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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,)	C17-1297-MJP
)	
Plaintiffs,)	SEATTLE, WASHINGTON
)	
v.)	March 27, 2018
)	
DONALD J. TRUMP, et al.,)	Motion Hearing
)	
Defendants.)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE MARSHA J. PECHMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:	Natalie Nardecchia Peter Renn Lambda Legal Defense and Education Fund, Inc. 4221 Wilshire Blvd. Suite 20 Los Angeles, CA 90010
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For the Defendants: Ryan Parker
Brett Shumat
U.S. Department of Justice
Civil Division, Federal Programs
Branch
20 Mass. Ave, NW
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1 THE CLERK: This is in the matter of Ryan Karnoski
2 versus Donald Trump, C17-1297. Counsel, please rise and make
3 your appearance for the record.

4 MS. NARDECCHIA: Good morning, Your Honor, I'm
5 Natalie Nardecchia, Lambda Legal, for the plaintiffs.

6 MR. PATTON: Good morning, Your Honor, Steve Patton
7 from Kirkland & Ellis for the plaintiffs.

8 MS. BAKER: La Rond Baker, Assistant Attorney General
9 for the State of Washington.

10 MR. RENN: Peter Renn for plaintiffs.

11 MR. TYSON: Ben Tyson, Kirkland & Ellis, for
12 plaintiffs.

13 THE COURT: Good morning.

14 MR. PARKER: Good morning, Your Honor. Ryan Parker
15 for the defendants.

16 MR. SHUMAT: Good morning, Your Honor. Brett Shumat,
17 also for the defendants.

18 THE COURT: Welcome, all.

19 Before we get started, there are a couple of things that I
20 need to put on the record. There was some late filings made
21 Thursday and Friday of last week. The court sent out an
22 e-mail asking what effect that would have on our hearing this
23 morning. I received, through my law clerk on Saturday, a
24 response that the plaintiffs wished to go forward. I also
25 received a response from the defense saying that they

1 believed it was not necessary. I made the decision that we
2 are going forward today and we are arguing the motions that
3 are currently pending before the court.

4 You should have also received a copy of a series of
5 questions that I would like to have you address sometime
6 during the argument that you make today. Also, after we have
7 completed the argument on the pending motions, I want to have
8 -- I have some questions about how it is that we are going to
9 proceed and the timing of various motions that were filed.

10 So who is it that will be speaking today for the
11 plaintiffs in support of the motions?

12 MS. NARDECCHIA: Your Honor, I will be making the
13 argument for the motion for summary judgment. And to the
14 extent that Your Honor has questions regarding the motion to
15 dissolve or the motion for protective order, I will most
16 likely refer those to Mr. Patton.

17 THE COURT: Well, the motion to dissolve and the
18 motion for protective order aren't noted for today, are they?

19 MS. NARDECCHIA: No, Your Honor.

20 THE COURT: So, I don't intend to move forward on
21 those motions. Because I believe at this point the
22 plaintiffs haven't had an opportunity to respond to that.

23 MS. NARDECCHIA: Okay. Very well.

24 THE COURT: So we are going to confine ourselves to
25 the issues noted for today.

1 MS. NARDECCHIA: Okay. Thank you, Your Honor.

2 THE COURT: And who is going to speak for the
3 defense?

4 MR. PARKER: I will be speaking for the defendants.
5 Ryan Parker.

6 THE COURT: All right. And representing the State of
7 Washington?

8 MS. BAKER: Your Honor, La Rond Baker.

9 THE COURT: Thank you, Ms. Baker. All right. I
10 believe that you've been told how long you have. How have
11 the plaintiffs decided to divide up their time?

12 MS. NARDECCHIA: Your Honor, the plaintiffs will
13 divide their time equally.

14 THE COURT: Okay. So that means Ms. Baker will take
15 half of the time?

16 MS. NARDECCHIA: Yes, Your Honor.

17 THE COURT: Okay. Then, counsel, it's your motion
18 for summary judgment. You may proceed.

19 MS. NARDECCHIA: Your Honor, the transgender men and
20 women proudly serving our country, and those who wish to do
21 so, who sacrifice to keep all of us safe and who are willing
22 to pay the ultimate price, deserve a final judgment. They
23 deserve the piece of mind and security of knowing that the
24 government cannot uniquely demean and stigmatize them simply
25 for being transgender.

1 The government has now finished cooking up its post hoc
2 reasons for the ban. But the chronology is very important
3 here. The President directed Secretary Mattis to return to
4 banning transgender people from the military, and to submit
5 to him an implementation plan to make it happen. Secretary
6 Mattis then confirmed that the military would, "Carry out the
7 President's policy and directives."

8 The implementation plan is in now. And the defendants
9 call it a new policy, but it is not new. The ban today
10 continues the same core elements as to our plaintiffs, and
11 continues the same unconstitutional policies that plaintiffs
12 challenge in their summary judgment motion.

13 Defendants have made some tweaks, but their policy still
14 bans transgender people from the military. This includes
15 plaintiffs Karnoski, D.L. and Callahan, whose noble dreams of
16 serving their country are shattered by the ban. And, Your
17 Honor, Mr. Conner Callahan is with us today in the courtroom.

18 The policy stigmatizes plaintiffs by perpetuating the lie
19 that transgender people are unfit to serve.

20 THE COURT: Counsel, you're going outside the ban
21 that you originally moved on, at least as I understand it.
22 If you're referring to what the President filed last Friday,
23 then that's outside the scope of the pleadings that we have
24 here.

25 MS. NARDECCHIA: Very well, Your Honor.

1 THE COURT: Okay? And one of the questions that I do
2 intend to ask at the end of this is, when is the effective
3 date of that ban? Because I expect that it doesn't go into
4 effect until it's been in the Federal Registry. I don't know
5 if that's happened. But whatever the President said on
6 Friday, nobody has had time to do any analysis of that. So
7 you're here to argue about the original ban that was put on.
8 And I've tried to make the point to the defense several
9 times, we're not here about the implementation memorandum,
10 we're here to talk about the original ban.

11 MS. NARDECCHIA: Very well, Your Honor. Understood.

12 To survive at summary judgment, defendants cannot rely
13 upon speculation or any of the post hoc evidence they've
14 concocted. They were obligated, for this motion, to come
15 forward and have their justification, before banning
16 transgender people. And there is no evidence of that. As a
17 threshold matter, a trial is not necessary for the court to
18 determine, for the third time, that plaintiffs have standing.
19 That ruling was and is correct, because plaintiffs meet all
20 of the requirements for standing. The harms they endure are
21 significant.

22 As I mentioned, plaintiffs Karnoski, D.L. and Callahan,
23 each feel personally called to serve, and are on the path to
24 do so. They have a concrete interest in accession. But the
25 ban wholly forecloses that possibility. And they continue to

1 face a credible threat of being denied the opportunity to
2 compete on equal footing with non-transgender individuals.

3 For plaintiff, Jane Doe, the ban chills her
4 self-expression and burdens her liberty interests. She must
5 refrain from expressing that she is a woman and transgender,
6 due to her actual and well-founded fear that she will be
7 discharged as a result. This is a constitutionally
8 sufficient injury. Jane Doe will also not receive any of the
9 medical care that she needs, which this court has also found
10 is a concrete interest. The currently serving plaintiffs
11 also face the credible threat of discharge.

12 And as to Your Honor's question regarding stigma, I'd like
13 to address that right now. Stigmatic injury, coupled with
14 personal denial of equal treatment, provides standing. And
15 that is a constitutionally significant injury. As applied
16 here, all of the plaintiffs would be required, under the ban,
17 to serve on different terms than non-transgender service
18 members. And this has real harms. As plaintiffs'
19 declarations show, they have difficulty focusing on their
20 duties, knowing they are viewed as burdens. And being
21 labeled as unworthy, impairs plaintiffs' ability to carry out
22 their duties safely and effectively and lowers their esteem
23 and relationships in the military.

24 The notion, for instance, that Terece Lewis's performance
25 will be seen on par with her peers, is not credible. She has

1 been deemed less worthy by the Commander in Chief.

2 Your Honor, I'll now turn to address plaintiffs' equal
3 protection claim.

4 Courts routinely begin with the threshold determination of
5 the level of scrutiny to apply. When the government
6 discriminates based on sex, as the ban does, intermediate
7 scrutiny applies, at a minimum. And discrimination against
8 transgender people also independently requires strict
9 scrutiny.

10 So I'll now address Your Honor's second question regarding
11 the level of scrutiny. It is correct that the four factors
12 for both intermediate and strict scrutiny are the same. The
13 difference between a quasi-suspect and suspected
14 classification is the degree to which the government might
15 have a valid reason to differentiate based on the
16 characteristic at issue.

17 For instance, there are so few instances when the
18 government can take race into account. That is a suspect
19 classification. In comparison, the government can sometimes
20 take legitimacy into account. And that is a quasi-suspect
21 classification. With regard to classifications based on
22 transgender status, there are so seldom instances when it
23 could be permissible for the government to differentiate
24 between transgender people and non-transgender people, that
25 it's plaintiffs' position that this should be deemed a

1 suspect classification as well. It falls more into the
2 bucket of the strict-scrutiny classifications.

3 And transgender people are a vulnerable minority group
4 lacking any political power, as this case well shows. They
5 face a unique history of discrimination. And all the indicia
6 of a suspect classification are present. The analysis is the
7 same, whether military or civilian. And as the government
8 has already conceded in its motion to dismiss at Docket 69,
9 page 27, no amount of deference could save the military's
10 decision to exclude a race or religion from being considered
11 under the strict-scrutiny standard. The bottom line, Your
12 Honor, is that heightened scrutiny applies in this case. And
13 the ban fails under both intermediate and strict scrutiny.

14 Defendants have to overcome the strong presumption that
15 the ban is invalid. They have that demanding burden to prove
16 an exceedingly persuasive justification for the ban. The
17 justification must be genuine and it must have actually
18 motivated the ban. There is no evidence that when the
19 President decided to ban all transgender people from the
20 military, there's no evidence that anything that came later
21 actually motivated his decision.

22 And as the Supreme Court has ruled, it will not do to
23 hypothesize or invent governmental purposes for gender
24 classification post hoc. But it appears this has always been
25 defendants' game plan. After the ban was announced on

1 Twitter, they have invented governmental purposes for banning
2 transgender people post hoc. This tactic must fail as a
3 matter of law. Since the ban lacks even a rational basis, it
4 fails at all levels of review.

5 I will now turn to the three hypothetical justifications
6 that defendants assert, because in their briefing they say:
7 These three justifications could be the reason that we banned
8 transgender people from the military, but we're not sure yet.

9 Defendants have not and cannot show that any part of the
10 ban advances military readiness. The facts before the court
11 show that the ban would actually degrade readiness and that
12 open service promotes readiness. This is the military's own
13 reasoned judgment and conclusion, and is reflected into the
14 various declarations plaintiffs have submitted from the
15 service secretaries and Admiral Mullen. Indeed, in the past
16 year with open service, there is no evidence of any negative
17 impact on readiness.

18 Instead of providing evidence, defendants rely on
19 speculation that transgender people could experience medical
20 needs that "could impair" their performance. But the
21 military has already considered and decisively rejected these
22 overbroad generalizations. And so has the court. As a
23 military reason, in enacting the open-service policy, short
24 periods of non-deployability are common for all service
25 members. It is irrational, then, for defendants to treat

1 transgender people differently from all other personnel who
2 may also experience periods of unavailability.

3 And there is not a shred of evidence to presume, as
4 defendants do, that transgender people are inherently unfit
5 to serve. They are just as capable of serving and deploying
6 as everyone else. And the unrebutted expert declaration of
7 Dr. George R. Brown, is particularly instructive on this
8 point.

9 As to the retention part of the ban, defendants first
10 pretended that the ban did not exist, and that the interim
11 guidance applied. The court already rejected those claims.

12 As for the accession ban, defendants cannot meet their
13 burden. The open-service policy under Secretary Carter
14 required transgender people to have completed all transgender
15 related -- sorry -- all transition-related medical care, and
16 to have been stable in their true gender for 18 months, prior
17 to joining the military. If they have already completed all
18 treatment, it makes no sense to argue that transgender people
19 would impede readiness due to treatment. They would have
20 already completed their treatment before they entered.

21 And to the extent that defendants claim that gender
22 dysphoria or transition-related care are inherently
23 disqualifying, the military already considered and rejected
24 those overbroad generalizations, and so has the court.

25 Gender dysphoria is a fully treatable condition, and the

1 military has no basis to treat transgender people
2 inconsistently, compared to all other people who may have
3 also experienced a curable condition.

4 I'll turn next to unit cohesion, Your Honor. The
5 declarations show that permitting open service furthers
6 cohesion, by enabling service members to be open about who
7 they are. And honesty is the number one important criteria
8 for forming those bonds of unit cohesion. Our plaintiffs
9 have said this themselves. Conversely, forcing transgender
10 service members to serve in silence harms cohesion, because
11 they must abandon and conceal from their peers, an integral
12 part of who they are.

13 Indeed, the military carefully considered this issue and
14 found no evidence that open service would impair cohesion.
15 And as to Your Honor's question -- or, as Your Honor noted,
16 similar arguments about unit cohesion were used to support
17 discriminatory policies precluding African-American and gay
18 and lesbian soldiers from serving, and precluding women from
19 serving in combat roles. It is exactly the same here. To
20 the extent these issues are based on private prejudice, the
21 law can give that no effect.

22 And I'll reserve three minutes for rebuttal. Thank you,
23 Your Honor.

24 THE COURT: Thank you.

25 Ms. Baker.

1 MS. BAKER: Good morning, Your Honor, La Rond Baker
2 for the State of Washington.

3 When the military was desegregated, it was declared that
4 it is essential that there be maintained in the Armed
5 Services of the United States the highest standards of
6 democracy with equality of treatment and opportunity for all
7 service members. We are here today to ensure that the
8 military meets, remembers, and abides by these constitutional
9 guidelines.

10 Transgender individuals have always protected our country
11 by putting their lives on the line to serve in the United
12 States military. But they do so in silence. In an effort to
13 ensure that the military respects its members and provides
14 equal treatment to all service members, the United States
15 military underwent an extensive effort to determine whether
16 it should abandon its long-standing discriminatory policy
17 that excluded transgender individuals from open service in
18 the military.

19 After military leaders, medical experts, and civilian
20 researchers determined that open service by transgender
21 individuals actually made our military stronger, the United
22 States military revoked its long-standing ban, allowed
23 transgender individuals to openly serve in the military, and
24 set a date to allow transgender individuals the opportunity
25 to access into military service.

1 After the military allowed open service, some transgender
2 military service members came forward and began to serve
3 openly, and other transgender individuals, who long wanted to
4 serve their country, planned their accessions. These
5 individuals were blindsided by President Trump's statement of
6 the ban on open service, announced via Twitter, and President
7 Trump's new directive to the military that barred transgender
8 individuals from serving in any capacity in the United States
9 military, and barred the military from paying for necessary
10 surgical care for service members based solely on their
11 transgender status.

12 President Trump seemingly made this change in military
13 policy without any analysis or regard to past research, I'd
14 assume, by the lack of evidence defendants submitted in
15 response to Washington's motion for summary judgment, and in
16 direct opposition to the recommendation of military
17 leadership, medical experts, and independent researchers.

18 Defendants doubled down on President Trump's Twitter
19 policy and formalized the ban in an August 25, 2017
20 Presidential memorandum that directed defendants to return to
21 the long-standing policy. Subsequently, the Secretary of
22 Defense, James Mattis, issued interim guidance that
23 guaranteed for now, currently serving transgender service
24 members would not be immediately ejected from military
25 services, but continued the ban on accessions by transgender

1 individuals.

2 THE COURT: Ms. Baker, the state argued, when they
3 intervened, that they had particularized interests that were
4 separate, but coextensive, with the individual plaintiffs and
5 the group plaintiffs. I'd like to have you turn your
6 attention to what has the government produced in response to
7 the State of Washington's particular issues? Because I'm
8 hard-pressed to find it in their brief.

9 MS. BAKER: Defendants have not produced any evidence
10 that would address -- or argument, really -- that would
11 address Washington's particularized injuries. In their
12 briefing, defendants consistently -- they actually refer to
13 Washington's motion for summary judgment, solely in a
14 footnote, and try to attack Washington's motion for summary
15 judgment solely on the attempt to say that Washington's
16 standing is completely tethered to the standing of private
17 plaintiffs, which is incorrect.

18 Washington has standing to protect its sovereign and its
19 quasi-sovereign interests, sovereign interests in protecting
20 its natural resources, its environment, and in maintaining
21 its legal code, including its antidiscrimination laws.
22 Washington also has a separate interest in protecting
23 transgender Washingtonians from the impact of the ban. We
24 also have a separate interest in ensuring that our Washington
25 National Guard is able to pull in as many Washingtonians that

1 wish to serve, and that there are no bars to individuals who
2 are willing to be part of the National Guard from being able
3 to join.

4 But defendants have not addressed, directly, any of
5 Washington's harms.

6 THE COURT: So does that mean procedurally, you
7 automatically win?

8 MS. BAKER: Your Honor, it is our contention that
9 that is correct. Defendants have not produced any evidence
10 arguing that Washington -- any evidence stating that there's
11 any disputed material issues of fact relating to the
12 arguments that Washington put forward, or relating to
13 Washington's standard. They simply rely on an argument that
14 Washington's standing is tethered to private plaintiffs, and
15 therefore is potentially -- there potentially might be a
16 problem with standing. But, however, there is not.

17 THE COURT: So, given that the standing issue has
18 been decided, are you asking me to simply declare
19 procedurally that the State of Washington should be granted
20 this summary judgment because the defense has failed to
21 respond?

22 MS. BAKER: Your Honor, if you believe that that is
23 an appropriate step, then, yes.

24 THE COURT: What I'm asking for is, do you want me to
25 analyze the other issues or do you want to win based upon a

1 procedural -- the procedural rule that basically says, if
2 someone is challenged to bring forward their facts and they
3 do not do so, is that the kind of order you want?

4 MS. BAKER: We are all here before the court today to
5 ensure that the constitutional rights and protections for
6 transgender individuals receive a full and thorough vetting
7 and that the ban is actually reviewed in detail. And so
8 while procedurally we may be able to -- while procedurally it
9 might be appropriate to rule in our favor for summary
10 judgment just on that, it's important that this court
11 actually reach the underlying constitutional issues.

12 THE COURT: All right. Thank you. Go ahead.

13 MS. BAKER: This court talked about Washington's
14 interests, and so I'd like to address those. Washington is
15 home to approximately 32,850 transgender adults. Each of
16 these individuals are targeted by the ban and denied access
17 to military career opportunities, including the Washington
18 National Guard. And each of these Washingtonians is
19 subjected to discriminatory stigma caused by the federal
20 government effectively deeming them subpar or second-class
21 individuals.

22 Washington seeks to protect each of its transgender
23 residents from discrimination. The military is also the
24 second largest direct public employer in Washington State.
25 As such, the employment practices of the United States

1 military have deep impact on Washington's employment force,
2 including transgender workers. Indeed, the military employs
3 approximately 60,000 Washingtonians in military service,
4 including 8,000 members of the Washington National Guard.
5 Each of these Washingtonians is impacted by the
6 discriminatory ban, as they are forced to participate in
7 discrimination targeting their own colleagues and other
8 Washington residents. Washington seeks to protect
9 Washingtonians from the unlawful ban.

10 Washington further seeks to protect its natural resources
11 by bringing the challenge. We rely heavily upon the National
12 Guard to protect our natural environments and resources. And
13 the National Guard provides significant assistance in
14 preventing serious harm to Washington's natural resources by
15 fighting forest fires, managing and cleaning up flooding
16 incidents, and providing assistance after natural disasters,
17 like earthquakes and landslides.

18 However, accession in the Washington National Guard is
19 covered by defendants' accession and retention policies,
20 including the ban --

21 THE COURT: Ms. Baker, you've got to slow down. I
22 can't get a record on you.

23 MS. BAKER: Okay. The exclusion of any qualified
24 Washingtonian from service in its National Guard, negatively
25 impacts its ability to protect its natural resources.

1 Washington's equal protection claim, we should succeed
2 upon. Washington has argued that sex discrimination
3 targeting transgender individuals, is targeting transgender
4 individuals who are part of a quasi-suspect class and should
5 be reviewed under intermediate scrutiny. However,
6 transgender individuals also meet the requirements for being
7 deemed a suspect class. And so the court -- Washington has
8 consistently argued that intermediate scrutiny applies.
9 However, the court definitely has the appropriate facts
10 before it, if it chooses to deem transgender individuals to
11 be a suspect classification.

12 Under intermediate scrutiny, in order to survive
13 Washington's motion for an equal protection challenge,
14 defendants have an obligation to provide this court with
15 evidence sufficient to show an exceedingly persuasive
16 justification for the ban. To do so, they needed to show
17 that the ban serves important governmental interests and that
18 the ban substantially is related to those interests.
19 Defendants failed at both prongs.

20 They argue that there are important governmental interests
21 in military readiness, unit cohesion, and cost controls. But
22 they presented no evidence to support those arguments, to
23 show that those governmental interests are actually at risk
24 by the service of transgender individuals. And to survive
25 the summary judgment motion, they needed to present this

1 court with evidence of that and not just make bald
2 assertions.

3 Further, regarding defendants' claim that unit cohesion is
4 an important governmental interest, undergirding the ban,
5 inasmuch as private discrimination aimed at transgender
6 service members is a cause of unit erosion, this is not a
7 legitimate governmental interest that the government can rely
8 upon to support the ban. It is clear that private prejudice
9 against minorities can never justify official discrimination.

10 Further, many military service members grapple with
11 medical issues that leave them temporarily undeployable. But
12 the military does not and cannot implement a blanket ban for
13 their service because of this potential.

14 The defendants also needed to prove that the ban is
15 substantially related to the achievement of asserted
16 governmental interests. Most telling is defendants' failure
17 to educe evidence that proves that the ban is substantially
18 related to the protection of these governmental interests.
19 Even if we were to assume that the governmental interests
20 that defendants assert are actually at risk, they presented
21 no evidence to show that the ban is substantially related to
22 it.

23 And while military readiness, unit cohesion, and cost
24 controls can be deemed and have been deemed at times
25 legitimate governmental interests, defendants presented no

1 evidence to support that.

2 And this is not surprising because there is no substantial
3 relationship to a governmental policy, to governmental
4 interests that are actively undermined by the policy itself.
5 In *Mississippi University v. Hogan*, the court found that a
6 policy of excluding males perpetuated gender stereotypes
7 rather than challenged them, and rejected that. Similar with
8 *Morales-Santana*.

9 Further, defendants have not shown that individualized
10 assessments, which it is skilled at performing for the myriad
11 of needs that service members present, is not a more
12 appropriate way in which to protect any important
13 governmental interest of military readiness, unit cohesion,
14 and cost control. Defendants routinely perform
15 individualized assessments with these interests in mind, and
16 they have presented no evidence as to why such assessments
17 would be unavailable or insufficient to protect the
18 governmental interests at stake here. And for these reasons,
19 Washington succeeds on its equal protection claim.

20 And for the same reasons, Washington succeeds on its
21 substantive due process claim. Personal choice is central to
22 individual dignity and autonomy, including choices that
23 define personal identity and beliefs, are all protected by
24 substantive due process. Under any level of review,
25 defendants fail to meet the requirements to survive

1 substantive due process review.

2 Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. PARKER: Good morning, Your Honor. May it please
5 the court.

6 THE COURT: Good morning.

7 MR. PARKER: On August 25, 2017, President Trump
8 issued a memorandum stating that further study was needed of
9 the issue of military service by transgender individuals, and
10 ordering the Department of Defense to maintain the status quo
11 while that study was undertaken. Following the Presidential
12 memorandum, Secretary of Defense Mattis convened a panel of
13 military experts with experience in combat and deployment to
14 study the issue of military service by transgender
15 individuals.

16 Shortly thereafter, plaintiffs filed this action
17 challenging the President's August 25, 2017 memo. The State
18 of Washington then intervened in the case, also challenging
19 that memorandum.

20 THE COURT: You're not telling me anything I don't
21 know.

22 MR. PARKER: Thank you, Your Honor, I'll hurry along
23 here. Shortly thereafter, the parties moved for summary
24 judgment on the President's August 25, 2017 memorandum.
25 Defendants have maintained, throughout this case, that the

1 government's policy on military service by transgender
2 individuals, was being studied and that it was unclear what
3 that policy would be. And because it was unclear, plaintiffs
4 -- specifically the currently serving service members and the
5 service members who seek to serve in the military -- it was
6 unclear whether they would ever suffer harm from the
7 government's policy on that issue. The government has now
8 issued a new policy. President Trump has issued a memorandum
9 revoking his August 25, 2017 memorandum.

10 THE COURT: Well, as I told you, counsel, that isn't
11 in effect, as I understand it, yet. And I ask that you argue
12 the issues that are before the court and that have been
13 briefed. Okay? So let's -- I've told -- we've had
14 clarification on this previously. And I've told you what the
15 issue is and what the ban is. So let's talk about what
16 defense you put up to that challenge.

17 MR. PARKER: Your Honor, the reason that I bring up
18 the new policy is because the primary defense that
19 plaintiffs -- or defendants have raised in this case to this
20 point is a defense of lack of standing. Defendants have
21 argued that plaintiffs, specifically the currently serving
22 service members, will not be harmed by the government's
23 policy. The government has now issued a new policy. The
24 President has specifically revoked the old policy, and under
25 the new policy, currently serving transgender service members

1 will be allowed to continue to serve.

2 THE COURT: Am I correct, counsel, that before that
3 can go into effect, it has to be in the Federal Register?

4 MR. PARKER: Your Honor, I think that putting it in
5 the Federal Register is not the thing that would put it into
6 effect.

7 THE COURT: So what is it? You asked for rulings by
8 a specific date, I believe the date was May 23rd, which just
9 happens to be 60 days after. So is the new policy in effect
10 or not?

11 MR. PARKER: So, Your Honor, out of an abundance of
12 caution, the defendants have asked for the dissolution of the
13 preliminary injunction so that it will be absolutely clear
14 that that policy can take effect without violating a court
15 order.

16 THE COURT: So right now you've got four different
17 injunctions pending in four different courts. So doesn't
18 that answer the question that the new policy cannot be put
19 into effect at this moment?

20 MR. PARKER: Your Honor, the government respectfully
21 takes the position that the only thing before the court was
22 the August 25, 2017 memorandum and it would be inappropriate
23 for any of the courts to enjoin anything beyond the
24 application of that memorandum.

25 THE COURT: Counsel, you've already lost that four

1 times. So let's take our time and talk about the issues that
2 have been presented, the summary judgment. Now, I've read
3 your brief. I can't find any factual underpinnings in what
4 you supplied to me that responds to the brief. You have
5 argued standing. Standing has already been decided. So,
6 please, let's talk about what it is you want me to consider
7 that hasn't already been decided.

8 MR. PARKER: Sure. Thank you, Your Honor. Let me
9 answer your question in two ways. First, the defendants
10 requested that they have an opportunity to take adequate
11 discovery of both the plaintiffs and the state, specifically
12 to take discovery of -- regarding the specific allegations
13 made by the plaintiffs and the state regarding the harms that
14 they have suffered or they claim to have suffered, and their
15 standing in the case, and the arguments they make related to
16 the merits.

17 Plaintiffs alluded to, in their argument, declarations
18 that were submitted by former service secretaries. And they
19 clearly relied on that information in their motion for
20 summary judgment. And defendants requested that this court
21 provide them with an opportunity to depose those individuals
22 and to test the assertions in their declarations. And that
23 opportunity was denied.

24 So I guess on one hand, one of the reasons defendants have
25 not been able to provide as much information as they would

1 like in their defense, is that the court denied defendants
2 the opportunity to take adequate discovery in this case,
3 despite the fact that plaintiffs relied on 20 separate
4 declarations in support of their motion for summary judgment.
5 Defendants have not had an opportunity to depose even one of
6 those 20 declarants, including declarants from the state, who
7 provided specific information about Washington's purported
8 interests.

9 In the government's view, it would be inappropriate for
10 the court to enter judgment against the government without
11 providing the government with the opportunity to take
12 discovery of the declarants, upon which both plaintiffs and
13 the state rely for their motions for summary judgment.

14 Second, the government has provided and filed with the
15 court this past Friday on March 23rd, a significant amount of
16 information and evidence in support of the government's new
17 policy. It is clear from that evidence that the new policy
18 is the result of the considered judgment of the military,
19 that it is based on studies, military judgment, and the
20 considered judgment of military officials who have combat and
21 deployment experience.

22 The court can and should consider that evidence. The
23 defendants submitted on Thursday, at 26-2, a report and
24 recommendation from the Department of Defense, that lays out
25 the results of their months of study. The issue of military

1 service by transgender individuals.

2 In that report, the Department of Defense explains that it
3 heard from transgender service members, commanders who
4 oversee transgender service members, military medical
5 personnel, civilian medical personnel, and a host of experts,
6 on the issue of military service by transgender individuals.
7 After considering all the information that was presented to
8 the panel and to the Department, the Department of Defense
9 recommended a new policy, which is different in significant
10 respects from the Ash Carter Policy.

11 But that information that has been provided to the court
12 raises serious questions of fact that should preclude the
13 court from entering judgment in this case. So for both of
14 those reasons, there are significant questions of fact.

15 I would also say that --

16 THE COURT: Well, counsel, that's not part of this
17 record. That is late filed. It's not part of the record
18 before the court.

19 Now, you requested a 56, Rule 56 delay. That was turned
20 down, because you didn't identify any of the particularized
21 discovery that you wanted to use. So you lost that motion.
22 So you instead decided to defend, based upon legal issues of
23 standing. If that's how you're going to defend, then let's
24 talk about the case that's before us and what's in the
25 record.

1 MR. PARKER: Your Honor, there is Supreme Court
2 precedent, especially in military cases. And I would direct
3 the court to the case of *Rostker v. Weinberger*, which is
4 cited extensively in the government's motion to dissolve the
5 preliminary injunction, where the court looked at evidence
6 that postdated the passage of a statute regarding the
7 opportunity for women to serve in the military.

8 In military cases, courts can look at evidence that is
9 produced after a policy. And in this instance, the policy,
10 the new policy, was not issued until March 23, 2018. And the
11 very evening that it was issued, it was put before this
12 court.

13 Defendants could not have put that information before the
14 court any earlier. And it's defendants' position that the
15 court can consider that information. It is a substantial --
16 there's a substantial report that lays out all of the
17 evidence that the Department of Defense considered in
18 formulating its new policy. And that evidence, I think,
19 presents significant questions of fact that should preclude
20 the court from entering summary judgment in this case, in
21 this posture.

22 That evidence --

23 THE COURT: So is there a procedural rule that you
24 can point me to that allows late filings to be considered?

25 MR. PARKER: Your Honor, I think the court has,

1 within its discretion, to consider what is before it. And as
2 the Supreme Court did in *Rostker v. Weinberger*, I would
3 submit that the court has discretion to consider the
4 information that was provided.

5 THE COURT: Okay. What federal rule, that I'm bound
6 by -- the Supreme Court can make up its own rules about what
7 it wants to do -- what civil rule are you pointing to that
8 says I should accept late filing information?

9 MR. PARKER: Your Honor, I guess that I would
10 maintain that there's not a federal rule that would preclude
11 the court from accepting that information, that the court has
12 discretion, that in its discretion it can decide to consider
13 that information, that it's not precluded from the rules, and
14 that the Supreme Court has set a precedent for doing so in
15 military cases.

16 THE COURT: Okay. Well, there are rules about
17 striking material that's late filed.

18 MR. PARKER: Your Honor, that material was not -- I
19 think many of those rules go to materials that could have
20 been filed much earlier. In this instance, the defendants
21 filed that material as soon as it was available to the court,
22 the very night that the decision was made to revoke the
23 August 25, 2017 policy.

24 THE COURT: Well, I understand that the President
25 made that decision on, I think Friday night. But the

1 material was turned over in February, as I read the
2 materials. So in other words, the material was delayed in
3 getting to the court and delayed in getting to the opposition
4 for a month.

5 MR. PARKER: Your Honor, while the material was being
6 considered by the President, defendants did not provide it to
7 the court. And I would submit we're not required to do so at
8 that point. Until the President made his decision and
9 released the recommendation, defendants could not provide it
10 to the court. But as soon as that was --

11 THE COURT: Except that that was the deadline that
12 you claimed in your original papers that the material was
13 going to be ready. But it wasn't.

14 MR. PARKER: Your Honor, respectfully, I think that
15 the Presidential memorandum itself stated that the Secretary
16 of Defense would provide his implementation plan to the
17 President on February 21st. Defendants never represented
18 that that plan would be made public or provided to the court
19 on that day.

20 THE COURT: I see. Okay. Thank you for that
21 clarification. What else would you like to argue today?

22 MR. PARKER: Your Honor, I would like to address the
23 court's questions, but first I would like to go to standing.
24 At this point, the court certainly has within its discretion
25 and should consider subsequent events, events that would

1 happen after a motion for summary judgment is filed, in
2 considering whether the parties have standing. Standing is
3 an issue that's before the court at all times. And here
4 there is a new policy that has been entered that states that
5 the plaintiffs, the currently serving plaintiffs in this
6 case, will not be discharged from the military and will
7 receive medically necessary medical care.

8 Those plaintiffs cannot show any harm. And their standing
9 is properly before the court. And the court can properly
10 consider the new policy, which says that they will not be
11 discharged from the military and they will receive the
12 medically necessary medical care.

13 In addition, the new policy provides for new accession
14 standards, that may affect the plaintiffs who wish to join
15 the military in different ways. The issue of standing is
16 very much before the court. And additional briefing and
17 potentially discovery could be necessary on the standing of
18 the plaintiffs to even maintain their suit.

19 At this point, it's unclear how the new policy would
20 affect at least some of the plaintiffs in this case. And it
21 appears that many if not all of them -- that they may not
22 have standing at this point to pursue the litigation.

23 And that issue I think is squarely teed up by defendants'
24 motion to dissolve the preliminary injunction, where
25 defendants argue that the plaintiffs no longer have standing

1 and that this case is moot. And I understand we're going to
2 talk about that later, and I'll leave it at that. But
3 defendants have briefed the issue of standing, and how the
4 new policy affects plaintiffs' standing, their current
5 standing in this case. And the court would need to address
6 that issue before entering final judgment on a policy that
7 has been revoked and is no longer in effect.

8 THE COURT: Okay. I don't want to keep going round
9 and round with you about this, but does that policy have any
10 effect at this point? Because there's an injunction in
11 place. And, you know, you still haven't answered my question
12 as to how that policy actually goes into effect. It
13 obviously doesn't just spring out. There has to be some
14 formal way that that's recorded. And so right now, right
15 here, how can that policy that isn't in effect, affect the
16 standing of the individuals here today?

17 MR. PARKER: Let me answer that in two ways, Your
18 Honor. First, the Presidential memorandum that was issued on
19 March 23rd, revokes the previous Presidential memorandum and
20 all prior statements. So to the extent plaintiffs based
21 their claims of harm and standing on the August 25, 2017
22 memorandum, or any prior statements from the government on
23 that issue, those have been revoked. They are no longer in
24 effect. They are not affecting plaintiffs now. And they
25 will not affect plaintiffs in the future.

1 Two, defendants have not implemented the new policy, out
2 of an abundance of caution, because of the preliminary
3 injunction in this case and in the other three cases, as the
4 court acknowledged. Defendants likely would issue
5 implementing regulations or instructions that would put those
6 policies into effect. And that is the reason that defendants
7 filed a motion to dissolve the preliminary injunction and
8 asked that the court rule on it expeditiously.

9 The Department of Defense has determined that the current
10 state of the policy -- that a new policy is warranted and
11 necessary. And the Department of Defense would like to issue
12 the instructions to implement that policy. And that's why
13 defendants have asked the court to dissolve the injunction as
14 quickly as possible.

15 To the extent plaintiffs still have standing to challenge
16 that new policy, they could supplement their complaint. They
17 could dismiss this case and bring another action with new
18 plaintiffs. But those issues, defendants would submit, need
19 to be decided very quickly, the issues of mootness and
20 standing, so that the defendants can implement this new
21 policy, which, as I stated earlier, will allow current
22 service members, like the current service member plaintiffs,
23 to continue to serve in the military, and may allow some of
24 the plaintiffs who are applying for the military, to join the
25 military. But defendants want to put that policy in place as

1 quickly as possible. And that's why we moved to dissolve the
2 preliminary injunction as soon as the new policy was issued.

3 THE COURT: And that hasn't taken place. So I ask
4 you again, as of this moment in time, where is your challenge
5 to standing?

6 MR. PARKER: Our challenge to standing, Your Honor,
7 is that there is nothing that would dictate that plaintiffs,
8 the currently serving service members, be discharged from the
9 military based on their transgender status. There is no
10 regulation or instruction that would lead to them being
11 discharged. They have not identified an imminent harm. They
12 are not going to be discharged from the military or denied
13 necessary medical services. Accordingly, they cannot show
14 imminent harm. They do not have standing.

15 The plaintiffs, the prospective military members, it's
16 unclear whether they will be able to join the military, but
17 as set forth in defendants' motion to dissolve, there are
18 substantial questions about whether they will be able to join
19 the military or not. It is unclear how the new policy will
20 affect them. And they have not shown an imminent harm.

21 So at this point, I think the new policy, which has
22 revoked the August 25th memo and any prior statements, has
23 eliminated whatever specter of imminent harm plaintiffs had
24 before. Defendants have argued that plaintiffs have never
25 had imminent harm. But at this point with the new policy, it

1 is abundantly clear that they are not facing discharge from
2 the military, they are not going to be denied necessary
3 medical care, and they are not facing imminent harm. The
4 court should therefore dismiss this case as moot, or because
5 plaintiffs lack standing. But certainly the court should not
6 grant summary judgment to plaintiffs who do not have
7 standing. Or at the very least, when there are substantial
8 questions as to the standing of the plaintiffs.

9 THE COURT: Now you haven't said anything about the
10 State of Washington. And you didn't write anything in your
11 brief about the State of Washington. And they've raised
12 different issues. You know, one of the issues, of course, is
13 they don't want to be in a position of applying
14 discriminatory rules that may violate the state's own
15 constitution. So why didn't you respond to that?

16 MR. PARKER: Your Honor, one of the difficulties that
17 defendants had was they were not given an adequate
18 opportunity to depose officials from the State of Washington
19 to better understand what Washington actually is claiming and
20 to understand Washington's claimed harms.

21 The defendants in this case weren't given an opportunity
22 to submit document requests or take other discovery of the
23 state to adequately address those issues.

24 Washington, in large part, raised the same legal issues as
25 the plaintiffs in this case. And defendants clearly

1 responded to their joint legal issues. But as far as the
2 factual issues, because the court did not provide defendants
3 with an adequate opportunity to take that discovery --

4 THE COURT: Let's talk about what it is you wanted to
5 do. Who is it that you wanted to take, that you wanted to
6 tee up? That was the problem with your request is you
7 weren't specific as to what it is you wanted to take and what
8 it is you expected to discover, which is the essence of a
9 Rule 56 motion when you want to postpone. You have to
10 identify. So who is it? Name your people.

11 MR. PARKER: Well, Your Honor, we actually didn't
12 need to name our people, because the State of Washington
13 included in their initial disclosures, for example, I believe
14 it was the Chief of Staff to the Governor, and other
15 members -- or other individuals who were involved with their
16 reserves. And we wanted a chance to depose those individuals
17 to see to what extent they would have to apply federal law,
18 how they think that applying federal law would actually harm
19 the state, and to probe the injuries that they allege.

20 It was unclear to us from their filings, why some of the
21 allegations of harm that they set forth in their briefing
22 would occur, and we wanted --

23 THE COURT: All right. So you wanted to depose
24 Governor Inslee. Did you tell me that in your materials?

25 MR. PARKER: No, Your Honor. But if you look at our

1 initial disclosures, we listed two -- we do not want to
2 depose the Governor, Your Honor -- we listed in our initial
3 disclosures, a member of the Governor's staff, who was
4 identified for us by the state, as someone who was likely to
5 have information that the state would use to support their
6 claims.

7 Because the state identified that person as being
8 knowledgeable, we asked for an opportunity to depose that
9 person. In fact, the state, as I recall, identified two
10 individuals that would have information about the interplay
11 between federal law and the state interests identified by the
12 state.

13 And defendants didn't have an opportunity to depose those
14 two individuals. And so it was difficult for defendants to
15 make factual arguments rebutting the state's allegations
16 without the -- an adequate opportunity to take discovery of
17 the state.

18 And, again, Your Honor, defendants would ask for that
19 opportunity, before the court would enter final judgment
20 against the defendants. Certainly the government should have
21 an opportunity to depose the individuals that the state
22 itself has said it would rely on in support of its claims.

23 And the same goes for the plaintiffs in this case. The
24 plaintiffs identified individuals that they intend to rely on
25 in support of their claims. Plaintiffs filed, with their

1 motion for summary judgment, twenty separate declarations
2 from both plaintiffs and potential expert witnesses, third
3 parties. And defendants haven't had an opportunity to depose
4 even one of those individuals, before the briefing of this
5 motion. And so defendants have been severely handicapped in
6 their ability to respond to specific factual allegations made
7 by the plaintiffs and the state.

8 Nevertheless, defendants would argue that there are
9 substantial questions of fact that defendants have already
10 pointed out in their motion, about whether plaintiffs have
11 standing to move forward. And whether the information and
12 the evidence that defendants submitted to the court on
13 March 23rd, defendants would argue that that information
14 creates also substantial questions of fact that the court --
15 should preclude the court from entering summary judgment in
16 this case.

17 I'd like to just address quickly the three questions that
18 you sent. I know that I've used my time, but I'm happy to
19 address those questions.

20 THE COURT: You should. Because those are all legal
21 questions.

22 MR. PARKER: Thank you. Thank you, Your Honor.

23 THE COURT: You know the facial -- you know, if this
24 case is decided merely on the reading of the prohibitions,
25 what facts do you need?

1 MR. PARKER: Well, Your Honor, it's clear that --

2 THE COURT: I want you to answer the questions.

3 MR. PARKER: You want me to answer the questions?

4 THE COURT: Yes.

5 MR. PARKER: Let me move to the questions, Your
6 Honor. Thank you.

7 And I'll start with the standard of review. Your Honor,
8 when applying the standard of review, the guiding principle
9 should be deference to military judgment. The Supreme Court
10 in a number of cases, including *Rostker v. Weinberger*, has
11 not been caught up with identifying or using terminology to
12 identify a standard of review, but has instead applied a
13 healthy degree of deference to the military. And we think
14 the court in this case should similarly focus on military
15 deference.

16 This is a case that now involves a military medical
17 decision, a decision regarding whether a medical condition,
18 gender dysphoria, is disqualifying for military service. And
19 military decisions regarding the composition of the force,
20 especially with regard to medical conditions, are entitled to
21 substantial deference. And the government's position is that
22 the court should defer to the military on this important
23 matter regarding the medical qualifications to serve in the
24 military.

25 THE COURT: Well, dysphoria wasn't part of the

1 initial -- the President's initial Tweet. It was, "No person
2 who is transgender shall serve." And so you're talking about
3 a medical condition, but the plaintiffs are talking about a
4 suspect class. So let's talk about deference, okay? And
5 historical deference to the military.

6 We gave historical deference when we excluded blacks from
7 the military. We gave deference when we did not have mixed
8 military units. We gave deference when we excluded gays and
9 lesbians. We gave deference when we disallowed women in
10 combat. And in retrospect, all of that deference was in
11 error. So why is it that the court should give deference
12 when we now have a long history of that deference being
13 constitutionally inappropriate?

14 MR. PARKER: Your Honor, I think your question sort
15 of moves us to the unit cohesion question that you sent out,
16 and I'd be happy to answer that question. There are
17 fundamental differences between the integration into the
18 military of race and sexual orientation, and service by
19 individuals who have gender dysphoria.

20 As set forth very clearly in the Department of Defense's
21 report and recommendation, individuals who have the medical
22 condition gender dysphoria are more likely to be undeployable
23 than individuals who do not have gender dysphoria. That
24 certainly was not the case with regard to race, gender,
25 sexual orientation in the military. Those characteristics --

1 THE COURT: We don't have female combatants now that
2 get pregnant or have postpartum depression? Isn't this like
3 one other issue that the military needs to deal with?

4 MR. PARKER: Your Honor, I would suggest respectfully
5 this is more like other medical conditions, like anxiety
6 disorder, that are addressed in military medical regulations.
7 That this is a medical condition that can affect an
8 individual's ability to deploy, the amount of time they would
9 need for medical leave, and those are not issues that
10 affected the integration of sexual orientation and race into
11 the military.

12 Moreover, this issue presents other logistical
13 difficulties that were not presented by those two instances.
14 And so this is significantly different than the integration
15 of race or sexual orientation into the military. This is a
16 medical condition that is like other medical conditions that
17 are used to determine whether individuals can serve.

18 THE COURT: Where is it, in your defensive papers,
19 that I find those arguments? Because they certainly were in
20 your control, apparently. So, in defending this case, you've
21 just argued several things that tell me that I shouldn't
22 apply a suspect class or a heightened scrutiny. Those were
23 all under your control. You didn't file them.

24 MR. PARKER: Your Honor, those arguments were made
25 with regard to unit cohesion. Arguments about deployability

1 and about the logistical arrangements that would be required
2 for the integration of individuals with gender dysphoria into
3 the military, were included in the defendants' briefing.

4 THE COURT: Well, you briefed it, but you didn't
5 supply any of the materials. You didn't supply any
6 declarations to that effect. Or did I miss it?

7 MR. PARKER: Your Honor, there is significant
8 evidence to that effect that has now been submitted with the
9 court in the Department of Defense's report and
10 recommendation.

11 THE COURT: Okay. So it's after the fact. We're
12 getting back to that again.

13 MR. PARKER: Your Honor, those arguments were
14 preserved by the government in its filings.

15 THE COURT: Okay. Please, it's not such a hard
16 thing. I want to go read it if it's there. If it was filed
17 within the timeframe for this motion, believe me, I've
18 crawled all over the record. I don't find it. If I'm in
19 error, tell me what docket number did you put in any of these
20 arguments that you're making right now?

21 MR. PARKER: Defendants' opposition to plaintiffs'
22 motion for summary judgment and Washington's motion for
23 summary judgment, contains arguments about the logistical
24 difficulties --

25 THE COURT: That's not what I asked you. What

1 declarations or underlying factual disputes did you put in?
2 You didn't.

3 MR. PARKER: And that information, Your Honor, is
4 currently before the court in the Department of Defense's
5 report and recommendation.

6 THE COURT: Counsel, please, it's a simple question.
7 What docket number, that was timely filed, puts in these
8 kinds of declarations? You just argued to me that: Oh, poor
9 me, we didn't get a chance to do discovery. But you had
10 control of some of these issues, if you wished to present
11 them. And you did not. Please, tell me where it is and I
12 will go look at it.

13 MR. PARKER: Your Honor, the defendants did not
14 submit that information through declaration, but did make
15 that in argumentation in its motion.

16 THE COURT: Thank you. Now, what else would you like
17 to argue to me?

18 MR. PARKER: Your Honor, I'll just answer the court's
19 last question with regard to stigma. The Supreme Court, in
20 *Allen v. Wright*, has made clear that stigmatic injury alone
21 is not enough to confer standing. It must be stigmatic
22 injury, plus a concrete effect. And the plaintiffs in this
23 case, who under the new policy will be allowed to continue
24 serving, have not shown a concrete effect that would allow
25 them to establish standing under a stigma theory.

1 Your Honor, for all the reasons articulated in this
2 argument and because the motions at issue here are moot, the
3 government would ask that the court deny plaintiffs' and the
4 State of Washington's motions for summary judgment.

5 THE COURT: Thank you. Any rebuttal?

6 Counsel, defense argues that they didn't have enough time
7 to do discovery, they didn't have enough time to take
8 depositions, and that you moved on this too quickly. Do you
9 want to respond to that?

10 MS. NARDECCHIA: Yes, Your Honor. Thank you.
11 Defendants' request for delay under Rule 56(d) was properly
12 denied. Defendants failed to establish that any additional
13 discovery would uncover specific facts essential to opposing
14 summary judgment. Defendants, as they said, sought to --
15 they stated their desire was to probe whether plaintiffs meet
16 the eligibility requirements. But these facts are not
17 essential, because to have standing, the accession plaintiffs
18 need to show that it is a denial of equal opportunity to
19 compete.

20 To the extent they say they need more time to get their
21 own declarations, that information is solely in their
22 possession. They didn't need any more time. This case has
23 been pending for nearly eight months. And defendants have
24 had abundant opportunities to conduct the discovery they
25 need. And they haven't met their burden to show what was

1 needed in order to warrant a continuation.

2 Your Honor, I also wanted to point out that plaintiff
3 Cathrine Schmid is also in the courtroom today; I failed to
4 mention that earlier.

5 Your Honor, there are several things I want to respond to,
6 I'll try to be brief. The new report that was filed on
7 Friday night, not only is there not a procedural rule for it,
8 but it is legally irrelevant. It is post hoc evidence that
9 can never legally suffice. When the government discriminates
10 against a group of people, they need to have a reason. They
11 can't say: We'll go study it after the fact and come up with
12 the reason.

13 Under controlling Supreme Court precedent, *VMI*,
14 *Morales-Santana*, those cases make clear, when you
15 discriminate, including a gender-based classification, you
16 need your reason at that time. You can't invent or come up
17 with post hoc reasons. It legally fails.

18 Defendants bring up the case of *Rostker*. But that case
19 doesn't change the test before the court, that heightened
20 scrutiny applies. And, again, that defendants cannot rely on
21 any post hoc evidence.

22 In addition, no deference is owed here, because deference
23 -- *Rostker* is also very clear that deference applies when
24 there is considered, reasoned evaluation and judgment that
25 goes into making a policy. Here, defendants made their

1 policy first, and then supposedly went through this review
2 and used reasoned judgment.

3 But it doesn't matter how good the report was, it's
4 legally irrelevant. It cannot suffice as a justification for
5 the ban on transgender people from the military.

6 I want to quickly address gender dysphoria. Defendants
7 did not provide any evidence about gender dysphoria in their
8 argument. They had generalizations and they said it could
9 maybe impair people's ability. That is not sufficient at
10 summary judgment. Plus, using gender dysphoria is really a
11 proxy to discriminate. They cannot target the medical
12 diagnosis for being transgender and pretend it's about
13 something else. It's about being transgender.

14 Secretary Carter, when he enacted the open-service policy
15 asked, "Are they going to be excellent service members?"
16 That was his criterion. Defendants only want to know, "Are
17 they transgender?"

18 And as for standing, Your Honor, as the court has already
19 ruled, plaintiffs have standing with regard to the
20 accessions, medical, and retention bans. They continue to
21 face a credible threat. Defendants do not even appear to
22 know what policy is in place.

23 Even if we assume, Your Honor, that the implementation
24 plan that came out on Friday is the "new policy," plaintiffs
25 still have standing. The ban today continues the same core

1 elements as to our plaintiffs and continues the same
2 unconstitutional policies that plaintiffs challenge.

3 Mr. Callahan has, since the ban came on Twitter, not been
4 able to enter the military, because he's transgender. For
5 plaintiff Jane Doe, the entire time she has not been able to
6 come out as transgender, express that she is the woman she
7 is. She has to pretend to be a man in order to keep her job.

8 That impedes upon fundamental liberty interests to define
9 your own identity that the Supreme Court has recognized time
10 and again, including in *Obergefell*, *Lawrence* and the
11 preceding case law.

12 These are serious constitutional deprivations. And we,
13 similarly to Ms. Baker, would urge the court to reach the
14 merits of the constitutional harms that are at stake, and
15 even though procedurally plaintiffs should also be granted
16 summary judgment.

17 And I will just close, Your Honor, by saying, until a
18 permanent injunction is issued, each day is a day that Jane
19 Doe and others like her must serve in silence and fear of
20 discharge. Putting service members in that position is
21 extremely harmful to both plaintiffs and the military. For
22 Mr. Karnoski, for plaintiff D.L., and Mr. Callahan, each day
23 is another day they need to put their lives and dreams on
24 hold.

25 For all of our plaintiffs, it is another day of wearing an

1 undeserved badge of inferiority, that was foisted upon them
2 by the President. There is no reason to delay justice
3 another day.

4 Thank you, Your Honor.

5 THE COURT: Thank you, counsel.

6 Counsel, as of Saturday morning, I was prepared to tell
7 you that I could give you a written opinion in about ten
8 days. Your arguments today that have been made lead me to
9 believe that you need to write for me as to what, if
10 anything, the new material, the President's material filed on
11 Friday evening, when that goes into effect, and what effect
12 it has on the constitutional analysis here today.

13 So I'd like to have you write for me on that. I'd like to
14 have you give me brief simultaneous filings, no more than ten
15 pages, and you've got seven days to do it. Based upon that
16 briefing, then we'll sort out what kind of an order needs to
17 come out.

18 There are a couple of other issues that we also need to
19 address. Who is it from the government that is in charge of
20 the formatting for your briefing?

21 MR. PARKER: Your Honor, I'm not sure I could name a
22 specific person. We work as a team. But I'm happy to bear
23 responsibility for that and take a message back to our team.

24 THE COURT: The local rules require a certain font
25 type. And it's obvious that you haven't been following them.

1 Your font is too small. That means that you are violating
2 page limitations of the local rules. So I'm going to ask
3 you, for what it is you have filed that is yet to be ruled
4 upon, that you refile under the proper format and renote.
5 Because it allows you more space than what the plaintiffs
6 have limited themselves to. How do I know? I need a
7 different pair of glasses to read your brief. Okay?

8 So, the other issue is that if you want arguments to be
9 seriously considered, you can't make them in the footnotes.
10 They have to be in the body of the material. Footnotes are
11 for elaboration, they are not for discussion of original
12 arguments, as another way to beat the page limitations.

13 So, if you would do that for me, that would be greatly
14 appreciated.

15 Now, there's another issue that is outstanding, and I
16 don't know what the plaintiffs want to do about it. But
17 there was a motion to compel. The motion to compel was
18 granted. There was a motion for reconsideration. The motion
19 for reconsideration was denied. There was a response filed
20 saying: Sorry, Judge, we're not going to do it. So I need
21 to know what effect you believe that has on the court's
22 orders and whether I should be considering contempt, an order
23 to show cause, a denial of briefing, or if that's not what we
24 should be doing and we should be hitting the issues on the
25 merits head on.

1 MR. PATTON: Your Honor, if it pleases the court, I
2 would be happy to address that. Steve Patton. I am rather
3 new to this case, but I am familiar with that issue.

4 I think our position is it was contemptuous, but we are
5 not seeking relief at this point. We want to continue to
6 focus, as the parties have so far and as Your Honor has, on
7 the core constitutional issues here, the unconstitutionality
8 of -- what we believe is the clear unconstitutionality of
9 this ban, which continues, and having a final disposition.
10 And we respectfully request permanent injunction on that
11 issue.

12 If we were not to get to that point, and I'm not in any
13 way suggesting or I hope being presumptuous on that, then we
14 would get to issues as to the effect of the recent letter
15 saying, in so many words: We're not going to comply with the
16 court's order. But at this point, that is not central to the
17 core issues of summary judgment, and whether or not we're in
18 a position where we can move forward to a final disposition
19 of this matter.

20 THE COURT: Well, your request originally went to
21 whether President Trump, having tweeted that he consulted
22 with others, actually consulted with anyone. And I took that
23 as the thrust of what it is that you wanted to know. If
24 that's not an issue anymore, we will set it aside.

25 MR. PATTON: I don't think it is, Judge. No matter

1 what the answer is to that, we have had a fulsome opportunity
2 for any relevant factual showing to be made, and certainly
3 the facts on that are exclusively within the province of the
4 defendants. And we believe we can make our showing without
5 knowing what the answer to that question is.

6 THE COURT: All right. What other issues do you
7 believe that we need to be concerned about as we move
8 forward, in terms of -- I'm not talking about substantive,
9 I'm talking about procedurally, that we need to be concerned
10 about?

11 MR. PATTON: Well, I guess it would just be to get
12 clarification. You're crystal clear in terms of, I think
13 what you want from us within seven days, we're happy to do
14 that and we'll do that. That does leave the issue of the
15 pending motions for both dissolution of the preliminary
16 injunction and for a protective order pending.

17 Our premise coming in would be that we would brief that in
18 the ordinary course. It may be that -- the state has
19 mentioned to us they may want a little more time on that. In
20 full disclosure, Your Honor, I think that the briefing that
21 we're going to submit in seven days will overlap somewhat
22 with really the core issues in the motion for dissolution.

23 So we would be happy to separately brief that issue or
24 wait until we have the simultaneous briefing, and then
25 address what, if any, further need there is to respond at

1 that time.

2 I think having said that, probably our preference would be
3 to go ahead and proceed with the joining issue and filing our
4 opposition to those two motions.

5 THE COURT: Okay. Well, you just heard me say that I
6 want them refiled, because they're violative of the local
7 rule. So they're going to take time to do that. That means
8 they are going to be renoted.

9 MR. PATTON: Yeah. We'll see where we are at that
10 point, Your Honor.

11 THE COURT: Essentially there are two motions, one at
12 Docket 215 and one at Docket 217. The first one is the
13 motion to dissolve the preliminary injunction. And the
14 second motion is for a protective order. You know, you may
15 not be concerned about a protective order at this point. I
16 don't know whether you are or not. But you've just told me
17 that you don't want me to do anything about the contempt of
18 failing to respond. Usually people get a protective order
19 before they're ordered to do something.

20 MR. PATTON: We think that's the proper procedure.
21 That's been my experience.

22 THE COURT: But we're in a little different posture
23 now. So what I suggest -- and I'm going to give the
24 government an opportunity to tell me otherwise here in a
25 moment -- is that they're going to refile in the proper

1 format, they will renote. You'll have an opportunity to
2 respond to those motions within the normal timeframe.

3 MR. PATTON: Great, Your Honor.

4 THE COURT: Okay. What does the government want to
5 do?

6 MR. PARKER: Your Honor, the government is
7 comfortable with this way forward. We will reformat the
8 filings and refile them. We will renote them, as required
9 under the local rules. And the plaintiffs and the state can
10 then respond to those motions in due course.

11 We, of course, have been -- both parties worked
12 cooperatively on scheduling issues. And to the extent those
13 arise in this motion, I don't think that will be a problem.
14 And we'll be prepared to file a filing seven days from today
15 addressing the court's questions.

16 THE COURT: Okay. So, it's not my intent that you're
17 going to get to come back and argue again, after you file the
18 materials seven days from today. You know, I'm intending to
19 take that into account and take a look at it, as I fashion an
20 order on what you've argued today.

21 As to the other motions, if you intend to request oral
22 argument, then you have to do so. Otherwise they'll be
23 decided on the paper.

24 MR. PATTON: Thank you, Your Honor. Understood.

25 MR. PARKER: Thank you, Your Honor.

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THE COURT: All right. Anything else I can help you with?

MR. PATTON: Not from plaintiffs, Your Honor.

MR. PARKER: Nothing from defendants, Your Honor.

THE COURT: Okay. Thank you very much.

(The proceedings adjourned.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Debbie Zurn

DEBBIE ZURN
COURT REPORTER