IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Case 1:17-cv-02459-GLR Hon. George L. Russell, III

DEFENDANTS' SURREPLY
TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendants respectfully provide this surreply to Plaintiffs' Cross-Motion for Summary Judgment ("Plaintiffs' Motion"), Dkt. 163. The Supreme Court's recent decisions in *Abbott v. Perez*, 138 S. Ct. 2305 (June 25, 2018), and, most significantly, *Trump v. Hawaii*, 138 S. Ct. 2392 (June 26, 2018), impact the Court's consideration of Plaintiffs' Motion and Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint, or, in the Alternative, for Summary Judgment ("Defendants' Motion"), Dkt. 158.

BACKGROUND

By way of background, in *Hawaii*, the President initially signed Executive Order No. 13769 (EO-1), which directed the Secretary of Homeland Security to conduct a review to examine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States. That executive order suspended for 90 days the entry of foreign nationals from seven counties. Plaintiffs alleged that the executive order violated, among other things, the Equal Protection, Due Process, and Establishment Clauses, and the district court entered a temporary restraining order. In response, the President revoked EO-1, replacing it with Executive Order No.

13780 (EO-2), which also directed a worldwide review, and temporarily restricted entry of foreign nationals from six of the countries covered by EO-1 during the pendency of that review. This executive order was immediately challenged in court and was preliminarily enjoined. The Supreme Court stayed the injunctions and the temporary restrictions in EO-2 expired before the Supreme Court could address the merits. After completion of the worldwide review, the President issued Proclamation No. 9645 (EO-3), which sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present public safety threats. Accordingly, EO-3 placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate.

In *Hawaii*, the Supreme Court rejected an Establishment Clause challenge to EO-3 and vacated a nationwide preliminary injunction issued against the proclamation. Several aspects of that decision affect the Court's consideration of the merits of Plaintiffs' constitutional claims, Plaintiffs' request for additional discovery pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, and the availability of Plaintiffs' requested relief.

ARGUMENT

A. *Hawaii* Confirms that the Court Should Apply a Deferential Standard of Review When Examining Military Actions and Matters Concerning National Security.

As a preliminary matter, as explained in Defendants' Opposition to Plaintiffs' Cross-Motion for Summary Judgment ("Defendants' Opposition"), the Department of Defense's 2018 policy triggers rational-basis review because it—like the policy announced by former Secretary of Defense Ashton Carter during the prior administration—draws lines on the basis of gender dysphoria (a medical condition) and gender transition (a medical treatment), rather than transgender status. Defs.' Opp. 30, Dkt. 176. But even if an analogous civilian policy would trigger heightened scrutiny,

military-deference principles require an approach akin to rational-basis review here. *Id.* at 30–31. The Supreme Court recently confirmed this point in *Hawaii*, when it rejected the invitation to import "the *de novo* 'reasonable observer' inquiry" into "the national security and foreign affairs context," including cases that involve review of "military actions." 138 S. Ct. at 2420 n.5. Instead, based on deference principles, the Court applied "rational basis review" and stressed that judicial "inquiry into matters of . . . national security is highly constrained." *Id.* at 2420 (citing *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976)). In conducting its review of a policy affecting national security, the Supreme Court stressed that a court "cannot substitute [its] own assessment for the Executive's predictive judgments on such matters, all of which 'are delicate, complex, and involve large elements of prophecy.'" *Id.* at 2421 (quoting *Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948)). The Supreme Court further explained that this deferential review may apply "across different contexts and constitutional claims," even when evaluating a "'categorical'" classification "on the basis of sex." *Id.* at 2419 (citing *Fiallo v. Bell*, 430 U.S. 787, 795, 799 (1977)). Therefore, *Hawaii* underscores that deferential review applies to "military actions," *id.* at 2420 n.5—regardless of whether a similar action would trigger heightened scrutiny in the civilian context—and that such deference is triggered by the subject matter of the decision; here, manning and personnel decisions concerning the armed forces. In applying this deferential standard of review, the Court considers whether the policy is "plausibly related to the Government's stated objective" and must "uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds."[1] *Id.* at 2420.

[1] Plaintiffs argue that "[b]ecause President Trump's directive to ban transgender people from serving was plainly a 'substantial or motivating factor' behind the Implementation Plan, summary judgment must be granted unless Defendants carry their burden of demonstrating that the Plan 'would have been enacted without this factor.'" Pls.' Reply 11 (quoting *Hunter v. Underwood*, 471 U.S. 222, 228 (1985)). But it is not the Government's "burden" under *Hunter* to prove that the military would have adopted the 2018 policy absent the 2017 memorandum (or statements on Twitter). Rather, it is Plaintiffs' burden to show that the 2018 policy is unconstitutional, and that is "not changed by a

Hawaii further instructs that the Court must assess the 2018 policy on its own terms, rather than on purported intent behind the policy based on prior statements, including as to an expressly revoked policy. Although the Supreme Court in *Hawaii* stated that it "may consider plaintiffs' extrinsic evidence" of previous executive orders and past statements by the President about Muslims, *id.*, it upheld the proclamation based on its text and the "worldwide review process undertaken by multiple Cabinet officials and their agencies" that supported it, *id.* at 2421. Yet like the challengers and principal dissent in *Hawaii*, Plaintiffs urge this Court to discount the text of the 2018 Department of Defense policy and the extensive review process undertaken by Cabinet officials that supported it in favor of a myopic focus on the President's past statements. *Compare id.* at 2417, 2421, and *id.* at 2433, 2439–40, 2443 (Sotomayor, J., dissenting), *with* Pls.' Reply 10–15, Dkt. 190. The Supreme Court rejected that approach in *Hawaii*, and there is no reason why it should fare any better in this case.

Plaintiffs argue that *Hawaii* does not affect the Court's consideration of this case because the policy at issue in *Hawaii* is facially neutral. Pls.' Reply 11 n.5. But, as stated above, the military's 2018 policy is equally neutral: it turns on a medical condition—gender dysphoria—and its treatment, not on any protected status. And even assuming, *arguendo*, that the new policy could be viewed as a facial classification based on transgender status, applying heightened scrutiny nevertheless would be improper. The deference to the Executive Branch in *Hawaii* turned on whether the policy fell squarely within the realm of international affairs or national security—areas where "deference [is] traditionally accorded [to] the President." 138 S. Ct. at 2409. That is the case here, and is also consistent with the level of scrutiny applied in *Rostker v. Goldberg*, 453 U.S. 57 (1981), to a statute that drew distinctions based on gender.

finding of past discrimination." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (rejecting similar misreading of *Hunter*).

Plaintiffs also contend that the Secretary of Defense's February 2018 memorandum and its accompanying 44-page report, as well as the 3,000-page administrative record, are merely "post hoc justifications" for the President's alleged "Ban." Pls.' Mot. 30, *see also id.* at 34; Pls.' Reply 11 n.5. But the Supreme Court in *Hawaii* rejected an attempt to discredit "the thoroughness of [a] multi-agency review" underlying the challenged proclamation on similar grounds, 138 S. Ct. at 2421, and the Court should do the same here. In *Hawaii*, the President issued EO-1, which among other things, "directed the Secretary of Homeland Security to conduct review to examine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States." *Id.* at 2403. After the President revoked EO-1, he replaced it with EO-2, which "again directed a worldwide review." *Id.* at 2404. Following completion of the worldwide review, the President replaced EO-2 with EO-3, which was based upon the findings from that review. *Id.* The Supreme Court did not consider the review to be a post hoc justification for the original executive order, but rather found that EO-3 "reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies." *Id.* at 2421. Similarly, here, in his August 2017 Memorandum, the President directed the Secretary of Defense to conduct a "further study" of the Carter policy, 82 Fed. Reg. 41,319 (Aug. 25, 2017), and, upon completion of the Department's study, the President expressly "revoke[d]" his August 2017 Memorandum to permit the implementation of the Department's recommended policy, 83 Fed. Reg. 13,367 (Mar. 23, 2018). Therefore, as in *Hawaii*, the Court should analyze the findings of the Department's comprehensive study, rather than, as Plaintiffs advocate, ignore them as "post hoc justifications" for the President's alleged "Ban." *See* Pls.' Mot. 30, *see also id.* at 34; Pls.' Reply 11 n.5.

Finally, *Hawaii* supports Defendants' argument that the Department's 2018 policy is based upon legitimate military interests. Both EO-3 in *Hawaii* and the Department's policy contain "waivers and exceptions." DoD Report and Recommendations on Military Service by Transgender

Persons ("Report") 5, Dkt. 120-2; *Hawaii*, 138 S. Ct. at 2422. The Supreme Court found that the "waiver program" in EO-3 "support[s] the Government's claim of a legitimate national security interest." *Hawaii*, 138 S. Ct. at 2422. Similarly, here, the Court should find that the Department's policy, which contains "waivers or exceptions" that generally apply to all Department and Service-specific standards and policies, as well as a categorical reliance exception for service members who took advantage of the Carter policy, Report 5–6, supports "the Government's claim of a legitimate" military interest, *see Hawaii*, 138 S. Ct. at 2422.

Accordingly, the Court should apply a deferential standard of review to the Department of Defense's 2018 policy and examine that policy on its own terms.

B. *Hawaii* Makes Clear that No Additional Discovery Is Necessary for the Court to Rule on the Cross-Motions for Summary Judgment.

Hawaii also affects the Court's consideration of Plaintiffs' request for additional discovery under Federal Rule of Civil Procedure 56(d). *See* Pls.' Mot. 49–50. Based on their theory that "the White House influenced the purportedly independent DoD study," *id.* at 50, Plaintiffs argue that "[a]t a minimum, Plaintiffs are entitled to further discovery into, *inter alia*, the process by which the Implementation Plan was developed," *id.* at 49. But because the Court's review of the policy is both "deferential" and "highly constrained," *Hawaii*, 138 S. Ct. at 2419–20, any discovery in this case should be significantly curtailed, and, in particular, any discovery concerning presidential communications and deliberations about a military policy should be precluded. In *Hawaii*, the Court rejected plaintiffs' request "for a searching inquiry of the President's justifications" for the policy because, among other reasons, it is "inconsistent with . . . the deference traditionally accorded the President in this sphere." *Id.* at 2409. The Court recognized that such "searching inquiry" would be inappropriate because "'when it comes to collecting evidence and drawing inferences' on questions of national security, 'the lack of competence of the courts is marked.'" *Id.* at 2409, 2419 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010)). Moreover, "'[j]udicial inquiry into the

national-security realm raises concerns for the separation of powers' by intruding on the President's constitutional responsibilities in the area of foreign affairs." *Id.* at 2419 (quoting *Ziglar v. Abbasi*, 582 U.S. __, 137 S. Ct. 1843, 1861 (2017)). Owing to these separation-of-powers concerns, the Court must ensure that "any discovery and other preliminary matters would not themselves intrude on the foreign affairs power of the Executive." *Id.* at 2424 (Kennedy, J., concurring).

The wide-ranging and unprecedented discovery of the President and of the Department of Defense that Plaintiffs seek in this case is contrary to these principles. Along with seeking the disclosure of all deliberative information and documents from the Department of Defense related to the work of the Panel of Experts and the development of the 2018 policy, *see* Pls.' Mot. to Compel Supp. Interrog. Answers and Production, Dkt. 177-1, Plaintiffs seek, among other things, the President's explanation of the process he used to formulate military policy, the identification of individuals he consulted in forming that military policy, and communications with the President and his advisors related to military service by transgender individuals, *see, e.g.*, Pls.' First Set of Interrogs. to Defs. 8–9, Dkt. 177-5; Pls.' Second Set of Interrogs. to Certain Defs. 9–10, Dkt. 177-30; Pls.' First Set of Requests for Production of Documents 10–14, Dkt. 177-6; Pls.' Second Set of Requests for Production of Documents to Certain Defs. 10–11, Dkt. 177-30. The collection and disclosure of this information violates the separation-of-powers principles recognized by the Court in *Hawaii* by intruding on the deliberations of the President, in his role as the Commander in Chief, concerning a military policy. *See* 138 S. Ct. 2419–20; *id.* at 2424 (Kennedy, J., concurring). Again, as explained in *Hawaii*, the Court should focus on the stated justifications for the policy as set forth in the Memorandum issued by the Secretary of Defense on February 22, 2018, and its accompanying report, not any underlying presidential statements or deliberations. For these reasons, and those set forth in Defendants' Opposition, the Court should deny Plaintiffs' request for additional discovery under Rule 56(d).

C. Justice Thomas's Concurrence in *Hawaii* Underscores that Entry of a Universal Injunction Would Be Improper.

Even if the Court grants summary judgment in favor of Plaintiffs, it should reject their request for the Court to enter a universal injunction. *See* Second Am. Compl. 56, Dkt. 148. In his concurrence in *Hawaii*, Justice Thomas expressed "skeptic[ism] that district courts have the authority to issue universal injunctions." 138 S. Ct. at 2425 (Thomas, J. concurring). Upon examination of the legal and historical bases for the imposition of universal injunctions, Justice Thomas explained that "'universal' or 'nationwide' injunctions" "appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts." *Id.* at 2424–25. Justice Thomas also observed that, as a practical matter, "[t]hese injunctions are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch." *Id.* at 2425. Thus, given that the Court's authority to enter a universal injunction is, at best, "legally and historically dubious," *id.* at 2429, the Court should decline to enter a permanent, universal injunction in this case.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint, or, in the Alternative, for Summary Judgment and Defendants' Opposition to Plaintiffs' Cross-Motion for Summary Judgment, the Court should grant Defendants' Motion, deny Plaintiffs' Cross-Motion, and enter judgment for Defendants.

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