by the researchers mentioned above, namely that individuals who obtain the care they need achieve health parity with non-transgender individuals. A 2009 study using a probability sample of 50 transgender Belgian women found “no significant differences” in overall health between subjects and the general population, which the study noted was “in accordance with a previous study in which no differences in psychological and physical complaints between transsexuals and the general Belgian population were found.”¹⁶⁴ A 2012 study reported that “Most transsexual patients attending a gender identity unit reported subclinical levels of social distress, anxiety, and depression” and did “not appear to notably differ from the normative sample in terms of mean levels of social distress, anxiety, and depression.” Patients who were not yet treated for gender dysphoria had “marginally higher distress scores than average, and treated subjects [were] *in the normal range.*”¹⁶⁵ An Italian study that assessed the impact of hormonal treatment on the mental health of transgender patients found that “the majority of transsexual patients have no psychiatric comorbidity, suggesting that transsexualism is not necessarily associated with severe comorbid psychiatric findings.”¹⁶⁶ A Croatian study from the same year concluded that, “Despite the unfavorable circumstances in Croatian society, participants demonstrated stable mental, social, and professional functioning, as well as a relative resilience to minority stress.”¹⁶⁷

Efficacy of hormone therapy

Studies show clearly that hormone treatment is effective at treating gender dysphoria and improving well-being. In 2015, Harvard and University of Houston researchers published the first controlled longitudinal follow-up study to examine the immediate effects of testosterone treatment on the psychological functioning of transgender men. The study used the Minnesota Multiphasic Personality Inventory test (2nd ed.) to take an empirical measure of psychological well-being after hormone treatment, assessing outcomes before and after treatment. (The MMPI-2 is one of the oldest, most commonly used psychological tests and is considered so rigorous that it typically requires many years of intensive psychotherapy to generate notable improvements in outcomes.) The results showed marked change in just three months: Transgender subjects who presented with clinical distress and demonstrated “poorer psychological functioning than nontransgender males” prior to treatment functioned “as well as male and female controls and demonstrated positive gains in multiple clinical domains” after just three months of

testosterone. “There were no longer statistically significant differences between transgender men and male controls” on a range of symptoms including hypochondria, hysteria, paranoia, and others after three months of treatment, the study concluded. “Overall findings here,” concluded the study, “suggest significant, rapid, and positive effects of initiating testosterone treatment on the psychological functioning in transgender men.”¹⁶⁸

These findings echoed earlier research on the efficacy of hormone therapy for treating gender dysphoria. A 2006 U.S. study of 446 female-to-male (FTM) subjects found improvements when comparing those who had and had not received hormone treatment: “FTM transgender participants who received testosterone (67 percent) reported statistically significant higher quality of life scores ($p < 0.01$) than those who had not received hormone therapy.” The study concluded that providing transgender individuals “with the hormonal care they request is associated with improved quality of life.”¹⁶⁹ A 2012 study assessed outcome differences between transgender patients who obtained hormone treatment and those who did not among 187 subjects. It found that “patients who have not yet initiated cross-sex hormonal treatment showed significantly higher levels of social distress and emotional disturbances than patients under this treatment.”¹⁷⁰

An Italian study published in 2014 that assessed hormone therapy found that “when treated, transsexual patients reported less anxiety, depression, psychological symptoms and functional impairment” with the improvements between baseline and one-year follow-up being “statistically significant.” The study stated that “psychiatric distress and functional impairment were present in a significantly higher percentage of patients before starting the hormonal treatment than after 12 months.”¹⁷¹ Another study published in 2014 found that “participants who were receiving testosterone endorsed fewer symptoms of anxiety and depression as well as less anger than the untreated group.”¹⁷²

Efficacy of surgery

A wide body of scholarly literature also demonstrates the effectiveness of gender-transition surgery. A 1999 follow-up study using multi-point questionnaires and rigorous qualitative methods including in-depth, blind follow-up interviews evaluated 28 MTF subjects who underwent transition surgery at Albert Einstein College of Medicine. The study was authored by four physicians who conducted transition surgeries at university centers in New York and Israel. *All* their subjects reported satisfaction in having transitioned, and they responded positively when asked if their lives were “becoming easier and more comfortable” following transition. Large majorities said that reassignment surgery “solved most of their emotional problems,” adding in follow-up assessments comments such as: “I am now a complete person in every way,” “I feel more self-confident and more socially adapted,” “I am more confident and feel better about myself,” and “I am happier.” Summarizing their conclusions, the authors noted “a marked decrease of suicide attempts, criminal activity, and drug use in our postoperative population. This might indicate that there is a marked improvement in antisocial and self-destructive behavior, that was evident prior to sex reassignment surgery. Most patients

were able to maintain their standard of living and to continue working, usually at the same jobs.”¹⁷³

A 2010 study of thirty patients found that “gender reassignment surgery improves the QoL [quality of life] for transsexuals in several different important areas: most are satisfied of their sexual reassignment (28/30), their social (21/30) and sexual QoL (25/30) are improved.”¹⁷⁴ A long-term follow-up study of 62 Belgian patients who underwent gender transition surgery, published in 2006, found that, while transgender subjects remain a vulnerable population “in some respects” following treatment, the vast majority “proclaimed an overall positive change in their family and social life.” The authors concluded that “SRS proves to be an effective therapy for transsexuals even after a longer period, mainly because of its positive effect on the gender dysphoria.”¹⁷⁵

Efficacy of the combination of hormone therapy and surgery

Some studies assessed global outcomes from a combination of hormone treatment and transition surgery, or they did not isolate one form of treatment from the other in reporting their overall results. They consistently found improved outcomes when transgender individuals obtained the specific care recommended by their doctor.

A 2011 Canadian study found that “the odds of depression were 2.8 times greater for FTMs not currently using hormones compared with current users” and that FTM subjects “who were planning to medically transition (hormones and/or surgery) but had not begun were five times more likely to be depressed than FTMs who had medically transitioned.” The finding shows that gender transition is strongly correlated with improved well-being for transgender individuals.¹⁷⁶ An Australian study found that “the combination of current hormone use and having had some form of gender affirmative surgery provided a significant contribution to lower depressive symptoms over and above control variables.”¹⁷⁷

A 2015 study conducted in Germany with follow-up periods up to 24 years, with a mean of 13.8 years, tracked 71 transgender participants using a combination of quantitative and qualitative outcome measures that included structured interviews, standardized questionnaires, and validated psychological assessment tools. It found that “positive and desired changes were determined by all of the instruments.” The improvements included that “participants showed significantly fewer psychological problems and interpersonal difficulties as well as a strongly increased life satisfaction at follow-up than at the time of the initial consultation.” The authors cautioned that, notwithstanding the positive results, “the treatment of transsexualism is far from being perfect,” but noted that, in addition to the positive result they found in the current study, “numerous studies with shorter follow-up times have already demonstrated positive outcomes after sex reassignment” and that this study added to that body of research the finding that “these positive outcomes persist even 10 or more years” beyond their legal gender transition.¹⁷⁸

Regrets low

A strong indicator of the efficacy of gender transition is the extremely low rate of regrets that studies have found across the board. A recent focus in popular culture on anecdotes by individuals who regretted their gender transition has served to obscure the overall statistics on regret rates. A 2014 study co-authored by Cecilia Dhejne evaluated the entirety of individuals who were granted a legal gender change in Sweden across the 50-year period from 1960 through 2010. Of the total number of 681 individuals, the number who sought a reversal was 15, a regret rate of 2.2 percent. The study also found a “significant decline of regrets over the time period.” For the most recent decade covered by Dhejne’s data, 2000 to 2010, the regret rate was just three tenths of one percent. Researchers attribute the improvements over time to advances in surgical technique and in social support for gender minorities, suggesting that today’s transgender population is the most treatable in history, while also sounding a caution that institutional stigma and discrimination can themselves become barriers to adequate care.¹⁷⁹

The low regret rate is consistent in the scholarly literature, and it is confirmed by qualitative studies and quantitative assessments. A 1992 study authored by one of the world’s leading researchers on transgender health put the average regret rate at between 1 and 1.5 percent. This figure was based on cumulative numbers from 74 different follow-up studies conducted over three decades, as well as a separate clinical follow-up sample of more than 600 patients.¹⁸⁰ A 2002 literature review also put the figure at 1 percent.¹⁸¹ A 1998 study put the figure as high as 3.8 percent, but attributed most regret to family rejection of the subjects’ transgender identity.¹⁸² The 1999 study of transition surgery outcomes at Albert Einstein College of Medicine found that “None of the patients regretted or had doubts about having undergone sex-reassignment surgery.”¹⁸³ The 2006 Belgian study mentioned elsewhere followed 62 subjects who underwent transition surgery and “none of them showed any regrets” about their transition. “Even after several years, they feel happy, adapt well socially and feel no regrets,” the authors concluded.¹⁸⁴ And the 2015 German follow-up study of adults with gender dysphoria found that none of its 71 participants expressed a wish to reverse their transition.¹⁸⁵

¹ The authors wish to thank John Blosnich, Drew Cameron, Jack Drescher, Jesse Ehrenfeld, Nick Gorton, Evan Schofer, Andy Slavitt, Hugh Waddington, and the many medical experts and service members who provided feedback. We are grateful for their invaluable assistance in preparing this study.

² Department of Defense, “Department of Defense Report and Recommendations on Military Service by Transgender Persons” (February 2018), 5.

³ *Ibid.*, 32.

⁴ American Medical Association (Resolution), “Removing Financial Barriers to Care for Transgender Patients” (2008); American Medical Association, Letter to James N. Mattis from James L. Madara, MD, April 3, 2018.

⁵ American Psychological Association, “Statement Regarding Transgender Individuals Serving in Military,” March 26, 2018; Palm Center (news release), “Former Surgeons General Debunk Pentagon Assertions about Medical Fitness of Transgender Troops,” March 28, 2018; American Psychiatric Association, “APA Reiterates Its Strong Opposition to Ban of Transgender Americans from Serving in U.S. Military” (News Release), Mar. 24, 2018; World Professional Association for Transgender Health, “WPATH Policy Statements: Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.,” December 21, 2016.

⁶ What We Know Project, Center for the Study of Inequality, Cornell University (research analysis), “What does the scholarly research say about the effect of gender transition on transgender well-being?” 2018.

⁷ Freidemann Pfäfflin and Astrid Junge (1998), “Sex Reassignment—Thirty Years of International Follow-up Studies after Sex Reassignment Surgery: A Comparison Review, 1961–1991” (translated from the German edition, 1992, into English, 1998).

⁸ Jamil Rehman, Simcha Lazer, Alexandru Benet, Leah Schaefer, and Arnod Melman (1999), “The Reported Sex and Surgery Satisfaction of 28 Postoperative Male-to-Female Transsexual Patients,” *Archives of Sexual Behavior*, 28(1): 71–89.

⁹ Tamara Jensen, Joseph Chin, James Rollins, Elizabeth Koller, Linda Gousis, and Katherine Szarama. “Final Decision Memorandum on Gender Reassignment Surgery for Medicare Beneficiaries with Gender Dysphoria,” Centers for Medicare and Medicaid Services (CMS), August 30, 2016, 71.

¹⁰ CMS 100-08, Medicare Program Integrity Manual (2000), 13.7.1, <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs-Items/CMS019033.html>, accessed April 23, 2018.

¹¹ *Ibid.*

¹² Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna Johansson, Niklas Langstrom, and Mikael Landen (2011), “Long-Term Follow-up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden,” *PLoS One* 6(2).

¹³ Palm Center (news release), “Former Surgeons General Debunk Pentagon Assertions about Medical Fitness of Transgender Troops,” March 28, 2018. At the time of writing, the publicly released version of the statement has been signed by two former Surgeons General. Since the statement’s release, however, four additional former Surgeons General have signed. The revised signatory list will be released soon.

¹⁴ DoD Report, 24.

¹⁵ Department of Defense Instruction 6130.03, Medical Standards for Appointment, Enlistment, or Induction in the Military Services (April 28, 2010, incorporating Change 1, September 13, 2011), 9. Also see <http://www.amsara.amedd.army.mil/>.

¹⁶ DoD Report, 24, quoting Jensen, et al. “Final Decision Memorandum,” 62.

¹⁷ Department of Health and Human Services (HHS), Department Appeals Board Appellate Division, NCD 140.3, Transsexual Surgery Docket No. A-13-87 Decision No. 2576, May 30, 2014, 20.

¹⁸ HHS, Transsexual Surgery Docket, 20.

¹⁹ Jensen et al. “Final Decision Memorandum,” 54, 57, emphasis added.

²⁰ Personal communication with the authors, April 21, 2018.

²¹ DoD Report, 25–26.

²² R. Nick Gorton, “Research Memo Evaluating the 2014 Hayes Report: ‘Sex Reassignment Surgery for the Treatment of Gender Dysphoria’ and the 2004 Hayes Report: ‘Sex Reassignment Surgery and Associated Therapies for Treatment of GID,’ April 2018.”

²³ *Ibid.*

-
- ²⁴ Ibid.
- ²⁵ Ibid.
- ²⁶ William Byne et al. (2012), “Report of the American Psychiatric Association Task Force on Treatment of Gender Identity Disorder,” *Archives of Sexual Behavior* 41(4): 759–96.
- ²⁷ Gorton, “Research Memo.”
- ²⁸ Dhejne et al., “Long-Term Follow-up”; Cecilia Dhejne, Roy Van Vlerken, Gunter Heylens, and Jon Arcelus (2016), “Mental Health and Gender Dysphoria: A Review of the Literature,” *International Review of Psychiatry* 28(1): 44–57, emphasis added.
- ²⁹ Dhejne et al., “Long-Term Follow-up”; Dhejne et al., “Review of the Literature,” emphasis added.
- ³⁰ Cristan Williams, “Fact Check: Study Shows Transition Makes Trans People Suicidal,” *The TransAdvocate*, November 2, 2015.
- ³¹ M. Hassan Murad et al. (2010), “Hormonal Therapy and Sex Reassignment: A Systematic Review and Meta-Analysis of Quality of Life and Psychosocial Outcomes,” *Clinical Endocrinology*, 72(2): 214–31.
- ³² DoD Report, 19.
- ³³ Memorandum, Secretary of Defense, Military Service by Transgender Individuals (February 22, 2018), 2.
- ³⁴ Department of Defense Instruction 1322.18, Disability Evaluation System (August 5, 2014), 23.
- ³⁵ Memorandum, Under Secretary of Defense, Personnel and Readiness, DoD Retention Policy for Non-Deployable Service Members (February 14, 2018).
- ³⁶ DoD Report, 5.
- ³⁷ Ibid., 5–6.
- ³⁸ Ibid., 5 (emphasis added).
- ³⁹ Ibid., 32.
- ⁴⁰ Ibid., 6, 32.
- ⁴¹ Ibid., 10.
- ⁴² DoDI 6130.03, 18.
- ⁴³ DoD Report, 11.
- ⁴⁴ DoDI 6130.03, 25.
- ⁴⁵ Department of Defense Instruction 1300.28, In-Service Transition for Transgender Service Members (October 1, 2016), 3.
- ⁴⁶ Palm Center, “Former Surgeons General.”
- ⁴⁷ DoD Report, 20–21.
- ⁴⁸ Jack Drescher et al. (2012), “Minding the Body: Situation Gender Identity Diagnoses in the ICD-11,” *International Review of Psychiatry*, 24(6): 568; See also Jack Drescher (2010), “Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual,” *Archives of Sexual Behavior*, 39(2): 427–60.
- ⁴⁹ Personal communication with the authors, April 10, 2018.
- ⁵⁰ American Psychiatric Association, “APA Reiterates Its Strong Opposition.”
- ⁵¹ DoD Report, 27.
- ⁵² Army Regulation 40-501, Standards of Medical Fitness (December 22, 2016), 60.
- ⁵³ Ibid., 62.
- ⁵⁴ Ibid., 63.
- ⁵⁵ DoD Report, 33.
- ⁵⁶ Ibid., 34.
- ⁵⁷ Department of Defense, Transgender Service in the U.S. Military: An Implementation Handbook (September 30, 2016), 31 (“Commander’s Handbook”).
- ⁵⁸ DoDI 1300.28, 3.
- ⁵⁹ DoD Report, 34.
- ⁶⁰ Department of Defense, Health Data on Active Duty Service Members with Gender Dysphoria: Comparison Health Care Data with Statistical Analysis, Deployment, Treatment Plan, Surgical Recovery Times, Separation Data and Cost Data (December 13, 2017), 10–12.
- ⁶¹ DoD Report, 18.
- ⁶² Ibid., 33.
- ⁶³ Department of Defense, Health Data on Active Duty Service Members with Gender Dysphoria, 17.
- ⁶⁴ Modification Thirteen to U.S. Central Command Individual Protection and Individual, Unit Deployment Policy, Tab A (March 2017).

- ⁶⁵ DoD Report, 34n130.
- ⁶⁶ Ibid., 34.
- ⁶⁷ Modification Thirteen, 8.
- ⁶⁸ Ibid., 9–10.
- ⁶⁹ Ibid., 8.
- ⁷⁰ Ibid., 4.
- ⁷¹ DoD Report, 33.
- ⁷² Ibid.; See also DoD Report, 22–23, 34 and 41n164.
- ⁷³ Letter from Dr. Wylie C. Hembree, M.D. (October 25, 2015).
- ⁷⁴ DoD Report, 33.
- ⁷⁵ Ibid., 34.
- ⁷⁶ Ibid., 33n123, citing Agnes Schaefer et al. (2016), “Assessing the Implications of Allowing Transgender Personnel to Serve Openly,” RAND Corporation, 59.
- ⁷⁷ M. Joycelyn Elders, George R. Brown, Eli Coleman, Thomas A. Kolditz, and Alan M. Steinman (2014), “Medical Aspects of Transgender Military Service,” *Armed Forces and Society*, 41(2): 206–207 (footnotes omitted).
- ⁷⁸ DoD Report, 2.
- ⁷⁹ Ibid., 22.
- ⁸⁰ DoDI 1300.28.
- ⁸¹ Ibid., 9.
- ⁸² Ibid.
- ⁸³ Commander’s Handbook, 13.
- ⁸⁴ Department of the Navy, BUMED Notice 6000, Medical Treatment of Transgender Service Members—Interim Guidance (September 27, 2016), 3.
- ⁸⁵ Ibid.
- ⁸⁶ “Individualized TGCT Care Plan (n.d.),” NMW Transgender Care Team, Naval Medical Center San Diego.
- ⁸⁷ Personal communication with the authors, February 7, 2018.
- ⁸⁸ Natasha Schvey et al. (May 2017), “Military Family Physicians’ Readiness for Treating Patients with Gender Dysphoria,” *Journal of the American Medical Association, Internal Medicine*, 177(5): 727–29.
- ⁸⁹ Personal communication with the authors, February 6, 2018.
- ⁹⁰ Ibid., February 9, 2018.
- ⁹¹ Surveys and follow-up emails between anonymous service members and Palm Center researchers, February 1–15, 2018; Telephone interview with authors, August 30, 2017. The 81 mental health visits were the total number reported by the seven of our subjects who completed written surveys.
- ⁹² John Blosnich, Letter to the Editor (draft in preparation for peer-review submission, forthcoming, 2018). Unlike the military, VHA does not provide transition surgery. VHA mental health utilization among transgender individuals could increase if VHA provided surgery, because patients might need additional mental health approval to qualify. At the same time, mental health utilization might decrease if VHA provided surgery, because surgery can mitigate gender dysphoria, which would diminish the need for mental health care.
- ⁹³ Jesse M. Ehrenfeld, Del Ray Zimmerman and Gilbert Gonzales (March 16, 2018), “Healthcare Utilization Among Transgender Individuals in California,” *Journal of Medical Systems*, 42(5): 77.
- ⁹⁴ Tamika Gilreath et al. (2015), “Suicidality among Military-Connected Adolescents in California Shools,” *European Child & Adolescent Psychiatry* 25(1): 61–66.
- ⁹⁵ DoD Report, 21.
- ⁹⁶ Ibid.
- ⁹⁷ Department of Defense, Defense Suicide Prevention Office, Military Suicide Data Surveillance: Baseline Results from Non-clinical Populations on Proximal Outcomes for Suicide Prevention (July 25, 2017), 5.
- ⁹⁸ See Schaefer et al., “Assessing the Implications,” 9–10.
- ⁹⁹ American Psychological Association, “Statement Regarding Transgender Individuals.”
- ¹⁰⁰ American Psychiatric Association, “APA Reiterates Its Strong Opposition.”
- ¹⁰¹ DoD Report, 31.
- ¹⁰² Ibid., 28.

¹⁰³ Claudia Grisales, "Defense Chief Says He Is 'Prepared to Defend' New Transgender Military Policy," *Stars and Stripes*, April 12, 2018.

¹⁰⁴ Geoff Ziezulewicz, "No Reports of Transgender Troops Affecting Unit Cohesion, Marine Corps and Navy Leaders Say," *Military Times*, April 19, 2018; Rebecca Kheel, "Air Force Chief Not Aware of Cohesion, Morale Issues Due to Transgender Troops," *The Hill*, April 24, 2018.

¹⁰⁵ DoD Report, 3.

¹⁰⁶ Grisales, "Defense Chief Says."

¹⁰⁷ On the measurement of unit cohesion, see, for example, James Griffith (1988), "Measurement of Group Cohesion in U. S. Army Units," *Basic and Applied Social Psychology*, 9(2): 149–71.

¹⁰⁸ Aaron Belkin, Morten G. Ender, Nathaniel Frank, Stacie R. Furia, George Lucas, Gary Packard, Steven M. Samuels, Tammy Schultz, and David Segal (2013), "Readiness and DADT Repeal: Has the New Policy of Open Service Undermined the Military," *Armed Forces and Society*, 39(4): 587–601.

¹⁰⁹ DoD Report, 29.

¹¹⁰ Alex Bedard, Robert Peterson, and Ray Barone, "Punching through Barriers: Female Cadets Integrated into Mandatory Boxing at West Point," Association of the United States Army, November 16, 2017.

¹¹¹ Commander's Handbook, 63.

¹¹² *Ibid.*

¹¹³ *Ibid.*, 37.

¹¹⁴ *Ibid.*, 65.

¹¹⁵ *Ibid.*, 29.

¹¹⁶ *Ibid.*, 22.

¹¹⁷ Training Slides Tier III Training: Education and Training Plan for the Implementation of Army Policy on Military Service of Transgender Soldiers (September 16, 2016), 14.

¹¹⁸ David Ari Bianco, "Echoes of Prejudice: The Debates Over Race and Sexuality in the Armed Forces," in Craig A. Rimmerman, ed. (2006), *Gay Rights, Military Wrongs: Political Perspectives on Lesbians and Gays in the Military* (New York: St. Martin's Press); Nathaniel Frank (2009), *Unfriendly Fire: How the Gay Ban Undermines the Military and Weakens America* (New York: St. Martin's); Brian Mitchell (1997), *Women in the Military: Flirting with Disaster* (Washington: Regency Publishing).

¹¹⁹ Aaron Belkin and Melissa S. Embser-Herbert (2002), "A Modest Proposal: Privacy as a Rationale for Excluding Gays and Lesbians from the U.S. Military," *International Security*, 27(2): 178–97. Melissa Wells-Petry (1993), *Exclusion: Homosexuals and the Right to Serve* (Washington: Regnery Gateway), 127–30.

¹²⁰ Peter Sprigg, "Homosexual Assault in the Military," Family Research Council, 2010.

¹²¹ "A Military Success Story," *New York Times* (editorial), September 15, 2012.

¹²² Gale S. Pollock and Shannon Minter (2014), "Report of the Planning Commission on Transgender Military Service," Palm Center, 21.

¹²³ Schaefer et al., "Assessing the Implications"; M. Joycelyn Elders, George R. Brown, Eli Coleman, Thomas A. Kolditz, and Alan M. Steinman (2014), "Medical Aspects of Transgender Military Service," *Armed Forces and Society*, 41(2): 199–220; Pollock and Minter, "Report of the Planning Commission"; Alan Okros and Denise Scott (2014), "Gender Identity in the Canadian Forces: A Review of Possible Impacts on Operational Effectiveness," *Armed Forces and Society*, 41(2): 243–56.

¹²⁴ Department of Defense, "Statement by Secretary of Defense Ash Carter on DoD Transgender Policy," (press release), July 13, 2015, Memorandum from Ashton Carter, Secretary of Defense, "Transgender Service Members" (July 28, 2015).

¹²⁵ DTM 16-005, Military Service of Transgender Service Members (June 30, 2016); DoDI 1300.28, In-Service Transition for Transgender Service Members (June 30, 2016), 2.

¹²⁶ This list does not include service-level training materials or Military Entrance Processing Command accession documents: DTM 16-005, Military Service of Transgender Service Members (June 30, 2016); DoDI 1300.28, In-Service Transition for Transgender Service Members (June 30, 2016); Department of Defense, Transgender Service in the U. S. Military: An Implementation Handbook (September 30, 2016); Assistant Secretary of Defense, Health Affairs, Guidance for Treatment of Gender Dysphoria for Active and Reserve Component Service Members (July 29, 2016); Interim Defense Health Agency Procedures for Reviewing Requests for Waivers to Allow Supplemental Health Care Program Coverage of Sex Reassignment Surgical Procedures (November 13, 2017); Army Directive 2016-30, Army Policy on Military Service of Transgender Soldiers (July 1, 2016); Army Directive 2016-35, Army Policy on Military Service of Transgender Soldiers (October 7, 2016); OTSG/MEDCOM Policy Memo 16-060, Interim

AMEDD Guidance for Transgender Medical Care (August 3, 2016); SECNAV Instruction 1000.11, Service of Transgender Sailors and Marines (November 4, 2016); U.S. Navy, Transgender and Gender Transition: Commanding Officer's Toolkit (2016); Department of the Navy, BUMED Notice 6000, Medical Treatment of Transgender Service Members—Interim Guidance (September 27, 2016); AFPM 2016-36-01, Air Force Policy Memorandum for In-Service Transition for Airmen Identifying as Transgender (October 6, 2016); Marine Corps Bulletin 1121, Transgender Service (November 22, 2016); U.S. Coast Guard, COMDTINST M1000.13, Military Transgender Service (December 22, 2016).

¹²⁷ Schaefer et al., “Assessing the Implications,” 70.

¹²⁸ Okros and Scott, “Gender Identity in the Canadian Forces,” 243.

¹²⁹ Schaefer et al., “Assessing the Implications,” xiii.

¹³⁰ Correspondence with senior civilian DoD official, April 21, 2017; Telephone interview with former Navy Secretary Ray Mabus, April 20, 2017; Correspondence with former Air Force Secretary Deborah James, April 20, 2017; Correspondence with former Army Secretary Eric Fanning, April 24, 2017; Correspondence with former senior civilian DoD official, April 19, 2017.

¹³¹ Memorandum, Secretary of Defense, Military Service by Transgender Individuals (February 22, 2018), 2.

¹³² DoD Report, 14.

¹³³ *Ibid.*, 44.

¹³⁴ Rand Arroyo Center Annual Report 2015, 1.

¹³⁵ Belkin et al., “Readiness and DADT Repeal.”

¹³⁶ Department of Defense, Health Data on Active Duty Service Members with Gender Dysphoria, 21.

¹³⁷ *Ibid.*, 31.

¹³⁸ For various benefits of inclusive policy and costs of the ban, see Schaefer et al., “Assessing the Implications,” 8 (surgical skills); 45, 60–61 (diversity and readiness); and 10 (denial of care).

¹³⁹ Okros and Scott, “Gender Identity in the Canadian Forces,” 246.

¹⁴⁰ John D. Hutson, “An Unwarranted Attack on Transgender Service,” *Stars and Stripes*, February 6, 2018; Steve Liewer, “Transgender Offutt Airman – Finally ‘Able to Live as My True Self’ – Finds Support, Acceptance during Transition,” *Omaha World-Herald*, April 22, 2017; Emanuella Grinberg, “A transgender Marine Comes Out, Tests Military’s New Policy,” *CNN.com*, November 19, 2016.

¹⁴¹ DoD Report, 37, Note 143.

¹⁴² Dhejne et. al, “Mental Health and Gender Dysphoria.”

¹⁴³ Gay and lesbian service members reported an increase in morale after DADT repeal. See Belkin et al., “Readiness and DADT Repeal.”

¹⁴⁴ According to a 2015 estimate by Accession Medical Standards Analysis and Research Activity (AMSARA), “Recruiting, screening and training costs are approximately \$75,000 per enlistee.” Accession Medical Standards Analysis & Research Activity, <http://www.amsara.amedd.army.mil/Default.aspx>, last modified date April 1, 2015, accessed August 3, 2017.

¹⁴⁵ See Schaefer et al., “Assessing the Implications,” 9–10. For the estimate that 14,700 transgender personnel serve currently in the Active Component and Selected Reserve, see Palm Center, “Breaking Down the March 23, 2018 Transgender Military Ban,” March 27, 2018.

¹⁴⁶ For extensive evidence on this point, see the ten annual reports of the Servicemembers Legal Defense Network that are posted at <http://dont.law.stanford.edu/commentary/>, accessed April 23, 2018. Sharon Terman argues that harassment cannot be regulated in institutions that allow formal discrimination. See Sharon Terman, “The Practical and Conceptual Problems with Regulating Harassment in a Discriminatory Institution,” Center for the Study of Sexual Minorities in the Military, 2004.

¹⁴⁷ Aaron Belkin, Frank J. Barrett, Mark J. Eitelberg, and Marc J. Ventresca (2017), “Discharging Transgender Troops Would Cost \$960 Million,” Palm Center.

¹⁴⁸ Hutson, “An Unwarranted Attack.”

¹⁴⁹ Tobias Barrington Wolff (1997), “Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy,” *Brooklyn Law Review*, 63: 1141–1211.

¹⁵⁰ Frank, *Unfriendly Fire*, xix.

¹⁵¹ “Top Military Officer: Gays Should Serve,” *NBC News*, February 2, 2010.

¹⁵² Aaron Belkin (2008), “‘Don’t Ask, Don’t Tell’: Does the Gay Ban Undermine the Military’s Reputation?” *Armed Forces and Society*, 34(2): 276–91.

¹⁵³ Belkin, “‘Don’t Ask, Don’t Tell.’”

- ¹⁵⁴ “Easier Access for Military Recruiters,” *Tampa Tribune*, July 6, 2000, as cited in Belkin, ““Don’t Ask, Don’t Tell,”” 283, and David F. Burrelli and Jody Feder (2009), “Homosexuals in the U.S. Military: Current Issues,” Congressional Research Service, 24.
- ¹⁵⁵ According to a poll that was administered to 5,650 service members, retirees, veterans, and their family members in October and November 2017, “twice as many respondents support transgender individuals serving in the military as those who don’t.” See “Survey 2017 Results,” Military Family Advisory Network, 31. According to an August 2017 Quinnipiac poll, 68 percent of voters support allowing transgender individuals to serve in the military, with 27 percent opposing. See Quinnipiac University, “U.S. Voters Say 68–27% Let Transgender People Serve,” (press release), August 3, 2017.
- ¹⁵⁶ DoD Report, 41.
- ¹⁵⁷ Department of Defense, Health Data on Active Duty Service Members with Gender Dysphoria, 31–32.
- ¹⁵⁸ \$2.2 million / 2.1 million service members / 12 months = 9 cents per member per month.
- ¹⁵⁹ Luk Gijs and Anne Brewaeys (2007), “Surgical Treatment of Gender Dysphoria in Adults and Adolescents: Recent Developments, Effectiveness, and Challenges,” *Annual Review of Sex Research*, 18(1): 178–224. The 1990 study was Charles Mate-Kole, Maurizio Freschi, and Ashley Robin (1990), “A Controlled Study of Psychological and Social Change after Surgical Gender Reassignment in Selected Male Transsexuals,” *The British Journal of Psychiatry*, 157(2): 261–64.
- ¹⁶⁰ Murad et al., “Hormonal Therapy.” The DoD Report notes that the Murad study found the quality of most evidence to be “low,” a claim we address elsewhere in this report.
- ¹⁶¹ Colton Keo-Meier, Levi Herman, Sari Reisner, Seth Pardo, Carla Sharp, and Julia Babcock (2015), “Testosterone Treatment and MMPI-2 Improvement in Transgender Men: A Prospective Controlled Study,” *Journal of Consulting and Clinical Psychology*, 83(1): 143–56.
- ¹⁶² Dhejne et. al, “Mental Health and Gender Dysphoria.”
- ¹⁶³ Rosalià Costa and Marco Colizzi (2016), “The Effect of Cross-Sex Hormonal Treatment on Gender Dysphoria Individuals’ Mental Health: A Systematic Review,” *Neuropsychiatric Disease and Treatment* 12: 1953–66.
- ¹⁶⁴ Steven Weyers et al. (2009), “Long-Term Assessment of the Physical, Mental, and Sexual Health among Transsexual Women,” *The Journal of Sexual Medicine*, 6(3): 752–60.
- ¹⁶⁵ Ester Gomez-Gil et al. (2012), “Hormone-Treated Transsexuals Report Less Social Distress, Anxiety and Depression,” *Psychoneuroendocrinology*, 37(5): 662–70.
- ¹⁶⁶ Marco Colizzi, Rosalià Costa, and Orlando Todarello (2014), “Transsexual Patients’ Psychiatric Comorbidity and Positive Effect of Cross-Sex Hormonal Treatment on Mental Health: Results from a Longitudinal Study,” *Psychoneuroendocrinology*, 39: 65–73.
- ¹⁶⁷ Nataša Jokic-Begic, Anita Lauri Korajlija, and Tanja Jurin (2014), “Psychosocial Adjustment to Sex Reassignment Surgery: A Qualitative Examination and Personal Experiences of Six Transsexual Persons in Croatia,” *Scientific World Journal* 2014, 6.
- ¹⁶⁸ Keo-Meier et al., “Testosterone Treatment.”
- ¹⁶⁹ Emily Newfield, Stacey Hart, Suzanne Dibble, and Lori Kohler (2006), “Female-to-Male Transgender Quality of Life,” *Quality of Life Research*, 15(9): 1447–57.
- ¹⁷⁰ Gomez-Gil et al., “Hormone-Treated Transsexuals.”
- ¹⁷¹ Colizzi, Costa, and Todarello, “Transsexual Patients’ Psychiatric Comorbidity.”
- ¹⁷² Samuel Davis and S. Colton Meier, (2014), “Effects of Testosterone Treatment and Chest Reconstruction Surgery on Mental Health and Sexuality in Female-to-Male Transgender People,” *International Journal of Sexual Health*, 26(2): 113–28.
- ¹⁷³ Rehman et al., “The Reported Sex and Surgery Satisfaction.”
- ¹⁷⁴ Nathalie Parola et al. (2010), “Study of Quality of Life for Transsexuals after Hormonal and Surgical Reassignment,” *Sexologies*, 19(1): 24–28.
- ¹⁷⁵ Griet De Cuypere et al. (2006), “Long-Term Follow-up: Psychosocial Outcome of Belgian Transsexuals after Sex Reassignment Surgery,” *Sexologies*, 15(2): 126–33.
- ¹⁷⁶ Nooshin Khobzi Rotondi et al. (2011), “Prevalence of and Risk and Protective Factors for Depression in Female-to-Male Transgender Ontarians: Trans PULSE Project,” *Canadian Journal of Community Mental Health*, 30(2): 135–55.
- ¹⁷⁷ Crystal Boza and Kathryn Nicholson Perry (2014), “Gender-Related Victimization, Perceived Social Support, and Predictors of Depression among Transgender Australians,” *International Journal of Transgenderism*, 15(1): 35–52.

¹⁷⁸ Ulrike Ruppín, and Freidemann Pfäfflin (2015), “Long-Term Follow-up of Adults with Gender Identity Disorder,” *Archives of Sexual Behavior*, 44(5): 1321–29.

¹⁷⁹ Cecilia Dhejne, Katarina Öberg, Stefan Arver, and Mikael Landén (2014), “An Analysis of All Applications for Sex Reassignment Surgery in Sweden, 1960–2010: Prevalence, Incidence, and Regrets,” *Archives of Sexual Behavior*, 43(8): 1535–45.

¹⁸⁰ Freidemann Pfäfflin (1992; sometimes listed as 1993), “Regrets after Sex Reassignment Surgery,” *Journal of Psychology and Human Sexuality*, 5(4): 69–85.

¹⁸¹ Aude Michel, Marc Ansseau, Jean-Jacques Legros, William Pitchot, and Christian Mormont (2002), “The Transsexual: What about the Future?” *European Psychiatry*, 17(6): 353–62.

¹⁸² Mikael Landén, Jan Wålinder, Gunnar Lambert, and Bengt Lundström (1998), “Factors Predictive of Regret in Sex Reassignment,” *Acta Psychiatrica Scandinavica*, 97(4): 284–89.

¹⁸³ Rehman et al., “The Reported Sex and Surgery Satisfaction.”

¹⁸⁴ De Cuypere et al., “Long-Term Follow-up.”

¹⁸⁵ Ruppín and Pfäfflin, “Long-Term Follow-up.”

Exhibit 9



Your Military

(/news/your-military/)

All 4 service chiefs on record: No harm to units from transgender service

By: **Tara Copp** (/author/tara-copp) April 24

3K

Air Force Chief of Staff Gen. Dave Goldfein told Congress Tuesday he was not aware of any negative effects from transgender personnel serving (https://www.militarytimes.com/news/your-military/2018/03/26/mattis-pentagon-quiet-on-new-transgender-policy/), joining all three other service chiefs in a rare public split with President Donald Trump (https://www.militarytimes.com/news/your-military/2018/03/24/here-is-the-mattis-guidance-and-pentagon-study-behind-trump-transgender-decision/) over the issue.

Sen. Kristen Gillibrand, D-N.Y., as she had with the top military leaders of the Army, Navy and Marine Corps when they appeared before the Senate Armed Services Committee for their budget hearings, used the opportunity to question Goldfein as to whether he was aware of any “issues of unit cohesion, disciplinary problems or issues of morale resulting from open transgender service.”

“In the last two weeks Gen. [Mark] Milley, Gen. [Robert] Neller, and Adm. [John] Richardson have told me that they have seen zero reports of issues of cohesion, discipline, morale as a result of open transgender service in their respective service branches,” Gillibrand said, referring to the chiefs of staff of the Army, Marine Corps and Navy, respectively.

Goldfein said he was not aware of any issues with transgender service members, but emphasized that each case is unique. Goldfein said among the transgender service members he had talked to, he had found a “commitment to serve by each of them.”





(/news/your-military/2018/03/24/here-is-the-mattis-guidance-and-pentagon-study-behind-trump-transgender-decision/)

Here is the Mattis guidance and Pentagon study behind the Trump transgender decision (/news/your-military/2018/03/24/here-is-the-mattis-guidance-and-pentagon-study-behind-trump-transgender-decision/)

The White House's late Friday announcement was influenced by the these documents.

By: Tara Copp

Likewise, in earlier testimonies, when the three other service secretaries were asked if they had heard of any harm to unit cohesion or other problems, they responded:

Navy: “By virtue of being a Navy sailor, we treat every one of those Navy sailors, regardless, with dignity and respect,” said Chief of Naval Operations Adm. John Richardson (<https://www.militarytimes.com/news/your-navy/2018/04/19/no-reports-of-transgender-troops-affecting-unit-cohesion-marine-corps-and-navy-leaders-say/>). “That is warranted by wearing the uniform of the United States Navy. By virtue of that approach, I am not aware of any issues.”

Marine Corps: “By reporting those Marines that have come forward, there’s 27 Marines that have identified as transgender, one sailor serving. I am not aware of any issues in those areas,” said Marine Commandant Gen. Robert Neller.

Army: “We have a finite number. We know who they are, and it is monitored very closely, because, you know, I’m concerned about that, and want to make sure that they are, in fact, treated with dignity and respect. And no, I have received precisely zero reports,” said Army Chief of Staff Gen. Mark Milley.



Last month the White House announced that it would leave the decision to the service secretaries on whether or not to allow transgender personnel to serve; but also directed that a subset of transgender personnel — those with a diagnosis of gender dysphoria — would be prohibited from serving. Gender dysphoria is a condition where a person experiences discomfort with their biological sex.

In his February guidance to President Trump (<https://www.militarytimes.com/news/your-army/2018/03/24/trump-order-would-ban-most-transgender-troops-from-serving/>), Mattis also listed several other limitations on transgender service, including an extension of the amount of time someone would need to be stable in their preferred sex to 36 months and a prohibition on service members who have undergone corrective surgery.

Critics have said the gender dysphoria argument is an attempt to keep all transgender personnel from serving, because “gender dysphoria” is a broadly used diagnosis used by the medical community for transgender persons and not indicative of a more serious issue.

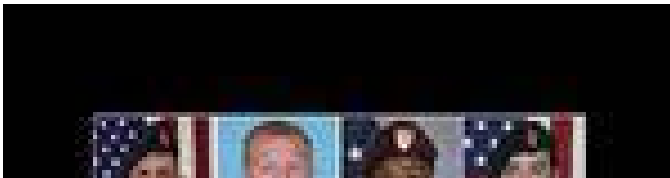


The four service chiefs, along with the chief of the National Guard Bureau and Chairman of the Joint Chiefs of Staff Gen. Joseph Dunford, comprise the president's top circle of military advisers. Each service chief's testimony marked an unusual split with the president and Defense Secretary Jim Mattis, who have advised that allowing personnel with gender dysphoria to serve would harm unit cohesion and present an "unreasonable burden on the military."

The administration's prohibitions on transgender service are still being challenged in the courts; four federal courts have already overturned Trump's previous ban on new accessions by transgender personnel and the other aspects of the administration's transgender policy are now part of ongoing lawsuits.

3K

Recommended for you



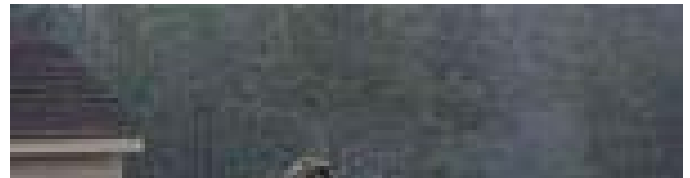
Pentagon to unveil probe into Niger ambush that killed 4

(http://www.militarytimes.com/flashpoints/2018/05/10/pentagon-to-unveil-probe-into-niger-ambush-that-killed-4/?utm_source=clavis)



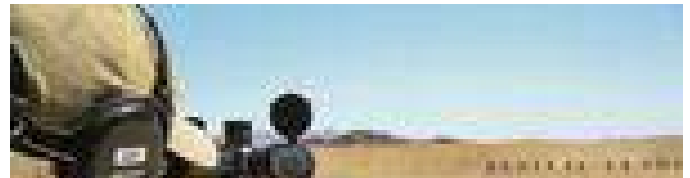
New 'blue water veterans' deal could mean benefits for 90,000 Vietnam War troops

(http://www.militarytimes.com/veterans/2018/05/04/new-blue-water-veterans-deal-could-mean-benefits-for-90000-vietnam-war-troops/?utm_source=clavis)



SOCOM snipers will ditch their bullets for this new round next year

(http://www.militarytimes.com/news/your-military/2018/05/08/socom-snipers-will-ditch-their-bullets-for-this-new-round-next-year/?utm_source=clavis)



Homeland Security shooters are dumping .308 for this long-range round

(http://www.militarytimes.com/off-duty/gearscout/2018/05/08/homeland-security-shooters-are-dumping-308-for-this-long-range-round/?utm_source=clavis)

Around The Web

ghtlinemediagroup-militarytimes&utm_medium=referral&utm_content=alternating-thumbnails-a:Below Article Thumbnails:)
ghtlinemediagroup-militarytimes&utm_medium=referral&utm_content=alternating-thumbnails-a:Below Article Thumbnails:)
ghtlinemediagroup-militarytimes&utm_medium=referral&utm_content=alternating-thumbnails-a:Below Article Thumbnails:)

(https://tophatter.com/?categories=electronics&ad_id2=4doc31&ad_creative_id=ac00014&ad_image=6f234e5bfb57761a32df52fb8463dc31.jpg&ad_title=%7B%7BTITLE%7D%7D&source=taboola&campaign=930670militarytimes)

It's Like Ebay, but Everything Sells in 90 Seconds

Tophatter

(https://tophatter.com/?categories=electronics&ad_id2=4doc31&ad_creative_id=ac00014&ad_image=6f234e5bfb57761a32df52fb8463dc31.jpg&ad_title=%7B%7BTITLE%7D%7D&source=taboola&campaign=930670militarytimes)

Exhibit 14

Stenographic Transcript
Before the

COMMITTEE ON
ARMED SERVICES

UNITED STATES SENATE

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

Thursday, April 12, 2018

Washington, D.C.

ALDERSON COURT REPORTING
1155 CONNECTICUT AVENUE, N.W.
SUITE 200
WASHINGTON, D.C. 20036
(202) 289-2260
www.aldersonreporting.com

1 HEARING TO RECEIVE TESTIMONY ON THE
2 POSTURE OF THE DEPARTMENT OF THE ARMY IN REVIEW OF THE
3 DEFENSE AUTHORIZATION REQUEST FOR FISCAL YEAR 2019 AND THE
4 FUTURE YEARS DEFENSE PROGRAM

5

6 Thursday, April 12, 2018

7

8 U.S. Senate
9 Committee on Armed Services
10 Washington, D.C.

11

12 The committee met, pursuant to notice, at 9:37 a.m. in
13 Room SD-G50, Dirksen Senate Office Building, Hon. James M.
14 Inhofe, presiding.

15 Committee Members Present: Senators Inhofe
16 [presiding], Inhofe, Wicker, Fischer, Cotton, Rounds, Ernst,
17 Tillis, Sullivan, Perdue, Cruz, Graham, Reed, Nelson,
18 McCaskill, Shaheen, Gillibrand, Blumenthal, Donnelly,
19 Hirono, Kaine, King, Heinrich, Warren, and Peters.

20

21

22

23

24

25

1 General Milley: Sure.

2 Senator Gillibrand: Dr. Esper and General Milley, in
3 light of the existing injunctions, DOD is currently
4 operating under the previous transgender open service policy
5 put in place by the last administration, yet transgender
6 soldiers have now seen the Department's recommendations and
7 are on notice that, if the policy is implemented, they will
8 get kicked out for seeking care or treatment for their
9 gender dysphoria. I'm worried that this uncertainty will
10 get -- will have a negative impact on these individuals, but
11 also on their units, and that fear of these recommendations
12 will stop these soldiers from seeking care. What are you
13 doing to ensure readiness in light of the pall that has been
14 cast on the future of transgender soldiers?

15 Dr. Esper: Senator, we continue to treat every
16 soldier, transgender or not, with dignity and respect,
17 ensure that they're well trained and well equipped for
18 whatever future fights. With regard to accessions, our
19 accessions folks understand that we are operating under the
20 Carter policy, if you will. We've had some persons already
21 join, transgender persons join, and we will continue to
22 access them and train them and treat them well, in
23 accordance with that policy.

24 Senator Gillibrand: Well, I'm concerned, because the
25 report that was included with the memo claimed that

1 transgender persons serving in our military might hurt unit
2 cohesion. So, that is different than treating everyone with
3 dignity and respect. When asked by reporters, in February,
4 whether soldiers have concerns about serving beside openly
5 transgender individuals, you said it really hasn't come up.
6 Are you aware of any problems with unit cohesion arising
7 since you made that comment? And, if so, can you tell us
8 how they were handled by the unit leadership involved?

9 Dr. Esper: Senator, nothing has percolated up to my
10 level. When I made that comment, I was -- it was a question
11 about, you know, have I met with soldiers and talked about
12 these issues? What do they raise? And, as I said then, the
13 soldiers tend to -- you know, young kids tend to raise the
14 issue in front of them at the day. It could be that they're
15 performing all-night duty or didn't get their paycheck, and
16 this was just not an issue that came up at that moment in
17 time. And, beyond that --

18 Senator Gillibrand: Have you since heard anything, how
19 transgender servicemembers are harming unit cohesion?

20 Dr. Esper: Again, nothing has percolated up to me.

21 Senator Gillibrand: General Milley, have you heard
22 that?

23 General Milley: No, not at all. The -- and we have a
24 finite number. We know who they are, and it is monitored
25 very closely, because, you know, I'm concerned about that,

1 and want to make sure that they are, in fact, treated with
2 dignity and respect. And no, I have received precisely zero
3 reports --

4 Senator Gillibrand: Okay.

5 General Milley: -- of issues of cohesion, discipline,
6 morale, and all those sorts of things. No.

7 Senator Gillibrand: That's good news.

8 I know that the Secretary spoke with transgender
9 soldiers recently. Of all the ones that you have personally
10 spoke with of the Active Duty transgender soldiers, were you
11 concerned by any of them continuing to serve?

12 Dr. Esper: Well, I actually met with them in the first
13 30 days on the job, Senator. And no, nothing came up that
14 would cause me concern. I was, you know, impressed by what
15 I heard.

16 Senator Gillibrand: And have either of you spoken to
17 any transgender servicemembers since this set of
18 recommendations was released by the administration in March?
19 And, if you have, what did you hear?

20 Dr. Esper: No, ma'am.

21 General Milley: I have not. I did before. I have
22 not. But, let -- you know, the case, as you are well aware,
23 is in litigation. It's in four different courts. So, the -
24 - we're limited in, actually, what we should or could say
25 right this minute, because it could, either one way or the

Exhibit 15

Stenographic Transcript
Before the

COMMITTEE ON
ARMED SERVICES

UNITED STATES SENATE

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

Thursday, April 19, 2018

Washington, D.C.

ALDERSON COURT REPORTING
1155 CONNECTICUT AVE, N.W.
SUITE 200
WASHINGTON, D.C. 20036
(202) 289-2260
www.aldersonreporting.com

1 HEARING TO RECEIVE TESTIMONY ON THE
2 POSTURE OF THE DEPARTMENT OF THE NAVY IN REVIEW OF THE
3 DEFENSE AUTHORIZATION REQUEST FOR FISCAL YEAR 2019 AND THE
4 FUTURE YEARS DEFENSE PROGRAM

5

6 Thursday, April 19, 2018

7

8 U.S. Senate
9 Committee on Armed Services
10 Washington, D.C.

11

12 The committee met, pursuant to notice, at 9:31 a.m. in
13 Room SD-G50, Dirksen Senate Office Building, Hon. James M.
14 Inhofe, presiding.

15 Committee Members Present: Senators Inhofe
16 [presiding], Wicker, Fischer, Cotton, Ernst, Tillis,
17 Sullivan, Perdue, Graham, Scott, Reed, Nelson, McCaskill,
18 Shaheen, Gillibrand, Blumenthal, Donnelly, Hirono, Kaine,
19 King, Warren, and Peters.

20

21

22

23

24

25

1 with our terrific allies in Norway who are just doing
2 yeoman's work monitoring the gap. But, they opened my eyes
3 as to what's going on in the Arctic. I had read about it,
4 but, when you see what's going on there, what Russia is
5 doing, repaving 12,000-foot runways, 10,000 spetznaz up
6 there in Barracks 4, search and rescue, we need to have
7 presence up there.

8 The complication, as you well know, because we've
9 talked about this, is -- icebreaking is one of the
10 complications. It's not a mission of the Navy. We are
11 working hand in hand with the Coast Guard. In fact, we have
12 just finished helping them design in requirements for the
13 next class of icebreaker. But, that is their mission.

14 That being said, we do not have ice-hardened ships.
15 There is a new terminology up there, called the Blue Water
16 Arctic, that there now is open blue waters up there. The
17 CNO and I have talked about, How do we have presence up
18 there? We're working on that. And when we see our strategy
19 roll out, you will see more this summer.

20 Senator Sullivan: Great. I appreciate it.

21 Thank you, gentlemen.

22 Senator Inhofe: Thank you, Senator Sullivan.

23 Senator Gillibrand.

24 Senator Gillibrand: Thank you, Mr. Chairman.

25 Admiral Richardson and General Neller, General Milley

1 told me, last week, that there were, quote, "precisely zero
2 reports of issues of cohesion, discipline, morale, and all
3 sorts of things in the Army as a result of open transgender
4 service." Are you aware of any issue of unit cohesion,
5 disciplinary problems, or issues with morale resulting from
6 open transgender service?

7 Admiral Richardson: Senator, I'll go first on that.
8 You know, by virtue of being a Navy sailor, we treat every
9 one of those sailors, regardless, with dignity and respect
10 that is warranted by wearing the uniform of the United
11 States Navy. By virtue of that approach, I am not aware of
12 any issues.

13 Senator Gillibrand: General Neller?

14 General Neller: Senator, by reporting, those marines
15 that have come forward -- there's 27 marines that have
16 identified as transgender, one sailor serving -- I am not
17 aware of any issues in those areas. The only issues I have
18 heard of is, in some cases, because of the medical
19 requirements of some of these individuals, that there is a
20 burden on the commands to handle all their medical stuff.
21 But, discipline, cohesion of the force, no.

22 Senator Gillibrand: Can you amplify what burdens on
23 the command are related to medical issues?

24 General Neller: Some of these individuals -- and, you
25 know, they've resolved whatever it was that -- as they went

1 through the process of identifying other than their birth
2 sex, and so they're going forward. And I think those that
3 came forward, we have a -- we have to honor the fact that
4 they came out and they trusted us to say that, and that we
5 need to make sure that we help them get through that
6 process. Some of them are in a different place than others.
7 And so, there is -- part of it's an education, but part of
8 it is that there are some medical things that have to be
9 involved as they go through the process of transitioning and
10 real-life experience and whatever their level of dysphoria
11 is. So, for commanders, some of them have said, "No, it's
12 not a problem at all." Others have said that there is a lot
13 of time where this individual is -- may or may not be
14 available.

15 So, we're all about readiness. We're looking for
16 deployability. But, in the areas that you talked about, no,
17 I have not -- I have not heard of or have reported to me any
18 issues.

19 Senator Gillibrand: Have you had the opportunity,
20 General Neller, to meet with any of your transgender troops?

21 General Neller: Yes.

22 Senator Gillibrand: And what did you learn from those
23 meetings?

24 General Neller: I learned that -- I learned a lot
25 about the experience that they had. I learned that -- I met

1 with four -- actually, one was a naval officer, one was an
2 Army staff sergeant, one was a marine officer, and one was a
3 Navy corpsman -- and I learned about their desire to serve.
4 I learned about, you know, where their recognition of their
5 identification opposite their birth sex. We had a very
6 candid, frank conversation. And I respect -- as CNO said --
7 respect their desire to serve. And all of them, to the best
8 of my knowledge, were ready and prepared to deploy, and
9 they-- as long as they can meet the standard of what their
10 particular occupation was, then I think we'll move forward.

11 Senator Gillibrand: Thank you, General Neller.

12 Admiral Richardson, what are you doing to ensure
13 readiness at the personnel and unit level, in light of this
14 new policy that's come forward from the White House, in
15 terms of a new burden placed on transgender sailors and
16 marines?

17 Admiral Richardson: Ma'am, I will tell you that we're--
18 - it's steady as she goes. We have a worldwide deployable
19 Navy. All of our sailors, or the vast, vast majority of our
20 sailors, are worldwide deployable. We're taking lessons
21 from when we integrated women into the submarine force. And
22 one of the pillars of that was to make sure that there were
23 really no differences highlighted in our approach to
24 training those sailors. That program has gone very well.
25 And so, maintaining that level playing field of a standards-

1 based approach seems to be the key to -- a key to success,
2 and that's the approach we're taking.

3 Senator Gillibrand: Thank you, Admiral.

4 You and I had a long conversation about military
5 justice. And we talked about some of the sexual harassment
6 and assault issues that are within the Navy. We had a issue
7 with regard to "Bad Santa," as you know, where your public
8 affairs officer was allowed to stay in his position for
9 several months despite his clearly inappropriate behavior.
10 Do you have a sense of what message members serving under
11 you received from him being allowed to stay in that
12 position? And have you changed your approach because of
13 that incident?

14 Admiral Richardson: The beginning of that approach was
15 really defined by making sure that we got a thorough
16 investigation into a complicated scenario there with
17 allegations and counter-allegations. So, that -- the
18 investigation took some of the time.

19 Having said all that, I've become acutely aware that
20 that may have sent a bad message, particularly to the
21 survivors of the behavior. And so, that -- you know, my
22 radar has been completely retuned, in terms of sensitivity
23 to that message. And I hope that we've arrived at a good
24 place at the end of the -- at the end of this event. It
25 took longer, in hindsight, than it should have. If I was

Exhibit 16

Stenographic Transcript
Before the

COMMITTEE ON
ARMED SERVICES

UNITED STATES SENATE

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

Tuesday, April 24, 2018

Washington, D.C.

ALDERSON COURT REPORTING
1155 CONNECTICUT AVENUE, N.W.
SUITE 200
WASHINGTON, D.C. 20036
(202) 289-2260
www.aldersonreporting.com

1 HEARING TO RECEIVE TESTIMONY ON
2 THE POSTURE OF
3 THE DEPARTMENT OF THE AIR FORCE
4 IN REVIEW OF THE DEFENSE AUTHORIZATION REQUEST
5 FOR FISCAL YEAR 2019 AND
6 THE FUTURE YEARS DEFENSE PROGRAM

7

8 Tuesday, April 24, 2018

9

10 U.S. Senate
11 Committee on Armed Services
12 Washington, D.C.

13

14 The committee met, pursuant to notice, at 9:30 a.m. in
15 Room SD-G50, Dirksen Senate Office Building, Hon. James M.
16 Inhofe, presiding.

17 Committee Members Present: Senators Inhofe
18 [presiding], Wicker, Fischer, Cotton, Rounds, Ernst, Tillis,
19 Sullivan, Cruz, Scott, Reed, Nelson, McCaskill, Shaheen,
20 Gillibrand, Blumenthal, Donnelly, Hirono, Kaine, King,
21 Heinrich, Warren, and Peters.

22

23

24

25

1 Senator Sullivan: So you think the Army is capable to
2 provide you the Air Force and the bases that you are in
3 charge of globally with sufficient short-range air defense
4 systems to defend overseas air bases?

5 General Goldfein: I believe the Army has -- and I
6 cannot speak for my fellow joint chief, General Milley, in
7 terms of what is in his budget submission, but I will tell
8 you that I know the Army is invested and committed to their
9 responsibility for base defense.

10 Senator Sullivan: But not just ballistic missile. I
11 am talking cruise missile.

12 General Goldfein: Right.

13 Senator Sullivan: Madam Secretary, do you have a view
14 on that?

15 Dr. Wilson: Senator, I do think that when it comes to
16 air base defense, that is an area where we probably need to
17 look really carefully. It is one that long term I think all
18 of us as airmen have concerns about. Are we going to be
19 able to defend the bases from which we fight?

20 Senator Sullivan: Thank you, Mr. Chairman.

21 Senator Inhofe: Thank you, Senator Sullivan.

22 Senator Gillibrand?

23 Senator Gillibrand: Hi, General Goldfein. Hi, Madam
24 Secretary. Thank you so much for being here.

25 General Goldfein, in the last 2 weeks, General Milley,

1 General Neller, and Admiral Richardson have told me that
2 they have seen zero reports of issues of cohesion,
3 discipline, and morale, as a result of open transgender
4 service in their respective service branches. Are you aware
5 of any specific issues of unit cohesion, disciplinary
6 problems, or issues of morale resulting from open
7 transgender service members in the Air Force?

8 General Goldfein: Not the way you have presented the
9 question, ma'am, I am not. I will tell you that I have
10 talked commanders in the field, first sergeants, senior
11 NCOs, and I am committed to ensure that they have the right
12 levels of guidance to understand these very personal issues
13 that they are dealing with. And so we continue to move
14 forward to ensure that we understand the issues.

15 Senator Gillibrand: And have you personally met with
16 transgender service members?

17 General Goldfein: Yes, ma'am, I have.

18 Senator Gillibrand: And what did you learn from those
19 meetings?

20 General Goldfein: A combination of, one, commitment to
21 serve by each of them, and then number two, how individual
22 each particular case is. It is not a one-size-fits-all
23 approach. It is very personal to each individual. And that
24 is why I go back to we have an obligation to ensure that we
25 understand this medically and that we can provide our

1 commanders and supervisors the guidance they need to be able
2 to deal with this so we do not have issues.

3 Senator Gillibrand: Thank you.

4 Secretary Wilson, on April 3rd, 2018, the American
5 Medical Association wrote a letter to Secretary decrying the
6 recent policy released by the White House. Echoing concerns
7 raised by the American Psychological Association and two
8 former Surgeon Generals, the American Medical Association
9 said, quote, we believe there is no medically valid reason,
10 including a diagnosis of gender dysphoria, to exclude
11 transgender individuals from military service. The memo
12 mischaracterized and rejected the wide body of peer-reviewed
13 research on the effectiveness of transgender medical care.
14 Yet, this DOD panel of experts came to a drastically
15 different conclusion from the preeminent medical
16 organizations in America about gender dysphoria, the
17 effectiveness and impact of gender transition on medical and
18 psychological health, and the ability of transgender service
19 members to meet standards of accession and retention.

20 Do you know who represented the Air Force on this
21 panel?

22 Dr. Wilson: On the advisory panel to the Secretary of
23 Defense?

24 Senator Gillibrand: Yes.

25 Dr. Wilson: Yes, ma'am, I do.

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al,

Plaintiffs,

v.

DONALD TRUMP, et al,

Defendants.

STATE OF WASHINGTON,

Intervenor-Plaintiff,

v.

DONALD TRUMP, et al,

Intervenor-Defendants.

Case No: 2:17-cv-1297-MJP

DECLARATION OF
LA ROND BAKER IN
SUPPORT
OF WASHINGTON'S
RESPONSE TO
DEFENDANTS' MOTION
TO STAY PRELIMINARY
INJUNCTION PENDING
APPEAL

Pursuant to 28 U.S.C. § 1746(2), I, LA ROND BAKER, hereby declare as follows:

1. I am over the age of eighteen and am competent to testify.
2. I am an Assistant Attorney General for the State of Washington, and I make this declaration as a representative of the State of Washington in Support of Washington's Response to Defendants' Motion to Stay Preliminary Injunction Pending Appeal

DECLARATION OF
LA ROND BAKER IN SUPPORT
OF WASHINGTON'S RESPONSE TO
DEFENDANTS' MOTION TO STAY
PRELIMINARY INJUNCTION PENDING
APPEAL

1

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 442-4492

WA SER 576

3. Attached hereto as **Baker Declaration Exhibit A** is a true and correct copy of Washington Military Department Policy No. HR-209-02 – Equal Opportunity/Affirmative Action (October 4, 2017), available online at <https://www.mil.wa.gov/uploads/pdf/policies/other-agencies/human-resources/hr-209-02.pdf> (last visited May 14, 2018).
4. Attached hereto as **Baker Declaration Exhibit B** is a true and correct copy of a Washington Military Department Policy No. HR-208-01 – Anti-Discrimination (February 1, 2013), available online at https://www.mil.wa.gov/uploads/pdf/policies/other-agencies/human-resources/hr20801_000.pdf (last visited May 14, 2018).
5. Attached hereto as **Baker Declaration Exhibit C** is a true and correct copy of Directive of the Governor 16-11 *LGBTQ Inclusion and Safe Places Initiative*, available online at https://www.governor.wa.gov/sites/default/files/directive/dir_16-11_0.pdf (last visited May 14, 2018).
6. Attached hereto as **Baker Declaration Exhibit D** is a true and correct copy of Proclamation by the Governor 18-03 (May 11, 2018), available online at <https://www.governor.wa.gov/sites/default/files/proclamations/18-03%20State%20of%20Emergency%20%28tmp%29.pdf> (last visited May 14, 2018).
7. Attached hereto as **Baker Declaration Exhibit E** is a true and correct copy of Proclamation by the Governor 17-13 (Dec. 18, 2017), available online at https://www.governor.wa.gov/sites/default/files/proclamations/proc_17-13.pdf (last visited May 14, 2018).
8. Attached hereto as **Baker Declaration Exhibit F** is a true and correct copy of Proclamation by the Governor 17-12 (Sept. 2, 2017), available online at https://www.governor.wa.gov/sites/default/files/proclamations/proc_17-12.pdf (last

visited May 14, 2018).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14th day of May 2018 at Seattle, Washington.

s/ La Rond Baker

LA ROND BAKER, WSBA No. 43610

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 14th day of May, 2018.

/s/ La Rond Baker

LA ROND BAKER, WSBA No. 43610

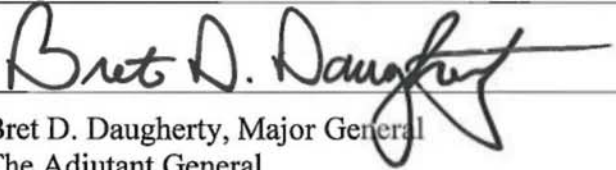
Exhibit A

Department Policy No. HR-209-02
October 4, 2017

Page 1 of 3



Department Policy No. HR-209-02

Title:	Equal Opportunity / Affirmative Action
Former Number:	03-203-05
Authorizing Source:	Presidential Executive Orders 11246 (as amended) and 11375; Code of Federal Regulations (CFR) Title 41, Part 60-2; Title VII of the Civil Rights Act of 1964, as amended; Equal Employment Opportunity governing guidelines, CFR Titles 28, 29, and 43; Vietnam-Era Veterans Readjustment Act of 1974; The American with Disabilities Act of 1990, as amended The Rehabilitation Act of 1973, Section 504, as amended The Age Discrimination Act of 1975, as amended Governor's Executive Orders 93-07 and 98-01 RCW Chapters 41.06 and 49.60 WAC Chapter 357-25 Directive of the Governor 16-11 Human Resource Policy and Procedure #HR-208-01 –Anti-Discrimination
Information Contact:	Human Resources Director Building #33 (253) 512-7941
Effective Date:	June 30, 2005
Mandatory Review Date:	October 4, 2021
Revised:	October 4, 2017
Approved By:	 Bret D. Daugherty, Major General The Adjutant General Washington Military Department Director

Purpose

The Washington Military Department affirms its commitment to providing equal employment opportunity in accordance with the principles, intent, and purposes of the laws and regulations cited in this policy, recognizing that affirmative action is an effective legal tool for attaining and maintaining parity within the workforce.

Applicability

This policy is applicable to all state employees, applicants for state employment, contractors, vendors, and customers/clients. It does not apply to National Guard personnel on state active duty or to federal personnel to include Active Guard Reserve (AGR), traditional guard personnel in a federal military status, or military technicians.

Policy

The Military Department is committed to equal employment opportunity and access to its programs and services for all persons without regard to race, color, sex, religion, creed, age, marital status, national origin, sexual orientation or gender identity and expression, disabled and Vietnam-Era veteran, veteran or military status, or the presence of any physical, sensory or mental disability or any other legally protected status.

Equal employment opportunity and affirmative action are vital responsibilities that are equally important within all functions of the agency. It is the responsibility of each employee to comply with and promote this policy and for maintaining a work environment that encourages and promotes diversity and inclusion.

The Military Department will provide access to its services and programs in a fair and impartial manner. Equal employment opportunity is the goal, whereas, the Affirmative Action Plan is the methodology by which the Agency will fulfill this goal. In an effort to eliminate barriers and to improve employment opportunities to underutilized groups, this policy shall be implemented in recruitment, hiring, career development, training, promotion, transfer, retention, reclassification, corrective/disciplinary actions, termination, reversion and non-permanent appointments.

The Military Department will provide an environment free from all forms of discrimination. Employees are prohibited from engaging in any form of racial, religious, and sexual harassment behavior including jokes, slurs, and innuendoes. This behavior is inappropriate in the work environment and may be grounds for corrective or disciplinary action in accordance with Washington State Collective Bargaining Agreements and Washington Administrative Code.

Responsibilities

Equal employment opportunity and affirmative action are vital responsibilities and, as such, assume equal importance within all functions of the Department.

1. Department Director/The Adjutant General (TAG)

The Department Director/TAG has overall responsibility for implementation of the Department's equal employment opportunity program, Affirmative Action Plan, and to ensure management supports and promotes a high visibility of its commitment to equal employment opportunity/affirmative action.

Department Policy No. HR-209-02
October 4, 2017

Page 3 of 3

2. Human Resource Director (HRD)

The HRD is the Director's AA/EEO designee with the responsibility for:

- Developing, implementing, and disseminating the Department's Affirmative Action Plan.
- Designing, implementing, and monitoring internal reporting systems and advising management and staff regarding Equal Opportunity/Affirmative Action policy, plan and strategies.
- Analyzing hiring, promotions, demotions, corrective/disciplinary actions, layoffs, termination, and training participation patterns to identify potential barriers to equal employment opportunity and developing strategies to correct/eliminate the barriers.
- Assisting managers, supervisory and employees with the implementation of the Equal Employment Opportunity/Affirmative action policy, plan, and strategies.

3. Managers/Supervisors

Managers and supervisors are responsible for promoting and implementing the principles of affirmative action and equal opportunity as outlined in the Department's goals and objectives.

4. Employees

Employees are responsible for creating and maintaining a respectful and welcoming work environment, acting within the law, and for complying with this policy.

Information Dissemination

AA/EEO policies will be provided to all new employees. New policies and updates will be distributed to all employees. The Affirmative Action Plan is available through the State Human Resource Office.

Exhibit B



Department Policy No. HR-208-01

Title:	Anti-Discrimination
Former Number:	03-201
Authorizing Source:	Titles VI and VII of the Civil Rights Act of 1964, as amended Section 504 of the Rehabilitation Act of 1973, as amended The Age Discrimination Act of 1975, as amended The Age Discrimination Employment Act of 1967, as amended The Americans with Disabilities Act of 1990, as amended Washington State Law Against Discrimination, RCW 49.60, as amended Washington State Executive Orders: 89-01, Sexual Harassment; 96-04, Reasonable Accommodation; and 93-07, Equal Employment Opportunity/Affirmative Action
Information Contact:	Human Resources Director Building # 33 (253) 512-7941
Effective Date:	January 1, 1998
Mandatory Review Date:	February 1, 2017
Revised:	February 1, 2013
Approved By:	 Bret D. Daugherty, Major General The Adjutant General Washington Military Department Director

Purpose

Maintain a work culture and environment within the Washington Military Department that is free from Discrimination.

Scope

This policy applies to all state employees, applicants for state employment, contractors, and vendors.

Policy

- a. The Washington Military Department prohibits discrimination on the basis of race, color, creed, national origin, sex, marital status, religion, age, sexual preference/orientation, gender identity, or the presence of any sensory, mental, or physical disability in all aspects of service delivery and employment. Accordingly, complaints alleging discrimination will receive prompt and effective treatment.
- b. It is the responsibility of all employees to maintain a work environment free from all forms of discrimination. Employees are prohibited from engaging in any form of discrimination based on protected group status, as noted above, in the course of conducting Department business. Employees who engage in such discriminator behavior may be subject to corrective and/or disciplinary action in accordance with Merit System Rules.
- c. Employees who believe that they have been discriminated against may file a discrimination complaint. No employee will be subject to any form of retaliation as a result of filing a discrimination complaint.

Procedure

Employees that believe they have been subjected to unlawful discrimination should notify the Department as soon as possible, as outlined in the following procedure.

1. Complaints shall be in writing and include a description of the discriminatory act, including the location and date of the action, as well as the name, address, and phone number of complainant. Upon request, alternative means of filing complaints such as personal interview or tape recordings of the complaint will be made available for persons with disabilities.
2. All complaints alleging discrimination should be addressed to:

Human Resources Director
Washington Military Department
State Human Resources Office
Camp Murray, Building #33
Tacoma, WA 98430-5006
(253) 512-7940
3. Complaints alleging sexual harassment should be submitted in accordance with the Department's Sexual Harassment policy.

4. The Human Resources Director will provide written acknowledgment, of all complaints filed in accordance with this procedure, within seven (7) calendar days of their receipt. The acknowledgement will identify a point of contact and provide a reasonable time frame for further response to the complainant. All employees shall cooperate in all phases of the investigative process. The Human Resources Director may determine the need to request the investigation be completed by a neutral, outside party with appropriate investigation skills.
5. Complaints will be investigated, findings shall be addressed expeditiously, and a written response will be provided to the complainant. The response will advise complainants of their right to submit charges to the Washington State Human Rights Commission:

711 South Capitol Way, Suite 402
Olympia, WA 98504-2490
Toll Free (800) 233-3247
TTY: (800) 300-7525

And/or

US Equal Employment Opportunity Commission
Seattle Field Office
Federal Office Building
909 First Avenue, Suite 400
Seattle, WA 98104-1061
Toll Free (800) 669-4000
TTY: (800) 669-6820

6. The investigation of discrimination complaints under this procedure shall be conducted in a confidential manner. Any employee who is a participant in the investigation and violates the confidentiality of the investigation where the integrity of the investigation could be compromised may be subject to corrective and/or disciplinary action in accordance with the Merit System Rules.
7. Employees of the Department who are not satisfied with the Human Resources Director's response to their complaint may request a review by the Adjutant General (Department Director). Requests must be submitted in writing within seven (7) calendar days of the Human Resources Director's written response. The Adjutant General (Department Director) or designee will review the Human Resources Director's response and attempt to seek resolution. The Adjutant General (Department Director) or designee will provide a written response to the employee within twenty-one (21) calendar days from the date of receipt. The response will notify the complainant of their right to seek resolution through appropriate administrative or civil procedure external to the Department. A copy of the response will be forwarded to the Human Resources Director.

Exhibit C

JAY INSLEE
Governor



STATE OF WASHINGTON
OFFICE OF THE GOVERNOR

P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 902-4111 • www.governor.wa.gov

**DIRECTIVE OF THE GOVERNOR
16-11**

June 23, 2016

To: Washington State Cabinet and Small-Cabinet Agencies

From: Governor Jay Inslee

Subject: LGBTQ Inclusion and Safe Places Initiative

The state of Washington has a long and proud history of honoring diversity. Our own law against discrimination predates the Civil Rights Act of 1964, and we were one of the first states to extend civil rights protections to our LGBTQ neighbors, friends, and family members. In Washington we know that the diverse families, expressions of personal identity, and experiences of all our residents enrich our future.

We traditionally celebrate June as LGBTQ Pride Month. I believe that as public leaders and servants, though, our commitment to diversity and inclusion extends beyond a single month of recognition; and the recent violence in Orlando, Florida, highlights the need for us to sustain our efforts year round. Every person in the state of Washington has the right to feel safe, enjoy the benefits of public services, and fully participate in civic life. Accordingly, I am asking you to support me in the following initiatives:

- **Employee Resource Group.** I have always valued the insight and experience of our own employees in creating better workplaces and services. This is true as well in promoting diversity and inclusion. Accordingly, I am directing OFM's State HR Division to work with agencies to create a statewide LGBTQ employee resource group to advise and develop strategies for creating safe, diverse, and inclusive workplaces for our LGBTQ employees and customers.
- **Best Practices.** Many of you are already doing great work building safe and inclusive environments for our LGBTQ employees and customers. I believe that most of these efforts can be replicated. Therefore, I am also asking OFM's State HR Division to work with agencies, institutions, and the LGBTQ employee resource group to identify and share these best practices, so we can all benefit from each other's innovation.

Directive by the Governor 16-11

June 23, 2016

Page 2

- **Safe Place WA.** The Seattle Police Department recently created a “Safe Place” program, in which local businesses and organizations can signal to the public that they serve as locations for members of the LGBTQ community to find safe and secure spaces to request and wait for police assistance. Businesses and organizations throughout Seattle, including Starbucks and Seattle Public Schools, are participating in this program. I believe that our public-facing state offices should also be safe places where people can connect with emergency and related support services. Consequently, I am also asking my Policy Office and OFM to work with agencies and the new employee resource group to develop a similar state program.

Thank you in advance for your support. Staff from my Policy Office and OFM State Human Resources will be reaching out to all of you shortly to begin work on these initiatives. Together we will build a better future for all Washingtonians.

Exhibit D

JAY INSLEE
Governor



STATE OF WASHINGTON
Office of the Governor

PROCLAMATION BY THE GOVERNOR

18-03

WHEREAS, a combination of above normal snowpack in the mountains, above average temperatures, and recent rainfall has resulted in higher than normal snow melt causing flooding of rivers and streams in Ferry, Okanogan and Pend Oreille counties; and

WHEREAS, continued higher temperatures are predicted to increase the threat of additional flooding in areas of eastern Washington over the next seven days with additional flooding expected to occur in these and other eastern Washington counties as rivers and streams continue to rise to record or near record levels; and

WHEREAS, the flooding is resulting in road closures, establishment of alternate transportation routes, evacuations, impacts to local utility services, localized reductions in available drinking water, and damage to public and private property and infrastructure; and

WHEREAS, state agencies and local jurisdictions are coordinating resources to address the impacts of and assess damage caused by the flooding, and to implement appropriate response and recovery activities; and

WHEREAS, the threat of damage from this situation and its effects impact the life and health of our people as well as the property and infrastructure of Washington State, all of which is a public disaster that affects life, health, property, or the public peace; and

WHEREAS, the Washington Military Department has activated the State Emergency Operations Center, implemented response procedures, is coordinating resources to support state and local officials in alleviating the immediate social and economic impacts to people, property and infrastructure, and is continuing to assess impacts resulting from incident.

NOW, THEREFORE, I, Jay Inslee, Governor of the State of Washington, as a result of the above-noted situation, and under Chapters 38.08, 38.52 and 43.06 RCW, do hereby proclaim that a State of Emergency exists in Adams, Asotin, Benton, Chelan, Columbia, Douglas, Ferry, Franklin, Garfield, Grant, Kittitas, Klickitat, Lincoln, Okanogan, Pend Oreille, Spokane, Stevens, Yakima, Walla Walla, and Whitman counties in the state of Washington, and direct the plans and procedures of the *Washington State Comprehensive Emergency Management Plan* be implemented. State agencies and departments are directed to utilize state resources and to do everything reasonably possible to assist affected political subdivisions in an effort to respond to and recover from the incident.

As a result of this incident, I also hereby order into active state service the organized militia of Washington State to include the National Guard and the State Guard, or such part thereof as may be necessary in the opinion of The Adjutant General, to perform such duties as directed by competent authority of the Washington Military Department in addressing this situation. Additionally, the Washington State Emergency Operations Center is instructed to coordinate all incident-related assistance to the affected areas.

Signed and sealed with the official seal of the State of Washington this 11th day of May, A.D, Two Thousand and Eighteen at Olympia, Washington.

By:

/s/
Jay Inslee, Governor

BY THE GOVERNOR:

/s/
Secretary of State

Exhibit E

JAY INSLEE
Governor



**PROCLAMATION BY THE GOVERNOR
17-13**

WHEREAS, on the morning of December 18, 2017, an Amtrak Train derailed onto Interstate 5 at the Mounts Road overpass in Pierce County near the Thurston County line, resulting in loss of life, injuries, and damage to infrastructure; and

WHEREAS, the derailment has caused significant structural damage to the overpass, railway and highway infrastructure, resulting in closure of the overpass and Interstate 5 for the safety of the travelling public until repairs can be completed; and

WHEREAS, the effects of the derailment and related rail and highway closures impact the life and health of the people as well as the property and infrastructure of Washington State, all of which is a public disaster that affects life, health, property, or the public peace; and

WHEREAS, the Washington Military Department has activated the State Emergency Operations Center, implemented response procedures, is coordinating resources to support state and local officials in alleviating the immediate social and economic impacts to people, property and infrastructure, and is continuing to assess impacts resulting from incident.

NOW, THEREFORE, I, Jay Inslee, Governor of the state of Washington, as a result of the above-noted situation, and under Chapters 38.08, 38.52 and 43.06 RCW, do hereby proclaim that a State of Emergency exists in Pierce and Thurston counties in the state of Washington, and direct the plans and procedures of the *Washington State Comprehensive Emergency Management Plan* be implemented. State agencies and departments are directed to utilize state resources and to do everything reasonably possible to assist affected political subdivisions in an effort to respond to and recover from the incidents.

As a result of this incident, I also hereby order into active state service the organized militia of Washington State to include the National Guard and the State Guard, or such part thereof as may be necessary in the opinion of The Adjutant General, to perform such duties as directed by competent authority of the

Washington Military Department in addressing this event. Additionally, the Washington State Emergency Operations Center is instructed to coordinate all incident-related assistance to the affected areas.

Signed and sealed with the official seal of the state of Washington this 18th day of December, A.D, Two Thousand and Seventeen at Olympia, Washington.

By:

_____/s/
Jay Inslee, Governor

BY THE GOVERNOR:

_____/s/
Secretary of State

Exhibit F

JAY INSLEE
Governor



PROCLAMATION BY THE GOVERNOR

17-12

WHEREAS, since June 2017, we have experienced drier than normal weather conditions with periods of above average temperatures throughout the State which, when combined with projected weather and fire fuel conditions for early September, present a high risk of severe wildfires throughout the State of Washington; and

WHEREAS, current weather forecasts predict continuing elevated temperatures throughout the State for the next seven days, providing hot and dry conditions that, combined with the existing high-risk fire fuel conditions, support an active burning environment capable of producing significant multiple wildfires requiring the need for additional immediate response throughout the State; and

WHEREAS, the Jolly Mountain Fire in Kittitas County, which has been burning since August 11, has grown to over 14,500 acres and is threatening local communities, homes and businesses, resulting in road closures and the issuance of evacuation notices by local authorities for some threatened areas; and

WHEREAS, the threat to life and property from existing and threatened wildfires throughout the State is extreme and could cause extensive damage to homes, public facilities, businesses, public utilities, and infrastructure impacting the life and health of people throughout Washington State, all of which affect life, health, property, or the public peace, and is a public disaster demanding immediate action; and

WHEREAS, current availability of firefighting resources throughout the state of Washington and the western United States is limited due to existing and projected fire conditions and activities throughout the region, and existing firefighting resources may already be committed to fighting wildfires throughout the Pacific Northwest; and

WHEREAS, because available firefighting resources may not be adequate to address the outbreak of simultaneous large wildfires resulting from the above noted conditions, the Washington National Guard and State Guard may be needed to assist local jurisdictions and state agencies throughout the state of Washington with this public disaster and for the public health, safety and welfare; and

WHEREAS, the Washington Military Department has activated the State Emergency Operations Center, implemented response procedures, is coordinating resources to support state and local officials in alleviating the immediate social and economic impacts to people, property and infrastructure, and is continuing to assess the wildfire danger resulting from existing high risk weather and fire fuel conditions.

NOW, THEREFORE, I, Jay Inslee, Governor of the state of Washington, as a result of the above-noted situation, and under Chapters 38.08, 38.52 and 43.06 RCW, do hereby proclaim that a State of Emergency exists in all Counties in the state of Washington, and direct the plans and procedures of the *Washington State Comprehensive Emergency Management Plan* be implemented. State agencies and departments are directed to utilize state resources and to do everything reasonably possible to assist affected political subdivisions in an effort to respond to and recover from the incidents.

As a result of this event, I also hereby order into active state service the organized militia of Washington State to include the National Guard and the State Guard, or such part thereof as may be necessary in the opinion of The Adjutant General, to perform such duties as directed by competent authority of the Washington Military Department in addressing this event. Additionally, the Washington State Emergency Operations Center is instructed to coordinate all incident-related assistance to the affected areas.

Signed and sealed with the official seal of the state of Washington on this 2nd day of September A.D., Two Thousand and Seventeen at Olympia, Washington.

By:

/s/

Jay Inslee, Governor

BY THE GOVERNOR:

/s/

Secretary of State

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.,

Defendant.

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

**SUPPLEMENTAL EXCERPTS OF RECORD
VOLUME IV**

ROBERT W. FERGUSON
Attorney General

La Rond Baker, WSBA No. 43610
Assistant Attorney General
Washington State Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744

**INDEX TO
SUPPLEMENTAL EXCERPTS OF RECORD**

Ryan Karnoski, et al., State of Washington v. Donald J. Trump.
United States Court of Appeals
for the Ninth Circuit
No. 18-35347
United States District Court
for the Western District of Washington, Seattle
No. 2:17-cv-01297-MJP

Dkt #	Date Filed	Document Description	Vol.	SER
Vol I				
221	3/27/2018	Mar. 27, 2018 Order on Motion for Summary Judgment Hearing	I	WA SER 001-003
283	6/15/2018	Order Denying Motion to Stay Preliminary Injunction	I	WA SER 004-009

Vol II				
150	1/25/2018	Washington State's Motion for Summary Judgment	II	WA SER 010-025
163-1	1/31/2018	Amicus Brief Constitutional Accountability Center	II	WA SER 026-063
169	2/1/2018	Agreed Motion For Leave To File Amicus Brief-Legal Voice	II	WA SER 064-084
170-2	2/1/2018	Amicus Brief of the Commonwealth of-Massachusetts and Amici States	II	WA SER 085-115
178	2/12/2018	Defendants Response To Plaintiff-Intervenor Washington's Motion for Summary Judgment	II	WA SER 116-126
185	2/16/2018	Plaintiff's Reply on Summary Judgment	II	WA SER 127-138
194	2/28/2018	Cross-Motion for Summary Judgment and Opposition To Plaintiffs And Interveners Motions for Summary Judgment	II	WA SER 139-167
201	3/7/2018	Plaintiff's Reply in Support of Motion for Summary Judgment	II	WA SER 168-182
202	3/7/2018	Plaintiff Intervenor Washington's reply in support of Motion for Summary Judgment	II	WA SER 183-201
226	4/3/2018	Defendants Supplemental Brief In Opposition To Plaintiffs MSJ	II	WA SER 202-214
227	4/3/2018	Plaintiff's Supplemental Briefing in Support of MSJ	II	WA SER 215-227

228	4/3/2018	Washington's Supplemental Brief In Support Of Own MSJ	II	WA SER 228-241
238	4/30/2018	Motion to Stay Preliminary Injunction	II	WA SER 242-249
250	5/14/2018	Plaintiff's Opposition to Defendant's Motion to Stay	II	WA SER 250-265
257	5/14/2018	Response, by Intervenor Plaintiff State of Washington, to Motion to Stay Preliminary Injunction Pending Appeal	II	WA SER 266-282
261	5/18/2018	Reply, filed by Intervenor Defendants Department of Homeland Security, Elaine C. Duke, Defendants James N Mattis, Donald J. Trump, United States Department of Defense, United States of America, to Response Motion to Stay Preliminary Injunction Pending Appeal	II	WA SER 283-291

VOL III				
152-2	1/29/2018	Amicus Brief of Retired Military Officers	III	WA SER 292-316
187-1	2/16/2018	Declaration La Rond Baker In Support Of Washington's MSJ	III	WA SER 317-318
187-2	2/16/2018	Exhibit A-E-mails Dated 2/6/2018 Re: Request For Extension To File Opposition To MSJ	III	WA SER 319-323
197	2/28/2018	Declaration of Parker In Support of Defendant's Motion for Summary Judgment	III	WA SER 324-392
215	3/23/2018	Motion to Dissolve Preliminary Injunction	III	WA SER 393-420
224	3/29/2018	Declaration Of Ryan Parker In Support Of Motion To Dissolve Preliminary Injunction	III	WA SER 421-422
224-2	3/29/2018	Exhibit 2-Department of Defense Report And Recommendation On Military Service By Transgender Persons February 2008	III	WA SER 423-468
251-3	5/14/2018	American Psychological Association, APA Statement Regarding Transgender Individuals Serving in the Military Mar. 26, 2018	III	WA SER 469-470
251-4	5/14/2018	American Medical Association, Letter to James Mattis Apr. 3, 2018	III	WA SER 471-472
255-4	5/14/2018	Ford, Zack, Pence Secretly Drafted Trumps Latest Transgender Military Ban Mar. 25, 2018	III	WA SER 473-487
255-6	5/14/2018	Palm Center, Former Surgeons Gen. Debunk Pentagon Assertions About Medical Fitness Transgender Troops Mar. 28, 2018	III	WA SER 488-494
255-8	5/14/2018	Palm Center, DoD's Rationale for Reinstating the Transgender Ban Is Contradicted by Evidence April 2018	III	WA SER 495-551

255-9	5/14/2018	Copp, Tara, "All Four Service Chiefs On Record: New Harm Units Transgender Circles" Mar. 24, 2018	III	WA SER 552-555
255-14	5/14/2018	Exhibit 14 Transcript Before The Committee On Armed Services U.S. Senate 4/12/2018	III	WA SER 556-561
255-15	5/14/2018	Exhibit 15 Transcript Before Committee On Armed Services U.S. Senate 4/19/2018	III	WA SER 562-569
255-16	3/14/2018	Exhibit 15 Transcript Before Committee On Armed Services U.S. Senate 4/24/2018	III	WA SER 570-575
258	5/14/2018	Declaration La Rond Baker in Support of Washington's Response to Def's Mtn to Stay PI	III	WA SER 576-579
258-1	5/14/2018	Dept Policy HR-209-02 Equal Opportunity/Affirm. Action	III	WA SER 580-583
258-2	5/14/2018	Exhibit B – Dept. Policy HR-208-01 Anti-Discrimination	III	WA SER 584-587
258-3	5/14/2018	Directive of The Governor 16-11 6/23/2016	III	WA SER 588-590
258-4	5/14/2018	Proclamation by the Governor 18-03	III	WA SER 591-593
258-5	5/14/2018	Proclamation by the Governor 17-13	III	WA SER 594-596
258-6	5/14/2018	Proclamation by the Governor 17-12	III	WA SER 597-599

VOL IV				
34-1	9/14/2017	Department of Defense Press Briefing – Secretary Carter	IV	WA SER 600-617
34-3	9/14/2017	Statement of Chief Pentagon Spokesperson D. White On Transgender Accessions	IV	WA SER 618-619
34-6	9/14/2017	President Donald J. Trump Twitter Announcement	IV	WA SER 620-621
46	9/14/2017	Declaration of Brad R. Carson in Support of Pltf's Mtn for Prelim. Injunction	IV	WA SER 622-631
48-6	9/14/2017	Exhibit F – Implementation Guidance	IV	WA SER 632-704
56-8	9/25/2017	Department Policy No. HR-253-02 State Active-Duty Injury/Illness-Death Reporting Process	IV	WA SER 705-711
56-9	9/25/2017	WAARING Recruiting Overview	IV	WA SER 712-714

Exhibit 1

Department of Defense Press Briefing by Secretary Carter on Transgender Service Policies in the Pentagon Briefing Room

Press Operations

June 30, 2016

SECRETARY OF DEFENSE ASH CARTER: Good afternoon, everyone. Thanks for being here.

I am here today to announce some changes in the Defense Department's policies regarding transgender service members. And before I announce what changes we're making, I want to explain why.

There are three main reasons, having to do with their future force, our current force and matters of principle. The first and fundamental reason is that the Defense Department and the military need to avail ourselves of all talent possible in order to remain what we are now, the finest fighting force the world has ever known.

Our mission is to defend this country and we don't want barriers unrelated to a person's qualification to serve preventing us from recruiting or retaining the soldier, sailor, airman or Marine who can best accomplish the mission.

We have to have access to 100 percent of America's population for our all-volunteer force to be able to recruit from among them the most highly qualified and to retain them.

Now, while there isn't definitive data on the number of transgender service members, RAND looked at the existing studies out there, and their best estimate was that about 2,500 people out of approximately 1.3 million active-duty service members,

Case 2:18-cv-01297-MJP Document 34-56 Filed 09/14/17 Page 3 of 189
and about 1,500 out of 825,000 reserve service members are transgender, with the upper end of their range of estimates of around 7,000 in the active component and 4,000 in the reserves.

Although relatively few in number, we're talking about talented and trained Americans who are serving their country with honor and distinction. We invest hundreds of thousands of dollars to train and develop each individual, and we want to take the opportunity to retain people whose talent we've invested in and who have proven themselves.

And this brings me to the second reason, which is that the reality is that we have transgender service members serving in uniform today. And I have a responsibility to them and to their commanders to provide them both with clearer and more consistent guidance than is provided by current policies.

We owe commanders better guidance on how to handle questions such as deployment, medical treatment and other matters. And this is particularly true for small unit leaders, like our senior enlisted and junior officers. Also, right now, most of our transgender service members must go outside the military medical system in order to obtain medical care is judged by doctors to be necessary, and they have to pay for it out of their own pockets. This is inconsistent with our promise to all our troops that we will take care of them and pay for necessary medical treat.

I, and the Defense Department's other senior leaders who have been studying this issue the past year, have met with some of these transgender service members. They've deployed all over the world, serving on aircraft, submarines, forward operating bases and right here in the Pentagon. And while I learned that in most cases, their peers and local commanders have recognized the value of retaining such high-quality people, I also learned the lack of clear guidelines for how to handle this issue puts the commanders and the service members in a difficult and unfair position.

One service member I met with described how some people had urged him to leave the military, because of the challenges he was facing with our policies, and he said he just wouldn't quit. He was too committed to the mission, and this is where he wanted to be. These are the kind of people we want serving in our military.

The third and final reason for the change, also important, is a matter of principle. Americans who want to serve and can meet our standards should be afforded the opportunity to compete to do so. After all, our all-volunteer force is built upon having the most qualified Americans, and the profession of arms is based on honor and trust.

Army Chief-of-Staff General Milley recently reminded us of this when he said, and I quote him, "The United States Army is open to all Americans who meet the standard, regardless of who they are. Embedded within our Constitution is that very principle, that all Americans are free and equal. And we, as an Army, are sworn to protect and defend that very principle. And we are sworn to even die for that principle. So, if we in uniform are willing to die for that principle, then we in uniform should be willing to live by that principle." That's General Milley.

In view of these three reasons to change our policy, last July I directed the commencement of a study to identify the practical issues related to transgender Americans serving openly, and to develop an implementation plan that addresses those issues consistent with military readiness, because our mission -- which is defending the country -- has to come first.

I directed the working group to start with the presumption that transgender persons can serve openly without adverse effect -- impact, excuse me, on military effectiveness and readiness, unless and except where objective, practical impediments are identified.

I think it's fair to say this has been an educational process for a lot of people here in the department, including me. We had to look carefully and deliberately at medical, legal and policy considerations that have been evolving very rapidly in recent years. And we had to take into account the unique nature of military readiness and make sure we got it right.

I'm proud of the thoughtful and deliberate manner in which the department's leadership has pursued this review. I've been guided throughout by one central question. Is someone the best-qualified service member to accomplish our mission?

Let me now describe the process we used to study this over the last year. The leadership of the armed services, the Joint Chiefs of Staff, the service secretaries, myself, together with personnel, training, readiness and medical specialists from across the Department of Defense, studied all the data available to us. We also had the RAND Corporation analyze relevant data and studies to help us with our review. And we got input from transgender service members, from outside expert groups, and from medical professionals outside of the department.

We looked carefully at what lessons could be learned from the outside, including from allied militaries that already allow transgender service members to serve openly. And from the private sector also, because even though we're not a business and are different than a company in important ways, their experience and their practices are still relevant.

It's worth noting, for example, that at least 18 countries already allow transgender personnel to serve openly in their militaries. These include close allies such as the United Kingdom, Israel, and Australia. And we were able to study how they dealt with this issue.

We also saw that among doctors, employers and insurance companies today, providing medical care for transgender individuals is becoming common and normalized in both public and private sectors alike. Today, over a third of Fortune 500 companies, including companies like Boeing, CVS, and Ford, offer employee health insurance plans with transgender-inclusive coverage. That's up from zero such companies in 2002.

Similarly, nondiscrimination policies at two-thirds of Fortune 500 companies now cover gender identity, up from just three percent in 2002.

And for the public sector, all civilian federal employees have access today to a health insurance plan that provides comprehensive coverage for transgender-related care and medical treatment.

Based on its analysis of allied militaries and the expected rate at which American transgender service members would require medical treatment that would impact their fitness for duty or deployability, RAND's analysis concluded that there would be, quote, "minimal readiness impacts from allowing transgender service members to serve openly," end quote.

And in terms of cost, RAND concluded that health care costs would represent, again in their words, "an exceedingly small proportion of DOD's overall health care expenditures."

Now, as a result of this year-long study, I'm announcing today that we're ending the ban on transgender Americans in the United States military.

Effective immediately, transgender Americans may serve openly and they can no longer be discharged or otherwise separated from the military just for being transgender.

Additionally, I have directed that the gender identity of an otherwise qualified individual will not bar them from military service or from any accession program.

In taking the steps, we are eliminating policies that can result in transgender members being treated differently from their peers based solely upon their gender identity, rather than upon their ability to serve and we are confirming that going forward we will apply the same general principles, standards and procedures to transgender service members as we do to all service members.

What I heard from the transgender service members I met with overwhelmingly was that they don't want special treatment. They want to be held to the same standards and be treated like everybody else.

As I directed, the study identified practical issues that arise with respect to transgender service, and it developed an implementation plan to address those issues.

Let me briefly describe that implementation plan. I want to emphasize that in this case, as in the department's decisions on Don't Ask, Don't Tell and women in service, simply declaring a change in policy is not effective implementation.

That is why we have worked hard on the implementation plan and must continue to do so. These policies will be implemented in stages over the next 12 months, starting most immediately with guidance for current service members and their commanders, followed by training for the entire force and then beginning to access new military service members who are transgender.

Implementation will begin today. Starting today, otherwise qualified service members can no longer be involuntarily separated, discharged or denied reenlistment or continuation of service just for being transgender.

Then, no later than 90 days from today, the department will complete and issue both a commander's guidebook for leading currently serving - for leaders of currently serving transgender members and medical guidance to doctors for providing transition-related care, if required, to currently serving transgender service members.

Our military treatment facilities will begin providing transgender service members with all medically necessary care based on that medical guidance. Also starting on that date, service members will be able to initiate the process to officially change their gender in our personnel management systems.

Next, over the nine months that follow, based on detailed guidance and training materials that will be prepared, the services will conduct training of the force and commanders to medical personnel, to the operating force and recruiters.

When the training is complete, no later than one year from today, the military services will begin accessing transgender individuals who meet all standards, holding them to the same physical and mental fitness standards as everyone else who wants to join the military.

Our initial accession policy will require an individual to have completed any medical treatment that their doctor has determined as necessary in connection with their gender transition and to have been stable in their identified gender for 18 months, as certified by their doctor before they can enter the military.

I have directed that this succession standard be reviewed no later than twenty-four months from today to ensure it reflects what we learn over the next two years as this is implemented as well as the most up-to-date medical knowledge.

I've discussed the implementation plan with our senior military leaders, including Chairman Dunford. The chief sent specific recommendations about the timeline, and I made adjustments to the implementation plan timeline to incorporate those recommendations. The chairman has indicated the services support the final implementation timeline that I've laid out today.

Overall, the policies we are issuing today will allow us to assess -- excuse me, access talent of transgender service members to strengthen accomplishment of our mission, clarify guidance for commanders and military medical providers, and reflect better the department's and our nation's principles.

I want to close by emphasizing that deliberate and thoughtful implementation will be key. I, and the senior leaders of the department will therefore be ensuring all issues identified in this study are addressed in implementation.

I'm confident they can and will be addressed in implementation. That's why we are taking the step-by-step approach I've described. And I'm 100 percent confident in the ability of our military leaders and all men and women in uniform to implement these changes in a manner that both protects the readiness of the force and also

I'm also confident that we have reason to be proud today of what this will mean for our military, because it is the right thing to do, and it's another step in ensuring that we continue to recruit and retain the most qualified people.

And good people are the key to the best military in the world. Our military and the nation it defends will be stronger.

Thank you. And now, I'll take some questions. And -- Phil, you want to start?

Q: Sure. Mr. Secretary, could you talk a bit about -- I know you spoke about the costs for health care. Are there other costs associated with this implementation plan? And could you elaborate a bit on the timing issue, the adjustments in timing you spoke to?

SEC. CARTER: Sure. With respect to cost -- by the way, I will mention that Peter Levine will be here later and will be prepared to answer questions in detail.

But the reason that RAND concluded the costs would be minimal is that the medical treatment that service members who are currently transgender requires fairly straightforward, well-understood -- they were able to make those estimates. And that was, as they said, minimal.

And with respect to accessing new members as I indicated, they will have already completed and been stable in their transition for a period of not less than 18 months before they can access service, so there will be no medical costs associated with that.

And with respect to the timetable for implementation, the -- there's -- as I indicated in the stages, there's the -- the preparation of the medical guidance, that is up to the doctors who need to do that, so that doctors at military treatment facilities all have a standard protocol.

I'm giving them 90 days to that. That is what they asked for. The commanders' guidance, the -- as I indicated, the chairman and the chiefs asked for 90 days in that regard -- to prepare that commanders guidance and the training guidance.

And I agreed to that. I think that's reasonable. That's the amount of time it will take them to complete the job. Obviously, they've begun some of that.

And then, the rest of the time is time to train the force, which is comparable to the time we took to train the force say, in Don't Ask, Don't Tell. We do have some experience in this kind of thing, and we're following that template to successful implementation -- change of this kind.

Q: (inaudible) -- on Russia?

SEC. CARTER: Sure.

Q: --On a separate subject -- there's a report today that spoke to a proposal to strengthen coordination -- military coordination with Russia in targeting al-Nusra in Syria. And I'm just wondering is there -- you've been a skeptic in the past about cooperating with Russia militarily in Syria, given that their motives are different than those of the United States. Has something changed? Would you support this proposal?

SEC. CARTER: Well, we do have a professional relationship with the Russian military to make sure that there are no incidents and no safety issues as we both operate in neighboring areas of Syria. But I -- I've said before, the Russians got off on the wrong foot in Syria. They said they were coming in to fight ISIL. And that they would assist the political transition in Syria towards a post-Assad government that

They haven't done either of those things. So I think while I'm still hopeful that they will do both of those things, and I think that's what Secretary Kerry's talks, which are very frequent with the Russians, are all about. But meanwhile, we have a channel which is focused on safety issues, and we maintain that. And that's a very professional working channel between us.

Q: Can I follow up on that and ask you something else? It's a follow-on to Phil's question. You're well known to be skeptical of the Russians and some of the things that they have -- their military has done. So, really straight up, are you willing -- are you in favor now of an expanded effort for military cooperation with the Russians inside Syria?

Because most people in this town think you are not.

SEC. CARTER: If the Russians would do the right thing in Syria, and that's an important condition, as in all cases with Russia, we're willing to work with them. That's what we've been urging them to do since they came in. That's the objective that Secretary Kerry's talks are aimed at. And if we can get them to that point, that's a good thing.

Q: But may I follow up on two small items? Are you willing to include an effort for the U.S. to begin airstrikes against al-Nusra? And may I also ask you about Raqqah? As the world has watched what's happened in Istanbul, how urgent now are you, beyond the usual discussion of accelerants, to see the Syrian Arab coalition and the other fighters get to Raqqah? Because --

SEC. CARTER: Oh, very, very eager to get them to Raqqah. This is the same group that we've been working successfully with, that is they have been successful, and we've been enabling and supporting them, in -- to envelop and take, which they will, from ISIL the city of Manbij, which like Raqqah, isn't as well known, but Manbij is

And was part of the transit hub from the Turkish border down to ISIL in Syria. So that was an important objective. Those same forces, and that same approach, or really the same approach and some larger forces, actually, are the ones that we plan -- and I just was discussing this with General Votel and General MacFarland the other day, along with General Dunford.

Those are the forces that we are going to position to, again, envelop and collapse ISIL's control of Raqqa.

And the reason I want to do that, Barbara, as soon as possible is that Raqqa is the self-proclaimed capital of the self-proclaimed caliphate of ISIL. And it's important to destroy the ISIL in Iraq and Syria, because that's absolutely necessary.

It's not sufficient to avoid all kinds of radicalization and so forth, but it's necessary in order to eliminate the idea that there can be a state based upon that ideology. That's why we are so intent in our military campaign against ISIL on Iraq and Syria. So we would like to get Raqqa as soon as -- as soon as we possibly can, like everything else.

Chris?

Q: Mr. Secretary, a couple of questions about what this change will mean for the transgender service members. First, can you verify that the health -- the military health care coverage will cover all aspects of transition-related care, including gender reassignment surgery?

And second, will the Pentagon add gender identity or transgender status to the military equal opportunity policy in the event that a transgender service member feels like they're experiencing discrimination?

SEC. CARTER: The answer to the first one is the medical standards don't change. The transgender individual, like all other servicemembers, will get all medical care their doctors deem necessary.

They will have to do that with their -- subject to, if it's non-urgent medical care, subject to their commanders. Because, you know, if they need to be deployed, they need to be deployed. And it's normal that if you -- if you have, say, a procedure which is not urgent, that you have to defer that if you are being deployed.

So we don't have any -- we're not going to have any different medical policy for transgender service members than others. Our doctors will treat them -- give them medically necessary treatment according to the protocols that are determined by the medical profession.

Q: (inaudible) -- MEO policy? Will you add transgender status for the MEO?

SEC. CARTER: You know, I don't know the specific answer to that. I certainly assume the answer is yes, and Peter is telling me yes, that certainly stands to reason that we would. That makes sense.

Let's see. Cory. Cory is not here. How about Paul?

Q: I wanted to follow-up on that question. So there's been some debate on whether the military would only cover hormone therapy versus covering full reassignment surgery. So will reassignment surgery be covered?

SEC. CARTER: This is for currently serving members. Again, that's going to be a matter that the doctors will determine in accordance with what is medically necessary. That's a decision that they make with their physician.

Case 2:17-cv-01297-MJP Document 1-1 Filed 09/14/17 Page 18 of 189
And the timing of it -- of any treatment, of any kind, like any other non-urgent medical care, will be something that their commanders will have a voice in for the very simple reason that we -- we as, in this matter as in all matters, readiness and deployability are critical. Tom?

Q: Mr. Secretary, if I could follow-up very quickly. You said a current service member --

SEC. CARTER: Only because --

Q: So incoming service members who are transition would not be eligible for that transitional surgery?

SEC. CARTER: It depends, Nick. If someone who is transgender and comes out will need to and be required to have undergone transition and be stable in that state for 18 months before they can enter the military.

Q: But the U.S. military will not provide that surgery. Is that what you're saying?

SEC. CARTER: They won't be in the U.S. military at that time because they won't have accessed until they have undergone transition. Tom --

Q: Just wondering, if I could -- how many transgender troops have been dismissed under the old policy? And also, I'm wondering why Chairman Dunford isn't here to discuss this policy since it affects the uniformed military --

SEC. CARTER: I'll take the second part first. This is my decision. However, I have, we have arrived at it together, the senior leadership of the department. They support this timetable, this implementation plan, as I indicated, I actually made some adjustments in it specifically to take into account some of the desire by some of the chiefs to have a little more time on the front end, particularly for the commanders in

Case 2:18-cv-01297-MJP Document 1-1 Filed 09/14/17 Page 15 of 189
training guidance, and so I agreed to that because I thought that was reasonable. And I have a general principle around here which is very important which is that it's important that the people who have to implement decisions be part of the decision making, and the armed services are the ones that are going to have to implement that, so it's very important that they've been part of this study, but now, they're a critical part of implementation, because they and I all agree, as I said before, that simply declaring the military open to transgender individuals does not constitute effective implementation. We have work to do and we'll do it and we'll do it together.

Q: Mr. Secretary, in light of the events this morning at Andrews Air Force Base, are you getting a little fed up about all these false alarms for an active shooter? And why the communications problems this morning?

SEC. CARTER: Well, I wouldn't say fed up, because I think we have to take these things seriously when they occur, and I'm sure if a mistake was made here, if somebody inadvertently did, they weren't doing that on purpose, and it also shows a high degree of readiness and rapidity of responses. So it does appear, based on the information that I have at this moment, that this was mistaken, and that this was a drill that was going on that was mistaken for a real event, and a response was made, and that is something -- because it has happened before, that I think we need to pay attention to -- how to minimize the chances of false alarms like that. At the same time, I think it's important to have a reasonable level of awareness of the possibility of this kind of event and what to do, and I thought the response was strong and solid. So that's the good news. The bad news is, it appears to have been a mistake, and we'd like to reduce the number of mistakes made in this way, no question about it. David --

Q: Mr. Secretary, I'm still confused by your answer to Mik's question. Someone who is already in the military, if he is -- he or she is deemed medically -- if sex change surgery is deemed medically necessary, the military will pay for it?

SEC. CARTER: That's correct.

Q: What happens now -- and then you explained the 18 month stable before you commit, but what happens to a service man or woman who joins --

SEC. CARTER: They'll receive --

(CROSSTALK)

Q: They join as a man or woman and then decide at some point after they've joined the service that they need --

SEC. CARTER: Any medical treatment in that instance, that is determined to be medically necessary by their doctors, will be provided like any other medical care. However, and I emphasize this, they're subject to the normal readiness requirements that are imposed upon any military serviceman.

Q: So, this is not a one-time -- one-time offer? It -- this is going to --

SEC. CARTER: No, I think our -- our offer in this is an all medical -- because there is no change in medical policy. Medically-necessary policy to serving service -- medically-necessary care to -- as determined by doctors, which is appropriate, will be provided to service members in -- as is part of our promise about medical care in general.

Can I -- one -- one more?

Q: Reaction to the response from Capitol that's, of course, already come in. This is the way things work and this electronic age as -- Chairman Mac Thornberry of the House Armed Services Committee has already reacted to your announcement, even as you're still making it.

And I -- if I could just read a tiny bit of his statement, and just get your response. He says, quote, "This is the latest example of the Pentagon and the president

Case 2:17-cv-01297-MJP Document 1-1 Filed 09/14/17 Page 17 of 189
prioritizing politics over policy. Our military readiness, and hence, our national security, is dependent on our troops being medically ready and deployable. The administration seems unwilling or unable to assure the Congress and the American people that transgender individuals will meet these individual readiness requirements."

Can you --

SEC. CARTER: Well, the chair -- the chairman is right -- that is Chairman Thornberry -- is right to emphasize readiness. That is a key part of our -- was a key part of our study, and will be a key part of implementation.

And the chairman and other members of the committee and I -- committees and -- I've actually heard a variety of opinions on this, some urging us to move even faster than we have moved, and some wanting -- and this is very legitimate -- to understand what the effects on readiness and so forth are.

But we have some principles here. We have a necessity here. And we're going to act upon that. We're going to do it in a deliberate, and thoughtful and step-by-step manner. But it's important that we do it.

(CROSSTALK)

Q: One question. Is that in Afghanistan -- (inaudible)?

SEC. CARTER: Thank you very much.

-END-

Exhibit 3

IMMEDIATE RELEASE

Statement by Chief Pentagon Spokesperson Dana W. White on Transgender Accessions

Press Operations

Release No: NR-250-17

June 30, 2017

Secretary Mattis today approved a recommendation by the services to defer accessing transgender applicants into the military until Jan. 1, 2018.

The services will review their accession plans and provide input on the impact to the readiness and lethality of our forces.

Exhibit 6



Donald J. Trump  @realDonaldTrump · 4h

...victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you

 39K  25K  73K 



Donald J. Trump  @realDonaldTrump · 4h

....Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming.....

 24K  27K  71K 



Donald J. Trump  @realDonaldTrump · 4h

After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow.....

 14K  26K  66K 

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

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

Defendants.

Case No. 2:17-cv-01297-MJP

**DECLARATION OF BRAD R.
CARSON IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

NOTE ON MOTION CALENDAR:

October 6, 2017

ORAL ARGUMENT REQUESTED

I, Brad R. Carson, declare as follows:

1. I served as the Acting Under Secretary of Defense for Personnel and Readiness ("USD P&R") from April 2, 2015 to April 8, 2016. In that capacity, and at the direction of the Secretary of Defense, I led a group of senior personnel drawn from all of the armed services to develop, over many months of information collection and analysis, a Department-wide policy regarding service by transgender people, all as more fully described below.

PROFESSIONAL BACKGROUND

2. I attended Baylor University and obtained an undergraduate degree in history in 1989. After college, I attended Trinity College in Oxford, England on a Rhodes Scholarship and earned a Master's degree in Politics, Philosophy, and Economics. When I returned to the United States, I attended the University of Oklahoma College of Law, graduating with a law degree in

1 1994.

2 3. After I graduated law school, I practiced as an attorney at the law firm Crowe &
3 Dunlevy. From 1997 to 1998 I served as a White House Fellow, where I worked as a Special
4 Assistant to the Secretary of Defense. From 2001 to 2005, I served in Congress as the
5 Representative for the State of Oklahoma's 2nd District.

6 4. In addition to my civilian career, I am also a commissioned officer in the United
7 States Navy Reserve. I currently serve in the Individual Ready Reserve. I deployed to Iraq in
8 2008 as Officer-in-Charge of intelligence teams embedded with the U.S. Army's 84th Explosive
9 Ordnance Disposal Battalion. In Iraq, our teams were responsible for investigation of activities
10 relating to improvised explosive devices and the smuggling of weapons and explosives. For my
11 service in Iraq, I was awarded the Bronze Star Medal and other awards.

12 5. I have held several leadership positions within the Department of Defense
13 ("DoD"). In 2011, I was nominated by the President to serve as General Counsel to the United
14 States Army and unanimously confirmed by the U.S. Senate. As General Counsel, my duties
15 included providing legal advice to the Secretary, Under Secretary, and Assistant Secretaries of
16 the Army regarding the regulation and operation of the U.S. Army. I also assisted in the
17 supervision of the Office of the Judge Advocate General. I served as General Counsel to the
18 United States Army until March 2014.

19 6. In late 2013, while serving in that position, I was nominated by the President to
20 serve as Under Secretary of the Army. I was unanimously confirmed by the U.S. Senate in
21 February 2014 and sworn in on March 27, 2014. As Under Secretary of the Army, I was the
22 second ranking civilian official in the Department of the Army. My responsibilities included the
23 welfare of roughly 1.4 million active and reserve soldiers and other Army personnel, as well as a
24 variety of matters relating to Army readiness, including oversight of installation management
25 and weapons and equipment procurement. With the assistance of two Deputy Under Secretaries,
26 I directly supervised the Assistant Secretaries of the Army for Manpower and Reserve Affairs;
27 Acquisition, Logistics and Technology; Financial Management and Comptroller; Installations,
28 Energy and Environment; and Civil Works. My responsibilities involved the management and

1 allocation of an annual budget amounting to almost \$150 billion.

2 7. I was appointed by the President to serve as acting USD P&R in April 2015. In
3 that capacity, I functioned as the principal staff assistant and advisor to the Secretary and Deputy
4 Secretary of Defense for Total Force Management with respect to readiness; National Guard and
5 Reserve component affairs; health affairs; training; and personnel requirements and
6 management, including equal opportunity, morale, welfare, recreation, and quality of life
7 matters. My responsibilities over these matters extended to more than 2.5 million military
8 personnel.

9 **DEVELOPMENT OF POLICY REGARDING TRANSGENDER SERVICE MEMBERS**

10 8. On July 28, 2015, then-Secretary of Defense Ashton B. Carter ordered me, in my
11 capacity as USD P&R, to convene a working group to formulate policy options for DoD
12 regarding transgender service members (the "Working Group"). Secretary Carter ordered the
13 Working Group to present its recommendations within 180 days. In the interim, transgender
14 service members were not to be discharged or denied reenlistment or continuation of service on
15 the basis of gender identity without my personal approval. A true and accurate copy of the July
16 28, 2015 order is attached hereto as Exhibit A.

17 9. The Working Group included roughly twenty-five members. Each branch of
18 military service was represented by a senior uniformed officer (generally a three-star admiral or
19 general), a senior civilian official, and various staff members. The Surgeons General and senior
20 representatives of the Chaplains for each branch of service also attended the Working Group
21 meetings.

22 10. The Working Group formulated its recommendations by collecting and
23 considering evidence from a variety of sources, including a careful review of all available
24 scholarly evidence and consultations with medical experts, personnel experts, readiness experts,
25 health insurance companies, civilian employers, and commanders whose units included
26 transgender service members.

27 **THE FINDINGS OF THE RAND REPORT**

28 11. On behalf of the Working Group, I requested that RAND, a nonprofit research

1 institution that provides research and analysis to the Armed Services, complete a comprehensive
 2 study of the health care needs of transgender people, including potential health care utilization
 3 and costs, and to assess whether allowing transgender service members to serve openly would
 4 affect readiness.

5 12. In 2016, RAND presented the results of its exhaustive study in a report entitled
 6 Assessing the Implications of Allowing Transgender Personnel to Serve Openly (“RAND
 7 Report”), a true and accurate copy of which is attached as Exhibit B.

8 13. The RAND Report explained that according to the American Psychiatric
 9 Association, the term transgender refers to “the broad spectrum of individuals who identify with
 10 a gender different from their natal sex.” The RAND Report also explained that “transgender
 11 status alone does not constitute a medical condition,” and that “only transgender individuals who
 12 experience significant related distress are considered to have a medical condition called gender
 13 dysphoria (GD).” For those individuals, the recognized standard of care includes some
 14 combination of psychosocial, pharmacological, and/or surgical care. “Not all patients seek all
 15 forms of care.” “While one or more of these types of treatments may be medically necessary for
 16 some transgender individuals with GD, the course of treatment varies and must be determined on
 17 an individual basis by patients and clinicians.”

18 14. The RAND Report evaluated the capacity of the military health system (MHS) to
 19 provide necessary care for transgender service members. The RAND Report determined that
 20 necessary psychotherapeutic and pharmacological care are available and regularly provided
 21 through the MHS, and that surgical procedures “quite similar to those used for gender transition
 22 are already performed within the MHS for other clinical indications.” In particular, the MHS
 23 already performs reconstructive surgeries on patients who have been injured or wounded in
 24 combat. “The skills and competencies required to perform these procedures on transgender
 25 patients are often identical or overlapping.” In addition, the RAND Report noted that
 26 “performing these surgeries on transgender patients may help maintain a vitally important skill
 27 required of military surgeons to effectively treat combat injuries.”

28 15. The RAND Report also examined all available actuarial data to determine how

1 many transgender service members are likely to seek gender transition-related medical treatment.
2 The RAND Report concluded that “we expect annual gender transition-related health care to be
3 an extremely small part of overall health care provided to the AC [Active Component]
4 population.”

5 16. The RAND Report similarly concluded that the cost of extending health care
6 coverage for gender transition-related treatments is expected to be “an exceedingly small
7 proportion of DoD's overall health care expenditure.”

8 17. The RAND Report found no evidence that allowing transgender people to serve
9 openly would negatively impact unit cohesion, operational effectiveness, or readiness.

10 18. The RAND Report found that the estimated loss of days available for deployment
11 due to transition-related treatments “is negligible.” Based on estimates assuming the highest
12 utilization rates, it concluded that the number of nondeployable man-years due to gender
13 transition-related treatments would constitute 0.0015 percent of all available deployable labor-
14 years across both the Active Component and Select Reserves.

15 19. The RAND Report also found no evidence that permitting openly transgender
16 people to serve in the military would disrupt unit cohesion. The RAND Report noted that while
17 similar concerns were raised preceding policy changes permitting open service by gay and
18 lesbian personnel and allowing women to serve in ground combat positions, those concerns
19 proved to be unfounded. The RAND Report found no evidence to expect a different outcome for
20 open service by transgender persons.

21 20. The RAND Report examined the experience of eighteen other countries that
22 permit open service by transgender personnel—including Israel, Australia, the United Kingdom,
23 and Canada. The Report found that all of the available research revealed no negative effect on
24 cohesion, operational effectiveness, or readiness. Some commanders reported that “increases in
25 diversity led to increases in readiness and performance.”

26 21. The Rand Report also identified significant costs associated with separation and a
27 ban on open service, including “the discharge of personnel with valuable skills who are
28 otherwise qualified.”

ISSUES CONSIDERED BY THE WORKING GROUP

22. The Working Group sought to identify and address all relevant issues relating to service by openly transgender persons, including deployability. In addition to taking into consideration the conclusions of the RAND Report, the Working Group discussed that while some transgender service members might not be deployable for short periods of time due to their treatment, this is not unusual, as it is common for service members to be non-deployable for periods of time due to medical conditions such as pregnancy, orthopedic injuries, obstructive sleep apnea, appendicitis, gall bladder disease, infectious disease, and myriad other conditions. For example, the RAND Report estimated that at the time of the report, 14 percent of the active Army personnel—or 50,000 active duty soldiers—were ineligible to deploy for legal, medical, or administrative reasons.

23. The Working Group also addressed the psychological health and stability of transgender people. In addition to taking into account the conclusions of the RAND Report, the Working Group concluded, based on discussions with medical experts and others, that being transgender is not a psychological disorder. While some transgender people experience gender dysphoria, that condition is resolved with appropriate medical care. In addition, the Working Group noted the positive track record of transgender people in civilian employment, as well as the positive experiences of commanders with transgender service members in their units.

24. The Working Group also concluded that transgender service members would have ready access to any relevant necessary medication while deployed in combat settings. It determined that military policy and practice allows service members to use a range of medications, including hormones, while in such settings. The MHS has an effective system for distributing prescribed medications to deployed service members across the globe, including those in combat settings.

25. The Working Group also concluded that banning service by openly transgender persons would require the discharge of highly trained and experienced service members, leaving unexpected vacancies in operational units and requiring the expensive and time-consuming recruitment and training of replacement personnel.

1 26. The Working Group also concluded that banning service by openly transgender
2 persons would harm the military by excluding qualified individuals based on a characteristic
3 with no relevance to a person's fitness to serve.

4 27. I concluded my service as USD P&R on April 8, 2016. By that time, the Working
5 Group was unanimously resolved that transgender personnel should be permitted to serve openly
6 in the military.

7 **RECENT REVERSAL OF POLICY**

8 28. On July 26, 2017, President Donald Trump issued a statement that transgender
9 individuals will not be permitted to serve in any capacity in the Armed Forces. On August 25,
10 2017, President Trump issued a memorandum to the Secretary of Defense and the Secretary of
11 Homeland Security to reverse the policy adopted in June 2016 that permitted military service by
12 openly transgender persons. That memorandum stated: "In my judgment, the previous
13 Administration failed to identify a sufficient basis to conclude that terminating the Departments'
14 longstanding policy and practice would not hinder military effectiveness and lethality, disrupt
15 unit cohesion, or tax military resources, and there remain meaningful concerns that further study
16 is needed to ensure that continued implementation of last year's policy change would not have
17 those negative effects."

18 29. President Trump's stated rationale for a ban on military service by openly
19 transgender service members is unfounded and refuted by the comprehensive investigation and
20 review performed by the Working Group.

21 30. In addition to contravening the Working Group's conclusions and the exhaustive
22 supporting evidence that was collected, I believe that prohibiting transgender individuals from
23 serving openly in the military is harmful to the public interest for several reasons. My belief is
24 based on my experience as USD P&R and in other leadership positions within DoD, and upon
25 my active duty experience in Iraq.

26 31. First, a prohibition on service by openly transgender individuals would degrade
27 military readiness and capabilities. Many military units include transgender service members
28 who are highly trained and skilled and who perform outstanding work. Separating these service

1 members will deprive our military and our country of their skills and talents.

2 32. Second, banning military service by openly transgender persons would impose
3 significant costs that far outweigh the minimal cost of permitting them to serve. A study authored
4 in August 2017 by the Palm Center and professors associated with the Naval Postgraduate
5 School estimated that separating transgender service members currently serving in the military
6 would cost \$960 million, based on the costs of recruiting and training replacements. A true and
7 correct copy of the August 2017 Palm Center study is attached hereto at Exhibit C.

8 33. Third, the sudden and arbitrary reversal of the DoD policy allowing openly
9 transgender personnel to serve will cause significant disruption and thereby undermine military
10 readiness and lethality. This policy bait-and-switch, after many service members disclosed their
11 transgender status in reliance on statements from the highest levels of the chain of command,
12 conveys to service members that the military cannot be relied upon to follow its own rules or
13 maintain consistent standards.

14 34. Fourth, in addition to the breach of transgender service members' trust resulting
15 in the deprivation of their careers and livelihood, the President's policy reversal will cause other
16 historically disadvantaged groups in the military, including women and gay and lesbian service
17 members, to question whether their careers and ability to serve as equal members of the military
18 may also be sacrificed.

19 35. Fifth, those serving in our Armed Forces are expected to perform difficult and
20 dangerous work. The President's reversal of policy puts tremendous additional and unnecessary
21 stress on transgender service members, their command leaders, and those with whom they serve.

22 36. In short, the President's reversal of the policy permitting military service by
23 openly transgender individuals has had, and will continue to have, a deleterious effect on
24 readiness, force morale, and trust in the chain of command in the Armed Services.

25 37. I have reviewed and am familiar with the declarations by my colleagues – Former
26 Secretary of the Army Eric Fanning, Former Secretary of the Navy Raymond Mabus, Former
27 Secretary of the Air Force Deborah Lee James, and Former Deputy Surgeon General Margaret
28 Chamberlain Wilmoth – that were submitted in *Doe v. Trump*, Case Number 1:17-cv-01597

(District Court for the District of Columbia). I also submitted a declaration in that case. There is nothing in any of the declarations by my colleagues, filed in *Doe v. Trump*, with which I disagree.

I declare under the penalty of perjury that the foregoing is true and correct.

DATED: September 13, 2017


Brad R. Carson

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that on September 14, 2017, I caused true and correct copies of the foregoing documents to be served by the method(s) listed below on the following interested parties:

By Hand Delivery:

US Attorney's Office
700 Stewart St., Suite 5220
Seattle, WA 98101-1271

By Registered or Certified Mail:

Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Department of Defense
1400 Defense Pentagon
Washington, DC 20301-1400

Secretary of Defense James N. Mattis
1000 Defense Pentagon
Washington, DC 20301-1000

President Donald J. Trump
1600 Pennsylvania Ave. NW
Washington, DC 20500

I hereby certify under the penalty of perjury that the foregoing is true and correct. Executed on September 14, 2017 at Seattle, Washington.

s/Rachel Horvitz

Rachel Horvitz, *Paralegal*

Exhibit F



United States Department of Defense

TRANSGENDER SERVICE IN THE U.S. MILITARY

An Implementation Handbook

September 30, 2016

WA SER 633



PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

SEP 30 2016

MEMORANDUM FOR ALL SERVICE MEMBERS

SUBJECT: Transgender Service in the U.S. Military: An Implementation Handbook

In July 2015, the Secretary of Defense directed the Department of Defense to identify the practical issues related to the open service of transgender Americans in the military, and to develop an implementation plan addressing those issues in manner consistent with military readiness. On June 30, 2016, the Secretary announced a new policy allowing open service by transgender Service members:

"This is the right thing to do for our people and for the force. We're talking about talented Americans who are serving with distinction or who want the opportunity to serve. We can't allow barriers unrelated to a person's qualifications to prevent us from recruiting and retaining those who can best accomplish the mission."

This handbook will assist our transgender Service members in their gender transition, help commanders with their duties and responsibilities, and help all Service members understand Department policy allowing the open service of transgender Service members. It is the product of broad collaboration among the Services, and is intended as a practical day-to-day guide. For further information, you are encouraged to contact your chain of command and/or Service Central Coordination Cell.

A handwritten signature in black ink, appearing to read "Peter Levine", is located below the text.

Peter Levine
Acting

TRANSGENDER SERVICE IN THE U.S. MILITARY

AN IMPLEMENTATION HANDBOOK

September 30, 2016

TABLE OF CONTENTS

BACKGROUND.....	8
INTRODUCTION	9
POLICY	10
TERMS AND DEFINITIONS	11
THE BASICS.....	13
Gender Transition Approval Process Overview	14
FOR THE TRANSGENDER SERVICE MEMBER.....	17
In-Service Transition	17
Communication	20
Finding a Mentor	20
Considerations	21
Period of Adjustment	21
Impact Transitioning May Have on Your Career	21
Assignments	21
Individual Medical Readiness (IMR)	22
Physical Readiness Testing (PRT)	22
Privacy	22
Military Records	22
Expectation Management	23
Tips for Transitioning Service Members	23
FOR THE COMMANDER.....	25
The Commander's Impact	25
Commander's Roles and Responsibilities.....	25
In-Service Transition.....	25
What You Should Expect From the Military Medical Provider (MMP)	28
Policy Implications.....	28
Non-Military Medical Care.....	28
Military Personnel Uniform and Grooming Standards	28
Deployment	29
Physical Fitness.....	29
Privacy Accommodations.....	29
Military Personnel Drug Abuse Testing Program.....	29
Tips for Commanders	30

FOR ALL SERVICE MEMBERS	31
Understanding Gender Transition	31
Harassment and Bullying.....	32
Respect for Personal Information	32
Tips for Service Members.....	33
Privacy	33
ACRONYMS.....	34
BIBLIOGRAPHY	35
ANNEX A: <i>Questions and Answers</i>	36
The Basics	36
Health Care Issues	37
In-Service Transition Policy Issues	37
New Accession Policy Issues.....	39
Recruiting.....	39
Military Service Academy (MSA)/	
Reserve Officers' Training Corps (ROTC).....	40
ANNEX B: <i>Gender Transition Roadmap for U.S. Military Personnel</i>	42
Service Member Responsibilities	42
Before Initiating Gender Transition.....	42
Reserve Considerations	42
During Gender Transition	43
When Gender Transition is Complete.....	43
After Gender Marker Change in the Service Personnel Data System	43
Commander Responsibilities	44
Before Initiating Gender Transition.....	44
During Gender Transition	45
When Gender Transition is Complete.....	46
After Gender Marker Change in the Service Personnel Data System	47
ANNEX C: <i>Scenarios</i>	48
Readiness	48
Scenario 1: Inability to Meet Standards during Transition	48
Scenario 2: Physical Standards	49
Scenario 3: Pregnancy	50
Career	52
Scenario 4: Specialized Career Limitations.....	52
Scenario 5: Entry-Level Training.....	53
Reserve Component.....	54
Scenario 6: Individual Ready Reserve.....	54

Scenario 7: Standards and Exceptions to Policy.....	55
Scenario 8: Satisfactory Reserve Participation.....	56
Scenario 9: Medical Compliance.....	57
Scenario 10: Unauthorized Medical Care	59
Privacy and Cohabitation.....	60
Scenario 11: Use of Shower Facilities.....	60
Scenario 12: Urinalysis	61
Good Order and Discipline	62
Scenario 13: Living Quarters	62
Scenario 14: Proper Attire during a Swim Test.....	63
Scenario 15: Living Quarters	63
Real Life Experience (RLE).....	65
Scenario 16: Attending a Unit Social Event.....	65
Scenario 17: Off Duty.....	66
Overseas.....	67
Scenario 18: Liberty Call and Personal Safety.....	67
Scenario 19: Assignment Considerations	68
ANNEX D: Additional Resources and Links	70
DoD Public and CAC-Enabled Websites	70
Foreign Clearance Guide:	70
Passport.....	70
Service Boards for Correction of Military Records.....	70
Service Central Coordination Cells (SCCCs)	71

TRANSGENDER SERVICE IN THE US MILITARY:

An Implementation Handbook

Our mission is to defend this country, and we don't want barriers unrelated to a person's qualification to serve preventing us from recruiting or retaining the Soldier, Sailor, Airman, or Marine who can best accomplish the mission. We have to have access to 100 percent of America's population for our all-volunteer force to be able to recruit from among them the most highly qualified—and to retain them...Starting today: Otherwise qualified Service members can no longer be involuntarily separated, discharged, or denied reenlistment or continuation of service just for being transgender.

—Statement by Secretary of Defense Ash Carter¹

¹ U.S. Secretary of Defense Ash Carter, "Secretary of Defense Ash Carter Remarks Announcing Transgender Policy Changes," June 30, 2016.

BACKGROUND

The handbook is designed to assist our transgender Service members in their gender transition, help commanders with their duties and responsibilities, and help all Service members understand new policies enabling the open service of transgender Service members. The handbook includes advice, questions and answers, and scenarios.

This handbook outlines some of the issues faced by commanders, transgender Service members, and the Military Services; it does not have all of the solutions – individual circumstances will vary. It is an administrative management tool, and is not a health management tool or policy document. Additional key parts of this handbook include: Annex A, which contains questions and answers to help with understanding specific terms and words; Annex B, which provides step-by-step details of the gender transition process; Annex C, which highlights situation-based scenarios that may be useful for training situations; and Annex D, which provides links to additional resources. For specific policies refer to Department of Defense Instruction (DoDI) 1300.28,² Directive-type Memorandum (DTM) 16-005,³ Service policies, and/or Service Central Coordination Cells (SCCC).⁴

2 DoD Instruction (DoDI) 1300.28, “In-Service Transition for Service Members Identifying as Transgender,” June 30, 2016.

3 Directive-type Memorandum (DTM), 16-005, “Military Service of Transgender Service Members,” June 30, 2016.

4 See Annex D for SCCC contact information.

INTRODUCTION

Sex and gender are different. Sex is whether a person is male or female through their biology. Gender is the socially defined roles and characteristics of being male and female associated with that sex. There are a number of people for whom these associations do not match. This feeling may arise in childhood, adolescence or adulthood and may result in gender dysphoria. Sometimes people's gender identity does not match their sex at birth.

Gender dysphoria is a medical diagnosis that refers to distress that some transgender individuals experience due to a mismatch between their gender and their sex assigned at birth. The condition can manifest in a person as strong and persistent cross-gender identification and a discomfort with their biological sex, or a sense of inappropriateness in the gender role of that sex. Transgender Service members may face challenges centered on their own personal situation and/or others' unfamiliarity with gender identity issues.

POLICY

In July 2015, the Secretary of Defense directed the Department of Defense to identify the practical issues related to transgender Americans serving openly in the military and to develop an implementation plan that addresses those issues consistent with military readiness. On June 30, 2016, the Secretary announced a new policy⁵ allowing open service of transgender Service members and outlined three reasons⁶ for this policy change:

- The Army, Navy, Air Force, Marine Corps, and Coast Guard need to avail themselves of all available talent in order to remain the finest fighting force the world has ever known. The mission to defend this country requires that the Services do not have barriers unrelated to a person's qualification to serve or preventing the Department of Defense (DoD) from recruiting or retaining Service members.
- There are transgender Service members in uniform today. DoD has a responsibility to them and their commanders to provide clearer and more consistent guidance.
- Individuals who want to serve and can meet the Department's standards should be afforded the opportunity to compete to do so.

This handbook will explain the framework by which transgender Service members may transition gender while serving.

⁵ DoDI 1300.28 and DTM 16-005.

⁶ U.S. Secretary of Defense Ash Carter Remarks, June 30, 2016.

TERMS AND DEFINITIONS

The following terms are associated with open service by transgender individuals. The list is not all-inclusive. The definitions are consistent with those in the new policy.

Cross-sex hormone therapy. The use of feminizing hormones in an individual assigned male at birth based on traditional biological indicators or the use of masculinizing hormones in an individual assigned female at birth. A common medical treatment associated with gender transition.

Gender dysphoria. A medical diagnosis that refers to distress that some transgender individuals experience due to a mismatch between their gender and their sex assigned at birth.

Gender identity. One's internal or personal sense of being male or female.

Gender marker. Data element in the Defense Enrollment Eligibility Reporting System (DEERS) that identifies a Service member's gender. A Service member must meet all military standards associated with the member's gender marker in DEERS and use military berthing, bathroom, and shower facilities in accordance with the DEERS gender marker.⁷

Gender transition is complete. A Service member has completed the medical care identified or approved by a military medical provider in a documented medical treatment plan as necessary to achieve stability in the preferred gender.

Gender transition process. Gender transition in the military begins when a Service member receives a diagnosis from a military medical provider indicating that the member's gender transition is medically necessary, and concludes when the Service member's gender marker in DEERS is changed and the member is recognized in the preferred gender.

Human and functional support network. Support network for a Service member that may be informal (e.g., friends, family, co-workers, social media.) or formal (e.g., medical professionals, counselors, clergy).

⁷ While the gender marker change is reflected in DEERS, the Services' personnel data systems are the means to input gender; as such, the remainder of this handbook refers to 'Services' personnel data systems'.

Medically necessary. Those health care services or supplies necessary to prevent, diagnose, or treat an illness, injury, condition, disease, or its symptoms and that meet accepted standards of medical care.

Non-urgent medical care. The care required to diagnose and treat problems that are not life or limb threatening or that do not require immediate attention.

Preferred gender. The gender of a transgender Service member when gender transition is complete and the gender marker in DEERS is changed.

Real life experience (RLE). The phase in the gender transition process when the individual commences living socially in the gender role consistent with their preferred gender. RLE may or may not be preceded by the commencement of cross-sex hormone therapy, depending on the individual gender transition medical treatment plan. The RLE phase is also a necessary precursor to certain medical procedures, including gender transition surgery. RLE generally encompasses dressing in the new gender, as well as using preferred gender berthing, bathroom, and shower facilities.⁸

Service Central Coordination Cell (SCCC). Service-level cell of experts created to provide multi-disciplinary (e.g., medical, legal) advice and assistance to commanders with regard to service by transgender Service members and gender transition in the military.⁹

Stable in the preferred gender. Medical care identified or approved by a military medical provider in a documented medical treatment plan is complete, no functional limitations or complications persist, and the individual is not experiencing clinically significant distress or impairment in social, occupational, or other important areas of functioning. Continuing medical care, including but not limited to cross-sex hormone therapy, may be required to maintain a state of stability.

Transgender Service member. A Service member who has received a medical diagnosis indicating that gender transition is medically necessary, including any Service member who intends to begin transition, is undergoing transition, or has completed transition and is stable in the preferred gender.

⁸ RLE intended to occur off duty; however, exceptions to policy may be granted. Consult Service policy for specifics.

⁹ A complete listing with SCCC contact information can be found at Annex D.

THE BASICS

Sex and gender are different. Sex is the assignment made at birth as male or female, based on anatomy. Gender identity is an individual's internal sense of being male or female. Gender role or expression is the socially defined roles and characteristics of being male and female associated with that sex. For most people, gender identity and expression are consistent with their sex assigned at birth. However, in transgender individuals, gender identity and/or expression differs from their sex assigned at birth.

Gender dysphoria is a medical diagnosis that refers to distress that some transgender individuals experience due to a mismatch between their gender and their sex assigned at birth.

Broadly, the term “transgender person” refers to individuals whose internal sense of being male or female (gender identity) is different from the sex they were assigned at birth. Some transgender individuals feel compelled to align their external appearance with their gender identity and undergo transition to the preferred gender. Gender transition care is individualized and can include psychotherapy, hormone therapy, RLE, and sex reassignment surgery.

Traditionally, society has had little understanding of what it means to transition gender. Many transitioning people have been subjected to hostility, ridicule, and discrimination. Every person has the right to have their gender identity recognized and respected, and all Service members who receive a diagnosis that gender transition is medically necessary will be provided with support and management to transition, within the bounds of military readiness.

Gender transition is the process a person goes through to live fully in their preferred gender. Gender transition in the military may present challenges associated with addressing the needs of the Service member while preserving military readiness. The oversight and management of the gender transition process is a team effort with the commander, the Service member, and the military medical provider (MMP). DoD values the contributions of all Service members and tries to ensure all are as medically ready as possible throughout their service. Individual readiness is a key to Total Force readiness.

Gender Transition Approval Process Overview

Gender transition is highly individualized. Figure 1 outlines the main components. Generally, the gender transition process includes:

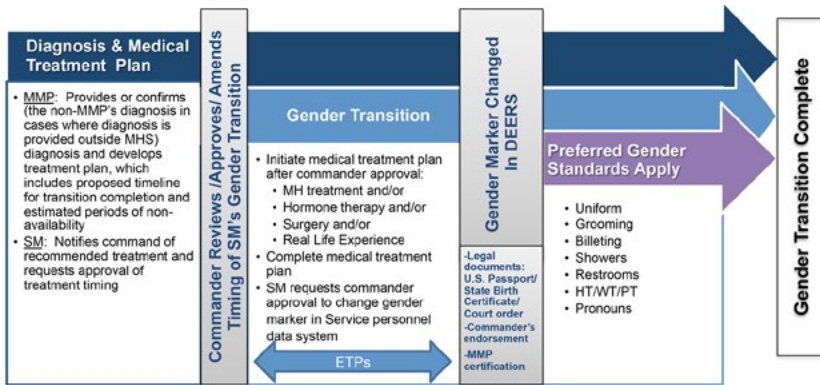
- Diagnosis and medical treatment plan received from or validated by an MMP;
- Gender transition (initiate medical treatment plan, complete medical treatment plan, Service member requesting gender marker change); and
- Compliance with gender standards post-gender marker change.

The process depicted is only a framework and Service members may progress on varying timelines. The commander, informed by the recommendations of the MMP, the SCCC, and others, as appropriate, will respond to the request to transition gender while ensuring readiness by minimizing impacts to the mission (including deployment, operations, training, exercise schedules, and critical skills availability), as well as to the morale and welfare and good order and discipline of the command.

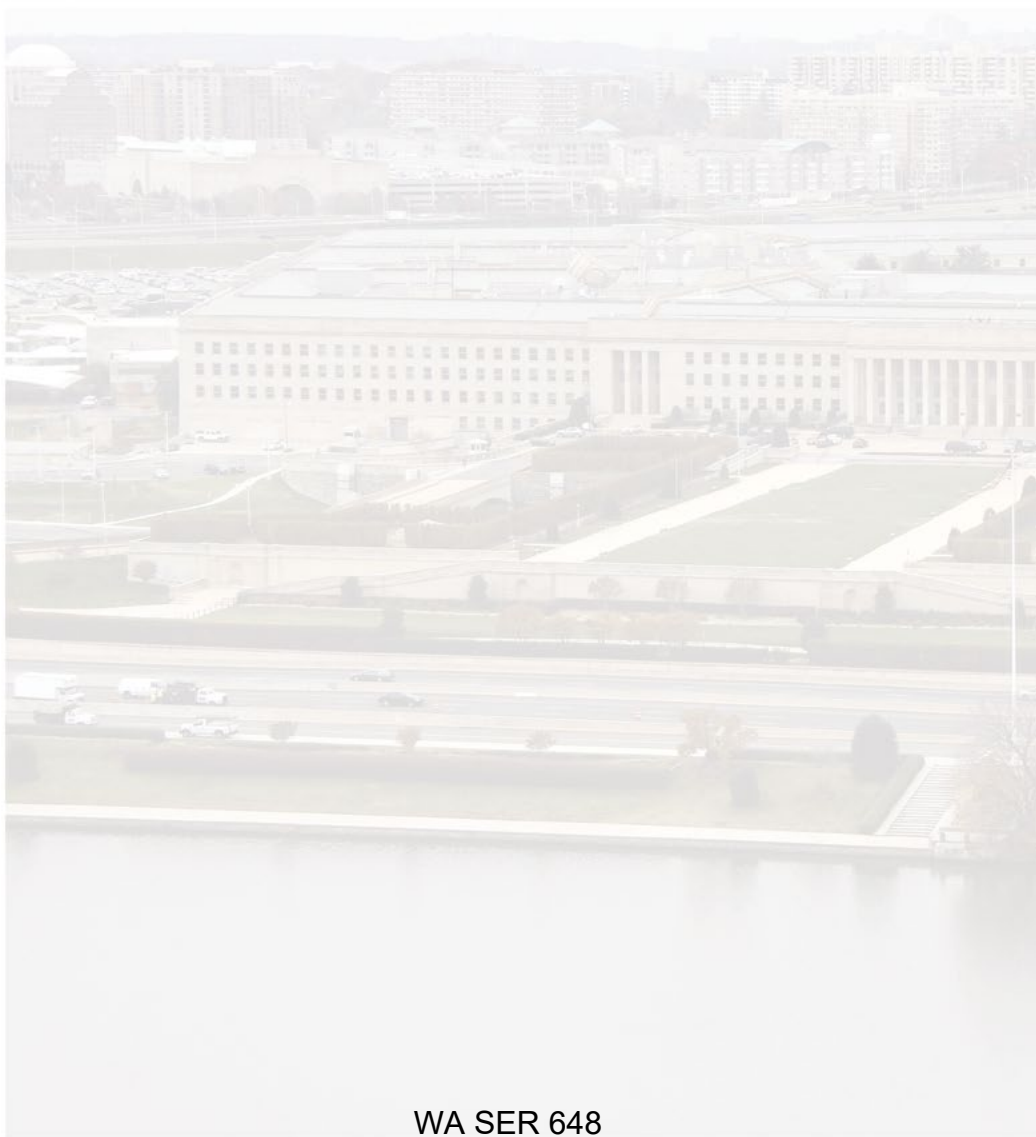
Within this framework, the commander plays a key role in making recommendations and taking action on:

- The timing of medical treatment associated with gender transition;
- Timing of RLE (e.g., non-duty hours, duty hours with an exception to policy (ETP))
- Requested ETPs associated with gender transition; and
- A change to the Service member's gender marker in their Service's personnel data system.

Figure 1: Gender Transition Process



Key Acronyms:
DEERS – Defense Enrollment Eligibility Reporting System
HT/WT/PT – Height/Weight/Physical Training
MH – Mental Health
MHS – Military Health System
MMP – Military Medical Provider
SM – Service Member



WA SER 648

FOR THE TRANSGENDER SERVICE MEMBER

“...the reality is that we have transgender Service members serving in uniform today, and I have a responsibility to them and their commanders to provide them both with clearer and more consistent guidance than is provided by current policies.”

—Statement by Secretary of Defense Ash Carter¹⁰

DoD's revised transgender Service member policy ensures your medical care is brought into the military health system (MHS), protects your privacy when receiving medical care, and establishes a structured process whereby you may transition gender when medically necessary.

In-Service Transition

Gender transition in the military begins when you receive a diagnosis from an MMP indicating that gender transition is medically necessary and concludes when you change your gender marker in your Service's personnel data system. Your commander is a critical part of your transition and much of this section will highlight his/her role. The table below outlines responsibilities for both Active and Reserve Component Service members requesting in-service transition. To make a request, you must:

¹⁰ U.S. Secretary of Defense Ash Carter Remarks, June 30, 2016.

Active Component & Reserve Component Uniformed Full-Time Support Personnel	Reserve Component (All Others)
1. Secure a medical diagnosis and a medical treatment plan from your MMP. If the diagnosis and treatment plan are from a non-military medical provider (<u>non-MMP</u>), you are required to notify your MMP at the earliest practical opportunity to bring your care into the MHS. Your MMP will review, and if appropriate validate the <u>non-MMP's</u> diagnosis and treatment plan.	1. Secure a medical diagnosis and a medical treatment plan from your <u>non-MMP</u>.
2. Notify your commander of the diagnosis and medical treatment plan indicating that gender transition is medically necessary. Work with your commander and your MMP to develop a transition plan that includes a timeline for treatment and an estimated date for a change of your gender marker in your Service's personnel data system.	2. Notify your commander of the diagnosis and medical treatment plan, indicating that gender transition is medically necessary. Work with your commander to have an MMP validate the <u>non-MMP's</u> diagnosis and treatment plan and develop a transition plan that includes a timeline for treatment and an estimated date for a change of your gender marker in your Service's personnel data system.
3. Notify your commander of any changes to the medical treatment plan, the projected schedule for such treatment, any exceptions to policy (ETP) you may request, and the estimated date on which your gender marker would be changed in your Service's personnel data system.	3. Same as AC.
4. Obtain one of the following to change your gender marker in your Service's personnel data system: ■ A certified true copy of a state birth certificate reflecting your preferred gender; or ■ A certified true copy of a court order reflecting your preferred gender; or ■ A U.S. Passport reflecting your preferred gender.	4. Same as AC.

Active Component & Reserve Component Uniformed Full-Time Support Personnel	Reserve Component (All Others)
5. Obtain your MMP's confirmation that gender transition is complete. ¹¹	5. Obtain a <u>non-MMP</u> confirmation that your gender transition is complete, then validate with an MMP (in concert with commander).
6. Obtain written approval from your commander to change your gender marker in your service's personnel data system.	6. Same as AC.
7. Submit paperwork to your personnel administrative office once you have all the required documentation and your commander's written approval to obtain your gender marker change.	7. Same as AC.
8. Meet all applicable military standards in your preferred gender (to include using military berthing, bathroom, and shower facilities), when your gender marker is changed in your Service's personnel data system.	8. Same as AC.
9. Adhere to the ongoing medical treatment plan developed by your MMP to address continuing medical needs, including follow-up visits related to continuous hormone treatment and routine health screening. ¹²	9. Adhere to the ongoing medical treatment plan developed by your <u>non-MMP</u> to address continuing medical needs, including follow-up visits related to continuous hormone treatment and routine health screening.

11 In DoDI 1300.28, gender transition is complete when a Service member has completed the medical care identified or approved by a military medical provider in a documented medical treatment plan as necessary to achieve stability in the preferred gender.

12 The MMP (or non-MMP, if you are not on active duty) may determine certain aspects of your medical care and treatment to be medically necessary, even after your gender marker is changed in your Service's personnel data system (e.g., cross-sex hormone therapy). A gender marker change does not prohibit you from receiving further care and treatment.

Communication

It is vital that you are open and honest with your leadership when discussing the gender transition process. This will enable you to convey your needs as well as address any questions or concerns from your leadership.

Communication with colleagues is equally important as they may not be familiar or comfortable with gender transition. It is important to remember that while you have had many months, probably years, to understand your need to transition, this may be the first time your colleagues have encountered gender transition. They may have difficulty understanding the reasons and the process.

There are many ways to respectfully disclose your gender identity to your colleagues. How and when you wish to tell your coworkers is something you will need to discuss with your commander and/or your MMP. It is important to state what information you are open to discussing and what information you wish to remain private. Communication strategies could include:

- Ask your leadership to convene a unit meeting and make an announcement on your behalf. Have health professionals and/or chaplains available to answer questions;
- Share a letter from you with your unit;
- Distribute a letter or notification via email; and/or
- Make the announcement in person at a unit meeting.

Finding a Mentor

Similar to seeking a mentor to assist and guide in career/professional development, it may be advisable to seek a mentor to assist you in your transition. A mentor should be someone familiar with the process you are undertaking. If possible, choose someone from your peer group or military pay grade. If you cannot find your own potential mentor(s), consider seeking recommendations from your commander, a chaplain, or medical professional. Below are some areas where a mentor may be beneficial:

- Providing advice on military issues related to the correct wear of your preferred gender uniform and related grooming issues;
- Being a supportive sounding board;

- Providing frank and honest advice; and
- Being a unit point of contact, or conduit, for questions from the workplace related to gender transition.

Considerations

Below are some career considerations that you may wish to take into account.

Period of Adjustment

Early on in your transition you may need to consider that adjusting your appearance and grooming can take some time. During this period of transition, it may be appropriate to discuss periods of authorized absence with your commander and the MMP.

For most of your transition, you should not need to use convalescent leave; however, you may require some time to recover from certain medical or surgical treatments. Accordingly, when convalescent leave is recommended, ensure you have coordinated with your unit leadership, administrative personnel, and medical personnel.

Impact Transitioning May Have on Your Career

Transitioning gender may have an impact on several different aspects of your career including deployability, assignment considerations, medical classification, and aspects of individual readiness (e.g., physical fitness, body composition assessment, and professional military education attendance). Since the impact to your career could be significant, it is strongly recommended you discuss this with your commander and/or mentor.

Assignments

You may need to discuss with your MMP and commander whether you want to transition while in your current unit or upon arrival at a new unit. There are advantages and disadvantages to both. The latter has the advantage of leaving your old life at your last duty station and arriving at your next assignment ready to start your new life. However, the disadvantage is that you will have to re-establish your support network in the new location.

Completing transition within a normal Permanent Change of Station cycle of 3-4 years is possible, but may or may not be desirable depending on your circumstances. Below are some issues to consider:

- Specialized medical care may not be available at all duty locations. Assignments near installations with such care may need to be considered;
- Moving locations means potentially moving away from a stable environment, including medical specialists and social support. However, making a fresh start may be easier for some transitioning members;
- Your duty locations may impact decisions about when to commence RLE in your preferred gender; and
- Not all duty assignments will be able to support a gender transition.

Individual Medical Readiness (IMR)

Medical care for gender transition is managed in the same way as other medical conditions. You may be non-deployable for some periods during your gender transition process. It is your responsibility to inform your leadership regarding your medical condition when, as a result of any medical treatment, you will be or have become non-deployable.¹³

Physical Readiness Testing (PRT)

PRT is a fundamental requirement of your military service. You are required to meet the PRT standards based upon your gender marker in your Service's personnel data system and in accordance with Service regulations. Similar to other circumstances where Service members may not meet standards, it is important that you consult regularly with your MMP to ensure you can meet standards (i.e., fitness). If you are unable to meet the standards, it may be necessary to request an ETP.

Privacy

Maintaining dignity and respect for all is important. You will need to consider both your own privacy needs and the privacy needs of others. This includes, but is not limited to, maintaining personal privacy in locker rooms, showers, and living quarters. One strategy might include adjusting personal hygiene hours. If you have concerns, you are encouraged to discuss them with your chain of command.

Military Records

Your records prior to transition (e.g., awards, performance evaluations) are historical and will not be changed after completion of your gender transition.

¹³ DoDI 6025.19, "Individual Medical Readiness (IMR)," June 9, 2014.

Your Service has a board process that may consider changes to historical military records.¹⁴ All records generated after your Service's personnel data system gender marker is changed will reflect your preferred gender.

Expectation Management

The military developed a process to allow you to transition gender while you serve. Keep the lines of communication open and be patient with the process. Your timeline may need to be flexible due to operational requirements.

Tips for Transitioning Service Members

The following tips have been provided by Service members from an allied foreign military who have transitioned gender.¹⁵

- Honesty. "If you wish to be respected you must also give that same respect to your coworkers up and down the chain. How you treat others and inform others will be directly related to the way you are treated. It is incredibly hard to open up and trust people with a personal secret you have probably carried for your entire adult life; however from my experiences if you keep an open-door philosophy and answer honest questions with polite and clear non-emotional detail, most will accept and understand."
- Be professional. "The hormones you may [take] to change will have a varied and perhaps profound effect on not only your physical body, but more importantly your emotional stability. Try not to allow this to cloud or affect your judgement, it will be hard for some to see this happening, trust in your friends when they point out little slips and errors in your emotional well-being, they have your interests at heart!"
- Empower those around you. "Knowledge equals power which equals understanding; empowering those around you to understand will help them feel less threatened and confused, which can assist in being treated with respect and understanding rather than confusion and possibly even contempt and hostility."
- Be confident. "Know yourself, make as much effort as possible to be part of the team and not hide or be hidden away to avoid embarrassment. Stepping

14 See Annex D for a list of Service links to boards for correction of military records.

15 Australian Air Force, Air Force Diversity Handbook: Transitioning Gender in the Air Force, April 2013, 19.

out in to the work arena will be hard, but the sooner you face this challenge the sooner your well-being can return.”

- Trust. “Trusting others when you’re vulnerable is hard for most serving people. We are proud, strong, and generally rather too stubborn to allow others to take charge of us when we feel we can manage ourselves. The problem is you may not understand all that is happening around you, particularly with your coworkers. So listen and trust in your commanders based on their good sound knowledge.”
- Planning. “Map out your transition as best you can, try and forecast as much as possible and pass this on to the relevant commanders. Learn and understand not only what’s happening now in your world, but look and think about where you will be and what you may need.”

FOR THE COMMANDER

“We owe commanders better guidance on how to handle questions such as deployment, medical treatment and other matters. And this is particularly true for small unit leaders, like our senior enlisted and junior officers.”

—Statement by Secretary of Defense Ash Carter¹⁶

The Commander’s Impact

In the course of your duties, you may encounter a transgender Service member who wants to transition gender. It is important that you are aware of your obligations and responsibilities with regard to the support and management of Service members who are transitioning gender. You are responsible and accountable for the overall readiness of your command. You are also responsible for the collective morale and welfare and good order and discipline of the unit and for fostering a command climate where all members of your command are treated with dignity and respect.

Commander’s Roles and Responsibilities

In-Service Transition

When you receive a request from a Service member for medical treatment or an ETP associated with gender transition, you must consider the individual needs associated with the request and the needs of your command. The table below outlines your responsibilities for Active and Reserve Component Service members requesting in-service transition. In making a decision on the request, your responsibilities include:

16 U.S. Secretary of Defense Ash Carter Remarks, June 30, 2016.

Active Component & Reserve Component Uniformed Full-Time Support Personnel	Reserve Component (All Others)
1. Complying with the provisions of DoDI 1300.28 ¹⁷ and with Military Department and Service regulations, policies, guidance, and with your SCCC, as appropriate.	1. Same as AC.
2. Evaluating a Service member's request to transition gender. Ensure, as appropriate, a transition process that: ■ Considers the individual facts and circumstances presented by the Service member; ■ Considers military readiness and impacts to the mission (including deployment, operations, training, and exercise schedules, and critical skills availability), as well as to the morale and welfare and good order and discipline of the unit; ■ Is consistent with the medical treatment plan generated or validated by the MMP; and incorporates consideration of other factors, as appropriate.	2. A Service member will likely provide a diagnosis and medical treatment plan from a <u>non-MMP</u> . In this instance, it still must be validated by the MMP. Consult your chain of command for guidance, if required. You must still evaluate Service member's request in light of the 3 bullets in the active duty column.
3. Reviewing a Service member's request for completeness. ¹⁸ If you determine the request to be incomplete, you must return it to the Service member, with written notice of the deficiencies identified, as soon as practicable, but not later than 30 days after receipt.	3. Same as AC.

¹⁷ DoDI 1300.28.

¹⁸ Refer to Figure 1 and Service policy for completeness determination; in all cases, it will include: completed medical treatment plan and commander approval of request.

Active Component & Reserve Component Uniformed Full-Time Support Personnel	Reserve Component (All Others)
4. Responding to any requests for medical treatment or an ETP¹⁹ associated with gender transition, as soon as practicable, but not later than 90 days after receiving a request determined to be complete. Your response shall: ■ Be in writing; including notice of any actions taken by you; and ■ Be provided to both the Service member and their MMP.	4. Same as AC.
5. At any time prior to the change of the Service member's gender marker in Service's personnel data system, you may modify a previously approved approach to, or an ETP associated with, gender transition.	5. Same as AC.
6. Approving in writing²⁰ the request to change a Service member's gender marker in your Service's personnel data system upon receipt of the recommendation by the MMP and the requisite legal documentation from the Service member. The Service member is then able to take the approval and the legal documentation to the personnel administrative office to obtain the change to the gender marker.	6. Ensuring <u>non-MMP's</u> statement of completion is validated by an MMP, prior to your approval. The remaining process in active duty column should be followed.
7. When the gender marker in the Service's personnel data system is changed: ■ Apply uniform, grooming, body composition assessment (BCA), PRT, Military Personnel Drug Abuse Testing Program (MPDATP), and other standards reflecting the Service member's gender marker in the Service's personnel data system; and ■ Direct the use of berthing, bathroom, and shower facilities according to the Service member's gender marker as reflected in the Service's personnel data system in facilities that are subject to regulation by the military.	7. Same as AC.

19 Your Service will determine the approval level for ETPs. Refer to Service policy or your SCCC if there are concerns.

20 There is no prescribed format for approving a request to change gender marker. Refer to Service policy or your SCCC if there are concerns.

What You Should Expect From the Military Medical Provider (MMP)

The MMP plays a key role in the gender transition process. The MMP will:

- Provide the medical diagnosis applicable to the Service member; list the medically necessary treatments, including the timing of the proposed treatment and the likely impact of the treatment on the individual's readiness, and deployability; and
- Formally advise you when the Service member's medical treatment plan for gender transition is complete and recommend a time at which the gender marker may be changed in your Service's personnel data system.
- Validate the non-MMP's confirmation that Service member's gender transition is complete.

Policy Implications

You have broad responsibilities to maintain your unit's readiness. Select policy areas that may impact the transition process are highlighted below.

Non-Military Medical Care

If an active duty Service member's diagnosis and/or treatment plan are from a non-MMP, direct the individual to notify the MMP at the earliest practical opportunity to bring the care into the MHS. The MMP must consider, and if appropriate, validate the Service member's diagnosis before initiating any other steps in the transition process. If the request is from a non-active duty Service member, the non-MMP diagnosis and/or treatment plan must still be approved by an MMP.

Military Personnel Uniform and Grooming Standards

Exceptions for uniform and grooming standards may be considered per your Service's policy. You may consider current and preferred gender uniforms, form, fit and/or function, the Service member's professional military image, as well as impact on unit cohesion and good order and discipline. If you have questions, refer to your SCCC.

Deployment

Service members will deploy if they are medically and otherwise qualified to do so. As with any Service member, exceptions may be considered by your Service and must be coordinated with the deployed commander, if unique medical needs exist. Individuals requiring close monitoring or ongoing care may not be available for deployment.

Physical Fitness

There are no separate standards for transgender Service members. Any exceptions to PRT standards will be administered by your Service. Individuals undergoing cross-sex hormone therapy may experience changes to their body shape and physical strength, which may have a notable effect on their ability to maintain standards. If that is the case, consult with the individual and the MMP as you would for any other Service member with a medical condition affecting their ability to meet physical fitness standards.

Privacy Accommodations

If concerns are raised by Service members about their privacy in showers, bathrooms, or other shared spaces, you may employ reasonable accommodations, such as installing shower curtains and placing towel and clothing hooks inside individual shower stalls, to respect the privacy interests of Service members. In cases where accommodations are not practicable, you may authorize alternative measures to respect personal privacy, such as adjustments to timing of the use of shower or changing facilities. This should be done with the intent of avoiding any stigmatizing impact to any Service member. You are encouraged to consult with your SCCC for guidance on such measures.

Military Personnel Drug Abuse Testing Program

The MPDATP²³ requires urinalysis specimens to be collected under the direct supervision of a designated individual of the same sex as the Service member providing the specimen. You have discretion to take additional steps to promote privacy, provided those steps do not undermine the integrity of the program. However, all collections must be directly observed. You are encouraged to use discretion and/or contact your SCCC for additional guidance.

23 DoDI 1010.16, "Technical Procedures for the Military Personnel Drug Abuse Testing Program (MPDATP)," October 10, 2012.

Tips for Commanders

The below tips are provided by an allied foreign military and may prove useful:²⁴

- Protect the service member's privacy. Information management is very important.
- Listen to the Service member's wishes with respect to disclosure to the workplace and the broader community.
- Consider consultation with the chaplain, behavioral health personnel, and medical providers.
- Seek guidance and advice from other commanders and supervisors who have experience with individuals who transitioned gender while serving.
- Encourage the Service member to articulate a plan to include a timeline and strategy for notifying coworkers and other command personnel.
- Assist the Service member with identifying a mentor with whom they are comfortable.
- Encourage open communication. Feel free to ask questions.
- Ensure bullying, bias, harassment, hazing, or any other unacceptable behavior is not tolerated.

²⁴ Australian Air Force Handbook.

FOR ALL SERVICE MEMBERS

“I am 100 percent confident in the ability of our military leaders and all our men and women in uniform to implement these changes in a manner that both protects the readiness of the force and also upholds values cherished by the military—honor, trust, and judging every individual on their merits.”

—Statement by Secretary of Defense Ash Carter²⁵

The cornerstone of DoD values is treating every Service member with dignity and respect. Anyone who wants to serve their country, upholds our values, and can meet our standards, should be given the opportunity to compete to do so. Being a transgender individual, in and of itself, does not affect a Service member’s ability to perform their job. Previous policy, however, required transgender Service members to hide their gender identity and forced them to receive their gender-related medical care outside the MHS.

The June 30, 2016, policy allows transgender Service members to openly acknowledge their gender identity, brings all of their medical care into the MHS, allows transgender Service members to transition their gender when medically necessary, and allows the commander to work with the Service member and an MMP to implement a gender transition plan that meets the individual’s medical requirements and unit readiness requirements.

Understanding Gender Transition

The gender transition process is individualized. Gender transition can include social, medical, and legal components. Social transition, in the military context, will generally encompass living in the preferred gender after duty hours. (You may encounter a situation where you know a Service member by one name during duty hours and another after duty hours; this all depends on the individual’s transition.) Medical treatment may include behavioral health care, use of hormones (which may change physical appearance), and/or surgery.

²⁵ U.S. Secretary of Defense Ash Carter Remarks, June 30, 2016.

Other aspects of transition includes formally changing one's gender with federal, state, and military documentation.

Some individuals prefer that very few people know they are transgender Service members and hope that after transition they can quietly blend in with their new gender. Others are committed to educating the public about gender identity, are eager to answer questions, and continue to talk openly about being a transgender Service member long after transition.

Revealing gender identity at work may be one of the last steps transgender Service members take to live and work in their preferred gender. By the time they inform their chain of command they plan to change gender, they have often been dealing with this issue for many years. It is also important not to "out" a transgender Service member (i.e., do not talk about someone else's gender identity or status unless they are okay with it.) The bottom line is to treat others with the dignity, respect, and consideration you would like to be treated with by others.

Harassment and Bullying

Everyone plays a role in stopping bullying and harassment. You must be proactive and question behavior that is inappropriate at the time it occurs. You must report inappropriate behavior to your chain of command immediately. Remember, everyone is responsible for fostering the best possible command climate within your unit.

The impact harassment can have on Service members should not be underestimated; it has the potential to affect the member both personally and professionally. Inappropriate jokes, attitudes, or comments that marginalize transgender Service members are damaging to command climate. In an environment that permits inappropriate jokes and behavior, transgender Service members who have not disclosed their status may be unlikely to seek the care they need.

Respect for Personal Information

You are responsible for upholding and maintaining the high standards of the U.S. military at all times and at all places. Out of respect for all Service members, as mentioned earlier, you should not disclose someone's gender identity without their permission, unless the disclosure is made for official use.²⁶

26 Services retain the authority provided by law and Department and Service regulations to counsel, discipline, and involuntarily separate, as appropriate under the circumstances, those Service members who fail to obey established standards.

Tips for Service Members

Your social interactions and developing friendships with peers contribute to a positive work environment. Do not make assumptions about an individual's gender or sexual orientation. Let others volunteer personal information.

Try to ensure planned social activities are inclusive of Service members and their families who may not fit into your perception of what is typical.

If you notice colleagues or peers are expressing opinions that may alienate others, speak up regarding how their statements may impact others. Often people may be unaware of how their statements, questions, and activities may alienate and offend their coworkers, team members, or staff.

You should be sensitive to the use of pronouns when addressing others. This will vary by individual and unit. If there is ever any question about pronoun usage, do not hesitate to ask the Service member how they wish to be addressed.

If you have questions or concerns, you are encouraged to talk with your chain of command.

Privacy

Maintaining dignity and respect for all is important. You will need to consider both your own privacy needs and the privacy needs of others. This includes, but is not limited to, maintaining personal privacy in locker rooms, showers, and living quarters. One strategy might include adjusting personal hygiene hours. If you have concerns, you are encouraged to discuss them with your chain of command.

ACRONYMS

AOR	<i>Area of Responsibility</i>
BCA	<i>Body Composition Assessment</i>
DEERS	<i>Defense Enrollment Eligibility Reporting System</i>
DES	<i>Disability Evaluation System</i>
DoD	<i>Department of Defense</i>
DoDI	<i>Department of Defense Instruction</i>
DTM	<i>Directive-type Memorandum</i>
ETP	<i>Exception to Policy</i>
HT/WT	<i>Height/Weight</i>
IMR	<i>Individual Medical Readiness</i>
ING	<i>Inactive National Guard</i>
IR	<i>Individual Readiness</i>
IRR	<i>Individual Ready Reserve</i>
MHS	<i>Military Health System</i>
MLOA	<i>Medical Leave of Absence</i>
MMP	<i>Military Medical Provider</i>
MPDATP	<i>Military Personnel Drug Abuse Testing Program</i>
MSA	<i>Military Service Academy</i>
MTF	<i>Military Treatment Facility</i>
PRT	<i>Physical Readiness Test</i>
RLE	<i>Real Life Experience</i>
ROTC	<i>Reserve Officers' Training Corps</i>
SCCC	<i>Service Central Coordination Cell</i>
SELRES	<i>Selected Reserve</i>

BIBLIOGRAPHY

Australian Air Force. *Air Force Diversity Handbook: Transitioning Gender in the Air Force*. Australian Air Force, 2013.

DTM 16-005, “*Military Service of Transgender Service Members*,” June 30, 2016.

DoDI 1010.16, “*Technical Procedures for the Military Personnel Drug Abuse Testing Program (MPDAP)*,” October 10, 2012.

DoDI 1215.08, “*Senior Reserve Officers’ Training Corps (ROTC) Programs*,” June 26, 2006.

DoDI 1215.13, “*Ready Reserve Member Participation Policy*,” May 5, 2015.

DoDI 1300.28, “*In-Service Transition for Service Members Identifying as Transgender*,” June 30, 2016.

DoDI 1332.14, “*Enlisted Administrative Separations*,” January 27, 2014, as amended.

DoDI 1332.18, “*Disability Evaluation System (DES)*,” August 5, 2014.

DoDI 1322.22, “*Service Academies*,” September 24, 2015.

DoDI 6025.19, “*Individual Medical Readiness (IMR)*,” June 9, 2014.

DoDI 6130.03, “*Medical Standards for Appointment, Enlistment, or Induction in the Military Services*,” September 13, 2011.

DoDI 6490.04, “*Mental Health Evaluations of Members of the Military Services*,” March 4, 2013.

U.S. Secretary of Defense Ash Carter, “*Secretary of Defense Ash Carter Remarks Announcing Transgender Policy Changes*,” Washington, D.C., June 30, 2016.

ANNEX A:

Questions and Answers

Listed below are responses to frequently asked questions organized by topic and applicable to multiple audiences.

The Basics

1. What does transgender mean?
 - A. Transgender is a term used to describe people whose sex at birth is different from their sense of being male or female. A transgender male is someone who was born female but identifies as male, and a transgender female is someone who was born male but identifies as female.
2. What is gender identity?
 - A. Gender identity is one's internal sense of being male or female.
3. What is gender dysphoria?
 - A. Gender dysphoria is a medical diagnosis that refers to distress that some transgender individuals experience due to a mismatch between their gender and their sex assigned at birth.
4. Is being a transgender person the same as being a transvestite or a cross-dresser?
 - A. No. "Transvestite" is an outdated term that is considered derogatory. A "cross-dresser" is a person who wears clothing of the opposite sex for reasons other than gender identity (see question #2). A transgender person who dresses according to their gender identity is not "cross-dressing."
5. What is the relationship between sexual orientation and gender identity?
 - A. There is no relationship between sexual orientation and gender identity.
6. What pronouns should I use with transgender Service members?
 - A. This will vary by individual and unit. Transgender Service members should work with their unit leadership to establish correct pronoun usage. If there is ever any question about pronoun usage, do not hesitate to ask the Service member how they wish to be addressed.

7. What happens when federal and state laws appear to conflict?
- A. When not on federal property, Service members must abide by local laws. If there are any questions or concerns about how state laws may affect Service members and/or their dependents off federal property or in areas of concurrent federal and state jurisdiction, the installation legal assistance office should be consulted.

It is also the commander's responsibility to ensure the safety of unit personnel. This includes reminding Service members of risks through use of safety bulletins, alerts, or briefings regarding off-installation activities. Additionally, judge advocate and SCCC resources are available to enhance risk management strategies.

Health Care Issues

8. What hormones do transgender people need?
- A. Not all transgender Service members need cross-sex hormone therapy. Male or female hormones may be prescribed by medical providers in order for transgender Service members to develop the physical characteristics of their preferred gender if that is part of their transition plan.
9. What if a deployed transgender Service member loses his or her medications?
- A. In the event that a Service member lost his or her supply of hormones, and for some unlikely reason was not able to obtain replacements, any side effects, like irritability, decreased energy, or hot flashes, would take a few weeks to become evident. None of these side effects would be life threatening.

In-Service Transition Policy Issues

10. Have other countries allowed transgender individuals to serve openly in their militaries?
- A. Yes. At least 18 countries: Australia, Austria, Belgium, Bolivia, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Israel, the Netherlands, New Zealand, Norway, Spain, Sweden, and the United Kingdom, allow transgender personnel to serve openly.

11. What about Service members whose beliefs just cannot allow them to accept this as normal?
 - A. In today's military, people of different moral and religious values work, live, and fight together. This is possible because they treat each other with dignity and respect. This will not change. There will be no changes regarding Service members' ability to freely exercise their religious beliefs, nor are there any changes to policies concerning the Chaplain Corps of the Military Departments and their duties. Service members will continue to treat with respect and serve with others who may hold different views and beliefs.
12. What is the Service Central Coordination Cell (SCCC)?
 - A. Each Service has an SCCC of medical, legal, and policy experts, primarily to advise field commanders and medical service providers. Contact information for the SCCC can be found in Annex D of this handbook.
13. Will Reserve Component members receive any kind of medical care or financial assistance to pay for transition-related treatment? Can they be treated in a military treatment facility (MTF) throughout their transition?
 - A. Reserve Component members typically receive health care through private civilian health insurance. Those enrolled in TRICARE Reserve Select may be able to access mental health and hormone treatment through TRICARE and are eligible for care in MTFs on a space-available basis. Service members are encouraged to contact their civilian provider/TRICARE for eligibility benefits. A civilian diagnosis and medical treatment plan must be submitted to your chain of command and validated by an MMP. This may be accomplished by telemedicine if available or submission of civilian health documentation to an MMP for review per Service policy.
14. How will the military protect the rights of Service members who are not comfortable sharing berthing, bathroom, and shower facilities with a transitioning Service member? Are they forced to just accept a transgender person living and showering with them?
 - A. To the extent feasible, a commander may employ reasonable accommodations to protect the privacy interests of Service members, while avoiding a stigmatizing impact to any Service member. Commanders are encouraged to consult with their SCCC for guidance.

15. How long will a Service member's deployment eligibility be affected? Is this a way to get out of deployment? Can a Service member in the process of transitioning, which can be a lengthy process, still deploy if called upon?
- A. A Service member's period of non-deployability will vary by individual based on the care needed. Availability for deployment and any anticipated duty limitations would be part of the conversation Service members have with their commanders and medical providers as part of a medical treatment plan. Medical recommendations concerning unanticipated calls for deployment would be made in the same way as other medical conditions and as part of the pre-deployment process.

New Accession Policy Issues

Recruiting

16. Does the new policy mean the Military Services will start recruiting transgender applicants immediately?
- A. No, policy is being revised to allow the Military Services to recruit new personnel no later than July 1, 2017.²⁷

When training of the Force is complete and the new DoDI 6130.03 is effective, the Military Services will begin accessing transgender applicants who meet all standards, holding them to the same physical and mental fitness standards as everyone else who wants to join the military.

Detailed accession policy can be found in in DoD DTM 16-005, "Military Service of Transgender Service Members."²⁸

17. What should a recruiter do if a transgender applicant wants to enlist, but the new policy is not in place?
- A. A recruiter should ensure the applicant meets all standards (e.g., physical fitness, medical fitness) prior to being accessed. This is also a good time to assist the applicant in understanding the accession requirements so they can prepare themselves for entry once the new policy is in place.

²⁷ DTM 16-005.

²⁸ Ibid.

Military Service Academy (MSA)/ Reserve Officers' Training Corps (ROTC)

18. Does the new accession policy mentioned above apply to the Service Academies and the Reserve Officers' Training Corps (ROTC)?
 - A. Yes, effective July 1, 2017, the gender identity of an otherwise qualified individual will not bar them from joining the military, from admission to the MSAs, or from participating in ROTC or any other accession program. However, they must adhere to accession standards prior to being commissioned.
19. If ROTC or MSA students seek to transition during college, would they need to be stable for 18 months prior to commissioning?
 - A. Yes. An individual participant who is transgender is subject to separation from ROTC in accordance with DoDI 1215.08²⁹ or from an MSA in accordance with DoDI 1322.22,³⁰ based on a medical condition that impairs the individual's ability to complete such training or to access into the Armed Forces, under the same terms and conditions applicable to participants in comparable circumstances not related to transgender persons or gender transition. ROTC and MSA cadets and midshipmen are required to meet medical accessions standards when they are appointed as commissioned officers.
20. What are the medical requirements that must be met by an MSA cadet or midshipman to be eligible for a commission?
 - A. Cadets and midshipmen are subject to medical accession standards enumerated in DoDI 6130.03³¹ prior to being commissioned.

29 DoDI 1215.08, "Senior Reserve Officers' Training Corps (ROTC) Programs," June 26, 2006.

30 DoDI 1322.22, "Service Academies," September 24, 2015.

31 DoDI 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services," September 13, 2011. (Currently under revision to reflect DTM 16-005 changes.)

21. What are the medical requirements that must be met by a ROTC cadet or midshipman to be eligible for a commission?
- A. In accordance with DoDI 1215.08,³² E3.2 (Senior ROTC Programs), complete medical examinations must be conducted before enrollment in the scholarship program or at the time of or immediately before enrollment in Senior ROTC programs of the Army, Navy, and Air Force. Such examinations must, in all respects, be equal to the examination conducted to determine medical qualifications for appointment as a commissioned officer. Provided the cadet or midshipman meets the requirements in DoDI 6130.03,³³ they would be qualified to receive a commission.
22. Would a cadet or midshipman be able to undergo hormone therapy while at one of the MSAs or enrolled in ROTC?
- A. It depends. Cadets and midshipmen must continue to meet medical accession standards while at the MSA or enrolled in ROTC. If the standards for appointment into the U.S. Military Services are not maintained, an ROTC cadet or midshipman may be placed on an involuntary Medical Leave of Absence (MLOA) by the Service Secretary or designee. When an MLOA is recommended, a medical record review will determine whether the health-related incapacity or condition presents clear evidence that, following medical treatment, the cadet or midshipman will be unable to meet the physical standards for appointment into the U.S. Armed Forces within a reasonable period of time. Military Service Academy cadets and midshipmen who cannot meet medical accession standards and become medically disqualified may be disenrolled.³⁴

32 DoDI 1215.08.

33 DoDI 6130.03.

34 DoDI 1322.22.

ANNEX B:

Gender Transition Roadmap for U.S. Military Personnel

Below is a summary of the gender transition process for a Service member in accordance with the recently implemented DoD Instruction, “In-Service Transition for Transgender Service Members.” The roles, responsibilities, and courses of action available to transgender Service members and their commanders are described below.

Service Member Responsibilities

Before Initiating Gender Transition

Request an assessment by an MMP in order to confirm a diagnosis stating gender transition is medically necessary.

- Collaborate with and assist the MMP with developing a medical treatment plan for submission to the commander. This plan should include a projected timeline for completion of gender transition, and estimated periods of non-deployability and absence.
- Notify the commander of the recommended treatment and request approval of the timing of the treatment plan. The written request should include the following:
 - Medical treatment plan outlining all medically necessary care and a projected schedule for such treatment; and an estimated date for the completion of gender transition and a gender marker change in the appropriate Service personnel data system.

Reserve Considerations

- All transgender Reserve Component Service members (except Selected Reserve (SELRES) Full-Time Support personnel who fall under Active Component rules/requirements) will submit to, and coordinate with, their chain of command evidence of a civilian medical evaluation that includes a medical treatment plan.
- To the greatest extent possible, commanders and Service members shall address periods of non-availability for any period of military duty, paid or unpaid, during the Service member’s gender transition with a view

to mitigate unsatisfactory participation through the use of rescheduled training or authorized absences.

During Gender Transition

- Initiate gender transition after obtaining the commander's approval.
- Inform the commander of any medical issues that come up in the course of gender transition.
- Notify the commander of any changes to the approved timeline of the medical treatment plan.
- Request the commander process an ETP, if necessary.

When Gender Transition is Complete

- Through your MMP, inform the commander that gender transition is complete, along with a recommended time to change gender marker in the Service personnel data system.
- Request the commander's written approval to change the gender marker in the Service personnel data system. The request must comply with Service policies and must, at a minimum, be accompanied by one of the following legal documents to support gender change:
 - A certified true copy of a State birth certificate reflecting your preferred gender;
 - A certified true copy of a court order reflecting your preferred gender; or
 - A U.S. passport reflecting your preferred gender.
- Upon receipt of the commander's approval, submit supporting documentation to personnel servicing activity to change the gender marker in the Service personnel data system.

After Gender Marker Change in the Service Personnel Data System

- Meet applicable Service standards of the preferred gender, including medical fitness, physical fitness, uniform and grooming, deployability, and retention standards.

- Use military berthing, bathroom, and shower facilities associated with the preferred gender.
- Request ETPs, as needed, from the commander.

Commander Responsibilities

Before Initiating Gender Transition

No later than 30 calendar days after receiving a Service member's request to transition gender:

- Review Service member's request to ensure that it contains the required documentation in accordance with DoD and Service policies, to include a medical treatment plan with a projected timeline for completion of gender transition, estimated periods of non-deployability/absence, and estimated date of gender marker change;
- Coordinate with an MMP. If request to transition gender is from an RC Service member they will likely provide a diagnosis and medical treatment plan from a non-MMP. In this instance, it still must be validated by an MMP;
- Consult with the SCCC; and
- If the Service member's request is incomplete, return it with a written notice of additional required documentation.

No later than 90 calendar days after receiving a Service member's request to transition gender:

- Provide a written response to Service member's request for gender transition or an ETP, with a copy to the MMP; and
- In reviewing the Service member's gender transition request, ensure the decision:
 - Complies with DoD, Service policies, and guidance;
 - Considers the individual facts and circumstances presented by the Service member;

- Considers the needs of the command (including deployment, operations, training, exercise schedules, critical skills availability, morale and welfare, and good order and discipline of the unit);
- Minimizes impacts to the mission and readiness by balancing the needs of the individual with the needs of the command;
- Is consistent with the medical treatment plan; and
- Incorporates input provided by the MMP.

During Gender Transition

In cases where a transitioning Service member is unable to meet standards or requests an ETP during the gender transition, review Service policies outlining the actions a commander may take to balance the needs of the individual Service member and unit readiness. As permitted by Service policies, the commander may:

- Adjust the date on which the Service member's gender transition, or any component of the transition process, will commence;
- Advise the Service member regarding options for extended leave status or participation in other voluntary absence programs during the transition process;
- Arrange for the transfer of the Service member to another organization, command, location, or duty status (e.g., Individual Ready Reserve (IRR)), as appropriate, during the transition process;
- Review and forward ETP requests for application of standards for uniforms and grooming, PRT, and MPDATP participation;
- Establish, or adjust, command policies on the use of berthing, bathroom, and shower facilities;
- Refer for a determination of fitness in the disability evaluation system in accordance with DoDI 1332.18;³⁵

³⁵ DoDI 1332.18, "Disability Evaluation System (DES)," August 5, 2014.

- Initiate administrative proceedings, comparable to actions that could be initiated with regard to others whose ability to serve is limited by medical conditions unrelated to gender transition; and
- Consult the SCCC, with regard to:
 - Service by transgender Service members and gender transition in the military;
 - Implementing DoD, Military Department, and Service policies and procedures; and
 - Assessing the means and timing of any proposed medical care or treatment.
- Coordinate with the MMP regarding any medical issues that arise in the course of a Service member's gender transition;
- Ensure that requests for ETPs are processed within 90 days and provide a written response to both the Service member and their MMP; and
- Modify a previously approved timeline for gender transition or an ETP at any time prior to the change in a Service member's gender marker in the Service personnel data system.
 - A determination that modification is necessary and appropriate will be made in accordance with DoD/Service policies and procedures.
 - Notify Service member of such modification under established DoD procedures as described in the 'before initiating gender transition' section at beginning of 'commander's responsibilities'.

When Gender Transition is Complete

- Review a Service member's request to change gender marker in the Service personnel data system to ensure that it complies with Service requirements, to include at a minimum:
 - A recommendation from the MMP stating that gender transition according to the medical treatment plan is complete and that the Service member is stable in the identified gender; and

- One of the following legal documents to effect gender change:
 - A certified true copy of a State birth certificate reflecting the Service member's preferred gender;
 - A certified true copy of a court order reflecting the Service member's preferred gender; or
 - A U.S. passport reflecting the member's preferred gender.
- If the Service member's request is complete, provide written approval to Service member authorizing gender marker change in the Service personnel data system.

After Gender Marker Change in the Service Personnel Data System

- Apply uniform standards, grooming standards, BCA standards, PRT standards, MPDATP standards, and other standards according to the Service member's identified gender listed in the Service personnel data system.
- Direct the use of military berthing, bathroom, and shower facilities according to the Service member's gender listed in the Service personnel data system.
- Review ETP requests as appropriate.

ANNEX C:

Scenarios

The following fictional cases illustrate scenarios that may be encountered when addressing individual issues.³⁶ The delineation of responsibilities in each scenario is intended only to provide a general discussion of issues that may arise. The scenarios are not all inclusive, nor are they directive in nature. All personnel are reminded to consult with their Chain of Command, SCCC, Service, and DoD guidelines before determining the best course(s) of action. Commanders are reminded of their responsibility to ensure good order and discipline throughout their entire unit.

Readiness

Scenario 1: Inability to Meet Standards during Transition

A senior officer, Tony, is transitioning to become Tanya. The officer is about halfway through the gender transition timeline agreed upon with his military medical provider (MMP) and commander and is taking feminizing hormone therapy. The officer is aware that male standards (berthing, uniform, BCA, PRT, etc.) will still apply until his transition is complete. However, midway through hormone treatment, it becomes increasingly difficult for Tony to meet the male body composition and physical readiness standards. Tony's commander is supportive, but several key unit training events have been scheduled over the next several months, making immediate accommodation difficult.

Key takeaway(s)

This scenario illustrates the importance of notifying the commander of any changes to individual medical readiness (IMR) that may impact the ability to meet standards. It is essential that communication among Service member, commander, and the MMP is ongoing.

Service member responsibilities

- If necessary, work with the MMP to obtain proper waiver for male physical readiness standards during the period of gender transition and ensure the commander is informed; and

³⁶ The scenarios presented are fictitious and not intended to represent any actual person or event.

- Discuss alternatives with the commander, such as rescheduled training events or extended leave/absence until gender transition process is complete.

Commander responsibilities

The commander can exercise multiple options listed below, as permitted by DoD and Service policies:

- Advise Tony on the option of taking extended leave/absence during the gender transition process;
- Explore the possibility of transferring Tony to another organization with less rigorous operational requirements;
- Refer Tony for a determination of fitness in the disability evaluation system;³⁷ or
- Review approved ETPs consistent with Service policies for male physical readiness and male body composition standards and ensure they are followed until the change of gender marker in the Service personnel data system to a female is complete.

Scenario 2: Physical Standards

A Service member has completed their medical treatment plan and is requesting commander approval to change their gender marker in the Service personnel data system. The commander has concerns about the Service member's ability to meet height/weight (HT/WT) and physical readiness training (PRT) standards for the preferred gender.

Key takeaway(s)

This scenario illustrates the importance of ongoing communication among Service member, commander, and the MMP, and the requirement for the commander to approve in writing all gender marker change requests. This communication will assist the commander in determining the timing of the gender marker change in the Service's personnel data system.

³⁷ DoDI 1332.18. (USCG reference is Physical Disability Evaluation System, COMDTINST M1850.2 (series))

Service member responsibilities

- Part of your transition process should include a provision to meet new HT/WT and PRT standards and consider whether an ETP will be required as you progress through the medical treatment plan.
- Continue communicating with your commander and your MMP on your ability to meet HT/WT and PRT standards.

Commander responsibilities

- Part of the Service member's transition process should include a provision to meet new HT/WT and PRT standards as they progress through their medical treatment plan.
- Counsel Service member on HT/WT requirements and personal fitness and the potential negative outcomes should they fail to meet those requirements.
- Consult with the MMP on Service member's ability to meet standards.
- Consider two possible courses of action for gender marker change in Service personnel data system: (1) grant gender marker change with ETPs or (2) delay gender marker change until all standards of the preferred gender are met.
- Consult DoD and Service policy as well as the SCCC.

Scenario 3: Pregnancy

Lieutenant Marty changed his gender marker in the Service personnel data system from female to male after completing an approved transition plan. Lieutenant Marty has not had sex reassignment surgery as part of the transition plan and is working with his MMP on a plan to start a family. Lieutenant Marty approached his commanding officer a few weeks ago and mentioned he was pregnant.

Key takeaway(s)

This scenario illustrates the importance of ongoing communication among Service member, commander, and the MMP with regard to Individual Medical Readiness (IMR). It also emphasizes the importance of understanding

special medical care that may be required and administrative benefits resulting from pregnancy.

Service member responsibilities

- It is your responsibility to notify the chain of command of any change to IMR.³⁸
- Though you have changed your gender marker in the Service personnel data system, there are IMR requirements that may be contrary to what is listed in the personnel data system (i.e., gender reflects male, however you have female anatomical characteristics). Health matters specific to anatomical characteristics still require appropriate medical review as they may affect your overall health and readiness, thus you will still require annual female examinations.
- You will receive any/all treatment/check-ups/physicals as it relates to female genitalia, including, in this case, prenatal care. Upon giving birth, you will be entitled to all relevant medical care, administrative entitlements, and leave prescribed under Service policies.
- Be aware that colleagues may find this situation confusing. Consider how and when you would like to discuss the pregnancy with your chain of command and colleagues.

Commander responsibilities

- Comply with Service pregnancy policies.
- Understand and be prepared to address administrative entitlements with Lieutenant Marty (i.e., maternity leave).
- Even though Lieutenant Marty has maintained female anatomy, he must be screened for pregnancy prior to deployment. If Lieutenant Marty became pregnant on deployment he will be transferred in accordance with Service policy.
- Consider workplace communications at the appropriate time with consideration of Lieutenant Marty's wishes.
- Consult with the SCCC.

³⁸ DoDI 6025.19.

Career

Scenario 4: Specialized Career Limitations

A male aviation officer with 12 years of service approaches his commanding officer and requests guidance on how to complete a transition from “Eric” to “Erica.” He has been living as a female when not on duty, and has already started hormone therapy, prescribed by a civilian provider, sought consultation for surgical transition, and is about to have a legal name change.

Key takeaway(s)

This scenario illustrates the importance of notifying the commander of any changes to IMR, and the importance of bringing all medical care into the MHS, whether a member of the Active or Reserve Component. Even though the Service member has received gender transition-related treatment with a civilian medical provider, they must have their subsequent care within the military health system. Finally, the scenario highlights how performance of duty may be limited depending on specialty/career field.

Service member responsibilities

- Immediately notify the flight surgeon of care received by a civilian medical provider.
- You are required by policy to inform your commander of medical treatment that may impact your medical readiness status.
- You have a responsibility to maintain your health and fitness, meet IMR requirements,³⁹ and report medical (including mental health) and health issues that may affect your readiness to deploy or fitness to continue serving in an active/reserve status;
- Receive a diagnosis and a treatment plan from an MMP.
- Provide all medical documentation from your civilian provider to the MMP.
- Develop a transition timeline with the MMP and the commander.

³⁹ Ibid.

Commander responsibilities

- Consider Service policies applicable to Service members regarding unauthorized medical care.
- Direct Service member to an MMP for diagnosis and review of procedures already performed.
- Consult the MMP and/or the SCCC regarding the impact of gender transition on the Service member's readiness status and ability to perform military duties, highlighting the immediate impact to the officer's ability to maintain aviation credentials.
- Consider the timing of medical requirements in the treatment plan and any impacts to the mission (including deployments, operations, training and exercises) as well as the morale and welfare, and good order and discipline of the unit.

Scenario 5: Entry-Level Training

After four months, Private Lee completes recruit and combat training. She then reports to Ft. Sill for Military Occupational Specialty training. Upon arrival, Private Lee tells her Platoon Sergeant she is currently feeling distress as she believes she should be a man. Although she pushed herself through to completion, recruit training increased her distress. Private Lee has expressed reluctance about seeing a mental health specialist and/or medical care provider.

Key takeaway(s)

This scenario illustrates the importance of receiving a proper diagnosis from the MMP prior to other actions being taken. The commander has tools available to facilitate medical care for a Service member's well-being and to ensure Service members complete initial entry training.

Service member responsibilities

- Discuss situation with the commander.
- Obtain an evaluation by an MMP.

Next, Private Lee received a diagnosis of gender dysphoria, and the commander is told her training will be interrupted as treatment is medically necessary. After one month, it is clear Private Lee's medical condition impairs her ability to train.

Commander responsibilities

- Consult with an MMP and determine need for a command-directed mental health evaluation.⁴⁰
- Consult with the SCCC.
- Inform Private Lee potential courses of action may include: withdrawal from training due to her medical condition, a training delay, or an initial entry separation if within 180 days of accession.⁴¹

Reserve Component

Scenario 6: Individual Ready Reserve

Corporal Kennedy is a member of the IRR and does not have access to an MMP. He has recently completed the transition from female to male. Corporal Kennedy wants to be considered male by his Service. He has a new birth certificate showing his preferred gender.

Key takeaway(s)

This scenario illustrates the importance of notifying the commander of any changes to IMR, whether a member of the Active or Reserve Component. Even though the Service member did all of their gender transition-related treatment with a civilian medical provider, they must still adhere to established military medical and personnel processes.

⁴⁰ DoDI 6490.04, "Mental Health Evaluations of Members of the Military Services," March 4, 2013.

⁴¹ DoDI 1332.14, "Enlisted Administrative Separations," January 27, 2014, as amended.

Service member responsibilities

- All IRR Service members have a responsibility to maintain their health and fitness, meet IMR requirements,⁴² and report to their chain of command any medical (including mental health) and health issues that may affect their readiness to deploy or fitness to continue serving.
- Provide medical documentation indicating that transition is complete to their IRR command and ensure it is available to an MMP to confirm the diagnosis.
- Provide legal documentation of gender change (i.e., certified birth certificate, U.S. passport, certified court order) to IRR command.

Commander responsibilities

- Review documentation with an MMP to ensure completeness and compliance with Service instructions and DoD policy.
- If complete, provide letter authorizing gender marker change in the Service personnel database.
- Consult with SCCC.

Scenario 7: Standards and Exceptions to Policy

Sergeant Rich, a Selected Reservist, informs his commanding officer that he has been living as a female when he is not in a drilling status. He requests to be called Meena; to use the female bathroom; to be held to female physical, uniform, and grooming standards; and to have his gender changed in his official military personnel file.

Key takeaway(s)

This scenario illustrates the importance of notifying the commander of any changes to IMR, whether a member of the Active or Reserve Component. Even though the Service member has initiated their gender transition-related treatment with a civilian medical provider, they must still adhere to established military medical and personnel processes.

⁴² DoDI 1215.13, “Ready Reserve Member Participation Policy,” May 5, 2015.

Service member responsibilities

- All Selected Reserve Service members have a responsibility to maintain their health and fitness, meet IMR requirements,⁴³ and report to their chain of command any medical (including mental health) and health issues that may affect their readiness to deploy or fitness to continue serving.
- Provide medical documentation to the MMP showing diagnosis and medical treatment received from civilian medical provider.
- Upon confirmed diagnosis by the MMP, work with the MMP and commander to develop a transition plan.
- Provide legal documentation of gender change (i.e., certified birth certificate, U.S. passport, certified court order).

Commander responsibilities

- Facilitate Sergeant Rich's consultation with the MMP and discuss need for any ETPs that may be required.
- Upon confirmed diagnosis by the MMP, work with Sergeant Rich and the MMP to develop a gender transition plan consistent with your unit's operational responsibilities.
- When transition is complete, as certified by the MMP, provide a letter authorizing gender marker change in the Service personnel database.
- Ensure your unit is properly trained to accept and understand Sergeant Rich's preferred gender.

Scenario 8: Satisfactory Reserve Participation

Sergeant Williams is a Selected Reserve member with an Army Reserve unit. He has been in consultation with his commander regarding his gender transition. The medical treatment portion of his gender transition will require him to miss up to 2 months of duty. Both the commander and Sergeant Williams are working through potential mitigation strategies to ensure he does not become an unsatisfactory participant.

⁴³ DoDI 6025.19.

Key policy takeaway(s)

This scenario illustrates the importance of notifying the commander of any changes to IMR, whether a member of the Active or Reserve Component. The commander also has tools available to address the Service member's absence.

Service member responsibilities

- As part of the previously agreed to transition, continued communication with the commander is key to success.
- Be aware of participation requirements to ensure a satisfactory year is achieved.
- Consult with the commander regarding alternative training opportunities.

Commander responsibilities

- You have the necessary tools to develop an initial mitigation strategy; options available to you include: (1) rescheduled training; (2) authorized absences; or (3) alternate training.
- Individual Service policies will detail processes and procedures required to use the above mitigation tools.
- Consult with your SCCC.
- Ensure your unit is properly trained to accept and understand Sergeant Williams' preferred gender.

Scenario 9: Medical Compliance

Airman Bristol, a Selected Reserve member with an Air Force Reserve unit, has an approved transition plan. She has been contemplating an unscheduled medical procedure between unit training assemblies. It is highly unlikely that the surgical procedure will require her to miss training. Airman Bristol is uncertain if she needs to report the procedure to her chain of command.

Key takeaway(s)

This scenario illustrates the importance of notifying the commander of any changes to IMR, whether a member of the Active or Reserve Component. Even though the Service member has initiated their gender transition-related treatment with a civilian medical provider, they must still adhere to established military medical and personnel processes. The commander also has tools available to facilitate the Service member's well-being.

Service member responsibilities

- You have a responsibility to maintain your health and fitness, meet IMR requirements,⁴⁴ and report to your chain of command any medical (including mental health) and health issues that may affect your readiness to deploy or fitness to continue serving in an active status.
- Discuss with your commander to address potential adjustments to your transition plan and any readiness implications.

Commander responsibilities

- You should prepare Airman Bristol for any potential periods of non-availability and work with her to mitigate absences. Options available to you include: (1) rescheduled training; (2) authorized absences; or (3) alternate training.
- Consider potential adjustments to Airman Bristol's transition plan based on individual needs as well as readiness.
- Individual Service policies will detail processes and procedures required to use any of these mitigation tools.
- You must also balance the needs of the individual and the unit in terms of readiness. While Airman Bristol may have great flexibility in her Air Force Reserve unit as to the timing of the medical procedure, this may not always be the case. Continued dialogue between you and Airman Bristol is important to individual and unit readiness. For further information, you should consult your chain of command and/or SCCC.

⁴⁴ Ibid.

Scenario 10: Unauthorized Medical Care

An Active Guard/Reserve (AGR) National Guardsman has completed nearly all aspects of gender transition with the assistance of a civilian medical provider. His gender transition and medical treatment have not been disclosed to the chain of command. He would like to be recognized in his preferred gender.

Key takeaway(s)

This scenario illustrates the importance of notifying the commander of any changes to IMR, whether a member of the Active or Reserve Component. Even though the Service member did all of their gender transition-related treatment with a civilian medical provider, they must still adhere to established military medical procedures.

Service member responsibilities

Even though you have completed nearly all aspects of gender transition by a civilian medical provider, you must:

- By policy, inform your commander of medical treatment that may impact your medical readiness status.
- Maintain your health and fitness, meet IMR requirements, and report medical (including mental health) and health issues that may affect your readiness to deploy or fitness to continue serving in an active/reserve status.
- Request and receive a diagnosis and a treatment plan from an MMP.
- Provide all medical documentation from your civilian provider to the MMP.
- Develop a transition timeline with the MMP and the commander.

Commander responsibilities

- Consider Service policies applicable to Service members regarding unauthorized medical care.
- Direct the Service member to military medical for diagnosis and review of procedures already performed.

- Consult the MMP and/or the SCCC regarding the impact of gender transition on the Service member's readiness status and ability to perform military duties.
- Consider the timing of medical requirements in the treatment plan and any impacts to the mission (including deployments, operations, training and exercises) as well as the morale and welfare, and good order and discipline of the unit.

Privacy and Cohabitation

Scenario 11: Use of Shower Facilities

A transgender Service member has expressed privacy concerns regarding the open bay shower configuration. Similarly, several other non-transgender Service members have expressed discomfort when showering in these facilities with individuals who have different genitalia.

Key takeaway(s)

This scenario illustrates the importance of open lines of communication between the Service member and the commander. It also depicts steps a commander may take to permit privacy, based on Service policy.

Service member responsibilities

- If you have any concerns about privacy in an open bay shower setting, you should discuss this with your chain of command.
- Consider altering your shower hours.

Commander responsibilities

- You may employ reasonable accommodations when/if you have a Service member who voices concerns about privacy. This should be done with the intent of avoiding any stigmatizing impact to any Service member. If permitted by Service policies, some of these steps may include:
 - Facility modifications, such as installing shower curtains and placing towel and clothing hooks inside individual shower stalls.

- In cases where accommodations are not practicable, you may authorize alternative measures to respect personal privacy, such as adjustments to timing of the use of shower or changing facilities.
- Take proactive steps through the chain of command to ensure that expressions of discomfort don't escalate into harassment or hazing.
- Consult the SCCC for guidance on how to institute such measures.

Scenario 12: Urinalysis

A transgender Service member is randomly selected to undergo a urinalysis test at their new command.

Key takeaway(s)

This scenario illustrates the importance of open lines of communication between the Service member and the commander. The commander must adhere to procedures outlined in the Military Personnel Drug Abuse Testing Program (MPDATP)⁴⁵ and Service policy.

Service member responsibilities

- Discuss your circumstances with command leadership during sign-in period to determine your options and allow the commander the ability to adjust as required/desired for your comfort and the comfort level of the observer, particularly if you have not undergone full surgical change.

Commander responsibilities

- Depending on Service regulations, you may consider alternate observation options if a request from a transgender Service member or an observer is made. Options could include observation by a different observer or medical personnel.
- You have discretion to take additional steps to promote privacy, provided those steps do not undermine the integrity of the program. However, all collections must be directly observed.

⁴⁵ DoDI 1010.16.

- Consult with the SCCC; if unable to make special accommodation, spend time discussing with both the observer and the Service member.
- Ensure your observers are properly trained.

Good Order and Discipline

Scenario 13: Living Quarters

You are the leading Chief Petty Officer aboard ship. A high performing Petty Officer, who is transgender and completely transitioned, approaches you and states she can no longer tolerate her roommate. Through positive reinforcement, counseling, and mentorship, you attempt to resolve the issue at the lowest level in the chain of command. However, you notice her performance starting to diminish, and she and her roommate are making derogatory comments to co-workers about each other. The behavior has become disruptive to the entire unit and others are starting to complain. She puts in a request to be re-assigned to another berthing area onboard ship.

Key takeaway(s)

This scenario illustrates the importance of open lines of communication between the Service member and the commander, as well as standards of conduct. It also highlights existing tools available to resolve the situation.

Service member responsibilities

- Respecting each other's rights within a closed space is critical to maintaining good order and discipline.
- Standards of conduct apply equally to all Service members.

Commander responsibilities

- Take an active and positive leadership approach with a focus on conflict resolution and professional obligations to maintain high standards of conduct.
- Counsel the individuals and encourage them to resolve their personal differences. Make clear to both that respecting each other's rights within a closed space is critical to maintaining good order and discipline.

- If the issue cannot be resolved and alternative berthing arrangements can be made within command policy and without degrading good order and discipline of the unit, you may consider alternative arrangements.

Scenario 14: Proper Attire during a Swim Test

It is the semi-annual swim test and a female to male transgender Service member who has fully transitioned, but did not undergo surgical change, would like to wear a male swimsuit for the test with no shirt or other top coverage.

Key takeaway(s)

This scenario illustrates the importance of open lines of communication between the Service member and the commander. It also depicts steps a commander may take to permit privacy, based on Service policy.

Service member responsibilities

- You may be comfortable with your outward appearance; however, there may be a period of adjustment for others. It is courteous and respectful to consider social norms and mandatory to adhere to military standards of conduct.
- Discuss with your chain of command.

Commander responsibilities

- It is within your discretion to take measures ensuring good order and discipline.
- When administering the swim test, counsel the individual and address the unit, if additional options (e.g., requiring all personnel to wear shirts) are being considered.
- Consult with your SCCC.

Scenario 15: Living Quarters

Following her transition (which did not include any sex reassignment surgery) and gender marker change in the Service personnel data system from male to female, Petty Officer Kelleher was assigned to a Coast Guard cutter and

provided quarters in female berthing. Shortly after her arrival aboard the cutter, several females in Petty Officer Kelleher's berthing area complained to the Command Senior Chief about being uncomfortable around Petty Officer Kelleher as she still has male genitalia. The Command Senior Chief approached the commanding officer with these complaints hoping to achieve some sort of resolution.

Key takeaway(s)

This scenario illustrates the importance of open lines of communication between the Service member and the commander, as well as standards of conduct. It also highlights existing tools available to resolve the situation.

Service member responsibilities

- You are not required to modify or adjust your behavior based on the fact you do not “match” the physical appearance of those in your berthing area. You must, however, follow all relevant shipboard and/or Service regulations commensurate with your gender.
- If you suspect others feel uncomfortable, or begin to feel uncomfortable, you should immediately reach out to an appropriate member of your command and note your concern. Should you feel uncomfortable approaching your command, every effort should be made to use resources available through the command senior enlisted leader network (e.g., Command Master Chief, Command Sergeant Major).
- The preservation of personal privacy, dignity, and respect is a responsibility shared by all crew members.

Commander's responsibilities

- Prior to Petty Officer Kelleher's arrival, ensure crew has received baseline training on policy regarding service by transgender personnel.
- Immediately upon the gender marker change in the Service personnel data system, Petty Officer Kelleher will be responsible for meeting all applicable military standards in her preferred gender, and subject to regulation by the military, will use those berthing, bathroom, and shower facilities associated with the preferred gender.

- You are responsible for the collective morale and welfare and good order and discipline of the unit and for fostering a command climate where all members of your command are treated with dignity and respect.
- An initial approach to the complaints may entail meeting with the Command Senior Chief as well as the complaining members of the berthing area to determine the exact nature of their complaints. You should inform them that Petty Officer Kelleher's assignment to female berthing is required regardless of her physical appearance and that their lack of comfort is not reason to prevent Petty Officer Kelleher from residing in female berthing or make her subject to treatment different from others.
- Similarly, as with any other issue taking place in a berthing area that affects the morale and welfare and good order and discipline, you (or Command Senior Chief) may also want to speak with Petty Officer Kelleher to inform her of the perceived problem regarding her physical appearance and its effect on the other members in the berthing area. Such a conversation should be handled very carefully; coordination with the SCCC is advisable to gain assistance on strategies to successfully engage in such communication.
- In every case, you may employ reasonable accommodations to respect the privacy interests of Service members. Avoid stigmatizing actions that may single out any Service members in an attempt to resolve the complaints.

Real Life Experience (RLE)

Scenario 16: Attending a Unit Social Event

A Service member has been undergoing transition for the last three months, from male to female, and his gender marker has not been changed in the Service's personnel data system. Only the immediate chain of command is aware of this transition. The Service member desires to attend an off-post unit event dressed as a female.

Key takeaway(s)

This scenario illustrates the importance of open lines of communication between the Service member and the commander, as well as standards of conduct. It also

highlights existing tools available to resolve the situation, as well as emphasizing the RLE agreement that was discussed when developing the transition plan.

Service member responsibilities

- Your RLE should be conducted in accordance with your approved transition plan. If this specific situation is not addressed, discuss this with your commander and the MMP to potentially modify the transition plan.
- Devise a communication plan with the commander to inform unit members of the transition to your preferred gender prior to attending unit events.

Commander responsibilities

- Maintain good order and discipline.
- During transition planning, discuss and document expected conduct to include RLE and whether ETPs may be necessary.
- If approving the ETP, ensure the unit members are properly trained prior to the event. If granting an ETP is not practicable, discuss with the Service member and advise him not to attend such activities as a female until unit members are properly trained.

Scenario 17: Off Duty

A Service member has been undergoing transition for the last three months, from male to female, and has not yet changed his gender marker in the Service's personnel database system. The unit is aware of his transition. He is preparing to begin his RLE after duty hours (i.e., wearing make-up, wigs, and female clothing) and would like to do so in his barracks room, unit day room, and on the military installation. He is still using the male facilities.

Key takeaway(s)

This scenario illustrates the importance of open lines of communication between the Service member and the commander, as well as standards of conduct. It also highlights existing tools available to resolve the situation, as well as emphasizing the RLE agreement that was discussed when developing transition plan.

Service member responsibilities

- Your RLE should be conducted in accordance with your approved transition plan. If this specific situation is not addressed, discuss this with your commander and the MMP to potentially modify the transition plan (i.e., request an ETP if necessary).

Commander responsibilities

- During transition plan development, discuss and document expected conduct to include RLE.
- Consider ETPs if requested by Service member; ensure your unit is aware and properly trained prior to granting an ETP.
- Only at the Service member's request, consider authorizing extended leave, transfer to IRR, ING, or Career Intermission Program/Temporary Separation in accordance with Service policy to allow the Service member to live in their preferred gender and conduct RLE. Care should be taken to not apply any undue pressure on the Service member to avail himself of these voluntary options.
- Consider notifying the installation commander that you have a transitioning Service member to mitigate any potential confusion at base access control points.

Overseas

Scenario 18: Liberty Call and Personal Safety

The USS SHIP is about to pull into port for 3 days of liberty. The diverse crew, which includes a transgender Service member, has been working hard in the Arabian Gulf and is excited about a few days off. There is concern for Service member safety ashore due to wide spread anti-LGBT sentiment. Additionally, there are criminal penalties for violations of social norms.

Key takeaway(s)

This scenario illustrates the importance of open lines of communication between the Service member and the commander. Additionally, emphasis is placed on using available tools to evaluate assignments that may be potentially risky for the Service member.

Service member responsibilities

- You must always remember that the laws and what is considered socially normal in the host country may be vastly different than in the U.S.
- Pay attention to any travel warnings given at your command as a pre-arrival brief. You should also consult the Foreign Clearance Guide,⁴⁶ Travel Precautions, and Information section for LGBT travel information for that country.
- You should ensure that when you visit the country that you are always accompanied by some of your shipmates and avoid areas that are listed as dangerous. Be cautious of potential risky situations and don't do anything you would not do at home.
- You should avoid all physical displays of affection in public.

Commander responsibilities

- While having a transgender Service member might be unique to your crew, the specific issues and concerns are analyzed similarly to any other safety issues that may be encountered by any member of your crew.
- Conduct a thorough analysis of the country you are visiting prior to arrival. At a minimum, you should review the U.S. State Department's country specific website and DoD Foreign Clearance Guide.
- Tailor your pre-briefs to the crew on the accepted country norms and places to avoid. Ensure a robust buddy system for liberty is prescribed. Educate your non-commissioned officers about any concerns regarding the port.

Scenario 19: Assignment Considerations

A newly reported transgender female Service member arrives in the CENTCOM Area of Responsibility (AOR) to serve as an advise-and-assist mentor to women police officers. The country of assignment specifically requires female trainers for their female police officers.

⁴⁶ See Annex D.

Key takeaway(s)

This scenario illustrates the importance of open lines of communication between the Service member and the commander, as well as the personnel assignment officer. Additionally, emphasis is placed on using available tools to evaluate assignments that may be potentially risky for the Service member.

Service member responsibilities

- You must be mindful of challenges presented by beliefs and norms in the AOR and how they are different than the accepted norms in the U.S.
- You may need to adjust your expectations in the event that you are asked to shift to a different billet in support of the mission. It is important to maintain a flexible mentality when working with foreign nations to better meet the needs of the overall mission.

Commander responsibilities

- This situation is unique in that close proximity with women and men in foreign countries may be more complicated than in the U.S.
- Some nations view transgender people as culturally unacceptable and will not recognize the individual's preferred gender.
- Conduct a thorough analysis of the country prior to arrival. At a minimum, you should review the U.S. State Department's country specific website and DoD Foreign Clearance Guide.
- You are encouraged to discuss this situation with your chain of command and the SCCC.

Proceed with caution for the safety of the Service member and the possible attention local media interest would generate in assigning this individual to the billet. The individual may need to be reassigned.

ANNEX D:

Additional Resources and Links

DoD Public and CAC-Enabled Websites

Public DoD website, "Department of Defense Transgender Policy":
<http://www.defense.gov/transgender>

DoD CAC-enabled website:
<https://ra.sp.pentagon.mil/DoDCCC/SitePages/HomePage.aspx>

Foreign Clearance Guide:

<https://www.fcg.pentagon.mil/>

Passport

The Department of State has established procedures allowing a person to change the gender on their U.S. Passport. Significantly, an amended birth certificate is not required. Details on this process are contained in the attached information page, found at this link:

<http://travel.state.gov/content/passports/english/passports/information/gender.html>

Service Boards for Correction of Military Records

Air Force:

<http://www.afpc.af.mil/board-for-correction-of-military-records>

Army:

<http://arba.army.pentagon.mil/abcmr-overview.cfm>

Coast Guard:

<http://www.uscg.mil/legal/BCMR.asp>

Navy and Marine Corps:

<http://www.secnav.navy.mil/mra/bcnc/Pages/home.aspx>

Service Central Coordination Cells (SCCCs)

Air Force:

usaf.pentagon.saf-mr.mbx.af-central-coordination-cell@mail.mil

Army:

usarmy.pentagon.hqda-dcs-g-1.mbx.sccc@mail.mil

Coast Guard:

SCCC@uscg.mil

Marine Corps:

USMC.SCCC@usmc.mil

Navy:

usn_navy_sccc@navy.mil



WA SER 704

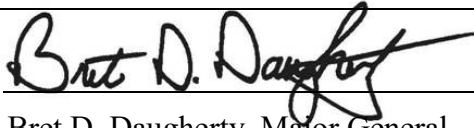
Baker Declaration Exhibit H

Department Policy No. HR-253-02
April 25, 2016

Page 1 of 6



Department Policy No. HR-253-02

Title:	State Active Duty Injury/ Illness- Death Reporting and Claim Process
Former Number:	00-020-02
Authorizing Source:	Title 38, Revised Code of Washington, Chapter 38.40.030 Title 51, Revised Code of Washington Title 296, Washington Administrative Code Attorney General Opinion dated December 7, 2001 Department of Defense Instruction 1332.38 AFI 36-2910, Line of Duty (Misconduct) Determination AR 600-8-1, Army Casualty Operations/Assistance/Insurance ANGI 36-2910, Line of Duty and Misconduct Determinations
References:	WMD Form 2029-15, Request for Medical Treatment for Washington National Guard (WNG) Member on State Active Duty (SAD) WMD Form 2030-15, WA State Active Duty – Line of Duty Personnel & Medical Information WMD Form 2031-15, Pre-State Active Duty Medical Questionnaire WMD Form 2032-15, Post State Active Duty Medical Questionnaire WMD Form, 2033-15 State Active Duty Personal Expense Reimbursement Request
Information Contact:	Military Department Human Resources Director Building #33 (253) 512-7940
Effective Date:	August 19, 2002
Mandatory Review Date:	April 25, 2020
Revised:	April 25, 2016
Approved By:	 Bret D. Daugherty, Major General The Adjutant General Washington Military Department Director

Purpose

To set forth policy regarding initiation and processing of State Active Duty (SAD) Line of Duty (LOD) illness, injury, or fatal incident claims, to include eligibility determination for medical treatment, loss time after deactivation and benefits when accidents or illnesses result in a fatality while in the line of duty.

Scope

This policy applies to all Washington Army and Air National Guard (WNG) members activated by the Governor in state active duty status only. It does not apply to regular state employees, federal military technicians, or guardsmen in a Title 32 military status.

Policy

- A. When a Washington National Guard (WNG) Airman or Soldier is injured, becomes ill or incapacitated, or dies while on SAD, a Line of Duty investigation form will be completed in accordance with procedural guidance set forth in this policy. The investigation will be documented using the Washington State Active Duty – Line of Duty Personnel and Medical Information Form (WMD Form 2030-15), and referenced throughout this policy as the SAD LOD form.
- B. Pre-State Active Duty Medical Questionnaire
 Prior to mobilization to state active duty, a member of the National Guard must complete a Pre-State Active Duty Medical Questionnaire (WMD Form 2031-5). The questionnaire will be reviewed to determine suitable physical and mental health for SAD activation of the member. Any response indicating medical challenges must be cleared with the consultation of a medical professional prior to activation.
- C. State Active Duty Medical Personnel
 When it is determined by the J3 JOC that the operation of the mission warrants the need for medical personnel (doctor, nurse, physician's assistant, or medical specialist), the necessary medical personnel will also be activated in support of the state active duty mission.
- D. Military Medical Review Board
 RCW 38-40-030 establishes the Military Medical Review Board (MMRB) as the mechanism for inquiring into SAD claims, making findings about compensation eligibility, compensation for review by TAG, and review and approval by the Governor. The WMD's Representative from the State Office of the Attorney General has advised the WMD that it is appropriate and permissible for the MMRB to use federal military LOD standards and guidance in determining whether a claim is compensable. The MMRB is comprised of the Military Department Joint Chief of Staff, Federal Human Resources Director, and a Medical Officer. The State Injury/Illness Claims Administrator and the JAG (Judge Advocate General) serve as board resources.. The MMRB reserves the right to consult with Subject Matter Experts.
- E. Reporting a death, in-patient hospitalization, amputation or loss of an eye
 When a state activation results in the death or in-patient hospitalization of a WNG member, the incident must be reported to the Labor and Industries Division of Occupational Safety and Health within the specific timeframes.
 - a. A workplace fatality or in-patient hospitalization must be reported within 8 hours of the incident.

- b. An amputation or loss of an eye(s) must be reported within 24 hours of the incident. Use the 8-hour guideline, if the amputation or loss of the eye(s) results in a death.
- c. Contact the Labor and Industries Division of Occupational Safety and Health via their Hotline at 1-800-423-7233. The following information must be provided.
 - Your contact name and number
 - Injured Worker's Name
 - WMD Risk Manager Contact Information – 253-512-7940
 - Agency name: Washington Military Department
 - Location of the incident
 - Time and date of the incident
 - # of employees who have expired, lost limbs or eyesight; and their names
 - A brief description of the incident.

F. Responsibilities

1. The WNG member who sustains an injury, becomes ill, or is otherwise medically incapacitated while activated on SAD shall:
 - a. Notify their chain-of-command/commander immediately of injury, illness or other incapacitation. If they are unable to do so, another knowledgeable person may report it to the commander.
 - b. Provide information on facts and circumstances of injury or illness by completing Part I of the SAD LOD form, including the release section allowing agency access to medical, employment, and military record information required to administer the state active duty medical claim.
 - c. Respond to any other requests for information or documentation from the command or the state administrative services office for purposes of processing the state active duty medical claim.
2. The WNG Medical Personnel/JOC Officer in Charge shall:
 - a. Determine whether the injured or ill member should be sent to a medical facility for further treatment.
 - b. Determine whether the member should be demobilized and released from SAD, due to the medical condition.
 - c. When a WNG member is sent to a medical facility, the medical personnel (or the commander's representative assisting the member if no medical personnel are activated) is responsible to:
 - 1) Ensure the injured WNG member completes and signs Part II of the SAD LOD form, unless the severity of the injury or illness precludes it at the time of admittance to the medical facility.
 - 2) Complete Part III of the SAD LOD form.
 - 3) Complete a Request for Medical Treatment for Washington National Guard (WNG) Member on State Active Duty (SAD) (WMD Form 2029-15),

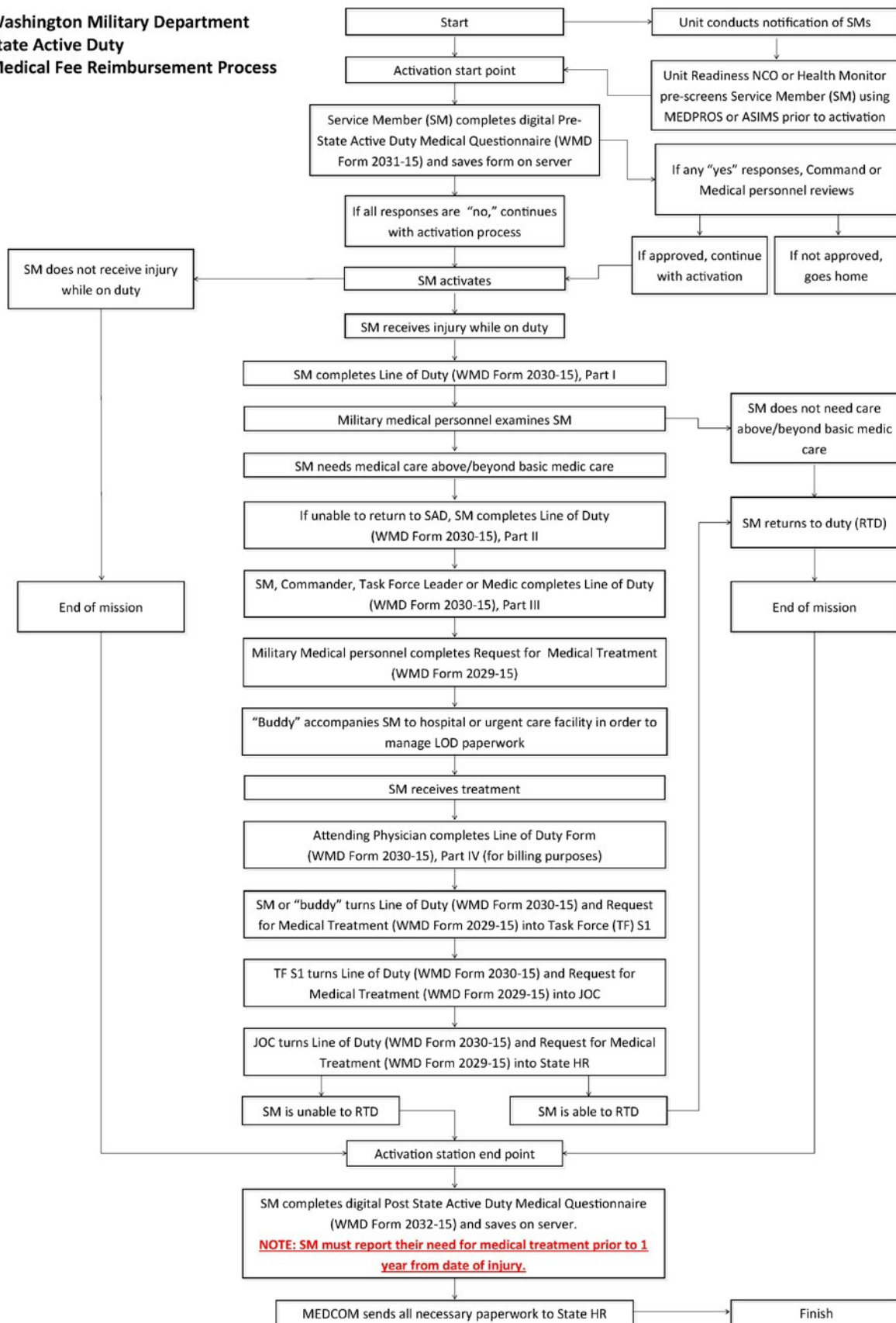
- 4) Ensure there will be a “buddy” to accompany injured WNG member to the medical facility. This “buddy” must be able to explain claim criteria and processing procedures (Part IV of the SAD LOD form must be completed by the physician) and ensure all necessary forms are returned to the Commander/TF S1.
3. The Commander shall:
 - a. Ensure the SAD LOD form regarding the injury or illness is completed.
 - b. Forward the completed SAD LOD form with accompanying supporting witness statements and medical treatment documents to the Joint Operations Center (JOC) within 24 hours of the injury, who shall forward it to the State Risk Manager.
 - c. In the event of death or dismemberment immediately call the Labor and Industries (L&I) Reporting Hotline as notated previously in this policy.
 - d. Take pictures of the scene as it appears immediately following the incident; cordon off the area whenever possible in preparation for L&I Inspection.
 - e. Notify the Agency Risk Manager along with other required notifications.
4. The State Risk Manager shall:
 - a. Receive the SAD LOD form from the JOC, review for completeness and send the form to the MMRB for their review and recommendation.
 - b. Maintain files on each WNG member including all correspondence, medical bills, and other appropriate claim information.
 - c. Forward the information to the MMRB for their review and recommendation.
 - d. Forward the MMRB recommendation to TAG.
 - e. Prepare documentation for TAG to the Governor.
 - f. Coordinate all actions with the Office of Financial Management to expedite approval of claims.
 - g. Administer disbursement of compensation.
 - h. Oversee further actions regarding the claim to include further medical treatment and/or rehabilitation.
 - i. In the event of a death or dismemberment validate that the L&I Hotline has been called. Respond to the location if safe to conduct an independent investigation while cooperating fully with L&I Inspectors.
 - j. Coordinate death processing with the Agency Claims Manager.
5. The MMRB shall:
 - a. Review the claim to determine whether injury, illness, or incapacitation occurred in line of duty and should be compensated.
 - b. Make finding regarding eligibility for compensation.
 - c. Forward findings to the State Risk Manager for further processing.
 - d. Investigate further or direct further investigation of the claim, and to request and/or subpoena people and documents in accordance with RCW 38.40.030 in order to make its determinations.

6. TAG shall:
 - a. Review the findings of the MMRB and submit the claim to the Governor with recommendations as to disposition.
 - b. Receive notification from the Governor of the approval, denial, or direct further action to be taken regarding the claim.
 - c. When the Governor approves the findings of the MMRB, TAG will notify the State Risk Manager to take action on all claims as appropriate.

Procedures

The following procedure outlines the actions to take for reporting SAD LOD illness, injury, or fatal incident claims.

1. The Service Member (SM) or other knowledgeable person notifies their chain of command of the injury and completes Part I of the SAD LOD form.
2. The WNG Medical Personnel will examine the SM. In absence of Medical Personnel the Commander or Task Force Leader will evaluate the situation.
 - a. If the SM does not need care above/beyond the basic medic care, the SM returns to duty to complete the mission.
 - b. If the SM is in need of medical care above/beyond the basic medic care then:
 - 1) SM completes Part II of the SAD LOD form.
 - 2) SM, Commander, Task Force Leader or Medic completes Part III of the SAD LOD form.
 - 3) Military Medical personnel/Commander or Task Force Leader completes WMD Form 2029-15 and assigns a designated "buddy" to the injured SM.
 - 4) Designated "buddy" accompanies the SM to a civilian hospital or urgent care facility in order to manage the SAD LOD paperwork.
 - 5) SM receives treatment.
 - 6) Attending physician completes Part IV of the SAD LOD form.
 - 7) SM or "buddy" turns the SAD LOD form and WMD Form 2029-15 into the TASK Force (TF) S1.
 - 8) TF S1 turns the SAD LOD form and WMD Form 2029-15 into the JOC.
 - 9) JOC turns the SAD LOD form and WMD Form 2029-15 into State HR.
 - 10) If unable to return to duty, the SM completes the digital Post State Active Duty Medical Questionnaire (WMD Form 2032-15).
 - 11) MEDCOM sends all of the necessary paperwork to State HRO.

Washington Military Department
State Active Duty
Medical Fee Reimbursement Process

Baker Declaration Exhibit I

WAARNG Recruiting Overview



WAARNG vs State Demographics

Description	WAARNG Strength %	WA State Population %	Delta
White	81.3%	74.4%	+6.9%
Black	6.8%	4.0%	+2.8%
Asian/Pacific Islander	8.4%	9.0%	-0.7%
American Indian	1.4%	1.6%	-0.2%
Other	2.2%	5.8%	-3.6%
Hispanic	7.6%	12.7%	-5.1%
Female	14.7%	50.1%	-35.5%

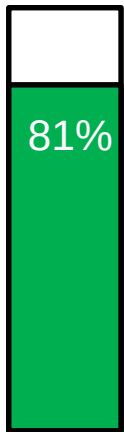
Total Recruiters in Washington

ARNG: 58 Field Recruiters

USAREC: 252 Field Recruiters

FY17 Mission

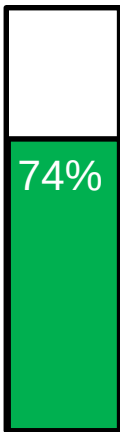
Accessions



Mission: 915

Accessions
YTD: 739

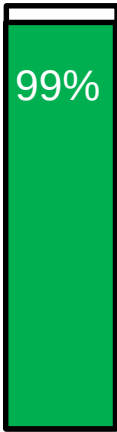
Retention



Eligible: 709

Retention
YTD: 527

End Strength



Mission: 6050

Strength
YTD: 5991

Notes:

- No significant change in ARNG recruiting trends over last 5 years

WAARNG Top Recruiting Concerns



☐ **Active Component / United States Army Recruiting Command (USAREC) Concerns:**

- National Commission for the Future of the Army (NCFA) Recommendations 38 (Total Army Recruiter) and 39 (Army centralized marketing) will destroy the National Guard brand and unique Citizen Soldier aspects important to our recruiting efforts.
- Active Component retention is expected to jump from 64% to 75%, reducing the Reserve Component Transition market.
- AC and USAR have television commercials, but the guard has been off the market for 3 years.

☐ **State / National Guard Concerns:**

- Recruiter turnover rate is high and therefore offers no stabilization and/or recruiter community familiarity. Recruiter Incentive pay may help stabilization of the force.
- Certain schools, such as Seattle Public Schools, limit access to students and present anti-recruiters, weakening our abilities to recruit

☐ **Available Recruiting Programs:**

- Programs like Military Accessions Vital to National Interest (MAVNI) would give us more options to compete with USAREC. MAVNI allows aliens on valid student or work visas with critical skills to join the Army as a path to citizenship.