

~~MOTIONS HEARING~~

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

3	BROCK STONE, et al.,)	
4	Plaintiffs,)	
5	vs.)	CIVIL CASE NO. MJG-17-2459
6	DONALD J. TRUMP, in his)	
7	official capacity as)	
8	President of the United States,)	
9	et al.,)	
10	Defendants.)	

Thursday, November 9, 2017
Courtroom 5A
Baltimore, Maryland

BEFORE: THE HONORABLE MARVIN J. GARBIS, JUDGE

MOTIONS HEARING

Reported by:

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1 For the Plaintiffs:

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14 For the Defendants:

15 Brett A. Shumate, Esquire
16 Deputy Assistant Attorney General
17 United States Department of Justice
18 Civil Division, Federal Programs Branch

19 Ryan B. Parker, Esquire
20 Senior Trial Counsel
21 United States Department of Justice
22 Civil Division, Federal Programs Branch

23 Also Present:

24 Brock Stone, Plaintiff
25

P R O C E E D I N G S

(10:30 a.m.)

THE COURT: Thank you. Good morning.

THE CLERK: You all may be seated.

The matter now pending before this Court is Civil Docket No. MJG-17-2459, Brock Stone, et al., versus Donald Trump, et al.

Seated at counsel table for the plaintiff is Joshua Block, Chase Strangio, David Zions, Carolyn Corwin, and the plaintiff, Brock Stone.

Seated at counsel table for the defendants is Brett Shumate and Ryan Parker.

This matter comes before the Court for a hearing.

THE COURT: Okay. Who is the primary person speaking for the plaintiffs?

MR. BLOCK: I am, Your Honor. Josh Block.

THE COURT: Mr. Block.

For the defendant?

MR. SHUMATE: Brett Shumate, Your Honor.

THE COURT: Okay. Thank you. Thank you.

All right. We have before us a motion to dismiss and a motion for preliminary injunction.

Let me start off by introducing you to my law clerks.

First is Mary Yang.

Mary, if you would stand.

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1 And the second is Marie Worden.

2 The aspect of Mary Yang, who is not working on this
3 case, is that Mary was with the Covington law firm before she
4 came with me in September. And she did not work on the case.
5 She's not working on the case with me. If she goes back to
6 Covington, she's not going to work on the case.

7 And I just don't have any problem with having the
8 case, but I thought you should know about Mary's relationship.

9 Marie has no connection to anybody.

10 So now we can proceed.

11 All right. I think the first thing I would like to do
12 is to try and set up the status of where we are. And let's see
13 if -- I'm perfectly willing to be told that I'm getting
14 something wrong.

15 But President Obama in June of 2016 decided, based
16 upon information that he had and his beliefs, to eliminate the
17 long restriction on transgender people that had existed and
18 that barred them from accession into the U.S. military. So
19 essentially, he terminated that. He made it possible for
20 transgender people to serve openly.

21 Many took his action as a basis for them to reveal
22 that they were transgender, a revelation that has, of course,
23 negative consequences now.

24 But he terminated the accession to the military bar
25 that was then in effect, and we were to allow people who were

1 transgender to join the military in 2017. And that particular
2 starting date was moved to January 1st of 2018.

3 President Trump issued a memorandum, which we call a
4 ban, that effectively reversed what President Obama had done.
5 It eliminated the elimination of the no accession determination
6 and said that basically transgenders cannot be admitted into
7 the military until such time as he, Trump, is convinced to
8 change the situation.

9 He allows the discharge of a military person for being
10 transgender. I'm not sure what that means, he allows the
11 discharge. But we can get into that.

12 He forbids funding for sex-reassignment surgery that
13 ends up effective March 23rd, 2018, with an exception. That
14 is a subject we have to probably discuss.

15 Interim guidelines or an interim guidance was issued
16 in September of 2017 that is not a study to determine whether
17 or not the effects of the ban are to go into operation. But
18 essentially it said that the ban aspects are not immediately
19 effective but directed the Secretary of Defense to provide a
20 plan to implement the ban. And that implementation plan is due
21 February the 21st of 2018.

22 That's essentially where we are.

23 We then have a companion or a similar case in the
24 District of Columbia in which the District Court there has
25 issued a decision. And the decision of the D.C. Court was to

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1 issue a preliminary injunction enjoining the accession and the
2 retention aspects of the ban, but it did not reach or touch the
3 surgical limitations based on the fact that no D.C. plaintiff
4 had standing to assert injury, cognizable injury, from the
5 surgical-funding restriction in the plan. And the defense has
6 asked to stay our proceeding pending appeal of the D.C. case.

7 Well, I didn't stay this hearing. And I just -- I'm
8 not sure if I understand what is, Mr. Shumate, the detriment to
9 the defendant if I would issue -- first of all, if I would
10 issue the same preliminary injunction that the D.C. Court did
11 in regard to the accession and retention aspects of this ban,
12 how is it any worse for the defendant?

13 **MR. SHUMATE:** Thank you, Your Honor. If I may speak
14 from here.

15 It may not have any practical impact, but there would
16 be a harm to the Government from having a second injunction
17 interfering with military affairs.

18 So our view is that there is no reason for the Court
19 to exercise judicial power in a case like this one where, first
20 of all, these plaintiffs do not have standing; they're not
21 currently suffering any harm; and they're doubly protected by a
22 preliminary injunction by the D.C. Court.

23 But I'm happy to walk through each of the aspects of
24 the President's memorandum and explain why these plaintiffs are
25 not being harmed.

1 But, Your Honor, I think it's really a question of
2 whether it's appropriate to exercise judicial power.

3 **THE COURT:** We'll certainly get to that in terms --
4 but in terms of a stay, I'm not -- I don't understand the extra
5 stay.

6 I mean, right now you can't enforce the ban against
7 anybody based -- in terms of accession or retention; correct?

8 **MR. SHUMATE:** That's correct, Your Honor.

9 **THE COURT:** Okay. So any -- if I issued the same
10 thing, it wouldn't make any difference except there would be
11 another order and you'd have another and different
12 Court of Appeals to appeal to.

13 **MR. SHUMATE:** Potentially, that's right, Your Honor.

14 But one thing I would just point out is it's the
15 plaintiffs' burden to invoke this Court's jurisdiction and to
16 establish harm, irreparable harm, to warrant preliminary
17 injunctive relief. And it's just -- I can't see how these
18 plaintiffs can establish any harm at this point, particularly
19 when --

20 **THE COURT:** Well, we'll find out. But I'm talking
21 about the -- we're talking about the stay. The stay would say
22 I'm not going to undertake even to let you present your
23 arguments, Plaintiffs. We're just going to stay the case
24 'cause you've already got whatever you wanted from the
25 D.C. Court.

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1 **MR. SHUMATE:** That's right, Your Honor. We are
2 perfectly happy with that outcome. If the Court exercises its
3 discretion to put this case on hold, we think that would be an
4 appropriate outcome.

5 **THE COURT:** All right. Well, the fact is the
6 D.C. Court did not reach the surgical-funding aspects of the
7 ban, and we do seem to have plaintiffs who are different from
8 the D.C. plaintiffs and who, at least arguably, have standing
9 with regard to the surgical-funding issue.

10 **MR. SHUMATE:** We respectfully disagree, Your Honor,
11 for the same reasons that the D.C. Court dismissed the
12 challenge to Section 2(b) regarding sex-reassignment surgery.

13 The Court should also dismiss the challenge here in
14 this case, because these plaintiffs are not currently harmed in
15 any way by that provision.

16 **THE COURT:** All right. But at least I should decide
17 it. I shouldn't say I'm going to -- I'm not even going to
18 consider whether you have standing.

19 **MR. SHUMATE:** I think that's right, Your Honor. As
20 long as the Court decides that these plaintiffs have standing,
21 then I think it would be appropriate for the Court to take up
22 that question. But our position is that there is no need for
23 the Court to reach the merits of that because these plaintiffs
24 do not have standing. And it's --

25 **THE COURT:** All right. Well, let's deal with

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1 whether -- first of all, I'm not going to stay my case pending
2 appeal from the D.C. Circuit because, number one, it's a
3 different circuit. Secondly -- which means there is -- their
4 decision is not binding on me, in any event.

5 And, also, these plaintiffs are entitled to have a
6 decision by the Fourth Circuit that governs what we do here, so
7 I don't see a stay being appropriate.

8 But let's deal with the standing with regard to the
9 surgical-funding issue.

10 So, Plaintiffs, tell me about what it is that gives
11 any of our plaintiffs standing that allows us to proceed with
12 regard to the surgical-funding issue.

13 **MR. BLOCK:** Thank you, Your Honor.

14 With respect to the ban on medically necessary care,
15 there are two plaintiffs in this case, Petty Officer Stone and
16 Staff Sergeant --

17 **THE COURT:** Let's try and be as careful as we can to
18 use the exact words that are used in the President's memorandum
19 or the other documents and not put our own slide on it.

20 The ban is not stated to be a ban on
21 medically necessary care. It is a ban on funding surgery
22 relating to gender change. And it would block that funding
23 whether it was medically necessary or not.

24 **MR. BLOCK:** Well, Your Honor, that's absolutely true.
25 I do think the memo should be read in light of the 2016 memo

1 that it is rolling back.

2 And the 2016 memo established a medical policy saying
3 that necessary medical care for the treatment of
4 gender dysphoria will be provided just like any other
5 medical condition.

6 **THE COURT:** Well, are you conceding or agreeing that
7 gender dysphoria is a medical -- is an illness, is a
8 medical defect?

9 **MR. BLOCK:** Gender dysphoria is certainly a
10 medical condition; and when it results in clinically
11 significant distress, it is subject to treatment and should be
12 treated like any other medical condition.

13 **THE COURT:** When you say it's a medical condition, you
14 mean it's a negative medical condition?

15 **MR. BLOCK:** That's correct, but only to the extent
16 that it generates distress that leads to clinically significant
17 impairment.

18 If it is treated and there's no distress, then it is a
19 treated medical condition as opposed to one that is currently
20 causing any interference.

21 **THE COURT:** But the condition is a difference between
22 what a person wishes in terms of gender identity and what the
23 human being's body says that person is.

24 **MR. BLOCK:** Your Honor, I don't think that is quite
25 right under the DSM-5. And Dr. Brown's declaration talks about

1 this.

2 Simply being transgender, simply having a
3 gender identity different than the one assigned to you at
4 birth, is not a medical condition, is not a defect in any way,
5 does not result in any impairment.

6 A subset of people who have that misalignment suffer
7 clinically significant distress, and it's only that subset of
8 people who suffer that distress have gender dysphoria. And
9 that dysphoria is a medical condition, but the fact of having a
10 different gender identity is not.

11 **THE COURT:** Well, the ban relates to people who have
12 the medical condition, whether they are in distress or not.

13 **MR. BLOCK:** Well, it relates to people who have the
14 condition of gender dysphoria; that's true. Whether they --
15 whether they are currently experiencing --

16 **THE COURT:** Well, they are all presumably not going to
17 be accepted for military service, whether they're in distress
18 or not.

19 **MR. BLOCK:** Well, Your Honor, I think that's -- do you
20 mean under the current memorandum from the President?

21 **THE COURT:** Yes. Under the policy or ban that you're
22 trying to defeat here, it basically says, We will not accept a
23 transgender person into the military.

24 **MR. BLOCK:** That's absolutely right.

25 In terms of the -- Section 2(b) of President Trump's

1 memo, which says that DoD and DHS must halt all use of
2 resources to fund sex-reassignment surgical procedures, you
3 know, I'm happy to use that terminology. And I'm happy to
4 explain why the plaintiffs here have standing in a way that the
5 Court found that the plaintiff in the Doe case did not.

6 **THE COURT:** Well, please explain that. That's the
7 question.

8 **MR. BLOCK:** So we have two plaintiffs, Mr. Stone and
9 Ms. Gilbert, who both have medical plans that call for
10 medically necessary surgery to be performed in 2018. And there
11 is not sufficient time for both those surgeries to be performed
12 before the March 23rd deadline.

13 As I understand the Court's ruling in the Doe case,
14 all the plaintiffs in that case except for one would be able to
15 receive surgery before March 23rd.

16 And the remaining plaintiff who did have a
17 treatment plan calling for surgery, there were two reasons why
18 that surgery would be too remote in time to provide standing:
19 One was that the plaintiff had not begun any medical-transition
20 process at all. And so surgery was far -- would be further
21 out.

22 But the second reason is that plaintiff was scheduled
23 for a long-term deployment overseas, and it wasn't clear how
24 long that deployment would last or when the plaintiff would
25 return.

1 And so those two conditions, the fact that the
2 plaintiff would have to deploy for -- the opinion doesn't
3 reflect the amount of time -- and then after returning, the
4 employee -- the plaintiff would have to begin the process of
5 medical transition before even reaching the surgery, I think
6 led the Court in Doe to conclude that the time gap was too
7 remote.

8 Here --

9 **THE COURT:** Well, the treatment of this condition
10 doesn't necessarily include surgery for everybody.

11 **MR. BLOCK:** That's correct. And the only people --
12 the reason why the two plaintiffs in this case have
13 treatment plans calling for surgery is because a group of
14 doctors and experts have, according to the operable standards
15 of care, determined that the surgery is medically necessary for
16 them as individuals. It's not medically necessary for
17 everyone.

18 By definition, people who don't have a medical need
19 for the surgery wouldn't have gotten it under the 2016 memo and
20 they won't get it now.

21 You only get surgery if -- if and only if it's
22 medically necessary for you as an individual.

23 And the plaintiffs in this case, those two plaintiffs,
24 are individuals who have treatment plans saying it is
25 medically necessary for them. And they will not be able to

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1 receive it before March 23rd.

2 **THE COURT:** All right. The defendants say that they
3 will still get the surgery because of the exception.

4 **MR. BLOCK:** Well, Your Honor, the defendants I don't
5 think have said that. They have suggested that it is possible
6 that this exception that says, "except to the extent necessary
7 to protect the health of an individual who has already begun a
8 course of treatment to reassign his or her sex" -- they suggest
9 that that exception might allow them to have surgery since they
10 have already had some form of treatment.

11 **THE COURT:** Is it your position that the exception
12 only covers a problem that manifested in regard to prior
13 surgery?

14 **MR. BLOCK:** Yes, Your Honor. I think that is what the
15 exception was intended to cover. I think that's how similar
16 exceptions -- I think that's the exception that makes sense of
17 the -- the place of this directive within the overall context
18 of what the President was doing.

19 But Plaintiff -- the Government does not say that that
20 interpretation is wrong. They say maybe another interpretation
21 would allow Plaintiffs to receive the surgery. They don't
22 commit to that being the interpretation of what it means.

23 **THE COURT:** Well, we'll find out if they commit to it,
24 but --

25 **MR. BLOCK:** Well, that --

1 **THE COURT:** -- if they did -- if they commit to saying
2 that your two plaintiffs will get funding for their operations
3 because of the exception, then they wouldn't have standing,
4 would they?

5 **MR. BLOCK:** Well, I still think they would have
6 standing because it is true that they would be -- assuming it's
7 interpreted that way, they'd be provided with these particular
8 surgeries. This ban on funding for this subset of medical care
9 is tied in with a directive whose sole function is to single
10 out transgender people and brand them as being different from
11 everyone else.

12 Under the -- before Secretary Carter passed his
13 Open Service Directive, gender dysphoria was not treated like
14 any other medical condition. It was treated in a separate
15 category as a condition that rendered you administratively
16 unfit, like a character defect.

17 What Secretary Carter's directive did is it removed it
18 from that administrative separation box, and it said we're
19 going to view this just like any other medical condition. If
20 it interferes with your ability to serve, you're out. But if
21 it's treatable and doesn't interfere with your ability to
22 serve, there's no reason to exclude you.

23 What this memo does is it says we're not going to
24 treat it like any other medical condition anymore. We're going
25 to put it in a separate, stigmatized category.

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1 **THE COURT:** Well, that's -- all right. Well, now
2 you're arguing the accession and the retention aspects. We're
3 here on the -- making an argument that your plaintiffs have
4 standing where the D.C. plaintiffs didn't for the
5 surgical-funding issue.

6 **MR. BLOCK:** Yes, Your Honor. And I agree they clearly
7 have standing as a result of physically not being able to get
8 the surgery.

9 But I do think, just like there's a stigmatic harm for
10 the other directives, I think there's a stigmatic harm even for
11 the medical directives too, that they're being provided --

12 **THE COURT:** Well, that existed for the D.C. plaintiffs
13 also.

14 **MR. BLOCK:** Well, I think -- but in that case I think
15 the surgical need was, according to that Court, too far remote
16 in time.

17 And, of course, this Court isn't bound by that Court's
18 determination of standing either. I think that --

19 **THE COURT:** Well, I understand that.

20 **MR. BLOCK:** Yeah. So I would think that there's
21 reasons why the plaintiff in that case also should have had
22 standing. I don't think two years is too remote in time for
23 standing, certainly. But I think even if you follow --

24 **THE COURT:** Well, I know you disagree with the
25 D.C. decision, the part that went against you. And you

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1 presumably could cross-appeal, if that's what you want.

2 **MR. BLOCK:** Oh, it's not my -- I'm not -- those aren't
3 my clients. It's a totally different set of clients.

4 **THE COURT:** Well, okay. The plaintiff -- the lawyers
5 representing the plaintiffs in D.C. could choose to
6 cross-appeal if they wanted to do that.

7 **MR. BLOCK:** That's correct, Your Honor.

8 **THE COURT:** Okay. Are you ready for the defense to
9 respond to your standing?

10 **MR. BLOCK:** On just -- I can also address the standing
11 of the other provisions too, but I'm --

12 **THE COURT:** No. Let's just stick with the
13 medical aspects first.

14 **MR. SHUMATE:** Your Honor, I think it's important to
15 draw a distinction between current harm and future harm.

16 Section 2(b) does not take effect until March 23rd
17 of 2018.

18 **THE COURT:** Well, if you want to talk about
19 current harm, you have some plaintiffs here who had scheduled
20 surgery that was postponed because of the ban and who
21 presumably that was -- if that was a wrong, they'd be entitled
22 to something, wouldn't they?

23 **MR. SHUMATE:** Well, Your Honor, I -- Plaintiff Cole, I
24 believe, was the one who had the surgery that was put on pause.
25 But that surgery ultimately went ahead in October --

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1 **THE COURT:** It did go.

2 **MR. SHUMATE:** -- which I think shows that the
3 Section 2(b) is not in effect. And the interim guidance
4 currently says that in the interim period while this provision
5 is being studied, medical care will be provided.

6 **THE COURT:** But there was another one who was --
7 another plaintiff who was also deferred and said that they were
8 going to have the operation in October, I believe; not -- it
9 was not just the one you mentioned, but it was another one.

10 **MR. SHUMATE:** Your Honor, there may be a number of
11 reasons why a surgery may be delayed. I am not sure it's fair
12 to attribute that to the memorandum when that provision is not
13 yet in effect and the interim guidance is clear.

14 And we have declarations in the record from
15 Colonel Brooks and Captain Vanderlugt that surgeries are
16 allowed to go forward at this point in time.

17 So really the question is: What's going to happen in
18 the future after March 23rd? As Your Honor noted, there is
19 an exception to Section 2(b), which says that those procedures
20 can go forward if they're necessary to protect the health of an
21 individual who's already begun --

22 **THE COURT:** Well, you want the exception to be viewed
23 as eliminating the restriction altogether; that it just --
24 nobody could have standing on your theory. And that is -- I
25 gather is you're saying anybody who has a program that includes

1 surgery now is going to be able to get it after March the
2 23rd so that there's -- the exception is going to clear up
3 any such plaintiff.

4 **MR. SHUMATE:** That's not my position, Your Honor.

5 My position is all of these plaintiffs have stated
6 that they have already begun a course of treatment or they're
7 actively pursuing a course of treatment.

8 And I just heard plaintiffs' counsel say that these
9 surgeries will be medically necessary.

10 Now, based on those representations, they very well
11 may fall within that exception. And they may be allowed to
12 have surgeries that go forward.

13 **THE COURT:** Well, what do you mean "may fall within
14 the exception"? They aren't -- you're not able to commit the
15 Government to its position with regard to these plaintiffs or
16 any particular plaintiff?

17 **MR. SHUMATE:** Your Honor, I can't make any commitment.
18 This is an issue that's currently being studied by the
19 military. It is the plaintiffs' burden to show certainly
20 impending harm. They cannot show that they will be certainly
21 denied medical care after March 23rd.

22 And that is another reason why we think this -- not
23 only do these plaintiffs not have standing, but the case really
24 isn't ripe because we don't --

25 **THE COURT:** Well, I don't think they're required to

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1 show absolute certainty. They have to show a question of
2 probabilities.

3 **MR. SHUMATE:** Right. And they've explained and
4 they've put in declarations that these surgeries are
5 medically necessary and that they've begun courses of
6 treatment.

7 **THE COURT:** Yes.

8 **MR. SHUMATE:** And so my reading of the exception is
9 they may well fall within that exception. This is -- they are
10 differently situated than --

11 **THE COURT:** Well, you're using the words "they may
12 well." I mean, I'm supposed to render a decision that says
13 that they will meet the exception, in which case they have no
14 standing. That's what you want.

15 **MR. SHUMATE:** Well, it's their burden --

16 **THE COURT:** You're not willing to say that they will
17 meet the exception.

18 **MR. SHUMATE:** Your Honor, I can't, because that's a
19 decision for the military to make after March 23rd. This
20 is -- Section 2(b) is currently being studied by the military.
21 There may be further clarification of what the exception means.

22 And it's just mere speculation at this point to
23 presume that the military will deny them medically necessary
24 surgeries.

25 **THE COURT:** Well, is it speculation that somebody who

1 has a medical need has to be worried about whether that medical
2 need will be met? Isn't that itself a harm?

3 **MR. SHUMATE:** Under Lujan and Clapper, speculation is
4 not enough to establish Article III injury. The injury must be
5 imminent and concrete, not conjectural and speculative.

6 And that's all they can do at this point in time,
7 because nobody has been denied medical treatment under the
8 President's memorandum, which is not currently in effect.
9 Section 2(b) is not currently in effect.

10 The military is studying Section 2(b) and how to
11 implement that provision. And until the military denies
12 medically necessary treatment, we won't know whether these
13 plaintiffs actually have standing to challenge that provision.

14 **THE COURT:** Well, what about the Plaintiffs' position
15 that the exception can be interpreted as limited to curing
16 problems that arose because of surgery that was done before
17 March the 23rd?

18 **MR. SHUMATE:** Well, that is not what the exception
19 says. The exception says "except to the extent necessary to
20 protect the health of an individual who has already begun a
21 course of treatment to reassign his or her sex."

22 That is -- that is their interpretation of 2(b), but
23 that may not be the military's ultimate interpretation of
24 Section 2(b) or their application in a particular case. It's
25 just mere speculation, and I think it --

1 **THE COURT:** Plaintiffs allege that the
2 surgical-funding ban also is not compliant with the statute --
3 is it 1074? Is that the number that requires the military to
4 provide medical treatment for people in the military?

5 **MR. SHUMATE:** That's correct, Your Honor. We don't
6 believe any of these plaintiffs have standing at this point in
7 time to challenge a noncompliance with that statute because
8 they have been -- not been denied medical treatment.

9 That statute does not create a private cause of action
10 to sue the military in civilian court over the denial of
11 medical treatment.

12 And that statute delegates broad discretion to the
13 Secretary of Defense to decide the appropriate level of
14 medical care.

15 I understand the plaintiffs want the Government to pay
16 for --

17 **THE COURT:** Well, where does the statute give the
18 administration discretion to deny treatment for a medical need?

19 **MR. SHUMATE:** Well, the statute delegates that
20 discretion to the military to decide what medical conditions
21 are disqualifying, what level -- what level of care to provide.

22 Courts have always granted broad discretion and
23 deference to the military to decide questions of the
24 composition of the force and the level of care and things like
25 that.

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1 So it's not really appropriate for a court to
2 second-guess the military's judgments as to how to care for
3 soldiers and to decide who --

4 **THE COURT:** Well, you say -- is there any military
5 support for the President's decision to inflict this ban on
6 transgender people?

7 **MR. SHUMATE:** Well, first of all, Your Honor, I want
8 to make clear that the Government does not agree with your
9 opening characterization of the President's decision here.

10 Section 1(a) explains clearly that the President
11 decided that further study was needed before we withdraw or
12 move away from the longstanding policy on transgender service
13 in the military, and he ordered further study of this question.

14 So I don't think it's fair --

15 **THE COURT:** Well, yes, he ordered further study for
16 support that would persuade him to allow transgenders to be in
17 the military. He's not -- he's not deciding, based on further
18 study, as to whether to continue this past restriction. He's
19 continuing the past restriction until he happens to be
20 convinced that that's wrong.

21 **MR. SHUMATE:** Well, he said, "Let's maintain the
22 status quo." And then in Section 3, he broadly delegated
23 discretion to the Secretary of Defense to study --

24 **THE COURT:** Well, what is the status -- is the
25 status quo -- the status quo before President Obama acted was

1 there was a prohibition against transgender military people
2 being part of the military. He changed that with his action in
3 2016, effective January 1st, 2018.

4 So for President Trump, the status quo was
5 transgenders are being admitted into the military starting
6 January 1st, 2018. So he changed that. He didn't maintain
7 the status quo. He changed the status quo as he had it.

8 **MR. SHUMATE:** So let's be clear, all of these
9 plaintiffs are all currently serving members of the military.
10 And with respect to currently serving members of the military,
11 the status quo is maintained.

12 The President did not order the Secretary of Defense
13 to discharge currently serving members of the military. In
14 Section 3 he said -- I'll read the language precisely in
15 Section 3.

16 He says, "As part of the implementation plan, the
17 Secretary of Defense, in consultation with the Secretary of
18 Homeland Security, shall determine how to address
19 transgender individuals currently serving in the United States
20 military. Until the Secretary has made that determination, no
21 action may be taken against such individuals under the policy
22 set forth in Section 1(b) of this memorandum."

23 So when we talk --

24 **THE COURT:** Well, okay. That's the
25 implementation plan as to how to do it. But his statement, the

1 thing that we call the ban, talks about the status quo prior to
2 President Obama's action as authorizing the discharge of such
3 individuals; that is, authorizing the military to discharge a
4 person in the military just because that person is a
5 transgender.

6 **MR. SHUMATE:** But, Your Honor, I think you need to
7 read that directive, Section 1(b), in light of both Section 2
8 and Section 3.

9 Section 2 are the directives to the military. And
10 you'll notice that there is no directive regarding current
11 servicemembers. There's a directive regarding accessions, and
12 there's a directive regarding sex-reassignment surgery. There
13 is no directive to the military to discharge currently serving
14 members on March 23rd.

15 Instead, Section 3 says, Go study this question and
16 get back to me and come up with a final policy.

17 And we know this because --

18 **THE COURT:** The plan for implementing the
19 general policy set forth in 1(b), the general policy I read as
20 authorizing discharge of these people.

21 **MR. SHUMATE:** Well, the President in Section 1(b)
22 said, Before we make a change, before we continue implementing
23 Secretary Carter's policy, there needs to be further study.

24 And then in Section 3 he says, The
25 Secretary of Defense shall make that determination about

1 current servicemembers.

2 And then if you look at the interim guidance, the
3 Secretary of Defense clearly understands that he has the
4 discretion from the President to adopt a final policy regarding
5 current servicemembers.

6 **THE COURT:** Well, you're saying that a particular
7 individual who's transgender may be in a sensitive military
8 assignment in which the Secretary of Defense can determine that
9 it is not worthwhile to discharge this person because of the
10 cost of replacement or something.

11 **MR. SHUMATE:** That very well may be part of the
12 ultimate policy, but we just don't know. That policy is under
13 consideration.

14 And until there is a final policy adopted by the
15 military, it's mere speculation to assume that any of these
16 plaintiffs will be discharged after March 23rd.

17 Likewise, it's spec --

18 **THE COURT:** I think we're sliding off of the
19 surgical-standing issue. I don't want to. I want to stick
20 with surgical standing; and we'll come back to what you're now
21 talking about, which is the standing for other grounds.

22 So let me ask, Plaintiffs, do you want to respond to
23 what has been said so far with regard to standing on the
24 surgical-funding issue?

25 **MR. BLOCK:** Yes. Absolutely, Your Honor.

1 A couple points, Your Honor.

2 First of all, going back to the memo that the counsel
3 just read, even this implementation plan is about implementing
4 Section 1(b). It's not about implementing the specific
5 directives in Section 2 where the surgery ban is.

6 Section 2 is a specific directive that orders
7 Secretary Mattis to halt all use of resources to fund these
8 medical procedures. There's no implementation plan for that
9 whatsoever. There's no doubt that will become policy on
10 March 23rd.

11 With respect to the harm of our -- how the policy will
12 be interpreted and applied to our clients, I think this is very
13 similar to the Santa Clara case that was decided in --
14 regarding sanctuary city funding policy where the text of what
15 the President and the Attorney General did said one thing;
16 Government counsel came in and said, We interpret it to mean
17 something else; and the Court said it can't rely on the spin of
18 Government counsel to override the text of what the President
19 wrote and the surrounding context of how he did it.

20 And under their interpretation, Section 2(b) would
21 accomplish exactly nothing, because Section 2(b) does not halt
22 provision of hormone therapy.

23 So any transgender person could receive
24 hormone therapy, and they would have then begun a course of
25 medical treatment. And as part of that medical treatment, if

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1 they had a medically necessary need for surgery, their
2 interpretation would mean that they would still provide that
3 surgery.

4 And this is -- the Court in the Santa Clara County
5 case said the Government was asking him to adopt an
6 interpretation that would nullify the entire -- not only the
7 document that the President had issued, but also the entire
8 purpose of it, the document.

9 We know that halting funding for these procedures was
10 the whole motivation that kicked this off in the first place.
11 So that's why we think that's not a plausible interpretation.

12 And, of course, as Your Honor mentioned, the standard
13 isn't whether or not -- isn't whether or not our plaintiffs
14 will certainly suffer harm. For standing, it's whether there's
15 a substantial risk. And for a PI, it's whether there's a
16 likelihood. And we certainly meet both those barriers here.

17 And, in fact, there is harm now, because the
18 Government, as far as we're aware, is not scheduling anything
19 for after March 22nd.

20 So people have medical plans. They need to move
21 forward with their lives. And saying, Oh, we'll let you know
22 after March 22nd whether you can move forward with your
23 comprehensive, yearlong medical plan, that's a concrete injury
24 right now.

25 And if you want any other proof of how this is going

1 to be interpreted --

2 **THE COURT:** Well, which plaintiff has -- is suffering
3 that injury?

4 **MR. BLOCK:** Well, they -- so both Staff Sergeant Cole
5 and Petty Officer Stone both have treatment plans that call for
6 surgery.

7 My understanding -- and the Government can correct me
8 if I'm wrong -- is that nothing is being scheduled after
9 March 23rd. They have surgeries that can't be completed
10 before that deadline.

11 And so it's not like you can wait until March 23rd
12 and then decide, oh, will you have surgery or not? The
13 forthcoming ban has effect on people now.

14 And I think it's also important to note one of the
15 reasons why these medical procedures don't interfere with
16 military effectiveness is because everyone -- including the
17 servicemembers themselves and their chain of command -- are
18 very sensitive to scheduling procedures in a way that won't
19 disrupt the fighting mission. So they plan it around their
20 deployments.

21 And this sort of monkey wrench being thrown into their
22 plans, not only does that disrupt their individual case, but
23 that interferes with military fighting efficiency much more so
24 than following the course of treatment.

25 And one more thing just about this -- whatever is

1 ostensibly being studied. There is absolutely no evidence in
2 the record at all about what this study is. All we have is the
3 assertion of plaintiffs' counsel and the vague mention in the
4 interim guidance.

5 This is a PI motion. They could have submitted a
6 declaration from someone providing even a bare-bones
7 description of what options are on the table. They certainly
8 provided declarations from other people, but they haven't
9 provided one from anyone conducting this study.

10 And further, I think, ultimately, even if the
11 Department of Defense is interpreting the memo a particular
12 way, what matters here is how the President interprets it,
13 because the President issued this memo against the
14 recommendations of his military officials. That is a statement
15 that is in our --

16 **THE COURT:** Well, where is the evidence that this was
17 against military recommendations?

18 **MR. BLOCK:** So as laid out in our PI motion in the
19 Complaint and in the news stories attached to it, which this
20 Court can consider on a PI, it says that the group of
21 legislators that wanted to ban this surgery asked Mattis to do
22 so. He refused to do so. They then went over his head and
23 asked the President to do it.

24 And on a motion for preliminary injunction, the Court
25 has to accept all the uncontroverted facts in the declarations

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1 as true.

2 And we have laid out in detail the narrative of how
3 this happened. And the defendants don't dispute it. And in
4 terms of deference to military decisions about how to care for
5 the troops, the amicus brief from former high-ranking officials
6 explains in depth how this is not how those decisions are made.
7 This is completely contrary to how military decisions are
8 usually made on these issues.

9 So this Court mentioned President Obama's policy based
10 on his values. It wasn't a policy from President Obama. It
11 was a policy adopted from the military.

12 Secretary Carter issued it, but there had been a
13 yearlong, comprehensive study and review internal to the
14 military that reached these conclusions that decided we care
15 for our servicemembers, regardless of who they are, and we
16 address their medical needs in accordance with medical
17 standards, not with, you know, standards of moral disapproval.
18 And they determined this is what was necessary to defend the
19 people who are defending us.

20 And what you had was the President stepping in and
21 just overriding it, without providing any reasons.

22 So if any deference is due, I think it's due to the
23 military judgment that actually was made.

24 **THE COURT:** Okay. All right. Mr. Shumate, do you
25 want to respond to that, or do we want to move on to the

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1 standing on the other issues?

2 **MR. SHUMATE:** Your Honor, I would like to respond to
3 the assertion that this is essentially a sham study prepared by
4 the military and there is nothing in the record about this.
5 That's just not true.

6 Secretary Mattis issued a statement immediately after
7 the President's memorandum in which he said, quote, Panel
8 members will bring mature experience, most notably in combat
9 and deployed operations and seasoned judgment to this task.
10 The panel will assemble and thoroughly analyze all pertinent
11 data, quantifiable and nonquantifiable.

12 And then subsequently in his September 14th
13 memorandum that attached the interim guidance, he appointed the
14 Deputy Secretary of Defense and the Vice Chairman of the
15 Joint Chiefs of Staff to lead this panel of experts that's
16 currently studying these questions at the direction of the
17 President.

18 In fact, I could also go back to the --

19 **THE COURT:** Well, what does he say they're studying?
20 What are they -- it's supposed to be an implementation plan,
21 isn't it?

22 **MR. SHUMATE:** Well, it's a study as well as an
23 implementation plan. And it's ultimately to adopt a
24 final policy. Section 3 says exactly what they're studying.
25 Section 3 says [reading]: By February 21st of 2018, the

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1 Secretary of Defense shall submit a plan for implementing both
2 the general policy set forth in 1(b) and the specific
3 directives set forth in Section 2. That includes Section 2(b),
4 the sex-reassignment surgery provision.

5 So by February 21st, we may have some further
6 clarification by the military or a final policy regarding the
7 payment and funding --

8 **THE COURT:** Well, the directive is to give them an
9 implementation plan, which is rather indicative that the ban is
10 going to go into effect.

11 So I don't -- I think your characterization of what
12 this is, some kind of study, as if we're going to -- as if it's
13 a study to see whether we should do this to transgenders, is
14 inaccurate. I don't think that's what President Trump
15 assigned. He wanted an implementation plan which is to get --
16 make his intentions or policy functional.

17 **MR. SHUMATE:** Right. But I have to draw a distinction
18 between the provision on sex-reassignment surgery and the
19 policy with respect to currently serving members.

20 Certainly, Section 2(b) becomes effective on
21 March 23rd, and the military is studying how to implement
22 that directive.

23 By contrast, there is no directive to discharge
24 currently serving members of the military. Instead, there is
25 an instruction to the Secretary of Defense in Section 3 to

1 study that question and adopt a final policy.

2 **THE COURT:** So it may include -- it authorizes people
3 to be fired or discharged strictly because they're transgender;
4 that's authorized.

5 **MR. SHUMATE:** But Section 3 also says [reading]:
6 Until the Secretary has made that determination, no action may
7 be taken against such individuals until the policy set forth in
8 Section B -- under the policy set forth in Section --

9 **THE COURT:** Right. But anybody who is a transgender
10 serving in the military is currently oppressed by what's going
11 on. The ability to obtain long-term assignments is affected
12 negatively by the existence of the possibility that they may be
13 canned right after March 23rd.

14 **MR. SHUMATE:** No, Your Honor. The interim guidance
15 makes clear that the policy and the memorandum does not affect
16 re-enlistments. Our declarations make clear that the
17 memorandum does not affect promotions.

18 So to suggest that this may have some concrete --

19 **THE COURT:** Well, I talked about assignments,
20 long-term assignments, getting a position that you want that's
21 a desirable position to be stationed somewhere for two years;
22 that's a negative factor in somebody who's considering who to
23 pick for a slot when your application has to say: But, you
24 know, I can't guarantee that I'm not going to be fired --

25 **MR. SHUMATE:** Well, Your Honor --

~~MOTIONS HEARING~~

1 **THE COURT:** -- just because of what I've said I am,
2 which I said because of what I took to be the word of the
3 President of the United States.

4 **MR. SHUMATE:** Your Honor, that is speculation about
5 what the effect of the final policy will be. But we do not
6 know what that final policy will be with respect to current
7 servicemembers.

8 Nobody is being denied equal protection right now.
9 The interim guidance protects all currently serving members.
10 We don't know what the final policy --

11 **THE COURT:** You're saying that it's not ripe to
12 consider a negative -- that there's a negative effect from
13 having this planning going on that anybody who's filling a
14 position knows may restrict this particular transgendered
15 person's ability to stay with the project after March 23rd.
16 I think that's unrealistic. It's definitely a negative factor.

17 **MR. SHUMATE:** I respectfully disagree, Your Honor.
18 There is -- these plaintiffs are not being
19 denied equal protection in any way. They're not being
20 threatened with discharge. They are not being denied
21 medical treatment.

22 They are -- I could understand the anxiety they have;
23 but that is not a concrete, perceptible impact on the
24 plaintiffs. We don't have a final policy. We don't know what
25 the military's ultimate judgment will be, and that is why this

1 case is ripe.

2 Just imagine if this were a typical agency case in
3 which we have an interim policy adopted by an agency. The
4 Court would not review that policy because it's not a
5 final decision. It's not ripe yet.

6 So too here, we don't have a final decision by the
7 military. And the President in Section 3 delegated discretion
8 to the military to decide how to address current
9 servicemembers.

10 And these plaintiffs are not suffering any harm right
11 now, and it's entirely speculative whether they will --

12 **THE COURT:** Well, they're certainly suffering the
13 stigmata that exists by virtue of the President's statements
14 and the formal ban that's in effect which says that if you're
15 transgender, you are special. And that's not specially good;
16 you're specially bad.

17 **MR. SHUMATE:** No, Your Honor. Allen versus Wright,
18 which we cited in our brief, speaks to this question quite
19 clearly, and in particular Footnote 22. It's not enough just
20 to allege a stigma. You have to be personally
21 denied equal treatment of the laws.

22 If stigma were enough, then every
23 transgender individual in America would have standing. They
24 have to prove -- they have to allege that they are personally
25 being denied equal treatment to allege a stigma, and they

1 cannot do that because the interim guidance says --

2 **THE COURT:** Well, maybe every transgender person does
3 have standing because the President in this policy has chosen
4 to single them out as worthy of treatment negatively compared
5 to people who aren't transgender.

6 **MR. SHUMATE:** Well, Your Honor, that can't possibly be
7 correct. Just from ordinary standing principles, we know that
8 there has to be a personal impact on the plaintiff. They have
9 to have a personal stake in the outcome of the controversy.

10 And if a transgender individual has no desire to join
11 the military, I can't see how they would possibly be injured by
12 what the President --

13 **THE COURT:** Well, we don't have a plaintiff who is a
14 member of the general public who's transgender who's saying --
15 who's taking this extreme position. I'm just saying that
16 stigmatization does exist because of this, and every plaintiff
17 is suffering from that to the extent that every other
18 transgender . . .

19 **MR. SHUMATE:** But these plaintiffs have to show some
20 personal impact. And they cannot, because, number one, they're
21 protected by both the memorandum and the interim guidance from
22 discharge while the military is studying and adopting a
23 final policy. They're not currently being denied any
24 medical care. It's entirely speculative whether they will be
25 denied medical care after March 23rd.

~~MOTIONS HEARING~~

1 Both -- all of Section 2 is currently being
2 implemented by the military. I know the plaintiffs have a
3 concern about how that will be interpreted, but that is part of
4 the study that's ongoing right now. And we very well -- may
5 well have a final policy that clarifies whether these
6 plaintiffs are going to be injured in the future, after
7 March 21st.

8 **THE COURT:** Well, you're asking me to find that the
9 exception in Section 2(b) wipes out the whole purpose of
10 stopping the funding because, essentially, everybody who needs
11 it is going to get it. That's what you're -- that's one of
12 your positions that I find a little bit hard to make as a
13 definite finding to soothe or throw out the plaintiffs.

14 **MR. SHUMATE:** No, Your Honor. My position is that
15 it's speculation whether these particular plaintiffs will be
16 denied medical treatment when they have alleged that they have
17 begun courses of treatment and that surgeries will be
18 medically necessary after March of '18.

19 If those allegations are true -- and we're happy to
20 accept them as true -- then they may have a very good argument
21 that they fall within this exception as written in Section 2(b)
22 of the memorandum.

23 Now, the military may come up with a more restrictive
24 definition -- interpretation of Section 2(b), but we just don't
25 know.

1 **THE COURT:** So you're saying that they may have
2 standing later, but not today?

3 **MR. SHUMATE:** Certainly. The facts can always change.
4 And these plaintiffs may be able to allege concrete facts that
5 show they were denied medical treatment because of Section 2(b)
6 of the memorandum, in which case they very likely would have
7 standing.

8 But as of right now, they are protected by the
9 interim guidance. We know that Plaintiff Cole had a surgical
10 procedure on October 17th -- in October of 2017. And it's
11 speculative whether --

12 **THE COURT:** The interim guidance you say protects them
13 from being discharged now?

14 **MR. SHUMATE:** Correct, because interim guidance says
15 [reading]: As directed by the memorandum, no action may be
16 taken to involuntarily separate or discharge an otherwise
17 qualified servicemember solely on the basis of a
18 gender dysphoria diagnosis or transgender status.

19 That is an implementation of Section 3 of the
20 President's memorandum.

21 **THE COURT:** All right. Thank you.

22 **MR. SHUMATE:** Thank you, Your Honor.

23 **THE COURT:** Okay. Mr. Block, do you want to respond
24 to that?

25 **MR. BLOCK:** Thank you, Your Honor.

1 Under the Open Service Directive that was in place
2 before President Trump issued his memo, transgender people were
3 held to all the same physical standards and deployability
4 standards but, like this interim guidance, were protected from
5 being discharged solely based on them being transgender.

6 Section 1 of the President's memo here explicitly
7 overturns that policy. You know, you read Section A,
8 Section 1(a) [reading]: Until June 2016, you know, the
9 military generally prohibited openly transgender individuals
10 from accession into the U.S. military and authorized the
11 discharge of such individuals.

12 He then says shortly before President Obama left
13 office, he changed that policy. Section 1(b) then says
14 [reading]: I am directing the Secretary of Defense to return
15 to the longstanding policy and practice that existed before
16 June 2016.

17 That is a policy that, quote, authorized the discharge
18 of such individuals.

19 The defendants don't address what it means to be
20 authorized for discharge. They act as though the only possible
21 injury is actually being discharged.

22 And so what will happen, regardless of the
23 implementation plan, is that transgender people will no longer
24 be protected from discharge based on being transgender, and
25 their discharge on that basis will be authorized.

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1 Even in a best-case scenario, where Secretary Mattis
2 says we should allow everyone who's already in the military to
3 stay there and best-case scenario where President Trump finds
4 that is a sufficiently convincing recommendation, that's still
5 an enormous injury-in-fact on the plaintiffs. They will be --

6 **THE COURT:** Well, how is that an injury?

7 **MR. BLOCK:** So they will be serving under a
8 second-class status where they, their fellow servicemembers,
9 their chain of command will all be told that even though
10 they're serving, they don't really belong there and they are
11 inherently administratively flawed or unfit.

12 If you think of any other minority group where the
13 military said, We're not going to allow any more of you in, but
14 those who are already in can stick around, not only is that a
15 dignitary harm for the people still in there, but it's
16 impossible for them to do their job.

17 How are they supposed to give commands to, you know,
18 inferior officers? How are they supposed to be respected?
19 They are being allowed to serve in spite of their unfitness.

20 And so that's the best-case scenario.

21 A more likely scenario is that they are at risk for
22 discharge in a way that no one else is. And the defendants
23 talk about the plaintiffs have to be personally subject to
24 unequal treatment, but they ignore the Northeast Florida
25 Contractors line of cases that says an unequal playing field is

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1 itself a form of unequal treatment.

2 Everyone else isn't at risk of being discharged
3 because of who they are. Transgender people have an
4 unequal barrier they have to overcome in order to be treated
5 equally.

6 So even indulging every presumption about how lenient
7 the final policy will be and indulging presumptions that the
8 President will then accept that recommendation, I think we've
9 still stated an injury-in-fact and one that is certainly
10 impending.

11 There's no -- there's -- you can't read the document
12 and think that the Secretary has been allowed to come up with a
13 recommendation that says, Actually, we're going to continue
14 prohibiting the discharge of people based on their
15 transgender status.

16 And if what the President wanted to do was commission
17 a study, he would have commissioned a study.

18 When Secretary Carter wanted to commission a study
19 about whether to have an Open Service Directive, he didn't say,
20 I am ordering that on June 30th, 2016, transgender people
21 will be allowed to commission unless my generals come back and
22 provide me some other contrary recommendation.

23 He commissioned a study, and then he acted after the
24 study was completed. This is an incredibly odd way to go about
25 commissioning an open-ended study, if that's what the President

1 intended to do.

2 **THE COURT:** No, he didn't intend to do that 'cause he
3 didn't do that.

4 **MR. BLOCK:** That's right, Your Honor. He changed the
5 policy first in order to study only after the fact.

6 I'm happy to continue discussing the retention policy;
7 or I can move on to the accessions policy as well, if now is
8 the right time for that.

9 **THE COURT:** Okay.

10 **MR. BLOCK:** So for the accessions policy, that is
11 another policy where there's no doubt that the law has been
12 changed.

13 The status quo ante was that Secretary Mattis was
14 having a study to determine when trans people should be allowed
15 to join the military.

16 Absent further action from Secretary Mattis, they
17 would have been allowed to join on January 1st of 2018 and
18 could only join if they meet very strict requirements that
19 included having all anticipated surgery already completed more
20 than 18 months before serving.

21 President Trump then changed that status quo by
22 permanently prohibiting Secretary Mattis from allowing
23 transgender people to enlist until he gets special
24 authorization from the President that he has provided a
25 sufficiently convincing reason for doing so.

~~MOTIONS HEARING~~

1 And, in fact, shortly after tweeting out his ban or
2 his intention to ban transgender people, President Trump then
3 went in front of television cameras; and he said, I'm doing the
4 military a great favor by just coming out and saying what the
5 answer should be instead of having them waste time studying it.

6 So I think that's a big change to the status quo.
7 We're not asking for an injunction that does anything more than
8 resets the status quo to where it was.

9 Secretary Mattis can continue studying whatever he
10 wants to study. And if he takes further action based on that
11 study, the Constitutionality or legality of that action can be
12 assessed on its own terms.

13 But just because it's theoretically permissible for
14 Secretary Mattis to have an independent study that comes to
15 independent conclusions doesn't mean it's permissible for the
16 President to forecast what he wants the outcome to be to tie
17 Secretary Mattis' hands and to signal to everyone serving or
18 seeking to commission as officers that they're not wanted.

19 In terms --

20 **THE COURT:** When you say it's not permissible, of
21 course it's permissible. I mean, the President is supposed to
22 have policies.

23 And it's permissible for a President to announce a
24 policy and say, I want an implementation plan. I don't want
25 you to tell me whether I should do this or not. You just say

1 this particular policy is invalid.

2 **MR. BLOCK:** Well, that's right. I don't mean to be
3 saying something different. I mean to be saying this is
4 certainly within his Article II powers. But those Article II
5 powers are subject to Amendment 5, Fifth Amendment limitations.
6 And what -- those limitations are that the President can't
7 exercise those powers in an arbitrary manner, in a manner
8 that's based on overbroad stereotypes or prejudice or in a
9 manner that violates the Fifth Amendment rights of
10 servicemembers.

11 So -- and motive matters. Motive matters under
12 equal protection. And just because something can be done for
13 permissible motive doesn't mean it can be done for an
14 impermissible one.

15 **THE COURT:** Well, what do you say is the
16 impermissible motive that I should find for this ban?

17 **MR. BLOCK:** Well, Your Honor, first of all, I don't
18 think we need a finding of impermissible motive. I think
19 irrationality is enough.

20 But I think that this case is on all fours with
21 Cleburne, where in Cleburne, a City Council sort of acceded to
22 negative attitudes, unfounded fears, and prejudices of
23 third parties and prohibited a group home for people with
24 mental disabilities from being located in the town.

25 And every single explanation they gave for why the

1 group home shouldn't be there would also have applied to all
2 sorts of other homes that were permitted.

3 So you couldn't say it was too many people because
4 they allow frat houses.

5 And I think the Court, after walking through why each
6 of those rationales made no sense in light of how other groups
7 were treated, the Court concluded that there's an inescapable
8 inference here that this must have rested on a desire to cater
9 to these fears and stereotypes of the populous.

10 And that's what happened here. The Court doesn't have
11 to find that President Trump himself harbors some animus. All
12 the Court has to do is walk through the reasons President Trump
13 gave. None of them makes any sense in light of how any other
14 group of people, any other medical condition is treated.

15 And then I think the lack of a rational basis is
16 evidence that the policy must have rested on a desire to
17 appease legislators or members that he -- news stories talk
18 about his base -- to appease fears or prejudices or stereotypes
19 about this group of people who, you know, as we talk about in
20 saying why transgender people should constitute a
21 suspect class, you know, I think it's uncontested that this is
22 a discrete and insular minority that have been subject to a
23 long history of prejudice, do not have political power.

24 Just recently, you know, this past election is the
25 first time that we know of openly transgender people being

1 elected to even a State Legislature.

2 And there's a reason why transgender people meet all
3 of the criteria for heightened scrutiny. And this is exactly
4 the context in which the Court should be more attuned to the
5 possibility that this sort of unequal treatment doesn't rest on
6 a -- legitimate bases for difference but rests on overbroad
7 stereotypes and fears.

8 So that's the finding that we think the Court could
9 make either under heightened scrutiny, under rational basis
10 review. I think that's exactly what happened here.

11 **THE COURT:** You're saying that the policy would not
12 survive even rational basis review?

13 **MR. BLOCK:** That's right, Your Honor. And that's
14 Cleburne. Cleburne was a rational basis case. We think that
15 under any standard, this just lacks an objective,
16 rational basis.

17 But I don't want to in any way concede that
18 transgender -- discrimination against transgender people isn't
19 also subject to heightened scrutiny, and for good reason. It's
20 because they are more likely to be the victims of
21 irrational decision-making that doesn't actually treat them
22 equally as everyone else.

23 Since we're addressing standing, I want to make sure
24 to talk about the standing of our plaintiffs to challenge the
25 accessions ban, because I think a lot of confusion was cleared

1 up in the reply declaration of Airman George. And the
2 Government's final filing doesn't address that final reply
3 declaration at all.

4 Airman George is ready, willing, and able to apply to
5 directly commission as an officer as soon as he can. All he's
6 been waiting for is for the final change in his gender marker
7 in the DERS system to go through. He submitted all that
8 paperwork. It should go through any minute. He wants to apply
9 the first day that he can.

10 He is separately pursuing a higher degree in nursing
11 because he wants to be commissioned at, you know, the highest
12 level possible and doesn't want to put his career on hold.

13 But his ability to commission and his desire to
14 commission are not contingent on him completing that nursing
15 program.

16 As soon as he can commission, he will. And he would
17 do it on January 1st if he were allowed to do so.

18 He is not allowed to do so directly because of the
19 President's specific directive in 1(a), and --

20 **THE COURT:** So that, you're saying, is he has standing
21 with regard to the accession part of the ban?

22 **MR. BLOCK:** That's right, Your Honor. And his
23 circumstance --

24 **THE COURT:** Effective January 1st?

25 **MR. BLOCK:** That's correct, Your Honor. And his

1 circumstances illustrates the irrationality of Section 1(a).
2 He has already had any surgery that he's going to have. So the
3 notion that he should be prevented from enlisting because of
4 these inaccurate stereotypes about the results of surgery just
5 doesn't make any sense on its own terms because people who are
6 joining the military under the Open Service Directive must have
7 already completed any surgery that they anticipate having.

8 His only long-term medical needs are hormone therapy,
9 and that therapy is no different than the hormones provided to
10 any other servicemember and that, you know, there are very few
11 medications that are inconsistent with deployment, and hormones
12 aren't among them.

13 So the notion that he should be blocked from the
14 military out of some hypothetical and inaccurate perception of
15 the effect of what having a surgery would be, you know, it
16 just -- it -- the means and the ends have a complete
17 disconnect.

18 And in general, the policy's means and ends have a
19 complete disconnect because anyone who's in the military right
20 now is in there because they can meet the same standards that
21 apply to everyone else.

22 If there's a transgender person whose gender dysphoria
23 is limiting their ability to serve, they can be kicked out just
24 like any other person whose medical condition is limiting their
25 ability.

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1 The only effect of a categorical ban is to kick out
2 people who those concerns don't apply to, by definition. It's
3 an inherently irrational thing to do where if the concern is
4 medical fitness and deployability, the military has generally
5 applicable standards for determining that.

6 What the President has done is he's had a categorical
7 rule that substitutes those generally applicable standards with
8 a label that if you're transgender, you're out. And I don't --
9 that fails heightened scrutiny, and it's just irrational under
10 any standard.

11 **THE COURT:** Okay. What about the statute, 1074, the
12 medical treatment statute?

13 **MR. BLOCK:** Yes, Your Honor.

14 **THE COURT:** You're saying that's -- the ban violates
15 that statute?

16 **MR. BLOCK:** Yes. Yes, I do. And regardless of
17 whether there's a private right of action, this Court has
18 equitable powers to hold ultra vires any actions of the
19 President that contradict the statute. And, of course, DoD is
20 subject to the limitations of the APA and can't take action
21 contrary to the law.

22 **THE COURT:** Well, let's see where that -- you're
23 saying that the statute requires needed medical care to
24 individuals who are in the military?

25 **MR. BLOCK:** Yes. It's saying that every servicemember

1 in the military is entitled to medical care.

2 **THE COURT:** Firing somebody, the consequence of which
3 will be to eliminate the need to provide needed medical care,
4 you say that's a statutory violation of 1074?

5 **MR. BLOCK:** No, no, not at all. We just think
6 Section 2(b) is the statutory violation. To have a subset of
7 servicemembers who are in the military that have been singled
8 out for denial of medical care is what's a violation. And, of
9 course, the --

10 **THE COURT:** The existence of 2(b) and the existence of
11 an exception is the recognition that there are going to be
12 transgender people in the military not discharged after
13 March 23rd; isn't that right? Otherwise, there would be no
14 1074 issue.

15 **MR. BLOCK:** Well, assuming -- I think that that is
16 true, that Section 2(b) and a violation of 1074 only -- will
17 only come into play in the case of a scenario in which
18 transgender people aren't immediately purged from the military
19 on March 23rd.

20 But I'm happy to concede that there is a big
21 possibility that there won't be an immediate purge of every
22 single transgender person on March 23rd. That doesn't mean
23 that there's not a substantial likelihood of -- that people
24 will be discharged or that they will be harmed, even if they're
25 allowed to continue serving.

1 And the thing for Section 1174 [sic] is, of course, it
2 allows decisions about what healthcare is necessary to be
3 determined based on valid criteria, the way that any other sort
4 of medical decision is determined by.

5 So it doesn't mandate any particular treatment for any
6 particular person, but it does prohibit a policy that
7 discriminatorily and for impermissible reasons says that this
8 particular treatment is not going to be assessed based on how
9 every other medical condition is assessed; that it's going to
10 be blocked for a policy reason because it appeases allies in
11 Congress.

12 **THE COURT:** Well, it's not the treatment. It's not
13 like some kind of religious viewpoint that the surgery is
14 somehow violative of some law of God or something.

15 **MR. BLOCK:** Your Honor, I actually think that's
16 incorrect. I think that the main backer of this ban, both in
17 the meetings, as a faith advisor to the President, and in the
18 studies given to Representative Hartzler is the
19 Family Research Council.

20 And they are a group that has a religious belief that
21 man and women were created Adam and Eve and that any deviation
22 of trying to change your body away from God's vision is, you
23 know, in violation of God's image. And it is very much a
24 religious belief among that aspect of the base.

25 **THE COURT:** This policy does not purport to affect

1 medical treatment for dependents of military. That is, a
2 non-transgender military person could have a child who is
3 transgender who would get these operations if -- the surgery if
4 medically necessary.

5 **MR. BLOCK:** So, unfortunately, medical care for
6 dependents and veterans is set by a different statute, TRICARE.
7 And that statute, unlike this one, actually does have an
8 exception for -- it says "for cosmetic surgeries," and then in
9 parentheses, "including, i.e." -- or "for example" --
10 "sex-reassignment surgeries."

11 I think there are separate legal issues with that
12 statute, ways to interpret it to why it shouldn't cover
13 procedures that are medically necessary.

14 **THE COURT:** But it's not 1074.

15 **MR. BLOCK:** But -- and that's the point, that when
16 Congress wanted to have an exception for that, they had it
17 explicitly in the TRICARE statute.

18 Congress knows how to carve out those exceptions, and
19 I think comparing those two statutes shows why it's
20 impermissible for the President to write an exception into the
21 statute that Congress knew how to write and didn't do so.

22 **THE COURT:** I see. Okay.

23 **MR. BLOCK:** Unless Your Honor has any further
24 questions for me . . .

25 **THE COURT:** Yes. What is the fundamental right that's

1 violated -- of the plaintiffs that's violated by the
2 surgical-funding prohibition?

3 **MR. BLOCK:** Your Honor, we're not alleging violation
4 of a fundamental right. We're alleging arbitrary governmental
5 action that shocks the conscience.

6 So this is not in any way dependent on a finding of a
7 burden on a fundamental right. The Fifth Amendment protects
8 everyone from arbitrary conscience-shocking action.

9 So I appreciate the opportunity to clarify.

10 **THE COURT:** Yes, clarify it. What's shocking the
11 conscience about the funding restriction?

12 **MR. BLOCK:** Well, I think that it's not simply what
13 was done, but how and why it was done.

14 I think that the amicus brief from the former
15 high-ranking officials is extremely helpful in saying, you
16 know, for these matters of military governance and
17 national security, there is a way to do things; and we do those
18 things both for national security but also to ensure that every
19 transgender person is -- I mean, everyone, including
20 transgender people, you know, in the military are treated with
21 dignity and respect.

22 And you have an unprecedented deviation from those
23 norms. An announcement via Twitter to people who are serving
24 in the field that they will no longer be allowed to serve in
25 any capacity?

~~MOTIONS HEARING~~

1 I mean, it's -- especially after they had just been
2 given a promise to come forward. Be open with your
3 chain of command. You'll be treated like everyone else.
4 You'll be given the dignity that everyone else is given.

5 I think for anyone wearing the uniform to hear that
6 from their Commander in Chief is incredibly
7 conscience-shocking.

8 And I don't think this ban on surgery can be separated
9 from that in any way. It puts a target on their back and
10 singles them out as unworthy to be there and unwanted.

11 And I think it shocked -- according to news reports,
12 it shocked his own generals who thought that he was announcing
13 a missile launch on North Korea.

14 So I think it is certainly conscience-shocking the way
15 this was done.

16 **THE COURT:** Okay. All right.

17 Mr. Shumate, you seem to have a lot here to respond
18 to.

19 **MR. SHUMATE:** Yes, Your Honor.

20 Your Honor, the plaintiffs' concession that they do
21 not read the memorandum to require a purge of current
22 servicemembers who are transgender after March 23rd destroys
23 their standing.

24 That's exactly what I've been saying all day today, is
25 that the President did not decide to discharge all currently

1 serving transgender individuals after March 23rd. He
2 directed --

3 **THE COURT:** Well, what he did decide is that you're
4 authorized to make -- to discharge anybody because he's a
5 trans -- or he/she is a transgender person.

6 **MR. SHUMATE:** I don't even think that's a fair
7 characterization either, Your Honor. He said in Section 1(b):
8 Return to the status quo.

9 And then in Section 3: Study. Come up with a
10 final policy before 1(b) takes effect.

11 **THE COURT:** But he refers to the prior policy that he
12 wants to take effect as one that allows a discharge strictly
13 because you're transgender.

14 **MR. SHUMATE:** No, I don't think that's fair,
15 Your Honor. What he said in Section 1(a) is: This is the old
16 policy. Secretary Mattis had extended that, even before he
17 issued the memorandum.

18 And then what the plaintiffs don't acknowledge is the
19 second paragraph of Section 1(a) in which he says, in his
20 judgment [reading]: The prior administration had failed to
21 identify a sufficient basis to conclude that terminating the
22 prior policy would not hinder military effectiveness and
23 lethality, disrupt unit cohesion, or tax military resources.
24 And there remain meaningful concerns that further study is
25 needed to ensure that continued implementation of last year's

1 policy change would not have these negative effects.

2 So from the beginning of this memorandum, the
3 President is directing more study to be done. He has not
4 directed the military to take any final action with respect to
5 current servicemembers.

6 In fact, in Section 3, he delegated that discretion to
7 the Secretary of Defense. And he said, Take no action against
8 those individuals until you, the Secretary, make a -- adopt a
9 final policy with respect to current servicemembers.

10 With respect to accession, Your Honor, I think that is
11 their vehicle to get to all of the merits of this case, but
12 it's quite clear to me that they have no standing. These are
13 all current servicemembers. They are not affected by the
14 accession policy.

15 It's true; the accession policy goes into effect
16 January 1st of 2018, putting aside the D.C. injunction. But
17 none of these plaintiffs are seeking to join the military.
18 They are all current servicemembers.

19 Now, they identified two plaintiffs that would like to
20 become commissioned officers. So none of them have been denied
21 a commission. None of them have applied for a commission.
22 None of them have sought a waiver from a -- for a commission.

23 The plaintiffs identify -- I believe it's
24 Plaintiff George. He is currently pursuing a degree and would
25 like to pursue a commission in the Army Nursing Corps.

1 He plans to seek another degree in nursing beginning
2 of January of 2018 that he expects to complete in 12 to 18
3 months.

4 So the earliest he could even apply for a commission
5 would be 2019. So how does this individual have standing now
6 to challenge an accession policy that would not apply to him
7 for a year, year and a half?

8 **THE COURT:** Well, it can affect his proceeding with
9 his schooling to qualify for something that he may be blocked
10 from because of his transgender situation.

11 **MR. SHUMATE:** Well, I think that's speculation at this
12 point, Your Honor. He may have a plan to apply for a
13 commission, but he has not done so.

14 And I think another important feature to keep in mind
15 is that these plaintiffs would like to return to the
16 Carter policy of 2016.

17 But let's be clear about what that policy is with
18 respect to accessions. It was not: Open the doors to all
19 transgender individuals. Transgender status was still
20 presumptively disqualifying unless the individual had been
21 stable for 18 months.

22 So we understand from the declarations that
23 Plaintiff George has had some procedures and even under the
24 Carter policy might not even be eligible for the commission.

25 So it's not even clear whether granting preliminary

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1 injunctive relief and putting the Carter policy back into
2 effect now would have any impact on any of these plaintiffs.

3 If I can speak to the merits, Your Honor, what the
4 President did was he said there are meaningful concerns that
5 need to be studied.

6 Under any standard of review, rational basis or
7 heightened scrutiny, it was entirely rational and permissible
8 for the President to say, Before we depart from longstanding
9 policy -- this is a policy that had been in place by the
10 military for decades -- there needs to be further study.

11 There is -- under any standard of review, that has to
12 be rational. And the President has not made a decision. He
13 has ordered the military to study this issue further.

14 And the reasons that the President gave -- concerns
15 about taxing military resources, military effectiveness, and
16 lethality and unit cohesion -- are rational under any standard
17 and permissible under any standard.

18 I'd also like to address the plaintiffs' point about
19 an unequal playing field. That is a standard, yes, that some
20 courts have said plaintiffs have standing in the education
21 context and in the bid-protest context to sue if there's --
22 they're being denied equal treatment for kind of like a
23 zero-sum game, for a contract or for acceding at a university.

24 But this is very different. This is an eligibility
25 requirement.

1 So in all of those cases, the plaintiff would be
2 presumed eligible to apply for the contract or bid for the
3 contract or apply for admissions.

4 There are many different reasons why an individual may
5 not be accepted for a commission or denied accession into the
6 military. And until that happens, a challenge to this policy
7 is not ripe and should not be undertaken, Your Honor.

8 **THE COURT:** Well, you're saying that the only person
9 who has standing is somebody who would definitely meet all the
10 other criteria and failed just because of this one, rather than
11 saying that the existence of this ban affects me. I have to do
12 a little bit more in order to get what other people get.

13 **MR. SHUMATE:** Well, I think that's right, Your Honor,
14 that we -- for these plaintiffs, we would need the military to
15 deny a commission before we know whether any of these
16 plaintiffs have standing and are harmed by the President's
17 policy here or the military's final policy.

18 But right now, it's entirely speculative. These are
19 all current servicemembers. They have jobs in the military.
20 They may like to accede to a commissioned officer status in the
21 future. They have not applied to do so. They haven't been
22 denied.

23 And there's also a waiver process. That may also be a
24 form of relief for these plaintiffs.

25 So it is speculation built on speculation, both as to

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1 the accession policy and current servicemembers, Your Honor.

2 **THE COURT:** Okay. Well, thank you. Thank you.

3 **MR. SHUMATE:** Thank you, Your Honor.

4 **THE COURT:** All right. Let's take a brief morning
5 recess, come back and see if there's anything else that we have
6 to cover.

7 Let's take ten minutes.

8 (11:53 a.m.)

9 (Recess taken.)

10 (12:04 p.m.)

11 **THE COURT:** Okay. I think you have done fine in
12 answering the various subjects that I've raised.

13 I would like to ask the plaintiffs for clarification
14 on a subject that I'll mention, and then I think you can make
15 your final statements so that nobody feels that they have been
16 cut off.

17 Okay. Let's see here.

18 I need the -- for the surgical-funding restriction
19 purposes and standing, I need to have the surgical status of
20 the plaintiffs clarified, particularly Stone, Cole, Doe, and
21 Gilbert.

22 Do they have an approved plan? Is surgery included in
23 the plan that they have approved? And when is the surgery
24 approved?

25 So I'd like the plaintiff to do that.

~~MOTIONS HEARING~~

1 And I wish the defendants to answer whether any
2 surgeries at all are being scheduled past March 23rd for
3 anybody at this time.

4 So, Plaintiff, you could give me the status of your
5 Plaintiffs Stone, Cole, Doe, and Gilbert. I appreciate it.

6 **MR. BLOCK:** Yes, Your Honor.

7 So for Plaintiff -- so we're relying for standing at
8 this point on Plaintiff Cole and Plaintiff Stone.

9 Plaintiff Doe, as far -- as far as I'm aware, does
10 not -- like, is able to have the surgery that is in his plan
11 and doesn't have a further need for surgery.

12 And --

13 **THE COURT:** You say he is able to have the surgery?

14 **MR. BLOCK:** Yes. Yeah.

15 **THE COURT:** Okay.

16 **MR. BLOCK:** I'm not sure if the surgery has been
17 completed, so we're not relying on it as an affirmative basis
18 for standing in this PI motion.

19 Plaintiff Cole has a final, approved medical plan that
20 calls for two additional surgeries. She is unable to have
21 those surgeries in the next coming months 'cause she's about to
22 go to drill sergeant school, which she doesn't return from
23 until early March.

24 So it is impossible for her to have both surgeries
25 before the March 23rd deadline.

~~MOTIONS HEARING~~

1 Plaintiff Stone has sort of a near-final draft of a
2 plan that calls for him to have --

3 **THE COURT:** You say you're not relying on Stone for
4 standing?

5 **MR. BLOCK:** No. I'm sorry. Did I say "Stone"? I
6 apologize. I meant Doe. If I said "Stone," I misspoke. I
7 meant Doe.

8 **THE COURT:** Okay.

9 **MR. BLOCK:** Stone, we are very much relying on Stone.
10 I apologize, Your Honor.

11 He has a near-final treatment plan that calls for two
12 surgeries. It needs to get a stamp of approval from Central,
13 but I don't think there is any reason to doubt that that
14 stamp of approval will happen.

15 And it currently calls for -- it was originally
16 calling for him to have the surgeries -- the first of the
17 surgeries in April.

18 They have tried to move it up to February in an
19 attempt to meet the deadline, but it seems unlikely that they
20 will be able to do so at this point. But it is -- you know,
21 it's a near-final document that says he has medical needs for
22 those two surgeries.

23 **THE COURT:** Okay. All right. Thank you. Thank you.
24 Okay.

25 Mr. Shumate, the question is: Are you now or is -- is

1 the military now scheduling any surgeries to be performed after
2 March 23rd?

3 **MR. SHUMATE:** The short answer is I don't know,
4 Your Honor. That's still four months away as well. It may be
5 premature to schedule surgeries after March.

6 But I think I can say that I'm not aware of any
7 surgery requests being denied, and that's not in the
8 declarations as of right now.

9 I know from the Stone declaration, there's a surgery
10 scheduled before March, but I'm not aware of any denial of a
11 request to have surgery after March.

12 **THE COURT:** Okay. Thank you.

13 All right. Why don't you folks feel free to make
14 whatever final arguments you want on the pending matters.

15 **MR. BLOCK:** Thank you, Your Honor. I'll be brief.

16 There is one point that I do want to make sure I
17 clarify, which is, again, about Airman George. The declaration
18 that Defendants read from is his opening declaration, not his
19 reply declaration, which makes clear that his nursing school
20 degree is not something he has to or intends to complete before
21 attempting to commission.

22 So that is not a barrier that stands in the way. He's
23 been pursuing it on a parallel track, but his reply declaration
24 makes that crystal-clear.

25 And, of course, he hasn't applied to commission

1 because the policy right now clearly says he can't.

2 But besides that factual clarification, I think the
3 only point I make to tie things up is, you know, all of the
4 Government's arguments have been about shielding what the
5 President has done from judicial review or denying that he did
6 what he did.

7 They have built a defense around the notion that all
8 the President did was order a study and defer further decisions
9 until after. It would -- that would be a rational thing to do,
10 but it's not what the President did.

11 And taking the President at his word, both in his
12 tweets and in his memorandum, is not engaging in speculation.
13 It is simply assuming that the President meant what he said and
14 said what he meant.

15 And I think if you just read the President's words, it
16 is clear that Plaintiffs have standing and they will suffer
17 irreparable harm unless this Court issues an injunction.

18 **THE COURT:** Okay. Thank you.

19 Mr. Shumate.

20 **MR. SHUMATE:** Thank you, Your Honor.

21 Three quick points.

22 The first is with respect to Plaintiff Cole, I think
23 there was a reference to drill sergeant school. Indeed, there
24 is -- in her supplemental declaration, dated October 26th of
25 '17, in Paragraph 7 there's a reference to the fact that she's

~~MOTIONS HEARING~~

1 been ordered to enroll in drill sergeant school starting on
2 January 3rd, 2018, with an expected graduation date in March.

3 That proves our point, that there is no adverse action
4 being taken against anyone who's currently serving in the
5 military.

6 And the suggestion that they're being denied
7 opportunities or promotions or assignments is not true in light
8 of this declaration.

9 The second thing I would point out is I think it's
10 quite clear after this discussion today that it is not a sure
11 thing that current servicemembers will be discharged after
12 March 23rd of 2018. That's, I think, clear from the text of
13 the President's memorandum, from concessions I've heard the
14 plaintiffs make today, and from the Secretary of Defense's
15 interim guidance.

16 And the last thing I would just say, Your Honor, is
17 we're not saying these plaintiffs should forever be denied
18 their day in court.

19 Our position is that as of right now, none of these
20 plaintiffs have standing, and the case is not ripe. They very
21 well may have standing in the future when we have a
22 final policy adopted by the military.

23 But as of today, this case is not ripe, and it should
24 be dismissed.

25 Thank you, Your Honor.

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THE COURT: Okay. Thank you.
All right. Thank you, folks.
We can adjourn.

(Court adjourned at 12:12 p.m.)

I, Douglas J. Zweizig, RDR, CRR, do hereby certify that the foregoing is a correct transcript from the stenographic record of proceedings in the above-entitled matter.



Douglas J. Zweizig, RDR, CRR
Registered Diplomate Reporter
Certified Realtime Reporter
Federal Official Court Reporter
DATE: November 15, 2017

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